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Malicki v. Doe

THE CONSTITUTIONALITY OF NEGLIGENT HIRING AND SUPERVISION CLAIMS*

I. INTRODUCTION

In recent years, clerical sexual abuse has been exposed as a problem of startling proportions in the United States, touching and impacting nearly every American diocese.¹ According to one study commissioned by the American Catholic Bishops, over the last fifty-two years four percent of priests have been involved in sexual abuse.² In actual numbers, 4,392 priests have allegedly victimized 10,667 children over the past five decades.³ However, because these statistics only reflect those individuals who have reported sexual abuse the numbers may actually be much larger.⁴ As a result of the increased awareness of sexual abuse, parishioners are suing religious institutions in record numbers.⁵

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¹ Laurie Goodstein, *Decades of Damage; Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, at A1 ("Every region was seriously affected, with 206 accused priests in the West, 246 in the South, 335 in the Midwest and 434 in the Northeast. . . . The crisis reached not only big cities like Boston and Los Angeles but smaller ones like Louisville, Ky., with 27 priests accused, and St. Cloud, Minn., with 9.").

² Laurie Goodstein, *Two Studies Cite Child Sex Abuse by 4% of Priests*, N.Y. TIMES, Feb. 26, 2004, at A1.

³ *Id.*

⁴ *Id.*

⁵ See, e.g., *id.* ("[T]he John Jay survey found that the church spent more than \$572 million on lawyers' fees, settlements and therapy for victims and treatment for the priests. But the report said the figure was prematurely low. . . a more accurate total was about three-quarters of a billion dollars . . .").

Parishioners have brought these suits under various theories, including clergy malpractice, breach of fiduciary duty, negligent hiring, supervision, and retention, and several intentional torts. However, all of these theories raise serious constitutional problems. In civil suits against them, religious institutions have repeatedly asserted immunity based on the Free Exercise and Establishment Clauses of the First Amendment, and have in many instances succeeded on this defense.⁶

⁶ Many cases have upheld this constitutional defense. *See, e.g.*, *Dausch v. Rykse*, 52 F.3d 1425, 1429 (7th Cir. 1994) (holding negligence claims of adult parishioner barred by First Amendment as they would foster excessive state entanglement with religion); *Ehrens v. Lutheran Church-Missouri Synod*, 269 F. Supp. 2d 328, 332 (S.D.N.Y. 2003) (denying negligent hiring, supervision, and retention claims on grounds that by defining a duty of care owed by a member of the clergy it would foster excessive entanglement with religion and thus is barred by the First Amendment); *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) (finding that determining negligence claims would excessively entangle the state in the affairs of the church and thus such determinations are barred by the Establishment Clause); *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998) (holding child's claim for negligent hiring and supervision violated First Amendment); *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1150-51 (E.D. Mich. 1995) (upholding negligent supervision claim but at the same time finding that questions of hiring and retention of clergy necessarily required interpretation of church doctrines and thus were barred by the First Amendment); *Bryan R. v. Watchtower Bible & Tract Soc'y*, 738 A.2d 839, 848 (Me. 1999); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 445 (Me. 1997) (stating that upholding the negligent supervision claim would restrict the freedom of the church to interact with the clergy and thus was barred by the First Amendment); *Gibson v. Brewer*, 952 S.W.2d 239, 246-48 (Mo. 1997) (en banc) (maintaining that negligent hiring, ordaining, retaining, and supervision claims would result in an endorsement of religion and inquiries into church doctrine and thus they violated the First Amendment); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 791 (Wis. 1995) (holding that "the tort of negligent hiring and retention may not be maintained against a religious governing body due to concerns of excessive entanglement, and that the tort of negligent training or supervision cannot be successfully asserted . . . because it would require an inquiry into church laws, practices, and policies"); *S.H.C. v. Sheng-Yen Lu*, 54 P.3d 174, 175 (Wash. Ct. App. 2002) (finding negligent retention and supervision claims barred by the First Amendment); *Mulinix v. Mulinix*, No. C2-97-297, 1997 Minn. App. LEXIS 1102, at *18-19 (Minn. Ct. App. Sept. 22, 1997) (holding that negligent supervision and retention claims were fundamentally connected to church governance necessitating an inquiry into internal church decisions and thus barred by the First Amendment); *Heroux v. Carpentier*, No. PC 92-5807, 1998 R.I. Super. LEXIS 52, at *24-6 (R.I. Super Ct. Jan. 23, 1998); *but see, e.g.*, *Smith v. O'Connell*, 986 F. Supp. 73, 77 (D.R.I. 1997) (holding that negligent supervision claim was not barred by First Amendment because it did not involve the interpretation of religious doctrine); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1323-24 (Colo. 1996) (holding that the First Amendment did not bar a child parishioner's claim for negligent hiring of a minister as the claim did not involve religious doctrine); *Smith v. Privette*, 495 S.E. 2d 395, 398 (N.C. Ct. App. 1998) (holding tort claims required no inquiry into religious doctrine and thus not barred by First Amendment); *Kenneth R. v. Roman Catholic Diocese*, 229 A.D.2d 159, 165, 654 N.Y.S.2d 791, 796 (App. Div. 2d Dep't 1997) (holding negligent supervision and retention claims not barred by First Amendment); *Bivin v. Wright*, 656 N.E. 2d 1121, 1124-25 (Ill. App. Ct. 1995) (holding

This Comment will examine the constitutionality of negligent hiring and supervision claims brought against religious institutions. It will focus on one case in particular, *Malicki v. Doe*,⁷ in which the Florida Supreme Court allowed a negligent hiring and supervision claim to proceed against St. David Catholic Church and the Archdiocese of Miami (collectively, the “Church Defendants”).⁸ *Malicki* involved the molestation and sexual abuse of an adult and child parishioner by a priest of the St. David Catholic Church in Miami. These two parishioners sued the Archdiocese for negligently hiring and supervising Father Malicki, claiming that the Archdiocese knew or should have known of the potential dangers the priest posed. On appeal, the court held that the First Amendment did not bar the negligent hiring and supervision claims because they did not involve conduct rooted in religious belief, they applied neutral principles of tort law, and they did not excessively entangle the state in church matters.⁹

As this Comment will show, the *Malicki* court’s reasoning is incorrect. Put succinctly, because claims of negligent hiring and supervision require creating and applying a standard of care, courts are forced to interpret religious doctrine and perhaps prefer the practices of one religion over another. Both of those actions violate the First Amendment. Recognizing that, the Florida Supreme Court should never have allowed the negligence claims to proceed against the Church Defendants and instead should have foreclosed the causes of action.

Part II of this Comment relays the facts of *Malicki* in greater detail. Part III.A provides a general discussion of the Supreme Court’s current interpretation of the First Amendment’s Free Exercise and Establishment Clauses. Part III.B then explores the flaws in the Florida Supreme Court’s decision¹⁰ and substantiates the above thesis with supporting arguments. Part IV then switches gears to discuss the policy reasons for preventing religious institutions from shirking all responsibility for their inadequate actions to protect their

that negligent supervision claims may not implicate church doctrine and thus did not violate the First Amendment).

⁷ 814 So. 2d 347 (Fla. 2002) [hereinafter *Malicki*].

⁸ *Id.*

⁹ *Id.*

¹⁰ These flaws include the Court’s misinterpretation of the First Amendment and its inconsistency with previous rulings. See discussion *infra* Part III.B.

parishioners. In light of the pervasive need for society to protect individuals, especially children, from sexual abuse, Part IV goes on to propose several possible claims that would more legitimately survive First Amendment scrutiny, including intentional torts and criminal charges. Finally, this Comment concludes that negligence claims involving the ordination and supervision of a cleric should be barred as unconstitutional but that several alternative claims that do not involve the interpretation of religious scripture by secular courts can pass constitutional muster.

II. THE FACTS OF *MALICKI*

In *Malicki*, a minor and an adult parishioner who worked at St. David Catholic Church sued the church and the Archdiocese of Miami for negligently hiring, supervising, and retaining Father Jan Malicki.¹¹ The minor and adult parishioner worked at the church in exchange for tuition and worked under the direct supervision and control of Father Malicki and the Church Defendants.¹²

In the complaint, the respondents alleged "that on numerous occasions, [Father] Malicki 'fondled, molested, touched, abused, sexually assaulted and/or battered' the parishioners on the premises of St. David."¹³ The negligent hiring and supervision claims were premised on the accusation that the "Church Defendants 'knew, or in the exercise of reasonable care, should have known, [that Father Malicki] was unsuited for teaching, counseling, spiritually guiding, supervising and leading employees and parishioners.'"¹⁴ The parishioners also claimed that "the Church Defendants negligently failed 'to make inquiries into [Father] Malicki's background, qualifications, reputation, work history, and/or criminal history prior to employing him in the capacity of Associate Pastor.'"¹⁵ Lastly, the parishioners asserted that "the Church Defendants negligently placed them under the supervision of Father Malicki, when the Church Defendants

¹¹ *Malicki*, 814 So. 2d at 352.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

either knew or should have known that Father Malicki had the propensity to commit sexual assaults and molestations.”¹⁶

The Church Defendants moved to dismiss the complaint on the grounds that “resolution of these issues would ‘involve the internal ecclesiastical decisions of the Roman Catholic Church required by Canon Law’ and therefore they [were] barred by the First Amendment.”¹⁷ The trial court agreed with the Church Defendants and dismissed the case.¹⁸

On appeal, the Third District Court of Appeals reversed the decision of the trial court.¹⁹ The Third District claimed that the real issue was whether the Church Defendants had reason to know of Father Malicki’s misconduct and did nothing to prevent it. Furthermore, the appellate court stated that since this issue did not require an inquiry into the religious doctrines and practices of the church, the First Amendment did not bar its resolution.²⁰

The Church Defendants appealed the Third District’s decision to the Florida Supreme Court, which affirmed.²¹ It reasoned that the case did not implicate the Free Exercise Clause because “the conduct sought to be regulated; that is, the Church Defendants’ alleged negligence in hiring and supervise[ing] [was] not rooted in religious belief.”²² The court further stated, even “assuming an ‘incidental effect of burdening a particular religious practice,’ the parishioners’ cause of action . . . [was] not barred because it [was] based on [a] neutral application of principles of tort law.”²³ The court additionally refused to bar the case on the basis of the Establishment Clause, stating:

The Establishment clause does not bar these causes of action because the imposition of tort liability in this case has a secular purpose and the primary effect of imposing tort liability based on allegations of the complaint neither advances nor inhibits religion. The core inquiry in determining whether the Church Defendants are liable will focus on whether they reasonably should have foreseen the risk of harm to third parties. This is a neutral principle of tort law. Therefore, based on the allegations in the complaint, we do not

¹⁶ *Malicki*, 814 So. 2d at 352.

¹⁷ *Id.* at 353.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Malicki*, 814 So. 2d at 365.

²² *Id.* at 361.

²³ *Id.*

foresee 'excessive' entanglement in internal church matters or in interpretation of religious doctrine or ecclesiastical law.²⁴

With that background set, this Comment next examines the relevant First Amendment principles before applying them to the case at hand.

III. DISCUSSION

A. *First Amendment*

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."²⁵ Through the Establishment and the Free Exercise Clauses, the First Amendment stands for the notion that church and state should remain separate; however, it does not require that the separation be total.²⁶ There are many instances in which the government and the courts may restrict conduct that might be characterized as religious practice.²⁷ For example, in *Employment Division v. Smith*, the Court upheld a law prohibiting the use of peyote during religious ceremonies.²⁸ However, the Constitution conditions any such involvement upon courts applying neutral principles of law,²⁹ avoiding excessive entanglement between church and state,³⁰ and

²⁴ *Id.* at 364.

²⁵ U.S. CONST. amend. I. The Fourteenth Amendment makes the First Amendment applicable to the states. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000); *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757 (1995).

²⁶ Donald T. Kramer, Annotation, *Supreme Court Cases Involving Establishment and Freedom of Religion Clauses of Federal Constitution*, 37 L. Ed. 2d 1147, 1158 (1999).

²⁷ *See, e.g., Employment Div. v. Smith*, 494 U.S. 872 (1990) (upholding an Oregon law prohibiting the use of peyote during religious ceremonies as constitutional since the free exercise clause was not implicated because the law was not aimed at promoting or restricting religious beliefs).

²⁸ *Id.*

²⁹ *See id.* at 878 (holding "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" (citation omitted)).

³⁰ *See Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (creating a three-prong test to determine whether the Establishment Clause has been violated, including a prong that governmental action must not foster "an excessive government entanglement with religion") (citation omitted).

refraining from interpreting religious doctrine, polity, or practice.³¹

1. The Establishment Clause

The first clause of the First Amendment, the Establishment Clause, guards against three main evils: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”³² The main inquiry under the Establishment Clause was set down in *Lemon v. Kurtzman*.³³ In *Lemon*, the Court stated that a governmental action is valid under the Establishment Clause if it has a secular purpose, if its primary effect is neither to enhance nor inhibit religion, and if the action does not foster an excessive government entanglement with religion.³⁴ The Court stressed that total separation of church and state is not possible and thus only excessive intrusions by the government into religion would be held unconstitutional.³⁵ Under the third prong of the above test, to determine whether the entanglement is excessive a court must “examine the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority.”³⁶ Throughout the 1990s, the Supreme Court did not consistently apply this three-part test.³⁷ The Court more often turned to the concept of religious neutrality to guide its decisions.³⁸ However, the *Lemon* test has never been overruled and is still the predominate doctrine.³⁹

³¹ *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997) (en banc) (citing *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969), and *Jones v. Wolf*, 443 U.S. 595, 603 (1979)).

³² *Lemon*, 403 U.S. at 612 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)).

³³ *Id.* at 602.

³⁴ *Id.* at 612-13.

³⁵ *Id.* at 614.

³⁶ *Id.* at 615.

³⁷ *L.L.N. v. Clauder*, 563 N.W.2d 434, 440 n.11 (Wis. 1997).

³⁸ *Id.* Laws that have a valid secular objective are not invalid merely because they confer an indirect, remote, or incidental benefit upon religious institutions. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). The Supreme Court has concluded “that under the Establishment Clause the proper relationship of government vis-a-vis religion and religious institutions in this country is not one of hostility, but neutrality, and that the neutrality which is required need not stem from callous indifference to religion, but may at times be benevolent.” *Kramer*, *supra* note 26.

³⁹ *Konkle v. Henson*, 672 N.E.2d 450, 454 n.3 (Ind. Ct. App. 3d Dist. 1996) (citing *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)).

For purposes of this Comment the most relevant part of the Lemon test is the nonentanglement requirement. In interpreting the phrase "excessive government entanglement," the Supreme Court has concluded that "routine regulatory interaction which involves *no inquir[y] into religious doctrine*, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies, [will] not itself violate the nonentanglement command."⁴⁰ By implication, if the inverse of any of the preceding three statements are true – e.g., if the regulation necessitates an examination of religious doctrine or results in a close surveillance of religious institutions – excessive entanglement between church and state may result.

In *Hernandez v. Commissioner*, the Court was faced with just such an entanglement problem.⁴¹ *Hernandez* involved a dispute between a group of Scientologist followers and the Internal Revenue Service over a tax deduction.⁴² Scientologists believe that inside of every human being is an immortal spirit and the only way to become aware of this spiritual dimension is to go through a process known as "auditing."⁴³ "Auditing involves a one-to-one encounter between a participant . . . and a Church official . . ." to help the participant reach spiritual enlightenment.⁴⁴ Pursuant to this belief the Church offered several different types of classes to its parishioners allowing them to increase their spiritual awareness and train to be auditors by studying the tenets of the faith.⁴⁵ The payments received for these classes were based on a central tenet of the Scientologist faith known as the 'doctrine of exchange'⁴⁶ and they formed the Church's primary source of income.⁴⁷ Each of the petitioners made payments for these training and auditing services and tried to deduct such payments under Section 170 of the Internal Revenue Code of 1954 as a charitable

⁴⁰ See *Hernandez v. Comm'r*, 490 U.S. 680, 696-97 (1989) (emphasis added) (citing *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969), and *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), and quoting *Aguilar v. Felton*, 473 U.S. 402 (1985)); see also *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 395-96 (1990).

⁴¹ 490 U.S. 680 (1989).

⁴² *Id.* at 684.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 680.

⁴⁶ According to this doctrine "any time a person receives something he must pay something back." 490 U.S. at 685.

⁴⁷ *Id.* at 685-86.

contribution.⁴⁸ Petitioners argued that by denying the deduction the Court would violate the Establishment Clause because it would require the “IRS to entangle itself with religion by engaging in ‘supervision of religious beliefs and practices’ and ‘valuation of religious services.’”⁴⁹

The Court held that there was no Establishment Clause violation because Section 170 of the Internal Revenue Code comported with all three prongs of the Lemon test.⁵⁰ With regard to the excessive entanglement prong, among other things, the Court stated that there was no violation of the Establishment Clause because Section 170 did *not* require the “[g]overnment to distinguish between ‘secular’ and ‘religious’ benefits or services” in that all the IRS had to do to determine if the payment was outside the Section 170 deduction was to gather information necessary to determine if it was part of a quid pro quo transaction.⁵¹ The Court noted that it is only the petitioners’ interpretation of Section 170⁵² that would require the government to make such distinctions.⁵³ The Court also pointed out that the application of Section 170 did not place a monetary value on religious benefits because the petitioners had claimed that the entire amount of their payments was exempt, rather than that a certain portion was exempt because it exceeded the value of the religious service.⁵⁴ Based on these two findings, there was no entanglement giving rise to an Establishment Clause violation.⁵⁵ In other words, because the Court was not forced to delve into religious doctrine to decide any of the issues, the Establishment Clause was not violated.

Similarly, in *Jimmy Swaggart Ministries v. Board of Equalization*, the Supreme Court was faced with the question of whether a state could tax the distribution of religious materials by a religious organization without implicating the First Amendment.⁵⁶ The Court found that the taxation did not

⁴⁸ *Id.* at 686.

⁴⁹ *Id.* at 695.

⁵⁰ *Id.* at 696.

⁵¹ 490 U.S. at 697.

⁵² The petitioners’ interpretation was that “a quid pro quo analysis is inappropriate under §170 when the benefit a taxpayer receives is purely religious in nature . . . [and alternatively] . . . payments made for the right to participate in a religious service should be automatically deductible under § 170.” *Id.* at 692.

⁵³ *Id.* at 697.

⁵⁴ *Id.*

⁵⁵ *Id.* at 696.

⁵⁶ 493 U.S. 378, 380 (1990).

involve an excessive government entanglement with religion and thus did not violate the Establishment Clause.⁵⁷ The Court rested its holding most significantly on the fact that "the imposition of the sales and use tax without an exemption for appellant [did] *not* require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items . . .".⁵⁸ However, again, had the practice required the interpretation of religious practices or policies, the Court may have come to very different conclusions.

Finally, many lower courts have interpreted the excessive entanglement prong of the *Lemon* test to mean that "[e]xcessive entanglement occurs when the courts begin to review and interpret a church's constitution, laws, and regulations."⁵⁹

2. The Free Exercise Clause

In contrast to the Establishment Clause, the Free Exercise Clause "guarantees 'first and foremost, the right to believe and profess whatever religious doctrine one desires.'"⁶⁰ Moreover, the Free Exercise Clause protects against laws that discriminate based on religious beliefs, as well as ordinances that regulate or prohibit conduct undertaken for religious reasons.⁶¹ However, the Supreme Court has not interpreted the Free Exercise Clause as an absolute protection of religious freedom.⁶² In *Cantwell v. Connecticut*, the Court stated that although the clause protects an individual's freedom to believe and freedom to act, the freedom to act is not absolute, since regulations on conduct are necessary to ensure an orderly and safe society.⁶³ For instance, in *Cantwell* the Court alluded to the fact that although the state may not deny the right to preach or disseminate religious views, it may regulate the time, place, and manner of such events.⁶⁴ However, regulation and

⁵⁷ *Id.* at 397.

⁵⁸ *Id.* at 396 (emphasis added).

⁵⁹ *See, e.g.*, *Konkle v. Henson*, 672 N.E.2d 450, 454 (Ind. Ct. App. 1996).

⁶⁰ *Malicki*, 814 So. 2d 347, 354 (Fla. 2002) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990)).

⁶¹ *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993).

⁶² *Zanita E. Fenton, Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 69 (2001).

⁶³ *Id.*

⁶⁴ *Id.* at 304.

infringement are not synonymous, and any attempt to infringe on the free exercise of religion, beyond mere regulations to keep peace and order in society, must be justified by a compelling state interest.⁶⁵

The first inquiry under the Free Exercise Clause is whether the conduct being regulated “is rooted in religious belief.”⁶⁶ If the conduct is rooted in religious belief, then the court must decide whether the law or governmental conduct regulating the religious belief is neutral “both on its face and in its purpose.”⁶⁷ The Supreme Court has held that if a law’s primary purpose is to infringe upon or restrict practices due to their religious motivation, the law is not neutral, and it is valid only if justified by a compelling interest narrowly tailored to advance that interest.⁶⁸ However, if a neutral law of general applicability⁶⁹ only incidentally burdens religious practices, it need not be justified by a compelling interest.⁷⁰

3. Religious Autonomy Doctrine

Finally, under the umbrella of *both* the Establishment Clause and the Free Exercise Clause, the Supreme Court has developed a concept referred to as the religious autonomy doctrine, which bars secular courts from becoming too closely

⁶⁵ Kramer, *supra* note 26.

⁶⁶ *Malicki*, 814 So. 2d 347, 354 (Fla. 2002) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

⁶⁷ *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). In *Lukumi*, the Court discussed the process of determining if a law is facially and objectively neutral. To determine facial neutrality a person must look at the text of the statute. If the law refers to a religious practice without obvious secular meaning it is facially neutral. In *Lukumi*, the Court held that even though the law contained religious terms such as sacrifice and ritual, it was not obviously facially discriminatory because these terms had religious as well as secular meaning. However, the Court stated facial neutrality was not the end of the inquiry. A law must also be neutral in its object or purpose. Here, it was clear that the object of the law was the suppression of the central element of the Santeria worship service and thus the law was not neutral in its purpose. *Id.* at 533-34.

⁶⁸ *Id.* at 533. The compelling interest test involves a very difficult burden. For example, in *Lukumi* the court dealt with laws prohibiting animal sacrifice. The Court found the ordinances were not neutral as they aimed to proscribe the religious practices of Santeria adherents. Furthermore, although protecting public health and preventing cruelty to animals may be compelling state interests, the laws were both under-inclusive and over-inclusive and thus did not meet the burdens of the test. *Id.* at 542-45. In its summation, the Court stated, “A law that targets religious conduct . . . will survive strict scrutiny only in rare cases.” *Id.* at 546.

⁶⁹ For examples of neutral laws of general applicability, see discussion *infra* Part III.B.2.a.

⁷⁰ *Lukumi Babalu*, 508 U.S. at 531. In such a case, no further inquiry is required.

involved in the internal affairs of religious institutions.⁷¹ Under this doctrine, the First Amendment prohibits courts from resolving doctrinal disputes or determining whether a religious organization acted in accordance with its canons and bylaws.⁷² In short, courts may not adjudicate a claim when rendering a decision would require interpreting religious doctrine.⁷³ Instead, "where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, . . . civil courts shall not disturb the decision of the [hierarchical church], but must accept such decisions as binding on them"⁷⁴

This doctrine was fashioned in *Watson v. Jones*, which held that civil courts should steer clear of questions regarding religious discipline, faith, ecclesiastical rule, custom, or law.⁷⁵ It took further hold in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.⁷⁶ *Presbyterian* involved a property dispute between two local churches that arose following their withdrawal from a larger hierarchical general church organization.⁷⁷ Under the applicable law, the

⁷¹ See *Serbian E. Orthodox Diocese v. Malivojevich*, 426 U.S. 696 (1976) [hereinafter *Serbian*]; *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Watson v. Jones*, 13 Wall. 679 (1872). The Court has spoken of the religious autonomy doctrine in reference to both the Free Exercise and Establishment Clauses and it may in fact implicate both clauses.

⁷² *Smith v. O'Connell*, 986 F. Supp. 73, 76 (D.R.I. 1997). "This prohibition derives from cases arising out of disputes between parties within a church in which an interpretation of ecclesiastical law or church doctrine is required." *Id.* For example, in *Serbian*, the Court refused to invalidate the removal of a Serbian Orthodox Bishop by an ecclesiastical court holding that:

[C]ivil courts are bound to accept the decisions of the highest judiciaries of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.

426 U.S. at 713.

⁷³ *Smith*, 986 F. Supp. at 77 (citing *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969)).

⁷⁴ *Serbian*, 426 U.S. at 709.

⁷⁵ *Id.* at 710, (citing *Watson v. Jones*, 13 Wall. 679, 727 (1872)).

⁷⁶ 393 U.S. 440 (1969).

⁷⁷ *Id.* at 441.

right to the property turned on “whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it.”⁷⁸ Accordingly, resolving the property dispute would turn on whether the actions of the general church strayed substantially from prior doctrine.⁷⁹ The Court held that the First Amendment prohibited such a determination since it would require the interpretation of church doctrines.⁸⁰ Finally, the doctrine came to fruition in *Serbian Eastern Orthodox Diocese v. Malivojevich*. In *Serbian*, the Court held the First Amendment prevented a court from deciding whether a hierarchical church’s decision to remove a bishop was arbitrary and improper, as that decision would “necessitate[] the interpretation of ambiguous religious law and usage.”⁸¹ Therefore, it is clear that if a claim necessitates the interpretation of religious scripture, then under the First Amendment, it is not adjudicable in civil court.

B. Analysis of the Florida Supreme Court Decision

In *Malicki*, the Florida Supreme Court held that imposing liability on the Church Defendants for negligently hiring and supervising its clergy⁸² would not violate the Free Exercise and Establishment Clauses of the First Amendment.⁸³ First, the Florida Supreme Court stated that the negligent hiring and supervision claims do not implicate the Free Exercise Clause because the hiring and supervision of clergy is not rooted in religious belief, and even if it were, the causes of action for negligent hiring and supervision apply neutral principles of tort law.⁸⁴

Second, the Florida Supreme Court determined that the causes of action did not offend the tenets of the Establishment Clause because the core inquiry, whether the Church Defendants reasonably should have foreseen the risk of harm to third parties, did not require an interpretation of religious

⁷⁸ *Id.*

⁷⁹ *Id.* at 450.

⁸⁰ *Id.*

⁸¹ *Serbian*, 426 U.S. 696, 708 (1976).

⁸² For lack of a more comprehensive term, the terms “clergy” and “cleric” will refer to all religions generally, rather than Christianity specifically.

⁸³ *Malicki*, 814 So. 2d 347, 365 (Fla. 2002).

⁸⁴ *Id.* at 361.

doctrine or ecclesiastical law.⁸⁵ Ultimately, the following analysis will show that the Florida Supreme Court's reasoning contravenes First Amendment doctrine.

1. Negligent Hiring

Due to contradictory Supreme Court precedent in the religious autonomy line of cases, the Florida Supreme Court was wrong in upholding the constitutionality of the negligent hiring claim.⁸⁶ The Supreme Court, in cases such as *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*⁸⁷ and *Serbian Eastern Orthodox Diocese v. Milivojevich*,⁸⁸ has repeatedly made clear that the Free Exercise Clause bars secular courts from passing upon matters of clergy selection. In *Kedroff*, the Supreme Court invalidated on free exercise grounds a New York State law that undertook to transfer the control of the New York Russian Orthodox churches from one group to another.⁸⁹ The Court explained that its prior opinions

radiate[d] . . . a spirit of freedom for religious organization, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Freedom to select the clergy*, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.⁹⁰

In other words, the Court held that religious institutions should be free to select and appoint their members without undue interference by civil courts.

The Court came to a similar holding in *Serbian Eastern Orthodox Diocese v. Milivojevich*.⁹¹ In *Serbian*, petitioners had suspended and removed a bishop from their church due to

⁸⁵ *Id.* at 364.

⁸⁶ To establish negligent hiring, the plaintiff must demonstrate that:

(i) the employer was required to make an investigation of the employee and failed to do so, (ii) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general, and (iii) it was unreasonable for the employer to hire the employee in light of the information the employer knew or should have known.

Malicki, 814 So. 2d 347, 362 (2002).

⁸⁷ 344 U.S. 94 (1952).

⁸⁸ 426 U.S. 696 (1976).

⁸⁹ 344 U.S. 94 (1952).

⁹⁰ *Id.* at 116. (emphasis added) (citing *Watson v. Jones*, 80 U.S. 679 (1871)).

⁹¹ 426 U.S. 696.

complaints about his fitness as a bishop and his administration of the Diocese.⁹² The bishop sued for reinstatement.⁹³ The Illinois Supreme Court held that the proceedings of dismissal were “procedurally and substantively defective” and thus the removal was “arbitrary and invalid.”⁹⁴ The Court reversed this decision by finding, like in *Kedroff*, that the “ordination of a priest is a ‘quintessentially religious’ matter, ‘whose resolution the First Amendment commits *exclusively* to the highest ecclesiastical tribunals of [the] hierarchical church.’”⁹⁵ Following these two cases it is clear that it was, and is, the Supreme Court’s intention to, as far as practical, yield to the selection and hiring decisions of religious institutions.

However, as evidenced by the language in *Kedroff*, the freedom to select the clergy is not absolute. Only to the extent that “no improper method of choice are proven,” will the decisions of a religious organization be accepted without question.⁹⁶ Although this broadly worded exception might appear to fit *Malicki*, the Supreme Court has qualified this language considerably.⁹⁷ In *Kedroff*, the Court quoted *Gonzalez v. Archbishop* as stating in dicta that “[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.”⁹⁸ In effect, the Court seemed to indicate that the only time a decision would be found improper is if there existed fraud, collusion, or arbitrariness in its formulation. In *Serbian*, the Supreme Court limited this exception further by rejecting its arbitrariness component on the ground that judging whether a decision is arbitrary would entail a constitutionally impermissible inquiry into religious doctrine and procedures.⁹⁹

⁹² *Id.* at 702-03.

⁹³ *Id.* at 707.

⁹⁴ *Id.* at 698.

⁹⁵ *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997) (en banc) (quoting *Serbian*, 426 U.S. at 720) (emphasis added).

⁹⁶ *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

⁹⁷ *Id.* at 116 n.23; *Serbian*, 426 U.S. 696 (1991). The Court had to qualify this language because otherwise the exception would swallow the rule. Anytime the court decided a hiring decision of the church was “improper,” it could overrule it.

⁹⁸ 344 U.S. at 116 n.23.

⁹⁹ *Serbian*, 426 U.S. at 713-14. The Court did not reach the issues of fraud or collusion because they were not involved in the case.

Thus, the ultimate question is whether the facts of *Malicki* fall within the fraud/collusion exception to the normal rule that neither secular courts nor states should become involved in the clergy selection process of religious groups. The answer is unquestionably no. The plaintiffs did not allege that Malicki was fraudulently selected or that his hiring was the product of collusion. The claim was instead that the Church Defendants "failed 'to make inquiries into Malicki's background, qualifications, reputation, work history, and/or criminal history prior to employing him in the capacity of Associate Pastor.'"¹⁰⁰ As such, the Florida Supreme Court overstepped its authority in allowing the negligent hiring claim to stand since it involves an assessment of whether the priest in question was properly selected. Just as the Supreme Court in *Serbian* held that the court had no right to determine if dismissal of a clergy member was proper, the court here had no right to pass judgment on whether the hiring of a clergy member was proper.

Some may argue that the case at hand is distinguishable from these previous ordination cases because these prior cases asked whether the priest was properly retained as a priest *under the relevant religious doctrine*, while *Malicki* simply concerns a question of whether Father Malicki was properly selected vis-à-vis a secular duty to avoid foreseeable harm to others. In other words, the court here is not seeking to de-ordain; it is simply imposing liability based on a question of whether the church should have foreseen the harm. However, I would disagree with this argument. This case fits precisely within the above line of cases. As will be discussed in greater detail below in relation to the negligent supervision claim, a reasonableness inquiry involves more than just a question of whether the defendant should have foreseen the harm. The more important question, and the question that creates the First Amendment problem, is: Were the actions taken in response to the foreseeable harm reasonable?¹⁰¹ Here, the action taken in response to the foreseeable harm would have been the hiring of the priest. Therefore, the court will have to pass judgment on whether it was reasonable and proper for the church to hire the priest. In making such a reasonableness judgment the court must take into consideration the religious doctrines relevant in the ordination

¹⁰⁰ *Malicki*, 814 So. 2d 347, 352 (Fla. 2002).

¹⁰¹ See discussion *infra* Part III.B.2.b.

of a priest.¹⁰² Thus, when one looks closely at the elements of this negligent hiring claim, it is apparent that the court will be passing judgment on whether the priest was properly hired as a priest *under the relevant religious doctrines*. Such a judgment will result in the secular courts setting the standards for church hiring in the future. This is what the above line of cases has attempted to guard against.

2. Negligent Supervision

The Florida Supreme Court was equally wrong to say that the negligent supervision claim was constitutional; however, the reasoning is slightly more complicated than the negligent hiring claim. Upholding the supervision claim deeply interjects secular courts into the internal functioning of religious organizations and transgresses both the Free Exercise and Establishment Clauses. It also contradicts the religious autonomy doctrine described above.

a. The Court's Improper Treatment of the Free Exercise Clause

The court's reasoning regarding the Free Exercise Clause was improper on several accounts. First, the court incorrectly asserted that the supervision of clergy is not rooted in religious belief and thus does not implicate the Free Exercise Clause. In actuality, the religious doctrine of each denomination forms the very basis for supervision policies.¹⁰³ Second, the court inaccurately stated that the cause of action for negligent supervision applies neutral principles of tort law and therefore does not violate the Free Exercise Clause. In fact this tort is not analogous to the regulations the Supreme Court has found to be neutral laws of general applicability, as its application will infringe on the religious beliefs used to formulate the supervisory policy of the particular religious institution.

The Florida Supreme Court's assertion that the supervision of clergy is not rooted in religious belief was wrong.

¹⁰² See discussion *infra* Part III.B.2.b.

¹⁰³ See James T. O'Reilly & JoAnn Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 46 (1994); see also LYNN R. BUZZARD & THOMAS S. BRANDON, JR., CHURCH DISCIPLINE AND THE COURTS (1987).

The Roman Catholic Church and other religious institutions have well-established disciplinary policies and rules for their clergy.¹⁰⁴ Religious norms imbue these policies, such as mercy and forgiveness of sin, and it is these beliefs that govern the conduct of the particular religious institution.¹⁰⁵ For example,

[i]n the Roman Catholic Church . . . [c]anon law preserves the rights of the accused, and prevents dismissal of a priest by a bishop, even for the grave offense of child sexual abuse, if the conduct occurred as a result of psychological or physical impairment of the individual priest. Though dismissal for clergy sexual abuse has been made more likely as a result of canon law changes, it is still a cumbersome internal discipline issue bound up in a traditional deference to the sacred status of the priest.¹⁰⁶

What is most significant to this discussion is that these policies and norms are not randomly developed by the church upon a majority vote but are in fact derived from basic themes of the Old and New Testaments such as confession, repentance, the kingdom, diakonia, and koinonia, as well as from specific scripture.¹⁰⁷ The key passage for church discipline is Matthew 18:15-18, which reads:

[I]f thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, let him be unto thee as a heathen man and a publican. I say unto you, Whatsoever ye shall bind on earth shall be bound in heaven: and whatsoever ye shall loose on earth shall be loosed in heaven.¹⁰⁸

This passage has been interpreted as meaning there should never be indifference to sin but rather a full and concerted effort to recover the individual who has gone astray.¹⁰⁹ Only in the event the member consistently rejects recovery should they be cast out by the community.¹¹⁰ Matthew 18 contains other verses to reinforce this interpretation. For example:

¹⁰⁴ O'Reilly & Strasser, *supra* note 103, at 46.

¹⁰⁵ *Id.* at 45-46.

¹⁰⁶ *Id.* at 46.

¹⁰⁷ BUZZARD & BRANDON, *supra* note 103, at 39.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 39-40.

¹¹⁰ *Id.* at 40.

God seeks the one lost sheep and rejoices when it is found (vv. 12, 13), the Father is unwilling that any of the little ones be lost (v. 14), his forgiveness reaches seventy times seven (v. 22), and we have a duty to forgive as we have been forgiven lest judgment fall upon us (vv. 23-35).¹¹¹

Many Christian sects have looked to Matthew 18 as guidance for their disciplinary policies, including Calvinists, Anabaptists, and Baptists.¹¹² The Baptists, for example, read Matthew 18 to mean that only a failure to hear the church will result in exclusion. "It [is] not the sin, but the refusal to repent and be reconciled that occasion[s] the church's severe[st] action."¹¹³

Thus, the discipline of priests is not an arbitrary decision made by individual religious leaders, but is in fact governed by deep-seated religious beliefs, norms, and practices. Accordingly, permitting a secular court or jury to determine whether a religious institution has sufficiently disciplined, sanctioned, or counseled a clergy member would involve sensitive judgments about the propriety of religious beliefs and implicate the Free Exercise Clause of the First Amendment.¹¹⁴ For instance, in this case, depending on what scripture the Church Defendants use to justify their actions, to come to a full and complete decision regarding the negligent supervision claim the court must also pass judgment on whether *acting* in conformity with such scriptural beliefs was negligent, inadvertently passing judgment on the appropriateness of the relevant scripture. It is this secondary judgment that is violative of the Free Exercise Clause.

The Florida Supreme Court's second argument regarding the Free Exercise Clause is also unsound. The Court stated that the cause of action for negligent supervision applies neutral principles of tort law and therefore does not violate the Free Exercise Clause even if it has an incidental effect on religious beliefs.¹¹⁵ However, a negligent supervision claim cannot be equated with the neutral laws of general applicability expounded in *Employment Division v. Smith*.¹¹⁶

¹¹¹ *Id.*

¹¹² BUZZARD & BRANDON, *supra* note 103, at 50-51, 55.

¹¹³ *Id.* at 56.

¹¹⁴ *Bryan R. v. Watchtower Bible and Tract Society of N.Y.*, 738 A.2d 839, 848 (Me. 1999); *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1249 (D. Colo. 1998).

¹¹⁵ *Malicki*, 814 So. 2d 347, 361 (Fla. 2002).

¹¹⁶ 494 U.S. 872, 879 (1990).

In *Employment Division*, the Court stated "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"¹¹⁷ The Court then proceeded to list a number of generally applicable laws that the Court has upheld despite their impact on religion, including child labor laws,¹¹⁸ Sunday-closing laws,¹¹⁹ and Selective Service laws.¹²⁰

Although the Court in *Employment Division* gave examples of neutral laws of general applicability, it was not until *Lukumi Babalu Aye, Inc. v. City of Hialeah* that the Court expressly defined these terms.¹²¹ *Lukumi* dealt with the constitutionality of a series of ordinances that prohibited

¹¹⁷ *Id.*

¹¹⁸ *Prince v. Massachusetts*, 321 U.S. 158 (1944). In *Prince*, the Court held valid a Massachusetts statute which barred any boy under twelve or girl under eighteen from selling "any newspapers, magazines, [or] periodicals . . . in any street or public place," and imposed a penalty upon any parent, guardian or custodian who permitted a minor under his or her control to work in violation of the law. *Id.* at 160-61. The Court as well upheld the conviction of a Jehovah Witness who allowed her daughter to sell religious magazines on the street in direct contradiction of the law. *Id.* at 168-70. The Court rejected the argument that the law denied the defendant's right to freedom of religion claiming that the state had a right to protect children against the dangers of preaching religion on a highway. *Id.*

¹¹⁹ *Braunfeld v. Brown*, 366 U.S. 599 (1961). In *Braunfeld*, appellants, Orthodox Jewish merchants engaged in the retail sale of clothing and home furnishings, challenged the constitutional validity of a Pennsylvania criminal statute which proscribed the Sunday retail sale of several commodities including clothing and furniture. *Id.* at 600-01. The appellants claimed the Sunday closing law respected an establishment of religion and abridged their free exercise rights as they would have to keep their stores open on Saturday, their Sabbath, in order to counteract the economic loss which would be incurred from closing on Sundays. *Id.* at 601-02. The Court upheld the statute as it only had an incidental effect on religion (the inconveniencing of those members of the Jewish faith who chose to work on Sundays) and it did not illegalize any religious practice of the appellants, but rather simply regulated secular activity. *Id.* at 605-06.

¹²⁰ *Gillette v. United States*, 401 U.S. 437 (1971). In *Gillette*, the petitioners challenged the constitutionality of Section 6(j) of the Military Selective Service Act of 1967 which provided that no person shall be subject to "service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." *Id.* at 441. The petitioners, who objected specifically to the Vietnam War, claimed that the law violated their Free Exercise and Establishment Clause rights as it was construed to apply only to objectors of all war and not to objectors of a specific war even if that objection was religious in nature. *Id.* at 448. The Court held that Section 6(j) did not violate the Establishment Clause of the First Amendment as it did not discriminate based on religious affiliation or belief, nor did it violate the Free Exercise clause as it was not designed to interfere with any particular religious practice or penalize any theological position. *Id.* at 450-53, 461-62.

¹²¹ 508 U.S. 520 (1993).

animal sacrifice.¹²² These were passed specifically as a means of denying licenses to the Santeria Church for its practices of animal sacrifice.¹²³ In *Lukumi*, the Court stated that neutrality and general applicability are interrelated and the presence of one implies the presence of the other.¹²⁴ In defining neutrality, the Court stated: “[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”¹²⁵ The Court further stated that the inquiry into neutrality can go beyond the face of a law to its effects.¹²⁶ “The [Free Exercise] Clause forbids ‘subtle departures from neutrality’ and ‘covert suppression of particular religious beliefs.’”¹²⁷ The Court then went on to state that although it was not necessary in *Lukumi* to define the exact standard used to evaluate whether a prohibition is generally applicable, the principle behind it is that the “government, in the pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief”¹²⁸ In the end, the court found the ordinances were not neutral in text or effect as the law disproportionately impacted the ritual of Santeria sacrifice.¹²⁹ Furthermore, they were not of general applicability as they were targeted at religious belief and failed to prohibit similar non-religious behavior.¹³⁰

Under the *Lukumi* test the negligent supervision claim here would not be neutral in its effect despite the fact that it seems to be neutral on its face. The court in *Lukumi* stresses that a law may be found not neutral if it covertly suppresses particular religious beliefs. As discussed above, a religion’s supervisory and disciplinary policies are derived from religious scripture and are imbued with religious norms such as “penance, admonition and reconciliation as a sacramental response for sin.”¹³¹ If a court finds that actions taken in reliance on such beliefs are negligent, it will result in a rejection of those particular beliefs. Furthermore, since each denomination holds its own distinct set of beliefs, this tort will

¹²² *Id.* at 524.

¹²³ *Id.*

¹²⁴ *Id.* at 531.

¹²⁵ *Id.* at 533.

¹²⁶ *Lukumi*, 508 U.S. at 533.

¹²⁷ *Id.* at 534.

¹²⁸ *Id.* at 543.

¹²⁹ *Id.* at 535-42.

¹³⁰ *Id.* at 543-44.

¹³¹ O’Reilly & Strasser, *supra* note 103, at 47.

disproportionately impact some religions more than others, depending on which actions the court deems negligent. This effective illegalization of the particular beliefs of certain religions is not neutral, and the tort infringes on the free exercise rights of the religion in question. "To demand that church elders and pastors exercise church discipline in keeping with their religious faith and practices only at the risk of catastrophic liability in civil suits utilizing the machinery of the state certainly is a burden on the [free] exercise of religion."¹³²

Despite the above free exercise arguments, the supervision claim can be upheld upon a showing of a compelling state interest narrowly tailored to advance that interest.¹³³ This is a very difficult burden to meet; if the tort is in any way over- or under-inclusive it will be rejected.¹³⁴ And in any event, the claim still faces the Establishment Clause and religious autonomy problems that will be discussed below.

b. The Florida Court's Misguided Interpretation of the Establishment Clause

The Florida Supreme Court's reasoning regarding the Establishment Clause is also misguided. The court's contention that the central determination under the negligence claims – whether the Church Defendants reasonably should have foreseen the risk of harm to third parties – did not require an inquiry into church doctrines is erroneous. In order to accurately decide the negligence claims in *Malicki*, the court would have to make certain reasonableness determinations, which would in turn require the creation of a standard of care and the interpretation of religious doctrine. These activities excessively entangle secular courts in church matters and result in a violation of the Establishment Clause.

The Florida Supreme Court misses half the analysis. Contrary to the court's claim, the necessary inquiry in determining claims of negligent supervision is not *merely* whether the Church Defendants should have foreseen the

¹³² See BUZZARD & BRANDON, *supra* note 103, at 223.

¹³³ Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993).

¹³⁴ *Id.*

potential danger,¹³⁵ but *also* whether, given the level of foreseeability, their conduct under the circumstances was reasonable;¹³⁶ in other words, whether their actions in supervising Father Malicki and placing him close proximity to parishioners breached some standard of reasonable care.¹³⁷ Therefore, there are two parts to the negligence analysis: (1) Whether the harm was foreseeable (a question that the Florida Supreme Court recognizes); and (2) Whether the actions of the Church Defendants in response to the foreseeable harm were reasonable. It is the second part of this inquiry that proves problematic under the First Amendment, and it is this issue that the Florida Supreme Court ignores.

The reasonableness inquiry under the second part of this negligence analysis would require the court to determine if the Church Defendants acted as other reasonable church defendants would have acted under the same or similar circumstances.¹³⁸ Normally, the relevant question would be whether the defendant acted as a reasonably prudent *man* would have acted in the same or similar situation, a fairly objective standard. However, in certain cases, where the defendant is engaged in a highly specialized job for which ordinary people do not have the training or experience to pass

¹³⁵ Although foreseeability remains part of the inquiry, it is not the end of the inquiry. If the danger was not foreseeable it is obvious that the defendants could not have been negligent since a person cannot be liable for unforeseeable dangers he could not avoid. However, if the dangers were foreseeable, the question becomes, considering the defendants knowledge level, whether it was reasonable for the defendant to place the clergy member in close proximity to parishioners. It is this last inquiry that the Florida Supreme Court ignores. However, it is this inquiry that poses the constitutional problem.

¹³⁶ See *Gibson v. Brewer*, 952 S.W.2d 239, 249-50 (Mo. 1997) (en banc) ("Whether negligence exists in a particular situation depends on whether or not a reasonably prudent person would have anticipated danger *and provided against it*. In order to determine how a 'reasonably prudent Diocese' would act, a court would have to excessively entangle itself in religious doctrine, policy, and administration.") (emphasis added). See also *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1250-51 (D. Colo. 1998) (holding negligent supervision claim unconstitutional as it would necessitate an examination of whether the procedures the Archdiocese Defendants had in place regarding supervision were "reasonable and adequate").

¹³⁷ RESTATEMENT (SECOND) OF TORTS § 317 (1965); RESTATEMENT (SECOND) OF AGENCY § 213 (1958) ("A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the supervision of the activity.").

¹³⁸ RESTATEMENT (SECOND) OF TORTS § 283 (1965) (stating unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances). This is partially a subjective standard because it requires examining the reasonableness of the conduct in the context of what a person in like circumstances would have done.

judgment, the court will apply a reasonable professional standard.¹³⁹ In such instances, the defendant's actions will be compared to what another person in that profession would have done.¹⁴⁰ For instance, when a court litigates an attorney malpractice or medical malpractice case, the court looks at what a reasonable professional in that trade would have done under like circumstances, not what a reasonable man would have done.¹⁴¹ Given the complexity of religious scripture, of which a vast portion of the population has little to no understanding, clerics should likewise be judged under a professional standard of care. To do otherwise would be unfair to the cleric who is conforming his or her actions to the standards of his or her profession. This is where the constitutional problem of excessive entanglement arises.

In creating this professional standard of care and determining whether a church defendant acted reasonably in supervising its clerics, the court would have to come up with a "reasonable cleric" standard for each religion, such as a reasonable bishop standard, a reasonable rabbi standard, and a reasonable priest standard.¹⁴² Such individualized standards would be required because as explained above, the traditional denominations each have their own intricate principles of governance, supervision, and discipline that must be taken into consideration in formulating the reasonable professional standard. Furthermore, because these disciplinary principles are infused with the religious tenets of the particular sect at issue the court will be forced to delve into and interpret religious doctrine in order to adequately understand the governance policies of the sect and pass judgment on whether they were reasonable.¹⁴³ It is this interpretation of religious scripture that would result in an excessive entanglement of church and state.

¹³⁹ *The Germanic*, 196 U.S. 589 (1905) (holding the reasonable prudent person takes on the profession of the actor and an objective standard is applied).

¹⁴⁰ *Id.* at 596.

¹⁴¹ *See, e.g., Hodges v. Carter*, 80 S.E.2d 144 (N.C. 1954); *see also Boyce v. Brown*, 77 P.2d 455 (Ariz. 1938).

¹⁴² *See O'Reilly & Strasser, supra* note 103, at 47; *see also Schmidt v. Joseph P. Bishop*, 779 F. Supp. 321, 328 (S.D.N.Y. 1991) (holding "[a]ny effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community").

¹⁴³ *See, e.g., S.H.C. v. Sheng-Yen Lu*, 54 P.3d 174, 179 (Wash. Ct. App. 2002); *see also, L.L.N. v. Clauder*, 563 N.W.2d 434, 442 (Wis. 1997).

The case of *S.H.C. v. Sheng-Yen Lu* illustrates the above point.¹⁴⁴ In *Sheng-Yen* a Buddhist temple member who had sexual intercourse with the grandmaster charged the temple with negligently supervising the grandmaster.¹⁴⁵ The member claimed the Temple officials knew of the behavior and did nothing to remedy the situation.¹⁴⁶ In the Buddhist faith the stanzas of Guru devotion state that followers “should ‘see only good qualities in [the grandmaster], and never any faults.’” Furthermore, if the grandmaster “acts in [an] . . . unenlightened manner’ the follower should remember that ‘your own opinions are unreliable and the apparent faults you see may only be a reflection of your own deluded state of mind.’”¹⁴⁷ Finally, if one discovers that the Guru is a “phony and without any achievement as Dharma, then one should depart from the Guru and take refuge in another true Guru. With regard to the original Guru, however, . . . *one should not criticize nor slander the former Guru.*”¹⁴⁸ Thus, for the court to decide if the Temple leaders acted reasonably in supervising the grandmaster it would necessarily have to interpret and pass judgment on the sects’ belief in not exposing the Guru as a phony. The court would have to ask itself whether in light of the sects’ beliefs the Temple should have been other than “obedient” to the guru. “Should the Temple have seen faults in or ‘criticized’ him? Should the Temple have ‘slandered’ him by calling into question the activities of which it had knowledge?”¹⁴⁹ Answering these questions would result in an unavoidable entanglement of church and state.

This analysis is in line with the Supreme Court case law discussed above on excessive entanglement. In cases such as *Hernandez* and *Jimmy Swaggart* the Supreme Court has implied that where a regulation necessitates inquiry into church doctrines, excessive entanglement will occur.¹⁵⁰ In *Jimmy Swaggart* the Court emphasized that the reason the imposition of the sales and use tax did not result in an excessive entanglement with the state was because it did not require inquiry “into the religious content of the items sold or

¹⁴⁴ 54 P.3d 174 (Wash. Ct. App. 2002).

¹⁴⁵ *Id.* at 175-76.

¹⁴⁶ *Id.* at 177.

¹⁴⁷ *Id.* at 179.

¹⁴⁸ *Id.*

¹⁴⁹ 54 P.3d at 179.

¹⁵⁰ See discussion *supra* Part III.A.1.

the religious motivation for selling or purchasing the items.”¹⁵¹ In contrast, in this case an extremely intensive examination and interpretation of religious doctrine would be necessary to decide the claim of negligent supervision and thus an excessive entanglement between church and state would result.¹⁵² As said above, it is not enough, as the Florida Supreme Court claims, to base the decision entirely on a question of foreseeability; it is also necessary to make a determination as to whether, given the foreseeability of the harm, the defendants acted reasonably.

Some may argue that the intensive examination of church doctrines described above is not necessary as a court can simply create one over-arching employer standard of care for all religions, avoiding any excessive entanglement of church and state. However, it is not that simple. If a court failed to engage in an intensive examination of church doctrine and create a reasonable standard for each religion, and instead created a single “employer standard of care” for all religions, the action of the court may inadvertently result in an endorsement of a particular religion and thus still violate the Establishment Clause.¹⁵³ Creating a single standard may inadvertently result in such an endorsement because the court risks favoring one model for church hiring, ordination, and retention over another.¹⁵⁴ For example, the court may find that Jewish rabbis discipline deviant clerics much better than Catholic priests, thus inadvertently endorsing the Jewish model of discipline over the Catholic model. Such endorsement is *exactly* what the Establishment Clause aims to prevent.

Therefore, since the claim of negligent supervision would require the court to examine and interpret religious doctrine or endorse one religion over another, the reasoning of the Florida Supreme Court was wrong and the negligence claims should have been dismissed under the Establishment Clause.

¹⁵¹ 493 U.S. 378, 395-96 (1990).

¹⁵² *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁵³ *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997) (en banc); Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 231-32 (Winter 2000).

¹⁵⁴ *Gibson*, 952 S.W.2d at 247; Idleman, *supra* note 153.

c. Inconsistency with the Religious Autonomy Doctrine

Still a third reason the Florida Supreme Court was wrong in upholding the negligent supervision claim is that it contradicts the religious autonomy doctrine.¹⁵⁵ Under this doctrine, secular courts are not permitted to involve themselves in disputes that would require the interpretation of religious law.¹⁵⁶ In *Serbian*, the Court quotes *Watson v. Jones* for the principle that:

[T]he rule of action which should govern the civil courts . . . is, that, whenever the questions of discipline, or faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and binding on them, in their application to the case before them.¹⁵⁷

The Court's concern is if civil courts become too involved in matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the member of the church to the standard of morals required of them . . ." the court will deprive these institutions of the authority to run their own affairs.¹⁵⁸ "Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria."¹⁵⁹ In the end, the Court in *Serbian* found it was improper for the Illinois Supreme Court to pass judgment on the decision to remove a bishop from the church.¹⁶⁰ In reaching its conclusion the Court noted that for the Illinois Supreme Court to render its decision it had to engage in a detailed review of the removal and defrockment proceedings and determine whether they were in accordance with church policy.¹⁶¹

Like in *Serbian*, for the court to decide the negligent supervision claim in this case it would have to engage in

¹⁵⁵ See discussion *supra* Part III.A.

¹⁵⁶ *Id.*

¹⁵⁷ 426 U.S. 696, 710 (1976).

¹⁵⁸ *Id.* at 714.

¹⁵⁹ *Id.* at 714-15.

¹⁶⁰ *Id.* at 718.

¹⁶¹ *Id.* The Court stated "[n]ot only was this 'detailed review' impermissible under the First and Fourteenth Amendments, but in reaching this conclusion, the court evaluated conflicting testimony concerning internal church procedures and reflected the interpretations of relevant procedural provisions of the Mother Church's highest tribunals." *Id.*

extensive interpretations of church doctrine.¹⁶² Furthermore, it would effectively override the discretion of the church to engage in its own disciplinary and governance decisions and impermissibly dictate how the church or its congregation could act in the future.¹⁶³ This is not permitted under the religious autonomy doctrine and thus the Florida Supreme Court was irresponsible in upholding the negligent supervision claim.

It is imperative to note that the application of the religious autonomy doctrine to the case at hand is not without its problems. Thus far the religious autonomy doctrine has only been applied in cases involving internal disputes within or among various churches.¹⁶⁴ In contrast, this case would involve its application to a dispute between the church and an outside third party. Nonetheless, the doctrine is important to consider because it is conceivable that the Supreme Court would choose to extend the doctrine to this set of facts because "[w]hile it is true that the pleading caption . . . identifi[es] a dispute between church officials and a third [] party, a closer inquiry reveals that the nature of the dispute . . . implicates a secular examination into 'intra-church' process and procedure; an action proscribed by our Constitution."¹⁶⁵

IV. PUBLIC POLICY CONCERNS AND SOLUTIONS

The shortcomings of *Malicki* aside, there are very important social reasons for imposing liability upon the Roman Catholic Church and other religious institutions for the blatant disregard of the welfare of individuals put in the care of its clergy. The remainder of this Comment will discuss these policy concerns, namely, the impact of sexual abuse by clerics on its victims and the failure of religious institutions to tackle the problem themselves. This Comment will also pose possible alternate remedial schemes, including the utilization of some intentional torts and criminal charges.

The impact of clergy sexual abuse upon its victims, child or adult, can be devastating and extremely long lasting.¹⁶⁶ Studies have equated the harm suffered by women sexually

¹⁶² See discussion *supra* part III.B.2.a.

¹⁶³ *Malicki*, 814 So. 2d 347, 368 (Fla. 2002) (Harding, J., dissenting).

¹⁶⁴ *Id.* at 356.

¹⁶⁵ *Id.* at 368 (Harding, J., dissenting) (emphasis omitted).

¹⁶⁶ Eduardo Cruz, Comment, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and Search for Solutions*, 19 FLA. ST. L. REV. 499, 507 (1991).

abused by clerics with the extent and type of harm suffered by incest victims.¹⁶⁷ The situations are similar since the women liken the dominating role of the cleric with the dominating role of their fathers.¹⁶⁸ The harm manifests itself in "diminished self-esteem, increased feelings of personal ambivalence, increased sexual difficulties, anger at being exploited, a feeling of being used as a sex object, . . . an inability to trust other therapists" and possible hospitalization and suicide.¹⁶⁹ The "God Factor" further exacerbates these negative effects.¹⁷⁰ Since the victim in these cases often associates the abuser with God, the violation may spur a spiritual crisis, causing the victim to leave the church and suffer the "loss of pastor, faith and the community of faith." Furthermore, the victims often blame God for the abuse.¹⁷¹ Without the comfort of her faith, the victim is arguably worse off than she would have been if a secular individual had sexually abused her.¹⁷² If this were not enough, in many instances involving abuse against women, the religious community may shun a victim who exposes the abuse as a seductress and someone who should be ashamed of herself.¹⁷³

The impact on children of such abuse is more damaging still. Studies have shown that abused girls and boys "display problems in the areas of body image, impaired intimacy, depression, manifestations of self-destruction and traumatic rage. Boys often bear the extra burdens of confusion about their gender identity¹⁷⁴ and hyper-vigilance toward other males."¹⁷⁵ There have also been cases in which sexually abused males have displayed compulsive, and sometimes even violent, sexual contact with females.¹⁷⁶ For example, one sixteen-year-old boy, who had been "molested for two years by a priest reported . . . [that] even in the midst of lovemaking, he [was] haunted by his memory of the priest. He state[d], 'I'll see him on top of me [and] smell his cologne and house.' Unable to

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 508.

¹⁷¹ Cruz, *supra* note 166, at 508.

¹⁷² John H. Arnold, *Clergy Sexual Malpractice*, 8 U. FLA. J. LAW. & PUB. POL'Y 25, 33 (1996).

¹⁷³ Cruz, *supra* note 166, at 508.

¹⁷⁴ Gender identity problems occurs in males and not females because the molesters are almost exclusively male. Arnold, *supra* note 172, at 33.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

maintain his erection, he displaces his anger onto the woman for *her* sexual inadequacy.”¹⁷⁷ In conclusion, considering the traumatic effects cleric sexual abuse has on its victims, it is imperative to propose possible solutions to curb the epidemic.

The failure of religious institutions to confront and remedy the problem themselves accentuates the need for outside solutions. Instead of exploring ways to prevent abuse, these institutions often act in a very protective manner, shielding themselves from any possible outside criticism.¹⁷⁸ The institutions prevent criticism by ensuring that society never hears of the episodes of abuse in the first place. Historically, churches have had a “sexual ethic that stresses secrecy”¹⁷⁹ and a practice of ignoring and covering up the stories of the victims without charging the wrongdoer.¹⁸⁰ Even if the wrongdoing priest or minister was charged by the church, conviction would be problematic because “[i]n Canon Law, the penal process is derailed if a pedophilic priest simply expresses sorrow and seeks reconciliation.”¹⁸¹ In recent years, the most common remedy for sexually deviant behavior is for the institution simply to recommend counseling and transfer the clergyman to another parish.¹⁸²

Therefore, due to the very harmful effects of clergy sexual abuse on its victims, and the failure of religious institutions to react and remedy the abuse, society must deal

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 34.

¹⁷⁹ Cruz, *supra* note 166, at 508. See Fox Butterfield, *789 Children Abused by Priests Since 1940, Massachusetts Says*, N.Y. TIMES, July 24, 2003, at A1 (quoting Massachusetts Attorney General Thomas F. Reilly) (“When they had a choice between protecting children and protecting the church, they chose secrecy to protect the church. . . . They sacrificed the children for many, many years.”).

¹⁸⁰ Arnold, *supra* note 172, at 35.

In sixteenth-century England, when Reginald Scott wrote that the widespread belief that sleeping women had been impregnated by demons was, in fact, a cover for sexual crimes of the clergy, King James had his book burned. In the contemporary church, sexual abuse has been handled as an internal matter with both the clergy and laity ‘agreeing’ to hide the truth.

Id. For example, in the Louisville Kentucky Archdiocese, after a priest admitted to the archbishop that he had molested a 15-year-old boy, the archbishop concluded that the priest was not a danger and kept him in place. Jeffrey Gettleman, *Church Settlement Goes Beyond the Accused*, N.Y. TIMES, June 12, 2003, at A22.

¹⁸¹ Arnold, *supra* note 172, at 35.

¹⁸² *Id.* See Daniel J. Wakin, *Two Bishops in New York are Faulted in Abuse Cases*, N.Y. TIMES, July 24, 2003, at B1 (reporting how one New York Bishop “[h]ad a clear preference for keeping abusers in ministry by quietly moving them to new parishes instead of banishing them”). “The bishop also apparently felt that once caught, a molester priest would not abuse again, . . . [and thus failed] ‘to take any meaningful steps to limit abusive priests’ contact with children in the future.” *Id.*

with the dilemma in other ways. Some possible responses include the utilization of intentional torts, vicarious liability, and criminal charges.

A. *Intentional Torts*

In the past, courts have utilized several intentional tort theories to hold the church and other religious institutions liable for the sexual abuse of its parishioners. These torts include: (1) intentional failure to supervise the clergy and (2) intentional infliction of emotional distress.¹⁸³

The Missouri Supreme Court recognized the tort of intentional failure to supervise the clergy in *Gibson v. Brewer*.¹⁸⁴ The court refused to hear a negligent supervision claim on the grounds that determining the reasonableness of a church's supervision of a cleric requires exploring and interpreting religious doctrine.¹⁸⁵ The court further reasoned that barring the action was proper because otherwise it would "create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision."¹⁸⁶ However, the court then proceeded to uphold the tort of intentional failure to supervise the clergy.¹⁸⁷ The court reasoned that the rule of *Employment Division*, that the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability," applied both to generally applicable criminal laws and intentional torts.¹⁸⁸ In the court's opinion, the application to intentional torts was

¹⁸³ See, e.g., *Gibson v. Brewer*, 952 S.W.2d 239, 248-49 (Mo. 1997) (en banc); *Hester v. Barnett*, 723 S.W.2d 544, 552 (Mo. Ct. App. 1987) (stating that "intentional torts of a cleric are already actionable, . . . even though [they involve] incidents of religious practice and belief"); *F.G. v. MacDonnell*, 696 A.2d 697, 702 (N.J. 1997) (noting that "courts have recognized claims for intentional torts against clergymen"); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 785-86 (Okla. 1989).

¹⁸⁴ 952 S.W.2d at 248-49. Other courts have also upheld the tort while at the same time rejecting negligence claims. See, e.g., *Heroux v. Carpentier*, No. C.A. PC 92-5807, 1998 R.I. Super. LEXIS 52, 26-27 (Sup. Ct. R.I. Jan. 23, 1998).

¹⁸⁵ *Gibson*, 952 S.W.2d at 248-49.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* The court defined the tort by saying:

[a] cause of action for intentional failure to supervise clergy is stated if (1) a supervisor (or supervisors) exists, (2) the supervisor (or supervisors) knew that harm was certain or substantially certain to result, (3) the supervisor (or supervisors) disregarded this known risk, (4) the supervisor's inaction caused damage, and (5) the other requirements of the Restatement (Second) of Torts, § 317 are met.

Id.

¹⁸⁸ *Id.* at 248.

logical because "religious conduct intended or certain to cause harm need not be tolerated under the First Amendment."¹⁸⁹

Pleading under this tort theory would not implicate the First Amendment because it does not involve the interpretation or rejection of specific scriptural beliefs. In resolving this intentional tort claim the Free Exercise Clause is not violated because the court is not passing judgment on the reasonableness of a given religion's doctrinally-imbued supervision policy and thus it is not rejecting any religious doctrine.¹⁹⁰ Because there is no reasonableness inquiry to be made, it also does not implicate the Establishment Clause. As stated above, to make any reasonableness determinations one must examine how a reasonably prudent person under the same or similar circumstances would act, i.e., how a reasonable bishop or a reasonable rabbi would act.¹⁹¹ With an intentional tort, there are no such examinations because it comes down to one objective question: Did a supervisor disregard a known risk resulting in injury?

This tort would prove successful in holding religious institutions liable in numerous instances. In many of these cases, parishioners bring molestation or sexual misconduct to the attention of the religious leaders who nevertheless continue to allow the clergyman to work closely with parishioners – even small children – and engage in further sexual abuse.¹⁹² Therefore the actions of these leaders would properly fit the elements of the tort, as they will have disregarded (allowed continued contact with parishioners) a known risk (sexual abuse brought to their attention) resulting in further injury (more sexual abuse).

The judiciary has also regarded the tort of intentional infliction of emotional distress (IIED)¹⁹³ as a second means of

¹⁸⁹ *Gibson*, 952 S.W.2d at 248.

¹⁹⁰ See discussion *supra* Part III.B.2.a

¹⁹¹ See discussion *supra* Part III.B.2.b.

¹⁹² See, e.g., *Gibson*, 952 S.W.2d at 243. (finding that upon parents bringing to the attention of the Diocese an incident in which a priest fondled their son, they were told that "this happens to young men all the time" and that Michael "would get over it"); see also *supra* notes 180, 182 and accompanying text.

¹⁹³ The elements of intentional infliction of emotional distress include the following: (1) that the actor intended to inflict or recklessly caused emotional distress; (2) the conduct causing the distress was extreme or outrageous; (3) the defendant's conduct was the cause of the plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was severe. RESTATEMENT (SECOND) OF TORTS § 46(1) (1977). The word intent means "the actor desires to cause consequences of his act, or that he

holding religious institutions liable for the actions of clerics.¹⁹⁴ Again, the *Gibson* court upheld this claim on the ground that "liability for intentional torts [could] be imposed without excessively delving into religious doctrine, polity, or practice."¹⁹⁵ Similarly, the Court of Appeal of California in *Nally v. Grace Community Church of the Valley* upheld a claim of intentional infliction of emotional distress against a group of church defendants.¹⁹⁶ In *Nally*, plaintiff's son, Kenneth Nally, was receiving spiritual and personal counseling from a pastor of the church.¹⁹⁷ The pastor discouraged Kenneth from seeking further psychiatric or psychological counseling despite the pastor's awareness of Kenneth's suicidal tendencies.¹⁹⁸ As a result, Kenneth committed suicide.¹⁹⁹ The plaintiff parents further alleged that the defendants exacerbated Kenneth's preexisting guilt, anxiety, and depression, and held out suicide as a viable option.²⁰⁰ Based on these facts, the court upheld a judgment against the church, stating that "while defendants' religious beliefs are absolutely protected by the First Amendment, . . . the [F]ree [E]xercise [C]lause does not license intentional infliction of emotional distress in the name of religion and cannot shield defendants from liability for wrongful death for a suicide caused by such conduct."²⁰¹ This Comment supports this reasoning and the application of IIED for the same reasons expounded above, particularly, the fact that it requires no inquiry into religious doctrine.

believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1977).

¹⁹⁴ See, e.g., *Hartwig v. Albertus Magnus College*, 93 F. Supp. 2d 200, 219 (D. Conn. 2000); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 785-86 (Okla. 1989) (holding that where the Church defendant punished a parishioner for the sin of fornication, the first amendment did not shield them from a claim for intentional infliction of emotional distress); *Erickson v. Christenson*, 781 P.2d 383 (Or. Ct. App. 1989) (holding that lower court erred in dismissing intentional infliction of emotional distress claim where parishioner was seduced by the pastor as the claim was not barred by the First Amendment).

¹⁹⁵ 952 S.W.2d 239, 249 (Mo. 1997) (en banc).

¹⁹⁶ 204 Cal. Rptr. 303, 308-09 (Cal. Ct. App. 1984).

¹⁹⁷ *Id.* at 304.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 305. Evidence was introduced showing that when Kenneth showed the pastor an injury to his arm from an attempted suicide the pastor told him it was "God's punishment." 204 Cal. Rptr. at 305. Furthermore, a tape by Pastor Thomson at the church stated "suicide is one of the ways that the Lord takes home a disobedient believer." *Id.* at 306.

²⁰¹ *Id.* at 308-09.

However, IIED may prove a more problematic claim than intentional failure to supervise clergy. Several courts have already rejected the tort as violating the First Amendment since determining whether conduct was *extreme or outrageous* would require the interpretation of religious doctrine.²⁰² Furthermore, the tort imposes a *very* high standard of proof on the plaintiff. IIED requires not only intentional conduct, but also “extreme and outrageous” conduct intended to cause “severe emotional harm” which manifests itself in “bodily harm.”²⁰³ These standards are quite high and may be difficult to prove in court. Even in *Gibson*, although the court upheld the application of the tort, it found that the plaintiffs did not meet their burden of proof because they could not prove that the “Diocese’s sole purpose in its conduct was to invade the Gibsons’ interest in freedom from emotional distress.”²⁰⁴ Therefore, suits under IIED may be a last rather than a first resort.

With either one of these intentional torts, the claim can be made that they do nothing to compensate for the first, and perhaps only, instance of sexual abuse. However, it is not the first instance of abuse that any of these claims, including the negligence claims, are aiming to prevent. The goal of the litigation in this area is to hold churches accountable for ignoring known or easily discoverable abuses. The intentional tort claims would effectuate such a goal.

B. *Criminal Charges*

Civil suits are not the only means of holding religious institutions accountable for their failure to supervise their members. Alternatively, the state can criminally prosecute the superiors of these institutions.²⁰⁵ The major benefit of imposing criminal rather than civil sanctions is that religious institutions and their leaders cannot claim immunity under the Free Exercise or Establishment Clauses. It has long been held

²⁰² See, e.g., *Bryan R. v. Watchtower Bible & Tract Soc’y, Inc.*, 738 A.2d 839, 848 (Me. 1999) (dismissing intentional infliction of emotional distress claim as it would “require direct inquiry into the religious sanctions, discipline, and terms of redemption or forgiveness that were available within the church . . .”); see also, *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 266 (Minn. Ct. App. 2003).

²⁰³ RESTATEMENT (SECOND) OF TORTS § 46(1) (1977).

²⁰⁴ 952 S.W.2d 239, 249 (Mo. 1997) (en banc).

²⁰⁵ It is unclear whether religious institutions themselves can be held liable under criminal statutes or only its leaders. See discussion *infra* note 218.

by the Supreme Court that the “free exercise of religion does not include the right to commit crimes in the name of religion.”²⁰⁶ For example, in *Reynolds v. United States*²⁰⁷ and *Davis v. Beason*,²⁰⁸ the Supreme Court made clear that the federal government had a right to criminalize polygamy and arrest those persons who violated the law even if they claimed to be engaging in such acts as an exercise of their religion. Similarly, in *Cox v. New Hampshire*, the Court stated that it is not a defense to ignoring a traffic light that it is part of your religious duty to disobey municipal commands.²⁰⁹ In short, what these cases stand for is the idea that religion is not immune from the criminal law. Therefore, if in these sexual misconduct cases religious leaders are charged with a generally applicable criminal law, they will not be able to hide behind a defense of immunity.

The specific crimes charged against a religious institution and its leaders vary between jurisdictions. Even so, a focus on the criminal laws of New York State will provide a sense of the types of conduct that criminal sanctions can reach. A number of criminal statutes in New York could apply to the religious leaders in these sexual misconduct cases. The most easily applicable of these laws is endangering the welfare of a child. The child endangerment statute says that “[a] person is guilty of endangering the welfare of a child when . . . [h]e knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old”²¹⁰ In many of these molestation cases the religious superiors have placed children in the custody of clergy knowing of past instances of molestation and sodomy.²¹¹ Thus a jury could find that these individuals knowingly placed children in harm’s way, violating the statute outlined above.

These institutional leaders may also fall under the umbrella of criminal facilitation statutes. According to the New York law,

[a] person is guilty of criminal facilitation in the fourth degree when, believing it probable that he is rendering aid to a person who intends

²⁰⁶ Kramer, *supra* note 26. See also *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that religiously-neutral criminal laws would be upheld by the court).

²⁰⁷ 98 U.S. 145, 166-67 (1878).

²⁰⁸ 133 U.S. 333, 341-43 (1890).

²⁰⁹ 312 U.S. 569, 574 (1941).

²¹⁰ N.Y. PENAL LAW § 260.10 (Consol. 2004).

²¹¹ Gettleman, *supra* note 180; Wakin, *supra* note 182.

to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony²¹²

This is obviously a more difficult statute to apply than the child endangerment law because the crime involves more and heightened elements.²¹³ However, a jury could possibly find that the religious leaders facilitated the crime by permitting a cleric to have continued contact with parishioners despite evidence of sexual misconduct.²¹⁴ Furthermore, in cases where the institutional leaders actually concealed the cleric's actions from the public, facilitating the cleric's ability to commit the crime again, the State should have an easier time showing that religious superiors aided in the crime. The importance of finding criminal facilitation statutes applicable in these sexual misconduct cases is that they will cover misconduct against adults as well as children.

Even if the two statutes above can be invoked against religious leaders, there are still the problems of penalty and applicability. Endangering the welfare of a child and criminal facilitation are Class A Misdemeanors and thus are punishable by no more than one year in jail²¹⁵ or a one thousand dollar fine.²¹⁶ Having such minor penalties may not result in the desired level of accountability.²¹⁷ Second, these laws only apply to the individuals and not the institution directly.²¹⁸ Unless

²¹² N.Y. PENAL LAW § 115.00 (Consol. 2004).

²¹³ With child endangerment, all that needs to be proven is that the person had knowledge that their conduct could lead to injury to a minor. N.Y. PENAL LAW § 260.10 (Consol. 2004). Conversely, with the facilitation statute, the plaintiff must show: (1) the defendant believed he was aiding a person who intended to commit a crime, (2) the defendant provided the opportunity for such commission, and (3) the defendant in fact aided in the commission of a felony. N.Y. PENAL LAW § 115.00 (Consol. 2004).

²¹⁴ This finding would have to read as follows: Since the denominational leaders knew of past sexually deviant behavior and knew the cleric received no counseling for this behavior they were aware of the probability that the cleric intended to commit a future crime, and *in fact* aided that person in the commission of that crime by providing them with the opportunity to do so. N.Y. PENAL LAW § 115.00 (Consol. 2004).

²¹⁵ N.Y. PENAL LAW § 10.00 (Consol. 2004).

²¹⁶ N.Y. PENAL LAW § 80.05 (Consol. 2004).

²¹⁷ However, if the state, instead of bringing a single charge, begins to stack charges against the church the accountability incentives once again increase. Also, media attention to the levying of criminal sanctions against religious leaders may create embarrassment for the affiliated religious institution, in turn creating a greater incentive to expose and remedy such activities in the future.

²¹⁸ N.Y. PENAL LAW § 115.00 (Consol. 2004); N.Y. PENAL LAW § 260.10 (Consol. 2004) (stating first element of crime is perpetrator must be a *person*). The penal law defines a person as "a human being, and where appropriate, a public or private

laws can hold the institution directly accountable, the internal policies of the entity are not likely to change as quickly.

V. CONCLUSION

In conclusion, based on the modern interpretations of the Establishment and Free Exercise Clauses, religious institutions are virtually immune from negligent hiring and supervision claims. A religious organization's hiring, firing, and disciplinary policies are imbued with religious doctrine, beliefs, and practices. Any attempt by a court to determine whether such policies are reasonable would necessarily require the examination and interpretation of the denomination's scripture – an examination that is foreclosed by both the Free Exercise and Establishment Clauses. However, the impact of cleric sexual abuse can be devastating on its victims and thus religious organizations must not be permitted to escape all responsibility for their willful blindness in these cases. Therefore, it is important for society to find solutions to this epidemic, such as those examined in this Comment.

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corporation, an unincorporated association, a partnership, a government or a governmental instrumentality." N.Y. PENAL LAW § 10.00 (Consol. 2004). Therefore, unless the religious organization is considered an unincorporated association the penal law will not apply to it. This will vary based on the religious sect at issue.

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