DEFINING THE DUTY OF RELIGIOUS INSTITUTIONS TO PROTECT OTHERS: SURGICAL INSTRUMENTS, NOT MACHETES, ARE REQUIRED

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I. INTRODUCTION

The well-publicized and sometimes shocking acts of some Roman Catholic priests have brought questions of tort law—long buried in scholarly texts—to the front pages of our newspapers.[1] What is the duty of churches and other religious institutions to protect their memberships or communities in general? When should religious institutions be responsible for the wrongful acts of priests, ministers, rabbis, or other religious leaders? When, if ever, should they be liable for the acts of members of their congregations? If a duty of care is to be imposed, what is its nature and extent?

Surprisingly, many of these fundamental questions have not been answered in judicial opinions. Media commentators have properly speculated about the results.[2] The reasons one cannot find answers in judicial opinions are complex.

First, and most importantly, issues arise because of a drastic change in

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1. *See, e.g.*, Wendy Davis, *Redemption Key to Church Defense*, BOSTON GLOBE, Mar. 24, 2003, at B1; Ashbel S. Green, *Archdiocese Near Top in Paying*, OREGONIAN, Feb. 28, 2004, at A1; Gregory D. Kesich, *High Court Upholds Barrier to Abuse Suits: It Will Remain Almost Impossible to Sue Churches in Maine over Alleged Abuse by Clergy Members*, PORTLAND PRESS HERALD, July 10, 2002, at A1; *Priest Not Liable for Seduction of Parishioner: C.A. Rules First District Panel Says Pastor Has No "Fiduciary Duty" to Refrain from Sex with Church Member*, METRO. NEWS CO. (Los Angeles), Feb. 18, 2003, at 1; Ralph Ranalli, *Some in Church Suits May Face Tax Bill*, BOSTON GLOBE, Sept. 21, 2003, at B1; *see also* Rev. Raymond C. O'Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 367–68 (2004) (discussing media coverage of sexual abuse of minors by Roman Catholic clergy).

2. *See, e.g.*, Sheryl S. Desrosiers, *Let Archdioceses Reorganize*, BROWARD DAILY BUS. REV., Mar. 3, 2003, at A6; Mark A. Sargent, *Legal Defense: When Sued, How Should the Church Behave?*, COMMONWEAL, June 14, 2002, at 13; *The Big Story with John Gibson:* Fox News Interview with Andrew Napolitano & John Allen, Jr. (Fox News television broadcast Apr. 23, 2002).

the scope of a religious institution's liability. For many decades, these institutions enjoyed blanket immunity from tort suits, called "charitable immunity."[3] Since religious institutions were immune from liability, courts were not called upon to shape the duty owed by religious institutions to protect other persons. Courts began to repeal charitable immunity in the mid-twentieth century, raising many unanticipated issues. The repeal of charitable immunity was not prompted by sex abuse or other modern cases involving complex questions of the duty owed by religious institutions to others. Instead, the focus was on rather simple, traditional tort cases, such as when a person was injured by a negligently driven church vehicle or after slipping in a cathedral.[4] Legislatures and some courts believed that churches and other charities could absorb these simple tort claims through liability insurance.[5] No thought was given to the duties of religious institutions in more complex social situations, such as whether a religious institution should ever have a duty to protect its own members or members of the public from a wrongful act of a member of its congregation.

A second question of a religious institution's duty to protect others crosses into an area of general tort law that has experienced ongoing tension for two centuries. In general, U.S. tort law begins with the premise that there is no duty to rescue or help others.[6] The exceptions to this rule are subtle, ever-changing, and filled with challenging public policy choices.

Finally, an even more complex issue is whether a religious institution's duty to protect others is limited by the First Amendment's Establishment and Free Exercise Clauses. In general, these First Amendment issues do not affect other tort defendants. But as this Article will show, many courts have been reluctant to act as supervisors in defining the duty of religious institutions toward their members and others, because the endeavor might require courts to become entangled

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3. *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS 636 n.1 (11th ed. 2005). In 1846, charitable immunity originated in England and, up until 1942, was followed in all but two or three U.S. jurisdictions. *Id.*

4. *See, e.g.*, President & Dirs. of Georgetown Coll. v. Hughes, 130 F.2d 810, 817–18 (D.C. Cir. 1942) (discussing charitable immunity only in the context of negligence and simple torts and noting charitable immunity cases include actions arising out of "driving an ambulance or a truck on the streets" or "running an elevator or pushing a cart in the corridors of the hospital").

5. *See, e.g.*, Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 603 (Mo. 1969); *Hughes*, 130 F.2d at 823–24.

6. *See* Jennifer L. Groninger, Comment, *No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street? What Is Left of the American Rule, and Will it Survive Unabated?*, 26 PEPP. L. REV. 353 (1999). *But see* SCHWARTZ ET AL., *supra* note 3, at 419 n.5 (describing how other countries provide for a duty to rescue when the person can act without fear of endangering himself or others).

in disputes over religious doctrines or to interfere in the internal ecclesiastical affairs of religious institutions.

Defining the duty of religious institutions to protect others is a subtle craft. Answers should be shaped with surgical precision, not crudely wrought by machetes. One must balance the interest of the religious institution and the people it serves against the interests of persons who might be harmed because of failures for which it should be deemed responsible.

This Article first discusses in Part II the rise and fall of the charitable immunity doctrine and the void it left in tort jurisprudence governing religious institutions. Next, to guide our analysis in considering tort duties faced by religious institutions, Part III discusses the general U.S. rule of no duty to rescue or protect and the exceptions to that rule. Next, setting aside constitutional issues, Part III analyzes whether these exceptions allow for claims against religious institutions. Part IV discusses the overlay of constitutional issues that arise when courts seek to impose tort duties on religious institutions, particularly those involving decisionmaking about standards of care. Finally, Part V identifies public policy issues that support drawing a line at the imposition of a duty of religious institutions to protect their members from each other.

II. THE CHARITABLE IMMUNITY DOCTRINE

A. The Rise of the Charitable Immunity Doctrine

Charitable organizations, both religious and secular, have historically held a unique status in society because of the services and benefits they bestow. To encourage altruistic behavior and preserve funds for charities to use in their missions, courts created the "charitable immunity" doctrine, which relieved charities of liability for tortious conduct.[7] This doctrine helped assure potential and current donors that their contributions would be used as they intended rather than for legal damages, and assuaged concerns that tort awards would bankrupt charitable institutions.[8] By 1938, at least forty states had adopted the

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7. *See* SCHWARTZ ET AL., *supra* note 3, at 636 n.1; RESTATEMENT (SECOND) OF TORTS § 895E (1965).

8. The concept of charitable immunity first arose in the English courts, primarily under the justification that using charitable funds to pay for tort damages would be against a donor's intentions. *See* Feoffees of Heriot's Hosp. v. Ross, 8 Eng. Rep. 1508, 1510 (1846) (stating in dictum that cases sought damages for wrongful exclusion from the benefits of the charity), *overruled by* Mersey Docks

doctrine.[9] At its inception, proponents of charitable immunity believed that the "purses of donors would be closed and the funds of charity depleted if these institutions were not granted immunity."[10]

B. The Demise of the Charitable Immunity Doctrine

Beginning in the 1940s and accelerating as liability insurance later became more available, courts began to dissolve charitable immunity.[11] First, they carved out exceptions to the broad immunity they had previously created.[12] Soon, the exceptions swallowed the rule and effectively abolished "charitable immunity."[13]

As early as 1942, the United States Court of Appeals for the District of Columbia Circuit ruled in a landmark opinion that a charitable hospital was not entitled to more immunity than any other business or entity, and rejected the charitable immunity doctrine.[14] In *President and Directors of Georgetown College v. Hughes*, a nurse was struck in the

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Trs. v. Gibbs, 11 Eng. Rep. 1500 (1866) (holding trustees liable for damages caused to a dock by employees' negligence); Duncan v. Findlater, 7 Eng. Rep. 934 (1839) (stating in dictum that trustees were not liable for the negligence of persons not shown to be their servants), *overruled by Mersey Docks Trs.*, 11 Eng. Rep. 1500; *see also* Holliday v. Parish of St. Leonard, 142 Eng. Rep. 769, 774 (1861) (holding that trustees were not liable for negligence of employees), *overruled by Mersey Docks Trs.*, 11 Eng. Rep. 1500. While English courts held for this reason that trust funds could not be subject to tort judgments, the courts did not go so far as to create a blanket charitable immunity rule. *See* Note, *The Quality of Mercy: "Charitable Torts" and their Continuing Immunity*, 100 HARV. L. REV. 1382, 1383 n.9 (1987). U.S. courts adopted the English justification for the charitable immunity doctrine and added other justifications for the doctrine. *See, e.g.*, Hearns v. Waterbury Hosp., 33 A. 595, 604 (Conn. 1895) (holding church not liable for torts committed by its employees under doctrine of respondeat superior since it does not profit from their services); Vermillion v. Woman's Coll. of Due W., 88 S.E. 649, 650 (S.C. 1916) (citing public policy consideration that requires charities to pay tort judgments would adversely impact their monies for charitable activities); *see also* RESTATEMENT (SECOND) OF TORTS § 895E, *supra* note 7, at cmt. c (enumerating justifications for the immunity); Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities—Modern Status*, 25 A.L.R.4th 517 § 2 (1983) (collecting cases).

9. Note, *supra* note 8, at 1383 n.9.

10. *Abernathy*, 446 S.W.2d at 603. Further, they believed "[t]o give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." *Ross*, 8 Eng. Rep. at 1510.

11. Note, *supra* note 8, at 1382.

12. *See* RESTATEMENT (SECOND) OF TORTS § 895E, *supra* note 7, at cmt. b. For example, courts carved out an exception to charitable immunity for everyone other than recipients of the benefits of the charity and limited immunity to instances where there would be a depletion of trust assets, allowing liability in instances where there was some other form of payment, such as liability insurance. *Id.*

13. *See id.* at cmt. d.

14. President & Dirs. of Georgetown Coll. v. Hughes, 130 F.2d 810, 827 (D.C. Cir. 1942). A few courts had rejected the doctrine of charitable immunity in earlier decisions. *See* Nicholson v. Good Samaritan Hosp., 199 So. 344 (Fla. 1940); Mulliner v. Evangelischer Diakonniessenverein, 175 N.W. 699 (Minn. 1920); Welch v. Frisbie Mem'l Hosp., 9 A.2d 761 (N.H. 1939); Sheehan v. N. Country Comm. Hosp., 7 N.E.2d 28 (N.Y. 1937).

back by a swinging door that was pushed open "suddenly and violently by a student nurse coming out from the ward."[15] She became permanently disabled as a result of her injuries.[16] Judge Rutledge reviewed the doctrine of charitable immunity at length, considering and then rejecting all the reasons previously advanced for it.[17] Judge Rutledge's opinion stated that:

> The rule of immunity is out of step with the general trend of legislative and judicial policy in distributing losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving them wholly to be borne by those who sustain them.[18]

Judge Rutledge's rejection of the theories underlying charitable immunity was cited frequently for the next twenty-five years.[19] Subsequent cases abolishing charitable immunity similarly involved a plaintiff seeking recovery because of the affirmative actions of a worker at a charitable institution, not because of the institution's failure to act.[20] Judge Rutledge's language about "distributing losses" was also applicable; traditional liability insurance coverage was available and affordable.

This trend toward state court abrogation of complete charitable immunity accelerated after the American Law Institute's *Restatement of Torts (Second)* took the position in Section 895E that "[o]ne engaged in a charitable, educational, religious or benevolent enterprise or activity is not for that reason immune from tort liability."[21] The Institute's position was based on the public policy judgment that a person injured because of another's negligence should have the opportunity to obtain compensation from the person at fault.[22] The benefits of allowing recovery by a seriously injured person outweighed the need for protections that had been granted to charitable organizations.[23]

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15. *Hughes*, 130 F.2d at 811.

16. *Id.*

17. *Id.* at 822–27.

18. *Id.* at 827.

19. *See, e.g.*, Noel v. Menninger Found., 267 P.2d 934, 936 (Kan. 1954); Miss. Baptist Hosp. v. Holmes, 55 So. 2d 142, 143–44 (Miss. 1951); Flagiello v. Pa. Hosp., 208 A.2d 193, 194 (Pa. 1965).

20. For example, *Noel* is a truck accident case where a mentally ill patient sued his hospital after his nurse allowed him to cross a road and a truck struck him. 267 P.2d at 936. Similarly, *Flagiello* is a slip-and-fall case where a patient sustained injuries after a fall and sued the hospital for her injuries. 208 A.2d at 194.

21. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 895E.

22. *See Hughes*, 130 F.2d at 827.

23. A similar set of consequences unfolded in the collapse of family immunities, particularly between a parent and a child. While the collapse of parent-child immunity may have been due in part to the changing views of society, leading to the view that children are individuals with rights of their own,

This public policy trend coincided with the rising popularity and availability of liability insurance. The idea was that by buying liability insurance, charities could shift the risk of tort payments to insurance companies who assessed the risk and pooled funds to cover potential losses.[24] The belief that charitable organizations could, through insurance, absorb liability costs from automobile accidents, slips and falls, and ordinary torts based on negligence was an underpinning for the public policy decision to abrogate the charitable immunity doctrine.[25]

The *Restatement (Second)* explained that the justifications for the charitable immunity doctrine failed "when the charity can insure against liability."[26] Courts similarly assumed that insurance negated all of the concerns underlying the charitable immunity doctrine. For example, some courts opined that liability insurance would cover the cost of court judgments and prevent lawsuits from depleting charitable assets.[27] Others said that potential and existing donors would appreciate that liability insurance premiums were a legitimate operating expense for the charity and would not withhold contributions for fear of ordinary

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it also coincided with an increase in the availability of liability insurance and the resulting decrease in the financial strain a child's lawsuit placed on the family. Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 503–08 (1982). The courts became willing to re-assess the scope of the immunity as the existence of liability insurance further undermined its rationale, which was to preserve family tranquility by protecting it from the financial loss of lawsuits. *See, e.g.*, Sorenson v. Sorenson, 339 N.E.2d 907, 913–14 (Mass. 1975). *See also* Hollister, *supra*, at 503. The availability of liability insurance led to the "interpretation, distinction and exception" of the immunity by judicial decisions and statutes and an eventual whittling away of the immunity. Falco v. Pados, 282 A.2d 351, 354 (Pa. 1971). *See also* Hollister, *supra*, at 509.

As insurance became more widely available, the parent-child immunity was abrogated in the context of automobile accidents. *See id.* at 510–11 n.141 (articulating a breakdown by jurisdiction). There was a belief that the drivers and passengers would be covered under automobile insurance policies, shielding the parent from having to pay the damages. There was also a recognition that it was socially unwise to deny a claim and leave a potential victim stranded. *Id.* at 511 n.142 (citing DEL. CODE ANN. tit. 21, §§ 2118, 2904 (1979) and MONT. CODE ANN. § 61–6–301 (1981)). No thought was given to suits about what duty a parent owes to a child, whether the parent had to provide for the child's education, or whether that should be a superior education. Courts wrestled with these difficult problems.

24. *See* Note, *supra* note 8, at 1395.

25. *See id.*; Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 603 (Mo. 1969) ("Today public liability insurance is available to charitable institutions to indemnify them against losses by way of damages for their negligence, and it is common knowledge that most charitable institutions carry such insurance and pay the premiums thereon as a part of their normal cost of operation."); *Hughes*, 130 F.2d at 823–24 ("Further, if there is danger of dissipation, insurance is now available to guard against it and prudent management will provide the protection. It is highly doubtful that any substantial charity would be destroyed or donation deterred by the cost required to pay the premiums.").

26. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 895E cmt. e(5).

27. *See* Wendt v. Servite Fathers, 76 N.E.2d 342, 349 (Ill. App. Ct. 1947) (holding that where insurance exists and can cover tort liability so as not to diminish the trust fund, the charitable immunity defense is not available because otherwise upholding the absolute immunity rule "would seem a sheer waste of money for a charitable corporation to purchase insurance protection").

liability exposure.[28]

Some courts assumed that modern charities could afford insurance and that it was widely available.[29] Some jurisdictions were more guarded, limiting the abolition of the immunity to situations where liability insurance was clearly available.[30] Still other states passed legislation to limit the charity's liability to the extent that the insurance existed[31] or created a direct action against the charity's insurers who were not protected by the charitable immunity doctrine.[32] In any event, by the early 1980s, thirty-three jurisdictions had, either in whole or in part, abrogated the charitable immunity doctrine.[33]

C. *Implications for Today*

When the charitable immunity doctrine disappeared from the legal landscape, no thought was given to the duty of religious or secular charitable organizations beyond what was owed in common cases, such as negligence in automobile accidents and slips and falls.[34] Moreover, no thought was given to the constitutional issues potentially involved in the imposition of various tort duties on religious organizations, or if liability could be extended beyond these traditional tort actions.[35]

Clearly, courts had not considered the duty, if any, of a religious

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28. *See Abernathy*, 446 S.W.2d at 603; Albritton v. Neighborhood Ctrs. Ass'n for Child Dev., 466 N.E.2d 867, 871 (Ohio 1984).

29. *See Hughes*, 130 F.2d at 832–24; *Abernathy*, 446 S.W.2d at 603.

30. *See* Michard v. Myron Stratton Home, 355 P.2d 1078 (Colo. 1960) (holding that the charity was not granted immunity from suit nor non-liability, and that the trust funds themselves were protected and could not be taken, but non-trust funds, such as insurance coverage could be seized); Cox v. De Jarnette, 123 S.E.2d 16 (Ga. Ct. App. 1961); Howard v. Bishop Byrne Council Home, Inc., 238 A.2d 863 (Md. 1968) (noting that a hospital was not protected by the charitable immunity doctrine, and holding that if the hospital was insured for not less than $100,000, the liability was limited to the amount of the insurance policy); Rhoda v. Aroostook Gen. Hosp., 226 A.2d 530 (Me. 1967) (holding that a charity was fully immune beyond the extent of its insurance coverage); Eliason v. Funk, 196 A.2d 887 (Md. 1964); Myers v. Drozda, 141 N.W.2d 852 (Neb. 1966); Clontz v. St. Mark's Evangelical Lutheran Church, 578 S.E.2d 654 (N.C. Ct. App. 2003) (finding liability immunity defense waived to extent the charity has liability insurance).

31. *See, e.g.*, 14 MAINE REV. STAT. ANN. tit. 14 § 158 (2004) (creating partial immunity beyond what insurance covered by statute); N.C. GEN. STAT. § 1–539.10 (2004) (eliminating immunity to the extent a charitable organization has liability insurance).

32. *See, e.g.*, ARK. CODE ANN. § 66–3240 (1966) (providing an action against the insurer).

33. *See* Fairchild, *supra* note 8, § 2 (for history of charitable immunity decisions by jurisdiction). *See also* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 895E; Note, *supra* note 8, at 1385.

34. *See, e.g., Hughes*, 130 F.2d at 817–18 (discussing charitable immunity only in the context of negligence and simple torts, noting charitable immunity cases include actions arising out of "driving an ambulance or a truck on the streets" or "running an elevator or pushing a cart in the corridors of the hospital").

35. *See, e.g., id.* (abrogating charitable immunity without mentioning First Amendment issues).

institution to protect or rescue its members or others from acts of intentional wrongdoing such as child abuse.[36] The *Restatement (Second)* gave no guidance on the nature and extent of the duty of religious institutions to protect members or others from intentional wrongful acts of employees, parishioners, or other persons, nor did courts and legislatures when they repealed immunities.[37] Today, some religious organizations are concerned that courts could place new and unforeseen duties on them that could create a major financial crisis, one of the very concerns that led to the creation of charitable immunity in the first place.[38]

While charitable institutions are no longer protected by blanket immunity, sound public policy suggests that courts exercise care not to create duties that are inconsistent with the nature of religious institutions. Those institutions provide unique benefits to society, both in terms of tangible services and intangible but profoundly important aspects of religious life. Resolving this conflict between expanding tort duties and preserving the constitutional protections and financial viability of religious institutions requires careful consideration when shaping the duties and liabilities of religious institutions.

III. THE U.S. RULE OF NO DUTY TO RESCUE OR PROTECT

Given that charitable immunity is, for all practical purposes, gone, the question becomes as follows: When, if ever, does a religious institution have a duty to protect its members or the public from the intentional wrongful acts of its officials, employees, or members?

Generally, when U.S. courts take on the task of determining the existence and scope of a duty owed to others, they begin with a fundamental rule of U.S. tort law: there is no duty to rescue or protect.[39] A person is not responsible for any harm suffered by another and has no duty to step in and help when the person did not create the dangerous situation and did not take anything away from the person in danger.[40] In

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36. *See, e.g.*, Noel v. Menninger Found., 267 P.2d 934, 936 (Kan. 1954) (abrogating immunity in truck accident case where hospital allowed mentally ill patient to cross the street); Flagiello v. Pa. Hosp., 208 A.2d 193, 194 (Pa. 1965) (abrogating immunity in slip-and-fall case).

37. *See generally* Fairchild, *supra* note 8, § 2 (discussing a history of charitable immunity decisions by jurisdiction).

38. Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089 (2003).

39. *See* SCHWARTZ ET AL., *supra* note 3, 412 n.2; RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314; Groninger, *supra* note 6, at 353. *But see* SCHWARTZ ET AL., *supra* note 3, 419 n.5 (describing that other countries provide for a duty to rescue when the person can act without fear of endangering himself or others).

40. Groninger, *supra* note 6, at 374. This rule derives from the common law's distinction

other words, the mere fact that one individual knows that a third party is or could be dangerous to others does not make that individual responsible for controlling the third party or protecting others from the danger. In adopting this rule, courts hold that it is not the place of the courts to decide this moral issue; it is better left to a person's own conscience.[41]

A. Exceptions to the No Duty to Rescue or Protect Rule

As with most rules, the "no duty to rescue or protect" rule has exceptions. There are four general instances in which a defendant, referred to as the "actor," has a duty to act.

The first two instances arise out of personal relationships. There is a duty to act when a special relationship exists between the actor and the perpetrator of the harm,[42] or when a special relationship exists between the actor and the injured party.[43] The next two instances arise out of the actor's conduct. There is a duty to rescue or protect when the risk was created by the actor's conduct, even if that conduct was not negligent.[44] The duty also exists where the actor voluntarily undertakes to rescue another, and through his lack of care puts the individual in a worse situation than before the rescue effort began.[45]

Cases against religious institutions arising out of sexual abuse often focus on whether a "special relationship" exists between the actor-institution and the perpetrator or the member of the religious institution. The other exceptions may be pleaded as well.

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between misfeasance and nonfeasance, and its reluctance to impose liability for the latter. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 n.5 (Cal. 1976) (citing Fowler v. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934)).

41. *Tarasoff*, 551 P.2d at 374–75.

42. SCHWARTZ ET AL., *supra* note 3, at 420–25.

43. *Id.* at 420–22; Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 42 (2002).

44. SCHWARTZ ET AL., *supra* note 3, at 421–23; RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 322. *See also* Rustad & Koenig, *supra* note 43, at 42.

45. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, §§ 323–24. *See also* SCHWARTZ ET AL., *supra* note 3, at 423–24; President & Dirs. of Georgetown Coll. v. Hughes, 130 F.2d 810, 813 (D.C. Cir. 1942) ("One who undertakes to aid another must do so with due care. Whether the Good Samaritan rides an ass, a Cadillac, or picks up hitchhikers in a Model T, he must ride with forethought and caution."). This exception reflects that while there is no duty to aid a person in peril or difficultly, "there is at least a duty to avoid any affirmative acts which makes his [the injured person's] situation worse." Rustad & Koenig, *supra* note 43, at 41 (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984)).

1. The Special Relationship Exceptions

While the law generally imposes no duty to control the conduct of another or to prevent a person from doing harm to another, a duty to control may arise where:

> a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or a special relation exists between the actor and the other which gives to the other a right to protection.[46]

Courts have recognized these relationships as special because the person who takes custody of another is in a superior position to control the perpetrator than the injured party and has a special responsibility to protect injured parties from foreseeable harm.[47] The duty to rescue is based on the party's superior control to perceive and protect the more susceptible party from danger.[48] In any "special relationship" under the *Restatement*, liability "exists only if the resulting harm is within the risk created by the defendant's negligent conduct in acting or in failing to control."[49]

a. Special Relationship with the Perpetrator

The *Restatement (Second)* imposes liability on a defendant for a plaintiff's injuries where the defendant "controls, or has a duty to use care to control, the conduct of the other, who is likely to do harm if not controlled, and fails to exercise care in the control."[50] Under these circumstances, if a risk exists, an actor must take reasonable steps, in light of the foreseeable probability and magnitude of any harm, to prevent it from occurring. But if the actor neither knows nor should know of a risk of harm, no action is required.[51]

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46. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, §§ 315 (a)–(b), 877. *See* SCHWARTZ ET AL., *supra* note 3, at 420–25; Groninger, *supra* note 6, at 353.

47. KEETON ET AL., *supra* note 45, § 33, at 202.

48. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 320.

49. *Id.* § 877 cmt. b. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 41 (Tentative Draft No. 4, Apr. 1, 2004) ("An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship."); *id.* § 42 ("An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship.").

50. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 877(d). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42. *But see* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 320 cmt. d (when sheriff or law enforcement officer takes a person into custody there may arise a duty to anticipate danger).

51. *See generally* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 877(d) cmt. c. *See also*

The types of relationships that fall under this rule include a prison guard over a prisoner,[52] a parent over a minor child,[53] and a therapist over a patient.[54]

i. Custodians and People in Custody

Custodians of people who pose risks to others have long owed a duty of reasonable care to prevent the person in their custody from harming others. The classic custodian is a jailer of a dangerous criminal; other well-established examples include hospitals for the mentally ill and for those with contagious diseases.[55] Custodial relationships imposing a duty of care are limited to the period of actual custody[56] and also are limited to relationships that exist, in significant part, to protect others from risks posed by the person in custody.[57] A custodial relationship that exists solely for rehabilitative purposes, such as an in-patient clinic treating an individual with a gambling addiction, does not have a special relationship with the patient that creates a duty of reasonable care to third parties.[58]

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42 cmt. c. *But see* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 320 cmt. d (when sheriff or law enforcement officer takes a person into custody there may arise a duty to anticipate danger).

52. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 320 (stating that a prison guard has custody or a duty to control prisoners who the guard has reason to know will cause injury if they escaped); *id.* § 319 (describing duty of someone in charge of a person having dangerous propensities); *see, e.g.*, Morgan v. County of Yuba, 41 Cal. Rptr. 508 (Cal. Ct. App. 1964) (holding that the police had a duty to help a person avoid harm when a released prisoner threatened to kill him).

53. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 316 (describing duty of a parent to control the conduct of a child). *See also id.* § 877(d) cmt. e (where a child has shown dangerous propensities, the parents have a duty of care to prevent the child from harming someone). *See, e.g.*, Linder v. Bidner, 270 N.Y.S.2d 427 (N.Y. Sup. Ct. 1966) (holding that where parents knew of son's violent propensities, they had a duty to render aid when the boy assaulted another child).

54. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) (holding that a therapist had an obligation to prevent possible harm to the victim where his patient threatened to, and did, kill a specific third party). *But see* D.L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of* Tarasoff, 24 PAC. L.J. 1165, 1188 (1993) (a duty for therapists to rescue potential victims conflicts with doctor-patient confidentiality and could lead to a breach of confidentiality).

55. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42 cmt f. *See, e.g.*, Shepherd v. Wash. County, 962 S.W.2d 779 (Ark. 1998) (reaffirming the duty of jailers to third persons); Cansler v. State, 675 P.2d 57 (Kan. 1984) (same); Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975) (reaffirming the duty of hospitals that have custody of those with mental illnesses); Bradley Ctr., Inc. v. Wessner, 287 S.E.2d 716 (Ga. Ct. App.), *aff'd*, 296 S.E.2d 693 (Ga. 1982).

56. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42 cmt. f.

57. *See id.*

58. *See id.*

ii. Parents and Children

Parents owe third parties a duty of reasonable care for the acts of their minor children when—and only when—they are minors. This duty arises out of the parents' control over their children, their responsibility for child rearing, and the incapacity of some children to understand or engage in appropriate conduct.[59]

The *Restatement (Second)* ratified a parents' duty to use reasonable care to control a child's conduct where the parent "knows or has reason to know that he has the ability to control his [servant] child, and knows or should know of the necessity and opportunity for exercising such control."[60] Absent such notice and knowledge, a parent has no duty to exercise reasonable care in preventing the child from harming a third party.[61] Where a duty exists, a number of factors go into deciding what constitutes reasonable care. For example, as children reach adolescence, "courts recognize that the process of gaining independence is an important consideration in determining what constitutes reasonable care."[62] Parents often will have no reasonable warning that their children are about to engage in physically harmful conduct. Even parents of children who have shown propensities toward dangerous conduct may have no reasonable or practical way to ameliorate the dangers.[63]

iii. Mental Health Professionals and Patients

The most far-reaching extension of a special relationship creating a

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59. *See id.* § 42 cmt. d. When children reach the age of majority, parents no longer have control over them and the duty no longer exists.

60. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 316(a)–(b). In a case where a minor child assaulted a babysitter, for example, the court allowed the babysitter to bring a negligence action against the parents for failure to warn of the child's violent tendencies and their failure to exercise reasonable measures to control or restrain him. Ellis v. D'Angelo, 253 P.2d 675, 679 (Cal. Ct. App. 1953). The court found evidence to demonstrate that it was necessary to control the child and that the parents had the knowledge, ability, and opportunity to do so. *Id.* The facts were sufficient to shift liability from the innocent babysitter to the negligent parents, who were in the best position to prevent the babysitter from being hurt. *Id. See also* Valerie D. Barton, Comment, *Reconciling the Burden: Parental Liability for the Tortious Acts of Minors*, 51 EMORY L.J. 877, 904 (2002) (explaining that the Restatement's approach united the duty and foreseeability requirements of a negligence claim with the control requirement in a vicarious liability action).

61. Mazzilli v. Selger, 99 A.2d 417, 422 (N.J. 1953) (holding that a jury could find that there was a duty to control a child by the child's mother, but not father, when the child threw a gun from his window and his mother had custody and control over him but the father lived in a different house).

62. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42 cmt. d.

63. *See id.*

duty to third parties exists between mental health professionals and their patients. In the very controversial decision of *Tarasoff v. Regents of the University of California,* the Supreme Court of California recognized this "special relationship" and the corresponding duty to third parties whom the patient might harm.[64] In this case, the court found a psychotherapist liable for failure to warn a specific and readily identifiable victim of a patient's intentions to kill her. The court held the therapist had an obligation to use reasonable care to protect the intended victim when the therapist determined, or according to professional standards should have determined, that his patient posed a serious threat of harm to another specific person.[65] The court explained that two aspects of the therapist-patient relationship supported its establishment of this "special relationship:" the therapist's ability to predict dangerous behavior, and the therapist's ability to exercise some degree of control over dangerous behavior.[66]

This duty was later refined and limited. In a subsequent case, *Brady v. Hopper*, the court refused to extend liability between a therapist and the "world at large" for the actions of a patient.[67] The therapist only had a duty to act if there was a specific foreseeability that the harm would occur, and if the risk that existed included the harm that, in fact, did occur.[68] The court held that a therapist's duty to protect a third person does not arise until the risk of harm to the victim becomes foreseeable—when the threats are verbalized and directed at an identifiable person.[69] For example, in *Thompson v. County of Alameda*, the Supreme Court of California refused to extend the *Tarasoff* duty because the court found that the patient had made only general threats to kill, not specific threats targeted towards a specific, identifiable victim.[70] As the court in *Brady* stated, "the possibility that [a patient] may inflict injury on another is vague, speculative, and a matter of conjecture."[71] Other courts have refused to hold a therapist liable for injuries to a third person without the foreseeability created by specific threats to a "readily identifiable victim."[72]

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64. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

65. *Id.* at 340.

66. *Id.* at 343, 345.

67. Brady v. Hopper, 570 F. Supp. 1333, 1338 (D. Colo. 1983) (citing Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928)).

68. *Id.*

69. *Id.*

70. Thompson v. County of Alameda, 614 P.2d 728, 735 (Cal. 1980).

71. *Brady*, 570 F. Supp. at 1338.

72. *See id.* (citing *Thompson*, 614 P.2d 728; Doyle v. United States, 530 F. Supp. 1278 (C.D. Cal. 1982); Furr v. Spring Grove State Hosp., 454 A.2d 414 (Md. Ct. Spec. App. 1983); Megeff v.

b. Special Relationship with the Injured Party

Courts have ruled that the existence of a special relationship between a defendant and the injured person can impose a duty of reasonable care on the defendant. Relationships in this category include the relationship between an innkeeper and a guest,[73] a common carrier and a passenger,[74] a jailor and a prisoner,[75] a teacher and student,[76] a shopkeeper and business visitor,[77] and an employer and an employee acting in the course of employment.[78]

The scope of the duty arising out of these special relationships is limited to dangers that arise within the confines of the relationship, regardless of the source of the risk.[79] The relationships are also limited by geography and time.[80] For example, a common carrier only has a duty to a person as long as she is a passenger.[81] An innkeeper only has a duty to a guest while he is at the inn, not when the guest is away from

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Doland, 176 Cal. Rptr. 467 (Cal. Ct. App. 1981)).

73. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314A(2). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(2). *See, e.g.*, Dove v. Lowden, 47 F. Supp. 546 (W.D. Mo. 1942) (holding that innkeeper had duty to help a guest escape a hotel fire).

74. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314A(1). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(1). *See, e.g.*, Yu v. N.Y., New Haven & Hartford R.R. Co., 144 A.2d 56 (Conn. 1958) (finding that where a passenger who walked with a noticeable limp fell and was injured while boarding a train, the railroad company had a duty to aid); Middleton v. Whitridge, 108 N.E. 192 (N.Y. 1915) (holding street car employees liable for failing to aid sick passenger who employees assumed was intoxicated, not injured).

75. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314A(2). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(4). *See, e.g.*, Thomas v. Williams, 124 S.E.2d 409 (Ga. Ct. App. 1962) (holding that when a prisoner's mattress caught on fire in his cell, the jailor had a duty to rescue the prisoner).

76. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 320 cmt. b (passage imposing affirmative duty on custodians to control third persons observes that custodial relationship and accompanying duty is applicable to school and their students). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(5) & cmt. l.

77. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314A(3). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(3). *See, e.g.*, L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334 (Ind. 1942) (holding that when a six-year-old business visitor fell down the escalator and caught his fingers in the escalator's moving parts, the shopkeeper defendant had a duty to rescue the customer).

78. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314B. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(4).

79. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314A cmts. c, d. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41 cmts. f, g.

80. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41 cmt. f.

81. *Id.* § 41 cmt. e.

the premises.[82]

Other relationships may also qualify as special relationships that create an affirmative duty of care.[83] In determining what gives rise to a "special relationship," courts balance the value of allowing a tort claim to proceed against judicial interference in a person's family relations, private life, and other fundamental areas of personal privacy.[84] The decision of when to impose a duty, and upon whom, is influenced by the public policy goals of tort law—deterrence and the need for compensation—as well as by the need to protect essential relationships and rights.[85] When a special relationship between the parties justifies a court's interference and outweighs interests of personal privacy, a duty exists.[86]

While there is "[n]o algorithm . . . to provide clear guidance about which policies in which proportions justify the imposition of an affirmative duty based on a relationship,"[87] common threads emerge from the cases. Special relationships traditionally were based on economic relationships; for-profit entities had a higher duty to act than a disinterested party.[88] Many relationships relied on the actor's physical

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82. *Id.*

83. *See id.* § 41 cmt. o. Courts have considered some relationships that may create special duties of care, including: 1) social companions, *compare* Farwell v. Keaton, 240 N.W.2d 217, 222 (Mich. 1976) (holding that imposing no legal duty to assist companions in a social adventure "would be shocking to humanitarian considerations and fly in the face of the commonly accepted code of social conduct"), *with* Webstad v. Stortini, 924 P.2d 940, 948 (Wash. Ct. App. 1996) (holding that no "special relationship" duty of care arose where a defendant employed, dated, housed, and served alcohol to a woman who, while at his house, committed suicide); 2) police officers with intoxicated persons, *compare* Weldy v. Town of Kingston, 514 A.2d 1257, 1260–61 (N.H. 1986) (holding that officers' failure to arrest teenagers whom the officers observed drinking and transporting alcohol in their car breached duty of care), *with* Hildenbrand v. Cox, 369 N.W.2d 411, 414–15 (Iowa 1985) (holding that officer did not have "special relationship" to intoxicated driver who was killed in an accident where, earlier in the night, the officer pulled over the driver and gave him a citation); 3) surrogacy clinics, *see* Huddleston v. Infertility Ctr. of Am., 700 A.2d 453, 460 (Pa. 1997) (holding that surrogacy clinic has "special relationship" with prospective-parent patrons and with child born as a result of clinic's services); and 4) family members, *see* Chastain v. Fuqua Indus., Inc., 275 S.E.2d 679, 681–82 (Ga. Ct. App. 1980) (holding that aunt does not owe an affirmative duty to her nephew); *cf.* WILLIAM L. PROSSER, THE LAW OF TORTS § 54, at 338 (3d ed. 1964) (predicting for four decades that courts would recognize family members as a special relationship).

84. KEETON ET AL., *supra* note 45, § 3, at 16.

85. *See* Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 187 (1981).

86. KEETON ET AL., *supra* note 45, § 36, at 376.

87. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41 cmt. h.

88. KEETON ET AL., *supra* note 45, § 36, at 376; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41 cmt. h ("That a defendant derives a commercial advantage from the relationship has . . . been influential in the identification of special relationships. Although not involving an affirmative duty, commercial benefit has been critical to

custody of the other person, such as common carrier and passenger, and innkeeper and guest.[89] In these relationships, a person's ability to protect himself or herself is compromised, while the defendant is in a much better position to protect that person.[90] In some cases, a relationship identifies a specific person or group of persons, both making it easier for the actor to control the other and providing "a more limited and justified incursion on autonomy."[91] Some courts have even relied on the expectations of the parties to the relationship to determine whether the relationship is special. The difficulty with this reliance is that "[a]lmost everyone in virtually any kind of relationship expects that another would engage in an easy rescue in the event of serious peril."[92]

In its *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*, the American Law Institute declined to take a position on whether additional relationships should be accepted as sufficient to impose an affirmative duty on actors, since there was no "significant concurrence" among courts as to what those relationships should be.[93] In sum, the group of recognized special relationships is limited, with the majority of these relationships characterized by business dealings or physical custody or control.[94]

2. The Exceptions Involving the Actor's Conduct

The *Restatement (Second) of Torts* advocates for liability against a party for harm resulting to a third person from the tortious conduct of another when the party:

> (b) conducts an activity with the aid of the other and is negligent in employing him, or
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> . . . .
>
> (d) controls, or has a duty to use care to control, the conduct of the other, who is likely to do harm if not controlled, and fails to exercise care in the

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distinction between imposing a duty on dram shops with regard to their patrons and declining to impose a duty on social hosts."). *Cf.* Reynolds v. Hicks, 951 P.2d 761, 764 (Wash. 1998).

89. *See* Catlett v. Stewart, 804 S.W.2d 699 (Ark. 1991) (affirming duty of innkeeper to exercise reasonable care for safety of guests); Virginia D. v. Madesco Inv. Corp., 648 S.W.2d 881 (Mo. 1983) (same).

90. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41 cmt. h. *See, e.g.*, Lopez v. S. Cal. Rapid Transit Dist., 710 P.2d 907, 912 (Cal. 1985) (noting that "bus passengers are 'sealed in a moving steel cocoon'").

91. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 40 cmt. h.

92. *Id.*

93. *See id.* § 41 cmt. o.

94. *See supra* notes 46–94 and accompanying text.

control . . . .[95]

The comment in the *Restatement* further explains that the liability created in section 877 "exists only if the resulting harm is within the risk created by the defendant's negligent conduct in acting or in failing to control."[96] In order for the defendant to be found liable where a person commits a tort on another's premises, "permission must be given or continued at a time when the possessor or transferor realize[d] or should realize that the other is or will be negligent upon the land or with the chattel entrusted to him."[97] Liability arises because the party has a degree of control over and awareness of the third party's conduct.

B. Applying the Exceptions to the "No Duty to Protect or Rescue" Rule to Religious Institutions and Their Congregations

As indicated above, until recently, most tort claims against religious institutions have involved accidents such as slip-and-fall cases brought under landowner liability law,[98] or have been based on claims of negligence against its employees.[99] Traditional tort claims for slip-and-fall cases and car accidents were the types of claims that existed at the

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95. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 877(b), (d). *See also id.* § 302B cmt. e (stating that liability for a third party's conduct may exist where the actor has brought into contact with the plaintiff a person who the actor knows or should know is "peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct").

96. *Id.* § 877 cmt. b.

97. *Id.* § 877 cmt. d.

98. *See, e.g.*, Roman Catholic Church, Diocese of Tucson v. Keenan, 243 P.2d 455 (Ariz. 1952) (without deciding if the defendant church-school had breached any duty, holding that there were facts sufficient to find the defendant-church negligent as operator of the school, with control and possession of the premises, where a child was injured when he landed on metal bars lying on the ground); Garnier v. St. Andrew Presbyterian Church of St. Louis, 446 S.W.2d 607 (Mo. 1969) (holding that the reasons given for abolishing the charitable immunity doctrine in a negligence action against a hospital applied equally in a case against a church where an attendant slipped and fell in the entrance to a church); Friend v. Cove Methodist Church, Inc., 396 P.2d 546 (Wash. 1964) (holding that charitable immunity should be rejected in a case where a woman fell into a furnace pit while trying to leave the church and was injured); Smith v. Congregation of St. Rose, 61 N.W.2d 896 (Wis. 1953) (holding that a plaintiff injured as a result of falling on an icy sidewalk outside the church rectory had a nuisance claim because the dangerous situation was present long enough that the defendant knew or should have known of the dangerous condition to remedy it); Wilson v. Evangelical Lutheran Church of Reformation of Milwaukee, 230 N.W. 708 (Wis. 1930) (holding that a church was a public building and that a failure to turn on a light in a dark hall that caused plaintiff to fall down steps and be injured may constitute a failure to maintain the premises in a safe condition).

99. *See, e.g.*, Malloy v. Fong, 232 P.2d 241 (Cal. 1951) (holding that the church was liable for the negligent actions of its agents that resulted in injury to a student in the church's Vacation Bible School, where the agents performed work under the church's directions and the church had the means to control the agents' activities).

time the drafters of the *Restatement (Second)* abolished the charitable immunity doctrine.[100] Neither the Reporters of the *Restatement (Second)* nor their Advisory Commission anticipated that future causes of action would impose a tort duty upon religious institutions beyond maintaining their facilities or driving carefully. The only guidance on the topic is an entirely separate discussion of special relationships. The relationship between a church, synagogue, or mosque and its members, however, was not included in the *Restatement (Second)*.[101] Notably, the same is true in the new draft *Restatement (Third) of Torts*.[102]

1. Abuse Committed by a Clergy Member or Other Employee

The employer-employee relationship creates an affirmative duty of care to third parties for acts committed by the employee within the course and scope of the employment. Few, if any, courts have been willing to find that intentional misconduct such as sexual abuse falls within the scope of clergy members' employment.[103] Such heinous activities are obviously not part of their jobs.

A number of cases, however, have involved allegations that officials knew that the clergy member had sexually abused people before, but failed to take appropriate action to prevent subsequent abuse and sometimes actively concealed the clergy member's misconduct. In these situations, plaintiffs have had limited success with lawsuits for negligent hiring, supervision, and retention brought under the principles in the *Restatement (Second) of Torts*. Most courts have recognized serious constitutional problems with these claims when they involve the hiring, supervision, or retention of persons who perform important ministerial functions,[104] although some have allowed such claims to go forward

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100. *See supra* notes 11–38 and accompanying text.

101. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, §§ 314–17, 319.

102. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, §§ 41, 42.

103. *See, e.g.*, N.H. v. Presbyterian Church (U.S.A.), 998 P.2d 592, 599 (Okla. 1999) (collecting cases and stating that its "survey of national jurisprudence reveals that the majority of jurisdictions considering the issue of sexual contact between an ecclesiastic officer and a parishioner have held that the act is outside the scope of employment as a matter of law"). *But cf.* Fearing v. Bucher, 977 P.2d 1163, 1166 (Or. 1999) (holding that a priest's alleged sexual assaults on plaintiff clearly were outside the scope of his employment, but that the archdiocese still could be found vicariously liable if acts that were within the priest's scope of employment "'resulted in the acts which led to injury to plaintiff'") (citation omitted).

104. *See, e.g.*, Dausch v. Rykse, 52 F.3d 1425, 1429 (7th Cir. 1994) (holding that First Amendment barred parishioner's negligent hiring and supervision claims against pastor and church for sexual contact between pastor and parishioner during counseling relationship); Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998) (holding that First Amendment's Free Exercise and Establishment

under particular circumstances.[105] This Article does not address the proper resolution of such claims.[106]

2. Abuse by a Member of a Religious Institution

The focus of this Article is the more complex question of whether a religious institution should have a duty to control the wrongful acts of lay members of their congregations. A number of people have filed lawsuits against their religious institutions, alleging that the institutions breached a duty to protect them from abusive acts of other members.[107] These claims typically allege that officials of the religious institution knew, or should have known, about the propensity of a lay member to commit abuse but failed to provide appropriate warnings or otherwise protect the plaintiff. These cases are much more questionable than the

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Clauses barred negligent hiring and supervision claim against archdiocese for priest's alleged sexual abuse of minor); Gibson v. Brewer, 952 S.W.2d 239, 246–48 (Mo. 1997) (holding that First Amendment bars child victim of sexual abuse from bringing negligent hiring and supervision claims, but that First Amendment would not be violated by adjudication of claim of intentional failure to supervise priest); L.L.N. v. Clauder, 563 N.W.2d 434, 445 (Wis. 1997) (holding that First Amendment barred consideration of negligent supervision claim against diocese for sexual relationship between adult parishioner and priest during counseling relationship).

105. *See, e.g.*, Smith v. O'Connell, 986 F. Supp. 73, 75 (D.R.I. 1997) (holding that subjecting diocese to liability for negligent supervision of pedophile priests would not interfere with church's First Amendment rights under the Free Exercise Clause or require the court to become "'excessively entangled'" in religious matters); Malicki v. Doe, 814 So. 2d 347, 364 (Fla. 2002) (holding that the First Amendment does not bar claims of negligent hiring, supervision, or retention against diocese based on priest's sexual misconduct, for "the imposition of tort liability in this case has a secular purpose and the primary effect of imposing tort liability based on the allegations of the complaint neither advances nor inhibits religion"); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996) (holding that First Amendment did not forbid a child victim of sexual molestation from bringing claim of negligent hiring and supervision against church).

106. It should be noted, however, that the Supreme Court of Missouri, in an en banc decision, has approached the issue in a way that reflects sensitivity both to the need to protect children from sexual abuse by clergy members and to the constitutional concerns involved. *See Gibson*, 952 S.W.2d at 246–48 (ruling that First Amendment does not bar tort of intentional failure to supervise clergy, where the supervisor knew of and disregarded a certain or substantially certain risk of harm, and the supervisor's inaction caused the damage; also ruling that First Amendment bars claims for negligent hiring, retention, and ordination of clergy and negligent failure to supervise as they require excessive entanglement between the church and state and judicial inquiry would result in an endorsement of one model of religious supervision).

107. *See, e.g.*, Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 738 A.2d 839 (Me. 1999) (involving claims arising from alleged abuse of teenager by adult church member); Franco v. Church of Jesus Christ of Latter-day Saints, 21 P.3d 198 (Utah 2001) (involving claims arising out of alleged sexual abuse of minor by teenage church member); C.J.C. v. Corp. of Catholic Bishop of Yakima, 985 P.2d 262 (Wash. 1999) (involving consolidated cases including claims against clergy but also including claims arising out of alleged childhood molestation by prominent church member who was known to church officials to have previously engaged in abuse). *Accord* Smith v. Kelly, 778 A.2d 1162 (N.J. Super. Ct. App. Div. 2001) (involving suit against diocese by a daughter for failing to report her father's alleged abuse during her teen years).

cases against clergy members: there is no employment relationship to establish that the religious organizations had either actual or constructive control over the lay members' activities.

As a result, plaintiffs have alleged that the duty to protect arises from a "special relationship" between the religious institution and the member perpetrator, or between the institution and the plaintiff. The basis for the special relationship is often simply the person's status as an active member of the religious institution. In some cases, plaintiffs allege that the institution owes a duty to protect because of a fiduciary relationship, or due to the existence of child abuse reporting statutes.

a. A Church or Synagogue has Little Practical "Control" over its Members

In determining whether a "special relationship" exists, courts must appreciate that religious institutions have very limited, if any, practical control over a member. This creates a very real and practical difference from situations where courts have found "special relationships." In all of the "special relationships" where an actor owes a duty of care to a third person for risks posed by another, the relationships are characterized by the significant degree of practical control that the actor has over the perpetrator or the victim.[108] By contrast, while churches, synagogues or mosques may have religious influence over their members' religious practices and beliefs, they have little if any "control" over their day-to-day activities.

First, there are few opportunities for religious officials to ascertain what their members are doing or to direct their activities. A religious institution may consist of tens of thousands of local houses of worship, hundreds of regional bodies, and millions of individual members.[109] The "special relationships" that give rise to an affirmative tort duty all involve a fairly individualized relationship between the person with the

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108. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42 cmt. d (stating that a parent's duty to control the actions of a child "is limited to minor children. . . . The basis of the duty is the parents' responsibility for child-rearing, their control over their children. . . . [w]hen children reach majority, parents no longer have control, and the duty no longer exists"); cmt. f (stating that custodians of others have a duty "[s]o long as there is some custody and control of a person posing dangers to others, the custodian has an affirmative duty to exercise reasonable care, consistent with the extent of custody and control"); cmt. g (stating that the specific duty of mental health professionals "is one of reasonable care under the circumstance" and since "[p]atients who are not in custody cannot be "'controlled'" in the classic sense," a duty of reasonable care is extended to people who are "foreseeably put at risk by the patient" and "[r]easonable care . . . does not require "warning individuals who cannot be identified, so such a limitation is properly a question of reasonable care, not the existence of a duty").

109. Chopko, *supra* note 38, at 1089.

duty and the persons with whom there exists a special relationship. In cases involving a parent and child, an employee and employer, a custodian and ward, and a mental health professional and patient, the threat is individualized and limited to a relatively small group.

Even in smaller organizations, religious officials may see a member, at most, for a few hours a week. Sometimes weeks or even months may go by without any contact. Conversely, a hospital dealing with mentally disturbed patients has control over those patients twenty-four hours a day, much like a jailor. Likewise, a parent has more knowledge of, and control over, a child's activities because of the child's dependency.

Assuming that religious institutions are able to divine information about their members' propensities to engage in misconduct, these institutions still do not have effective secular methods of influencing member behavior.[110] Membership in a religious institution is voluntary, not compulsory. Members of a congregation attend because they wish to be there, and their presence may or may not indicate devotion to the religious institution's teachings and a willingness to submit to its authority. Of course, members always remain free to modify the degree to which their religion influences their lives. Religious affiliation is a matter of personal choice and preference, not control. On the other hand, schools have control over their students because the students are required by law to attend. Employers have control over their employees through the control of their wages, promotion, and even the very existence of their jobs.

Even where a member of a religious institution is acting at the encouragement of his church or synagogue, there is typically very little control. A religious institution may teach that members should care for each other and may even have service programs to assist in this effort. They may encourage members to visit each other regularly on their own time so as to lift burdens, provide spiritual strength, and teach the word of God.[111] But such voluntary service activities, carried out because of the religious teachings and encouragement of a religious institution, are still beyond its legal control. Religious institutions teach principles of service and righteous living and encourage members to live their religion on a day-to-day basis, but whether and how such teachings are

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110. *See, e.g.*, *C.J.C.*, 985 P.2d at 280 (Madsen, J., dissenting in relevant part) ("A duty to control should only be imposed where the actor could conceivably satisfy that duty; in other words, the authority to actually control the third party's conduct must exist.").

111. The Church of Jesus Christ of Latter-day Saints, for example, encourages its members to engage in "home teaching," whereby members visit each others' homes each month and provide a spiritual message and, if needed, charitable service. *See* ENCYCLOPEDIA OF MORMONISM 654–55 (Daniel H. Ludlow ed., 1992).

actually implemented in the lives of individual members remains a matter of conscience.

Religious institutions typically may discipline members who engage in misconduct according to their spiritual beliefs. Still, relying on ecclesiastical law to establish the requisite "control" would create serious constitutional infringements. For example, in *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, the plaintiffs argued that according to church doctrine, the perpetrator, a prominent church member, was subject to "'comprehensive disciplinary authority in all areas of his public and private life including matters of conscience as well as behavior.'"[112] While not addressing the control issue, the majority of the court found a "special relationship" to exist. However, one dissenting judge perceptively wrote,

> First Amendment concerns are clearly at issue.... [A] court would necessarily have to interpret church doctrine and religious principles ... in order to determine whether the expansive authority asserted by plaintiffs existed under church law. Such an inquiry is forbidden under the First Amendment.[113]

Clearly, a religious institution does not have the qualitative or quantitative secular control over its members that a jailer has over a prisoner, a parent has over a minor child, a school has over its students, a hospital has over its patients, or an employer has over its employees.

b. Fiduciary and Confidential Relationships

Some plaintiffs have argued that religious institutions have a fiduciary relationship with their members because of the trust and confidence members have placed in their religious leaders, and thus, the institutions have a duty to protect against sexual abuse of members. A fiduciary relationship arises when one person is under a duty to act or give advice for the benefit of another on matters within the scope of their relationship.[114] A fiduciary relationship can be a guardian and ward, trustee and beneficiary, principal and agent, or attorney and client.[115] It is an "unequal relationship between parties in which one surrenders to

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112. *C.J.C.*, 985 P.2d at 281 n.2 (Madsen, J., dissenting in relevant part) (rejecting comparisons to successful negligent hiring, supervision, and retention claims arising out of abuse by priests, as there was no evidence of "an employment-like situation" in this case, and the requisite control over the perpetrator could not be established without interpreting "the church document ... in order to glean directives for personal conduct based upon religious principles and doctrine").

113. *Id.* at 280 (Madsen, J., dissenting in relevant part) (citations omitted).

114. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 874 cmt. a.

115. *See* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795 (1983).

the other some degree of control because of the trust and confidence which he reposes in the other."[116] When such a relationship is found to exist, "the one in whom confidence was reposed may be held to a higher standard of disclosure and fairness than in an arms'-length relationship."[117] As a result, the superior party in the fiduciary or confidential relationship must assume a duty to act in the dependent party's best interest and can be subject to liability in tort for breaching this duty.[118]

These cases usually involve sexual misconduct claims brought against members of the clergy, not lay church members. They are often by adult church members who had initially sought counseling from the clergy member. Courts have taken two approaches with regard to the fiduciary duty argument. In claims against a religious institution, many courts reject the claim because they believe it is simply another way to plead a claim for clergy malpractice,[119] a cause of action that has been universally rejected as unconstitutional.[120] Other courts recognize the claim—so long as the conduct at issue is not part of the beliefs and practices of the defendant's religion; thus, resolution of the claim would

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116. RAFAEL CHODOS, THE LAW OF FIDUCIARY DUTIES 49–50 (2000).

117. *Id.*

118. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 874 cmt. a.

119. *See, e.g.*, Dausch v. Rykse, 52 F.3d 1425, 1429 (7th Cir. 1994); Schmidt v. Bishop, 779 F. Supp. 321, 326 (S.D.N.Y. 1991); Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789, 796 (Okla. 1993); Teadt v. Lutheran Church Missouri Synod, 603 N.W.2d 816, 822–23 (Mich. Ct. App. 1999). *See also* Gray v. Ward, 950 S.W.2d 232, 234 (Mo. 1997) (en banc) (upholding trial court's dismissal of fiduciary relationship claim, as allegations were simply a "recharacterization" of those in plaintiff's various negligence claims).

120. *See Dausch*, 52 F.3d at 1432 n.4 (Coffey, J., concurring) (stating no state or federal court in the United States now recognizes a cause of action for clergy malpractice, and collecting cases). More recent cases, such as *Franco v. Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198 (Utah 2001), agree. *Dausch* reflects widespread judicial action of the view that:

> [A]n action for clergy malpractice cannot be reconciled with the First Amendment because a standard of care and its breach could not be established without judicial determinations as to the training, skill, and standards applicable to members of the clergy in a wide array of religions holding different beliefs and practices. Even if a reasonable standard could be devised, which is questionable, it could not be uniformly applied without restricting the free exercise rights of religious organizations which could not comply without compromising the doctrines of their faith. The application of such a standard would also result in the establishment of judicially acceptable religions, because it would inevitably differentiate ecclesiastical counseling practices that are judicially acceptable from those that are not.

Richelle L. v. Roman Catholic Archbishop of San Francisco, 130 Cal. Rptr. 2d 601, 608–09 (Cal. Ct. App. 2003). *See also* F.G. v. MacDonell, 696 A.2d 697, 703 (N.J. 1997) ("[D]efining [a standard of care] would require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them.").

not require any inquiry into religious matters.[121]

However problematic, this type of claim against a religious institution—arising out of affirmative misconduct by a clergy member—is many steps away from a claim against a religious institution for failure to protect against the acts of a lay member. In the latter situation, plaintiffs have alleged that because they regard clergy members as their spiritual leaders and rely on them for religious guidance, or because of the doctrines or ecclesiastical practices of the religious institution, a fiduciary relationship exists and the clergy thus have a duty to protect them from harm. Such allegations are too general and attenuated to give rise to a cause of action. For example, in *Bryan R. v. Watchtower Bible and Tract Society of New York, Inc.*, the court stated that allegations that the plaintiff placed "substantial trust and confidence" in the elders of the church and trusted them "to protect him and guide him" did not state facts sufficient to establish a fiduciary relationship between him and the church.[122] A secular fiduciary duty is also inconsistent with the ecclesiastical/spiritual nature of the relationship between a religious institution and its members. Unlike lawyers and other fiduciaries, these religious institutions cannot act just in the best interest of a particular member, much less of every member, as a fiduciary duty requires. The duty of loyalty incumbent upon fiduciaries makes little sense in the context of religious institutions and their members—they strive to be faithful to their understanding of God's will, as set forth in their doctrines and faith traditions. They typically have a spiritual duty to look after the eternal welfare of all their members, not just the secular or emotional interests of a single person. The very notion of a secular fiduciary duty conflicts with the spiritual relationship that exists between a religious institution and its members.

c. Special Relationships and Spiritual Counseling

Efforts to use the spiritual counseling relationship to establish a special relationship are also misplaced. These lawsuits often allege that officials of the religious institution learned about the perpetrator's

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121. *See, e.g.*, Doe v. Evans, 814 So. 2d 370 (Fla. 2002) (marital counseling); *MacDonell*, 696 A.2d 697 (pastoral counseling); Destefano v. Grabrian, 763 P.2d 275, 283–84 (Colo. 1988) (marital counseling); Sanders v. Casa View Baptist Church, 898 F. Supp. 1169, 1173 (N.D. Tex. 1995) (marital counseling); Moses v. Diocese of Colo., 863 P.2d 310, 316 (Colo. 1993) (counseling regarding relationship with children); Erickson v. Christenson, 781 P.2d 383, 384 (Or. Ct. App. 1989) ("counseling relationship"); Adams v. Moore, 385 S.E.2d 799 (N.C. Ct. App. 1989) (financial counseling).

122. Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 738 A.2d 839, 847 (Me. 1999).

tendencies to commit abuse through confession, spiritual counseling, or other privileged communications between officials and the perpetrator or other members of the religious organization. Some plaintiffs have argued that when religious officials learn that a member has a propensity to commit abuse, the institution has a duty to warn the rest of the congregation.

A situation involving a religious institution that receives information from a member about his or her propensity to commit abuse is not analogous to a psychologist's special and unique situation with an individual patient. The relationship between a religious institution or clergyperson and a member is ecclesiastical and spiritual in nature, and varies according to the doctrine, polity, and practices of the particular faith community. By contrast, the relationship between a psychotherapist and a patient is professional; thus, it is subject to the relatively uniform standards and expectations of the profession. Moreover, even in the context of psychotherapy, the duty imposed upon the therapist in *Tarasoff* was refined and limited. Even if the most extreme extension of the "special relationship" rule were applied to religious institutions (e.g., the *Tarasoff* line of cases), these institutions would not be responsible for acts of a member of its organization. While churches, temples, and mosques do perform general counseling, they do not have the ongoing, highly specific relationships with members that occur between psychiatrists and specific patients. Certainly, religious institutions should not be held to a stricter standard than psychotherapists, whose liability is limited to specifically identifiable victims and not to categories of potential victims.

d. Reporting Statutes

Plaintiffs also have argued that state statutes requiring certain people to report suspected child abuse to the authorities or face criminal sanctions have created a private civil right of action. Nearly every state has enacted such a statute.[123] However, the "vast majority of courts"[124] that have considered whether these statutes provide a basis for civil liability have concluded that the statutes do not create a private right of action absent express direction from the legislature.[125]

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123. Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. REV. 1127, 1128 (2003).

124. Letlow v. Evans, 857 F. Supp. 676, 678 (W.D. Mo. 1994) ("[T]he vast majority of courts to face this issue across the country have found that reporting statutes such as the one at issue here, do not create a private right of action.") (citations omitted).

125. *See, e.g.*, Doe v. S & S Consol. Indep. Sch. Dist., 149 F. Supp. 2d 274, 299 (E.D. Tex. 2001);

Courts are generally reticent in allowing reporting statutes to provide a basis for a private right of action; there is a widely held belief that "where the legislature has intended that civil liability flow from the violation of a statute, it has often so provided."[126] This belief is based on the rationale that legislatures are "better equipped" than courts to consider whether there is a real need to create civil liability or whether the legislature intended a duty to be enforceable solely through the state's prosecutorial authority and judgment.[127]

This belief is particularly evident in the context of mandated reporting of child abuse by certain officials of a religious institution or its clergy members, who are likely to learn about actual or suspected abuse through confession or the spiritual counseling relationship. Because two important public policies—protecting confidences made to clergy and protecting children from harm—must be balanced to account for the needs of the public at large, the legislative branch should decide whether the public good is best advanced by prosecutors wielding the criminal law or by litigants in private tort actions, or both.

Whether child abuse reporting statutes create a civil cause of action against the clergy is only an issue in a few states. In thirty-seven states, clergy members have no statutory duty to report child abuse and thus no argument for a private right of action arises.[128] Of the remaining states,

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Isely v. Capuchin Province, 880 F. Supp. 1138, 1148 (E.D. Mich. 1995); Mora v. South Broward Hosp. Dist., 710 So. 2d 633, 634 (Fla. Dist. Ct. App. 1998); Bradley v. Ray, 904 S.W.2d 302, 314 (Mo. Ct. App. 1995); Marquay v. Eno, 662 A.2d 272, 278 (N.H. 1995); Valtakis v. Putnam, 504 N.W.2d 264, 266 (Minn. Ct. App. 1993); Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587, 604 (Kan. 1991) ("If the legislature had intended to grant a private right of action in [its child abuse reporting law] it would have specifically done so."). *See* Doe v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints, 98 P.3d 429 (Utah Ct. App. 2004).

126. *Marquay*, 662 A.2d at 278. *See also, e.g.*, Freehauf v. Sch. Bd. of Seminole County, 623 So. 2d 761, 764 (Fla. Dist. Ct. App. 1993); *Kan. State Bank & Trust*, 819 P.2d at 602–04; Cechman v. Travis, 414 S.E.2d 282, 284 (Ga. Ct. App. 1991); Borne v. Nw. Allen County Sch. Corp., 532 N.E.2d 1196, 1203 (Ind. Ct. App. 1989).

127. Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do To Stop It*, NAT'L LEGAL CENTER FOR PUB. INT. (Nov. 1999) (explaining that unlike courts, legislatures can hold public hearings, gather information from the public-at-large, balance the varied interests of all affected persons, and have their decisionmaking checked by the public).

128. In fifteen states, the statutes do not list clergy among those who must report incidents of child abuse and do not include a catchall phrase, such as "any person," to create a general community obligation. *See* ALA. CODE § 26–14–3 (2003); ALASKA STAT. § 47.17.020 (2003); ARK. CODE ANN. § 12–12–507 (2003); GA. CODE ANN. § 19–7–5 (2003); HAW. REV. STAT. § 350–1.1 (2002); IOWA CODE § 232.69 (2002); KAN. STAT. ANN. § 38–1522 (2002); N.Y. SOC. SERV. LAW § 413 (Consol. 2003); OHIO REV. CODE ANN. § 2151.421 (LexisNexis 2003); S.C. CODE ANN. § 20–7–510 (2002); S.D. CODIFIED LAWS § 26–8A–3 (2003); VT. STAT. ANN. tit. 33, § 4913 (2002); VA. CODE ANN. § 63.2–1509 (2003); WASH. REV. CODE § 26–44.030 (2003); WIS. STAT. § 48.981 (2003). "Clergy-privileged information" is specifically exempted by statute in another twenty-two states. *See* ARIZ. REV. STAT. § 13–3620 (LexisNexis 2003); CAL. PENAL CODE § 11166(c)(1) (West 2003); COLO. REV. STAT. § 19–3–304(2)(aa)(II) (2003); DEL. CODE ANN. tit. 16, § 909 (2003); FLA. STAT. § 39.204 (2003); IDAHO CODE

six explicitly subject the clergy member privilege to the statutory reporting requirement.[129] In three of those states, the courts have specifically ruled that reporting statutes do not create private rights of action.[130]

IV. FIRST AMENDMENT LIMITATIONS

In determining whether a religious institution has a duty to protect a member from the tortious acts of another member, courts must be careful to respect the protections of the religion clauses of the First Amendment and analogous provisions in state constitutions. Constitutional protections apply to civil actions based on the common law, sometimes limiting such claims,[131] and sometimes barring them outright.[132]

Although churches, synagogues, and mosques are not immune from tort liability, the First Amendment precludes common law claims that entangle civil courts in ecclesiastical matters or require judicial examination of an institution's doctrine or polity. A "long line of Supreme Court cases [has] affirm[ed] the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[133] "Courts have held that churches have autonomy in making decisions regarding their own internal affairs. This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith,

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ANN. § 16–1619(c) (2003); 325 ILL. COMP. STAT. 5/4 (2003); KY. REV. STAT. ANN. § 620.050(3) (LexisNexis 2002); LA. CHILD. CODE ANN. art. 603(13)(b) (2003); ME. REV. STAT. ANN. tit. 22, § 4011–A(1)(A)(27) (2003); MD. CODE ANN., FAM. LAW § 5–705 (LexisNexis 2003); MASS. GEN. LAWS ch. 119, § 51A (2003); MICH. COMP. LAWS § 722.631 (2003); MINN. STAT. § 626.556 subd. 3(a)(2) (2002); MO. REV. STAT. § 352.400 (2003); MONT. CODE ANN. § 41–3–201(4)(b) (2003); NEV. REV. STAT. 202.888 (2002); N.M. STAT. ANN. § 32A–4–3 (LexisNexis 2003); N.D. CENT. CODE § 50–25.1–03(1) (2003); OR. REV. STAT. § 419B.010(1) (2001); 23 PA. CONS. STAT. § 6311(a) (2002); UTAH CODE ANN. § 62A–4a–403(2) (2005).

129. *See* N.H. REV. STAT. ANN. § 169–C:32 (2002); N.C. GEN. STAT. § 7B–301 (2003); OKLA. STAT. tit. 10, § 7103(A)(3) (2002); R.I. GEN. LAWS § 40–11–11 (2002); TEX. FAM. CODE ANN. § 261.101(c) (Vernon 2003); W. VA. CODE § 49–6A–7 (2003).

130. *See* Paulson v. Sternlof, 15 P.3d 981 (Okla. Civ. App. 2000); Perry v. S.N., 973 S.W.2d 301 (Tex. 1998); *Marquay*, 662 A.2d 272.

131. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that defamation claims are subject to First Amendment limitations); Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

132. *See* Franco v. Church of Jesus Christ of Latter-day Saints, 21 P.3d 198 (Utah 2001).

133. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)); *see* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 672 (1970) (finding that the Supreme Court has "chart[ed] a course that preserved the autonomy and freedom of religious bodies").

doctrine, church governance, and polity."[134]

A. Genesis of the Church Autonomy Doctrine

The church autonomy doctrine limits the instances where a duty to protect can constitutionally be imposed on a religious organization. The church autonomy doctrine had its genesis in *Watson v. Jones*, a post-Civil War case involving a property dispute between factions of a Presbyterian church.[135] In *Watson*, the United States Supreme Court repudiated the analysis of a lower court that had "overrule[d] the decision of the highest judicatory of [the Presbyterian C]hurch . . . and, substitute[d] its own judgment for that of the ecclesiastical court."[136] The *Watson* Court held that civil courts should not attempt to resolve disputes within churches by determining which faction or person holds the correct interpretation of church doctrine, but rather by a rule of judicial deference to the church's internal decisionmaking bodies:

> [W]henever the questions of discipline, or of 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 as binding on them, in their application to the case before them.[137]

The Court's reasoning rested on four principles that directly bear on

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134. Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002) (citing *Kedroff*, 344 U.S. at 116–17).

135. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

136. *Id.* at 734.

137. *Id.* at 727; *see also* Sustar v. Williams, 263 So. 2d 537, 540 (Miss. 1972) ("[Mississippi] courts accept the highest ecclesiastical authority in each church as being the faith and practice of that church."); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994) ("[C]ivil court review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring or firing of clergy, are *in themselves* an 'extensive inquiry' into religious law and practice, and hence are forbidden by the First Amendment.") (emphasis in original); Clay v. Ill. Dist. Council of Assemblies of God Church, 657 N.E.2d 688, 693 (Ill. App. Ct. 1995) ("Civil courts must abstain from resolving such a religious controversy and must instead defer to the decision of the highest church body to decide the issue."); Downs v. Roman Catholic Archbishop of Baltimore, 683 A.2d 808, 811 (Md. Ct. Spec. App. 1996) ("Even where the dispute actually presented to the court is one that, if presented by any other set of litigants, would clearly be justiciable, if the resolution of that dispute between the litigants at hand would require the court to adjudicate matters of church doctrine or governance, or to second-guess ecclesiastical decisions made by a church body created to make those decisions, the matter falls outside the court's authority."); Jones v. Wolf, 443 U.S. 595, 602 (1979) ("[T]he [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization."); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) ("[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.").

whether a religious institution has a duty to protect others. First, the Court recognized that in contrast to Great Britain, all churches in the United States are independent from the state and thus enjoy a zone of authority and autonomy with which the state—including civil courts—cannot interfere. *Watson* rejected the English common law rule (Lord Eldon's Rule) which held that civil courts have authority "to inquire and decide . . . what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard."[138] The English rule was an outgrowth of the British government's supremacy over the established church and was therefore inconsistent with American norms of religious liberty and separation of church and state. In the United States, only churches have authority to rule on internal ecclesiastical matters, even if civil rights (such as property ownership) are in turn impacted by the ruling.[139]

Second, *Watson* teaches that when churches are sued, courts must discern the true nature of the disagreement and the role the court would have to play to adjudicate it. In *Watson*, the Court discerned that the property dispute at issue actually turned on a religious dispute among church members. The case was therefore reduced to a request for a civil court to rule in favor of one interpretation of church polity and doctrine over another; the fact that the case was ostensibly a dispute over property rights could not mask the reality that adjudication would require the court to take sides in a religious dispute. The *Watson* Court reasoned that because civil courts are "incompetent judges of matters of faith, discipline, and doctrine," they must decline jurisdiction over such cases.[140]

> Each of these [religious institutions] . . . has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned [i.e., religious] tribunal in the law that should decide the case, to one [i.e., the civil court] which is less so.[141]

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138. *Watson*, 80 U.S. (13 Wall.) at 727.

139. *See, e.g.*, Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16–17 (1929) (holding that Catholic Church has exclusive right to determine who will be a chaplain, even though right to income from chaplaincy at stake).

140. *Watson*, 80 U.S. (13 Wall.) at 732.

141. *Id.* at 729.

Third, *Watson* recognized that civil court adjudication of intra-church disputes would inevitably entangle the judicial branch in ecclesiastical matters.

> [I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court.[142]

Finally, the Court explained that a rule of judicial abstention was appropriate and fair because "[a]ll who unite themselves to [a religious organization] do so with an implied consent to this government, and are bound to submit to it."[143] No one is required to belong to a church, but if one does the courts will assume the person has willingly submitted himself or herself to its ecclesiastical jurisdiction in any dispute where the "subject-matter . . . [is] strictly and purely ecclesiastical in its character."[144] "[T]he civil courts exercise no jurisdiction" over ecclesiastical matters, such as "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[145]

The Court in *Watson* acknowledged structural limitations on the power of civil courts to adjudicate claims concerning ecclesiastical

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142. *Id.* at 733 (emphasis in original).

143. *Id.* at 729. The Court stated:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general associations, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Id. at 728–29.

144. *Id.* at 733.

145. *Id.*; *see also* Dees v. Moss Point Baptist Church, 17 So. 1, 2 (Miss. 1895) ("Every person uniting with the Baptist church impliedly or expressly covenants obedience to its laws, and by that covenant this appellant is bound."); Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 774 (Okla. 1989); Hadnot v. Shaw, 826 P.2d 978, 986–88 (Okla. 1992).

matters. "[N]o jurisdiction has been conferred on the [civil] tribunal to try the particular case before it," the Court said.[146] "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference [and] it has secured religious liberty from the invasion of the civil authority."[147]

B. Modern Church Autonomy Cases

As the *Watson* Court anticipated, its holding and rationale have had "far-reaching consequences."[148] In approximately a thousand published opinions addressing diverse claims and circumstances, courts have repeatedly affirmed the *Watson* rule that disputes over ecclesiastical subject matters must be resolved internally by the church, and that civil courts must defer jurisdiction to ecclesiastical decisionmakers in such cases.[149]

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146. *Watson*, 80 U.S. (13 Wall.) at 733.

147. *Id.* at 730 Professor Esbeck has summarized the church autonomy doctrine which arose from *Watson* as follows:

> [T]he Establishment Clause presupposes a constitutional model consisting of two spheres of competence: government and religion. The subject matters that the Clause sets apart from the sphere of civil government—and thereby leaves to the sphere of religion—are those topics "respecting an establishment of religion," e.g., ecclesiastical governance, the resolution of doctrine, the composing of prayers, and the teaching of religion.
>
> . . . .
>
> . . . .[The First A]mendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself . . . . However much government may become involved in regulating various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society, religion is an arena that, when it is doing its own thing, is off limits. This is not only an affirmation of the freedom of individual belief or practice, not only an acknowledgment that the state is noncompetent when it comes to theology, it is the recognition of a sacred domain that no secular authority can fully control. Practically, this means that at least one association may be brought into being in society that has a sovereignty beyond the control of government.

Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 10, 10 n.34 (1998) (quoting Max L. Stackhouse, *Religion, Rights, and the Constitution, in* AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 111 (1990)).

148. *Watson*, 80 U.S. (13 Wall.) at 734.

149. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 599 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 109 (1952); Scotts African Union Methodist Protestant Church v. Conf. of African Union First Colored Methodist Protestant Church, 98 F.3d 78, 86 (3rd Cir. 1996); Smith v. Raleigh Dist. of N.C. Conf. of United Methodist Church, 63 F. Supp. 2d 694, 702 (E.D.N.C. 1999); Presbytery of Riverside v. Community Church of Palm Springs, 152 Cal. Rptr. 854, 859 (Cal. Ct. App. 1979); N.Y. Annual Conf. of United Methodist Church v. Fisher, 438 A.2d 62, 67 (Conn. 1980); E. Lake Methodist Episcopal Church v. Trs. of Peninsula-Del. Annual Conf. of United Methodist Church, Inc., 731 A.2d 798, 805 (Del. Super. Ct. 1999); Baldwin v. Mills, 344 So. 2d 259, 263 (Fla. Dist. Ct. App. 1977); York v. First Presbyterian

Watson was decided before the First Amendment to the U.S. Constitution was incorporated into the Fourteenth Amendment and applied to the states. Thus, *Watson* could not have been directly founded on the First Amendment. The *Watson* rule attained constitutional status after such incorporation had taken place. For example, in striking down a New York law that interfered with the internal ecclesiastical affairs of the Russian Orthodox Church, the Supreme Court stated:

> [*Watson*] . . . radiates . . . a spirit of freedom for religious organizations, 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 part of the free exercise of religion against state interference.[150]

Other Supreme Court decisions have produced similar results in various contexts.[151]

C. First Amendment Limitations on Civil Claims Against Churches

The practical consequence of the church autonomy doctrine is to limit or totally bar certain types of civil claims against churches. Courts generally decline to adjudicate claims against churches involving (1)

Church of Anna, 474 N.E.2d 716, 719 (Ill. App. Ct. 1984); Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church, 489 A.2d 1317, 1319 (Pa. 1985).

150. *Kedroff*, 344 U.S. at 116; *see also* Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (extending church autonomy holding in *Kedroff* to judicial action).

151. For example, in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969), the Court struck down the "departure-from-doctrine element of the Georgia implied trust theory" because it "require[d] the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion." To prevent civil courts from being "inject[ed] . . . into substantive ecclesiastical matters," the Court barred them from "interpreting and weighing church doctrine." *Id.* at 450–51. Likewise, in *Milivojevich*, 426 U.S. at 710, the Court held that judicial abstention "applies with equal force to church disputes over church polity and church administration." Drawing from *Watson*, the Court held that under the First Amendment civil courts cannot adjudicate "'a matter which concerns . . . church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.'" *Id.* at 713–14 (quoting *Watson*, 80 U.S. (13 Wall.) at 733–34). The Court reasoned:

> [I]t 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. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Id. at 714–15.

church schisms and the resulting disputes over church property and ministry assignments;[152] (2) disputes over membership criteria or the ecclesiastical discipline (including excommunication) of church members;[153] (3) disputes between churches and ministers or clergypersons alleging wrongful termination, discrimination, or breach of employment contracts for ministerial positions;[154] (4) claims against

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152. The United States Supreme Court has repeatedly declined to adjudicate disputes over which religious faction gets to keep church property and select the minister who would preach from the pulpit of the disputed property. *See, e.g.*, *Watson*, 80 U.S. (13 Wall) 679; *Kreshik*, 363 U.S. 190; *Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440; *Milivojevich*, 426 U.S. 696; Jones v. Wolf, 443 U.S. 595 (1979); Shepard v. Barkley, 247 U.S. 1 (1918); *Kedroff*, 344 U.S. 94.

State and lower federal courts have likewise declined to adjudicate such disputes. *See, e.g.*, First English Lutheran Church of Oklahoma City v. Evangelical Lutheran Synod of Kan., 135 F.2d 701 (10th Cir. 1943); St. Mark Coptic Orthodox Church v. Tanios, 572 N.E.2d 283 (Ill. App. Ct. 1991); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); Bryce v. Episcopal Church in Diocese of Colo., 121 F. Supp. 2d 1327 (D. Colo. 2000); Williams v. Episcopal Diocese of Mass., 766 N.E.2d 820 (Mass. 2002); Hiles v. Episcopal Diocese of Mass., 773 N.E.2d 929 (Mass. 2002); Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974); Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328 (4th Cir. 1997); Cha v. Korean Presbyterian Church of Wash., 553 S.E.2d 511 (Va. 2001); Van Osdol v. Vogt, 908 P.2d 1122 (Colo. 1996).

153. *See, e.g.*, Conic v. Cobbins, 44 So. 2d 52 (Miss. 1950); O'Connor v. Diocese of Honolulu, 885 P.2d 361 (Haw. 1994); Smith v. Calvary Christian Church, 614 N.W.2d 590 (Mich. 2000); Parish of the Advent v. Protestant Episcopal Diocese of Mass., 688 N.E.2d 923 (Mass. 1997); Fowler v. Bailey, 844 P.2d 141 (Okla. 1992); Glass v. First United Pentecostal Church of DeRidder, 676 So. 2d 724 (La. Ct. App. 1996); Korean Presbyterian Church v. Lee, 880 P.2d 565 (Wash Ct. App. 1994); Marks v. Hartgerink Estate, 528 N.W.2d 539 (La. 1995); Nunn v. Black, 506 F. Supp. 444 (W.D. Va. 1981); Paul v. Watchtower Bible & Tract Soc'y, 819 F.2d 875 (9th Cir. 1997); Schoenhals v. Mains, 504 N.W.2d 233 (Minn. Ct. App. 1993); Williams v. Gleason, 26 S.W.3d 54 (Tex. App. 2000).

154. Virtually every United States Circuit Court of Appeals has held that courts must decline to adjudicate such cases rather than come between a church and its ministers, even when the ministers have alleged otherwise viable claims arising from their employment relationships. *See, e.g.*, *McClure*, 460 F.2d 553; *Simpson*, 494 F.2d 490; Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); Combs v. Cent. Tex. Annual Conf. of United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991); Rayburn v. Gen. Conf. of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985); Kaufmann v. Sheehan, 707 F.2d 355 (8th Cir. 1983); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986); *Natal*, 878 F.2d 1575; Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Lewis v. Seventh-day Adventists Lake Region Conf., 978 F.2d 940 (6th Cir. 1992); *Young*, 21 F.3d 184; *Catholic Univ. of Am.*, 83 F.3d 455; *Bell*, 126 F.3d 328; Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000).

The state courts have reached similar results. *See* Mallette v. Church of God Int'l, 789 So. 2d 120 (Miss. Ct. App. 2001); First Presbyterian Church of Perry v. Myers, 50 P. 70 (Okla. 1897); Tran v. Fiorenza, 934 S.W.2d 740 (Tex. App. 1996); United Methodist Church, Baltimore Annual Conf. v. White, 571 A.2d 790 (D.C. 1990); Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 755 N.E.2d 201 (Ind. Ct. App. 2001); *Cha*, 553 S.E.2d 511; Daniels v. Union Baptist Ass'n, 55 P.3d 1012 (Okla. 2001); Goodman v. Temple Shir Ami, Inc., 712 So. 2d 775 (Fla. Dist. Ct. App. 1998); Jay v. Christian

clergy for malpractice or breach of a fiduciary duty arising out of a purely religious relationship;[155] and (5) claims against churches or church officials for negligent hiring, assignment, or ecclesiastical supervision of clergy.[156]

Methodist Episcopal Church, 531 S.E.2d 369 (Ga. Ct. App. 2000); McManus v. Taylor, 521 So. 2d 449 (La. Ct. App. 1988); Singleton v. Christ the Servant Evangelical Lutheran Church, 541 N.W.2d 606 (Minn. Ct. App. 1996); United Baptist Church v. Holmes, 500 S.E.2d 653 (Ga. Ct. App. 1998); *Van Osdol*, 908 P.2d 1122; Williams v. Palmer, 532 N.E.2d 1061 (Ill. App. Ct. 1988).

155. Every U.S. court to consider the issue has refused to adjudicate claims of clergy malpractice. *See, e.g.*, Franco v. Church of Jesus Christ of Latter-day Saints, 21 P.3d 198 (Utah 2001); Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319 (Ill. App. Ct. 1986); Hester v. Barnett, 723 S.W.2d 544 (Mo. Ct. App. 1987); Handley v. Richards, 518 So. 2d 682 (Ala. 1987); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); Nally v. Grace Community Church of the Valley, 763 P.2d 948 (Cal. 1988); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991); Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991); Jones v. Trane, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992); Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789 (Okla. 1993); Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907 (Neb. 1993); *O'Connor*, 885 P.2d 361; Roppolo v. Moore, 644 So. 2d 206 (La. Ct. App. 1994); Joshua S. v. Casey, 615 N.Y.S.2d 200 (N.Y. App. Div. 1994); Podolinski v. Episcopal Diocese of Pittsburgh, 23 Pa. D.&C.4th 385 (Pa. Ct. Com. Pl. 1995); Cherepski v. Walker, 913 S.W.2d 761 (Ark. 1996); F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997); Amato v. Greenquist, 679 N.E.2d 446 (Ill. App. Ct. 1997); Teadt v. Lutheran Church Missouri Synod, 603 N.W.2d 816 (Mich. Ct. App. 1999); Borchers v. Hrychuk, 727 A.2d 388 (Md. Ct. Spec. App. 1999); Langford v. Roman Catholic Diocese of Brooklyn, 705 N.Y.S.2d 661 (N.Y. App. Div. 2000); Hawkins v. Trinity Baptist Church, 30 S.W.3d 446 (Tex. App. 2000); Lann v. Davis, 793 So. 2d 463 (La. Ct. App. 2001). *See also* Strock v. Pressnell, 527 N.E.2d 1235 (Ohio 1988); Greene v. Roy, 604 So. 2d 1359 (La. Ct. App. 1992).

Courts have likewise held that no legally cognizable fiduciary duty can arise from purely ecclesiastical relationships. *Franco*, 21 P.3d 198; *Amato*, 679 N.E.2d 446; Brown v. Pearson, 483 S.E.2d 477 (S.C. Ct. App. 1997); Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 738 A.2d 839 (Me. 1999); Meyer v. Lindala, 675 N.W.2d 635 (Minn. Ct. App. 2004); Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994); Elders v. United Methodist Church, 793 So. 2d 1038 (Fla. Dist. Ct. App. 2001); Gray v. Ward, 950 S.W.2d 232 (Mo. 1997); *Langford*, 705 N.Y.S.2d 661; L.C. v. R.P., 563 N.W.2d 799 (N.D. 1997); Richelle L. v. Roman Catholic Archbishop of San Francisco, 130 Cal. Rptr. 2d 601 (Cal. Ct. App. 2003); *Schieffer*, 508 N.W.2d 907; *Schmidt*, 779 F. Supp. 321; S.H.C. v. Lu, 54 P.3d 174 (Wash. Ct. App. 2002); Turner v. Church of Jesus Christ of Latter-day Saints, 18 S.W.3d 877 (Tex. App. 2000).

156. Civil courts have typically held that the First Amendment prevents them from adjudicating whether church leadership negligently hired, supervised, trained, or retained clergy or other ministers. *See, e.g., Schmidt*, 779 F. Supp. 321; Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995); Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997); Ehrens v. Lutheran Church, Missouri Synod, 269 F. Supp. 2d 328 (S.D.N.Y. 2003); *Lu*, 54 P.3d 174; Germain v. Pullman Baptist Church, 980 P.2d 809 (Wash. Ct. App. 1999); Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997); Ayon v. Gourley, 47 F. Supp. 2d 1246 (D. Colo. 1998); *Roppolo*, 644 So. 2d 206; L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997); Isely v. Capuchin Province, 880 F. Supp. 1138 (E.D. Mich. 1995); Higgins v. Maher, 258 Cal. Rptr. 757 (Cal. Ct. App. 1989); *Dausch*, 52 F.3d 1425; Roman Catholic Bishop of San Diego v. Super. Ct., 50 Cal. Rptr. 2d 399 (Cal. Ct. App. 1996); *Richelle L.*, 130 Cal. Rptr. 2d 601; *Turner*, 18 S.W.3d 877. *See also Bryan R.*, 738 A.2d at 848 ("Allowing a secular court or jury to determine whether a church and its clergy have sufficiently disciplined, sanctioned, or counseled a church member would insert the State into church matters in a fashion wholly forbidden by the . . . First Amendment.").

However, in some instances courts have permitted what amounts to negligent supervision/retention claims. *See, e.g.*, Bivin v. Wright, 656 N.E.2d 1121 (Ill. App. Ct. 1995); Doe v. Evans, 814 So. 2d 370 (Fla. 2002); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002); Doe v. Norwich Roman

D. *First Amendment Limitations on the Duty of Religious Institutions to Protect Members from the Tortious Acts of Other Members*

As this Article has shown, a person generally does not have a duty to protect a real or potential victim from a tortfeasor absent a special relationship with either the victim or the tortfeasor. As further noted, a special relationship does not arise between an institution and its members merely by virtue of membership; the American Bar Association, for instance, does not have a duty to protect some of its members from acts of others, regardless of how predatory such acts may be. There must be more to create a special relationship, such as legal custody or control over the victim or tortfeasor.

The First Amendment would generally not bar a court from imposing a duty on a religious organization to protect its members where the traditional indicia of custody or control are present. For example, a religious institution with custody of children during a religious retreat would likely have a duty of reasonable care to protect them from the tortious acts of a third party to the same extent that a secular institution would. The same is true of the relationship between a religious school and its students during school hours. Similarly, if a church had a *secular* relationship with a third person that imposed a duty to control the third person's conduct, then the religious organization could be held liable (again to the same extent as a secular institution) to a victim for a breach of its duty.[157] Since these special relationships are based on a purely secular foundation—e.g., custody or control—rather than a spiritual foundation—e.g., religious doctrines, spiritual counseling, trust arising from clerical titles or positions, etc.—the First Amendment would not automatically bar the imposition of a protective duty.[158]

By way of contrast, plaintiffs have recently sought to impose liability on their churches or clergy for not protecting members from injury by other members even absent custody, control, or analogous secular

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Catholic Diocesan Corp., 268 F. Supp. 2d 139 (D. Conn. 2003); Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989); *Gibson*, 952 S.W.2d 239; *Gray*, 929 S.W.2d 774; *Isely*, 880 F. Supp. 1138; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791 (N.Y. App. Div. 1997); Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993); Odenthal v. Minn. Conf. of Seventh-day Adventists, 657 N.W.2d 569 (Minn. Ct. App. 2003); Olson v. First Church of Nazarene, 661 N.W.2d 254 (Minn. Ct. App. 2003); Smith v. O'Connell, 986 F. Supp. 73 (D.R.I. 1997); Smith v. Privette, 495 S.E.2d 395 (N.C. Ct. App. 1998).

157. There appear to be few instances where such a duty to control could exist. A church-run hospital's duty to a mentally ill patient might be one example.

158. Of course, the mere fact of custody or control does not automatically give rise to a special relationship. Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993). Even where custody or control is present, churches would retain all the common-law defenses and arguments against imposition of a duty that are available to a secular institution.

circumstances. Plaintiffs have argued that a special protective relationship exists between a religious organization and its members based on one or more of the following factors: membership; doctrines, ecclesiastical canons, and teachings regarding pastoral care, member ministry, and the discipline of members for sin; mental, emotional, or spiritual reliance on the institution, its clergy, or its doctrines, policies, or procedures; and express or implied representations by the religious organization about the spiritual worthiness or morality of particular members.

These and other comparable religious factors cannot be used as a basis to establish a special protective relationship between a religious institution and its members.[159] The First Amendment bars the very judicial inquiry into church doctrine, teachings, polity, ecclesiastical policies, and practices that would be necessary to determine the truth and legal significance of such factors in a particular case. Adjudication of these types of religion-based allegations and claims inevitably results in civil court entanglement with religious matters and undue intrusion into the protected sphere of ecclesiastical autonomy.

For example, the significance of membership in a particular institution cannot properly be determined without an unconstitutional examination of religious doctrine and polity; to the extent that a plaintiff seeks to use evidence of church membership as a basis for asserting a protective duty, the inquiry quickly becomes entangled in ecclesiastical issues. Indeed, the entire inquiry depends on the nature of the particular religious institution, just as the inquiry would depend on the nature of the mental health institution in the medical context.

Naturally, different religious facts define the relationship between each religious organization and its members. The nature and meaning of membership in a Catholic parish differs from membership in a Baptist congregation or in a Jewish synagogue. When plaintiffs allege that church membership creates a special protective relationship, they unavoidably seek civil court adjudication of religious facts, which the First Amendment precludes.

The same First Amendment problems arise when alleged special relationships are based on other religious facts. A plaintiff cannot ground a special relationship on religious doctrines or canons governing the religious duties of clergy to members, or on the policies and procedures governing ecclesiastical discipline (such as excommunication) in cases of serious sin, because any such inquiry

159. Such actions are substantially intra-church disputes between a member and a church over the care the church ought to have provided, given the existence of a religious relationship.

inevitably requires an in-depth examination of religious doctrines and church polity. Under the First Amendment, religious organizations have the autonomy to establish and enforce their own ecclesiastical standards in such matters without interference from secular courts.

Religious institutions are free to judge the spiritual and moral worthiness of their members, and to commend or censure them before their congregations as their doctrines and polities dictate, without giving rise to secular legal duties or liability.[160] Just as no defamation claim arises from a religious institution's statement to its members that a particular member is unworthy under the institution's standards,[161] so too a religious institution's express or implied representation that a member is morally fit does not make the institution a guarantor of the member's goodness or a protector of those whom he might later injure. What a religious organization means and what its members understand when it says or implies that a person is moral or worthy is inextricably bound up with the meaning of religious doctrines and traditions. How the sinner obtains forgiveness and reconciliation with God—whether through faith alone, through religious sacraments, or through obedience to God's commandments—raises theological issues that have been hotly debated for centuries within Christianity, Judaism, and other religions. Religious pronouncements about a person's spiritual goodness cannot create secular duties to protect, warn, or report. The roles of religious officials need to be understood in context when making decisions in tort law.

V. CONCERN FOR RELIGIOUS ORGANIZATIONS TODAY

In formulating a religious organization's duty to protect its members from the acts of other members, one has to look to key legal and practical factors involved in imposing such a duty, including the amount of actual control by the religious institution. What would be the consequence of extending this duty, in terms of financial burden and impact on religious autonomy? Can the burden be met? How do laws governing the duties of a religious organization apply to the diverse governing structures and nomenclatures used by individual

160. *See supra* note 156.

161. *See, e.g.*, Korean Presbyterian Church of Seattle Normalization Comm. v. Lee, 880 P.2d 565 (Wash. Ct. App. 1994) (involving an excommunication announcement from the pulpit); Marks v. Hartgerink Estate, 528 N.W.2d 539 (Iowa 1995) (same); Rasmussen v. Bennett, 741 P.2d 755 (Mont. 1987) (same); Smith v. Calvary Christian Church, 614 N.W.2d 590 (Mich. 2000) (involving statement to congregation that member had been "marked" and that he had formerly visited prostitutes); Tran v. Fiorenza, 934 S.W.2d 740 (Tex. App. 1996) (involving statement that priest had been excommunicated).

organizations?

A. The Privilege Immunity and the Unique Role of Religious Institutions

Churches, synagogues, and mosques play unique roles in the lives of their members. They may be viewed as a safe haven where a member can go for guidance and repentance. Any duty imposed upon a religious institution to protect its members from other members may conflict with the privileged communications between a church and its members. Historically, the courts have recognized the importance of promoting and protecting the relationship between a religious leader and a member by creating the "priest-penitent" or "clergy-communicant" privilege. This privilege was created to encourage congregation members to talk with their religious leaders in a spirit of trust and confidentiality. The premise underlying the privilege is that these pillars of trust and confidentiality will, in most instances, assist in both the spiritual and mental health of the religious institution's members.[162] Under the privilege, conversations that occur when people reach out to religious leaders in search of spiritual counseling or redemption are privileged, confidential, and not discoverable in a court of law.[163] To impose a duty on religious institutions to report and monitor their members' actions would discourage members from seeking help. It would seriously transform the role of a religious leader from one of confidant, able to support and guide a troubled member, to one of a policing figure.

A general duty on religious institutions to be responsible for the wrongful acts of their members would impose a crushing financial burden on them. It would also create a practical impossibility to fulfill. Additionally, imposing a duty under tort law would raise questions concerning the scope of duty to all or just some members, and the geographical and temporal scopes of the responsibility.

The Supreme Court of Maine has recognized the burden that would be placed on religious institutions if a church is found to owe a duty to

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162. *See* Ellis v. United States, 922 F. Supp. 539, 540–41 (D. Utah 1996) (citing Scott v. Hammock, 870 P.2d 947, 955 (Utah 1994)) (upholding a clergy-cleric privilege where the clergy member sought "spiritual counseling, guidance or advice from a cleric" in his official position and holding that discussions outside the cleric's professional position outside the "discipline enjoined by the church" were not protected). *See also* UTAH R. EVID. 503 (2004) (governing "[c]ommunication to Clergy," creating a right to refuse to disclose "confidential communication to a cleric in the cleric's religious capacity and necessary and proper to enable the cleric to discharge the functions of the cleric's office according to the usual course of practice or discipline").

163. *See Ellis*, 922 F. Supp. 539.

its members simply because of their membership. In *Bryan R. v. Watchtower Bible and Tract Society of New York, Inc.*, the plaintiff alleged that his church wrongfully placed an adult church member with a known history of child sexual abuse into a position of leadership and trust, allowing the adult church member to earn the plaintiff's trust and confidence, and then molest him.[164] The court rejected the plaintiff's attempts to establish a general common-law duty owed him by the church, saying he failed to allege

> that there were aspects of [the plaintiff's] relationship with the church that were distinct from those of its relationships with any other members, adult or child, of the church. The creation of an amorphous common law duty on the part of a church or other voluntary organization requiring it to protect its members from each other would give rise to "both unlimited liability and liability out of all proportion to culpability."[165]

On the other hand, in *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, a majority of the Supreme Court of Washington jettisoned well-established principles of tort law and imposed an extremely broad duty on religious organizations to protect child members from foreseeable harm, regardless of whether the harm occurs off church property or outside the religious relationship.[166] In a clearly worded dissent, Justice Madsen outlined the adverse public policy impacts of the majority decision. He stated that the majority opinion used "nebulous grounds" to "expand[] the special custodial relationship theory of liability past rational limits."[167] Justice Madsen also recognized that the majority's holding could apply to "[v]irtually any organization providing services or activities for children . . . because in any such organization a parent might come to trust those involved in the activity, even those in voluntary capacities."[168]

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164. Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 738 A.2d 839 (Me. 1999).

165. *Id.* at 847 (citations omitted). Other courts have agreed that allowing suits for breach of fiduciary duty in cases involving sexual abuse by clergy members would place courts "on the slippery slope and is an unnecessary venture." H.R.B. v. J.L.G., 913 S.W.2d 92, 98 (Mo. Ct. App. 1995) (stating that "existing laws . . . provide adequate protection for society's interests"). *See also* Teadt v. Lutheran Church Missouri Synod, 603 N.W.2d 816, 823 (Mich. Ct. App. 2000) (granting summary judgment on a breach of fiduciary duty claim in a sexual abuse case, holding "[t]o apply these [fiduciary] principles to the case before us, where no financial transactions are involved, it appears [the pastor's] duty would be to act in a way that would benefit plaintiff emotionally, if she reposed faith, confidence, and trust and relied on his judgment and advice. Such a duty is impossible to define and has far-reaching implications. We refuse to impose such a duty.").

166. C.J.C. v. Corporation of the Catholic Bishop of Yakima, 985 P.2d 262, 265 (Wash. 1999).

167. *Id.* at 278 (Madsen, J., dissenting in relevant part).

168. *Id.* at 283 (Madsen, J., dissenting in relevant part) ("[T]he majority's analysis is far reaching, encompassing a variety of organizations where families associate, such as day care centers, youth groups, civic organizations, sports clubs and activities, music groups, parent-teacher associations and

This consolidated case addressed a variety of claims, including those arising out of the sexual abuse of three then-minor female plaintiffs—the daughters of the church pastor—by a prominent member of the church named Owen Wilson. Wilson held a variety of leadership positions in the church, including deacon, youth director, Bible school director, and Sunday school teacher.[169] The plaintiffs claimed that other prominent lay church members and church officials knew that Wilson had a prior history of child molestation, but negligently failed to warn their father and others or to take steps to prevent Wilson from being installed in church leadership positions that gave him "unlimited access to and significant authority over children of the church."[170]

No evidence demonstrated that any abuse occurred on church premises or during the course of church-sponsored activities; instead, the abuse occurred during private, non-church-related babysitting arrangements between Wilson and the plaintiffs' family.[171] The court majority, however, improperly looked to these non-church-related acts by a lay church member who had held high positions in the church to create a duty of care toward the plaintiffs, and then included these acts within the scope of that duty despite tort rules that provide otherwise.

First, the court found that:

> [t]he children of a congregation may be delivered into the custody and care of a church and its workers, whether it be on the premises for services and Sunday school, or off the premises at church sponsored activities or youth camps. . . . In many respects, the activities of a church, and the corresponding duties legitimately imposed upon it, are similar to those of a school.[172]

The analogy to the special custodial relationship that schools have over schoolchildren is misplaced. Justice Madsen recognized this. The school-schoolchildren special relationship is based on the fact that "[i]n the school situation, the protective custody of teachers is . . . substituted for that of the parent. A school accordingly has a duty to protect pupils in its custody from reasonably anticipated dangers."[173] While a religious institution might have special protective custody over children during religious services and classes, the acts at issue took place during

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volunteer activities in public and private schools.").

169. *Id.* at 265; Funkhouser v. Wilson, 950 P.2d 501, 503 (Wash. Ct. App. 1998), *aff'd on other grounds*, *C.J.C.*, 985 P.2d at 265.

170. *Funkhouser*, 950 P.2d at 504.

171. *Id.* at 510. Wilson admitted the sexual abuse in letters before his death, and his estate was substituted as a defendant. *C.J.C.*, 985 P.2d at 265–66.

172. *C.J.C.*, 985 P.2d at 265–66 at 274.

173. *Id.* at 281 (Madsen, J., dissenting in relevant part) (citations omitted).

a private, non-church-related babysitting arrangement, when the plaintiffs were in the custody of their parents.[174] The abuse did not take place when the children were in the protective custody of the church or taking part in church-related activities.[175] As Justice Madsen wrote, to conclude that a special custodial relationship existed between the church and the plaintiffs under these circumstances to create a duty to protect "is to expand this theory of liability beyond recognition."[176]

The majority also agreed with the plaintiffs that a duty existed because the church "placed [the perpetrator] in authority and in close relationship to church children, knowing of the danger."[177] In reaching this conclusion, the court misconstrued the *Restatement (Second)* of Torts § 302B. The *Restatement (Second)* § 302B cmt. e para. D states that liability for a third party's conduct may exist where there is a special relationship, or "[w]here the actor has brought into contact or association with the [victim] a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances *which afford a peculiar opportunity or temptation for such misconduct.*"[178]

While Wilson had held several high-profile membership positions in the church, the misconduct at issue occurred outside the church relationship. The church did not have anything to do with the private babysitting arrangements between plaintiffs' family and Wilson, which comprised the circumstances that created the "peculiar opportunity or temptation" for the abuse.[179] Such a nexus is required for a duty to arise under Section 302B.[180]

After finding that the church owed the plaintiffs a duty to protect, the majority defined the scope of that duty. In doing so, the majority wholly departed from the well-established rule that this duty is limited to acts occurring within the special relationship, including the geographical and

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 274 (quoting *Funkhouser* Supp. Br. at 7).

178. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 302B cmt. e (emphasis added). The majority also looked to a New Hampshire case imposing liability on a school for off-premises, after-hours abuse of former students under this same argument. *C.J.C.*, 985 P.2d at 273-74 (citing Marquay v. Eno, 662 A.2d 272 (N.H. 1995)).

179. *C.J.C.*, 985 P.2d at 282 (Madsen, J., dissenting in relevant part) ("Defendants did not bring Wilson and plaintiffs . . . together at Wilson's home. There is no allegation or evidence in the record that defendants recommended Wilson or his wife as child care providers, or that they had anything to do with the child care arrangements.").

180. *Id.* at 283 (Madsen, J., dissenting in relevant part) ("[T]he church or its leaders [have not] brought about an association *under the circumstances where the misconduct occurs*, as envisioned by the Restatement.") (emphasis in original).

temporal boundaries of that relationship. Instead, the court imposed an extraordinarily broad duty on the church to protect against foreseeable harms to minor church members, regardless of whether the harm occurs on or off church premises, during or outside church activities, or when plaintiffs were inside or outside "the protective custody of the Church."[181]

The duty would compromise or eliminate the volunteer work of members within the religious institution. Volunteer work is the lifeblood of religious institutions. Imposing a duty on a church or synagogue to monitor the behavior of its members, even if limited to members in leadership roles, would stifle member participation in its management and governance. Religious institutions commonly encourage their members to perform acts of charity and bolster the faith of others. Placing a general duty on a religious institution to prevent wrongful acts of members engaged in acts of private service—even if strongly encouraged by the teachings of their religious institution—is unsound social policy and would adversely impact the good work they perform.

B. In Determining Duty, it is Important to Understand the Nomenclature of Religious Institutions

The role of the courts is to develop fair and uniform laws that can account for the diversity of religious organizations. In determining the appropriate tort law duties, judges need to appreciate that different religious groups may use the same titles with different functional meanings. Judges should not assume that a religious title denotes the

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181. *Id.* at 274. The Washington Supreme Court also found, with little explanation, that the perpetrator Wilson's position in various unpaid, lay leadership roles in the church made him the church's agent, thereby creating a "special relationship" between him and the church. The court then explained that the combination of four factors meant that a duty could exist as a matter of law: (1) the special relationship between the church and deacon Wilson; (2) the special relationship between the church and the plaintiffs; (3) the alleged knowledge of the risk of harm possessed by the church; and (4) the alleged causal connection between Wilson's position in the church and the resulting harm. "Under these circumstances," the majority wrote, "we simply do not agree with the church that its duty to take protective action was arbitrarily relieved at the church door." *Id.* at 275. The court also noted the state's "strong public policy in favor of protecting children against acts of sexual abuse," as illustrated by various statutes criminalizing the failure of certain professionals to report suspected child abuse to authorities. *Id.* at 276, 276 n.16.

In his dissent, Madsen rejected the court's "intermingling" of four distinct legal theories to create a broad new duty, pointing out that the court itself had earlier frowned on that approach. *See id.* at 279 (citing Niece v. Elmview Group Home, 929 P.2d 420 (Wash. 1997) (rejecting argument which combined theory of liability for negligent supervision based on special relationship between group home and resident and theory of liability for breach of duty arising out of special relationship between group home and resident; first theory does not serve to define the duty owed under second theory)).

same level of responsibility or authority among the different religious organizations.

The variation in responsibilities and titles in religious organizations is as varied as in an institution that judges know well—law firms. For example, the traditional "partner" signified a person who held an equity stake in a firm. In law firms today, however, some own the business and are equity partners; others are not. Non-equity partners are salaried (albeit high-salaried) employees whose wages do not rise or fall with the ups and downs of the business.

Among different religions, there are even greater variances in responsibilities with respect to the same or similar titles. For that reason, no special duties should be based solely on ecclesiastical titles and nomenclature. For example, in some faith traditions, titles like "priest," "minister," and "patriarch" entail significant ecclesiastical authority, spiritual standing, and prestige. In other faiths such titles may not even exist or, if they do, have radically different meanings. Different theological traditions hold very different views on the spiritual significance, function, and power of religious ministers. To be a priest or high priest in one denomination may denote a full-time cleric with ecclesiastical authority to mediate between God and the community of faith and to provide authoritative counsel to individuals. In another denomination such titles may carry no power or status whatsoever.

In the Mormon faith, for example, the titles "priest," "elder," and "high priest" imply no ecclesiastical authority or prestige. The Mormon Church has a lay priesthood where virtually every male over the age of twelve holds an essentially honorific priesthood title of some sort. Teenage boys between the ages of twelve and eighteen hold the titles of "deacon," "teacher," and "priest," but have no ecclesiastical power within a Mormon congregation. Their functions are broadly analogous to those of a Catholic acolyte. Males over the age of eighteen typically have the title of "elder" while those over forty-five are typically "high priests." Within the Mormon polity, these membership-designation titles carry no prestige or ecclesiastical authority over the women and children who lack them. At the local level, real clerical authority is vested in "bishops" and "stake presidents" who are selected by higher priesthood authorities from the local pool of faithful elders and high priests.[182] Without an additional ordination to the position of bishop or

182. A bishop is the ecclesiastical leader of a "ward," a local Mormon congregation. A "stake president" presides over an ecclesiastical jurisdiction called a "stake," which consists of five to twelve wards in a defined geographical area. Using the Catholic Church as a point of reference, a Mormon bishop is roughly analogous to a parish pastor while a stake president is analogous to a diocesan bishop. Mormon bishops and stake presidents hold their positions for five and ten years respectively, and then

stake president, an elder or high priest is merely an ordinary member of the Mormon Church. As this example demonstrates, because of the great variation in meaning among religions, religious titles alone are never an appropriate basis for creating a duty or imposing liability on a religious institution.

VI. CONCLUSION

The unfortunate scandals involving some religious institutions and the failures of some of their leaders have been prominently displayed in the headlines in recent years. Still, courts must be careful not to allow the heinous acts of a few in leadership positions to expand the duty of churches, synagogues, or mosques beyond what is rational and reasonable, for example, to acts of members. Valid public policy reasons provided the underpinnings for the charitable immunity doctrine, but the doctrine itself was overbroad. Courts need to exercise care not to swing to an alternative example of overkill by unreasonably extending the tort duties of religious institutions. The need to preserve the financial resources of religious institutions and encourage their works that benefit the public is still very strong.

This Article does not advocate the return to total charitable immunity. Instead, we believe that courts should refrain from expanding "special relationships" where a religious institution defendant may be held responsible for the bad acts of a member or person not in the hierarchy of a church, synagogue, or mosque. Tort law has delineated "special relationships," where a defendant may be responsible for the wrongful acts of a third party, but religious institutions lack the elements of control and responsibility with respect to their members that create such special relationships.

Duties are limited when social good flows from such restraint. Thus, the federal government is not liable for public policy choices, and doctors have limited liability when they act as "Good Samaritans." Similarly, churches, synagogues, and mosques should not have the specter of liability overwhelm the good deeds they perform. Liability should not extend beyond the willful acts of religious institution officials. Imposing liability beyond that line would seriously jeopardize these unique institutions that are a fundamental part of American life.

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are relieved of their duties and returned to being ordinary church members. Bishops and stake presidents are also lay ministers who maintain their chosen secular careers, performing their clergy duties after work and on the weekends.