Liability For Sexual Abuse: The Anomalous Immunity of Churches.

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The problem of the philandering minister is not confined to the fictional character depicted in Nathaniel Hawthorne's *The Scarlet Letter*. Unfortunately, sexual exploitation[1] by members of the clergy[2] occurs with surprising frequency. Between 1983 and 1987 approximately two hundred Roman Catholic priests or brothers were publicly accused of sexual contact with children.[3] Otherwise stated, approximately once a week the Roman Catholic Church faced the devastating effects of having one of its representatives accused of child abuse.[4] Over twenty priests have been convicted and imprisoned on sexual abuse charges since 1983.[5] According to a Dominican canon lawyer, there may be as many as three thousand priests in the United States suffering from

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1. For purposes of this article, *clerical sexual exploitation* and *clerical sexual abuse* are defined as any interactions of a sexual nature (1) between a clergy member and a minor parishioner or (2) between a clergy member and a parishioner of any age whom he is counseling. It encompasses a broad spectrum of behavior, including any form of or requests for sexual penetration; kissing; or contact to the breasts, genital area, or clothing covering these areas. The consent of the parishioner is not an issue.

2. The definition of *clergy* depends on the religious group involved. For purposes of this article, it shall include "[a] person who becomes a cleric through the reception of diaconate and . . . [by being] incardinated into the particular church or personal prelature for whose service he has been advanced." Raymond C. O'Brien, *Pedophilia: The Legal Predicament of Clergy*, 4 J. Contemp. Health L. & Pol'y 91, 92 n.5 (1988) (citation omitted). This definition also encompasses any "minister, priest, rabbi, or other similar functionary of a religious organization, or and individual reasonably believed so to be by the person consulting him." Proposed Fed. R. Evid. 506 (as submitted to Congress).

Further, by using the male gender the author is neither implying that clerics are exclusively male nor expressing a preference for male clergy. Rather, it is used because the cases and research relied upon uncovered only male perpetrators.

3. Jason Berry, *Church Must Face the Sexual Crisis among Its Clergy*, Mpls. Star Trib., Sept. 26, 1989, at 15, col. 1.

4. *Id.*

5. *Id.*

pedophilia.[6] This figure represents approximately five percent of all American priests.[7] The results of a recent Wisconsin study indicate that members of the clergy represent eleven percent of all sexual misconduct perpetrated by mental health counselors.[8] Although much of the available studies and cases address sexual abuse within the Roman Catholic Church, this phenomenon knows no denominational boundary.[9] For example, in Minnesota churches have established a statewide interdenominational committee to address the issue of sexual exploitation by members of the clergy.[10]

The financial consequences of sexual abuse scandals can be devastating to churches. For example, some dioceses of the Roman Catholic Church have lost their insurance coverage for child sexual abuse cases, which has forced the Church to institute limited self-insurance plans.[11] A 1985 report to the U.S. Catholic Bishops projected that certain dioceses of the Roman Catholic Church could spend approximately one billion dollars in the next decade compensating victims of clerical sexual abuse.[12]

Despite the prevalence and significance of this problem, it has not been adequately addressed by the court system. Applicable case law illustrates a judicial failure to hold churches liable for clerical sexual abuse.[13] This article argues for the imposition of civil liability on churches for the clerical sexual abuse of parishio-

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6. *Id.* Pedophilia refers to a sexual orientation:

> towards children, regardless of whether the children are pre- or postpubertal. . . . [This definition includes three elements.] First, it is necessary to establish that the patient becomes erotically excited by the act or fantasy of engaging in sexual activities with children. Secondly, if the patient is an adult, rather than adolescent, the children must be at least ten years his junior. Finally, it must be clear that any sexual acts engaged in with children are not either due to other mental disorders such as schizophrenia, dementia or drug intoxication, or due to the lack of a suitable age-appropriate partner, which occurs in some cases of incarceration or incest.

O'Brien, *supra* note 2, at 93 (quoting Berlin, *Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment*, in Sexual Aggressor, Current Perspectives on Treatment 83, 86-87 (1983)). Studies indicate that the average pedophile is heterosexual and experiences 265 sexual contacts in his or her lifetime. Members of the clergy who abuse sexually mature minors are not considered to be pedophiles, although they could be prosecuted for statutory rape. Rorie Sherman, *Warnings Ignored? Legal Spotlight on Priests Who are Pedophiles*, Nat'l L.J., April 4, 1988, at 28.

7. Berry, *supra* note 3, at 15, col. 1.

8. Kenneth Woodward, *When a Pastor Turns Seducer*, Newsweek, Aug. 28, 1989, at 48.

9. Sherman, *supra* note 6, at 28.

10. Woodward, *supra* note 8, at 48.

11. *Id.*

12. *Id.*

13. *See* section I of this article (notes 11-50 *infra* and accompanying text).

ners. Churches, however, should not be strictly liable. Rather, liability should be limited to situations in which the church failed to properly investigate a minister prior to placement in a congregation or failed to investigate allegations of the minister's sexual misconduct.

The discussion is divided into three sections. Section I examines the scant case law on this topic and discusses the failure of the judicial system to impose liability on churches for clerical sexual abuse of parishioners. Section II presents a number of theories which have been successfully employed to impose liability on nonreligious institutions for the sexual misconduct of their employees. Curiously, these theories of recovery have not been applied by the courts to impose liability on churches for the sexual misconduct of their clergy. This section argues that judicial consistency mandates extending these theories of liability to churches. The article concludes by proposing that state legislatures adopt statutes requiring churches to investigate for sexual impropriety prior to hiring ministers. The proposed statute defines the investigative duty of a church. A statutory proposal would serve the dual purpose of protecting potential victims from a hidden abuser as well as protecting churches from the high costs of litigation and settlement by defining the required duty of investigation.

I. Judicial Reluctance to Impose Liability

Many victims of clerical sexual abuse have received large settlements from their respective churches without actually litigating the issue of liability.[14] Those who have reached the courts, however, have not fared well. Judicial decisions indicate a reluctance to hold churches liable for the sexual acts of their dysfunctional clergy. This manifests itself in a judicial hesitation to rule on the substantive issue of clerical sexual exploitation, thus leading to dismissal on procedural grounds.[15]

Sexual abuse victims and their families who do bring civil suits against churches have pursued a number of theories. These

14. In Louisiana a plaintiff received a 1.8 million dollar jury verdict for sexual abuse by a Catholic priest. The abuse occurred while the victim served as an altar boy. In an earlier case involving the same priest, the Reverend Gilbert Gauthe, another plaintiff received 1.25 million dollars. N.Y. Times, Dec. 13, 1987, at 46, col. 3. "[The Roman Catholic] church . . . along with its insurance companies has paid out more than 5.5 million to thirteen other victims in nine families in Lafayette Parish." United Press Int'l, Feb. 3, 1986, a.m. cycle. The prevalence and lucrative nature of these claims has allowed some litigation attorneys to develop a subspecialty in claims against churches for sexual abuse by clergy members. Sherman, *supra* note 6, at 28.

15. *See infra* notes 17-64 and accompanying text.

include respondeat superior, agency principles, negligent hiring and/or negligent retention of an unfit employee, and failure to properly supervise the victim.[16] Although such theories routinely provide relief for victims of sexual abuse by non-clergy,[17] they have proven unsuccessful for victims of sexual abuse by ministers. No viable explanation exists for this unequal treatment. Similarly situated plaintiffs deserve similar treatment. The following cases represent the only case law addressing the civil liability of churches for clerical sexual abuse of parishioners and demonstrate the courts' immunization of churches from such challenges.

In *Milla v. Tamayo*, seven priests sexually abused, frequently on church premises,[18] a sixteen-year-old girl ("Rita") who trusted them as spiritual advisors.[19] Despite the priests' egregious treatment of Rita, the California Court of Appeals had the audacity to imply that she was a co-conspirator and affirmed a lower court decision that a one-year statute of limitations barred her claims.[20] Notwithstanding the procedural dismissal, the court's spurious reasoning and dicta provide insight into the judicial refusal to extend civil liability in this context.

Rita was first sexually exploited by a priest in a confessional booth.[21] The priest began to fondle her.[22] He assured Rita that sexual activity with him, including intercourse, was ethical and religiously permitted.[23] Later, the other priests gave Rita similar assurances and she complied with their sexual demands because of these assurances.[24] Because of the priests' religious positions, Rita relied on their good will as spiritual advisors and counselors and accepted their representations.[25] At that time she was devoutly committed to the church and aspired to be a nun.[26]

Rita became pregnant by one of the priests. The priests devised a plan to secure Rita's silence: They would send her to the Phillipines to give birth and leave the baby there. She would then

16. Jeffrey Anderson, Civil Liability for Sexual Exploitation, pp. 3-12.

17. *Id.*

18. "While Rita was still sixteen, [Father] Tamayo made sexual advances toward her and succeeded in kissing and fondling her breasts. Such advances took place in a private room and in a confessional booth at St. Philomena." Appellant's Opening Brief at 6, Milla v. Tamayo, 187 Cal. App. 3d 1453, 232 Cal. Rptr. 685 (1986) (No. C485-488).

19. *Id.* at 6-7.

20. Milla v. Tamayo, 187 Cal. App. 3d 1453, 232 Cal. Rptr. 685, 690 (1986).

21. *Id.*

22. *Id.*

23. *Id.* at 1457, 232 Cal. Rptr. at 687.

24. Appellants' Opening Brief, *supra* note 18, at 6.

25. *Id.*

26. *Milla*, 187 Cal. App. 3d at 1456, 232 Cal. Rptr. at 687.

return to the United States without notifying anyone of her pregnancy, delivery, or sexual relations with the priests. Finally, a priest would tell Rita's parents that she was going to the Phillipines to study medicine.[27]

Promising to send money, the priests sent Rita to the Philippines. They failed, however, to send adequate funds; she suffered from malnutrition and nearly died in an emergency cesarean section. Rita then confided in a bishop, telling him that a priest was the father of her child. The Bishop instructed Rita not to tell anyone and promised he would resolve the matter when he returned to Los Angeles.[28]

Rita did not hear from him again. Upon returning to Los Angeles, she notified another bishop of her predicament. He also assured her that he would investigate the situation. Subsequently, he told her that there was nothing he could do for her. At this time Rita became disillusioned with the Catholic Church and sought legal counsel.[29]

Rita's complaint alleged that seven priests of the Roman Catholic Church entered into a conspiracy to have sexual contact with her.[30] The complaint contained claims of civil conspiracy, fraud and deceit, professional malpractice, and negligence.[31] The trial court held that the one-year statute of limitations barred the civil conspiracy, professional malpractice, and negligence claims.[32] The court also failed to hold the Archbishop liable for fraud and deceit under the theory of respondeat superior.[33] On appeal Rita's counsel argued against affirming the trial court's decision to sustain the Archbishop's demurrer. She maintained that the conspiracy allegations prevented the tolling of the statute of limitations on Rita's claim since the purpose of the conspiracy was to preserve the secrecy of these sexual encounters.[34]

The California Court of Appeals rejected Rita's argument and

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27. *Id.* at 1457, 232 Cal. Rptr. at 688.
28. Appellants' Opening Brief, *supra* note 17, at 6-10.
29. *Id.*
30. *Milla*, 187 Cal. App. 3d at 1457, 232 Cal. Rptr. at 688.
31. *Id.*
32. *Id.*
33. *Id.*
34. Appellants' Opening Brief, *supra* note 18, at 34-35.

> The crux of the complaint is that the defendant priests sought to conceal their misconduct from the outside world. Thus, acts designed to conceal the sexual relations and/or Rita's pregnancy from the outside world were in furtherance of the conspiracy. In the meanwhile, Rita was duped into believing that the sexual relations were morally and ethically permissible and not otherwise harmful.

Id.

affirmed the trial court. With respect to the tolling of the statute of limitations, it stated:

> [W]e pause to note an obvious, albeit often overlooked proposition. The doctrine of fraudulent concealment [for tolling the statute of limitations] does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim.[35]

The court refused to grant Rita relief because she "participated in the object of the conspiracy" by keeping silent and, therefore, was "clearly placed on notice."[36] Her participation, however, was merely in relying on the advice and counsel of her spiritual advisors. The court clearly failed to appreciate the power and control a Roman Catholic priest exercises over a sixteen-year-old girl aspiring to become a nun.

The court of appeals also rejected Rita's claim against the Archbishop under a respondeat superior theory. It reasoned, "An employer may be held responsible for tortious conduct by an employee only if the tort is committed within the course and scope of employment."[37] Therefore, respondeat superior "turns on whether (1) the act performed was either required or instant to the employee's duties or (2) the employee's misconduct could be reasonably foreseen as an outgrowth of the employee's duties."[38] It found that sexual contact with parishioners is not a requirement of the priesthood; therefore, Rita's claim failed the first prong of the test.[39] With respect to foreseeability, the second prong, the court stated, "It would defy every notion of logic and fairness to say that sexual activity between a priest and a parishioner is characteristic of the Archbishop of the Roman Catholic Church."[40] Thus, the priests' conduct was found not to be foreseeable.

The court failed to consider the foreseeability issue seriously. First, there was evidence that two of the seven priests had previous allegations of sexual impropriety leveled against them.[41] Second, since at least once a week a clergy member is publicly accused

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35. *Milla*, 187 Cal. App. 3d at 1460, 232 Cal. Rptr. at 690 (quoting Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985)).

36. *Milla*, 187 Cal. App. 3d at 1460, 232 Cal. Rptr. at 690.

37. *Id.* at 1461, 232 Cal. Rptr. at 690.

38. *Id.* (quoting Martine v. Hagopian, 182 Cal. App. 3d 1223, 1228-29, 227 Cal. Rptr. 763 (1986)) (emphasis added).

39. *Milla*, 187 Cal. App. 3d at 1461, 232 Cal. Rptr. at 690.

40. *Id.*

41. Appellants' Opening Brief, *supra* note 18, at 42 (evidence indicated that the Archbishop knew of incidents of sexual indiscretion with other parishioners by two of the defendant priests prior to the incidents with Rita). The *Milla* court, however, failed to acknowledge this alleged prior conduct in its opinion.

of sexually abusing a child,[42] it was disingenuous of the court to hold that Rita's abuse was not foreseeable. Thus, Rita was victimized not only by seven priests but also by a judicial system which refused to see the validity of her claims.

The *Schultz* series of three cases fortifies the principle established in *Milla v. Tamayo* that courts may cloak themselves in procedural issues to avoid addressing the disturbing problem of clerical sexual abuse.[43] In the *Schultz* cases the plaintiffs' alleged that the defendants were negligent in hiring and/or supervising the defendant, Edmund Coakeley, a Franciscan Brother who sexually abused the Schultz's children.[44] The plaintiffs sought damages for the abuse of their sons, Richard and Christopher, and for the wrongful death of Christopher who committed suicide.[45] They argued that Christopher committed suicide because of his inability to cope with the trauma of the sexual abuse.[46] The emotional trauma was suffered not only by Richard and Christopher. Shortly after the suicide, their mother suffered a nervous breakdown.[47]

The Franciscan Brothers assigned Coakeley to teach in a Roman Catholic school in New Jersey, and he also was appointed scout master for the school's Boy Scout troop.[48] Coakeley began to sexually abuse the boys, both in church and in school, when Richard was thirteen and Christopher only eleven years old.[49] The abuse continued on Scout camping trips.[50] He threatened harm to each boy individually to procure their silence and continued sadomasochistic abuse of Christopher upon their return.[51]

Eventually, Richard revealed to his parents that he and Christopher were being sexually abused by Coakeley.[52] Both boys received psychiatric care, and Christopher ultimately was placed in a psychiatric hospital.[53] Shortly thereafter, he killed himself by ingesting a lethal dose of drugs.[54]

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42. Berry, *supra* note 3, at 15, col. 1.

43. Schultz v. Roman Catholic Archdiocese of Newark, 95 N.J. 530, 472 A.2d 531, 536 (1984) [hereinafter Schultz I]; Schultz v. Boy Scouts of Am., Inc., 102 A.D.2d 100, 476 N.Y.S.2d 309, 313 (1984) [hereinafter Schultz II]; Schultz v. Boy Scouts of Am., Inc., 64 N.Y.2d 1165, 491 N.Y.S.2d 90 (1985) [hereinafter Schultz III].

44. Schultz III, 64 N.Y.2d at 192, 491 N.Y.S.2d at 92.

45. *Id.*

46. *Id.*

47. Schultz II, 102 A.D.2d 100, 476 N.Y.S.2d 309, 313 (1984).

48. Schultz III, 64 N.Y.2d at 192, 491 N.Y.S.2d at 92.

49. *Id.*

50. *Id.* at 193, 491 N.Y.S.2d at 92.

51. Schultz II, 102 A.D.2d 100, 476 N.Y.S.2d 309, 312 (1984) (Murphy, J., dissenting).

52. *Id.*

53. *Id.*

54. Schultz III, 64 N.Y.2d 192, 193, 491 N.Y.S.2d 90, 92 (1985).

The Schultz's first brought suit against the Archdiose of Newark, attempting to hold the defendent liable for the negligent hiring and supervision of Brother Coakeley.[55] The Supreme Court of New Jersey, however, found that the state's charitable immunity statute barred their claims. It stated, "whatever this Court's views of immunity, we should apply this statute as the Legislature intended."[56]

The Schultz's then attempted to hold the Boy Scouts of America responsible for Coakeley's actions as a troop leader. Since the Boy Scout camp at which the abuse occurred was located in upstate New York, they brought the case before the New York courts.

The Court of Appeals of New York denied the plaintiffs relief.[57] It held that the plaintiffs had previously litigated the same claim against the Archdiocese in the New Jersey action. Therefore, the court reasoned, they were collaterally estopped from relitigating these claims in New York.[58] The court relied upon the Supreme Court of New Jersey's application of the New Jersey charitable immunity statute,[59] despite the fact that New York had abolished its charitable immunity statute over thirty years ago and that much of the abuse occurred in New York.[60] Consequently, neither the New Jersey nor the New York courts considered the merits of the plaintiffs' case.

The dissent in the New York Court of Appeals' decision exposes the weaknesses of the majority's analysis. The dissent opined that New York's interest in applying the New Jersey charitable immunity statute is too attenuated when compared with New York's strong interest in applying its charitable non-immunity policy. Accordingly, New York's public policy should prevail, and the

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55. Schultz I, 95 N.J. 530, 472 A.2d 531, 532 (1984).

56. *Id.* at 471, A.2d at 535 (citations omitted).

57. Schultz III, 64 N.Y.2d 1165, 491 N.Y.S.2d 90 (1985).

58. *Id.* at 205, 491 N.Y.S.2d at 101.

59. Schultz I, 95 N.J. 530, 472 A.2d 531, 536 (1984).

The New Jersey Supreme Court split four to three on whether the charitable immunity statute should apply. The majority held that the legislature had spoken on the issue by statutorily barring the plaintiff's claim. *Id.* The dissent argued that the statute applied to negligent acts but remained silent on the issue of liability for intentional torts. *Id.* at 543. The dissent also stated that the immunity was conditional, not automatic. "Immunity does not attach simply because the entity is a charity. Rather, its availability is determined by whether the entity is acting charitably when the tortious conduct occurs." *Id.* at 542. As the sexual exploitation of Christopher and Richard "destroyed any vestige of a beneficent nexus" between the boys and the defendants, the dissent believed that the charitable immunity statute should not apply. *Id.* at 543.

60. Schultz III, 64 N.Y.2d at 202, 491 N.Y.S.2d at 92.

plaintiffs' claims should not be barred.[61] It reasoned:

> There can be no question that this State has a paramount interest in preventing and protecting against injurious misconduct within its borders. This interest is particularly vital and compelling where, as here, the tortious misconduct involves sexual abuse and exploitation of children, regardless of the residency of the victims and the tort-feasors.[62]

Even if the defendants' negligent hiring and retention of Coakeley began in New Jersey, the negligence ultimately impacted on the state of New York. New York has an overriding interest in protecting persons from the criminal activity of which Brother Coakeley is charged.[63] Indeed, New York has a compelling interest in enforcing civil laws against an abuser like Coakeley and the institutions of which he is an agent.[64] Once again, due to an unwillingness to address the substantive issues of clerical sexual abuse, courts denied recovery to a deserving plaintiff by cloaking themselves in a procedural shroud.

II. Recovery Theories

The anomalous immunity from liability that churches enjoy is exposed by examining courts' interpretation and application of various recovery theories in cases of sexual exploitation by an employer's agent or employee. This also illustrates the unequal and unjustifiable benefit to churches bestowed by such immunity. Specific theories discussed include respondeat superior, agency law, negligent hiring, and negligent retention of an unfit employee.

A. Respondeat Superior

Courts should impose liability on churches for clerical sexual abuse on the basis of respondeat superior. A non-negligent party can be held liable under respondeat superior based on a relationship the non-negligent party has with the party at fault.[65] For example, this theory is frequently utilized to hold employers liable for the acts of their employees.[66] Respondeat superior differs from negligent hiring and negligent retention of an unfit employee in that the former is not based on the negligence of the employer but rather imputes the negligence or intentional conduct of the em-

61. *Id.* at 205, 491 N.Y.S.2d at 101.
62. *Id.* at 207, 491 N.Y.S.2d at 102.
63. *Id.* at 208, 491 N.Y.S.2d at 103.
64. *Id.* at 208-11, 491 N.Y.S.2d at 103-04.
65. William Prosser, Handbook of the Law of Torts, § 69, at 499 (1971).
66. *Id.* at 500.

ployee onto the employer.[67] Liability under respondeat superior is deemed justified since the employer chose the employee and entrusted her to a responsible position.[68] Accordingly, it is considered more equitable that the employer suffer as a result of the employee's misbehavior rather than an innocent victim.[69]

Many commentators suggest that the availability of respondeat superior stems from the prevalent social policies of risk spreading and deterrence and from the general concern for compensating injured plaintiffs. The risk spreading theory posits that institutions are more capable both of compensating victims and of insuring against such risks; consequently, they should be held liable.[70] Deterrence proponents suggest that an employer who is held liable for the wrongful acts of employees has an incentive to carefully select, instruct, and supervise them.[71]

Although churches as charitable institutions are not able to pass the cost of compensation on to society through increased prices of products or services, churches should be held accountable for two reasons. First, churches are in a better position than individual plaintiffs to bear the financial cost of clerical abuse by obtaining liability insurance. Second, churches have the control potential plaintiffs lack to implement internal mechanisms to prevent sexual abuse.[72]

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67. *Id.*

68. *Id.*

69. Ralph L. Brill, *The Liability of an Employer for the Willful Torts of His Servants*, 45 Chi. Kent L. Rev. 1, 14 (1968).

70. *Id.* at 3 (quoting Young B. Smith, *Frolic and Detour*, 23 Colum. L. Rev. 444, 457-58 (1923)) ("[I]t is socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few.").

71. Even when insurance becomes unavailable, large religious institutions such as the Roman Catholic Church have instituted self-insurance plans. Sherman, *supra* note 6, at 28.

72. *See* Chancellor Kevin McDonough, Some Painful Lessons in Pastoral Responsibility: A Presentation to the Bishops of the Evangelical Lutheran Church of America, 3-4 (October 12, 1989) ("It is critical that we not promise more administrative control than we are capable of exercising, and conversely, it is also critical that we have the self-discipline to follow through on our public commitments to supervision and responsibility. The lawsuits brought against Church administrators alleging negligence on our part reflect this principle. We are being held accountable for the way we hold others accountable.").

One example of possible internal mechanisms that religious organizations can use to prevent abuse is the following set of guidelines promulgated by a Minnesota interdenominational committee:

> To prevent further sexual exploitation by clergy, the following recommendations are proposed:
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> * Religious endorsing bodies and/or seminars should do careful screening.
> * Seminaries should encourage or require courses and workshops for students and clergy on:

Under respondeat superior an employer is held liable for the intentional torts of an employee if the employee was acting within the general scope of employment or if the activity was in a broad sense job-connected.[73] Thus, an employer can be held liable when an employee has sexually exploited an individual if the exploitation had some causal connection to the employee's job.[74] For example, courts have held mental health clinics liable when therapists employed by the clinics sexually exploit patients.[75] Courts focus on whether the source of the abuse is related to the therapist's duties and whether the sexual activity occurs within the scheduled time and place of the therapy session.[76] A "but for"

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* sexual abuse/exploitation;
* power and authority of the role of religious leader;
* responsibility of the role of religious leader;
* counseling skills;
* stress management;
* healthy sexuality;
* sound interpersonal and sexual boundaries;

* Clergy and seminaries should be encouraged to adopt life patterns that promote physical, mental, emotional and spiritual health.
* Counseling supervision and support systems should be available for clergy and seminarians.

The Minnesota Interfaith Committee on Sexual Exploitation by Clergy, Entrusted to Our Care, Sexual Exploitation by Clergy: Reflections and Guidelines for Religious Leaders, 1989 (unpublished report) [hereinafter Interfaith Committee].

73. Brill, *supra* note 69, at 11-14 ("Thus, it would seem that the trend of decisions is to broaden substantially the meaning of 'scope of employment,' and to include within its coverage personal failings of the servant which have some causal relationship to his job.").

74. Bowman v. Home Life Ins. Co. of Am., 243 F.2d 331, 335 (3d Cir. 1957) (the employee "was armed by his principal with the means to do what he did and . . . the excess of his activities beyond his authority is at the principal's risk"); *see generally* Annotation, *Liability of Hospital or Clinic for Sexual Relationships with Patients by Staff Physicians, Psychologists, and Other Healers*, 45 A.L.R. 4th 289 (1986).

75. Marston v. Mpls. Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306 (Minn. 1982); *see generally* Annotation, *supra* note 74.

76. *Marston*, 329 N.W.2d at 310 (quoting Lange. v. National Biscuit Co., 297 Minn. 399, 211 N.W.2d 783, 786 (1973)). In *Marston* a psychologist employed by the clinic took advantage of his position as a therapist to engage in sexual relations with two patients. Focusing on the clinic's liability, the court concluded:

> Dr. Nuernberger, however, did act intentionally. In his relations with his patients, he intentionally departed from the standards of his profession, not, it is true, to cause harm to the two patients, but rather to confer a personal benefit on himself. This does not appear to be simply a case of a mutual infatuation; rather, it seems to be one where it is shown that the doctor imposes his personal, improper designs on the patient in a professional setting and—as some of the evidence suggests—the patient submits to the advances because of the very mental and emotional problems for which she is being professionally treated, thereby exacerbating these problems. In such a case, a jury might find that the employee's conduct is so related to the employment that the employer may be vicariously liable.

Id. at 310-11.

Regarding infractions committed by members of all professional associations, a

causation test is applied: but for the abusing therapist's employment with the mental health institution, the victim would not have consulted the therapist and the abuse would not have occurred.[77] In short, if the sexual activity coalesced with the therapy sessions, respondeat superior applies.

Sexual exploitation in the church is similar to sexual abuse of mental health patients for two reasons. First, victims of sexual abuse by the clergy are often vulnerable persons. Frequently, they are children.[78] Others are troubled individuals seeking counseling services.[79]

Second, like a psychotherapist, an abusive minister may manipulate victims by using his professional position to gain their trust.[80] A psychotherapist may "prescribe" sexual relations, and the client complies because of the therapist's authority and expertise. Similarly, the parishioner believes the minister is acting with the parishoner's best interest at heart.[81] Victims may rely on a minister's assertion that sexual activity is religiously permissible[82] or that a vow of celibacy only applies to heterosexual relationships, thus allowing any homosexual activity.[83] A minister's control is further heightened when the sexual requests or assaults occur when the minister is serving an ecclesiastical function.

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concurring justice stated, "I would instruct the jury that because of the personal and confidential relationship that exists between the members or employees of the association and the patient or client of the professional association, any transgressions are the responsibility of the assoication." *Id.* at 312 (Todd, J., concurring specially).

77. *Id.* at 311.

78. *See* Berry, *supra* note 3, at 15, col. 1.

79. Woodward, *supra* note 8, at 48 ("for most Americans, the place to turn first with personal problems remains the clergy").

80. *See* Milla v. Tamayo, 187 Cal. App. 3d 1453, 1457, 232 Cal. Rptr. 685, 687 (1986) ("parish priests . . . formed a conspiracy with the objective of utilizing their positions as priests and their confidential relationship with Rita to entice her to have sexual intercourse with them").

81. *See generally* Statement of Facts, J.D. v. Diocese of Winona, Archdiocese of St. Paul & Mpls. (priest met his victims through church-sanctioned activities, including coaching a boys' basketball team and serving as a high school principal; other victims included altar boys and boys attending church sponsored events under the supervision of the priest). *See also* Mpls. Star & Trib., Aug. 22, 1989, at 3B, col. 1 ("The [priest] abused the boy in [the priest's] office, in the church before mass, the rectory . . . and at the St. Paul Seminary. Further abuse occurred when the victim sought counseling from another priest."). *See also* Sherman, *supra* note 6, at 29 (Louisiana priest admitted to sexually abusing at least thirty-seven children; many, if not all, of his victims were altar boys).

82. *See* Milla, 187 Cal. App. 3d at 1457, 232 Cal. Rptr. at 687 ("Rita had sexual intercourse with the parish priests after having been told . . . that the acts were ethically and religiously permissible.").

83. *See* Plaintiff's Second Amended Complaint at 21, Riedle v. Diocese of Winona (No docket number) (1987).

Since courts do not allow mental health clinics to escape liability for assaults committed by their agents, it is aberrant to grant churches immunity for the identical sexual misconduct by their ministers. The unjustifiable result that similarly situated plaintiffs are treated differently exposes the unequal and favorable treatment churches enjoy in these cases. A person who sought the nurturing and spiritual environment of a church should not be denied recovery for assaults which transpired as a result of a minister's desire for personal gratification. Applying the reasoning adopted in the mental health context to the religious context, the causation issue would be: but for the church's employment of the minister which concomitantly stamped him as a religious and trustworthy person, the victim would not have sought religious counsel from the abusing minister and the sexual exploitation would not have occurred.

Courts acknowledged the heightened vulnerability a mental health patient has towards a therapist by allowing patients to recover damages from the therapist's employer. Likewise, courts should provide recovery for victims of sexual exploitation by ministers. Allowing recovery for the psychotherapist's victim and yet refusing to allow recovery for the minister's victim sanctions inequitable results. A victim's right to recover damages should not depend on whether the abuser is affiliated with a religious institution. Any inequality of treatment is clearly suspect. Thus, victims of clerical abuse should be allowed to recover from churches under the theory of respondeat superior.

B. Agency Law

Principles of agency law should also be available to hold churches accountable for clerical sexual misconduct. Specifically, the doctrine of apparent authority applies. Similar to respondeat superior, liability based on apparent authority imputes the actions of the employee onto the employer.[84] This doctrine holds a principal liable for the intentional torts of employees when the tort was caused by the nature of the employee-tortfeasor's employment position.[85] Unlike respondeat superior, liability based on apparent

84. Apparent authority exists when, due to the behavior of a principal, a third party holds a good faith belief that an agent acted with actual authority. It frequently exists when the principal allows a situation which misleads the innocent third party. Harold Reuschlein & William Gregory, The Law of Agency and Partnership § 23 (1990).

85. Allen O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563, 589 (1988).

authority does not limit liability to torts committed within the scope of the tortfeasor's employment.[86] According to the *Restatement (Second) of Agency*, liability may be imposed on a principal if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or [she] was aided in accomplishing the tort by the existence of the agency relation."[87]

Using the doctrine of apparent authority, courts frequently hold employers liable for sexual assaults committed by their agents.[88] In *Bowman v. Home Life Insurance Co. of America* the court applied the apparent authority doctrine of agency law to hold an employer liable in a case that is analogous to clerical sexual abuse.[89] The deceitful way in which the employee abused his authority is similar to the deception practiced by the sexually exploitive minister.[90]

In *Bowman* the plaintiff and her daughter applied for health insurance with the defendant insurance company. The insurance company had employed an underwriter who later impersonated a physician in order to perform intimate examinations of the plaintiff and her daughter. To enhance his credibility, the underwriter conducted the examinations while using information acquired from his files containing the plaintiffs' insurance application forms.[91]

The only issue on appeal was whether the insurance company could be held liable for the intentional torts of the underwriter.[92] The court of appeals cited sections 261 and 262 of the *Restatement*

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86. *Id.*

87. Restatement (Second) of Agency § 219 (1958).

88. *See* Bowman v. Home Life Ins. Co., 243 F.2d 331 (3d Cir. 1957); Appelwhite v. Baton Rouge, 380 So. 2d 119, 122 ("law enforcement officer [who raped plaintiff] has abused the 'apparent authority' given such persons to act in the public interest"); Henson v. City of Dundee, 682 F.2d 897, 910 (Ca. 11 1982) ("supervisor relies upon his apparent . . . authority to extort sexual consideration from an employee"); *see also* 53 Am. Jur. 2d *Master and Servant* § 910 (1964).

89. *Bowman*, 243 F.2d at 332.

90. *See generally* Woodward, *supra* note 8, at 48.

> There is what many have termed a 'power imbalance' or 'power differential' between someone seeking counseling and a clergyperson. Clergy are invested through their position with the deepest confidence of the parishioner who comes seeking help. Sexual contact is a gross misuse of that power and authority. It is a massive breach of sacred trust that takes advantage of another's vulnerability. We, as the church, must recognize the power vested in our leadership and respond faithfully to the trust of others.

Interfaith Committee, *supra* note 72, at 3.

91. *Bowman*, 243 F.2d at 333.

92. *Id.*

(Second) of Agency as controlling authority[93] and held that the insurance company was liable for the intentional torts of the underwriter.[94] It reasoned that by providing the underwriter with the information in the files the insurance company provided him with apparent authority to ask many questions and gain access to substantial information. The sham the underwriter perpetrated was "a kind of deceit which was well within the insignia of office with which he had been clothed."[95]

Similarly, when ministers represent to their victims that sexual contact with the minister is permissible, these representations are made "within the insignia of office" with which the church has "clothed" the ministers.[96] For example, churches represent their clergy as standing in a special relationship to God, and parishioners rely on this representation.[97].

Indeed, in Christian denominations the minister is perceived as Christ's representative on earth.[98] When a church places authority of this magnitude upon ministers it must be held accountable when that minister, by way of apparent authority, secures compliance with his sexual demands by asserting that the sexual activity serves a religious purpose. One authority noted, "What makes the clerical seduction different from those of secular counselors is the God factor: unlike other therapists, the minister's power and authority are perceived as ultimately derived from the Lord. . . . The God factor clouds the perceptions of the minister's victim. 'In the victim's perspective, that person *is* God.' "[99]

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93. The court quoted the following sections of the Restatement:

> 261. Agent's Position Enables Him to Deceive.
>
> A principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud.
>
> 262. Agent Acts for His Own Purposes.
>
> A person who otherwise would be liable to another for the misrepresentations of one apparently acting for him, under the rule stated in § 261, is not relieved from liability by the fact that the apparent agent acts entirely for his own purposes, unless the other has notice of this.

Id. at 374 (quoting Restatement (Second) of Agency §§ 261 & 262 (1957)).

94. *Id.* at 335.

95. *Id.* at 334.

96. *See* notes 82-83 *supra* and accompanying text.

97. "Responsible clergy are aware of their sacred calling as servants of God and of their responsibility to the people entrusted to their care." Interfaith Committee, *supra* note 72, at 10.

98. Dietrich Bonhoeffer, Spiritual Care 10 (Jay Rochelle trans. 1985).

99. Woodward, *supra* note 8, at 48.

C. Negligent Hiring Theory

Negligent hiring theory is another way in which churches could be held liable for clerical sexual abuse. Unlike respondeat superior, negligent hiring theory focuses on the negligence of the employer rather than the culpability of the abuser. Therefore, it advances the element of fault which is inapplicable under respondeat superior.[100] Negligent hiring theory does not impute the negligence of the employee onto the employer but rather finds fault in the employer's actions or omissions. Fault is established when an employer fails to use reasonable care in the selection or retention of an employee and that employee injures the plaintiff.[101] Successful applications of negligent hiring theory demonstrate that the employer itself is negligent because it selected or retained an employee who was unfit to fulfill the particular position. By negligently placing an unfit employee in an employment situation in which harm to others is reasonably foreseeable, the employer is rendered liable.[102] Thus, the theory places an affirmative duty on the employer to use reasonable care in the selection and retention of employees.[103]

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100. There are other differences between negligent hiring theory and respondeat superior. First, punitive damages may be awarded under negligent hiring but are not available under respondeat superior. Cindy M. Haerle, Note, *Minnesota Developments—Employer Liability for the Criminal Acts of Employees under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 Minn. L. Rev. 1303, 1306-7 (1984). Second, longer statutes of limitation may be available for plaintiffs under negligent hiring. Third, negligent hiring may allow a plaintiff to avoid typical respondeat superior defenses, including contributory negligence and assumption of risk. Finally, evidence of an employee's previous negligent behavior may be admissible under negligent hiring theory but is inadmissible under respondeat superior. *See* Donald K. Armstrong, Comment, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52 Or. L. Rev. 296, 304-305 (1973). *Compare* Estate of Arrington v. Fields, 578 S.W.2d 173 (Tex. Ct. App. 1979) (employee's past criminal record admissible under negligent hiring theory) *with* Parkinson v. Syracuse Transit Corp., 279 A.D. 848, 109 N.Y.S.2d 777 (1952) (evidence of employee's prior accidents not admissible to prove negligence at time of accident).

101. Brill, *supra* note 69, at 15. Respondeat superior and negligent hiring theory are derived from two different traditions. Respondeat superior began under Greek and Roman law and allowed recovery from the master when his family, animals, or slaves caused harm. Conversely, negligent hiring theory developed out of the common law tradition arising from the duties employers owed to employees. The breadth of such duties increased over time to include care in selecting fellow employees and, ultimately, a duty to third parties to employ competent persons. Haerle, *supra* note 100, at 1306.

102. Brill, *supra* note 69, at 15.

103. Some jurisdictions require that the employer have actual knowledge of the servant's lack of fitness before the employer is deemed negligent. Most courts require the employer to conduct a reasonable investigation prior to employment; therefore, negligence may be based on constructive knowledge. Some courts have held that a failure to conduct any investigation is per se negligence. Others indicate

One commentator justified liability based on negligent hiring theory by stating:

> [I]f the master has knowledge that an employee has dangerous propensities, such as a violent temper or sadistic tendencies, and the master nevertheless hires him or keeps him in his employ, the master is foreseeably exposing people who will come into contact with the servant to a serious risk of harm.[104]

A plaintiff who utilizes negligent hiring theory must first establish that the employer owed the plaintiff a duty to hire and retain only fit employees.[105] A duty exists when there is some type of connection between the plaintiff and the employer.[106] Courts have found a duty to exist between businesses and their customers,[107] students and schools or school districts,[108] prisoners and prison officials,[109] tenants and landlords,[110] and tenants and public housing authorities.[111] Accordingly, the duty requirement could be met by the relationship between a minister and a church member.

Whether a court would find that a duty exists depends primarily upon the circumstances surrounding plaintiff's initial contact with the employee. For example, if the abusive employee had

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that the employee's incompetance must be ascertainable at the time of the hiring. Haerle, *supra* note 100, at 1310.

104. Brill, *supra* note 69, at 15-16.

105. Haerle, *supra* note 100, at 1308.

106. John C. North, Note, *The Responsibility of Employers for the Actions of their Employees: The Negligent Hiring Theory of Liability*, 53 Chi. Kent L. Rev. 717, 721 (1977).

107. Hersh v. Kentfield Builders, Inc., 385 Mich. 410, 412, 189 N.W.2d 286, 288 (1971) ("An employer who knew or should have known of his employee's propensities and criminal record before commission of an intentional tort by employee upon customer who came to employer's place of business would be liable for damages to such customer."); Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951) ("One dealing with the public is bound to use reasonable care to select employees competent and fit . . . and to refrain from retaining the services of an unfit employee.").

108. Wagenblast v. Odessa School Dist., 110 Wash. 2d 845, 758 P.2d 968 (1988) ("school district owes a duty to its students to employ ordinary care and to anticipate reasonably foreseeable dangers so as to take precautions for protecting the children in its custody from such dangers"); Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238, 1243-44 (Idaho 1986) (school district may be liable for its negligence when a teacher sexually assaults students).

109. Parker v. Williams, 862 F.2d 1471 (11th Cir. 1989) (county may be liable for plaintiff's injuries resulting from her rape and kidnapping by the county's chief jailer if, on remand, the court finds that the county's inadequate hiring policy was a proximate cause of the rape); Redmond v. Baxley, 475 F. Supp. 1111 (E.D. Mich. 1979) (prison officials may be liable for injuries sustained when a prisoner was raped by fellow inmates).

110. Kendall v. Gore Properties, Inc., 236 F.2d 673, 677-79 (D.C. Cir. 1956); Mallory v. O'Neil, 69 So. 2d 313, 315 (Fla. 1954); Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983); La Lone v. Smith, 39 Wash. 2d 167, 234 P.2d 893 (1951).

111. Cramer v. Housing Opportunities Comm'n of Montgomery, 304 Md. 705, 501 A.2d 35 (1985); P.L.C. v. Housing Auth. of Warren, 588 F. Supp. 961 (W.D. Pa. 1984).

an employment-related reason for interacting with the plaintiff, a claim that the defendant owed the plaintiff a duty is strengthened.[112] A plaintiff can successfully assert the defendant owed her a duty if the defendant initially met the plaintiff through a work-related incident.[113] Thus, if a minister sexually exploited a parishioner at the parishioner's home, the church could still be held liable as a duty would exist even if the abuse did not occur on the church's property or during work hours. In this situation, the church's duty would be predicated on the relationship between the minister and the parishioner which began solely because of the minister's relationship to the church.

After establishing that the employer owed the plaintiff a duty, the court must determine what type of duty was owed. In most jurisdictions employers have a duty to investigate prospective employees.[114] The investigation which an employer must undertake to avoid liability is contingent on the type of employment involved[115] and varies positively with the severity of risk to third persons.[116]

Determining whether an employer breached this duty depends upon evidence existing prior to and at the time of the hiring.[117] In some jurisdictions the specific injury sustained by the plaintiff need not be foreseeable as long as there is a foreseeable risk of some injury.[118] When an employer fails to conduct a pre-employment investigation, several courts have held the employer negligent per se.[119]

Although the requirement of a pre-employment investigation is well-established,[120] applying it to churches presents unique issues arising from their internal structures. A potential problem is how to determine when a minister is "hired". Should the hiring date back to ordination, admission to seminary, or to placement in each new congregation? This issue is relevant in a negligent hiring action since the defendant is held accountable for knowledge held, or knowledge which reasonably should have been held, at the time

112. Haerle, *supra* note 100, at 1308-09.

113. North, *supra* note 106, at 723.

114. Haerle, *supra* note 100, at 1310.

115. *See id.* at 1311.

116. *Id.*

117. *See id.* at 1313.

118. Prosser, *supra* note 65, at 263 (in Louisiana, Minnesota, Vermont, and Wisconsin the foreseeability of the specific injury need not be apparent in determining proximate cause).

119. Haerle, *supra* note 100, at 1310.

120. *Id.*

of hiring.[121]

The impact of this determination is especially important given an all too frequent scenario: the transfer of a sexually-exploitive minister to a new, unsuspecting congregation after a former congregation discovered the minister's sexual transgressions.[122] Consequently, a church could escape liability under the negligent hiring theory and continue to endanger unsuspecting parishioners by simply asserting that hiring occurred at ordination. Therefore, public policy dictates that courts in clerical sexual abuse cases should construe "hiring" as placement in a new congregation. Such a rule should apply regardless of the length of the minister's tenure with the larger religious institution.

One court already has found that a church had a duty to investigate the background of a non-clerical employee before hiring.[123] In *J. v. Victory Tabernacle Baptist Church*, failure to conduct a pre-employment investigation resulted in the imposition of liability on the church for a non-clerical employee's sexual assault of a ten-year old parishioner.[124] The plaintiff's complaint alleged that the church hired and entrusted the employee with duties in which contact with children was foreseeable.[125] It also stated that the employee came into contact with the plaintiff through Victory Tabernacle Baptist church and that he raped her on at least one occassion in the church building.[126]

The court held the church liable for negligently hiring the employee, who previously had been convicted of aggravated sexual assault and whose probation terms forbade him from having contact with children.[127] The court found that the church failed to investigate the employee's background adequately and, therefore, negligently hired him.[128]

The result in this case demonstrates that at least one jurisdiction is willing to impose liability on churches for sexual abuse committed by their non-clerical employees. This case can be used

121. *See id.* at 1313.

122. *See infra* note 136 and accompanying text.

123. *See* J. v. Victory Tabernacle Baptist Church, 236 Va. 206, 372 S.E.2d 391, 394 (1988).

124. *Id.* at 392.

125. *Id.*

126. *Id.*

127. *Id.* at 394 ("To say that a negligently hired employee who acts willfully or criminally thus relieves his employer of liability for negligent hiring when willful or criminal conduct is precisely what the employer should have foreseen would rob the tort of vitality by improperly subjecting it to factors that bear upon the separate concept of employer liability based on respondeat superior.").

128. *Id.*

to illustrate how dissimilar treatment of churches in cases involving clerical sexual abuse would sanction inequitable results.

Courts have also applied negligent hiring theory to impose liability on public housing authorities and on apartment management companies when an employee sexually assaults a tenant.[129] The relationship between the tenant and the housing authority or management company is deemed sufficient to impose a duty on the company to hire only employees who are fit for their employment positions.[130]

In these cases, the employer negligently failed to investigate the criminal background of an employee who subsequently raped the plaintiff. A pre-employment investigation would have revealed the employee's felony convictions. Furthermore, the employee-rapist used keys furnished by the employer to gain access to the plaintiff's apartment. Consequently, courts held the companies liable for the plaintiffs' damages.[131] The courts stressed that the employer's relationship with the tenant created an affirmative duty to avoid hiring potentially dangerous employees for positions of authority.[132]

The liability these courts placed on housing authorities and apartment management companies should be similarly applied to churches for the sexual abuse of parishioners by clergy. First, as churches receive benefits from normal clergy/parishioner contact, a duty of reasonable care to protect the parishioner should exist. The Minnesota Supreme Court's discussion of the benefit received by a management company illustrates the duty which should arise from interaction between ministers and parishioners. The court stated:

> [S]ince plaintiff comes in contact with the employee as the direct result of the employment, and since the *employer receives*

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129. *See* Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983); P.L.C. v. Housing Auth. of Warren, 588 F. Supp. 961 (W.D. Pa. 1984); Cramer v. Housing Opportunities Comm'n of Montgomery, 304 Md. 705, 501 A.2d 35 (1985).

130. *See* North, *supra* note 106, at 721.

131. *Ponticas*, 331 N.W.2d at 907; *P.L.C.*, 588 F. Supp. at 962; *Cramer*, 304 Md. at 705, 501 A.2d at 35. In *P.L.C.* the plaintiff brought a claim against the housing authority under 42 U.S.C.A. § 1983. In finding for the plaintiff, the court emphasized that the housing authority was created to provide safe housing for low income people. It noted that the plaintiff was subject to the administrative system:

> For her security she surrendered the right of entry to her apartment to the Authority which undertook the obligation of security, and provided an employee with a key by which he could gain entry in order to carry out the Authority's function and responsibilities. This employee used the key, his symbol and instrument of governmental authority, to gain entrance to commit assault and rape.

P.L.C., 588 F. Supp. at 965.

132. *Id.*

> *some benefit*, even if only a potential or indirect benefit, by the contact between the plaintiff and the employee, there exists a duty on the employer to exercise reasonable care for the protection of the dwelling occupant to retain in such employment only those who, so far as can be reasonably ascertained, pose no threat to such occupant.[133]

Examining whether a church benefits from a minister's initial contact with a plaintiff had sexual exploitation *not* occurred reveals the undeniable benefit the church receives from its ministers. Indeed, the church's very existence is dependent on the perpetuation of faith which is relayed, in large part, through ministers' instruction of parishioners.[134] Moreover, many victims of abusive ministers were first sexually confronted while attempting to serve the church (e.g., as an altar boy) or while participating in required or recommended church activities (e.g., confession or religious instruction).[135] Since ministers' non-abusive contact with parishioners undeniably benefits churches, courts should impose a duty of reasonable care on churches in selecting and retaining clergy.

Second, the liability standards courts impose on apartment management companies and housing authorities should also apply to churches due to the similar grants of authority. Like these companies, churches confer potentially abusive authority onto their employees. For example, employees of management companies can use a pass key to enter their victim's apartment while ministers can abuse their authority by demanding compliance with sexual requests and claiming such requests are religiously permissible or mandated.

Given the authority which flows from being a minister, churches are often negligent in hiring and retaining potentially abusive clergy.[136] While a church hopes that a clergy member who

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133. *Ponticas*, 331 N.W.2d at 911 (emphasis added).

134. Bonhoeffer, *supra* note 98, at 10 ("The Christian Pastor is the representative of Christ's authority in the Congregation.").

135. *See* note 81 and accompanying text.

136. *See* N.Y. Times, May 4, 1986, at 26, col. 1 (A Roman Catholic priest pleaded guilty in 1986 to thirty-three counts of sexual misconduct, admitting to sexual involvement with boys at every parish he had served since his 1971 ordination. The bishop of the diocese received notice of the priest's sexual misconduct in 1974. The priest, however, continued to serve in parishes until 1983 when parents complained to church officials.); N.Y. Times, June 12, 1986, at 24, col. 1 (In 1988 a Washington Roman Catholic priest was removed from his parish for sexual molestation of children. The chancellor of the Seattle Archdiocese admitted that there had been allegations of pedophilia over the last twenty years against this particular priest.); Statement of Facts, *supra* note 81, at 7-8 (In Minnesota a priest suffering from pedophilia sexually abused at least ten boys and perhaps as many as twenty-five between 1961 and 1982. Evidence suggests that at least some diocese officials knew of the abuse as early as 1964. The priest remained in the parish until 1984, however,

has received counseling for psychosexual dysfunctions is in fact cured, society should demand more than mere hope from the institution of which he is an agent. The church takes an unjustifiable risk by allowing the clergy member to resume service in a parish where close, unsupervised interaction with parishioners is inevitable. Consequently, a church should not be able to avoid liability when an unsuspecting individual is injured because the church chose to take such a risk.[137]

Keeping sexually abusive ministers in a parish is arguably more dangerous than handing the master keys to the convicted rapist. The authoritative position the minister has over the parishioner heightens his potential control. Such control involves psychological, spiritual, and emotional manipulation of the parishioner.[138]

Many victims believe that the abusing minister has a direct link to the Divine. Therefore, victims may hesitate to question the legitimacy of a minister's sexual requests.[139] After all, the minister represents the church, an organization which claims its teachings have divine origin.[140] Most Christian denominations assert

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when the archdiocese received a summons and complaint.). A three-month study of court records confirmed that churches frequently will tranfer the sexually exploitive minister to a new congregation instead of removing him from pastoral practice. The study revealed that this pattern held true in approximately twenty-five dioceses of the Roman Catholic Church throughout the country. Sherman, *supra* note 6, at 29.

137. This is not to say that a pedophilic minister should never be able to serve as a religious leader. Rather, churches must acknowledge that there is no guaranteed treatment plan and supervise the minister carefully. *See* McDonough, *supra* note 72, at 5:

> [W]e place priest sex offenders into very limited and highly structured pastoral settings after the completion of aftercare. . . . [W]e ensure that a priest who has a history of offending is placed in a situation where significant members of his staff or leadership people in the congregation are aware of the history.

Church officials also must provide abusive ministers with therapy or other treatment. *See* Interfaith Committee, *supra* note 72, at 34. ("Reassignment to previously held positions in ministry will be possible only where the professional therapeutic community judges that the inappropriate sexual behavior was the result of psychological or environmental conditions which have been fully remedied.").

138. *See* Woodward, *supra* note 8, at 48-49.

139. *See* Milla v. Tamayo, 187 Cal. App. 3d 1453, 1457, 232 Cal. Rptr. 685, 687 (1986); Woodward, *supra* note 8, at 48-49; L.A. Times, Feb. 6, 1986, at 2, col. 4 (an eleven year old boy who had been repeatedly molested by his priest stated, "I thought he was doing the right thing because he was a priest."). *See also* Mpls. Star & Trib., Dec. 11, 1988, at 1e, col. 1 (victim of a pedophilic priest stated, "It was like, you just trust him. There was no question about that. He was an authority figure that you look up to and trust. Not like a parent. That's how I felt. Someone I looked up to, someone I trusted. I had no reason at the time, not to.").

140. *See, e.g., Matthew* 28:16-20.

that their ministers stand in a special relationship to God.[141] Indeed, many claim their ministers are personally called by God. Thus, the church cloaks its clergy members with religious authority.[142]

This authority includes the power to grant forgiveness and correspondingly the power not to grant forgiveness, to interpret Scripture and church dogma, to provide spiritual guidance, and to serve as pastoral counselors. Ministers also are held forth as moral, law-abiding, and principled people. Churches encourage their parishioners to seek counsel from clergy, to view them as spiritual leaders, and to place great trust and faith in clerical judgment.[143] When an institution places this kind of authority on an agent, the institution should have a corresponding legal[144] and moral[145] duty to insure the fitness of such an agent. Accordingly, under the negligent hiring theory, churches should have an affirmative duty to investigate their clergy.

D. Negligent Retention Theory

Finally, the negligent retention theory should serve to hold churches liable for clerical sexual exploitation of parishioners. Under the negligent retention theory, an employer is held liable for retaining an employee whom it knows or should have known is unfit for the employment position.[146] Similar to negligent hiring, the negligent retention theory places an affirmative investigative duty on the employer.[147] When an employer knows or should have known about allegations of sexual abuse by an employee, it has a duty to investigate the allegations and act pursuant to its

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141. *See supra* note 134 and accompanying text.

142. Interfaith Committee, *supra* note 72, at 6-7. "All clergy need to be aware of the power that their office carries. The authority of their leadership is unquestioned by many. Clergy persons need to realize that the power differential normally present in a counseling setting is intensified by the increased trust and respect many people have for clergy."

143. *See generally* Woodward, *supra* note 8, at 48-49 (most Americans turn first to members of the clergy when experiencing personal problems). *See also* Peter Ruther, *Sex in the Forbidden Zone*, Psychology Today, Oct. 1989, at 34, 36 (noting that therapists and clergy frequently encourage women whom they are counseling to reveal their secrets, including sexual secrets, which they would not disclose to another person).

144. *See infra* note 164 and accompanying text.

145. *See* Interfaith Committee, *supra* note 72, at 4:

> Fear of the legal consequences may indeed provide the motivating force to move us in the right direction. However, as persons who claim to be the people of God, we must be motivated by a genuine concern for our fellow human beings and the desire to be faithful to moral and ethical obligations and responsibilities.

146. 29 Am. Jur. Trials p. 272-77.

147. *Id.* at 285.

findings.[148] Consequently, evidence which indicates that the employer had notice of the abuser's problem yet failed to take reasonable action strengthens the plaintiff's case.[149] The victims of sexual abuse in non-religious contexts have recovered damages by establishing notice as such notice fortifies the plaintiff's allegations that it was the employer's negligent retention of the employee which caused the plaintiff's damages.[150]

When applying negligent retention theory, courts focus on whether the employer had notice concerning past sexual improprieties and on what measures, if any, the employer took to reprimand or dismiss the abusing agent.[151] As discussed above, notice of sexual abuse requires that the employer investigate and act accordingly;[152] failure to take the requisite action can render the employer liable.[153] To impose liability, it is helpful if the plaintiff is a member of an identifiable class of potential victims.[154] For example, if a church is on notice that a certain minister is a pedophile and yet fails to take action, the church's liability is clearer when the victim is a child rather than an adult.

When applied to religious institutions, this analysis illustrates that churches should have a legal responsibility to investigate allegations of sexual misconduct against clergy and a corresponding duty to act in accordance with their findings. This duty would encompass the reporting of sexual abuse to the proper civil, as well as to ecclesiastical, authorities;[155] removing the minister from his

148. *Id.* at 286.

149. *Id.* at 289 (plaintiff does not need to prove defendant had actual knowledge as constructive knowledge will suffice; demonstrating defendant had access to information which would have established employee's incompetence is beneficial to plaintiff's case).

150. *See, e.g.*, Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3d Cir. 1990), cert. denied 110 S.Ct. 840 (1990). In *Stoneking* evidence indicated that school officials received notice of the band director's abusive behavior in 1979. *Id.* at 722. The band director's abuse of the plaintiff began in 1980 and continued through 1985. *Id.* Sexual activity occurred, among other places, in the high school band room and on band trips. *Id.* at 724. The court noted that students have a liberty interest in being free from sexual harassment and abuse. The sexual advances and abuse perpetrated by the band director violated the plaintiff's right of personal bodily integrity. *Id.* at 726. *See also* Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (Idaho 1986) (school district may be held liable for its negligence arising out of teacher's sexual assault of students); Galli v. Kirkeby, 398 Mich. 527, 248 N.W.2d 149, 152 (Mich. 1976) (school board may be liable under doctrine of respondeat superior for principal's homosexual assaults on a student); Schultz v. Gould Academy, 332 A.2d 368 (Me. 1975) (boarding school liable when intruder gains access to dormitory room and assaults female student).

151. *Stoneking*, 882 F.2d at 727.

152. *Id.* at 729.

153. *Id.* at 730 (*citing* Black v. Skrang 662 F.2d 181 (3d Cir. 1981)).

154. *Stoneking*, 882 F.2d at 730.

155. Interfaith Committee, *supra* note 72, at 10-11.

parish; and monitoring the minister if he is returned to the parish after completion of psychotherapy or other appropriate treatment.[156] Also, as it is important to provide help for all the victims of a sexually abusive minister, past congregations in which he served must be notified of his problems. In addition, after an abusive pastor undergoes treatment, the church should be required to notify ministers with whom the abusing minister works of any restrictions placed on his work. Finally, if he later serves as the sole pastor of a congregation, the congregation's church council should be notified by the denomination's governing body of his past sexual improprieties.[157]

The purpose of imposing this duty is not to start a witch hunt to uncover all the skeletons in a minister's closet. Rather, it is an acknowledgment that there is a problem of clerical sexual abuse, that such abuse is often criminal behavior,[158] and that it always erodes the ministry of the church.[159] Churches must acknowledge that these clergy members are using the church's power and authority to victimize vulnerable parishioners. Churches may argue that it was the minister who harmed the victim not the church.

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156. With the influx of cases alleging clerical sexual abuse, many religious denominations have devoloped policies to deal with the crisis. In Minnesota, churches have established an interdenominational network to address sexual exploitation by the clergy. Woodward, *supra* note 8, at 48. Also, the Archdiocese of St. Paul-Minneapolis has developed a policy addressing many issues, including investigation of the victim's complaint, confrontation of the priest, treatment of abusing priests, and placement of such priests after they have received treatment. The Archdiocese generally will offer counseling for the victims; investigate the complaint by talking with the victim's family, other clergy, or lay professionals who may have worked with the priest; and, ultimately, confront the abusive priest. Frequent communication with civil authorities is considered imperative. The Archdiocese also will provide the accused priest with an advocate who offers support to the priest. It does not provide an advocate for victims but is considering implementing a victim's advocate program. Sexually exploitive priests are required to undergo an extensive evaluation followed by psychological and spiritual treatment. The period of structured aftercare may exceed two years. After such a period, priests may be placed back in a pastoral setting under certain circumstances. McDonough, *supra* note 72, at 8-16.

157. *See* N.Y. Times, June 12, 1988, at 24, col. 1, in which a priest who was aware of another priest's past pedophilia admitted:

> in retrospect, he would have told the parish council about the priest's background and let them decide what to do with him. 'Do you spread the news that a person is a pedophile or try to protect his confidentiality?' said Father Kramis. 'A year ago, when I welcomed him into my rectory, I was convinced confidentiality was the best way to go. Now, I would tell the parish council.'

158. *See supra* note 3 and accompanying text.

159. *See* Interfaith Committee, *supra* note 72, at 9. Sexual exploitation of a parishioner by a minister devastates, and frequently divides, a congregation. Some members blame the victim and others blame the minister. A spiritual crisis also is a common reaction from congregational members. *Id.*

But this argument fails because an agent of the church harmed the victim, not by means of a gun or violence, but by the clerical authority which the church gave the agent with its blessing.[160]

III. State Legislatures Should Impose a Statutory Duty on Churches to Investigate Clergy

As the discussion of respondeat superior revealed, there are numerous similarities between psychotherapists and ministers.[161] Briefly, both are in authoritative positions, have substantial contact with vulnerable individuals, and are relied upon by such individuals to provide counseling services.[162] Consequently, they should be treated similarly by state legislatures.

In response to the influx of reported cases involving sexual exploitation of patients by psychotherapists,[163] some state legislatures have imposed a statutory duty on mental health clinics to investigate their psychotherapists prior to their employment with the clinic.[164] Minnesota Statute § 148A is a good example.[165]

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160. *See, e.g.*, State v. French, 392 N.W.2d 596 (Minn. App. 1986). In *French* the sexual abuser was a church elder whose coercion prevented the victim from reporting the abuse. He told the victim that no one would believe her story as he was a respected member of the church and community. The victim thus did not press criminal charges against the abuser until she was an adult. By that time, the statute of limitations precluded any criminal action.

161. *See supra* notes 78-83 and accompanying text.

162. *See supra* notes 78-83 and accompanying text.

163. *See generally* Task Force on Sexual Exploitation by Counselors and Therapists, Report to the Minnesota Legislature (Feb. 1985). Recent studies reveal some alarming statistics. One report found that 17.1 percent of male and 2 percent of female psychologists responding to the survey had engaged in some sexual contact with patients either during therapy or within three months following termination of therapy. *Id.* at 7. Another estimates that one in five psychotherapists will be sexually involved with his or her patients. *Id.* A different study revealed that fifty percent of psychiatrists participating in the study knew of particular cases of sexual contact between the patient and therapist, yet most had not reported these incidents to the proper authorities. *Id.* A California task force discovered that fifty-seven percent of psychologists responding to its survey indicated that they had been informally approached by other therapists with concerns regarding their sexual involvement with patients. *Id.*

164. *See, e.g.*, Minn. Stat. §§ 188A.01-.03 (1986).

> 148A.02 CAUSE OF ACTION FOR SEXUAL EXPLOITATION
>
> A cause of action against a psychotherapist for sexual exploitation exists for a patient or former patient for injury caused by sexual contact with the psychotherapist, if the sexual contact occurred:
>
> (1) during the period the patient was receiving psychotherapy from the psychotherapist; or
>
> (2) after the period the patient received psychotherapy from the psychotherapist if (a) the former patient was emotionally dependent on the psychotherapist; or (b) the sexual contact occurred by means of therapeutic deception.
>
> The patient or former patient may recover damages from a psychotherapist who is found liable for sexual exploitation. It is not a de-

Under this statute, the employer of the psychotherapist may be liable "if the employer knows or has reason to know that the psychotherapist engaged in sexual activity with the plaintiff[, another] patient or [a] former patient."[166] In addition, the employer may be liable if it fails to inquire from the psychotherapist's past employers as to the existence of any sexual impropriety between the therapist and his/her patients.[167] Employers are also required to take action when notified of sexual misconduct.[168] "An employer of a psychotherapist may be liable. . .if. . .the employer fails or refuses to take reasonable action when the employer knows or has reason to know that the psychotherapist engaged in sexual contact with the plaintiff or any other patient or former patient of

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fense to the action that sexual contact with a patient occurred outside a therapy or treatment session or that it occurred off the premises regularly used by the psychotherapist for therapy or treatment sessions.

148A.03 LIABILITY OF EMPLOYER

(a) An employer of a psychotherapist may be liable under section 148A.02 if:

(1) the employer fails or refuses to take reasonable action when the employer knows or has reason to know that the psychotherapist engaged in sexual contact with the plaintiff or any other patient or former patient of the psychotherapist; or

(2) the employer fails or refuses to make inquiries of an employer or former employer, whose name and address have been disclosed to the employer and who employed the psychotherapist as a psychotherapist within the last five years, concerning the occurrence of sexual contacts by the psychotherapist with patients or former patients of the psychotherapist.

(b) An employer or former employer of a psychotherapist may be liable under section 148A.02 if the employer or former employer:

(1) knows of the occurrence of sexual contact by the psychotherapist with patients or former patients of the psychotherapist;

(2) receives a specific written request by another employer or prospective employer of the psychotherapist, engaged in the business of psychotherapy, concerning the existence or nature of the sexual contact; and

(3) fails or refuses to disclose the occurence of the sexual contacts.

(c) An employer or former employer may be liable under section 148A.02 only to the extent that the failure or refusal to take any action required by paragraph (a) or (b) was a proximate and actual cause of any damages sustained.

(d) No cause of action arises, nor may a licensing board in this state take disciplinary action, against a psychotherapist's employer or former employer who in good faith complies with this section.

The Minnesota statute includes clergy members in its definition of psychotherapist provided the clergy "performs or purports to perform psychotherapy." Minn. Stat. §§ 148A.01, subd. 5. Consequently, a church may not be liable under the statute for a minister's sexual abuse of an individual who sought religious guidance as opposed to psychotherapy.

165. Minn. Stat. §§ 148A.01-.03 (1986).

166. *Id.*, § 148A.03(a)(1).

167. *Id.*, § 148A.03(a)(2).

168. *Id.*, § 148A.03(a)(1).

the psychotherapist."[169] Sexual activity between the psychotherapist and patient or former patient is actionable even if the sexual activity did not occur during a therapy session or on the premises usually used for counseling.[170] Clergy members are included in the definition of psychotherapist.[171]

Such legislation holding churches accountable should be enacted in other states for four reasons. First, efficiency and consistency of results dictate that legislatures prescribe the duty which churches owe in one comprehensive law rather than leaving it to the piecemeal decision-making of the courts. Moreover, the legislature has superior fact-finding abilities, including the requisite resources and authority to conduct hearings and formulate policy. Second, the severity and prevalence of the problem requires states to take action to protect potential victims.[172] Since many sexual abusers were sexually abused as children, the public hazard created by suppressing recovery for such abuse is staggering.[173] Barring recovery arguably prevents victims from receiving the monetary resources necessary to procure counseling services and break the abuse cycle. Therefore, state legislatures should intervene not only to protect the welfare of its citizenry but also to ensure victims receive adequate treatment so they themselves do not become abusers. Victims of sexual abuse may well increase exponentially as some of today's victims later victimize others. To prevent an epidemic of abuse, the legislatures must take reasonable action.

Third, imposing a statutory duty which explicitly specifies the investigation a church must conduct prior to "hiring" a minister helps the church avoid the immense financial[174] as well as emotional[175] burden that sexual abuse lawsuits entail. The statute should expressly prohibit any cause of action against a church or former church which in good faith complies with the statute.[176] Accordingly, the statute would serve to protect churches as well as plaintiffs.

Fourth, without a statutory requirement, a church which requires its congregation to investigate a prospective minister for any

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169. *Id.*

170. *Id.* § 148A.02.

171. William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation, 240 (1988).

172. *See supra* notes 3-9 and accompanying text.

173. *See, e.g.*, Nickolas A. Groth & H. Jean Birbnaum, Men Who Rape: The Psychology of the Offender (1979); Kohn, *Shattered Innocence*, Feb. 1987, at 54-58.

174. *See supra* notes 8-9 and accompanying text.

175. Interfaith Committee, *supra* note 72, at 9.

176. Minn. Stat. § 148A.03(d) (1986).

past sexual impropriety risks alienating that minister from the congregation. This places a congregation which wants to make a responsible investigation in a Catch-22 position. It may alienate a potential minister by conducting a thorough investigation, but is vulnerable to multi-million dollar lawsuits if the investigation is not thorough enough. Consequently, lack of a statutory duty inhibits churches from acting prudently and conducting adequate investigations.

Conclusion

Victims of sexual exploitation may recover from institutions of which the victim's attacker was an agent, provided that the victim stands in a special relationship to the institution. Anomalously, this general rule has not been applied to churches for the sexual abuse of parishioners by their ministers. This leads to the inequitable result that similarly situated plaintiffs receive different treatment under the law. State legislatures should rectify this inequality by adopting statutes providing for the liability of churches in these cases as well as defining the investigative duty a church must undergo to avoid liability.