What Happens When Forgiveness Is Not Enough: The Ministerial Exception and Sexual Abuse Claims

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 J. D. Candidate, University of California, Davis School of Law, 2023. I would like to thank Professor Carlton F.W. Larson and Morgan Mitruka for their invaluable mentorship and feedback throughout the writing process. I am grateful to the many editors, members, and staff of *UC Davis Law Review* who helped prepare this passion project for publication. To all survivors of sexual abuse, whose fights for justice inspired this piece, I am in awe of your courage and strength. I am so thankful for the love and support of my siblings, family, and friends. To my parents, Bob and Stephanie, thank you for helping me turn this dream into a reality.

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INTRODUCTION

On January 6, 2002, the *Boston Globe* published an article titled "Church Allowed Abuse by Priest for Years," the first of a series of stories exposing the systemic abuse by clergy in the Catholic Church.[1] Despite Massachusetts law requiring clergy members to report known instances of abuse to local authorities, the series exposed a decades-long system of abuse and a church strategy of foregoing disclosure.[2] If any action was taken by a church, it was minimal. More concerning, if a priest had a credible accusation of sexual abuse against him, he was often sent to spiritual counseling or reassigned to spiritual duties that did not involve contact with children but would remain a member of the clergy.[3]

While individual abusers may be held accountable for their actions via the criminal justice system, the same cannot be said for the religious organizations who continue to employ these culprits. Since these church and religious institutions are not the actual causes of the harm, legal remedy is limited to civil claims, which often come in the form of negligent hiring, supervision, and retention.[4] However, during the process of seeking accountability, survivors of sexual abuse have had to face a nearly insurmountable obstacle: The First Amendment. The First Amendment of the United States Constitution declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[5] With respect to instances of sexual abuse by clergy members, religious institutions often use the First Amendment as an affirmative defense that bars all claims of negligence.[6] There is currently a split amongst lower courts on whether this "ministerial exception" prevents an individual from bringing a claim of negligent

[1] Matt Carroll, Sacha Pfeiffer, Michael Rezendes & Walter V. Robinson, *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2002, 5:50 PM), https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html [https://perma.cc/U635-JDAJ].

[2] *Id.*

[3] *See generally* Claudia Lauer & Meghan Hoyer, *Hundreds of Accused Clergy Left off Church's Sex Abuse Lists*, ASSOC. PRESS (Dec. 27, 2019), https://apnews.com/article/ia-state-wire-ri-state-wire-pa-state-wire-ma-state-wire-in-state-wire-f6238fe6724bdf4f30a42ff7d11a327e [https://perma.cc/TJ6G-ZQGC] (discussing why hundreds of clergies charged with sexual crimes are left off church's sex abuse lists).

[4] *See id.*

[5] U.S. CONST. amend. I.

[6] W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW §21.13 (2d ed. 2022).

hiring, supervising, and retention against churches.[7] The Second, Ninth, and Tenth Circuits have barred claims of negligent hiring, retention, and supervision, reasoning that examination into a church's employment of an accused abuser would violate the First Amendment by interpreting church doctrine.[8] The First Circuit has not barred such claims, believing that no interpretation of religious doctrine was necessary to determine liability.[9] This Note will argue that broad application of historical practices and understanding, first developed in the United States Supreme Court case *Kennedy v. Bremerton* and used to determine whether a government act violates the Establishment Clause, bestows upon courts the power to adjudicate negligence claims of secular injury, including sexual abuse, against religious institutions.[10]

Part I of this Note will analyze how current case law regarding negligent supervision, retention, and hiring fails to establish a consistent cause of action for victims of sexual abuse.[11] Parts II and III argue that courts have the authority to adjudicate claims without violating the Free Exercise Clause or the Establishment Clause through limited factual investigations and the application of neutral tort principles that follow the historical practices and understandings held by the Founding Fathers.[12] The secular nature of the injury in negligent hiring, supervision, and retention cases against churches permits the separation of canon law and church law.[13] Given that sexual abuse has yet to be declared an accepted religious practice, a factual inquiry in a priest's employment following a credible accusation of sexual abuse does not require interpretation of religious doctrine.[14] Finally, this Note will contend that courts should exercise their adjudicative power since religious institutions have yet to implement substantive changes and procedures that guarantee the safety of parishioners.[15]

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[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).

[11] *See* Ayon v. Gourley, 47 F. Supp. 2d 1246, 1249 (D. Colo. 1998); Isely v. Capuchin Province, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995).

[12] *Kennedy*, 142 S. Ct. at 2407.

[13] *See infra* Part II.

[14] *See infra* Part II.

[15] *See infra* Part III.

I. BACKGROUND

A. The Intersection of Church and Secular Law

The First Amendment of the United States Constitution provides that Congress shall not create any law that either establishes or prohibits the exercise of a religion.[16] The Supreme Court has recognized two constitutional protections from this language: the freedom to exercise religion and the freedom from the government establishing a religion or passing legislation which promotes, hinders, or forces the practice of religion.[17] The Free Exercise Clause, which guarantees the right to practice religion, and the Establishment Clause, which prohibits the government from making laws which control the practice of religion, were ratified for the purpose to maintain separation between church and state.[18] Recognizing the important relationship between an organized church and its clergy, courts have acknowledged that churches may be exempt from civil employment laws through a doctrine called the ministerial exception.[19] This doctrine, which draws upon the rationale of the Free Exercise Clause and the Establishment Clause, may insulate a church's employment decisions regarding its clergy from government regulation.[20] While the doctrine has historically been applied only to cases between a clergy member and a religious institution, it provides an important context to churches' fundamental beliefs of freedom from government interference in cases involving third parties.[21]

B. Lemon v. Kurtzman *and the Prohibition of Excessive Entanglement*

While the constitutional freedom to practice religion first appeared in 1791, the ministerial exception has only been explicitly recognized within

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[16] U.S. CONST. amend. I.

[17] *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); Reynolds v. U.S., 98 U.S. 145, 162 (1879).

[18] *See* Walz v. Tax Comm'n., 397 U.S. 664, 669 (1970).

[19] Werft v. Desert Sw. Ann. Conf. of United Methodist Church, 377 F.3d 1099, 1100-01 (9th Cir. 2004); McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 946-47 (9th Cir. 1999); *see* Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 724-25 (1976).

[20] *Werft*, 377 F.3d at 1100-01.

[21] *See* Roman Cath. Archbishop v. Super. Ct., 32 Cal. Rptr. 3d 209, 214 (Cal. Ct. App. 2005) (as modified on denial of rehearing (Aug. 16, 2005)).

the last few decades.[22] The first official acknowledgement of the doctrine which would become known as the ministerial exception occurred in 1952, when the Supreme Court gave deference to church governance regarding property disputes.[23] In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, a New York state statute recognized the separate administrative autonomy of the Russian Orthodox Churches in North America from the Russian Orthodox Church located in Moscow.[24] Dispute amongst the two branches arose when the American church sought to take possession of St. Nicholas Cathedral, which the Russian church occupied at the time.[25] The court declared that the statute recognizing the administrative autonomy of the American church impermissibly interfered with the Russian Orthodoxy's ability to oversee church governance, a right contained within the Free Exercise Clause.[26] The statute, according to the court, significantly hindered a religious organization's freedom from secular control and manipulation required by the Constitution.[27] As a result, the statute was held to be unconstitutional, and religious institutions began to wander beyond the limits of the government's reach.[28]

In 1971, the Supreme Court once again expanded the rights of religious institutions by significantly limiting the government's legislative power in *Lemon v. Kurtzman*.[29] Fearing the diminishing quality of education available in non-public elementary schools due to rapidly rising costs, Rhode Island and Pennsylvania legislatures each enacted statutes authorizing state officials to provide financial support to schools for secular activities and benefits to teachers who did not teach religious courses.[30] However, about 95% of the pupils assisted through these programs attended church-related schools.[31] Parents of children attending

[22] U.S. CONST. amend. I; Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012) (noting that "the ministerial exception has been around in the lower courts for 40 years"); *see* Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 95 (1952); *Serbian E. Orthodox Diocese*, 426 U.S. at 724-25.

[23] *Kedroff*, 344 U.S. at 120-21.

[24] *See id.* at 95-96.

[25] *Id.*

[26] *Id.* at 120-21.

[27] *Id.*

[28] *Id.*

[29] Lemon v. Kurtzman, 403 U.S. 602, 609 (1971).

[30] *Id.* at 606.

[31] *Id.* at 608.

state public schools filed lawsuits claiming these statutes violated the Establishment Clause, which prohibits making any law "respecting an establishment of religion."[32] The Court recognized that "the language of the Religion Clauses of the First Amendment is at best opaque, particularly compared with other portions of the Amendment" but nonetheless developed a test to combat the three main evils the Establishment Clause intended to protect against: sponsorship, financial support, and active involvement of the sovereign in religious activity.[33] As a result, the Court held that the government may only pass legislation if (1) the primary purpose of assistance is secular, (2) the assistance must neither promote nor inhibit religion, and (3) there is no excessive entanglement between church and state.[34] The Court in *Lemon* developed the third prong specifically to regulate state interactions that obscured the separation of church and state.[35] Prior to 2022, a court, when assessing a claim of state interaction with a religious organization, was required to consider "the character and the purposes of the institutions that are benefitted, the aid that the State provides, and the resulting relationship between the government and the religious authority".[36]

C. A New Test of Historical Practices and Understandings

The *Lemon* test remained precedent for analyzing potential Establishment Clause claims until its reversal in June 2022 with the Supreme Court's decision in *Kennedy v. Bremerton School District*.[37] In 2008, Joseph Kennedy began his position as an assistant football coach at Bremerton High School, a public school.[38] He quickly established a routine of kneeling at the 50-yard line in the middle of the field after football games for a prayer.[39] Bremerton High students, students from opposing teams, and other coaches joined Kennedy over time, yet the school board did not learn of the practice until 2015 when an opposing team commented positively that the district would allow for the practice.[40] The school board became concerned that permitting such a practice would

[32] U.S. CONST. amend. I.

[33] *Lemon*, 403 U.S. at 612 (quoting Walz v. Tax Comm'n., 397 U.S. 664, 668 (1970)).

[34] *Id.* at 612-13, 624-25.

[35] *Id.* at 613, 624-25; *see* U.S. CONST. amend. I; DURHAM & SMITH, *supra* note 6, § 4:9.

[36] *Lemon*, 403 U.S. at 615 (citing Walz v. Tax Comm'n., 397 U.S. 664, 695 (1970)).

[37] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).

[38] *Id.* at 2416.

[39] *Id.*

[40] *Id.*

violate the Establishment Clause, since a reasonable observer could view the school district's inaction as endorsement of religion.[41] The board subsequently offered accommodations, such as providing Kennedy a private location to conduct his prayer and suggesting that Kennedy wait until after spectators had left to pray. Kennedy continued to pray on the 50 yard-line in the middle of the field, and the board recommended that his contract not be renewed.[42]

Upon review, the Supreme Court held that the Ninth Circuit erroneously applied the *Lemon* test, and that the doctrines present in the First Amendment were to be viewed as complementary instead of contradictory.[43] Thus, the school district's concerns about the potential violations of the Establishment Clause did not supersede Kennedy's own Free Exercise and Free Speech rights.[44] The Court remarked that *Lemon* set forth an "ambitious, abstract, and ahistorical approach to the Establishment Clause."[45] Accordingly, in place of the *Lemon* test, courts must now interpret the Establishment Clause by "reference to historical practices and understandings."[46]

D. Application of Lemon *and* Kennedy *in the Federal Courts*

At the federal level, only the First Circuit has recognized the judicial power to regulate claims involving a church's negligent employment, while the Second, Ninth, and Tenth Circuits have dismissed such claims on First Amendment grounds.[47] The District Court of Colorado held in *Ayon v. Gourley* that "any inquiry into the decision of who should be permitted to become or remain a priest necessarily would involve prohibited excessive entanglement with religion."[48] In this case, the court concluded that to determine how a "reasonable church" would act for purposes of negligence would impermissibly create an excessive entanglement between church and government by analyzing church administrative decisions.[49] On appeal, the Tenth Circuit affirmed the

[41] *Id.* at 2416-17.

[42] *Kennedy*, 142 S. Ct. at 2417-19.

[43] *See id.* at 2427.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 2428.

[47] *See* DURHAM & SMITH, *supra* note 6, § 21.14.

[48] Ayon v. Gourley, 47 F. Supp. 2d 1246, 1249 (D. Colo. 1999) (citing Isely v. Capuchin Province, 880 F.Supp.1138, 1150 (E.D.Mich.1995)).

[49] *See id.* at 1250-51.

District Court's judgment.[50] Courts within the Sixth Circuit have also reached similar outcomes.[51] In *Isely v. Capuchin Province*, the District Court for the Eastern District of Michigan dismissed a seminary student's negligent hiring claim, which alleged sexual abuse by multiple clergymen at two different seminaries located in Michigan and Wisconsin.[52] Like *Ayon*, the court in *Isely* found that determining whether the church negligently hired the accused individuals would violate the First Amendment by requiring the court to consider the church's reasoning behind the decision to hire the alleged abusers.[53]

Broad judicial interpretation of *Lemon's* third prong, prohibition of excessive entanglement with church doctrine, as well as *Kennedy*'s broad wording of "historical practices" have transformed the First Amendment over time into an affirmative defense against any government regulation, no matter the significance of the government interest at hand.[54] Under current judicial interpretation, any form of statutory regulation would likely violate the First Amendment, since such action might not necessarily reflect the historical practices and the Founding Fathers' understanding of the Establishment Clause.[55] However, contrary to the courts' holdings in *Ayon* and *Isley*, adjudication of these negligent hiring, supervision, and retention claims would not violate the First Amendment, nor raise any of the potential dangers that the *Lemon* and *Kennedy* tests sought to prevent.[56] Assessing religious doctrine is not a prerequisite for conducting a strict factual inquiry to determine whether a church knew, or had reason to know, that sexual abuse would occur.[57]

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[50] *See* Ayon v. Gourley, No. 98-1305, slip op. at 8 (10th Cir. June 25, 1999).

[51] *See* Isely v. Capuchin Province, 880 F. Supp. 1138, 1150-51 (E.D. Mich. 1995).

[52] *Id.*

[53] *Id.*

[54] *See* DURHAM & SMITH, *supra* note 6, § 21.13.

[55] *See id.*

[56] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022); Lemon v. Kurtzman, 403 U.S. 602, 615 (1971); Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250-51 (D. Colo. 1999); *Isely*, 880 F. Supp. at 1150-51.

[57] *See Lemon*, 403 U.S. at 608-11, 625; *Ayon*, 47 F. Supp. 2d at 1249; *Isely*, 880 F. Supp. at 1150.

II. ADHERING TO CONSTITUTION BY FOLLOWING THE FACTS

A. Adjudicating Sexual Misconduct Cases Does Not Invoke the First Amendment

Application of the proposed guidelines in *Kennedy* to a parishioner's claim of negligent hiring, supervision, and retention against a religious institution for its clergy member's sexual misconduct does not inherently invoke, or violate, the First Amendment. When a court applies neutral principles of tort law to the facts of a case, interpretation of religious doctrine is not required and therefore excessive entanglement is avoided entirely.[58] In order to succeed on a negligent hiring and supervision claim, a plaintiff must establish a duty owed by the defendant employer to the plaintiff, a breach of that duty by the defendant employer, and damages proximately caused by the employer's breach of duty.[59] For a religious institution to be liable for a priest's sexual misconduct, the plaintiff would need to establish that the religious organization owed the plaintiff a duty, violated this duty in hiring or supervising the alleged priest, and that such actions were a proximate cause to the plaintiff's established damages.[60]

Several circuit courts have held that to investigate into the church's methods of "hiring, supervision, and disciplining its clergy" interferes with religious autonomy, although practical application of the judiciary's historical practices proves otherwise.[61] Specifically, courts can adhere to the Founding Fathers' understanding of the Establishment Clause through a strict application of established tort principles.[62] Laws that provide a cause of action for negligent hiring, retention, and supervision are indeed neutral; the objective of the statute is not to infringe upon or restrict practices because of their religious motivation.[63] Rather, these statutes are meant to provide individuals with the opportunity to seek remedies for

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[58] *Smith*, 986 F. Supp. at 77; *Bear Valley Church of Christ*, 928 P.2d at 1323-24; Malicki v. Doe, 814 So. 2d 347, 360-61 (Fla. 2002).

[59] 29 LOUIS B. YOSHA & LANCE D. CLINE, AM. JUR. TRIALS 267 § 5 (updated Nov. 2022).

[60] *See* RESTATEMENT (SECOND) OF TORTS § 282 (AM. L. INST. 1965).

[61] *Malicki*, 814 So. 2d at 358; *see* Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 120-21 (1952).

[62] *See Smith*, 986 F. Supp. at 77; *Bear Valley Church of Christ*, 928 P.2d at 1323-24; *Malicki*, 814 So. 2d at 360-61.

[63] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

harm caused by another's negligence.[64] A court's application of this secular law, in lieu of a church's own canon law, determines liability without any consideration of a church's own disciplinary rules. Application of secular law to tort claims is a long-standing practice in the judiciary, as courts have been providing remedies for common law torts since the early 1900s.[65]

The cases of *Smith v. O'Connell* and *Malicki v. Doe* are just two examples of how courts successfully applied neutral principles of law to assess liability of the church in accordance with the First Amendment, and serve as examples of how courts can adhere to historical practices and understandings after *Kennedy*.[66] In *Smith v. O'Connell*, the plaintiffs alleged that the hierarchy of defendants knew that the priests who sexually abused them were pedophiles and not only failed to take appropriate preventative action, but also actively concealed the sexual misconduct.[67] In response, the defendants filed a motion to dismiss based upon lack of subject matter jurisdiction.[68] In deciding this motion, the court held that defendants would be unable to raise a potential First Amendment defense, since application of neutral tort law did not threaten the protections guaranteed under the Establishment Clause or the Free Exercise Clause.[69] In fact, the court suggested that a dismissal of the claim could violate the Establishment Clause:

> Clearly the framers of our Constitution did not intend religious liberty to extend that far. Indeed, permitting some individuals to engage in conduct proscribed by neutral laws that must be observed by everyone else simply because that conduct emanates from a religious belief can be viewed as the kind of official recognition of a religion that is prohibited by the establishment clause.[70]

The *Smith* Court also properly concluded that the plaintiffs' claims were not barred by the First Amendment.[71] In using neutral tort law principles,

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[64] *Id.*

[65] 124 A.L.R. 814 (database updated 2022).

[66] Kennedy v. Bremerton Sch. Dist., 142 U.S. 2407, 2428 (2022); *Smith*, 986 F. Supp. at 77; *Malicki*, 814 So. 2d at 360-61.

[67] *Smith*, 986 F. Supp. at 75.

[68] *Id.*

[69] *Id.* at 81-82; *see* U.S. CONST. amend. I.

[70] *Smith*, 986 F. Supp. at 80; *see* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[71] *Smith*, 986 F. Supp. at 81-82.

the court refrained from applying any form of canon law to the case at hand.[72] Since application of general tort laws does not require courts to assess the facts of a case from a perspective grounded in religious doctrine, the protections of the First Amendment are not legitimately threatened by the court's involvement.[73] Therefore, the excessive entanglement that *Lemon* sought to prevent, and that *Kennedy* seeks to prevent in future cases, was not an issue.[74]

Similarly, in *Malicki v. Doe*, the Supreme Court of Florida held that the neutral principles of tort law did not require a court to conduct a probe into religious doctrine and canon law.[75] The dangers of government interaction with religious affiliated organizations were not applicable in the eyes of the court, since adherence to the secular law did not interfere with religious belief or activity.[76] Plaintiffs file claims of negligent hiring, supervision, and retention against religious organizations after a clergy member harms the plaintiff, a third party, through his or her employment.[77] Thus, when deciding this type of claim, courts are inquiring whether at the time of hiring, the employer had reason to believe the alleged priest would create an undue risk of harm to others.[78] To answer this question, courts do not examine "the employer's broad reasons for choosing this particular employee for the position, but instead look to whether the specific danger which ultimately manifested itself could have reasonably been foreseen" or failed to act once incidents of abuse became known.[79]

This clear and distinct separation between secular and canon law in sexual abuse claims is further strengthened through the common consensus of a secular component to sexual abuse and misconduct.[80] Just

[72] *See id.*

[73] *Id.*

[74] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 2407, 2432-33 (2022); Lemon v. Kurtzman, 403 U.S. 602, 625 (1971); *Smith*, 986 F. Supp. at 81-82.

[75] *Malicki*, 814 So. 2d 347, 360-61.

[76] *Id.* (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993)).

[77] *Id.* at 363 (citing Bear Valley Church of Christ v. Debose, 928 P.2d 1315, 1323 (Colo. 1996)); *see also* Van Osdol v. Vogt, 908 P.2d 1122, 1132 n.17 (Colo. 1996).

[78] *Malicki*, 814 So. 2d at 363 (citing Bear Valley Church of Christ v. Debose, 928 P.2d 1315, 1323 (Colo. 1996)).

[79] *Id.*; *see also* Doe v. Corp. of Catholic Bishop of Yakima, 957 F. Supp. 2d 1225 (E.D. Wash. 2013) (holding under Washington law, the First Amendment did not bar a negligence claim against church and its officials because the claim did not implicate religious doctrine or questions of internal church governance).

[80] *See Malicki*, 814 So. 2d at 363; RESTATEMENT (SECOND) OF TORTS § 282 (AM. L. INST. 1965).

as relying upon religious doctrine to settle a case would violate the First Amendment, so too would a court's decision to provide a remedy for an injury based within religious belief.[81] In *Malicki*, the defendants did not argue that the underlying acts of the claims, sexual assault and battery, were governed by sincerely held religious beliefs or practices.[82] This concession severely undermines the prospective dangers that would be present should a court choose to adjudicate a negligent hiring, supervision, and retention claim involving a religious organization.[83] Not only does the inquiry conducted by the court solely focus on whether the specific danger of sexual abuse could have been foreseen, but also the resulting injury, sexual misconduct, has no significant connection to religious doctrine.[84] The secular nature of sexual misconduct only serves to reinforce the argument that a court can assess a religious institution's liability for the sexual misconduct of its clergy entirely independent the institution's doctrine.[85] This perspective of sexual abuse as a secular harm, and eliminating any need for interpretation of religious doctrine, is not limited to *Malicki*.[86] Pope Francis, leader of the Catholic Church, previously stated that "everything possible must be done to rid the Church of the scourge of sexual abuse of minors,"[87] while the Southern Baptist Convention, the world's largest Baptist denomination, took an official stance that "any instance of sexual abuse [is] a reprehensible act."[88]

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[81] *See* U.S. CONST. amend. I.

[82] *Malicki*, 814 So. 2d at 360-61.

[83] *Id.*; *see* Kennedy v. Bremerton Sch. Dist., 142 U.S. 2407, 2431-32 (2022).

[84] *Malicki*, 814 So. 2d at 360-61.

[85] *See id.* at 363-65; RESTATEMENT (SECOND) OF TORTS § 282 (AM. L. INST. 1965).

[86] *Malicki*, 814 So. 2d at 360-61; *see, e.g.*, EXEC. COMM. OF THE S. BAPTIST CONVENTION, RESPONDING TO THE EVIL OF SEXUAL ABUSE (2008), https://www.sbc.net/wp-content/uploads/2020/03/2008ReportSBC.pdf [https://perma.cc/AV74-8BQH] (highlighting Southern Baptist Convention's belief that sexual abuse by pastors is a sin); Pope Francis, *Letter of His Holiness Pope Francis to the Presidents of the Episcopal Conferences and Superiors of Institutes of Consecrated Life and Societies of Apostolic Life Concerning the Pontifical Commission for the Protection of Minors*, VATICAN (Feb. 2, 2015), https://www.vatican.va/content/francesco/en/letters/2015/documents/papa-francesco_20150202_lettera-pontificia-commissione-tutela-minori.html [https://perma.cc/R32B-64QH] [hereinafter *Letter of His Holiness Pope Francis*] (clarifying Pope Francis's view that sexual abuse has no place in the Roman Catholic Church).

[87] *Letter of His Holiness Pope Francis*, *supra* note 86.

[88] EXEC. COMM. OF THE S. BAPTIST CONVENTION, *supra* note 86.

However, concerns about a court's excessive entanglement remain despite such a clear separation between secular and canon law.[89] Specifically, courts have expressed concern that any relationship between a church and its employees is an internal church matter protected from government oversight.[90] In 1952, *Kedroff* formally recognized the right of religious autonomy for internal church disputes.[91] Since the landmark case, courts have been resistant to adjudicate issues where a religious institution is acting as an employer, in addition to a place of worship.[92] Nonetheless, reliance upon *Kedroff* to dismiss negligent hiring, supervision, and retention claims is misplaced.[93] In *Kedroff,* a property dispute arose between the Russian Orthodox Church and one of its congregations in New York.[94] Both of the parties in the case were part of a hierarchical structure of church governance.[95] However, negligent hiring, supervision, and retention claims often are not limited to parties within the hierarchical church structure, because more often than not the plaintiff is a third party.[96] This presence of a third party is precisely what differentiates claims of negligent hiring, supervision, and retention from matters of internal dispute, and is why involvement of the courts is

[89] *See* Ayon v. Gourley, 47 F. Supp. 2d 1246, 1249 (D. Colo. 1999); Isely v. Capuchin Province, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995); Christopher L. Barbaruolo, Malicki v. Doe*: Defining Split of Authority Based on the State Tort Claims of Negligent Hiring and Supervision of Roman Catholic Clergy and the First Amendment Conflict*, 32 HOFSTRA L. REV. 423, 455 (2003); *see also* Ryan W. Jaziri, *Fixing a Crack in the Wall Of Separation: Why the Religion Clauses Preclude Adjudication of Sexual Harassment Claims Brought by Ministers*, 45 NEW ENG. L. REV. 719, 740-41 (2011).

[90] Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 120-21 (1952); Cantwell v. Conn., 310 U.S. 296, 303-04 (1940).

[91] *See Kedroff*, 344 U.S. at 120-21.

[92] *See Ayon*, 47 F. Supp. 2d at 1249; *Isely*, 880 F. Supp. at 1150.

[93] *See Isely*, 880 F. Supp. at 1150-51; McClure v. Salvation Army, 460 F.2d 553, 558-59 (1972).

[94] *Kedroff*, 344 U.S. at 95.

[95] *Id.* at 100-01.

[96] *See, e.g.*, *Ayon*, 47 F. Supp. 2d at 1250 (citing Plaintiff's complaint which alleges that Archdiocese received information that defendant had "sexually abused a boy"); (*Isely*, 880 F. Supp. at 1142 (describing how plaintiff was a seminary student, not a priest, at the time of the alleged abuse); Moses v. Diocese of Colo., 863 P.2d 310, 314 (Colo. 1993) (identifying plaintiff as a parishioner of St. Phillip and St. James Episcopal Church in Denver, Colo.); Malicki v. Doe, 814 So. 2d 347, 352 (Fla. 2002) (listing plaintiffs Jane Doe I and Jane Doe II as "parishioners"); Roman Cath. Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1219 (Miss. 2005) ("After moving from Boston to Jackson in 1969, Dr. Francis Morrison, his wife, Dorothy, and their three sons became active parishioners at the Cathedral of St. Peter the Apostle Catholic Church.")

crucial.[97] Unlike *Kedroff*, the underlying actions of sexual misconduct claims jeopardize public safety, particularly the safety of children.[98] While the First Amendment rightfully prohibits government interference in strictly church matters, a church cannot be immune from liability when injury occurs to third parties.[99] To do so would send a message that religious organizations can use the First Amendment as a shield to any government regulation, even regulation meant to protect public safety.[100]

Moreover, routine criminal prosecutions of clergy members that engage in the sexual abuse of minors support the imposition of civil liability upon the larger organization that permit such conduct, either directly or indirectly.[101] The Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS") is a fundamentalist sect of Mormonism that adheres to the practice of plural marriage by assigning underaged women to become the wives of older male members.[102] The marital relations that stem from these assignments result in the sexual abuse of numerous young women, although the reported sexual abuse also includes male survivors.[103] In 2011, Warren Jeffs, the former leader of the FLDS, was sentenced to life in prison plus 20 years for one count of aggravated sexual assault against a 12-year-old girl and one count of sexual assault against a 14-year-old-

[97] *Kedroff*, 344 U.S. at 95; *see* Bear Valley Church of Christ v. DeBose, 928 P.2d 1315, 1323 (Colo. 1996).

[98] *See Bear Valley Church of Christ*, 928 P.2d at 1321-23; Carroll et al., *supra* note 1.

[99] *See* U.S. CONST. amend. I; Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012); *Malicki*, 814 So. 2d at 360; Cantwell v. Conn., 310 U.S. 296, 303-04 (1940); *Bear Valley Church of Christ*, 928 P.2d at 1323.

[100] *See* DURHAM & SMITH, *supra* note 6, § 21:13.

[101] *See* Clayton Sandell & Christina Caron, *Polygamist Warren Jeffs Guilty of Child Rape*, ABC NEWS (Aug. 4, 2011, 12:11 AM), https://abcnews.go.com/US/warren-jeffs-guilty-child-rape/story?id=14228198 [https://perma.cc/W5RD-PHRF].

[102] *See* Marianne T. Watson, *The 1948 Secret Marriage of Louis J. Barlow: The Origin of FLDS Placement Marriages*, 40 DIALOGUE: A J. OF MORMON THOUGHT 83, 87, 106 (2007); Wade Goodwyn, Howard Berkes & Amy Walters, *Warren Jeffs and the FLDS*, NPR (May 3, 2005, 12:00 AM ET), https://www.npr.org/2005/05/03/4629320/warren-jeffs-and-the-flds [https://perma.cc/U7RY-D3CF]; David Kelly & Gary Cohn, *Blind Eye to Culture of Abuse*, L.A. TIMES (May 12, 2006, 12:00 AM PT), https://www.latimes.com/news/la-na-sect12may12-story.html [https://perma.cc/4DHN-DGKS].

[103] *See id.*; *see, e.g.*, Jessop v. State, 368 S.W.3d 653, 664-65 (Tex. App. 2012) (evidence showed that after the marriage ceremony between J. Jessop, 15, and defendant, 32, the two engaged in sexual relationship).

girl.[104] Jeffs contested these charges, claiming that both girls were his "spiritual wives" in accordance with his personal religious beliefs.[105]

The United States government's decision to criminally prosecute individuals like Jeffs shows a willingness to assign criminal liability to religious leaders and to interpret the ethics of one's religious doctrine within the criminal context. While many individuals view Jeffs' actions as repulsive, Jeffs, and other members of the FLDS, hold a genuine religious belief that marriage, and marital relations, with their underage wives lead to eternal life in heaven.[106] If the government is willing to infringe upon First Amendment rights of religious organizations that embrace sexual abuse as a part of their religious beliefs, the current hesitation to even minimally regulate religious organizations vehemently rejects such acts, in order to respect their First Amendment rights, is simply illogical.

B. Implementing a Reasonableness Standard Through Narrow Investigations

While a lack of excessive entanglement not only complies with the First Amendment, limited factual inquiries permit the imposition of a reasonableness standard upon religious organizations to in order establish liability.[107] Although the separation of secular and canon law authorize a court to hear a negligent hiring, supervision, and retention claim, limitations in the scope of the court's analysis can assist in determining liability without infringing upon the First Amendment.[108] To succeed on a negligent hiring, supervision, and retention claim, a plaintiff must demonstrate that the religious organization knew or had reason to know of

[104] Jim Forsyth, *Sect Leader Warren Jeffs Gets Life in Prison for Sex with Girls*, REUTERS (Aug. 9, 2011, 8:00 AM), https://www.reuters.com/article/us-polygamist-trial/sect-leader-warren-jeffs-gets-life-in-jail-for-sex-with-girls-idUSTRE77848W20110809 [https://perma.cc/62R8-QU4E].

[105] Sandell & Caron, *supra* note 101.

[106] *See id.*; Watson, *supra* note 102, at 83-84, 100 (describing how placement marriages, which sometimes involve underage brides, are a "deeply entrenched belief in the FLDS community").

[107] *See* U.S. CONST. amend. I; *see, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310, 321 (Colo. 1993) (holding that sufficient facts, not of ecclesiastical concern supported the plaintiff's negligent hiring, supervision, and retention claim); Malicki v. Doe, 814 So. 2d 347, 360-61 (Fla. 2002) (stating that the First Amendment does not bar adjudication because elements of negligent hiring claim are "factual inquiries").

[108] *See* U.S. CONST. amend. I; *Moses*, 863 P.2d at 319-21, 327-28.

the potential dangers at the time of the hiring.[109] Regardless of a court's ability to adjudicate these types of claims with neutral principles of law, imposition of a reasonable standard onto religious organizations raises First Amendment concerns.[110] Arguably, the creation of a "reasonable church" for the determining liability could in theory require the interpretation of religious doctrine.[111] Such a standard could force the court to assess the value of religious practices and interchurch procedures, actions which undoubtedly infringe upon the religious freedom guaranteed by the First Amendment.[112]

In the case of *Ayon v. Gourley*, the Tenth Circuit affirmed the District Court of Colorado's finding that consideration of a negligent hiring, supervision, and retention, specifically establishing a reasonableness standard, would cause excessive entanglement.[113] The application of secular tort law principles to church procedures, in the court's view, would "require an inquiry into present practices with an intent to pass on their reasonableness."[114] This reluctance to apply a reasonableness standard is understandable, since the District Court of Colorado's language is not narrow in scope.[115] When assessing reasonableness in this context, the District Court, and many others, mistakenly assume that a creation of a "reasonable church" would require an assessment of religious doctrine. However, only a strict assessment of fact is required to determine what is a "reasonable church" for the purpose of negligent hiring, supervision, and retention claims.[116] Conducting a strictly factual investigation may be difficult, but it is possible.

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[109] *See* RESTATEMENT (SECOND) OF TORTS § 282 (AM. L. INST. 1965); *Moses*, 863 P.2d at 328.

[110] *See* U.S. CONST. amend. I.; Ayon v. Gourley, 47 F. Supp. 2d 1246, 1249-50 (D. Colo. 1998).

[111] *See Ayon*, 47 F. Supp. 2d at 1250 (holding that the court could not apply a reasonable standard without interpreting church doctrine).

[112] *See id.*

[113] *See* Ayon v. Gourley, No. 98-1305, slip op. at 6-7 (10th Cir. 1999).

[114] *Ayon*, 47 F. Supp. 2d at 1250.

[115] *See id.*

[116] *See, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310, 320 (Colo. 1993) ("Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution."); Roman Cath. Diocese v. Morrison, 905 So. 2d 1213, 1230 (Miss. 2005) ("[T]he court's inquiry will end at learning whether the Diocese had the authority and power over Broussard to do that which our common law says should have been done, given the extent of knowledge and information available to it. If it indeed had such power and authority, its requirement to protect children from sexual abuse is not different from other institutions to which the common law applies; no more, no less.")

Like many other states, California case law recognizes that an employer can be held liable to a third person for negligent hiring, supervising, or retaining an unfit employee.[117] Negligence liability can be imposed directly on the employer, the church, if the employer knew of or should have known that hiring the employee would have created a particular harm, and that particular harm arises.[118] Regarding cases like clergy sexual abuse, a reasonable church under this standard would be a church that took adequate steps not to hire or retain an individual who the church either knew or should have known would sexually abuse parishioners.[119] Thus, assessing liability in these cases does not require courts to look at the purposes behind hiring procedures, but rather the effectiveness of these procedures for identifying the risk of a particular secular harm.[120] A "reasonable church" for the purposes of a negligent hiring, supervision, and retention claims is not created from the value of the church's doctrine; the reasonableness standard is created by assessing the effectiveness of hiring procedures at identifying any risks for sexual abuse.[121]

In determining whether a religious institution violated its duty to the parishioner in hiring, supervising, or retaining a clergy member who engaged in any alleged sexual misconduct, the institution is held to a standard that is based upon knowledge.[122] It is the institution's knowledge, or possible knowledge of abuse, that is in question, not the institution's reasoning for following a certain hiring process or procedure.[123] In *Roman Catholic Diocese of Jackson v. Morrison*, the Supreme Court of Mississippi held that a limited factual inquiry into a church's knowledge of the sexual abuse did not violate the *Lemon* test, as churches could be held to the same standard as other institutions subject to the common law.[124] To determine a breach of duty, a court need only inquire whether the religious organization had the authority act as common law says it should have, given the knowledge and information available to the

[117] Doe v. Cap. Cities, 55 Cal. Rptr. 2d 122, 132 (Cal. Ct. App. 1996).

[118] *See* Phillips v. TLC Plumbing, Inc., 91 Cal. Rptr. 3d 864, 868 (Cal. Ct. App. 2009).

[119] *See* Evan F. v. Hughson United Methodist Church, 10 Cal. Rptr. 2d 748, 758-59 (Cal. Ct. App. 1992).

[120] *See id.*

[121] *See Moses*, 863 P.2d at 327-29; *Roman Cath. Diocese*, 905 So. 2d at 1222; Morgan Fife, *Predator in the Primary: Applying the Tort of Negligent Hiring to Volunteers in Religious Organizations*, 2006 B.Y.U. L. REV. 569, 580-87.

[122] *See* RESTATEMENT (SECOND) OF TORTS § 285 (AM. L. INST. 1965).

[123] *See Moses*, 863 P.2d at 328-29.

[124] *Roman Cath. Diocese*, 905 So. 2d at 1230.

organization.[125] While these factual limitations themselves do not establish the elements required for a negligent hiring, supervision, and retention claim, they do permit a claim of this nature to be pursued in court.[126]

Further support for these limited factual inquiries can be found with tort claims brought against newspapers, organizations that, similar to religious institutions, have significant protections under the First Amendment.[127] In addition to protecting the free exercise of religion, the First Amendment of the United States Constitution prohibits Congress from "abridging the freedom of speech, or of the press."[128] However, despite protection from government censure, newspapers are still left to defend themselves against plaintiffs who file tort claims for the actions of their employees.[129] While many plaintiffs fail to establish the elements required to succeed on a negligent hiring, supervision, or retention claim against a newspaper, courts have nevertheless determined that adjudicating such claims does not violate the First Amendment; a conclusion that strongly suggests that the freedoms of the First Amendment provide absolute immunity against tort claims.[130]

C. Current Church Reform Has Failed to Create Substantial Change

Government oversight of religious institutions regarding instances of sexual abuse is necessary because governing church bodies have failed to create procedures that substantially rectify the evil of sexual abuse which has plagued religious organizations for years.[131] Sexual abuse within the

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[125] *Id.*

[126] *Id.*

[127] *See* U.S. CONST. amend. I.

[128] *Id.*

[129] *See, e.g.*, Robinson v. George, 105 P.2d 914, 918-19 (Cal. 1940) (finding judgment in favor of a plaintiff who sustained personal injuries from defendant employee's negligent operation of a vehicle); Patterson v. Se. Newspapers, Inc., 533 S.E.2d 119, 123-24 (Ga. Ct. App. 2000) (describing court's granting of defendant's motion for summary judgment in automobile accident involving defendant's employee was based upon lack of sufficient evidence presented by plaintiff, not subject matter jurisdiction); Schofield v. Cox Enters., Inc., 441 S.E.2d 693, 694 (Ga. Ct. App. 1994) (holding that trial court did not err in granting defendant's motion for summary judgment because review of the facts showed defendant's employee was engaged in his own pursuits at the time of the collision).

[130] *See* Evan F. v. Hughson United Methodist Church, 10 Cal. Rptr. 2d 748, 758-59 (Cal. Ct. App. 1992).

[131] Karen Liebreich, *The Catholic Church Has a Long History of Child Sexual Abuse and Coverups*, WASH. POST (Feb. 18, 2019, 5:34 PM EST), https://www.washingtonpost.com/opinions/the-catholic-church-has-a-long-history-of-child-sexual-abuse-and-coverups/2019/02/18/53c1f284-3396-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/R274-SY63].

Roman Catholic Church is documented to have occurred as early as the 1600s.[132] Following the nationwide scandal in 2002, the Catholic Church published the Dallas Charter, which became known as the Charter for the Protection of Children and Young People.[133] The Charter includes recommended procedures for claims of sexual abuse, most of which focus on reconciliation with both the victim and the perpetrator.[134] Additionally, there is a call for bishops to implement "safe environments" programs to provide education to parents, minors, and employees, as well as conducting background checks of all potential ministers in accordance with "local custom."[135] However, in the almost 20 years since the creation of the Dallas Charter, there has been little substantial or long term change, mostly because all of the procedures listed in the Charter are to be implemented with discretion.[136] While recognizing a congregation's individual autonomy may prove beneficial to avoid hierarchical disputes such as *Kedroff*, discretionary implementation of such desperately-needed regulation creates significant inconsistencies amongst reporting procedures within different dioceses.[137] As of 2020, only 5 of the 32 archdioceses of the Roman Catholic Church have assigned a lay person to head an investigative body for allegations of sexual misconduct.[138] A 2019 Pew Research Center survey found that seven in ten U.S. adults who attend religious services a few times a year or more claim to have *not* heard their religious leaders speak out against sexual abuse.[139] As a result, incidents

[132] *Id.*

[133] CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE, U.S. CONF. OF CATH. BISHOPS, PROMISE TO PROTECT: PLEDGE TO HEAL 3 (2018), https://www.usccb.org/test/upload/Charter-for-the-Protection-of-Children-and-Young-People-2018-final(1).pdf [https://perma.cc/H9BM-LAKU].

[134] *Id.*

[135] *Id.* at 3, 15.

[136] David Crary, *Report Finds Flaws in Catholic Church Abuse-Prevention Plans*, ASSOC. PRESS (Oct. 1, 2020), https://apnews.com/article/sexual-abuse-by-clergy-personnel-united-states-sexual-abuse-0f56041fffc8c9742701a41e77eacd60 [https://perma.cc/5G8R-QP8J]; *see* Lauer & Hoyer, *supra* note 3.

[137] Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 95-96 (1952); *see* Crary, *supra* note 136.

[138] Crary, *supra* note 136.

[139] Claire Gecewicz, *Key Takeaways About How Americans View the Sexual Abuse Scandal in the Catholic Church*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/key-takeaways-about-how-americans-view-the-sexual-abuse-scandal-in-the-catholic-church/ [https://perma.cc/T5JN-EJA2].

of sexual abuse by priests are still being uncovered today.[140] Even more concerning is that these newly reported claims did not occur during the supposed height of the church abuse scandal in the 1980s, but instead in the mid-2000s *after* the passage of the Dallas Charter.[141] Finally, these recent incidents of sexual abuse by clergy are not limited solely to the Catholic Church, but have become a significant issue in other religions as well.[142]

III. SUGGESTIONS FOR REFORM

Yet, as some scholars argue, the dual nature of the crime makes legal action an insufficient remedy.[143] The crime of sexual abuse by a clergy member has two distinct injuries, one of which the American legal system cannot redress. First is the violation of a person's right to have control of his or her own body.[144] Second, those abused by clergy members also suffer severe trauma to their personal faith.[145] Clergy members and ministers are seen by parishioners as an extension of the divine; they are "trusted and honored figures… by virtue of ordination."[146] The sexual abuse these individuals perpetuated arguably created trauma within one's faith that cannot be restored simply through secular law.[147] However, the circumstances of these crimes, and the injuries they cause, require a civil cause of action that can attempt to provide some form of remedy. Judicial

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[140] *See, e.g.*, *Priest Pleads No Contest to Abusing 11-Year-Old Altar Boy*, ASSOC. PRESS (Oct. 25, 2021), https://apnews.com/article/religion-pennsylvania-sexual-abuse-by-clergy-sexual-abuse-greensburg-fb5fc82c0d13ad5ba77208a9afe846ba [https://perma.cc/SWP2-NYNV] (noting one such recent discovery of sexual abuse).

[141] *See id.*

[142] *See, e.g.*, *Authorities: Monk in Alaska Faces Child Sexual Abuse Charge*, ASSOC. PRESS (Oct. 8, 2021), https://apnews.com/article/phoenix-alaska-kodiak-arizona-sexual-abuse-by-clergy-fb9efa263dce43fdd9093d25b48e75da [https://perma.cc/BN9Q-HCC] (reporting on an instance of a monk associated with the Russian Orthodox Church accused of sexual abuse); Peter Smith, *Southern Baptist Panel to Open Legal Records for Abuse Probe*, ASSOC. PRESS (Oct. 5, 2021), https://apnews.com/article/southern-baptist-convention-sexual-abuse-sexual-abuse-by-clergy-baptist-religion-84b2d92401e6e585cf84d53ab5860505 [https://perma.cc/9SGD-TPVZ] (noting that a committee of the Southern Baptists Convention would open up records to investigators regarding sexual abuse).

[143] *See* Theo Gaverielides, *Clergy Child Sexual Abuse and the Restorative Justice Dialogue*, 55 J. CHURCH & STATE 617, 623 (2012).

[144] *See id.*

[145] *See* Joseph J. Guido, *A Unique Betrayal: Clergy Sexual Abuse in the Context of the Catholic Religious Tradition*, 17 J. CHILD SEXUAL ABUSE 255, 257 (2008).

[146] *Id.*

[147] *See* Gaverielides, *supra* note 143, at 623.

abstention may encourage an organization and its congregation to continue dismissing such abuse.[148] Even when victims decide to report their abuse, many are often met with skepticism and denial by other parishioners, which may include family members.[149] Research shows that "because devotion to the institution shapes social identity, especially for more devout individuals, members of a religious community may be entirely suspicious of the victim's claims, favoring instead religious figures and his or her status and perceived credibility."[150] Imposing liability upon a religious institution for the sexual abuse its ministers committed may not provide a comprehensive remedy for survivors, but it is a necessary place to start. This abuse of spiritual power and an institution's internal hierarchy exploits the trust parishioners place in these institutions.[151] A formal recognition of wrong by a secular body, such as a court, would assist in legitimizing and addressing a problem that is often ignored and minimized in congregations with heedless devotion to clergy.

IV. A PATH FORWARD

Despite potential issues of excessive entanglement between church and state, it is important that victims of sexual abuse by clergy members can seek legal remedies against those responsible for the abuser's employment and access to the victims. Research has shown that the immediate and long-term effects of child abuse include Post-Traumatic Stress Disorder ("PTSD"), cognitive distortions, anxiety, depression, and increased rate of suicidal thoughts.[152] Thus, actions that seek to mitigate these devastating effects, such as negligence claims, are imperative in the recovery process for some.[153]

Permitting the adjudication of negligent hiring, supervision, and retention claims for a religious institution's negligence involving third

[148] *See* Geoff Mcmaster, *Research Reveals Patterns of Sexual Abuse in Religious Settings*, UNIV. OF ALBERTA (Aug. 5, 2020), https://www.ualberta.ca/folio/2020/08/researchers-reveal-patterns-of-sexual-abuse-in-religious-settings.html [https://perma.cc/5XHX-KNFC].

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] John N. Briere & Diana M. Elliot, *Immediate and Long-Term Impacts of Child Sexual Abuse*, *in* 4 THE FUTURE CHILDREN 54, 55-60 (1994).

[153] *See* Emily Allen, *Three Men Sue Catholic Diocese of Portland over Childhood Sexual Abuse*, PRESS HERALD (June 16, 2022), https://www.pressherald.com/2022/06/16/first-known-civil-complaints-filed-against-portland-catholic-church-for-childhood-sexual-abuse-since-statute-of-limitations-was-lifted/ [https://perma.cc/98ZH-B77R].

parties, as demonstrated in the First Circuit in *Smith v. O'Connell*, would hold institutions accountable for their ministers and may help to alleviate the self-blame, guilt that many survivors of sexual abuse experience.[154] Such change might also assist in the identification of more survivors, specifically people of color.[155] Within the Catholic Church specifically, numerous dioceses have failed to collect data regarding the demographics of victims in known sexual abuse cases.[156] However, this type of information is extremely important, as people of color and individuals from low-income communities face additional social, cultural, and financial barriers to reporting sexual abuse.[157] In fact, many victims from these communities choose not to report a clergy member's sexual abuse due to fear of losing resources, such as money or food, that their abusers provide to them and their families.[158] Demonstration of public support through the judiciary could assist in reducing the stigma surrounding sexual abuse, a stigma that contributes to underreporting.[159]

To comply with the First Amendment, courts must limit the scope of their analysis to secular law and questions of fact in order to comply with historical practices.[160] Given that the *Kennedy* test developed from a set of facts concerning a public school employee's right to religious expression, complicated interactions such as minister sexual abuse and negligent hiring, supervision, and retention perhaps are the outer limits of *Kennedy*'s reach.[161] However, the Supreme Court communicated through *Kennedy* that issues involving the Establishment Clause were to be decided looking at historical practices, and courts have chosen to dwell upon tort law for centuries.[162] By applying a secular interpretation of the neutral principles of law, courts avoid consideration and interpretation of religious doctrine and instead adhere to *Kennedy*'s "historical practices and understandings"

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[154] *See* Briere & Elliot, *supra* note 152.

[155] *See* Gary Fields, Juliet Linderman & Wong Maye-e, *Church Offers Little Outreach to Minority Victims of Priests*, ASSOC. PRESS (Jan. 4, 2020), https://apnews.com/article/us-news-ap-top-news-ca-state-wire-or-state-wire-the-reckoning-00a7a65248e88ccf3e9dcd2b6054bbdc [https://perma.cc/7T9J-VZZJ].

[156] *Id.*

[157] *Id.*

[158] *See id.*

[159] *See id.*

[160] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2449 (2022) (Sotomayor, J., dissenting).

[161] *Id.* at 2416-19.

[162] *Id.* at 2428; *see also* Ayon v. Gourley, 47 F. Supp. 2d 1246, 1249 (D. Colo. 1999).

standard.[163] Accountability for actions that endanger public safety does not infringe upon the freedom to practice religion.[164]

The First Amendment will also require courts to consider the identity of the parties to the claim, at least for the time being. While lay parishioners are a third party to the employment relationship, thus failing to invoke First Amendment concerns, the same cannot be said for ministers themselves.[165] In 1972, the Fifth Circuit was among the first to articulate a need for a ministerial exception under Title VII of the Civil Rights Act of 1964.[166] Other courts soon followed and a wide range of employees who performed "ministerial duties" found themselves without legal recourse due to concern that applying Title VII to a ministerial relationship would "cause the State to intrude upon matters of church administration and government."[167]

However, the case of *Bollard v. California Province of the Society of Jesus* demonstrates how one's legal rights are not entirely abandoned upon entering the church.[168] In this case, the Ninth Circuit established parameters to determine whether a minister's sexual harassment against their employers could be adjudicated in accordance with Title VII and the First Amendment.[169] John Bollard, a former seminarian, alleged that between 1990 and 1996, he was sexually harassed by his Jesuit superiors at the St. Ignatius College Preparatory School in San Francisco, California and the Jesuit School of Theology in Berkeley, California.[170] Bollard reported the harassment, which included unwelcome sexual advances, sexual discussions, and pornographic material, and eventually left the Jesuit Order in 1996 prior to taking his vows.[171] While the Ninth Circuit noted the longstanding practice of courts carving out a ministerial exception in employment disputes to reconcile Title VII with the United States Constitution, the court determined that none of the rationales for the exception, such as freedom to choose personnel that align with religious

163 U.S. CONST. amend. I.; *Kennedy*, 142 S. Ct. at 2428.

164 *See* U.S. CONST. amend. I.

165 *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 976 (7th Cir. 2021).

166 *See* 42 U.S.C. § 2000e-1(a) (2022); McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972); *see also The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1778 (2008).

167 *McClure*, 460 F.2d at 560; *see also* Rweyemamu v. Cote, 520 F.3d 198, 207 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 299 (3d Cir. 2006).

168 Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999).

169 *Id.* at 948-50.

170 *Id.* at 944.

171 *Id.*

beliefs, were present in the case at hand.[172] According to the record, the Jesuits never offered a religious justification for the harassment, and the Ninth Circuit determined that adjudication would only require a limited inquiry as to what measures, if any, the Jesuits took to prevent or correct the harassment.[173]

Unfortunately, *Bollard* appears to be the limit of a court's reach regarding the protection of a minister's legal rights, since the case assessed only whether the Jesuits knew about the harassment and took any measures to prevent or correct the harm, and did not assess any of the church's criteria for employment.[174] Unlike most ministers who bring claims of negligence and sexual harassment against their employers, the Jesuits in *Bollard* asserted that they wished for the plaintiff to remain a minister and member of the order.[175] Should a minister bring a sexual harassment claim, or an unlawful retaliation claim after being fired for reporting such behavior, it appears that the First Amendment would likely protect the employer against any form of inquiry related to employment decisions.[176] Thus, a minister could bring a sexual harassment claim against a religious organization as their employer under Title VII, but would be barred from suing the organization for negligently hiring, supervising, or retaining an individual who engaged in sexual harassment.[177] The Free Exercise Clause of the First Amendment may not protect a religious organization from being liable to third parties, such as parishioners, but it does protect the power of religious organizations to "decide for themselves, free from state interference, matters of church government."[178]

CONCLUSION

Sexual abuse is an immoral crime that has sought refuge within religious institutions for years due to a hesitancy amongst courts to impute civil

[172] *Id.* at 947-48.

[173] *Id.* at 950.

[174] *Id.* at 947, 950; *see* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 976-77, 979 (7th Cir. 2021).

[175] *Bollard*, 196 F.3d at 947.

[176] *See* Elvig v. Calvin Presbyterian Church, 375 F.3d, 951, 951 (9th Cir. 2004) (holding that the plaintiff could bring sexual harassment claims if the alleged harassment did not involve an employment decision by the church); *see also* Dolquist v. Heartland Presbytery, 342 F. Supp. 2d 996, 1004 (D. Kan. 2004).

[177] *See Bollard*, 196 F.3d at 950.

[178] *Id.* at 945 (quoting Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).

liability upon religious organizations.[179] The Establishment and Free Exercise Clauses of the First Amendment may insulate a religious institution from government interference regarding a dispute with an employee through the ministerial exception, but the exception lacks the necessary constitutional reasoning when applied to cases involving third parties.[180] While the *Lemon* test properly sought to prohibit excessive entanglement between church and secular government, reliance upon this test as a defense against negligent hiring, supervision, and retention claims by religious organizations was misplaced.[181] *Kennedy's* "historical practices and understandings" test supports a court's involvement in these types of cases, since the United States Constitution does not forbid the application of a secular standard to secular, tortious conduct.[182] Through strict, factual inquiries that focus on actual or constructive knowledge, a court need not interpret religious doctrine to determine a religious organization's liability.[183] It is the judiciary's duty and responsibility to exercise its inherent authority and provide survivors the opportunity to obtain the justice they deserve.

[179] *See supra* Part I.
[180] *See supra* Part II.
[181] *See supra* Part II.
[182] *See* Moses v. Diocese of Colo., 863 P.2d 310, 320 (Colo. 1993); *supra* Part II.B.
[183] *See supra* Parts II, III.