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Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct: The Implications of Fearing v. Bucher

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I. Introduction

According to a research study authorized by the United States Conference of Catholic Bishops, a total of 4392 Catholic priests faced allegations of sexual abuse of a minor between 1950 and 2002.[1] The epidemic of clergy sexual abuse has resulted in a torrent of litigation, with victims filing lawsuits against both the accused clerics[2] and the religious organizations employing these clerics.[3] Plaintiffs in these lawsuits have asserted several theories of liability against religious employers, including negligent hiring, negligent supervision, and negligent retention.[4] A common thread among each of these causes of action is a requirement that the plaintiff show that the employer was at fault. A plaintiff who lacks evidence of employer fault cannot succeed under these theories of liability, and the victim's lawsuit is instead confined to an action against the offending cleric. In cases involving religious organizations that require their clerics to take a vow of poverty,[5] the victim's recovery is effectively precluded in light of the judgment-proof offender.

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1. THE JOHN JAY COLLEGE RESEARCH TEAM, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 6 (2004), *available at* http://www.usccb.org/nrb/johnjaystudy/.

2. The terms clerics, clergymen, and priests are used interchangeably in this Note. These terms are used to denote an employee of a religious institution whose duties are to instruct followers in the teachings of the religion and to perform religious services on behalf of the institution. Similarly, the term parishioner is used to denote a member of a religious organization. There is no intention to single out any one religious organization, as the argument set forth in this Note is applicable to all hierarchical religious institutions.

3. *See* Janna Satz Nugent, *A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy*, 30 FLA. ST. U. L. REV. 957, 961 (2003) ("[I]t has become increasingly common for plaintiffs to sue religious organizations for their clerics' misconduct.").

4. *See id.* (noting common causes of action asserted against religious organizations in cases involving clergy sexual misconduct).

5. *See, e.g.*, U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 152 (2004) (noting that the Roman Catholic Church requires its priests to take a vow of poverty

Under the doctrine of respondeat superior, an employer is liable for an employee's tortious conduct "if the employee was acting within scope of employment."[6] Respondeat superior claims differ significantly from negligence claims in that under respondeat superior "an employer is liable, despite having no fault whatsoever, for the acts of its employees taken within the scope of their employment."[7] The basic rationale for imposing this type of vicarious liability is that employers subjected to such a rigid standard of liability will exercise greater care in selecting their employees.[8] In theory, the more stringent hiring standard will result in businesses hiring employees who are less prone to tortious conduct.

In general, courts are reluctant to find respondeat superior liability in cases of intentional torts.[9] In matters of intentional torts involving sexual misconduct, one court has stated as a matter of law that "when the tortfeaser-employee's [sic] activity with the alleged victim became sexual, the employee abandoned and ceased to further the employer's business."[10] In *Tichenor v. Archdiocese of New Orleans*,[11] the Fifth Circuit articulated a common judicial

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and to give all personal earnings to the order), *available at* http://www.bls.gov/oco/pdf/ocos063.pdf.

6. Fearing v. Bucher, 977 P.2d 1163, 1165 (Or. 1999); *see also* Fargher v. City of Boca Raton, 524 U.S. 775, 793 (1998) ("A 'master is subject to liability for the torts of his servants committed while acting in the scope of their employment.'" (quoting RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958))).

7. Hamilton v. Carell, 243 F.3d 992, 1001 (6th Cir. 2001); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991) (noting that respondeat superior involves "[i]mposing liability [on an employer] without independent fault"); Mary M. v. City of Los Angeles, 814 P.2d 1341, 1343 (Cal. 1991) ("[Respondeat superior] is a departure from the general tort principle that liability is based on fault.").

8. *See* Tippecanoe Beverages, Inc. v. S.A. El Aguila Brewing Co., 833 F.2d 633, 638 (7th Cir. 1987) (noting that the policy behind the doctrine of respondeat superior is "that of encouraging employers and other principals to select their employees and other agents carefully").

9. *See, e.g.*, Borneman v. United States, 213 F.3d 819, 828 (4th Cir. 2000) ("[U]nder the North Carolina law of *respondeat superior*, an intentional tort is 'rarely considered to be within the scope of an employee's employment.'" (quoting Meslin v. Bass, 398 S.E.2d 460, 464 (N.C. 1990))).

10. Reynolds v. Zizka, CV9505552225, 1998 Conn. Super. LEXIS 619, at *8 (Conn. Super. Ct. Mar. 5, 1998) (citing Gutieerez v. Thorne, 537 A.2d 527 (Conn. App. Ct. 1988)). *But see* Doe v. Norwich Roman Catholic Diocesan Corp., 309 F. Supp. 2d 247, 252 (D. Conn. 2004) (denying Archdiocese's motion to dismiss plaintiff's respondeat superior claim where the alleged sexual abuse took place during counseling sessions designed to bring the plaintiff closer to the church and thereby increase financial donations to the church).

11. Tichenor v. Roman Catholic Church Archdiocese of New Orleans, 32 F.3d 953 (5th Cir. 1994). In *Tichenor*, the petitioner claimed that he was molested by a priest employed by the Archdiocese of New Orleans. *Id.* at 957. The petitioner appealed a district court's grant of summary judgment in favor of the archdiocese on the issue of respondeat superior. *Id.* at 959.

reaction to a claim of respondeat superior against a religious institution based upon sexual misconduct, stating that "[i]t would be hard to imagine a more difficult argument than that [a priest's] illicit sexual pursuits were somehow related to his duties as a priest or that they in any way furthered the interests of . . . his employer."[12] Common sense dictates that a cleric's duties are to help others understand and follow religious teachings.[13] Sexual conduct of any kind, specifically sexual abuse, could hardly be considered to fulfill this duty.[14]

But one jurisdiction has recognized the validity of respondeat superior claims asserted against religious organizations in cases involving clergy sexual misconduct.[15] In *Fearing v. Bucher*,[16] the Oregon Supreme Court addressed the adequacy of a plaintiff's claim of respondeat superior against the

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The court discussed the priest's alleged conduct in light of his duties as a priest and an employee of the diocese. *Id.* Rejecting the petitioner's claim that the alleged sexual abuse was within the scope of the priest's employment, the court cited the priest's vow of celibacy and the Catholic Church's condemnation of homosexual relations as evidence that the priest's actions did not further the interests of his employer. *Id.* at 960. The Fifth Circuit affirmed the trial court's grant of summary judgment in favor of the diocese on the issue of respondeat superior. *Id.*

12. *Id.*

13. *See id.* at 959 (finding that a priest's duties include representing the word of God, aiding people in their relationship with God, and generally helping others).

14. *See id.* at 960 (noting a Catholic priest's vow of celibacy as evidence supporting the court's conclusion that the alleged sexual misconduct was outside of the priest's scope of employment); Hayes v. Norwich Roman Catholic Diocese, X07CV020084286S, 2004 Conn. Super. LEXIS 2440, at *7 (Conn. Super. Ct. Aug. 24, 2004) ("Unlike a situation where a servant performs the master's work poorly or misunderstands what the master wants done, the molestation of children is a total abdication of the master's work so that the pedophile priest can satisfy personal lust.").

15. *See* Fearing v. Bucher, 977 P.2d 1163, 1167 (Or. 1999) (holding that petitioner's complaint alleged sufficient facts to establish a claim of respondeat superior).

16. Fearing v. Bucher, 977 P.2d 1163 (Or. 1999). In *Fearing*, the petitioner alleged sexual molestation by a priest employed by the Archdiocese of Portland. *Id.* at 1164. The Oregon Court of Appeals affirmed the trial court's dismissal for failure to state a claim, based in part on the conclusion that the complaint failed to allege facts "from which it could be reasonably concluded that Bucher's sexual assaults on plaintiff were within the scope of Bucher's employment." *Id.* The Supreme Court of Oregon determined that the court of appeals did not apply the proper scope-of-employment inquiry. *Id.* at 1167. The proper inquiry should focus on whether "the sexual assaults were the culmination of a progressive series of actions that began with and continued to involve Bucher's performance of the ordinary and authorized duties of a priest." *Id.* In light of the plaintiff's allegations that Bucher abused his authority as a priest to gain the opportunity to commit the assaults, that court held that the complaint alleged facts sufficient to survive the Archdiocese's motion to dismiss. *Id.* The case was later settled out of court. Ashbel S. Green, *Oregon Clergy Flooded With Suits*, OREGONIAN, July 7, 2002, at A01, *available at* http://www.oregonlive.com/special/priest/index.ssf?/special/oregonian/priest/020707.html (on file with the Washington and Lee Law Review).

Archdiocese of Portland.[17] The *Fearing* court stated that intentional torts, including sexual assault, require a somewhat different respondeat superior analysis.[18] Rather than asking whether the sexual assault itself was within the scope of employment, the court instead inquired as to whether the priest's conduct leading up to the assault was within the scope of employment.[19] In so doing, the court considered the nature of the relationship between the priest and the plaintiff, including the plaintiff's allegations that the priest abused his clerical authority and manipulated the plaintiff's trust in order to gain the opportunity to commit the sexual assaults.[20] The court determined that a reasonable jury could conclude that the priest's legitimate actions preceding the abuse were "a necessary precursor to the sexual abuse" and that the sexual assaults therefore "were a direct outgrowth of and were engendered by conduct that was within the scope of [the priest's] employment."[21] In the opinion of the court, the issue of whether the sexual misconduct was within the priest's scope of employment was a question of fact to be determined by the jury.[22]

The failure of religious institutions to effectively address the crisis of clergy sexual abuse warrants a reexamination of the doctrine of respondeat superior as applied to hierarchical religious institutions in matters involving clergy sexual abuse. This Note argues that the analysis employed by the Oregon Supreme Court in *Fearing v. Bucher* is the proper respondeat superior analysis in all cases involving intentional torts, including sexual assault. Second, this Note contends that the inherent power imbalance between priest and parishioner renders the relationship extraordinarily susceptible to manipulation, which leads to a presumption that the required causal nexus between the employment and resulting harm is satisfied in clergy sexual misconduct cases. When a plaintiff is able to allege sufficient facts showing that the priest used his clerical authority to take advantage of the plaintiff's vulnerability and commit sexual assaults upon the plaintiff, courts should recognize the validity of a plaintiff's respondeat superior claim and allow the

17. *See Fearing*, 977 P.2d at 1165–68 (discussing the sufficiency of the petitioner's complaint in alleging a claim of respondeat superior).

18. *See id.* at 1167 (stating that in the context of intentional torts, a proper respondeat superior analysis must ask whether the tortfeasor's conduct that led to the injury was within the scope of employment, rather than whether the intentional tort itself was within the scope of employment).

19. *See id.* at 1168 (analyzing the defendant's conduct preceding the petitioner's injuries).

20. *See id.* (discussing the causal nexus between the employment and the sexual assault in light of the plaintiff's allegations that the priest used his authority to gain the plaintiff's trust and thereby gain the opportunity to commit the assaults).

21. *Id.*

22. *Id.*

jury to determine whether the defendant was acting within the scope of employment when the sexual misconduct occurred. By applying this standard of vicarious liability, the judicial system will take a major step toward holding these organizations accountable for the actions of their employees. Increased liability will result in greater assurance of compensation for victims of clergy sexual misconduct, more demanding selection and monitoring standards, and reduced incidents of clergy sexual abuse.

Part II of the Note discusses a significant threshold issue, the doctrine of Ecclesiastical Abstention, and analyzes a religious institution's ability to seek shelter behind the Establishment Clause and the Free Exercise Clause of the First Amendment. More specifically, Part II examines the viability of respondeat superior claims under the Ecclesiastical Abstention doctrine and determines that respondeat superior claims are less burdensome to the principles of religious autonomy than those grounded in negligence. Part III discusses the doctrine of respondeat superior as applied to intentional torts, particularly in the context of sexual assault, and compares the *Fearing* analysis to approaches taken by other jurisdictions. Part IV addresses the nature of the relationship between a cleric and parishioner, focusing on the vulnerability of the parishioner and the power of the cleric. Part IV also discusses other relationships involving dominant and vulnerable parties, such as the therapist-patient relationship, and explores the impact these relationships have on the applicability of respondeat superior. Furthermore, Part IV discusses the church-mandated "vow of poverty" taken by Roman Catholic priests in light of the policy concerns behind respondeat superior liability. Finally, Part V concludes that courts should employ the *Fearing* analysis when evaluating respondeat superior claims arising out of intentional torts. Part V further concludes that courts should recognize the validity of respondeat superior claims in cases of clergy sexual misconduct in order to provide both an effective method of compensating victims of sexual abuse and a strong incentive for religious organizations to exercise greater care in selecting and supervising employees.

II. The Doctrine of Ecclesiastical Abstention

A. Introduction to the Doctrine

The doctrine of Ecclesiastical Abstention is a significant threshold issue that one must address when analyzing any legal claims levied against religious institutions. Courts interpret the doctrine as an outgrowth of both First Amendment religious freedom clauses, the Free Exercise Clause, and the

Establishment Clause.[23] As articulated by the United States Supreme Court in *Watson v. Jones*,[24] the doctrine states that questions of ecclesiastical rule, church discipline, and theological controversy are "matter[s] over which the civil courts exercise no jurisdiction."[25] Watson and its progeny instruct that the First Amendment bars courts from deciding questions that require the interpretation of ecclesiastical law.[26] The doctrine's mandate of deference to religious institutions protects these organizations in two distinct ways. First, the Free Exercise prong of the doctrine protects religious organizations and officials from being coerced into abiding by governmentally defined standards of conduct.[27] Second, the Establishment Clause prong of the doctrine protects the general population from government endorsement of the practices of any particular religious organization.[28]

B. Smith *Neutrality and the Free Exercise Clause*

In *Employment Division, Department of Human Resources of Oregon v. Smith*,[29] the United States Supreme Court considered a Free Exercise claim

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23. *See* Christopher R. Farrell, Note, *Ecclesiastical Abstention and the Crisis in the Catholic Church*, 19 J.L. & POL. 109, 116 (2003) ("[T]he Court has been unclear as to the precise textual source of the doctrine—i.e., whether the doctrine is a product of the Free Exercise Clause or of the Establishment Clause.").

24. Watson v. Jones, 80 U.S. 679 (1872). *Watson* involved a dispute among members of the Walnut Street Presbyterian Church of Louisville, Kentucky. *Id.* at 714. The trustees of the church refused to recognize the validity of a church election that appointed several church elders and granted the elders the power to exercise control over church property. *Id.* at 717. After discussing the potential problems associated with judicial resolution of ecclesiastical disputes, the Court determined that the controversy at hand did not implicate ecclesiastical rule and was therefore justiciable. *Id.* at 734. The Court affirmed the lower court's ruling that the appellants had no right to the church property. *Id.* at 735.

25. *Id.* at 733.

26. *See* Farrell, *supra* note 23, at 116 (discussing the Supreme Court's interpretation of the doctrine of Ecclesiastical Abstention).

27. *See id.* at 131 (noting the ordainment of a priest as an example of a church decision that is directly tied to canon law).

28. *See id.* at 133 (stating that judicial approval of a particular method of hiring might amount to a governmental endorsement of a particular religion in violation of the Establishment Clause).

29. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990). In *Smith*, members of the Native American Church alleged a Free Exercise violation after the state denied them unemployment benefits following their dismissal from employment for using peyote. *Id.* at 874. The members of the church argued that although the law denying unemployment benefits to individuals who were dismissed for using drugs was a generally applicable law, the law was invalid because it was not justified by a compelling government interest. *Id.* at 883. The Supreme Court rejected the compelling government interest standard,

brought by members of the Native American Church who were denied unemployment benefits after they were fired from their jobs for ingesting peyote in a religious ceremony.[30] The church members argued that the law disqualifying them from unemployment benefits because of their drug use should be invalidated because it impeded their religious exercise and it did not serve a compelling state interest.[31] The Court rejected the compelling-government-interest standard and upheld the law, stating that the "government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[32] The decision in *Smith* "rejected the argument that the [Free Exercise] clause mandated exemptions for religiously motivated conduct in relation to generally applicable laws."[33] Read in conjunction with the Supreme Court's opinion in *Church of the Lukmi Babalu Aye, Inc. v. City of Hialeah*,[34] *Smith* established that although a law that exclusively imposes a burden upon religious practice must be narrowly tailored and serve a compelling government interest, an individual's religious beliefs cannot excuse him from failure to comply with a generally applicable law.[35]

Congress swiftly responded to *Smith* by passing the Religious Freedom Restoration Act of 1993 (RFRA).[36] Purportedly enacted pursuant to the Section 5 enforcement provision of the Fourteenth Amendment,[37] RFRA

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stating that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id.* at 885 (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

30. *See id.* at 874 (discussing church members' dismissals and disqualification for unemployment benefits).

31. *See id.* at 882–83 (noting that the respondents sought a compelling government interest standard for neutrally applicable laws that burden religious practices).

32. *Id.* at 885 (quoting *Lyng*, 485 U.S. at 451).

33. Farrell, *supra* note 23, at 122.

34. Church of the Lukmi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). In *Lukmi*, practitioners of the Santeria religion sought to invalidate a city ordinance that prohibited the killing or sacrifice of animals in any kind of ritual. *Id.* at 527. The Court noted both the language of the ordinance, which used religious terms including "sacrifice" and "ritual," and the legislative history of the ordinance, which evinced an intent to target practitioners of Santeria. *Id.* at 534–37. Holding that the ordinance was not a neutral law under *Smith*, the Court applied a compelling interest test and invalidated the ordinance. *Id.* at 542.

35. *See* Farrell, *supra* note 23, at 126 (stating that the Supreme Court created a bifurcated analysis under which neutral laws are analyzed under the *Smith* framework but laws that target religious practice are analyzed under *Lukmi*).

36. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (2000)).

37. *See* U.S. CONST. amend. XIV, § 5 (authorizing Congress "to enforce, by appropriate

explicitly abrogated the Supreme Court's holding in *Smith* and mandated the compelling-government-interest test as the appropriate standard for determining whether a neutrally applicable law violates the Free Exercise Clause.[38] In *City of Boerne v. Flores*,[39] the Supreme Court had its first opportunity to consider

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legislation, the provisions of this article").

38. *See* 42 U.S.C. § 2000bb(a) (2000) (stating that "the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interests"). The relevant text of the law stated the following congressional findings and purposes:

> § 2000bb. Congressional findings and declaration of purposes
>
> (a) Findings: The Congress finds that–
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
>
> (b) Purposes. The purposes of this Chapter are–
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id.

39. City of Boerne v. Flores, 521 U.S. 507 (1997). In *City of Boerne*, the Archbishop of San Antonio, Texas brought an action against the city of Boerne, Texas following the city's denial of a building permit sought by the St. Peter Catholic Church. *Id.* at 512. The church sought relief under the Religious Freedom Restoration Act (RFRA), a federal law that provided that a neutral state or federal law that burdens the free exercise of religion is invalid unless the government can demonstrate that the law furthers a compelling government interest and that the method chosen to further the interest is the least restrictive means of doing so. *Id.* at 515–16. The Archbishop argued that the City of Boerne's Historical Landmark ordinance, under which the church's permit was denied, violated RFRA. *Id.* at 512. The Fifth Circuit reversed the ruling of the district court, which had denied the church's claim and had held that RFRA was an unconstitutional exercise of Congress's Fourteenth Amendment enforcement power. *Id.* In reversing the Fifth Circuit, the United States Supreme Court found RFRA to be "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate

the constitutionality of RFRA.[40] Following a thorough analysis of the Free Exercise Clause and congressional enforcement power under Section 5 of the Fourteenth Amendment, the Court determined that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."[41] By holding RFRA unconstitutional, *City of Bourne* reestablished the *Smith* neutrality principle as the appropriate judicial guideline for evaluating laws of general applicability under the Free Exercise clause.[42]

C. Excessive Entanglement and the Establishment Clause

Although *City of Boerne* solidified the *Smith* neutrality principle, the effect of this holding on the constitutionality of third-party tort actions against religious institutions is unclear.[43] Generally applicable tort claims such as negligent hiring or negligent supervision are wholly unrelated to religious doctrine and are therefore neutral for purposes of *Smith*.[44] Nonetheless, some commentators argue that inquiring into the hiring or supervision policies of religious institutions would require a secular evaluation of religious practices that would violate the excessive-entanglement principle of the Ecclesiastical Abstention doctrine.[45] Even in the wake of *Smith* neutrality, the excessive-entanglement principle, as articulated by the United States District Court for the Southern District of New York in *Schmidt v. Bishop*,[46] remains at the heart of the doctrine of

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for the health and welfare of their citizens." *Id.* at 534. The Court held RFRA an unconstitutional exercise of Congress's Section 5 enforcement power that endangered principles of separation of powers and federal balance. *Id.* at 536.

40. *See id.* at 513–16 (discussing the constitutionality of RFRA).

41. *Id.* at 536.

42. *See id.* at 535 (invalidating RFRA and stating that burdens imposed on religious organizations by neutral laws do not violate the Free Exercise Clause).

43. *See* Farrell, *supra* note 23, at 127 (noting uncertainty as to the impact that *Smith* neutrality has had on the constitutional issues implicated when victims file lawsuits against religious organizations seeking to hold the organizations liable for the actions of clerics employed by the organization).

44. *Id.* at 135 (discussing the argument that negligence claims do not implicate religious doctrine and are therefore neutral for purposes of *Smith*).

45. *See, e.g.*, Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1115 (2003) ("It would seem difficult to complete [an evaluation of a religious organization's hiring practices] without in some sense trolling through religious beliefs and practices.").

46. Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991). In *Schmidt*, the complainant

Ecclesiastical Abstention: "[A]ny inquiry into the policies and practices of the Church Defendants in hiring or supervising their clergy raises . . . First Amendment problems of entanglement . . . which might involve the Court in making sensitive judgments about the propriety of the Church Defendant's supervision in light of their religious beliefs."[47]

Judicial concern over excessive entanglement is grounded in the Establishment Clause prong of the doctrine of Ecclesiastical Abstention.[48] In particular, the concern over adjudicating negligence-based tort actions levied against religious institutions centers on the idea that by setting objectively reasonable standards of conduct for religious organizations, courts would violate the Establishment Clause by judicially endorsing a particular method of hiring, supervising, or retaining a cleric.[49] In the opinion of the *Schmidt* court, an award of damages against a religious institution for failure to comply with a reasonable standard of conduct "would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination."[50] Thus, although negligence claims involve the application of neutral law, inquiring into a church's decision to ordain or maintain a priest might arguably violate the Establishment Clause by entangling a court in the doctrines of canon law and the policies of diocesan governance.[51]

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brought suit against the church-employer of a Presbyterian minister who had sexually abused the complainant over a period of several decades. *Id.* at 324. The complainant asserted theories of respondeat superior and negligent placement, retention, and supervision. *Id.* at 331. The court reasoned that judicial determination of the propriety of a church's hiring and monitoring standards would be unconstitutional because judicial approval of ecclesiastical practices would directly violate the Establishment Clause. *Id.* at 332. The court held it would be unconstitutional to question church governance, including matters of employee supervision and retention, and granted summary judgment in favor of the church. *Id.*

47. *Id.* at 332.

48. *See* Nugent, *supra* note 3, at 975–77 (discussing judicial concern over excessive entanglement with religious doctrine in the context of the First Amendment Establishment Clause).

49. *See* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995) ("[T]he First Amendment prevents the courts of this state from determining what makes one competent to serve as a Catholic priest . . . .").

50. *Schmidt*, 779 F. Supp. at 332.

51. *See* Farrell, *supra* note 23, at 131 ("[A] church's decisions regarding the ordination, discipline, and dismissal of priests is directly tied to canon law, and therefore falls squarely within the ban established by the ecclesiastical abstention doctrine.").

D. *The Current State of Third-Party Tort Actions Brought Against Religious Institutions*

Jurisdictions remain divided on the issue of whether tort actions levied against religious institutions are barred by the First Amendment.[52] Recently, the Supreme Court of Florida weighed in on the Ecclesiastical Abstention debate in *Malicki v. Doe*.[53] The plaintiffs in *Malicki* brought suit against the Archdiocese of Miami, alleging that the Archdiocese was negligent in hiring and supervising a priest who perpetrated sexual assaults upon the plaintiffs.[54] The opinion included a thorough discussion of both the Free Exercise Clause and the Establishment Clause prongs of the doctrine of Ecclesiastical Abstention.[55] The court stated that the allegations against the church represented "classic elements" of generally applicable claims of negligent hiring and negligent supervision.[56] The court reasoned that these claims were grounded in generally applicable tort law under *Smith* and therefore did not implicate religious doctrine.[57] Next, the court dismissed the issue of excessive entanglement in light of the Establishment Clause, simply declaring that "imposing tort liability based on the allegations of the complaint neither advances nor inhibits religion."[58] Having made these findings, the court held that the First Amendment could not itself serve as the impetus for dismissing a claim grounded in a religious institution's negligence.[59]

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52. *See id.* at 134 (noting that while "there are compelling arguments on both sides of the issue . . . there is a lack of consensus in the state and federal courts as to which interest will win out").

53. Malicki v. Doe, 814 So. 2d 347 (Fla. 2002). In *Malicki*, the respondents, a minor male and an adult female, brought suit against the Archdiocese of Miami, asserting that the Diocese's negligent hiring and supervision of a sexually abusive priest was the cause of their injuries. *Id.* at 352. The Church sought dismissal of the claims, citing First Amendment religion protection. *Id.* at 357. The court reasoned that allowing the claims to go forward would not violate the Free Exercise Clause because the generally applicable tort law was being neutrally applied. *Id.* at 363–64. Furthermore, the court determined that adjudication of the claims would not involve excessive entanglement such as would violate the Establishment Clause. *Id.* at 364. The court therefore concluded that the claims were not barred by the First Amendment. *Id.* at 365.

54. *Id.* at 352.

55. *See id.* at 357 ("Although an entanglement inquiry is associated with the adjudication of an Establishment Clause claim, the extent to which courts will be called upon to determine matters of church practice also implicates the Free Exercise Clause.").

56. *Id.* at 362.

57. *See id.* at 363–64 (stating that issues of foreseeability of the priest's conduct did not implicate religious doctrine for purposes of the Free Exercise Clause).

58. *Id.* at 364.

59. *See id.* at 365 (refusing to dismiss petitioner's claim in light of respondent's

If *Malicki* represents the modern trend in the Ecclesiastical Abstention doctrine, present-day plaintiffs have much less to fear when asserting negligence claims against religious institutions. Respondeat superior claims should find the First Amendment even less of a barrier. Like negligence-based tort claims, respondeat superior claims are neutral for purposes of *Smith* and are therefore only minimally impeded by the Free Exercise Clause portion of the doctrine of Ecclesiastical Abstention.[60] Furthermore, the Establishment Clause excessive-entanglement issue does not present the same concern for respondeat superior claims as it would in claims grounded in negligence. The primary concern over excessive entanglement is that by determining an objectively reasonable standard by which a religious institution is to hire, supervise, or discipline its employees, a court would be officially sanctioning religious conduct conforming to such a standard.[61] Religious institutions would be compelled to comply with the objectively reasonable standard, whether or not it conforms with their belief systems, in order to avoid the imposition of liability.

Respondeat superior claims would not implicate this concern over religious conformity to judicially mandated standards. The theory of respondeat superior states that an employer who is not at fault is nonetheless held liable for an employee's tortious conduct if the conduct occurs within the scope of employment.[62] Under the doctrine, no amount of care exercised by the employer to prevent tortious conduct by an employee will absolve the employer of liability if an employee commits a tort within the scope of employment.[63]

Ecclesiastical Abstention argument). The majority stated:

> [T]he First Amendment cannot be used at the initial pleading stage to shut the courthouse door on a plaintiff's claims, which are founded on a religious institution's alleged negligence arising from the institution's failure to prevent harm resulting from one of its clergy who sexually assaults and batters a minor or adult parishioner.

Id.

60. *See* Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 80 (2001) ("[I]t is clear that tort doctrines have evolved without regard to religious practices and are uniformly applicable whether or not the conduct is religiously inspired.").

61. *See* Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) (opining that judicial inquiry into the propriety of a religious institution's supervisory practices would lead indirectly to state control over the affairs of a religious organization, which would violate the Establishment Clause).

62. *See* Hamilton v. Carell, 243 F.3d 992, 1001 (6th Cir. 2001) (stating that under respondeat superior "an employer is liable, despite having no fault whatsoever, for the acts of its employees taken within the scope of their employment").

63. *See* Mary M. v. City of Los Angeles, 814 P.2d 1341, 1348 n.8 (Cal. 1991) (noting that an employer can be held liable for the tortious conduct of an employee regardless of the preventative measures taken by the employer). Specifically, the court stated:

Therefore, religious institutions would be under no direct pressure to alter their hiring, retention, or discipline procedures in ways that might conflict with their beliefs. While general concerns about the propriety of a court determining the scope of a cleric's employment may remain, respondeat superior claims should fare better than their negligence-based counterparts under the doctrine of Ecclesiastical Abstention.

III. Respondeat Superior and Intentional Torts

A. Respondeat Superior: Elements and Policies

In establishing a respondeat superior claim, a plaintiff must prove the existence of an employer-employee relationship.[64] Numerous factors may be relevant in determining the existence of an employer-employee relationship, including the degree of control exercised by the principal, the type of occupation, the skill required for performance of occupational duties, and the method of payment.[65] Except in rare circumstances, courts cannot impose respondeat superior liability in the absence of an employer-employee relationship.[66]

Assuming the existence of an employer-employee relationship, a court's next task is to decide whether the conduct occurred within the scope of employment. Determining whether an employee's act falls within the scope of employment is ordinarily a question of fact.[67] In cases in which "'reasonable

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> Under the doctrine of respondeat superior, the employer is held vicariously liable for the tortious conduct of its employees that is within the scope of employment. The employer's liability is unaffected by the steps it has taken to prevent such conduct. How best to prevent similar conduct in the future is a matter left to the employer; the doctrine provides an incentive for the employer to determine the appropriate measures to implement.

Id.

64. *See, e.g.*, Greene v. Amritsar Auto Servs. Co., 206 F. Supp. 2d 4, 8 (D.D.C. 2002) ("In order to find an employer vicariously liable for an employee's acts, a court must first determine that an employer-employee, or 'master-servant' relationship in fact exists.").

65. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (listing factors to be considered in distinguishing between a servant-employee and an independent contractor).

66. *See, e.g.*, *Greene*, 206 F. Supp. 2d at 8 (noting a rare exception to the employer-employee requirement allowing District of Columbia taxicab companies to be held vicariously liable for their drivers' actions despite the fact that taxicab drivers are generally independent contractors rather than employees).

67. *See, e.g.*, Murphy v. Pleasantville Sch. Dist., No. 4-06-CV-10010, U.S. Dist. LEXIS 22063, at *12 (S.D. Iowa May 4, 2000) (stating that that the question of whether an act occurred within the scope of employment is usually a question of fact for the jury); Clover v. Snowbird

minds may differ as to whether the [employee] was at a certain time involved wholly or partly in the performance of [the employer's] business or within the scope of employment,'" the question must be submitted to the jury.[68] Although states sometimes differ in their articulation of the scope-of-employment requirement,[69] the general rule is that an act falls within the scope of employment if the conduct (1) was of the kind of work that the employee was hired to perform; (2) took place within the typical temporal and spatial limits of the workplace; and (3) was motivated, at least in part, to serve the interests of the employer.[70]

The Supreme Court of Utah considered an archetypal claim of respondeat superior in *Christensen v. Swenson*.[71] Swenson, a security guard employed by

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Ski Resort, 808 P.2d 1037, 1040 (Utah 1991) (same).

68. Christensen v. Swenson, 874 P.2d 125, 127 (Utah 1994) (quoting Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989)).

69. *Compare* Osborne v. Payne, 31 S.W.3d 911, 915 (Ky. 2000) ("[T]o be within the scope of its employment, the conduct must be of the same general nature as that authorized or incidental to the conduct authorized."), *and* Beach v. Jean, 746 A.2d 228, 232 (Conn. Super. Ct. 1999) ("The phrase 'in the course of employment' . . . means while engaged in the service of the master . . . ."), *with* Jeffrey E. v. Cent. Baptist Church, 243 Cal. Rptr. 128, 130 (Cal. Ct. App. 1988) ("The determination as to whether an employee committed a tort during the course of his employment turns on whether 1) the act performed was either required or 'incident to his duties' . . . , or 2) the employee's misconduct could be reasonably foreseen by the employer in any event.") (internal citations omitted).

70. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 465 (5th ed. 1984) ("In general, a servant's conduct is within the scope of employment if it is the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master."); *see also* Lucas v. Leary, 98-2549, 2001 Mass. Super. LEXIS 114, at *5 (Mass. Super. Ct. Feb. 23, 2001) ("[C]onduct of an agent is within the scope of employment if it is of the kind he is employed to perform . . . if it occurs substantially within the authorized time and space limits . . . and it is motivated, at least in part, by a purpose to serve the employer . . . ."); Chesterman v. Barmon, 753 P.2d 404, 406 (Or. 1988) (stating that an employee's action falls within the scope of employment if it occurred substantially within the time and space limits authorized by the employment; was motivated, at least in part, to serve the interests of the employer; and was the kind of work that the employee was hired to perform); RESTATEMENT (SECOND) OF AGENCY § 229 (1958) (stating that in determining whether unauthorized conduct falls within the scope of employment, courts should weigh factors including an employee's departure from the normal method of reaching an authorized result; whether or not the instrumentality of harm was furnished by the employer; the time, place and purpose of the act; and whether or not the employer had reason to believe that such an act would be done). *But see* Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 361 (Cal. 1995) (stating that California has abandoned the traditional requirement that the employee's actions were motivated to serve the interests of the employer); Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 308 (Minn. 1983) (rejecting as an arbitrary judicial determination the requirement that the tortious conduct be intended to further the interests of the employer (citing Large v. Nat'l Biscuit Co., 211 N.W.2d 723 (Minn. 1973))).

71. Christensen v. Swenson, 874 P.2d 125 (Utah 1994). In *Swenson*, Christensen sought

Burns International Security Services (Burns), left her post at the Geneva Steel Plant (Geneva) to pick up lunch at a nearby restaurant.[72] On her way back to work, Swenson collided with a motorcycle operated by the plaintiff Christensen.[73] The court of appeals affirmed the trial court's grant of summary judgment in favor of Burns, holding as a matter of law that Swenson was not within the ordinary spatial boundaries of her employment at the time of the accident because the accident did not occur on Geneva property.[74]

In reversing the court of appeals, the Utah Supreme Court addressed each of the three criteria relevant in that jurisdiction for determining whether an action falls within the scope of employment.[75] As to the first criterion, the Court concluded that reasonable minds could differ as to whether Swenson's trip to the local cafe was the type of work that Swenson was hired to perform.[76] Noting Swenson's assertion that her role as a security guard was "to see and be seen" at and around the Geneva plant, the court found that "traveling the short distance to the Frontier Cafe in uniform arguably heightened the secure atmosphere that Burns sought to protect."[77] After noting that it was undisputed that the accident occurred during Swenson's usual work hours, the court concluded that reasonable minds could differ as to whether the accident occurred within the spatial boundaries of Swenson's workplace.[78] The court reasoned that because it occurred within a geographic area accessible during an

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to hold Burns International Security Services (Burns) vicariously liable for the negligent conduct of its employee, Swenson. *Id.* at 126. While driving back to work during a lunch break, Swenson collided with a motorcycle operated by Christensen, who was injured in the collision. *Id.* The trial court granted Burns's motion for summary judgment, finding that Swenson was not acting within the scope of employment at the time of the accident. *Id.* at 127. The court of appeals affirmed, concluding as a matter of law that Swenson's trip to the local restaurant was outside the scope of her employment. *Id.* In analyzing whether Swenson's conduct was within the scope of employment, the Utah Supreme Court considered three factors: (1) whether Swenson's actions were the type of work she was hired to perform; (2) whether the accident occurred within the typical temporal and spatial boundaries of Swenson's work; and (3) whether Swenson's actions in any way furthered the interest of her employer. *Id.* at 128–29. The court concluded that reasonable minds could differ as to whether Swenson's trip to the restaurant fell within her scope of employment and that the question should have been submitted to the jury. *Id.*

72. *Id.* at 126.

73. *Id.* at 126–27.

74. *Id.* at 127.

75. *See id.* at 128 ("[T]o avoid a second summary judgment on remand, we address all three of the [scope-of-employment] criteria.").

76. *Id.*

77. *Id.*

78. *See id.* (finding that the accident occurred during working hours and that the accident may have occurred substantially within the ordinary spatial boundaries of employment).

authorized lunch break, the accident arguably occurred substantially within the normal spatial boundaries of work.[79] Finally, the court recognized that employee breaks serve the interests of the employer by satisfying the needs of employees, thereby creating a more productive workforce.[80] *Swenson* is illustrative both of the flexibility of the doctrine[81] and of a general judicial policy strongly favoring the submission of respondeat superior claims to the jury.[82]

Courts weigh policy considerations in determining when to apply this rather harsh form of vicarious liability.[83] As guidelines for applying the doctrine, courts have recognized three distinct policy goals: (1) preventing future injuries; (2) assuring that the victim will be compensated; and (3) spreading losses equitably.[84] Application of the doctrine can prevent future injuries by giving employers a strong incentive to hire employees who are unlikely to engage in tortious conduct and to discipline or dismiss employees who have acted negligently.[85] The doctrine can assure compensation for a

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79. *See id.* at 128–29 (stating that a question of fact existed as to whether the accident occurred within the normal spatial boundaries of work). The court stated:

> [Swenson] was attempting to obtain lunch from a restaurant within the geographic area accessible during her ten- to fifteen-minute break. Given the other facts of this case, reasonable minds could differ as to whether Swenson's trip to the Frontier Cafe fell substantially within the ordinary spatial boundaries of her employment.

Id.

80. *See id.* at 129 ("Employees must occasionally eat meals and use the restroom, and employers receive the corresponding benefit of productive, satisfied employees.").

81. *See id.* at 128 n.1 ("The [scope-of-employment] criteria cannot be rigidly applied to every fact pattern. Some flexibility is required . . . .").

82. *See* Perez v. Van Groningren & Sons, Inc., 719 P.2d 676, 679 (Cal. 1986) (stating that whether an action falls within the scope of employment is a question of fact for the jury unless "the facts are undisputed and no conflicting inferences are possible").

83. *See, e.g.*, Wilson v. Drake, 87 F.3d 1073, 1078 (9th Cir. 1996) (noting "three policy considerations, which underlie California's respondeat superior law: '(1) to prevent recurrence of tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury'" (quoting Mary M. v. City of Los Angeles, 814 P.2d 1341, 1343–44 (Cal. 1991))).

84. *See* Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 366 (Cal. 1995) (describing policy considerations that should be used as guidelines in determining whether to apply the doctrine).

85. *See id.* (stating that increased precautionary measures are a benefit that results from imposing vicarious liability on employers). *But see* Gary Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1758–59 (1996) (discussing the impact of vicarious liability on the disciplinary practices of employers and suggesting that employers face too many legal impediments in hiring and disciplinary decisions to validate this policy).

victim where the employee is judgment-proof by reaching the deeper pockets of the employer.[86] Finally, the doctrine can be used to spread costs of an injury to the cheapest-cost bearers—the employer who benefits from the employment relationship.[87]

B. Application of Respondeat Superior to Intentional Torts

The Restatement (Second) of Agency specifically states that "[a]n act may be within the scope of employment although consciously criminal or tortious."[88] The authors of the Restatement, however, envisioned a fine line between intentional torts that fall within the scope of employment and those that fall beyond the scope, as indicated by the following example:

> [A] gardener using a small stick in an assault upon a trespassing child to exclude him from the premises may be found to be acting within the scope of employment; if, however, the gardener were to shoot the child for the same purpose, it would be difficult to find the act within the scope of employment.[89]

Some courts have taken it upon themselves to discern this fine line, deciding as a matter of law whether certain intentional torts, including sexual assault, fall within the scope of employment.[90] Various jurisdictions have articulated their own standards for determining whether an intentional tort is arguably within the scope of employment so as to warrant submission of the issue to the jury,[91] and inconsistencies in the submission of intentional tort

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86. *See Lisa M.*, 907 P.2d at 366–67 (stating that imposing vicarious liability on employers is likely to provide additional compensation to victims).

87. *See* Johnston v. Long, 181 P.2d 645, 651 (Cal. 1947) ("The principal justification for the application of the doctrine of respondeat superior in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business."); *see also* Marston v. Minneapolis Clinic of Psychology & Neurology, Ltd., 329 N.W.2d 306, 314 (Minn. 1983) (Peterson, J., dissenting) (describing the cost-spreading rationale as "appeal[ing] to an instinctive sense of justice").

88. RESTATEMENT (SECOND) OF AGENCY § 231 (1958); *see also Lisa M.*, 907 P.2d at 360–61 (noting that "an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment . . . even though the employer has not authorized the employee to commit crimes or intentional torts").

89. RESTATEMENT (SECOND) OF AGENCY § 231 cmt. a (1958).

90. *See, e.g.*, Reynolds v. Zizka, CV9505552225, 1998 Conn. Super. LEXIS 619, at *8 (Conn. Super. Ct. Mar. 5, 1998) (holding that "when the tortfeasor-employee's activity with the alleged victim became sexual, the employee abandoned and ceased to further the employer's business").

91. *See Lisa M.*, 907 P.2d at 361 ("[T]he employer will not be held liable for an assault or other intentional tort that did not have a causal nexus to an employee's work."); Glucksman v.

claims to juries are indicative of the difficulty courts face in making this determination.[92]

Although employee intentional torts might frequently occur within the temporal and spatial limits of the workplace, as a practical matter it is difficult to identify situations where an employee's intentional tort both was the type of work the employee was hired to do and was committed, at least in part, to further the interests of the employer. Only in the strangest of circumstances would an employer explicitly authorize an employee's intentional tort such that the tortious conduct would neatly fit into the latter two prongs of the scope-of-employment test.[93] Application of the motive-to-serve prong of the test to an intentional tort claim would by itself preclude a finding of vicarious liability in nearly all such cases.[94] Recognizing this problem, some jurisdictions have eliminated the motive-to-serve prong of the scope-of-employment analysis.[95]

Walters, 659 A.2d 1217, 1219 (Conn. App. Ct. 1995) (stating that the inquiry turns on "whether the servant on the occasion in question was engaged in a disobedient or unfaithful conducting of the master's business, or was engaged in an abandonment of the master's business"); Medlin v. Bass, 398 S.E.2d 460, 463 (N.C. 1990) (asking whether the employee was "about his master's business or whether he stepped aside from his employment to commit a wrong prompted by a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own").

92. *Compare* Carr v. Wm. C. Crowell Co., 171 P.2d 5, 7–8 (Cal. 1946) (holding building contractor vicariously liable when employee threw a hammer at subcontractor's employee), Pelletier v. Bilbiles, 227 A.2d 251, 253 (Conn. 1967) (denying summary judgment in favor of employer and stating that "the beating of an unruly customer . . . is an extremely forceful, although misguided, method of discouraging patrons . . . from causing disturbances on the premises in the future"), *and* Munick v. City of Durham, 106 S.E. 665, 667 (N.C. 1921) (finding question of fact for jury when city employee assaulted plaintiff after plaintiff paid portion of his water bill in pennies), *with* Hart v. Paint Valley Local Sch. Dist., CZ-01-004, 2002 U.S. Dist. LEXIS 25720, at *2 (S.D. Ohio Nov. 15, 2002) (granting summary judgment in favor of school district where school teacher fondled fourth-grade student), *and* Thorn v. City of Glendale, 35 Cal. Rptr. 2d 1, 6–7 (Cal. Ct. App. 1994) (finding no vicarious liability where city fire marshal set business premises on fire during inspection).

93. *See* Fearing v. Bucher, 977 P.2d 1163, 1166 n.4 (Or. 1999) ("[A]n employee's intentional tort rarely, if ever, will have been authorized expressly by the employer.").

94. *See Lisa M.*, 907 P.2d at 364 (opining that "mechanical application of a motivation-to-serve test for intentional torts . . . would bar vicarious liability for virtually all sexual misconduct").

95. *See, e.g.*, *Lisa M.*, 907 P.2d. at 361 (stating that California has abandoned the traditional requirement that the employee's actions must be motivated by a desire to serve the interests of the employer); Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 309–10 (Minn. 1983) (rejecting as an arbitrary judicial determination the requirement that the tortious conduct be intended to further the interests of the employer (citing Lange v. Nat'l Buscuit Co., 211 N.W.2d 783 (Minn. 1973))).

In *Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd.*,[96] the Minnesota Supreme Court abolished, in matters involving intentional torts, the traditional scope-of-employment requirement that the imposition of vicarious liability be conditioned on a finding that the employee's conduct was motivated to serve the interests of the employer.[97] The court stated that "[f]or an intentional tort, the focus is on whether the assault arises out of a dispute occurring within the scope of employment,"[98] and that "[i]t is irrelevant whether the actual assault involves a motivation to serve the master."[99] In discussing the rationale for abolishing the motive-to-serve requirement in cases of intentional torts, the court noted that the requirement would preclude respondeat superior liability in nearly all such cases.[100] Furthermore, the court found it to be unrealistic for a trier of fact to determine the point at which an employee's actions ceased to be motivated by the furtherance of the employer's interests and were instead wholly personally motivated.[101] It is interesting to note that despite abolishing the motive-to-serve requirement in cases involving intentional torts, the *Marston* court preserved the requirement in vicarious liability claims based on unintentional employee conduct.[102] California has also abolished the motive-to-serve prong of the traditional scope-of-employment

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96. Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306 (Minn. 1983). In *Marston*, the petitioners sought review of the trial court's instruction to the jury on the definition of scope of employment. *Id.* at 309. The case involved two plaintiffs who were sexually assaulted during the course of their treatment by a doctor employed by the Minneapolis Clinic of Psychiatry and Neurology. *Id.* at 308. The plaintiffs sought to hold the clinic vicariously liable, claiming that the doctor committed the assaults within the scope of his employment. *Id.* at 307. The trial court rejected the plaintiffs' proposed jury instructions, which omitted the motivation-to-serve prong of the respondeat superior analysis, and instead provided the jurors with an instruction that included the motivation-to-serve test. *Id.* at 309. Reasoning that "it would be a rare situation where a wrongful act would actually further the employer's business," the Supreme Court of Minnesota concluded that the motivation behind the employee's actions is irrelevant for purposes of determining vicarious liability. *Id.* at 311.

97. *See id.* at 309–10 ("We reject as the basis for imposing liability the arbitrary determination of when, and at what point, . . . [intentional torts] leave the sphere of the employer's business and become motivated by personal animosity." (quoting Lange v. Nat'l Biscuit Co., 211 N.W.2d 783, 785 (Minn. 1973))).

98. *Id.* at 310.

99. *Id.*

100. *See id.* at 311 (stating that it would be a rare occurrence in which an employee's intentional tort was actually motivated to further the interests of the employer).

101. *See id.* (describing the task of determining whether an action was motivated to further the interests of the employer as "both unrealistic and artificial").

102. *See id.* at 310 (preserving the motivation-to-serve prong of the traditional analysis in cases involving negligence-based torts).

test, but unlike Minnesota, California has abolished the prong for both intentional torts and negligence-based vicarious liability claims.[103]

The approach taken by California and Minnesota recognizes the futility of applying the traditional common law motive-to-serve requirement to intentional torts.[104] The alternative scope-of-employment inquiry postulated by these jurisdictions has been deemed the "engendered by the employment" test.[105] Rather than applying the inflexible traditional scope-of-employment analysis, including determining whether the employee's conduct was motivated by a desire to serve the interests of the employer, the engendered by the employment test asks more generally whether there existed a causal nexus between the employment relationship and the tortious conduct.[106] To satisfy the engendered by the employment test, the causal nexus between the employment and the resulting harm "must be more than that the work provided the opportunity for interaction between the victim and the tortfeasor."[107] Instead, the test requires that the tortious conduct be an outgrowth of the employment relationship and that the conduct be foreseeable to the employer.[108] The test is a fact-specific analysis that yields different results depending upon the employment relationship at issue.[109]

C. The Fearing *Analysis*

In *Fearing v. Bucher*, the Supreme Court of Oregon addressed the problems associated with applying the doctrine of respondeat superior to intentional torts.[110] The petitioner in *Fearing* alleged that a priest

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103. *See* Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 361 (Cal. 1995) (stating that California has abandoned the traditional requirement that the employee's actions must be motivated by a desire to serve the interests of the employer).

104. *See* Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 544–47 (2002) (noting the difficulties inherent in applying the motive-to-serve test to intentional torts).

105. *See id.* at 547 (stating that the California approach is called the "engendered by the employment" test).

106. *See id.* (describing the elements of the engendered by the employment inquiry); *see also Lisa M.*, 907 P.2d at 364 ("[A] sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work related events or conditions.").

107. Dalley, *supra* note 104, at 547.

108. *See id.* at 547–48 (discussing the requisite causal nexus in terms of foreseeability).

109. *See id.* at 547 (noting that whether conduct falls within the scope of employment depends upon the employee's duties).

110. *See* Fearing v. Bucher, 977 P.2d 1163, 1167 (Or. 1999) (noting difficulties with

employed[111] by the Archdiocese of Portland had sexually molested him.[112] Recognizing a need for a different respondeat superior analysis in the context of intentional torts, the court stated:

> [I]n the intentional tort context, it usually is inappropriate for the court to base its decision regarding the adequacy of the complaint on whether the complaint contains allegations that the intentional tort itself was committed in furtherance of any interest of the employer or was of the same kind of activities that the employee was hired to perform. Such circumstances rarely will occur and are not, in any event, necessary to vicarious liability. Rather, the focus properly is directed at whether the complaint contains sufficient allegations of [the defendant's] conduct that was within the scope of his employment that arguably resulted in the acts that caused the plaintiff's injury.[113]

Instead of asking whether the intentional tort itself was within the scope of employment, the *Fearing* analysis inquires as to whether the tortfeasor's conduct leading up to the intentional tort was conduct that falls within the scope of employment.[114] When a reasonable jury could find that the employee's conduct was a "necessary precursor to the [intentional torts] and the [torts] were a direct outgrowth of and were engendered by conduct that was within the scope of . . . employment," the causation question becomes a question of fact that must be left to the jury.[115] One commentator has accurately described the *Fearing* analysis as "a combination of the 'engendered by the [employment]' and the [traditional] purpose-to-serve tests," due to the fact that it focuses on the causal nexus requirement of the engendered by the

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applying respondeat superior to intentional torts).

111. One commentator has argued that "[w]ith a disparity in hiring practices among religious institutions, it is again too difficult to apply respondeat superior to the church because of the difficulty in defining the employer-employee relationship and the lack of uniformity in its application." Emily C. Short, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice*, 57 OKLA. L. REV. 183, 198 (2004). Most courts that have directly addressed the issue have concluded that a diocese and a priest can be considered to be in an employer-employee relationship. *See, e.g.*, Ambrosio v. Price, 495 F. Supp. 381, 383–86 (D. Neb. 1979) (holding that diocese and priest did have employer-employee relationship); Rita M. v. Roman Catholic Archbishop of Los Angeles, 187 Cal. App. 3d 1453, 1461 (Cal. Ct. App. 1986) (same). *But see* Brillhart v. Scheier, 758 P.2d 219, 224 (Kan. 1988) (concluding that priest was an independent contractor, not an employee, and that vicarious liability was therefore inapplicable).

112. *Fearing*, 977 P.2d at 1164. For a complete description of the facts of the case, see *supra* note 16 and accompanying text.

113. *Id.* at 1167 (emphasis added).

114. *Id.*

115. *Id.* at 1168.

employment test, yet the analysis retains the motive-to-serve requirement of the traditional scope-of-employment inquiry.[116]

Although at first blush the *Fearing* analysis appears to be a departure from the common law doctrine of respondeat superior, a closer look reveals that the examination is merely a clarification of the standard respondeat superior inquiry. In *Christensen v. Swenson*,[117] the Utah Supreme Court considered whether an employee's motor vehicle accident fell within the scope of employment.[118] When inquiring as to whether the employee's conduct was the type of work for which she was hired and whether the employee's conduct furthered any interests of the employer, the court did not ask whether the act of crashing a car into a motorcyclist satisfied these two requirements; rather, the court inquired as to whether leaving the premises to pick up lunch was the kind of work that Swenson was hired to perform or in any way furthered the interests of her employer.[119] Similarly, in *Fearing*, the court did not inquire as to whether the act of molesting a child either was the type of work for which a priest is hired or furthers the interests of the church; instead, the court asked whether spending time alone with parishioners, counseling them, and gaining their trust were acts that could satisfy these two requirements.[120]

The *Fearing* analysis is not a radical alteration of the traditional scope-of-employment prerequisite. Rather, the court properly refocused the scope-of-employment inquiry towards the conduct leading up to the intentional tort.[121] This shift allows courts to overcome the erroneous initial impulse to dismiss respondeat superior claims arising out of intentional torts simply because such claims fail to convincingly allege that the intentional tort itself either furthered the interests of the employer[122] or was the kind of work that the employee was

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116. Dalley, *supra* note 104, at 558 n.248.

117. For a discussion of the facts of this case, see *supra* Part III.A.

118. *See* Christensen v. Swenson, 874 P.2d. 125, 127 (Utah 1994) (considering whether the defendant's actions were arguably within the scope of employment). For a discussion of the facts of this case, see *supra* Part III.A.

119. *See id.* at 128–29 (discussing Swenson's trip to the cafe in light of the three scope-of-employment requirements).

120. *See* Fearing v. Bucher, 977 P.2d 1163, 1168 (Or. 1999) (discussing the conduct of the priest leading up to the assaults).

121. *See id.* at 1166 n.4 (stating that in matters involving intentional torts "it virtually always will be necessary to look to the acts that led to the injury to determine if *those* acts were within the scope of employment").

122. *See, e.g.*, Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66, 71 (D. Conn. 1995) (finding sexual conduct to be outside the scope of employment as a matter of law in light of the Roman Catholic Church's mandate of celibacy for priests). In dismissing the plaintiff's respondeat superior claim, the court stated:

> There is nothing in the record to indicate that the alleged sexual abuse by Doyle

hired to perform.[123] By refocusing the inquiry, the *Fearing* analysis allows courts to determine whether the tortious conduct was an outgrowth of actions taken within the scope of employment. This wording of the *Fearing* analysis is far more accommodating to intentional torts than is the traditional scope-of-employment inquiry. Furthermore, this approach recognizes that, depending on the nature of the employee-third party relationship, intentional torts committed by employees may well be fairly attributable to the employer—even though the intentional tort itself did not occur within the scope of employment—when the tort was an outgrowth of conduct that was within the scope of employment. The *Fearing* analysis opens the door to jury determination of the scope-of-employment question and gives victims of intentional torts a greater chance at recovering against the tortfeasor's employer. It allows factual analysis and policy considerations, rather than rigid and poorly suited traditional respondeat superior rules, to determine whether an employer should be held vicariously liable for the intentional tortious conduct of an employee.

IV. The Nature of the Cleric-Parishioner Relationship

A. The Significance of the Employee-Third Party Relationship

When applying the *Fearing* analysis to cases involving intentional torts committed by employees against third parties, a court must consider the nature of the employee-third party relationship.[124] In *Fearing*, the Supreme Court of Oregon based its holding largely on the plaintiff's allegation that there was a causal nexus between the sexual abuse and the priest's officially sanctioned duties.[125] It dismissed the Archdiocese's assertion that if a religious

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> was motivated by any purpose or object that would serve his employer. Indeed, as the affidavits submitted by the defendants indicate, the laws and standards of the Roman Catholic Church expressly prohibit priests from engaging in any sexual activity of any kind. Thus, even if Doyle engaged in sexually abusive conduct, he did so only after abandoning the church's tenets and his personal commitment to celibacy. Sexually abusive conduct amounts to the abandonment of the Church's business. As a matter of law, therefore, the alleged sexual abuse, even if true, cannot be said to further the defendant's business and therefore is outside of the scope of employment.

Id.

123. *See, e.g.*, Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans, 32 F.3d 953, 960 (5th Cir. 1994) ("It would be hard to imagine a more difficult argument than that [a priest's] illicit sexual pursuits were somehow related to his duties as a priest.").

124. *See Fearing*, 977 P.2d at 1168 (discussing the alleged interactions between the priest and parishioner in light of the priest's duties).

125. *See id.* (discussing the intimate nature of the relationship between the plaintiff and the

organization may be held liable for a cleric's sexual misconduct, any employer could be held liable for an employee's intentional torts merely because the employer provided the employee with the opportunity to be alone with third parties.[126] The court distinguished its holding in *G.L. v. Kaiser Foundation Hospitals*,[127] which involved the sexual assault of an unconscious hospital patient by a respiratory therapist, noting that in *G.L.* "the only nexus alleged between the employment and the assault was that the employment brought the tortfeasor and the victim together in time and place and, therefore, gave the tortfeasor the 'opportunity' to commit the assaults."[128] In contrast, the causal nexus in *Fearing* involved the priest's manipulation of authority so as to "befriend plaintiff and his family, gain their trust, spend large periods of time alone with plaintiff, physically touch plaintiff and, ultimately, to gain the opportunity to commit the sexual assaults upon him."[129] The intimate nature of the relationship between the priest and the victim, and the nexus between the priest's employment and his sexual assaults, would allow a reasonable jury to "infer that Bucher's performance of his pastoral duties with respect to plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of Bucher's employment."[130] *Fearing*'s requirement of a causal nexus recognizes that the nature of the job-created relationship between the employee and the third-party victim is a crucial factor for determining whether the scope-of-employment issue should be decided as a matter of law or is instead a question of fact for the jury.

Other courts applying approaches similar to the *Fearing* analysis have also found the nature of the employee-third party relationship to be a significant

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priest and citing the nature of the relationship as being the distinguishing factor between the instant case and contradictory authority).

126. *See id.* at 1167 (disagreeing with the defendant Archdiocese's contention that the only link between the sexual assault and the priest's employment was the mere opportunity to be alone with the victim, an incidental aspect of the priest's employment).

127. G.L. v. Kaiser Found. Hosps., 757 P.2d 1347 (Or. 1988). In *G.L.*, the plaintiff filed a claim against a hospital after a respiratory therapist sexually assaulted the plaintiff during her stay at the hospital. *Id.* at 1348. The plaintiff sought to hold the hospital vicariously liable for the employee's actions, arguing that public policy mandated that the hospital, rather than the victim, should bear the loss resulting from the sexual assault. *Id.* at 1349. The court analyzed the claim in light of the doctrine of respondeat superior and the policies underlying the doctrine. *Id.* at 1350. Finding that "there is no allegation—and we cannot imagine one—that the employee was acting for the purpose of furthering any interest of the employer," the court concluded that the plaintiff failed to state a claim for vicarious liability. *Id.*

128. Fearing v. Bucher, 977 P.2d 1163, 1168 (Or. 1999).

129. *Id.*

130. *Id.*

factor in determining whether to submit the scope-of-employment question to the jury.[131] In *Lisa M. v. Henry Mayo Newhall Memorial Hospital*,[132] the Supreme Court of California held that a hospital was not vicariously liable for a sexual assault perpetrated by an ultrasound technician during a routine examination.[133] California has rejected the traditional motive-to-serve requirement for respondeat superior liability,[134] and *Lisa M.* applied the engendered by the employment test, a standard similar to the *Fearing* analysis.[135] After considering the existence of a causal nexus and weighing the foreseeability of the harm, the court held that the sexual assault was outside of the scope of employment as a matter of law.[136] But the court explicitly stated that sexual assaults are not per se outside of the scope of employment.[137]

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131. *See, e.g.*, Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d. 358, 365 (Cal. 1995) (noting the lack of emotional involvement between the hospital technician and abused patient as influential in the court's conclusion that the sexual assault was outside the scope of employment as a matter of law).

132. Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358 (Cal. 1995). *Lisa M.* involved a patient seeking to hold a hospital vicariously liable for a sexual assault committed by an ultrasound technician employed by the hospital. *Id.* at 359–60. The trial court granted the hospital's motion for summary judgment on the issue of respondeat superior, but the court of appeals reversed the trial court. *Id.* at 360. The Supreme Court of California addressed the plaintiff's respondeat superior claim by considering both the existence of a causal nexus between the ultrasound technician's employment and the victim's injury and the foreseeability of the harm. *Id.* at 363–66. The court found that the technician's employment lacked the requisite causal nexus with the patient's injury and that the assault was not foreseeable by the hospital. *Id.* at 367. The court reversed the appellate court and held that the trial court did not err in granting summary judgment for the hospital on the issue of respondeat superior. *Id.*

133. *Id.* at 367 (concluding that the employee's sexual assault was not engendered by his employment so as to render the hospital vicariously liable for the plaintiff's injury).

134. *See id.* at 361 ("California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interest.").

135. *See id.* at 362 (noting that the engendered by the employment test requires a causal nexus between the employment relationship and the victim's injury). In articulating the elements of the test, the court stated:

> The nexus required for respondeat superior liability [is] that the tort be engendered by or arise from the work . . . . That the employment brought tortfeasor and victim together in time and place is not enough . . . . [T]he incident leading to the injury must be an "outgrowth" of the employment . . . . California courts have also asked whether the tort was, in a general way, foreseeable from the employee's duties . . . . [F]orseeability "merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."

Id. at 362 (quoting Carr v. Wm. C. Crowell Co., 171 P.2d 5, 8 (Cal. 1946) and Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 149 (Cal. App. 1975)).

136. *Id.* at 367.

137. *See id.* at 363 ("We are not persuaded that the roots of sexual violence and

Before concluding that the facts of the plaintiff's claim did not warrant submission of the issue to the jury, the court first analyzed the plaintiff's claim in light of the emotional relationship between the tortfeasor and the victim,[138] and next considered the significance of the ultrasound technician's job-created authority.[139] The court found no emotional involvement between the two parties and no coercive authority possessed by the employer such that would warrant submission of the scope-of-employment question to the jury.[140]

Judicial consideration of the employee-third party relationship amounts to an acknowledgement by courts that not all employment relationships are the same. While some jobs involve little or no employee contact with third persons, others permit or even require a great deal of intimate interaction with third persons. Employment relationships that merely bring "the tortfeasor and the victim together in time and place and, therefore, [give] the tortfeasor the 'opportunity' to commit the assaul[t]" are not sufficiently intimate to support a finding that a tortfeasor's sexual assault was an outgrowth of the employment relationship, and the scope-of-employment question may be properly disposed of as a matter of law.[141] On the other hand, employment relationships that include unilateral or bilateral emotional involvement or the vesting of significant coercive authority in the employee are highly susceptible to manipulation.[142] Abuse of trust or misuse of coercive authority to perpetrate a sexual assault is a foreseeable outgrowth of these employment relationships, and the scope-of-employment question should be left to the jury. Employee-third party relationships that fit into the latter category generally contain two distinct, yet closely intertwined, characteristics: (1) emotional vulnerability on the part of the third party; and (2) job-created authority possessed by the tortfeasor-employee.

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exploitation are in all cases so fundamentally different from those other abhorrent human traits as to allow a conclusion sexual misconduct is per se unforeseeable in the workplace.").

138. *See id.* at 365 (noting a lack of mutual or unilateral emotional involvement arising from the relationship between the ultrasound technician and the patient).

139. *See id.* at 365–66 (discussing the degree to which the ultrasound technician possessed coercive authority over the patient).

140. *See id.* (finding no coercive authority vested in the technician and no emotional involvement, unilateral or bilateral, between the parties).

141. *See* Fearing v. Bucher, 977 P.2d 1163, 1168 (Or. 1999) (distinguishing the case in which the employment relationship merely gave the tortfeasor access to the victim).

142. *See* Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 365–366 (Cal. 1995) (discussing the impact of emotional involvement and coercive authority on the scope-of-employment analysis).

B. Characteristics of Analogous Employee-Third Party Relationships

1. Trust-Dependency Relationships and the Emotional Vulnerability of Third Parties

The vulnerability of parishioners seeking spiritual guidance or instruction from clergymen is analogous to a patient's vulnerability in a therapist-patient relationship. The therapist-patient relationship is one in which the third-party victim is vulnerable to sexual assault through the manipulation of the trust-dependency dynamic.[143] The Ninth Circuit considered a respondeat superior claim involving a therapy-based relationship in the case of *Simmons v. United States*.[144] In *Simmons*, the plaintiff sought to hold the federal government liable for the sexual misconduct of a federal employee who, at the time of the misconduct, was acting as a mental health counselor for the plaintiff.[145] The counselor initiated a sexual relationship with the plaintiff that caused the plaintiff severe psychological distress, culminating in an attempted suicide.[146]

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143. *See* Linda Mabus Jorgenson et al., *Transference of Liability: Employer Liability for Sexual Misconduct by Therapists*, 60 BROOK. L. REV. 1421, 1421 (1995) (discussing the frequency of sexual misconduct committed by psychotherapists); *see also* Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 311 (Minn. 1982) (noting testimony that the potential for "sexual relations between a psychologist and a patient is a well-known hazard and thus, to a degree, foreseeable and a risk of employment").

144. Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986). *Simmons* involved a respondeat superior claim filed by the plaintiff against the United States under the Federal Tort Claims Act. *Id.* at 1364. The plaintiff alleged that a federally employed social worker engaged in negligent conduct by entering into a sexual relationship with the plaintiff while counseling her. *Id.* Following a bench trial in which the plaintiff prevailed, the government appealed, arguing that the social worker's conduct was outside the scope of employment as a matter of law and that the government should not have been held liable under respondeat superior. *Id.* The court applied the State of Washington's traditional scope-of-employment test, including the requirement that the tortious conduct be in furtherance of the employer's interests. *Id.* at 1369. In analyzing the issues presented, the court entered into a thorough discussion of the transference phenomenon, a term used in psychology to describe a patient's projection of feelings on a therapist after the therapist has come to represent a person from the patient's past. *Id.* at 1364. The court noted testimony at trial from a psychologist stating that the transference phenomenon can result in "a symbolic, sometimes conscious sometimes not, parent-child relationship existing in the therapy setting, even though you have two adults there." *Id.* at 1365. Furthermore, the court cited judicial opinions in other jurisdictions noting that "the transference phenomenon renders the patient particularly vulnerable." *Id.* at 1370 (quoting Vigilant Ins. Co. v. Employers Ins. of Wausau, 626 F. Supp. 262, 265 (S.D.N.Y. 1986)). After considering these factors, the court concluded that "the centrality of transference to therapy renders it impossible to separate an abuse of transference from the therapy itself." *Id.* The court affirmed the district court, holding that the district court correctly applied the principles of respondeat superior. *Id.* at 1371.

145. *Id.* at 1364.

146. *See id.* (describing the sexual relationship and its impact on the plaintiff).

The crucial factor in the Ninth Circuit's determination that the counselor's actions fell within the scope of employment was the counselor's abuse of the transference phenomenon.[147] The court defined the transference phenomenon as "the term used by psychiatrists and psychologists to denote a patient's emotional reaction to a therapist" and noted that the phenomenon "is 'generally applied to the projection of feelings, thoughts and wishes onto the analyst, who has come to represent some person from the patient's past.'"[148] Considering the vulnerability of the patient, the emotional involvement of the transference phenomenon, and the centrality of transference in the counselor's course of treatment, the court reasoned that it would be "impossible to separate an abuse of transference from the treatment itself."[149]

The Supreme Court of Alaska considered a set of facts similar to that of *Simmons* in *Doe v. Samaritan Counseling Center.*[150] Like *Simmons*, *Doe* involved a therapist's abuse of the transference phenomenon in order to initiate a sexual relationship with a patient.[151] The patient's vulnerability led the *Doe* court to hold that "it could reasonably be concluded that the resulting sexual conduct was 'incidental' to the therapy."[152] The importance that the court placed on both the intimacy of the relationship and the vulnerability of the patient was manifested by the court's willingness to submit the scope-of-employment question to the jury; this was done despite the fact that the sexual intercourse between the therapist and the plaintiff did not occur until roughly one month after the therapy sessions had ended, a time frame which might

147. *See id.* at 1366 (stating that the crucial factor that leads to the imposition of liability for sexual involvement between a therapist and a patient is the therapist's use of the transference phenomenon in the course of treatment).

148. *Id.* at 1364 (quoting STEDMAN'S MEDICAL DICTIONARY 1473 (5th Lawyers' ed. 1982)).

149. *Id.* at 1370.

150. Doe v. Samaritan Counseling Ctr., 791 P.2d 344 (Alaska 1990). In *Doe*, the Supreme Court of Alaska considered a claim arising out of a sexual relationship between the plaintiff and her therapist. *Id.* at 345. The plaintiff sought to hold the therapist's employer vicariously liable for the conduct of its employee. *Id.* In reviewing the respondeat superior claim, the court employed a scope-of-employment test that considered the three factors of the traditional approach as guidelines, rather than prerequisites, to finding vicarious liability. *Id.* at 347. As to the motivation-to-serve prong of the traditional approach, the court stated "that where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities, the 'motivation to serve' test will have been satisfied." *Id.* at 348. Applying this standard, the court considered the psychiatrist's use of the transference phenomenon and its impact on the plaintiff, concluding that the trial court erred in granting summary judgment in favor of the defendant on the issue of respondeat superior. *Id.*

151. *See id.* (discussing the sexual relationship between the two parties and the use of the transference phenomenon as part of the therapist's course of treatment).

152. *Id.*

easily have been dismissed as being outside the usual temporal boundaries of employment.[153]

Although both cases place a great deal of emphasis on the transference phenomenon itself,[154] the underlying concern is grounded in the patient's emotional vulnerability resulting from the trust-dependency relationship.[155] In a similar case, the Court of Appeals of Wisconsin discussed the patient's emotional vulnerability caused by the transference phenomenon in general terms of trust, stating that:

> The first and the most basic element of the doctor's charge is acting with this sense of imparting trust always guiding and governing the relationship. The relationship between the psychiatrist and his patient is of the most extreme confidence . . . because the patient's continued and embryonic stability may depend upon there being a reliable external source of meaning and later of identification and direction for him.[156]

Trust and dependence are essential to the effectiveness of psychiatric therapy,[157] yet these characteristics of the relationship also render the patient especially vulnerable to manipulation by the therapist.[158] The holdings of *Simmons* and *Doe* embrace a policy rationale that when the known hazards associated with manipulation of trust-dependency relationships result in injury to a third party, the employer should arguably bear the loss, and therefore courts should submit the scope-of-employment question to the jury.

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153. *See id.* at 349 ("A trier of fact might reasonably conclude that the sexual intercourse, which occurred roughly one month after counseling, was so connected with the tortious misuse of the transference phenomenon during counseling that it was not 'too far' removed from authorized time and space limits.").

154. *See* Simmons v. United States, 805 F.2d 1363, 1370–71 (9th Cir. 1986) (rejecting the government's argument that *Andrews v. United States*, 732 F.2d 366 (4th Cir. 1984), controlled the outcome in *Simmons*, and noting that *Andrews* did not involve use of the transference phenomenon); *Doe*, 791 P.2d at 348 ("Given the transference phenomenon that is alleged to have occurred in this case, we hold that it could reasonably be concluded that the resulting sexual conduct was 'incidental' to the therapy.").

155. *See Simmons*, 805 F.2d at 1371 (distinguishing *Andrews* on the basis that the therapist's conduct in *Andrews* "did not amount to an abuse of a trusting dependency relationship"); *see also* Jorgenson et al., *supra* note 143, at 1438–39 ("[C]ourts no longer exclusively focus on the abuse of transference or analyze each separate act of the professional to separate job-related from personal acts.").

156. L.L. v. Med. Protective Co., 362 N.W.2d 174, 177–78 (Wis. Ct. App. 1984) (quoting D. DAVIDOFF, THE MALPRACTICE OF PSYCHIATRISTS 6 (1973)).

157. *See id.* at 177 ("In order to benefit from therapy, the patient must develop a trusting relationship with the psychiatrist.").

158. *See id.* at 177–78 (discussing the need for a trust-dependency relationship in therapy and the potential harms that can arise out of the resulting emotional vulnerability).

2. *Power Through Job-Created Authority*

The job-created authority possessed by the tortfeasor is another aspect of the employee-third party relationship that can influence a court in its decision to submit the scope-of-employment question to the jury.[159] In *Mary M. v. City of Los Angeles*,[160] the Supreme Court of California considered whether a reasonable jury could conclude that a police officer's rape of a female detainee was within the scope of employment.[161] The rape occurred after the officer detained the victim, took her to her home, and threatened her with incarceration unless she submitted to his sexual overtures.[162] The defendant municipality argued that, as a matter of law, the officer was acting in pursuit of his own personal gratification, outside of the scope of his employment, when he committed the rape.[163] After considering both the policy reasons behind the doctrine of respondeat superior and the broad powers vested in police officers, the court concluded that the trial court acted properly in submitting the scope-of-employment question to the jury.[164]

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159. *See* Jorgenson et al., *supra* note 143, at 1435 (discussing the theory of job-created authority).

160. Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991). In *Mary M.*, the court considered whether a municipality could be held vicariously liable for a police officer's rape of a female detainee. *Id.* at 1342. The officer stopped the victim for erratic driving and detained her after she performed poorly during a field-sobriety test. *Id.* Rather than taking the woman to jail, the officer drove the plaintiff to her home. *Id.* After threatening the plaintiff with incarceration unless she cooperated, the officer raped the plaintiff. *Id.* at 1342–43. Following trial, the jury found in favor of the plaintiff and assessed damages against the city. *Id.* at 1343. The Court of Appeals reversed, holding as a matter of law that the officer was acting outside the scope of his employment when he raped the plaintiff. *Id.* On review, the Supreme Court of California determined that the policy reasons underlying the doctrine of respondeat superior generally support the imposition of vicarious liability on employers of police officers who commit sexual assault by abusing their authority. *Id.* at 1349. The court also discussed the significant authority possessed by police officers in carrying out their duties. *Id.* at 1350. Finding that the officer's initial detainment of the plaintiff was within the scope of his employment, the court determined that the officer's threats to take the plaintiff to jail if she did not cease resisting his assault could not be said, as a matter of law, to be outside the scope of his employment. *Id.* at 1351. The court concluded that the trial court was proper in submitting the scope-of-employment question to the jury. *Id.* at 1353.

161. *See id.* at 1347–53 (discussing the scope-of-employment question in light of the police officer's duties and authority).

162. *Id.* at 1342–43.

163. *See id.* at 1350 (addressing defendant's assertion that the rape was, as a matter of law, outside the scope of the officer's employment).

164. *See id.* at 1352 (finding that a reasonable jury could conclude that the officer's assault was committed within the scope of his employment). The court stated:

> [W]e hold that when, as in this case, a police officer on duty misuses his official authority by raping a woman whom he has detained, the public entity that employs

In reaching its decision, the *Mary M.* court placed a great deal of weight on the power that police officers possess over third parties.[165] The court thoroughly discussed not only the actual powers possessed, including the power to detain and frisk third parties,[166] but also the symbols of state-granted authority possessed by the officers, including "a distinctively marked car, a uniform, a badge, and a gun."[167] The court reasoned that in light of the power bestowed upon police officers, "it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct."[168] Finding the risk of sexual assaults to be "broadly incidental to the enterprise of law enforcement," the court stated that liability for such conduct "may appropriately be imposed on the employing public entity."[169] *Mary M.* is indicative of judicial willingness to consider the magnitude of the job-created authority possessed by the tortfeasor when evaluating the employment relationship and determining whether a causal nexus exists between the employment relationship and the resulting harm.[170] In matters involving tortfeasors who are endowed with significant job-created authority, courts recognize that liability arising from misuse of that authority should be imposed on the employer who granted the authority and benefited therefrom.[171]

3. Summary of Employee-Third Party Relationships

When applying the engendered by the employment test or the *Fearing* analysis, courts consider the nature of the employee-third party relationship to determine whether the scope-of-employment question should be submitted to the

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> him can be held vicariously liable. This does not mean that, as a matter of law, the public employer is vicariously liable whenever an on-duty officer commits a sexual assault. Rather, this is a question of fact for the jury.

Id.

165. *See id.* at 1349 (noting examples of the "great power and control" police officers possess over criminal suspects).

166. *See id.* at 1349–50 (discussing the authority of a police officer to detain suspected criminals and to frisk detainees).

167. *Id.* at 1349.

168. *Id.* at 1350.

169. *Id.*

170. *See id.* at 1352 (dismissing judicial authorities from other jurisdictions that "failed to consider the significance of the extraordinary authority wielded by law enforcement officers").

171. *See, e.g., id.* at 1353 (finding the scope-of-employment issue to be a question of fact for the jury and stating that "'[i]t is, after all, the state which puts the officer in a position to employ force and which benefits from its use'" (quoting Thomas v. Johnson, 295 F. Supp. 1025, 1032 (D.D.C. 1968))).

jury.[172] It is noteworthy that in discussing the significance of the relationship at issue, neither *Simmons*, *Doe*, nor *Mary M.* describes the employee-third party relationship as being a fiduciary relationship.[173] Yet in each of these cases, the courts relied on notions of authority and vulnerability inherent in the relationships to conclude that the scope-of-employment issue was a question of fact.[174] The obvious implication is that the significance of the employee-third party relationship to the scope-of-employment inquiry is not contingent on the finding of a fiduciary duty owed by the tortfeasor to the victim. Rather, courts look more generally at the power dynamics in the employee-third party relationship and allow the jury to determine the scope-of-employment question in cases involving relationships that exhibit a significant imbalance of power.[175]

C. The Cleric-Parishioner Relationship

A power imbalance is inherent in the relationship between a cleric and a parishioner.[176] In his role as a religious advisor and counselor, a cleric "carries the ultimate spiritual authority, particularly in the eyes of a trusting parishioner who looks to him for spiritual guidance and support."[177] For a parishioner seeking guidance, interaction with clergy is part of "a sacred trust, a place where parishioner can come with the deepest wounds and vulnerabilities."[178] As in the case of the therapist-patient or police officer-detainee relationships, the power imbalance in the priest-parishioner relationship renders it uniquely susceptible to manipulation and

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172. *See, e.g.*, Simmons v. United States, 805 F.2d 1363, 1370–71 (9th Cir. 1986) (finding an employer vicariously liable for a psychotherapist's sexual misconduct in light of the therapist's abuse of the transference phenomenon); Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 348–49 (Alaska 1990) (finding the scope-of-employment inquiry to be a question of fact where a therapist abused the transference phenomenon in order to sexually assault the plaintiff); Mary M. v. City of Los Angeles, 814 P.2d 1341, 1349 (Cal. 1991) (discussing the "great power and control" police officers possess over their suspects). For a discussion of the employee-third party relationship, see *supra* Part IV.A–B and accompanying footnotes.

173. *See supra* note 170 (noting cases that recognize the significance of the employee-third party relationship but make no explicit finding of the existence of a fiduciary relationship).

174. *See, e.g.*, *Doe*, 791 P.2d at 348 (discussing a therapist's abuse of the transference phenomenon and finding the scope-of-employment issue to be a question of fact).

175. *See, e.g.*, *Simmons*, 805 F.2d at 1370–71 (finding the employer vicariously liable for psychotherapist's sexual misconduct based on the patient's vulnerability); *Mary M.*, 814 P.2d at 1349 (discussing the "great power and control" police officers possess over their suspects).

176. *See* Pamela Cooper-White, *Soul-Stealing: Power Relations in Pastoral Sexual Abuse*, 108 CHRISTIAN CENTURY 196, 196 (1991) (stating that "there is an imbalance of power between [a cleric and a parishioner] at the outset" of the relationship).

177. *Id.*

178. *Id.*

exploitation of the vulnerable party by the dominant party.[179] Some jurisdictions that recognize the power imbalance in the therapist-patient or police officer-detainee contexts as being sufficient to satisfy the requisite causal nexus for the engendered by the employment analysis have not found the priest-parishioner relationship to possess the requisite degree of intimacy.[180] In *Fearing*, the court correctly held, in light of sufficient pleadings, that the intimacy of the priest-parishioner relationship satisfies the requisite causal nexus between the employment and the tortious conduct, and that such claims require submission of the scope-of-employment question to the jury.[181] In fact, the parishioner's perception of divinely bestowed powers in the priest arguably elevates the intimacy of the relationship beyond that present in the therapist-patient or police officer-detainee contexts.[182]

1. Trust-Dependency Relationships and Clergy Counseling

Among the many duties of clergymen is the counseling of parishioners.[183] By some estimates, clerics spend between twenty-five and sixty percent of their time in face-to-face consultation.[184] The same psychological crises that lead individuals to

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179. *See* Enderle v. Trautman, Civ. No. A3-01-22, 2001 U.S. Dist. LEXIS 20181, at *15 (D.N.D. Dec. 3, 2001) (describing clergy sexual misconduct as an "egregious abuse of power and trust by one in a special relationship with the exploited person").

180. *See, e.g.*, Simmons v. United States, 805 F.2d 1363, 1366 (9th Cir. 1986) (distinguishing the therapist-patient relationship from other intimate relationships, including the priest-parishioner relationship). Specifically, the court stated:

> The crucial factor in the therapist-patient relationship which leads to the imposition of legal liability for conduct which arguably is no more exploitative of a patient than sexual involvement of a lawyer with a client, a priest or minister with a parishioner, or a gynecologist with a patient is that lawyers, ministers and gynecologists do not offer a course of treatment and counseling predicated upon handling the transference phenomenon.

Id.

181. *See* Fearing v. Bucher, 977 P.2d 1163, 1168 (Or. 1999) ("A jury reasonably could infer that Bucher's performance of his pastoral duties . . . were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of employment.").

182. *See* Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 3 (1996) (describing sexual misconduct in the priest-parishioner setting as being "especially contemptible because the perpetrator's power and authority are perceived as derived from God").

183. *See* Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans, 32 F.3d 953, 959 n.23 (5th Cir. 1994) (noting the priest's testimony that his duties included "saying mass, hearing confessions, giving communion, anointing the sick, funerals, weddings," and "counseling").

184. *See* Eduardo Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions*, 19 FLA. ST. U. L. REV. 499, 504 (1991) (discussing

seek counseling from psychotherapists can often lead individuals to seek guidance from their pastor.[185] Likewise, the same issues of vulnerability arising out of the trust-dependency associations are present in both relationships.[186] In contrast to dicta in *Simmons*,[187] some commentators contend that the transference phenomenon is present in pastoral counseling just as it is in psychotherapy.[188] Courts evaluating respondeat superior claims grounded in clergy counseling should have the same concern about misuse of transference and its impact on the parishioner.[189] Consequently, courts willing to recognize transference as providing the requisite causal nexus for the engendered by the employment test in the psychotherapy setting should also recognize the causal nexus of transference in the pastoral counseling setting.

Even more fundamental than the apprehension over misuse of transference in therapist-patient relationships are the underlying concerns of vulnerability and the abuse of trust.[190] Like the therapist-patient relationship, the clergy-parishioner relationship is one that "creates trust and reliance."[191] Discussing concerns about the abuse of trust in pastoral counseling, one court stated:

> Trust and confidence are vital to the counseling relationship between parishioner and pastor.... Often parishioners who seek pastoral counseling are troubled and vulnerable. Sometimes, they turn to their pastor in the belief that their religion is the most likely source to sustain

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the recent increase in the amount of time devoted by clergy to pastoral counseling).

185. *See, e.g.*, Villiers, *supra* note 182, at 3 ("During an emotional or psychological crisis, many parishioners seek counseling from a local pastor.").

186. *See* Cruz, *supra* note 184, at 504 (stating that transference and the resulting patient vulnerability pose the same problems in pastoral counseling as in psychotherapy).

187. *See* Simmons v. United States, 805 F.2d 1363, 1366 (9th Cir. 1986) (stating that the priest-parishioner relationship "do[es] not offer a course of treatment and counseling predicated upon handling of the transference phenomenon").

188. *See* Cruz, *supra* note 184, at 504 ("Although the transference phenomenon is usually discussed in the context of psychiatrist- or psychologist-patient relationships, the same dynamics are in effect when the clergy assumes the role of religious counselor."); Fenton, *supra* note 60, at 64 ("Sexual exploitation at the time of transference . . . can occur in any relationship, not just within that of psychotherapist-patient....").

189. *See, e.g.*, L.L. v. Med. Protective Co., 362 N.W.2d 174, 178 (Wis. Ct. App. 1984) ("The transference phenomenon makes it impossible that the patient will have the same emotional response to sexual contact with the therapist that he or she would have to sexual contact with other persons.").

190. *See id.* at 177 ("The first and most basic element of the doctor's charge is acting with [a] sense of imparting trust always guiding and governing the relationship." (quoting D. DAVIDOFF, THE MALPRACTICE OF PSYCHIATRISTS 6 (1973))).

191. Moses v. Diocese of Colo., 863 P.2d 310, 322 (Colo. 1993).

> them in their time of trouble. The pastor knows, or should know of the parishioner's trust and the pastor's dominant position.[192]

A parishioner seeking spiritual or emotional guidance from a cleric necessarily expects that the cleric will act in the parishioner's best interests.[193] Sexual misconduct arising out of a cleric's abuse of this trust is an outgrowth of a cleric's legitimate duties and thus satisfies the causal nexus requirement of the engendered by the employment test and the *Fearing* analysis.

2. *Divine Authority and Clergy Power*

In *Mary M.*, the Supreme Court of California found it to be foreseeable that the coercive authority possessed by a police officer could be misused to perpetrate an assault on a third party.[194] The court limited its holding to respondeat superior claims arising out of assault by police officers, stating that "[e]mployees who do not have [police] authority and who commit sexual assault may be acting outside the scope of employment as a matter of law."[195] Yet the coercive authority possessed by clergymen is arguably more powerful than that possessed by police officers. Police officers carry out their duties under the authority of the state.[196] Clergymen, in the eyes of parishioners, derive their authority from God.[197] This perception allows a cleric to invoke God as supporting his conduct and to compel the victim to keep the sexual abuse confidential.[198] Just as the perception of a police officer's power is enhanced by "visible symbols of that power, . . . [including] a distinctively marked car, a uniform, a badge, and a gun,"[199] the perception of a cleric's divine power is bolstered by the clerical collar, the Bible, the cross, and other

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192. F.G. v. MacDonell, 696 A.2d 697, 704 (N.J. 1997).

193. *See* Villiers, *supra* note 182, at 3 (stating that parishioners hold clergy in high regard and expect clergy to act in their best interests).

194. *See* Mary M. v. City of Los Angeles, 814 P.2d 1341, 1350 (Cal. 1991) ("In view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct.").

195. *Id.* at 1350 n.11. For a discussion of this case, see *supra* Part IV.B.2.

196. *Id.* at 1352.

197. *See, e.g.*, Cruz, *supra* note 184, at 501 (stating that parishioners believe that clergy authority comes from God).

198. *See, e.g.*, Schmidt v. Bishop, 779 F. Supp. 321, 324 (S.D.N.Y. 1991) (noting plaintiff's allegations that the offending priest described the sexual conduct as "special and acceptable in the eyes of the Lord" and that "it was not something [she could] share with others").

199. *Mary M.*, 814 P.2d at 1349.

visual images of God. The "Man of God" characteristic of a clergymen's authority has been described as "one of the most insidious aspects of [clergy] power."[200] This unique authority is arguably more powerful than that possessed by a police officer over detainees, and it renders misuse of clergy power to perpetrate sexual assaults highly foreseeable.[201] The foreseeability of sexual misconduct in the clergy-parishioner relationship, like that in the police officer-detainee relationship, satisfies the requisite causal nexus between the employment relationship and the tortious conduct.

D. Respondeat Superior Policy Considerations and Clergy Sexual Misconduct

The policy considerations underlying the doctrine of respondeat superior strongly support its application in cases involving clergy sexual misconduct. One such consideration is the prevention of future injuries.[202] In theory, the stringent standard of liability imposed by respondeat superior gives employers an incentive to exercise greater care in selecting and monitoring their employees.[203] In clergy sexual misconduct cases, the potential for exorbitant jury awards against the employer-church arising out of the misconduct of an employee-cleric surely would provide a strong motivation for religious institutions to exercise greater care in selecting and monitoring their clerics. In light of the numerous high-profile clergy abuse cases involving a single cleric

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200. Cooper-White, *supra* note 176, at 197.

201. One commentator has suggested that in the context of clergy sexual misconduct, respondeat superior fails as a viable cause of action because "[p]roving foreseeability is nearly impossible." Short, *supra* note 111, at 197. It is true that proving foreseeability in a given respondeat superior case is difficult. In fact, where such evidence exists, the victim would likely be able to assert several negligence-based claims in addition to or in lieu of respondeat superior. But when determining whether a plaintiff states a valid respondeat superior claim, the foreseeability inquiry is not properly directed at the specific facts of the case. Rather, the foreseeability inquiry should instead be focused on the type of relationship—in this case, priest-parishioner—and whether it exhibits a power imbalance similar to the therapist-patient or police officer-detainee relationships such that it would warrant imposition of respondeat superior liability. Finally, the foreseeability of clergymen abusing their job-created authority is arguably bolstered by evidence that one in four clergymen has had some form of sexual contact with a parishioner. *Id.* at 184.

202. *See* Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 366 (Cal. 1995) (discussing policy considerations, including the prevention of future injuries, that should be used as guidelines in determining whether to apply respondeat superior).

203. Tippecanoe Beverages, Inc. v. S.A. El Aguila Brewing Co., 833 F.2d 633, 638 (7th Cir. 1987).

with multiple victims over many years,[204] closer supervision of cleric-employees would almost certainly allow religious institutions to uncover abusive behavior earlier and thereby prevent both further injuries and further victims.

A second policy consideration in determining the propriety of holding religious institutions vicariously liable for the sexual misconduct of clergymen is the effect of the church-mandated vow of poverty. In *Lisa M.*, the Supreme Court of California identified the assurance of victim compensation as one of three policy goals underlying the doctrine of respondeat superior.[205] When religious organizations require that their clerics take a vow of poverty, the organization effectively renders their employees judgment-proof. Some courts have acknowledged this policy consideration when evaluating respondeat superior claims arising out of sexual assaults perpetrated by clergy members who have taken the vow of poverty.[206] Additionally, one jurisdiction using the traditional motive-to-serve test held that a priest who has taken the vow of poverty was arguably acting to further the interests of the church when he committed a sexual assault during a counseling session because the vow of poverty required the priest to turn over all counseling proceeds to the church.[207] Although the precise judicial reasoning on the subject might vary, the policy of ensuring victim compensation is a factor that clearly weighs in favor of holding vicariously liable religious institutions that require their clerics to take a vow of poverty.

A third policy goal is to spread losses equitably and, whenever possible, to assign costs to the cheapest cost-bearer.[208] Beyond having deeper pockets than typical tort victims, employers are usually able to purchase insurance to cover damages resulting from torts, the cost of which can be absorbed as one of the many costs of doing business.[209] Furthermore, assigning costs to the party that

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204. *See, e.g.*, Short, *supra* note 111, at 219–21 (chronicling the repeated acts of abuse committed by Fr. John Geoghan of the Boston Archdiocese).

205. *See Lisa M.*, 907 P.2d at 366 (discussing policy reasons behind the doctrine of respondeat superior).

206. *See, e.g.*, Doe v. Hartz, 52 F. Supp. 2d 1027, 1077 (N.D. Iowa 1999) (stating that the vow of poverty may be a valid consideration in determining whether it would be just to attribute the losses resulting from the assault to the employer-church).

207. *See* Doe v. Norwich Roman Catholic Diocesan Corp., 309 F. Supp. 2d 247, 252 (D. Conn. 2004) (noting that the priest "allegedly assaulted plaintiff during counseling sessions in attempt to bring plaintiff closer to the Church and her religious faith, thereby increasing financial donations to the Church and volunteer time spent by plaintiff and her family in furtherance of the Church's business").

208. *See* Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 366 (Cal. 1995) (discussing the benefits of cost-spreading).

209. Johnston v. Long, 181 P.2d 645, 651 (Cal. 1947).

benefits from the employment relationship "appeals to an instinctive sense of justice."[210] On the whole, this policy goal is served by holding religious institutions vicariously liable for sexual assaults committed by clergymen. Religious institutions may purchase liability insurance and seek indemnity from insurance companies following adverse judgments in lawsuits.[211] Additionally, assigning the costs of the harm to the cleric's employer rather than to the victim of the sexual assault most certainly appeals to one's "intrinsic sense of justice."[212]

V. Conclusion

The epidemic of clergy sexual abuse warrants a reexamination of the viability of respondeat superior claims asserted against hierarchical religious institutions. One barrier to the imposition of vicarious liability on religious organizations is the doctrine of Ecclesiastical Abstention. In light of the United States Supreme Court decisions in *Smith* and *City of Boerne*, however, the Free Exercise Clause does not impede third-party tort actions grounded in neutral and generally applicable tort law. Furthermore, the Establishment Clause and the apprehension over excessive judicial entanglement in religious doctrine present less of a concern for respondeat superior claims than negligence claims because respondeat superior claims would not force courts to establish reasonable standards of clergy conduct.

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210. Marston v. Minneapolis Clinic of Psychology & Neurology, Ltd., 329 N.W.2d 306, 314 (Minn. 1982) (Peterson, J., dissenting).

211. *See* Roman Catholic Diocese of Dallas v. Interstate Fire & Cas. Co., 133 S.W.3d 887, 897 (Tex. Ct. App. 2004) (rejecting insurance companies' arguments that, as a matter of law, they were not required to indemnify the church because the acts of molestation were intentional). In *Interstate*, the court rejected the insurers' argument that the assaults against the victim were not "occurrences" for purposes of the insurance policy because the assaults were intentional. *Id.* at 891. The court noted that the determination of whether the abuse constituted an "occurrence" for purposes of the policy was to be made from the point of view of the insured. *Id.* at 894. Absent a finding that the abuse committed by the priest—who was not a party to the contract—was intended by the Diocese, the court held the abuse to be an "occurrence." *Id.* at 895. The court also rejected the insurers' public policy argument, stating that although public policy prohibits allowing a party to insure against his or her own intentional misconduct, the insurers had failed to prove that the abuse was the result of the Diocese's intentional conduct. *Id.* at 896.

212. *See* Mary M. v. City of Los Angeles, 814 P.2d 1341, 1353 (Cal. 1991) (stating that the public employer must be held accountable for assault committed by policemen on duty, in part because "'[i]t is, after all, the state which puts the officer in a position to employ force and which benefits from its use'" (quoting Thomas v. Johnson, 295 F. Supp. 1025, 1032 (D.D.C. 1968))).

Courts applying the traditional scope-of-employment inquiry have been unwilling to recognize the validity of respondeat superior claims arising out of clergy sexual misconduct because it is nearly impossible to show that sexual assault by a cleric in any way furthers the interests of the church.[213] Recognizing this difficulty in applying the traditional scope-of-employment inquiry to any intentional torts, several jurisdictions have begun to develop alternative tests for determining whether an act was within the scope of employment.[214] In *Fearing*, the Supreme Court of Oregon set forth a workable scope-of-employment analysis that strikes an ideal balance between the traditional scope-of-employment test and the engendered by the employment test.[215] The *Fearing* analysis does away with the rigidity of the traditional scope-of-employment analysis and replaces it with a flexible test that is far more suitable for determining whether an employee's intentional tort occurred within the scope of employment. The "causal nexus" requirement permits courts to reject as a matter of law claims that cannot fairly be said to have been engendered by the employment relationship.[216] At the same time, the *Fearing* analysis prevents courts from summarily dismissing respondeat superior claims arising out of intentionally tortious conduct merely because the commission of the intentional tort itself did not further the interests of the employer.[217]

The holding in *Fearing* recognizes that the intimate relationship between a cleric and a parishioner, when adequately pleaded, satisfies the requisite causal nexus and that the scope-of-employment question should, in such cases, become a question of fact for the jury. Like the therapist-patient and police

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213. *See, e.g.*, Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans, 32 F.3d 953, 960 (5th Cir. 1994) ("It would be hard to imagine a more difficult argument than that [a priest's] illicit sexual pursuits were somehow related to his duties as a priest or that they in any way furthered the interests of . . . his employer.").

214. *See, e.g.*, Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 361 (Cal. 1995) (stating that California has abandoned the traditional requirement that the employee's actions must be motivated by a desire to serve the interests of the employer); *Marston*, 329 N.W.2d at 309–10 ("We reject as the basis for imposing liability the arbitrary determination of when, and at what point, . . . [intentional torts] leave the sphere of the employer's business and become motivated by personal animosity." (quoting Lange v. Nat'l Biscuit Co., 211 N.W.2d 783, 785 (Minn. 1973))).

215. *See* Fearing v. Bucher, 977 P.2d 1163, 1167 (Or. 1999) (stating that the proper respondeat superior inquiry in cases involving intentional torts is to determine whether conduct "that was within the scope of his employment . . . arguably resulted in the acts that caused plaintiff's injury").

216. *See id.* (stating that the analysis requires "a causal connection between the acts that are alleged to be within the scope of employment and the harm to the plaintiff").

217. *See id.* at 1167 (noting that it is improper when analyzing intentional torts to ask whether the tortious act itself furthered the interests of the employer and was within the scope of employment).

officer-detainee relationships, the priest-parishioner relationship contains an inherent imbalance of power. The power imbalance in the priest-parishioner relationship is a product of the vulnerability of parishioners seeking guidance and the coercive authority possessed by clergymen. It is this power imbalance that renders abuse of trust and misuse of authority a foreseeable outgrowth of the priest-parishioner relationship and establishes a causal nexus between the employment relationship and the tortious conduct. Courts applying scope-of-employment tests similar to the *Fearing* analysis should recognize the intimacy of the priest-parishioner relationship and should find that the power imbalance inherent in the relationship satisfies the requisite causal nexus.

By applying the *Fearing* analysis to respondeat superior claims arising out of clergy sexual misconduct, courts will allow juries to determine whether the cleric's actions took place within the scope of employment. The judicial system can thereby take a significant step towards holding religious institutions accountable for the tortious actions of their employees. Holding these organizations vicariously liable will ensure compensation for the victims of clergy sexual abuse, encourage increased scrutiny in clergy selection and monitoring, and, ultimately, reduce the number of clergy sexual abuse victims.