

“Workers of God”: The Holy See’s Liability for Clerical Sexual Abuse

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I. INTRODUCTION

In the 1970s, no Boston priest was more electrifying than Paul Richard Shanley. Ordained in 1960, he sought and received from his bishop, Boston cardinal Humberto Medeiros, a mission to minister to “sexual minorities” in 1970 and became a well-known Boston “street

priest.”¹ Wearing jeans and smoking Kool cigarettes, he gathered about him runaway gay teenagers and advocated fiercely for gay rights.² Yet one of the boys drawn to him was the same one Shanley would be convicted of sexually abusing in 2005.³ In a civil suit seeking damages from the Archdiocese of Boston for its role in hiding Shanley’s abuse, the plaintiffs submitted at least twenty affidavits from Shanley’s victims detailing abuse from 1961 to 1988, including accounts of child sexual abuse and oral and anal rape.⁴ One victim’s affidavit states that during the abuse, “Father Shanley would explain to me that he was a ‘worker of God’ and that the acts of abuse were sanctioned by God.”⁵

God is not amenable to suit in the United States for the acts of His agents, but many victims have sued American bishops and dioceses in the Catholic Church.⁶ These suits have resulted in over \$2 billion in settlements.⁷ Yet some victims are seeking the even deeper pockets of the Holy See, the ecclesial administrative body of the Catholic Church governed by the pope.⁸ The Holy See, an internationally recognized sovereign that maintains formal relations with 176 sovereign states and has permanent observer status at the UN General Assembly,⁹ would normally receive immunity from suit through the Foreign Sovereign Immunities Act (“FSIA”).¹⁰ However, in

1. Sally Jacobs, *“If They Knew the Madness in Me”: A Search for the Real Rev. Paul Shanley Suggests He was Part Hero, Part Horror*, BOSTON GLOBE, July 10, 2002, at F1.

2. *Id.*

3. Pam Belluck, *Defrocked Priest Convicted in 1980’s Rape of Boy in Boston-Area Church*, N.Y. TIMES, Feb. 8, 2005, at A16. Shanley appealed, claiming that the evidence of abuse recovered from “repressed memories” was inadmissible. The Massachusetts Supreme Judicial Court upheld the conviction. John R. Ellement, *Former Catholic Priest’s Bid for New Trial Rejected: Use of Recovered Memories Upheld*, BOSTON GLOBE, Jan. 16, 2010, at B.4.

4. Twenty affidavits are available at <http://www.bishop-accountability.org/accounts>.

5. Affidavit of [name redacted] at 2, *Ford v. Law*, No. 02-04551-T1 (Mass. Super. Ct. July 21, 2003), available at http://www.bishop-accountability.org/ma-boston/archives/ShanleyMO_R/Shanley_MO_11_Affidavit_Ex08_R.pdf.

6. A diocese is a geographic area of ecclesial administration under the authority of a bishop. An archdiocese is a diocese with administrative functions over a regional group of dioceses and under the authority of an archbishop.

7. As of summer 2009, one victim’s website has chronicled over \$2 billion in settlement money paid out to over 4,000 victims by dioceses across the United States. BishopAccountability.org, *Major Settlements and Monetary Awards in Civil Suits*, <http://www.bishop-accountability.org/settlements> (last visited Aug. 31, 2010).

8. U.S. DEPT’ OF STATE, BUREAU OF EUROPEAN AND EURASIAN AFFAIRS, BACKGROUND NOTE: HOLY SEE (2010), <http://www.state.gov/r/pa/ei/bgn/3819.htm>.

9. Holy See Press Office, *Bilateral and Multilateral Relations of the Holy See*, http://www.vatican.va/news_services/press/documentazione/documents/corpo-diplomatico_index_en.html (last visited Aug. 31, 2010).

10. 28 U.S.C. § 1604 (2008).

two recent cases, *O'Bryan v. Holy See*¹¹ and *Doe v. Holy See*,¹² the Sixth and Ninth Circuit Courts of Appeals have held that suits against the Holy See may proceed through the tortious act exception of the FSIA.¹³ The plaintiffs alleged that the Holy See was liable through *respondeat superior*, a common law theory of vicarious liability holding employers liable for their employees' tortious acts within the scope of their employment.¹⁴

Although *respondeat superior* is an attractive theory of liability to overcome the Holy See's sovereign immunity, it also presents a host of thorny theoretical and practical problems. First, the Holy See's unique status and the unique religious organization it administers present difficult issues when applying traditional agency law. Priests, who are citizens of the nations in which they work and maintain few material ties to the Holy See, seem a far cry from the usual sovereign agents who find themselves in court, such as diplomatic attachés and state-owned banks. Second, to properly understand the relationship between a priest, a bishop, and the Holy See (and so to determine if the priest really is the Holy See's employee), a court likely must delve into Catholic theology. This raises the serious problem of determining ecclesial relationships in a secular court, which must abstain from religious questions under the doctrine of ecclesial abstention.

Finally, using state agency law to define the scope of employment creates fairness and unpredictability issues. One of Congress's major purposes in passing the FSIA was to ensure uniformity and predictability in establishing jurisdiction over foreign sovereigns.¹⁵ However, a plaintiff in one state would be able to sue the Holy See while another plaintiff in a different state would not. This situation is unfair both to hundreds of potential plaintiffs, who would not have the recourse to sue the Holy See, and to the Holy See itself, as the courts would have to apply the FSIA according to the employment rules of different state jurisdictions.

To overcome these problems and provide a uniformly applicable law to the Holy See's sovereign immunity with regard to clerical abuse cases, this Note argues that the test for command responsibility, the

11. *O'Bryan v. Holy See*, 556 F.3d 361, 386 (6th Cir. 2009).

12. *Doe v. Holy See*, 557 F.3d 1066, 1085 (9th Cir. 2009).

13. § 1605(a)(5). The tortious act exception to the FSIA allows a personal injury suit for damages against a foreign sovereign to proceed when the injury is caused by an employee of the sovereign acting within the scope of his employment. *See infra* note 60 and accompanying text.

14. *Doe*, 557 F.3d at 1081; *O'Bryan*, 556 F.3d at 386.

15. H. COMM. ON THE JUDICIARY, FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976, H.R. REP. NO. 94-1487, at 6-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06.

military criminal law analogue to *respondeat superior*,¹⁶ better suits the Catholic Church. Command responsibility holds superiors liable for their subordinates' criminal actions when, with effective control over their subordinates, they know or should know of the actions and fail to respond appropriately or punish their subordinates in the face of an affirmative duty.¹⁷ The requirements of effective control and knowledge take the nature of ecclesial authority out of Church doctrine and focus instead on the de facto operations of the Catholic Church and its actual knowledge of sexual abuse by clergy. Also, applying the command responsibility test solves the practical issues of fairness and unpredictability inherent in using state agency common law by grounding the Holy See's duty to act in *jus cogens* norms of international law.¹⁸

Part II of this Note discusses the Holy See and the FSIA. Part III analyzes the *respondeat superior* theory advanced in *Doe* and *O'Bryan* and discusses the legal and practical problems it raises. Part IV then turns to the command responsibility doctrine and demonstrates how it provides a better legal lens for analyzing the Holy See's complicity and liability in clerical sex abuse cases.

II. BACKGROUND

A. *Sovereignty of the Holy See and Its Control Over Catholic Affairs*

The Holy See is the central ecclesial administrative body of the Catholic Church and the sovereign entity ruling Vatican City. The pope is the head of state and directs the Roman Curia, a collection of administrative units governing different ecclesial functions such as religious life, evangelization, and church doctrine. Curial officials are cardinals, bishops, and priests directly employed at the Vatican in the different administrative units. In this Note, "Holy See" will refer to the sovereign entity. "Pope" will refer only to the pope in his function as head of state or as spiritual leader of the world's Catholics. "Curia" will refer solely to the administrative body of the Church and the clergy who staff it.

The Holy See occupies a unique position in international law. Although the Holy See is the legal sovereign of the State of Vatican

16. See, e.g., Allison Marston Danner, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 120 (2005).

17. *Id.* at 120–21 ("Indirect command responsibility arises from the culpable omissions of commanders or superiors.").

18. See *infra* notes 178–79 and accompanying text.

City, its claim to sovereignty does not rest on its territorial control of the Vatican.¹⁹ Rather, the Holy See, under the direction of the pope, has functioned as a sovereign since at least the time of Pope Leo I in the fifth century.²⁰ Until the Reformation, the Holy See acted as the spiritual authority over Western Europe. Kings sought the approval of the popes in international affairs,²¹ fought wars against them,²² and approached them for mediation.²³

The unification of Italy in the 1860s and 1870s put an end to the Holy See's territorial jurisdiction,²⁴ but this did not destroy its status as an international sovereign. From 1870 to 1929, the Holy See maintained its international rights and duties and continued to receive envoys, consistent with the rights of an international sovereign.²⁵ In 1929, the Holy See and Italy signed two treaties and a concordat, together called the Lateran Pacts ("the Pacts"). The Pacts permanently assured "to the Holy See a position de facto and de jure which shall guarantee absolute independence."²⁶ The two treaties addressed political, legal, and financial issues, while the concordat concerned religious issues.²⁷ Since 1929, the Holy See has maintained

19. See Josef L. Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 308, 309–10 (1952) (outlining and rejecting the argument that the Holy See's sovereign status depends on territorial control).

20. Robert Araujo, S.J., *The International Personality and Sovereignty of the Holy See*, 50 CATH. U.L. REV. 291, 296 (2001) ("Pope Leo the Great sent emissaries to both church councils and to the courts of temporal sovereigns. These early legations did not represent the purely spiritual sovereignty of the Holy See, but a temporal sovereignty whose voice would be heard throughout the world's political communities.")

21. E.g., The Avalon Project, The Bull of Pope Adrian IV Empowering Henry II to Conquer Ireland. A.D. 1155, available at <http://avalon.law.yale.edu/medieval/bullad.asp> (last visited Aug. 31, 2010) (writing to Henry II, "[I]n order the better to [spread the Christian religion to Ireland], thou dost ask the advice and favour of the apostolic see.")

22. Religion scholar Eamon Duffy refers to Pope Julius II (1502–1513) as "the warrior-pope" and references a sixteenth-century satire attributed to Erasmus, in which Saint Peter refuses to admit the armor-clad pope and his army of ghosts into heaven. EAMON DUFFY, *SAINTS AND SINNERS: A HISTORY OF THE POPES* 152 (3d ed. 2006).

23. Spain and Portugal sought papal mediation to resolve land claims in the new world. Pope Alexander VI's bull *Inter Caetara* decreed that the line be drawn "one hundred leagues towards the west and south from any of the islands commonly known as the Azores and Cape Verde." Catholic Forum, Pope Alexander VI—The Bull *Inter Caetara*—4 May 1493, available at <http://www.catholic-forum.com/saints/pope0214a.htm> (last visited Aug. 31, 2010).

24. For a history of Italian unification and the subsequent "Roman Question" of the Vatican's status, see generally DAVID I. KERTZER, *PRISONER OF THE VATICAN: THE POPES, THE KINGS, AND GARIBALDI'S REBELS IN THE STRUGGLE TO RULE MODERN ITALY* (2006).

25. See Kunz, *supra* note 19, at 311–12 (providing examples of the Holy See acting as a sovereign during the period of 1870–1929).

26. Treaty of Conciliation, It.-Vatican, pmbl., Feb. 11, 1929, available at <http://www.hol.com/~mikesch/treaty.htm> (last visited Aug. 31, 2010).

27. The Treaty of Conciliation addressed the Holy See's political status. *Id.* In the Financial Convention, Italy paid the Holy See for the loss of the Papal States. Financial Convention, It.-

territorial jurisdiction over Vatican City, but in reality all major civic functions are supplied by the Italian government, as provided in the Pacts.²⁸ Rather than relying on this incomplete territorial independence, the Holy See's status as an international sovereign lies in its history and role as spiritual head of over one billion people, independent of its control of the Vatican. This history makes the Holy See practically unique in international law,²⁹ because in modern times other states treat territorial jurisdiction as a *sine qua non* for sovereignty.³⁰ Today, the Holy See maintains diplomatic relations with 176 nations, including the United States.

The Holy See's unique international status is partly a result of the unique religious organization it directs, the Catholic Church. The Holy See and the pope maintain a degree of spiritual and ecclesial control over Catholics exceeding all other international religious organizations. Under canon law, the Holy See coordinates the ecclesial affairs of the worldwide church by creating and organizing new dioceses.³¹ The Holy See also names bishops to lead those dioceses and transfers them between different dioceses or religious offices within the Holy See.³² Canon law also provides minimum requirements for ordination as a priest or bishop.³³

Vatican, pmbL., Feb. 11, 1929, *available at* <http://www.hol.com/~mikesch/treaty.htm> (last visited Aug. 31, 2010). The Concordat regulates "the conditions of religion and the Church in Italy." Concordat, It.-Vatican, pmbL., Feb. 11, 1929, *available at* <http://www.hol.com/~mikesch/treaty.htm> (last visited Aug. 31, 2010).

28. Treaty of Conciliation, *supra* note 26, art. 6.

29. The only other currently recognized non-territorial sovereign is the Sovereign Military Order of Malta (also known as the Knights of Malta, or St. John's Hospitallers). Its claim to sovereignty rests in its former dominion over Rhodes until 1523 and Malta until 1798. The Order maintains diplomatic relations with 104 states, but not the United States. Order of Malta, *Bilateral Relations with Countries*, <http://www.orderofmalta.org/diplomatic-relations/862/bilateral-relations-with-countries/?lang=en> (last visited Aug. 31, 2010). The Order's sovereignty has not been tested in U.S. courts.

30. For example, the Palestinian Authority and the Palestine Liberation Organization were denied sovereign status in the United States because they lacked full autonomy over the land they nominally controlled. *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 288–89 (1st Cir. 2005) (partially requiring for sovereignty that the party claiming immunity "has a defined territory . . . under control of its own government," and that "to satisfy these requirements, a state's government must, at a bare minimum, be independent and in general control of its territory, maintaining at least a modicum of law and order"); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987) ("A state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.").

31. 1983 CODE c.373 (Vatican). The Congregation for Bishops oversees the creation and modification of dioceses. NEW COMMENTARY ON THE CODE OF CANON LAW 510 (John P. Beal et al. eds., 2000) [hereinafter NEW COMMENTARY].

32. 1983 CODE c.377, § 1. The local bishops submit names of suitable Episcopal candidates to the Congregation of Bishops every three years. The Congregation in turn chooses three of

The pope, through the administrative support of the Curia, can discipline Catholics by numerous means. Such measures can include prohibiting certain people from speaking or teaching in the name of the Catholic Church,³⁴ removing clerics from ecclesial office,³⁵ suspending priestly faculties,³⁶ dismissing clerics from the clerical state,³⁷ and, most drastically, excommunication.³⁸ Since the Council of Vatican II in the 1960s,³⁹ most excommunications have resulted either from conflicts with the teaching authority of the Holy See or from prohibited ecclesial actions such as ordaining women or unauthorized men as priests and bishops.⁴⁰ During this time, the Holy See itself has rarely punished clerics for personal immorality, opting instead to leave such matters to the discretion of the local bishop.⁴¹

These ecclesial sanctions generally have only a limited and indirect material effect. For example, Charles Curran, who in 1986 was prohibited from teaching at Catholic institutions due to his public disagreement with Catholic doctrine on sexual morality, was granted tenure at Southern Methodist University instead.⁴² Marcel Lefebvre, a

these to submit to the pope, who makes the final decision. NEW COMMENTARY, *supra* note 31, at 515.

33. See 1983 CODE cc.232–61(listing requirements for the selection and spiritual formation of priests); *id.* c.378 (listing the qualifications for bishops).

34. *Id.* c.1336, § 1 n.2.

35. *Id.*

36. *Id.* c.1333.

37. *Id.* c.1336, § 1 n.5.

38. *Id.* c.1331. Interestingly, the 1983 Code does not define excommunication; it simply lists its spiritual effects. The commentators note “the excommunicated person remains a member of the Church and subject to its legislation.” NEW COMMENTARY, *supra* note 31, at 1549.

39. The Second Vatican Council from 1962 to 1965, a council of Catholic bishops addressing issues facing the Catholic Church in the modern world, fundamentally altered the Church’s relationship with the world and how it viewed its mission. This resulted in several practical changes throughout the Church, such as liturgy in the vernacular and increased ecumenical activity.

40. An Internet search revealed roughly thirty formally declared excommunications during 2000-2009. Of these, twenty-three were for ordaining women or unauthorized men as priests or bishops, or for joining or creating schismatic communities. Another six were for heretical beliefs.

41. The exception that proves the rule was the disciplining of Fr. Marcial Maciel Degollado, the Mexican founder of the religious order Legionaries of Christ. In January 2006, Pope Benedict XVI ordered Fr. Maciel, the elderly public icon of the Order, to a “quiet life of ‘prayer and penitence’ ” after allegations surfaced that he had sexually abused several Mexican seminarians. Ian Fisher & Laurie Goodstein, *Vatican Disciplines Founder of Order over Abuse Charges*, N.Y. TIMES, May 20, 2006, at A6. In 2009, a year after his death, the new head of the Legion admitted that Fr. Maciel had fathered at least one child. Laurie Goodstein, *Catholic Order Jolted by Reports That Its Founder Led a Double Life*, N.Y. TIMES, Feb. 3, 2009, at A19. Fr. Maciel’s silencing was extraordinary because he was the founder of a religious order and not subject to any local bishop’s authority; any punishment had to come from the Vatican.

42. See AM. ASS’N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE: THE CATHOLIC UNIVERSITY OF AMERICA 28–33 (1989), available at <http://www.aaup.org/NR/rdonlyres>

French bishop who opposed the reforms of Vatican II and was excommunicated for ordaining bishops without the pope's consent,⁴³ continued under his own organization to promulgate his views.⁴⁴ Furthermore, bishops who have resigned from office still maintain their salary and accommodations from Church funds, and the Church still provides support to dismissed clergymen in need.⁴⁵

This is not to say that sanctions are irrelevant, but they are not generally sanctions as thought of in the secular world. Rather, such discipline is useful only insofar as the disciplined person considers it a spiritual penalty. Some excommunicated Catholics, such as female priests, consider their status a badge of honor rather than a sanction.⁴⁶ Priests and bishops desiring to stay within the church and avoid ecclesial penalties (or, a cynic might argue, desiring an ecclesial promotion) would do well to follow the Holy See's directives. Yet it is reasonable to assume that most do so out of their own belief in the righteousness of the pope's actions and policies, and their desire to be in spiritual communion with the pope, rather than out of fear of the material effects of possible sanctions. Furthermore, clerics have a lower chance of reputational harm or public humiliation because canon law instructs bishops to use public discipline only as a last resort.⁴⁷ Public discipline will ensue only if the cleric persists in his offending actions. The absence of a material effect from these ecclesial sanctions creates problems when a secular court must determine to what extent the pope and the Holy See control the actions of bishops and priests.

/9CA4679F-7BC7-4AD7-BA37-0C1B00AEBAA1/0/CatholicUUSA.pdf (discussing the background leading up to Curran's dismissal from the Catholic University of America ("CUA")). Curran left CUA in 1988, spent two years as a visiting professor at various institutions, and then accepted the tenured position at SMU in 1990. *Father Curran to Take Post at SMU*, L.A. TIMES, Dec. 15, 1990, at F17.

43. POPE JOHN PAUL II, APOSTOLIC LETTER "ECCLESIA DEI" para. 3 (1988).

44. The Catholic Church treated Lefebvre's organization, the Society of Saint Pius X ("SSPX"), and the four excommunicated bishops as schismatic until 2009. Lefebvre initially created the SSPX in 1970, and it quickly became an international organization. SSPX, Question 1: What Is the Society of St. Pius X?, http://www.sspix.org/SSPX_FAQs/q1_sspix.htm (last visited Aug. 31, 2010).

45. 1983 CODE c.1350, § 1. For example, in Ireland, four bishops have resigned due to their participation in cover-ups of sexual abuse, yet they will maintain their salaries and living conditions. *Bishop May Lose His Job, But Not His Salary or Standing in the Church*, BELFAST TEL., Dec. 9, 2009, <http://www.belfasttelegraph.co.uk/news/local-national/bishop-may-lose-his-job-but-not-his-salary-or-his-standing-in-the-church-14590816.html>.

46. See, e.g., ABC 7 News, *Female Priest Excommunicated*, May 30, 2008, <http://www.wjla.com/news/stories/0508/524380.html> (quoting excommunicated Bridget Mary Meehan: "The excommunication . . . just encourages us to go forward").

47. 1983 CODE c.1341 (requiring bishops to impose penalties only as a last resort, after other non-coercive methods such as fraternal correction or rebuke have failed).

B. The Holy See's Knowledge of Clerical Sexual Abuse

The duty of the Holy See to monitor its priests and report sexual abuse derives from its canon law. In 1917, the Curia completed a decade-long codification of church law into the 1917 Code of Canon Law. Following Vatican II, Pope Paul VI sought to update the canon law, resulting in the new 1983 Code. Because older abuse cases occurred in the context of the 1917 Code, it is important to highlight a key difference between the two. The 1917 Code of Canon Law made “adultery, debauchery, bestiality, sodomy, pandering, [and] incest” ecclesial crimes.⁴⁸ It mandated without reservation the suspension of guilty clerics and removal from any office, and “in more serious cases,” deposition.⁴⁹ However, it did not specifically require clerics or the laity to report civil crimes to the civil authorities, and it also lacked the 1983 Code’s “canonization” of civil law. The 1983 Code directs that “civil laws to which the law of the Church yields are to be observed in canon law with the same effects,”⁵⁰ which requires both laity and clergy to report civil crimes to civil authorities as a matter of canon law. Prior to 1983, neither the laity nor the clergy bore an *ecclesial* duty to report civil crimes to civil authorities, and failure to do so bore no ecclesial sanctions.

Under *respondeat superior* liability for employers, parties seeking to hold the Holy See liable for sexual abuse committed by a priest must first show that the Holy See knew or should have known that such abuse was occurring.⁵¹ Many American Catholic bishops and dioceses have fought to prevent the public disclosure of all documents possibly demonstrating knowledge of the abuse.⁵² However, some released documents demonstrate that local bishops, and perhaps the Holy See, might have known of specific instances of sexual abuse. For example, one 1979 letter from Cardinal Medeiros of Boston to the Holy See referred to Father Shanley as a “disturbed individual,” though the

48. 1917 CODE c.2359, § 2.

49. *Id.*

50. 1983 CODE c.22.

51. See RESTATEMENT (THIRD) OF AGENCY § 5.04(b) (2006) (refusing to impute notice of a fact from the agent to the principal when the agent acts adversely to the principal unless the principal ratifies or knowingly retains a benefit from the agent’s action).

52. The diocese of Bridgeport, Connecticut, recently lost a seven-year court battle to keep 12,000 pages of lawsuit records sealed. *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 970 A.2d 656 (Conn. 2009), *cert. denied*, 130 S. Ct. 500 (Nov. 2, 2009); Michael P. Mayko, *Diocesan Documents on Clergy Sex Abuse to be Released*, CONN. POST, Dec. 1, 2009, <http://www.ctpost.com/default/article/Diocesan-documents-on-clergy-sex-abuse-to-be-271098.php>.

letter discusses this only with regard to his preaching and ministry.⁵³ However, the vast majority of cases show no direct link between the Holy See and any particular priest.

The best evidence of the Holy See's knowledge of abuse came in 1962, when the Holy See issued specific instructions to its bishops for handling cases of solicitation. Solicitation is the ecclesial crime of making sexual advances upon a layperson during or in connection with the sacrament of confession.⁵⁴ "On the Manner of Proceeding in Cases of the Crime of Solicitation" (hereinafter "The 1962 Policy") sets forth a complex procedure for handling solicitation cases in an ecclesial court. During the "inquisition," or investigation phase, the accuser is made to take oaths of honesty and secrecy.⁵⁵ The investigation should be pursued in secrecy and "with the greatest circumspection" to avoid scandal.⁵⁶ If the allegation indicates "a crime serious enough but not yet sufficient to institute an accusatorial process," the accused cleric should be admonished secretly in writing.⁵⁷ Effectively, the matter comes into the open only if the allegations are reasonable enough to require an ecclesial trial. Penalties for solicitation range from removal of the faculties to perform the sacraments to complete laicization.⁵⁸ Finally, it calls solicitation of youths "the worst crime" and requires any decision in such cases to be communicated to the Holy See.⁵⁹

The 1962 Policy demonstrates that priestly sexual advances during or after confession concerned Curia officials enough to create secretive, specific procedures for handling the cases. It does not require laypeople or clerics to inform the civil authorities if the solicitation also amounts to a civil crime. It certainly encourages the shroud of secrecy that kept so many sex abuse cases under wraps for so long. On the other hand, the 1962 Policy clearly outlines an ecclesial procedure for an ecclesial crime. If the priest had made consensual advances on an unmarried adult woman, it would have

53. Letter from Humberto Cardinal Medeiros, Archbishop of Boston, to Franjo Cardinal Seper, Congregation for Doctrine of the Faith (Feb. 12, 1979), *available at* http://www.boston.com/globe/spotlight/abuse/documents/shanley_021279.htm.

54. CATHOLIC ENCYCLOPEDIA (William Fanning ed., 1912), *available at* <http://www.newadvent.org/cathen/14134b.htm>.

55. CONGREGATION OF THE HOLY OFFICE, ON THE MANNER OF PROCEEDING IN CASES OF SOLICITATION § 23 (1962).

56. *Id.* § 38.

57. *Id.* §§ 42(c), 43.

58. *Id.* § 61. Laicization, or more popularly "defrocking," removes the priest's ecclesial ability to function as a priest. The man is no longer ecclesially bound by his vows and is no longer a formal member of the clergy.

59. *Id.* §§ 73-74.

been an ecclesial crime, but not a civil crime. The 1962 Policy never discusses any actions to be taken with regard to the civil authority; the drafters might have assumed that other civil laws would be followed.

C. The FSIA and the Recent Cases Attacking the Holy See's Immunity

Passed in 1976, the FSIA provides immunity to foreign sovereigns in American courts unless the complaint properly alleges a theory of liability under one of the statutory exceptions.⁶⁰ The immunity offered is immunity from the jurisdiction of American courts, not merely immunity from liability.⁶¹ Among the exceptions, the tortious act exception strips immunity in cases “in which money damages are sought against a foreign state for personal injury . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.”⁶² But immunity is not stripped if the claim is “based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion [is] abused.”⁶³

Congress passed the FSIA in part to establish a uniform method of acquiring jurisdiction over foreign sovereigns in federal court.⁶⁴ Prior to 1976, the State Department would determine whether a sovereign could receive immunity in each particular case, creating considerable uncertainty and inequitable decisions.⁶⁵ The FSIA shifted this determination to the courts to reduce the appearance of bias when granting immunity. The accompanying House Report noted that Congress wanted a uniform standard for jurisdiction.⁶⁶ Similarly, the Supreme Court later found that Congress specifically allowed removal from state courts to encourage uniformity.⁶⁷

In 2009, plaintiffs in two cases convinced courts of appeals to allow their cases against the Holy See to proceed under the tortious act exception to the FSIA. In the first case, *O'Bryan v. Holy See*, three

60. 28 U.S.C. § 1604 (2008); *id.* § 1605 (listing the exceptions).

61. *Id.* § 1604.

62. *Id.* § 1605(a)(5).

63. *Id.* § 1605(a)(5)(A).

64. H.R. REP. NO. 94-1487, at 6–8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605–06.

65. *Id.* at 6606.

66. *Id.* at 6611; *see also* *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 489 (1983) (citing the House report).

67. *Verlinden*, 461 U.S. at 489.

plaintiffs sued the Holy See in a putative class action, representing all victims of clerical sexual abuse.⁶⁸ The plaintiffs themselves alleged that they were the victims of sexual abuse in the 1920s, 1960s, and 1970s.⁶⁹ They sued the Holy See directly and in its capacity as the employer of the bishops of the abusive priests for “violation of customary international law of human rights; negligence; breach of fiduciary duty; and the tort of outrage/intentional infliction of emotional distress.”⁷⁰ In stating their claims, the *O’Bryan* plaintiffs relied heavily on the 1962 Policy, claiming that it required bishops to “refuse to report childhood sexual abuse committed by priests to criminal or civil authorities, even where such failure to report would itself be a criminal offense.”⁷¹ In partially affirming the district court’s decision, the Sixth Circuit held that the *respondeat superior* claims against the Holy See for the bishops’ negligent supervision of its abusive priests satisfied the FSIA’s tortious act exception.⁷² However, the direct liability claims all involved acts that occurred outside the United States and did not survive on appeal.⁷³ Also, because the *O’Bryan* court assumed the abusive acts fell outside the priests’ scope of employment, the Holy See could not be held vicariously responsible for those, either.⁷⁴ Thus, the only claims that survived were those alleging *respondeat superior* liability for the bishops’ negligent supervision and other acts. The plaintiffs have since dropped the case,⁷⁵ but the precedent set lives on.

In the second case, *Doe v. Holy See*, an unnamed plaintiff sued the Holy See, along with the Archdiocese of Portland, the bishop of Chicago, and the Order of Friars Servants (“Servites”), for the Holy See’s role in assigning the Servite priest Andrew Ronan to a Portland, Oregon parish.⁷⁶ Doe alleged that Father Ronan repeatedly abused him during his time at the parish.⁷⁷ The Ninth Circuit held that the Holy See could be held liable under *respondeat superior* for the actions of its employee, Father Ronan. The direct negligence claim against the Holy See failed, however, because hiring Father Ronan and failing to

68. 556 F.3d 361, 369–70 (6th Cir. 2009).

69. *Id.*

70. *Id.* at 370 & n.1 (noting that “*respondeat superior* liability” is not a separate cause of action and that these claims will be addressed together with the claims of direct liability).

71. *Id.* at 370.

72. *Id.* at 386.

73. *Id.* at 387–88.

74. *Id.* at 385–86.

75. John L. Allen, Jr., *Plaintiffs Drop Lawsuit Against Vatican*, NAT’L CATHOLIC REP., Aug. 10, 2010, <http://ncronline.org/news/accountability/plaintiffs-drop-lawsuit-against-vatican>.

76. *Doe v. Holy See*, 557 F.3d 1066, 1069 (9th Cir. 2009).

77. *Id.* at 1070.

warn parishioners about him were discretionary acts.⁷⁸ Interestingly, the court also held that vicarious liability against the Holy See for the actions of the archdiocese, the bishop, and the Servites was not proper, because the plaintiff did not allege sufficient facts to overcome the presumption of a separate juridical status for these entities.⁷⁹ In essence, the court found that *respondeat superior* liability for the Holy See rested on the actions of the priest, not—as the Sixth Circuit found—the bishop.

III. IS *RESPONDEAT SUPERIOR* ACTUALLY SUPERIOR?

The plaintiffs in *O'Bryan* and *Doe* considered *respondeat superior* liability an attractive means of holding the Holy See liable in American courts. However, the opinions in these cases pass over two legal obstacles and create an unforeseen practical problem. First, the Supreme Court has traditionally held that when Congress uses “employee” in a statute, it intends to use the traditional definition of “employee” under agency law. Whether a priest or bishop is an employee of the Holy See is an important analytically because the very question of the Holy See’s immunity turns on this issue. The court must make this legal determination at the time immunity is asserted or challenged. To overcome the immunity, the plaintiff must plausibly allege in the complaint that a priest or bishop is indeed an employee, instead of simply asserting it. Yet the Holy See does not pay diocesan priests, direct their actions, or even discipline them except in rare instances—all of which are indicators of employment status under agency law. The Holy See exercises even less control over priests in religious orders. Instead, discipline is left to each diocese’s bishop and each order’s superiors. Even bishops are not paid by the Holy See or otherwise “employed”; bishops are largely left alone in directing the day-to-day operations of their dioceses. Therefore, it is highly questionable whether priests and bishops qualify as “employees” under agency law.

Second, understanding the relationship between priest, bishop, and pope requires delving into Catholic doctrine. Catholic theology proclaims the pope’s authority over all Catholics, but in practice this authority is delegated to the bishops, who exercise substantial control over Church policymaking and day-to-day operations. Yet American courts traditionally abstain from ruling on ecclesial or doctrinal issues. To resolve the issues raised in determining a priest’s status

78. *Id.* at 1069.

79. *Id.*

vis-à-vis the pope, these courts of appeals pass over the ecclesial abstention question.

Finally, even if *respondeat superior* liability properly attaches, it creates practical problems of unfairness and unpredictability because it rests in state common law claims. Each state's common law defines "employee," "scope of employment," and the employer-employee relationship differently. First, this is unfair to plaintiffs in some states, who will be barred from bringing essentially the same claim as plaintiffs in other states can bring. It is also unpredictable for the Holy See, which must adjudicate its sovereign immunity against fifty different state laws rather than a single federal law. The unfairness and unpredictability run counter to a major purpose for enacting the FSIA: to provide a uniform method for determining jurisdiction and immunity in cases against foreign sovereigns.

A. "*Do Not Be Called 'Master'*"⁸⁰: *Priests And Bishops as Employees of the Holy See*

Courts must consider the nature of a priest or bishop's relationship to the Holy See when ruling on a defense of sovereign immunity. Yet not all priests and bishops easily meet the common law definition of "employee."

The FSIA strips foreign sovereigns of immunity for "the tortious act or omission . . . of any official or employee of that foreign state while acting within the scope of his office or employment."⁸¹ This immunity is not simply immunity from liability, but rather immunity from *jurisdiction*.⁸² If the court determines that the priest or bishop is not an employee of the Holy See, it must dismiss the case immediately, without considering the merits of the claim.

The plaintiffs in both *Doe* and *O'Bryan* alleged that the abusive priests were employees of the Holy See,⁸³ but the courts required different levels of pleading to survive the motions to dismiss that were filed in both cases. In *Doe*, the Ninth Circuit panel wrote, "We are

80. *Matthew* 23:10 (New American Bible).

81. 28 U.S.C. § 1605(a)(5) (2008).

82. *Id.* § 1604; *see also* *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002) ("[S]overeign immunity is an immunity from trial, not just a defense to liability on the merits.").

83. *Doe*, 557 F.3d at 1070 (quoting the complaint: "Defendant . . . has unqualified power over . . . each and every individual and section of the Church"); *O'Bryan v. Holy See*, 556 F.3d 361, 369 (6th Cir. 2009) (quoting the complaint: "The sexual molestation in question 'occurred while the abusive Roman Catholic priest, agent, servant or employee was acting within the scope of his employment, as part of an agency relationship with the Defendant, Holy See, and the misconduct was committed with the apparent authority arising from this employment and/or agency relationship.'").

highly skeptical of the notion that under notice pleading, use of the word ‘employee’ in a complaint is insufficient to establish an allegation of an employee relationship.”⁸⁴ The Ninth Circuit essentially held that simply calling a priest an employee, without more, is sufficient to allege an employee relationship and survive a motion to dismiss. It even argued that a complaint’s allegation of the priest as an “employee” is meant in the colloquial manner, not as a legal definition, and that the court should not “engage in a hypertechnical reading of the complaint.”⁸⁵

Yet the very issue of the Holy See’s sovereign immunity turns on whether the priest was an “official or employee . . . acting within the scope of his office or employment.”⁸⁶ In several cases, most recently *Community for Creative Non-Violence v. Reid*, the Supreme Court has held that when Congress does not otherwise define “employee” and “scope of employment,” it intends to use the common law definitions of these terms.⁸⁷ Under the FSIA, each state would define “employee” and “scope of employment” in their common law.⁸⁸ Therefore, the court must determine whether a priest is an employee of the Holy See under applicable state law. Simply accepting the plaintiff’s characterization of a priest as an employee, without more, only ignores the crucial question.

In contrast to *Doe*, the Sixth Circuit in *O’Bryan* held that the employee inquiry “focuses on the degree of control exercised by the employer over the individual or individuals in question.”⁸⁹ After considering the relevant Kentucky law, the court held:

[P]laintiffs allege facts that demonstrate that the Holy See exercised a significant degree of control over the bishops and archbishops accused of having committed the tortious acts in question. Taking these allegations as true, plaintiffs have sufficiently pled the employee element of the tortious activity exception.⁹⁰

84. *Doe*, 557 F.3d at 1081.

85. *Id.* (internal citation omitted).

86. 28 U.S.C. § 1605(a)(5).

87. 490 U.S. 730 (1989) (applying common law definition of employee to determine if work was for hire under copyright law); *see also* *Kelley v. S. Pac. Co.*, 419 U.S. 318, 323–24 (1974) (applying common law definition to the Federal Employers Liability Act); *Baker v. Tex. & Pac. Ry. Co.*, 359 U.S. 227, 227 (1959) (same as *Kelley*); *Robinson v. Baltimore & O.R. Co.*, 237 U.S. 84, 94 (1915) (same as *Kelley*). *But see* *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 124–32 (1944) (rejecting common law definition of employee for the National Labor Relations Act (“NLRA”) because the purpose and structure of the NLRA required such).

88. *See* 28 U.S.C. § 1606 (“[T]he foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.”). The Supreme Court interpreted this to mean that state substantive law provides the rule of liability. *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983).

89. *O’Bryan v. Holy See*, 556 F.3d 361, 386 (6th Cir. 2009).

90. *Id.*

Unlike the Ninth Circuit, the Sixth Circuit looked more closely at the complaint's allegations and required the plaintiff to allege enough facts that, if true, create an employer-employee relationship.

The Sixth Circuit's heightened pleading requirement on this issue is better than the Ninth Circuit's requirement for two reasons. First, the Sixth Circuit's approach is more in accord with the Supreme Court's new "plausibility" standard in *Bell Atlantic Corp. v. Twombly* for evaluating complaints on a 12(b)(6) motion to dismiss.⁹¹ When a plaintiff sues a foreign state, the court should ensure that the facts pled, if true, show a plausible employment relationship between the tortfeasor and the sovereign. Otherwise, the court risks wasting valuable time and resources allowing discovery against a sovereign, whom it must dismiss at a later stage if the alleged employment relationship does not exist. Furthermore, an American court will likely have difficulties conducting and enforcing discovery requests against a foreign sovereign. Sovereigns likely will not turn over incriminating documents, which they can easily hide behind claims of state secrecy. The Holy See has already demonstrated that it will not willingly cooperate with these foreign investigations; the papal nuncio, or ambassador, to Ireland refused to cooperate with the Murphy Report that investigated Dublin clerical abuse or to meet with lawmakers afterward.⁹² Thus, plaintiffs will not likely discover any new evidence to change the court's analysis of the agency relationship.

These are the same concerns, in a different setting, that motivated the *Twombly* opinion. There, the Court worried that discovery would be exceedingly onerous and drag the litigation out for years with little chance of finding the "smoking gun" documents for a conspiracy.⁹³ Therefore, as in *Twombly*, courts confronting suits against the Holy See should require the plaintiff to allege enough facts that, if true, establish the priest or bishop as an employee of the Holy See. This approach allows courts to determine the agency relationship at the outset and dismiss cases that cannot evade the Holy See's sovereign immunity.

Second, the Sixth Circuit's heightened pleading requirement makes sense because it is not clear whether all priests and bishops are

91. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007). In 2009, the Court announced that *Twombly* applied to all cases, not just fraud and conspiracy. *Ashcroft v. Iqbal*, 129 S. Ct. 1939, 1949–50 (2009).

92. Mary Fitzgerald, *Decision of Papal Nuncio not to Attend Dáil Committee 'Scandalous'*, IRISH TIMES, Feb. 16, 2010, available at <http://www.irishtimes.com/newspaper/2010/0216/1224264554852.html>. The Murphy Report detailed the systematic cover-up of hundreds of sexual abuse allegations through several decades in Dublin.

93. *Twombly*, 550 U.S. at 557–58.

actually employees of the Holy See. Clerics come in many guises. For example, the apostolic nuncio to the United States functions as a traditional ambassador. He relays the Holy See's political and religious concerns to the United States and also informs the Holy See about American Catholic affairs. The nuncio, like an ambassador or other traditional diplomat, is clearly an "official or employee" of the Holy See. In contrast to the nuncio, the silent priests and monks of the Carthusian order, such as those in Vermont, belong to insular, self-sustaining religious communities with almost no contact with the outside world.⁹⁴ A court would strain very hard to find a Carthusian priest an employee of anyone, let alone the Holy See.

Somewhere between the apostolic nuncio and a Carthusian priest lie the diocesan bishops and priests. The court must determine whether the priest or bishop is an employee according to state agency law. Although an individual state's common law definition of "employee" may slightly differ, the Restatement (Third) of Agency defines "employee" as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work."⁹⁵ The comment on this definition lists many factual considerations for determining whether a person is indeed an "employee," including:

[1] [T]he extent of control that the agent and the principal have agreed the principal may exercise over details of the work; [2] whether the agent is engaged in a distinct occupation or business; [3] whether the type of work done by the agent is customarily done under a principal's direction or without supervision; [4] the skill required in the agent's occupation; [5] whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it; [6] the length of time during which the agent is engaged by a principal; [7] whether the agent is paid by the job or by the time worked; [8] whether the agent's work is part of the principal's regular business; [9] whether the principal and the agent believe that they are creating an employment relationship; and whether the principal is or is not in business. [10] Also relevant is the extent of control that the principal has exercised in practice over the details of the agent's work.⁹⁶

In the priest-bishop relationship, secular factual indicia of an employment relationship exist. For example, the priest works on diocesan-owned property, and receives his salary from diocesan funds. However, the Holy See directs its bishops and priests purely through its spiritual authority and canon law. In the United States, the Holy

94. As the Charterhouse's website makes clear, the only visitors allowed are men making vocational retreats to discern the Carthusian life. The monks themselves live silent lives and do not use the telephone or Internet. Their only external communication is by letter or fax. Charterhouse of the Transfiguration, Frequently Asked Questions (F.A.Q.), <http://transfiguration.chartreux.org/> (last visited Aug. 31, 2010).

95. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

96. *Id.* § 7.07 cmt.f (numbering added by Author).

See will generally choose bishops for each diocese and establish the ecclesial laws for their governance and administration, but otherwise the employment analysis is tenuous. Consider the Holy See's relationship to diocesan bishops using the ten factors from the Restatement.

First: "The extent of control that the agent and the principal have agreed the principal may exercise over details of the work." Canon law grants bishops "the power of governance" over their dioceses by virtue of their office, not by delegation from the Roman pontiff.⁹⁷ Furthermore, each bishop sets his own agenda, priorities, and administrative policies for his diocese. Lastly, the complex relationship of authority between the bishops and the pope is a matter of church doctrine.⁹⁸ To determine this factor, courts would have to interpret church doctrine, but this is likely barred by the ecclesial abstention doctrine, as discussed below.

Second: "Whether the agent is engaged in a distinct occupation or business." Bishops have distinct offices and powers within the Catholic Church. A court can recognize this without recourse to Catholic doctrine or law to determine what those powers are.

Third: "Whether the type of work done by the agent is customarily done under a principal's direction or without supervision." Canon law mandates that bishops send a report to the pope every five years.⁹⁹ But other supervision is informal, and the bishop can implement the Holy See's directives as he sees fit. Furthermore, unless transferred to other dioceses, bishops generally are removed from office only in cases of gross negligence or misuse of funds.¹⁰⁰ Church doctrine and canon law does grant the pope final authority,¹⁰¹ but in practice the pope and the Holy See do not generally involve themselves in local diocesan affairs. If a court can determine this

97. 1983 CODE c.131, § 1; *id.* c.381, § 1.

98. The Code of Canon Law states that the pope "possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely." *Id.* c.331. Yet, a diocesan bishop "has all ordinary, proper, and immediate power which is required for the exercise of his pastoral function" except for items explicitly reserved by the pope. *Id.* c.381, § 1. Catholic doctrine also indicates that bishops exercise a parallel authority in union with the pope.

99. *Id.* c.399, § 1.

100. Former Boston archbishop and cardinal Bernard Law was transferred to a Vatican office after he resigned over his handling of clerical abuse cases. Al Baker, *Cardinal Law Given Post in Rome*, N.Y. TIMES, May 28, 2004, at A13. Former Phoenix bishop Thomas O'Brien resigned following both a clerical abuse settlement and his culpability in an unrelated fatal hit-and-run accident. John M. Broder, *'Unraveled' by Sex Abuse Crisis in Diocese, Phoenix Bishop Quits*, N.Y. TIMES, June 19, 2003, at A1.

101. 1983 CODE c.331, § 1. The canon's statement that the pope "possesses supreme, full, immediate, universal, and ordinary power" must be interpreted in light of other canons, such as that granting the college of bishops "supreme . . . power over the universal Church." *Id.* c.336.

without recourse to church doctrine or law, it seems to favor a finding of no employment because of the wide latitude of practical authority for bishops.

Fourth: “The skill required in the agent’s occupation.” This factor usually comes into play if the agent has particular artisanal skills, such as carpentry or pottery. Bishops, like regional managers of a corporation, usually have management or financial skills;¹⁰² they also have liturgical and ecclesial functions defined by Catholic doctrine and canon law.¹⁰³ A bishop’s skills might favor a finding of employment, but as these are not unique to the position of a bishop, they also do not greatly influence the analysis.

Fifth: “Whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it.” Churches, property, liturgical vestments, and other items are legally owned by the diocesan corporation under the control of the bishop.¹⁰⁴ The diocese generally acquired this property through donations from its congregants and its own purchases. Any claim to the Holy See’s ownership lies in canon law,¹⁰⁵ which does not bind the court. Legally, the bishop is supplying the tools and instrumentalities. This supports a finding of no employment.

Sixth: “The length of time during which the agent is engaged by a principal.” Bishops and priests are engaged by the Church for their lives. This would favor a finding of employment.

Seventh: “Whether the agent is paid by the job or by the time worked.” The Holy See does not pay bishops. Instead, they are paid through their diocesan funds.¹⁰⁶ Dioceses receive money from local Catholic donations, investments, and other secular sources. This strongly favors a finding of no employment.

Eighth: “Whether the agent’s work is part of the principal’s regular business.” Bishops are instrumental in the Holy See’s mission

102. These are not hard and fast requirements, however. The Code of Canon Law lists the qualifications for bishops, *id.* c.378, and the only non-religious one is to be “endowed with other qualities which make him suitable to fulfill the office in question.” *Id.* c.378, § 1.

103. *See, e.g., id.* c.375, § 1 (“[T]hey are teachers of doctrine, priests of sacred worship.”).

104. *See, e.g.,* CHANCERY OFFICE, ARCHDIOCESE OF GALVESTON-HOUSTON, FINANCIAL STATEMENTS AND INDEPENDENT AUDITORS’ REPORTS 8–10 (2008), *available at* http://www.diogh.org/admin_accounting.htm (outlining the different types of property the diocese owns).

105. 1983 CODE c.1273. Even this canon limits the pope’s “supreme” administration to “ecclesiastical goods,” whereas the original draft included “all temporal goods.” NEW COMMENTARY, *supra* note 31, at 1474. Thus, a question exists even within canon law of the pope’s authority to control, for example, diocesan property other than churches. Furthermore, this power is “rarely exercised.” *Id.*

106. *See, e.g.,* CHANCERY OFFICE, *supra* note 104, at 6 (showing diocesan expenses, including salaries).

of spreading the Catholic faith. This supports a finding of employment.

Ninth: “Whether the principal and the agent believe that they are creating an employment relationship.” This can only be understood through Catholic doctrine. At the very least, the bishop and the Holy See can be said to be in an inferior-superior relationship, but bishops do not understand themselves to be employees as such. If the court can determine this without recourse to Catholic doctrine, it favors a finding of no employment.

Tenth: “Also relevant is the extent of control that the principal has exercised in practice over the details of the agent’s work.” As noted above in Factor Three, this tends to be minimal, except for canonically prescribed five-year reports. While certainly much informal communication goes back and forth between the Vatican and a diocese, the local bishop administers the details.

Using these ten factors, six favor not finding the bishop an employee, two are of little consequence, and only two support such a finding. These two factors of support are the bishop’s indefinite time in office and his agreement with the Holy See that Catholicism should spread around the world. These alone hardly support a finding of employment. Also, because a diocesan priest is paid by and reports to the diocese rather than the Holy See, he is even further removed from the Holy See’s secular control. Lastly, five factors would likely require analyzing Catholic doctrine either to answer the question or to support a finding of employment. As discussed in Part III.B, this creates its own problems.

The plaintiff in *Doe* relies on the fact that the Holy See chooses its bishops and can remove them at will in order to establish the bishops as employees.¹⁰⁷ This alone, however, does not create employment status. A person building a house, for example, does not establish an employment relationship with his construction contractor simply because he has chosen that contractor’s services and can dismiss at will.¹⁰⁸ The contractor is still an independent contractor unless the principal controls the details of the work. Like contractors, the pope’s ability to appoint and dismiss bishops, without more, does not turn bishops into employees.

107. *Doe v. Holy See*, 557 F.3d 1066, 1070 (9th Cir. 2009) (“[The Holy See] creates, appoints, assigns and re-assigns bishops [and] superiors of religious orders, and through the bishops and superiors of religious orders [it] has the power to directly assign and remove individual clergy.”).

108. *See, e.g., Wortham v. Am. Family Ins. Grp.*, 385 F.3d 1139, 1140–41 (8th Cir. 2004) (listing an “at will” agency relationship as a factor in favor of finding the agent to be an independent contractor, not an employee).

The result is that the ten factors of the Restatement do not support on their own the conclusion that a bishop or priest is an employee of the Holy See. For five factors that might support a conclusion on employee status, courts will find that Catholic doctrine intrudes on the analysis. This leads to the second major problem in applying *respondeat superior* liability to the Holy See, the ecclesial abstention doctrine.

B. "Render Unto Caesar What Is Caesar's, and to God What Is God's"¹⁰⁹: The Ecclesial Abstention Doctrine in American Courts

Although the Sixth Circuit in *O'Bryan* correctly required more pleading than the Ninth Circuit to satisfy *Twombly*, it failed to consider a second issue when analyzing the relationship of bishops and priests to the Holy See: the ecclesial abstention doctrine. *Respondeat superior* liability can only be extended to employers, but courts must analyze church doctrine to find a bishop an employee of the Holy See.

The Supreme Court has articulated a long-standing tradition of abstaining from deciding questions that implicate church doctrine. In *Watson v. Jones*,¹¹⁰ the Court held that "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" must be left to the church and are binding on civil courts.¹¹¹ Later, in *Gonzalez v. Roman Catholic Archbishop of Manila*, Justice Brandeis wrote, "[I]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."¹¹² *Gonzalez* involved a cleric who sued to recover his chaplaincy position, but the Court refused to intervene. The *Gonzalez* Court also clarified that following canon law does not constitute "arbitrariness."¹¹³

Ecclesial abstention reached its zenith in *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*.¹¹⁴ The Supreme Court reversed the Illinois Supreme Court's decision that defrocking priests and reorganizing dioceses was "arbitrary" if

109. *Matthew* 22:21 (New American Bible).

110. 80 U.S. 679 (1872).

111. *Id.* at 727.

112. 280 U.S. 1, 16 (1929).

113. *Id.* at 17.

114. 426 U.S. 696 (1976).

done without the diocese's approval.¹¹⁵ Justice Brennan, writing for the majority, held that courts cannot even inquire into whether the ecclesial body followed its own rules and procedures:

For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits.¹¹⁶

In dissent, Justice Rehnquist argued that the Court should only abstain when its ruling "plac[es] its weight behind a particular religious belief, tenet, or sect."¹¹⁷ In *Jones v. Wolf*, the Court seemed to shift toward Rehnquist, holding that church property disputes could be resolved "so long as [the disputes involve] no consideration of doctrinal matters."¹¹⁸ If courts can apply "neutral principles" of generally applicable law, they can adjudicate certain religious disputes.¹¹⁹

The "neutral principles" doctrine in *Jones* is the current test for applying the ecclesial abstention doctrine. It has also influenced the Court in other religion cases, particularly those involving the Free Exercise Clause. For example, in *Employment Division v. Smith*, the Court held that Oregon could disqualify members of the Native American Church from unemployment benefits due to their religious use of peyote.¹²⁰ Writing for the Court, Justice Scalia held that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral generally applicable law to religiously motivated action have not involved the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."¹²¹ Yet the dispute in *Smith* did not require the Court to resolve a fact necessary for applying the law by reference to religious

115. *Id.* at 712–13.

116. *Id.*

117. *Milivojevich*, 426 U.S. at 733 (Rehnquist, J., dissenting).

118. 443 U.S. 595, 602 (1979) (internal citation omitted).

119. *Jones*, 443 U.S. at 602–03.

120. 494 U.S. 872, 890 (1990).

121. *Id.* at 881. Congress quickly abrogated *Smith* with the Religious Freedom Restoration Act ("RFRA"), but the Court held that extending RFRA to the states was unconstitutional. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Therefore, the *Smith* analysis still applies to neutral, generally applicable state laws. However, if the law targets a specific religious ritual, it must be the least restrictive means to protect a compelling government interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). For a full discussion on *Smith* and its aftermath, see Christopher R. Farrel, Note, *Ecclesiastical Abstention and the Crisis in the Catholic Church*, 19 J.L. & POL. 109, 121–27 (2003).

doctrine; the respondents admitted to using peyote.¹²² The Court also explicitly endorsed the ecclesial abstention cases.¹²³

So far, no court has directly addressed the ecclesial abstention doctrine in cases seeking vicarious liability for Catholic bishops or the Holy See, mainly because in most cases the offending priest's actions were deemed outside the scope of his employment.¹²⁴ However, courts addressing negligent hiring and supervision claims against American Catholic bishops or religious orders have split on how to apply the doctrine.

Those allowing claims to proceed have presented two main arguments. First, some courts have held that there is generally applicable law to be used that does not require referencing church doctrine. As the District Court of Connecticut held in *Nutt v. Norwich Roman Catholic Diocese*, “[t]he court’s determination of an action against the defendants based upon their alleged negligent supervision . . . would not prejudice or impose upon any of the religious tenets or practices of Catholicism.”¹²⁵ Second, hearkening back to Justice Rehnquist’s *Milivojevich* dissent, abstention from this question amounts to religious immunity from liability that non-religious organizations would be subject to, which could violate the Establishment Clause.¹²⁶

However, other courts have abstained from deciding issues regarding negligent hiring or supervision. The *Gonzales* case before the Supreme Court concerned the Church’s decision in a hiring matter for a particular chaplaincy, and the Court refused to step in.¹²⁷ Furthermore, as at least one court has argued, if the state allows only

122. *Smith*, 494 U.S. at 874.

123. *Id.* at 877.

124. Of course, making this determination is also arguably subject to the ecclesial abstention doctrine, because the scope of the priest’s employment is determined by church law. However, this issue can be sidestepped if the court expands the “scope of employment” to include intentional torts that were made available to the employee through the purpose of his employment or were incidental to his legitimate work activities. *See infra* notes 124–31 and accompanying text. Then, the only question is whether the intentional tort became performable because of legitimate work activities. The majority of abusive priests first met their victims when the children either served at Mass or went to confession. While the full scope of a priest’s legitimate clerical activity may be debatable, saying Mass and hearing confessions are indisputably part of his work.

125. 921 F. Supp. 66, 74 (D. Conn. 1995).

126. *Serbian Eastern Orthodox Diocese of the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting).

127. *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929).

a single model of clergy selection and discipline, it violates the Free Exercise Clause.¹²⁸

The cases involving negligent hiring and supervision only ask whether the bishop exercises sufficient secular authority over the priest to create an employment relationship, and courts have already split on whether to abstain from analyzing the priest-bishop relationship. Extending this question to include the Holy See just magnifies the problem, because the Holy See's authority over a bishop or priest is almost entirely spiritual (or at least ecclesial) in nature. The Holy See proceeds almost solely through canon law and Catholic doctrine. It sets requirements for clerics in canon law, and Catholic doctrine influences how it treats clerics.¹²⁹ It chooses bishops through mechanisms created in canon law and defines their roles through canon law and Catholic doctrine.¹³⁰ It investigates and tries ecclesial crimes through canon law procedures in ecclesial courts,¹³¹ and it only dispenses ecclesial punishments authorized under canon law.¹³² The Holy See's decisions on priestly laicization or removal from office also take into account canon law requirements that reflect religious concerns of forgiveness, mercy, and personal spiritual renewal.¹³³ The Holy See reserves the most severe penalty, excommunication, for challenges to the structure or doctrine of the Church, not personal immorality.¹³⁴ In all of this, the Holy See is trying to see as God does, not as men do. A secular court analyzing a priest or bishop's relationship with the Holy See must necessarily grapple with Church doctrine and law to determine the fact of employment.

The problem, then, is that to establish a factual predicate—the existence of an employment relationship—to the generally applicable law of vicarious liability, a secular court would have to interpret

128. *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997) (“[J]udicial inquiry into hiring, ordaining, and retaining clergy would result in an endorsement of religion, by approving one model for church hiring, ordination, and retention of clergy.”).

129. *See supra* note 33 (discussing the role of canon law in setting requirements for clerics).

130. 1983 CODE cc.375–411.

131. The Catholic Church has an elaborate ecclesial court system. *See id.* cc.1400–1670 (providing canon guidelines for trials in general and “contentious trials,” or those with factual disputes, as well as provisions for the execution of sentences and hearing of appeals).

132. *See supra* notes 34–40 and accompanying text (discussing ecclesial sanctions and punishments under canon law).

133. *See, e.g.*, 1983 CODE c.1341 (requiring bishops to impose penalties only as a last resort, after other non-coercive methods have failed); *id.* c.1344 (allowing the ecclesial judge to defer, suspend, or abstain from imposing a penalty if the offender has reformed himself or led a “praiseworthy life”); *id.* c.1345 (allowing a judge to waive a penalty if the offense was committed “from fear, necessity, the heat of passion, or mental disturbance from drunkenness”).

134. *See supra* notes 38–40 and accompanying text (discussing punishment of excommunication).

Catholic doctrine and law. Christopher Farrel has argued that the ecclesial abstention cases would bar the determination of a factual predicate to applying a general law if that determination necessitated judicial interpretations of church doctrine or ecclesial law, stating:

[W]hile it is certainly true that the so-called “*Smith* rule” holds that the First Amendment does not excuse an individual from the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes, nothing in *Smith* allows courts to resolve questions of religious law or doctrine to determine whether the factual predicates of that generally applicable law have been established. Moreover, the *Smith* opinion itself noted the continued validity of the ecclesiastical abstention cases. From these principles, it follows that if a court must interpret questions of church policy or doctrine in order to decide whether the factual predicates for a neutral, generally applicable law have been established, the ecclesiastical abstention cases would bar that analysis, and the law could not be applied. That these cases involve disputes between church officials and members of the laity, rather than between two factions within a single church, does not change the fact that the particular dispute still turns on questions of ecclesiastical law—specifically, the church’s hiring practices and its supervisory authority over its individual priests.¹³⁵

For courts addressing vicarious liability suits against the Holy See, the very factual predicates that determine whether a bishop is an employee require the court to interpret religious doctrine. How exactly should a secular court handle a canon law provision declaring that the pope “possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely,”¹³⁶ while another gives a diocesan bishop “all ordinary, proper, and immediate power which is required for the exercise of his pastoral function”?¹³⁷ Does the First Vatican Council’s declaration of papal infallibility somehow make the bishop an “employee”?¹³⁸ Or does the Second Vatican Council’s statement that bishops “exercise their own authority for the good of their own faithful” imply that bishops are more like independent contractors?¹³⁹ These questions, along with the factors discussed in Part III.A, all require the court to interpret ecclesial doctrine when determining the facts necessary to find bishops to be employees, and this is exactly what *Gonzalez, Milivojevich*, and *Watson* prohibit. If the facts cannot be determined, the law cannot be applied.

Plaintiffs might attempt to resolve this problem by arguing that the ecclesial abstention doctrine only says that courts cannot resolve the ecclesial question themselves. This way, courts could still

135. Farrel, *supra* note 121, at 135.

136. 1983 CODE c.331.

137. *Id.* c.381, § 1.

138. FIRST VATICAN COUNCIL, PASTOR AETERNUS ch. 4, ¶ 9 (1870).

139. SECOND VATICAN COUNCIL, LUMEN GENTIUM ¶ 22 (1964).

rely on the doctrine's answer in secular cases. Yet even where Catholic doctrine or canon law is fairly clear, bishops and priests are never considered "employees" of the Holy See or the pope. Bishops in particular are understood as exercising a sometimes inferior, sometimes parallel authority to the pope or the Holy See.¹⁴⁰ Therefore, even using the secular label "employee" is inappropriate.

Thus, analyzing whether a priest or bishop is the Holy See's employee almost certainly will require analysis of Catholic doctrine and law, which the ecclesial abstention doctrine forbids. If a court cannot determine that a priest is an employee, the Holy See simply cannot be subject to vicarious liability.

Abstaining from this question is not appealing. The 1962 Policy indicates that at least by then, the Holy See had some general knowledge of clerical sexual abuse. Some victims of the abuse may want to have their day in court against the Holy See, not for the damages award, but for vindication. They want it held morally responsible. Yet for those plaintiffs seeking liability for the Holy See, Catholic doctrine simply stands in the way of applying *respondeat superior* liability.

C. "Do Not Consider Who a Person Is; Give Ear to the Lowly and to the Great Alike"¹⁴¹: Unfair and Unpredictable Application of the FSIA

Finally, suppose the court has managed to determine that bishops and priests are employees of the Holy See without recourse to Catholic doctrine and law. The court must then determine whether the abusive priest was acting within the scope of his employment for the Holy See to be liable through *respondeat superior*. Some states, such as Oregon, have defined "scope of employment" to include certain intentional torts.¹⁴² Other states do not include intentional torts in their definitions, and some have explicitly held that sexual abuse does not fall within the scope of employment.¹⁴³ Because the FSIA relies on state agency law to determine the rule of liability,¹⁴⁴ this creates unfairness and unpredictability for potential plaintiffs and for the Holy See. It is unfair because the plaintiffs in some states would be barred from suing the Holy See based solely on their residence in that

140. See, e.g., *id.* ¶¶ 18–25 (endorsing principles of collegiality between the pope and bishops).

141. *Deuteronomy* 1:17 (New American Bible).

142. *Fearing v. Bucher*, 977 P.2d 1163, 1168–69 (Or. 1999).

143. See *infra* note 153 and accompanying text (discussing Georgia case law).

144. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983).

state. It is unpredictable because the Holy See's immunity would depend on fifty different state laws.

Consider the scope of employment in Oregon, which expanded its definition to include certain intentional torts in *Fearing v. Bucher* in 1999.¹⁴⁵ There, the plaintiff Steven Fearing alleged that he had been abused by a priest, Melvin Bucher, in the Portland archdiocese in the 1970s, and he sought to hold the archdiocese vicariously liable.¹⁴⁶ The Oregon Supreme Court first stated the test for vicarious liability, which includes a determination that “the act must have been of a kind that the employee was hired to perform.”¹⁴⁷ Under this definition, it is absurd to think the priest was within the scope of his employment. However, “the inquiry does not end there,” for the court held that when considering intentional torts, it is more appropriate to ask “if the acts that were within Bucher’s scope of employment ‘resulted in the acts which led to injury to plaintiff.’”¹⁴⁸ Using this definition of “scope of employment” for intentional torts, the court found a jury could reasonably conclude that Bucher had access to Fearing and other victims through his employment as a priest, which would make the archdiocese vicariously liable.¹⁴⁹ Against the archdiocese’s objection that this would subject any employer to vicarious liability for its employee’s sexual torts, the court noted that a “nexus” must exist “between the employment and the assault,” and the court relied on a fiduciary relationship between priest and congregant to establish this nexus.¹⁵⁰ The court then denied the archdiocese’s motion to dismiss.¹⁵¹ The Ninth Circuit in *Doe* explicitly relied upon the *Fearing* analysis to deny the Holy See’s motion to dismiss.¹⁵²

On the other hand, Georgia flatly refuses to hold religious organizations vicariously liable for the sexual torts of their ministers. In *Alpharetta First United Methodist Church v. Stewart*, the plaintiff alleged an improper sexual relationship with a Methodist minister and sued both the local church and the North Georgia Conference of

145. 977 P.2d at 1168–69.

146. *Id.* at 1164.

147. *Id.* at 1166 (citing *Chesterman v. Barmon*, 753 P.2d 404, 404 (Or. 1988)).

148. *Id.* (quoting *Chesterman*, 753 P.2d at 443) (emphasis added).

149. *Id.* at 1167.

150. *Id.* at 1168. This was to distinguish an earlier case, which the court had dismissed after finding that a hospital could not be held vicariously liable when a respiratory therapist sexually assaulted an unconscious patient because the act was outside the scope of employment. *G.L. v. Kaiser Found. Hosps.*, 757 P.2d 1347 (Or. 1988). The court’s reasoning here seems specious, because the therapist would not have had access to that particular patient without being a therapist employed by the hospital.

151. *Fearing*, 977 P.2d at 1168–69.

152. *Doe v. Holy See*, 557 F.3d 1066, 1082 (9th Cir. 2009).

the Methodist Church.¹⁵³ The Georgia Court of Appeals reversed the trial court's denial of the defendants' motion to dismiss. It held that even if it was a nonconsensual relationship, "it is well settled under Georgia law that an employer is not responsible for the sexual misconduct of an employee."¹⁵⁴ The court added that the intentional torts, "being purely personal in nature, are unrelated to the employee's duties and, therefore, are outside the scope of employment because they were not in furtherance of the master's business."¹⁵⁵ In reference to the minister's scope of employment, the court stated, "The record shows that such behavior is clearly contrary to the tenets and principles of the Methodist church and is not a part of, or in any way incidental to, a minister's duties and responsibilities."¹⁵⁶ The same can be said of a priest in the Catholic Church. Thus, suing for *respondet superior* liability against the Holy See for its priests' sexual misconduct simply is not a cause of action in Georgia.

States are split on whether sexual torts absolutely fall outside the "scope of employment" for purposes of *respondet superior*. Four states and the District of Columbia would allow suits against employers for the sexual torts of their employees to proceed;¹⁵⁷ at least twelve states would not hold employers vicariously liable.¹⁵⁸ This creates a problem for exporting the vicarious liability theory to foreign sovereigns. Because the FSIA relies upon state law to determine whether a cause of action can even proceed, this means that the Holy See's immunity from suit, not just its liability, is at stake. If the Holy See is immune from suit, the case will be dismissed immediately without trial, and the plaintiffs will have no chance to present their novel theory of liability to the court. Therefore, the Holy See can completely evade suit in certain states, while in others it faces the possibility of both a trial and a damages award. Plaintiffs in Oregon

153. 472 S.E.2d 532, 533 (Ga. Ct. App. 1996).

154. *Id.* at 535.

155. *Id.* at 535–36.

156. *Id.* at 536.

157. *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344 (Alaska 1990); *Flores v. Autozone W. Inc.*, 74 Cal. Rptr. 3d 178 (Cal. Ct. App. 2008); *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752 (D.C. 2001); *Lange v. Nat'l Biscuit Co.*, 211 N.W.2d 783 (Minn. 1973); *Baker v. Saint Francis Hosp.*, 126 P.3d 602 (Okla. 2005).

158. *Porter v. Harshfield*, 948 S.W.2d 83 (Ark. 1997); *Special Olympics Fla., Inc. v. Showalter*, 6 So.3d 662 (Fla. Dist. Ct. App. 2009); *Green v. Carlinville Cmty. Unit Sch. Dist. 1*, 887 N.E.2d 451 (Ill. App. Ct. 2008); *Sandman v. Hagan*, 154 N.W.2d 113 (Iowa 1967); *Williams v. Cmty. Drive-In Theater, Inc.*, 520 P.2d 1296 (Kan. 1974); *Miller v. Federated Dep't Stores, Inc.*, 304 N.E.2d 573 (Mass. 1973); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997); *N.X. v. Cabrini Med. Ctr.*, 765 N.E.2d 844 (N.Y. 2002); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *Drake v. Star Mkt. Co., Inc.*, 526 A.2d 517 (R.I. 1987); *J.H. By & Through D.H. v. W. Valley City*, 840 P.2d 115 (Utah 1992); *Smith v. Sacred Heart Med. Ctr.*, 184 P.3d 646 (Wash. Ct. App. 2008).

can collect from the Holy See's deep pockets, while the Georgia plaintiffs are left penniless.

The problem becomes even more acute when considering bankrupt dioceses. To date, seven Catholic dioceses have entered bankruptcy, due in part to the sexual abuse claims against them.¹⁵⁹ Plaintiffs in those dioceses would have good reason to seek their remedy from the Holy See's deeper pockets. Oregon law would allow a plaintiff in the Archdiocese of Portland, which has declared bankruptcy, to sue the Holy See. But a plaintiff in Spokane, Washington would only be able to sue the bankrupt diocese of Spokane, because current Washington law effectively prevents a suit alleging vicarious liability against the Holy See.¹⁶⁰

This unfairness, unpredictability, and inconsistency run counter to the uniformity Congress sought in passing the FSIA. The House Report notes that Congress intended to encourage uniformity when finding jurisdiction,¹⁶¹ and it specifically allowed removal from state courts to encourage uniformity.¹⁶² Yet because the state laws defining employer liability for intentional torts are different, the law is not even applied consistently to a single sovereign for multiple similar cases. This surely cannot be what Congress intended in passing the FSIA.¹⁶³

The unfairness and unpredictability for litigants are additional practical concerns for using *respondeat superior* liability to hold the Holy See responsible for clerical sexual abuse. In addition to the legal problems with analyzing priests and bishops as employees of the Holy See and the likely intrusion of the ecclesial abstention doctrine, *respondeat superior* becomes an unwieldy, improper tool for holding the Holy See accountable. What the courts, plaintiffs, and the Holy See need is a theory of liability that avoids the common law definitions of employee and employment, focuses on the de facto operations of the Catholic Church, and applies uniformly to all cases. Plaintiffs can achieve this through the international criminal law analogue of *respondeat superior* liability, command responsibility.

159. The seven dioceses are the Archdiocese of Portland, Oregon and the dioceses of Tucson, Arizona; Spokane, Washington; Davenport, Iowa; San Diego, California; Fairbanks, Alaska; and Wilmington, Delaware. BishopAccountability.org, Bankruptcy Protection in the Abuse Crisis, <http://www.bishop-accountability.org/bankruptcy.htm> (last visited Aug. 31, 2010).

160. See *Smith v. Sacred Heart Med. Ctr.*, 184 P.3d 646, 649 (Wash. Ct. App. 2008) ("An employee's conduct falls outside the scope of his employment when his acts are directed toward personal, sexual gratification.").

161. H.R. REP. NO. 94-1487, at 6-8 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605-06.

162. *Id.*

163. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 489 (1983).

IV. COMMAND RESPONSIBILITY AND LIABILITY

A. *Command Responsibility in U.S. Courts*

The command responsibility doctrine developed in international law as a means of holding military superiors directly liable, as opposed to vicariously liable, for the war crimes of their subordinates. Command responsibility applies to both the superior's acts and omissions. First, a court can find "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" directly liable for that crime.¹⁶⁴ Second, a court can find a superior liable "if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior *failed to take the necessary and reasonable measures* to prevent such acts or to punish the perpetrators thereof."¹⁶⁵ Plaintiffs suing the Holy See would focus on the second, passive form of command responsibility.

Passive command responsibility has three elements. First, a relationship of effective control must exist between the superior and the subordinate; second, the superior must "know or have reason to know" of his subordinate's acts; and third, the superior must have failed to take necessary steps to prevent or punish the offense.¹⁶⁶ To establish effective control, Allison Marston Danner notes that the superior only needs de facto control over his subordinates, particularly when the question involves civilian control.¹⁶⁷ Effective control serves as an evidentiary standard: either a functioning hierarchy must exist, or the scope of the de facto authority must be delineated.¹⁶⁸ The knowledge requirement establishes the mens rea required to be properly held liable for the subordinate's act.¹⁶⁹ Finally, the superior must also fail to act upon a legal duty. This duty to act does not come

164. Security Council of the U.N., Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1) (2009).

165. *Id.* art. 7(3) (emphasis added).

166. Danner, *supra* note 16, at 122. Danner proceeds to outline various scholarly controversies over the different requirements, which are issues that go beyond the scope of this Note.

167. *Id.* at 130.

168. *Id.* at 130–31.

169. For the purposes of this Note, the knowledge requirement is roughly the equivalent to the knowledge level of mens rea understood in American criminal law: "[k]nowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962). For a discussion and critique of the different definitions for the knowledge requirement used in international courts, see Danner, *supra* note 16, at 125–30.

from local or national legal duties, but rather international human rights law.¹⁷⁰

The Supreme Court first accepted the command responsibility doctrine in criminal cases in *Application of Yamashita*,¹⁷¹ which involved a habeas petition by a Japanese general convicted of war crimes in an American military proceeding.¹⁷² The Supreme Court held, “We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution. There is no contention [by Yamashita] . . . that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances.”¹⁷³ An American court has also applied the command responsibility doctrine in a civil case involving international tort claims. In 1999, Salvadoran civilians tortured by Salvadoran military personnel sued two Salvadoran defense ministers in Florida under the Alien Tort Claims Act (“ATCA”) through command responsibility.¹⁷⁴ The jury found the two ministers liable for “crimes against humanity” and returned a \$54.6 million judgment.¹⁷⁵ The Eleventh Circuit later affirmed the judgment on appeal, vacating an earlier opinion holding that the statute of limitations had run.¹⁷⁶ The defendants did not contest the command responsibility theory of liability, and the court did not address it on appeal.

B. Applying Command Responsibility to the Catholic Church

The command responsibility test can function as a substitute test for determining the Holy See’s liability for the actions of its “officials . . . within the scope of their office,” the other language that determines liability under the FSIA.¹⁷⁷ In this way, the court can avoid the entanglements that traditional agency law creates. Of

170. Chia Lehnardt, *Individual Liability of Private Military Personnel Under International Criminal Law*, 19 EUR. J. INT’L L. 1015, 1028 (2008).

171. 327 U.S. 1, 15 (1946) (stating “the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates” and citing the Hague Convention of 1907).

172. *Id.* at 5.

173. *Id.* at 16.

174. Ctr. for Justice & Accountability, Case Summary, <http://cja.org/article.php?list=type&type=82#LEGAL%20PROCEEDINGS> (last visited Aug. 31, 2010).

175. *Id.*; see generally Beth Van Schaack, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213 (2003) (outlining the arguments used to support or contest the factual issues surrounding the application of command responsibility to the case).

176. *Arce v. Garcia*, 434 F.3d 1254, 1265 (11th Cir. 2006).

177. 28 U.S.C. § 1605(a)(5) (2008).

course, it is one thing to apply command responsibility—a theory born of international criminal law—to military officials in civil court to obtain a civil judgment. It is admittedly quite another to apply it to a neutral, hierarchical church without an operative military and whose potential liability stems not from war crimes but from sexual abuse of minors. Yet two reasons to do so stand out.

First, the Catholic Church's organization and structure share many attributes with military command. For example, both the church and the military send entrants to separate schools to learn important church doctrine or military tactics. Priests and privates answer to their superior bishop and lieutenant, respectively, for assignments of duty and are responsible to them for their actions. Failure to follow protocol can result in ecclesial or military discipline unique to each organization. Bishops, like generals, are given discrete geographic jurisdictions over which they set the priorities, oversee internal clerical or military affairs, and exercise control. Although bishops have substantial independence in how they carry out their work, like regional commanders, they report to others who oversee the entire global ecclesial or military operation.¹⁷⁸ Both the Catholic Church and the military have separate courts that define and investigate crimes outside the jurisdiction of civilian courts. Indeed, it is no coincidence that Catholic doctrine refers to the Church on Earth as the "church militant,"¹⁷⁹ with a mission to spread God's Word to the four corners of the Earth.

Second, command responsibility makes sense because the duties incumbent on the Holy See to act are grounded in international law. Military officers are bound by international law, for example, to treat prisoners of war humanely and to afford citizens certain fundamental rights.¹⁸⁰ These rules establish the minimum protections people around the globe expect to receive, and sovereign nations have created them because they are seen as universal. These are the *jus cogens* norms of international law, "from which no derogation is

178. American courts might have trouble determining the exact nature of the relationship between the bishop and the Holy See, but no one can argue that the bishop does not operate in harmony with and under the Holy See's authority.

179. In Catholic theology, this term refers to living Catholics who carry out the Church's temporal mission. The other grand divisions of the Church are the "church triumphant" (those who have died and entered Heaven) and the "church suffering" (those who have died and are expiating their sins in Purgatory).

180. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, art.3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (providing civilians certain fundamental rights); Geneva Convention Relative to the Treatment of Prisoners of War, art.13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (requiring that prisoners of war be treated humanely at all times).

permitted.”¹⁸¹ Yet *jus cogens* norms do not exist solely in the law of war; they also protect certain basic human rights.

For children, one basic right is the right to be “protected against all forms of neglect, cruelty and exploitation,”¹⁸² as the Declaration of the Rights of the Child declared in 1959. In 1990, the Convention on the Rights of the Child, the first legally binding international instrument to protect children, required governments to “protect children from all forms of sexual exploitation and abuse.”¹⁸³ The Holy See is a signatory to the Convention.¹⁸⁴ Thus, just as national militaries are subject to the Geneva Conventions, the Hague Conventions, and other instruments of the law of war, the Holy See should be subject to the Convention on the Rights of the Child. If, by its acts or omissions, it has contributed to the sexual abuse of children, it should be held liable for its actions through the application of international forms of liability. American courts can do this through command responsibility.

Not only does the application of command responsibility make sense in this situation, it also resolves the inherent problems of applying American *respondeat superior* liability. First, the command responsibility inquiry into effective control obviates the need to determine whether the priest or bishop is an “employee” of the Holy See. Instead, a court only needs to determine if, *de facto* or *de jure*, the Holy See has the ability to effectively control its clerics’ actions. A secular court would not need to determine if church doctrine or canon law supports this notion. Instead, the court could look to the Holy See’s public disciplinary actions of its flock, such as those discussed in Part II. Thus, the court now has “generally applicable principles” to analyze the Holy See’s authority while abstaining from questions of ecclesial doctrine. No longer must the court shove the round bishop’s miter into the square employee hole of American law.

Second, grounding the duty to act in international law removes the unpredictability and unfairness that accompanies trying to determine the “scope of employment.” If the Holy See had knowledge of clerical abuse and did not act to punish the perpetrators or prevent future abuse, it is liable for such abuse anywhere in the United States. Through command responsibility, the Holy See’s immunity turns only

181. BLACK’S LAW DICTIONARY 937 (9th ed. 2009).

182. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), princ. 9 U.N. GAOR, 14th Sess., Supp. No. 16, U.N. DOC. A/4354 (Nov. 20, 1959).

183. Convention on the Rights of the Child, art. 34, Nov. 20, 1989, 1577 U.N.T.S. 3.

184. The Holy See signed and ratified the Convention on April 20, 1990. United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec (last visited Oct. 9, 2010).

on the control and knowledge alleged, not on different state jurisdictions and their agency law holdings. Plaintiffs anywhere can bring their claims; the Holy See only has to defend its immunity in a single, federal jurisdiction.

Command responsibility is not a windfall for plaintiffs, however. The 1962 Policy only creates internal ecclesial procedures for how to handle a wide range of clerical sexual proclivities. Plaintiffs still have to prove that the Holy See actually knew of child sexual abuse occurring in the 1950s and 1960s for the 1962 Policy to be corroborative of such knowledge. There is also the very real factual question of whether church discipline amounts to “effective control.” After all, history is littered with examples of priests or bishops flouting papal directives, including the recent examples of female priests, Charles Curran, and Archbishop Lefebvre.¹⁸⁵ Although the Catholic Church is the most centralized religion in the world, its size and mission render “effective control” a very fleeting notion at times. A factfinder could find that priests and bishops still exercise substantial individual freedom of action apart from church directives or discipline.

These questions, however, are factual ones, not legal. Command responsibility simply establishes a legal framework to connect the abusive priest to the Holy See while avoiding the questions of church doctrine, the tricky legal issue of defining bishops as “employees” of the Holy See, and the unfairness and unpredictability of applying state law from multiple state jurisdictions.

V. CONCLUSION

Traditional *respondeat superior* liability presents many problems when applied to the Holy See. The question whether a priest or bishop is an employee is not obvious on its face, and answering this question involves church doctrine. It also creates unfairness and unpredictability because it relies on state agency law. To resolve these problems, plaintiffs should try to frame their claims under command responsibility instead. This moves the question of authority and control from a doctrinal analysis to a factual one, and it provides a uniform method of liability applicable throughout the United States. While it does not provide the plaintiff a certain victory at trial, at least it allows the plaintiffs to hold the Holy See and its bishops and priests liable if the facts demonstrate that such a result is appropriate, for

185. See *supra* notes 42–44 and accompanying text.

those who have done wrong, even clergy, should be brought to justice. “[He] will break off the horns of the wicked, but the horns of the just shall be lifted up.”¹⁸⁶

*Jacob William Neu **

186. *Psalms* 75:11 (New American Bible).

* Candidate for Doctor of Jurisprudence, May 2011, Vanderbilt University Law School. I would like to thank my wife Annie and my parents Amy and Joseph for their continual love and support, and the editors of the VANDERBILT LAW REVIEW for their tireless efforts. I dedicate this work to the victims of clerical abuse as well as to my brother Joshua and my friends Deacon Brandon Bernhard and Matthew Stehling, who have entered the seminary to study for the priesthood.