Reconciling L.L.N. v. Clauder and Pritzlaff v. Archdiocese of Milwaukee: Does This Mean Blanket Immunity for Religious Organizations?

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RECONCILING L.L.N. V. CLAUDER AND PRITZLAFF V. ARCHDIOCESE OF MILWAUKEE: DOES THIS MEAN BLANKET IMMUNITY FOR RELIGIOUS ORGANIZATIONS?

I. INTRODUCTION

... In religion,
What damn'd error but some sober brow
Will bless it, and approve it with a text,
Hiding the grossness with fair ornament?¹

In recent years, the public has been more open to discussion and acceptance of charges for sexual misconduct among the clergy.² From 1982 to 1992, the legal and medical costs of litigating sexual misconduct claims have cost the Roman Catholic church more than $400 million.³ Significant cases have settlements of about one million dollars.⁴

Religious organizations had, until recently, an inveterate tradition of dealing with this issue under their own doctrines and canons. This tra-

². Sexual misconduct can refer to any sexual exploitation whether it occurs with an adult parishioner or a minor.

For the purposes of this Comment, “clergy” or “priest” will be used interchangeably, depending on the religion involved and will represent any member of a religious organization. The definition of “clergy” or “priest” will include “[a] person who becomes a cleric through the reception of diaconate and . . . [by being] incardinated into the particular church or personal prelature for whose service he has been advanced.” Jill Fedje, Liability For Sexual Abuse: The Anomalous Immunity of Churches, 9 LAW & INEQ. J. 133, 133 n.2 (1990) (quoting Raymond C. O’Brien, Pedophilia: The Legal Predicament of Clergy, 4 J. CONTEMP. HEALTH L. & POL’Y 91, 92 n.5 (1988)). Furthermore, a member of the “clergy” in this instance may refer to any religious organization, such as a priest, rabbi, or minister.


⁴. See Peter Bronson, Predator in a Priest’s Collar, CIN. ENQUIRER, July 31, 1994, at n.2.
dition has led to the public's belief that there is a "culture of silence" that covers up clergy sexual misconduct and reassigns clergy who commit sexual misconduct to new positions in which they may again commit the offense. Today, with such wide media coverage, sexual misconduct within the clergy is something the public and courts no longer ignore.

While traditionally courts chose to give religious organizations immunity from civil intrusion, the recent national trend is to hold religious organizations accountable for a variety of sexual misconduct their clergy commit. This issue divides the judicial system about what, if any, conduct of a religious organization is governable by civil laws. If a court is to attempt to impose liability on religious organizations for their clergy's acts, it must strike a careful balance between honoring the constitutional protection of religious freedom—which allow religious organizations to be self-governing—and holding these dioceses accountable for their clergy's sexual misconduct.

Wisconsin has not been without its share of lawsuits that attempt recovery from a religious organization for its clergy's acts of sexual misconduct. In July 1996, the Wisconsin Court of Appeals released an


6. The religious organizations, both because of the misconduct and the threat of lawsuits, are taking a more active role against clergy's sexual misconduct. Several are implementing new policies to deal firmly with sexual abusers. See, e.g., Thomas F. Taylor, Will Your Church Be Sued? How to Anticipate and Avoid Lawsuits in an Age of Litigation Overkill, CHRISTIANITY TODAY, Jan. 6, 1997, at 42; see also Jeffery L. Sheler & Sarah Burke, The Unpardonable Sin, U.S. NEWS & WORLD REP., Nov. 16, 1992, at 94.

7. Thomas Jefferson is often cited for constructing the wall between church and state with his statement that the government is "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline or exercises." James T. O'Reilly & Joann M. Strasser, Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues, 7 ST. THOMAS L. REV. 31, 44 (1994) (quoting Letter from Thomas Jefferson to Reverend Samuel Miller (Jan. 23, 1808), in 5 THE FOUNDERS' CONSTITUTION 98 (Philip B. Kurkland & Ralph Lerner eds., 1987)).

8. See O'Reilly & Strasser, supra note 7, at 31. Some plaintiffs have attempted to recover under some imaginative theories. See Gibson v. Brewer, 952 S.W.2d 239 (1997) (claiming there existed a civil conspiracy between the priest and diocese).

9. This balancing act was eloquently described in State ex rel Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), in which the Tennessee Supreme Court noted, "[e]ssentially, therefore, the problem becomes one of a balancing of the interests between religious freedom and the preservation of the health, safety and morals of society. The scales must be weighed in favor of religious freedom, and yet the balance is delicate." Id. at 111.

10. The cases discussed in this Comment are not the only ones Wisconsin has to decide on this or similar issues. See, e.g., Doe v. Archdiocese of Milwaukee, 565 N.W.2d 94 (Wis. 1997) (involving six men and one woman who claimed that priests sexually abused them and wanted the Milwaukee Archdiocese to pay damages for emotional distress). Justice Janine
opinion that arguably opened the door to religious organization's liability for its clergy's sexual misconduct. In *L.L.N. v. Claunder*, the Wisconsin Court of Appeals found that neither the Establishment Clause of the First Amendment nor Wisconsin case law barred L.L.N.'s claim for negligent supervision against the religious organization. On appeal, the Wisconsin Supreme Court held that the First Amendment barred claims of negligent supervision against religious organizations.

Before *L.L.N.*, the Wisconsin Supreme Court held in *Pritzlaff v. Archdiocese of Milwaukee* that Wisconsin does not generally recognize a religious organization's liability for the sexual misconduct of its clergy. The Wisconsin Court of Appeals in *L.L.N.* then found that L.L.N.'s claim of negligent supervision against a religious organization for the sexual misconduct of its clergy was an exception to the *Pritzlaff* rule and allowed the claim. The Wisconsin Supreme Court, in *L.L.N.*, held that "the First Amendment precludes L.L.N.'s claim for negligent supervision" and put this issue to rest. Because religious organizations fail to react strongly when a clergy member is accused of sexual misconduct, because liable clergy members use their positions to manipulate a victim, and because victims need compensation to pay for treat-

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P. Geske held, *inter alia* that: (1) the statute of limitations accrued at the time the abuse occurred for victims of repressed memories; (2) the supreme court would not extend limitations period beyond that provided for in the statute covering suits by adults bringing claims for injuries incurred while they were minors.

12. The Establishment Clause and the Free Exercise Clause of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Thus, this statement contains both the Establishment Clause and the Free Exercise Clause. One can assume, however, to the extent that a rule of law may influence a religious organization's future decisions, that rule may also inhibit the religious organization's free exercise of religion.
15. 533 N.W.2d at 780.
16. *Id.* at 790-91. The Wisconsin Supreme Court also found that the discovery rule barred the plaintiff's claim, so the statute of limitation had expired. *Id.* at 790; *see also* Stacy C. Gerber Ward, *Sexual Misconduct Claims and the Discovery Rule*, WIS. LAW., JULY 1996, at 24.
17. *L.L.N.*, 552 N.W.2d at 885.
18. 563 N.W.2d 434, 445 (Wis. 1997).
19. Jill Fedje gives an interesting and horrifying discussion of how churches have shielded their clergy from liability and perpetuated abuse. *See Fedje, supra* note 2, at 136-41.
20. "Sexual exploitation is not as much about sex as it is about the abuse of power . . . It is where . . . power is exercised in the name or context of religion, that the civil law is properly and forcefully stepping in." O'Reilly & Strasser, *supra* note 7, at 37 (quoting Don-
ment to recover from this kind of abuse, it is clear that there is a policy issue dictating that given the right circumstances victims should be able to recover from religious organizations for egregious acts of negligent supervision. More importantly, this claim, when followed strictly, would pass constitutional muster. This Comment asserts that the Wisconsin Supreme Court needlessly misinterpreted L.L.N.'s claim under the First Amendment to immunize religious organizations, and that the court should have allowed the claim because of the secular nature of the supervision in this situation.

Part II of this Comment discusses the basic principles that courts use to review claims against religious organizations and discusses the different levels of constitutional review that exist on the federal and state levels. Part III discusses briefly some various theories of recovery that parishioners use to attempt to recover from a religious entity resulting from acts of its clergy and addresses why most of them are not viable legal claims. Part IV reviews the background of Wisconsin case law in this area and reviews the decision in L.L.N. Part V offers an evaluation of the Wisconsin Supreme Court's decision in L.L.N., as well as propose how Wisconsin could have handled claims against religious organizations so not to violate federal and state constitutions.

This Comment contends this issue is important because victims need to pay for treatment. Also, courts should hold religious organizations liable because religious organizations' tradition of dealing with this problem has failed, and the religious immunity afforded in the Constitution does not protect religious organizations from negligently supervising their clergy. Furthermore, this Comment contends Wisconsin was correct in not following other jurisdictions by allowing multiple, and far more intrusive, theories of recovery that violate federal and state constitutions. Negligent supervision is the only theory of recovery Wisconsin should have allowed because it is the only theory that does not violate the Religion Clauses of the First Amendment or the Wisconsin Constitution.

II. CLAIMS AGAINST RELIGIOUS ORGANIZATIONS, THE FIRST AMENDMENT, AND LEVELS OF CONSTITUTIONAL REVIEW

Any proposed claim in this area of law must first address whether the First Amendment allows the claim. Religious organizations will use

21. See O'Reilly & Strasser, supra note 7, at 37.
the First Amendment, and any state constitutional provisions, as their foremost defense. Thus, a court must determine whether the First Amendment bars a parishioner's cause of action. This section will briefly summarize some general principles used in this type of analysis and the development of the different levels of constitutional review.

There are a few basic principles that courts use as groundwork. This analysis begins with a brief passage from the Constitution that contains the Religion Clauses. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This language is the extent of both the Establishment Clause and the Free Exercise Clause. Because the language is broad, and the freedoms protected by them overlap, courts often confuse their analysis of this area of law.

Any religious organization's defense should include a claim under the Free Exercise Clause, that the religious organization has a right to

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22. See Cassandra Butler, *Church Tort Liability in Spite of First Amendment Protection*, 12 S.U. L. REV. 37, 37-38 (1985). Butler argued in 1985 that the gradual lowering of the shield provided to religious organizations by the First Amendment was a sign of things to come and that the Supreme Court would continue to gradually weaken religious organizations' First Amendment rights. *Id.* at 38.

23. U.S. CONST. amend. I.

24. Courts' analyses diverge at this point. Most courts agree that the issue is constitutional in nature and that the First Amendment is the appropriate body of law to apply, but they disagree on whether the right doctrine is the Establishment Clause or the Free Exercise Clause. See Butler, *supra* note 22, at 43-45.

Courts usually apply the Free Exercise Clause in situations in which an individual or institution is attempting to exercise an aspect of their religion conflicting with state or federal law. See, e.g., Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 146 (1987) (holding Florida's refusal to pay unemployment benefits to a Seventh-day Adventist who was discharged when she said she could not work on Saturday violated her Free Exercise Rights); Thomas v. Review Bd., 450 U.S. 707, 708-09 (1981) (Indiana's denial of employment benefits to a Jehovah's Witness who left a job at a munitions factory based on his religious objections to war violated the Free Exercise Clause.); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written [about the Free Exercise Clause] is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); Sherbert v. Verner, 374 U.S. 398 (1963) (An employee did not want to work on Saturday because it was against her religious principles.).

Courts usually use the Establishment Clause when the government has taken some kind of positive action to benefit or hinder a specific religion. See Everson v. Board of Educ., 330 U.S. 1, 15-18 (1947) (in which state money used to pay for bussing children to parochial schools was found to violate the Establishment Clause). Arguably, the Establishment Clause could bar people in the Free Exercise Claims from recovery if a court found that enforcing Free Exercise in these situations favors religion over non religion. This paradox uncovers the extreme overlap in the Religion Clauses. Conversely, when a court may allow state action in light of the Establishment Clause (state action passes the standard of review), that action will undoubtedly burden that institution's free exercise of religion.
exercise its religion without government interference. Consequently, when a state law or a court begins to grant the religious organization too broad a protection, a plaintiff or a court may decide to raise the issue that this protection is the equivalent of an establishment of religion (thus raising the Establishment Clause).\(^{25}\) One reason for the Establishment Clause is to keep government from helping or hindering a particular religion.\(^{26}\) However, Wisconsin case law in this area has primarily focused on evaluation of the Free Exercise Clause.\(^{27}\) Therefore, this Comment assumes that a court’s analysis of a religious organization’s defense would focus on the Free Exercise Clause, and a court’s claim that a religious organization has too much immunity could fall under an Establishment Clause analysis.\(^{28}\) Because both Clauses may be used in a court’s analysis, and courts often confuse the constitutional analysis of these defenses, this Comment will review principles and levels of constitutional review for both Clauses.\(^{29}\)

**A. Free Exercise Clause**

In Wisconsin and nationally, the level of constitutional review a court uses in free exercise claims that possibly interfere with church doctrine has endured some change in recent years. Under the traditional and federal First Amendment constitutional level of review,\(^{30}\) a

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25. This is an example of the point-counterpoint functions of the Religion Clauses. Further, it is an example of why the decision of which clause to apply, as well as the levels of constitutional review to be applied for each clause, is sometimes troublesome for courts.

26. The Supreme Court in *Everson* found:
The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *Everson*, 330 U.S. at 15-16. The Court is trying to mark a boundary between permissible and impermissible governmental actions regarding religion.


28. *Sherbert* dictates that a Free Exercise inquiry involves a court deciding: (1) Does the law burden the free exercise of religion?; and (2) Is there a compelling state interest served by the law? *See Sherbert*, 374 U.S. at 405.


30. The Bill of Rights, including the First Amendment, was incorporated into the Four-
court would apply a heightened standard of review for claims that possibly interfere with religious doctrine. Thus, a plaintiff in an action in which state law may intrude on religious doctrine would have to prove that there was a compelling state interest in the controversy and that the state's suggested solution was the least restrictive means of intruding upon the church's doctrine. A court may then apply the Supreme Court's distinction between the ideas of the absolute freedom to believe and the freedom to act. While the freedom to believe is unlimited, a society must limit the freedom to act for its own protection. For example, in a tort action, a court must balance the protection of society against the Constitution's mandate that government not entangle itself with church affairs.

The compelling state interest/least restrictive means test was the federal standard of review until the decision of Employment Division v. Smith, in which the Supreme Court found that a federal court, while

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32. See Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (holding that the government interest of ending discrimination outweighed burden on school's exercise of religious beliefs); United States v. Lee, 455 U.S. 252, 457-58 (1982) (ruling that the government may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest); Yoder, 406 U.S. at 215-16 (holding that only interests of the highest order can overcome legitimate claims of free exercise of religion).


34. Id.

35. This balancing test is set forth in Sherbert in which governmental actions that substantially burden a religious practice must be justified by a "compelling governmental interest." 374 U.S. at 402-03 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). This compelling interest test is also set forth in Yoder, 406 U.S. at 214-15.

36. "[E]xcessive government entanglement with religion" is the key phrase coined in Lemon v. Kurtzman to signify when the government or a court has crossed the line (drawn by the Establishment Clause) and has violated the Constitution by involving themselves in what should be purely ecclesiastical issues. 406 U.S. 574, 604 (1970). The Lemon test has been criticized for being used only when it is convenient, and has also been criticized for lacking real meaning. See Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring). Scalia here refers to the test in Lemon as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, and then Lemon stalks our Establishment Clause jurisprudence one again, frightening the little children and school attorneys..." Id. at 398.

37. 494 U.S. 872 (1990). In Smith, claimants sought review of the determination that their religious use of peyote, which resulted in their dismissal from employment, was "misconduct" which disqualified them from unemployment insurance. Id. at 874-76. The Supreme Court held that the Free Exercise Clause did not prohibit application of Oregon drug laws and that the state could deny unemployment benefits. Id. at 890. Therefore, the Free Exercise Clause did not relieve an individual of the obligation to comply with a facially
analyzing religious conduct brought into dispute, could apply "neutral principles of general applicability."

This lowered the standard of review in federal courts, dictating that a plaintiff challenging a religious organization no longer needed to meet the compelling state interest/least restrictive means test. The federal standard established in *Smith* is known as the "law of general applicability test" in which courts may apply neutral laws of general applicability to religious practices.

Answering this Supreme Court decision, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"). RFRA was Congress' attempt to restore the heightened standard of review that existed before *Smith*. Hence, the federal standard under RFRA replaced neutral law of general applicability.

38. This is now the standard of review for federal courts. See State v. Miller, 549 N.W.2d 235, 239-41 (Wis. 1996). State courts can either adopt this or use their state constitutional standard if it is an equivalent or stricter standard. Id. at 238-39.

39. The Court specifically found that the rights offered by the Free Exercise Clause do not "relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)).

40. The Supreme Court found that the only claims that would not allow neutral, generally applicable laws were ones that involved the Free Exercise Clause coupled with another constitutional protection. *See Smith*, 494 U.S. at 881.

41. Thus, a "compelling governmental interest" inquiry would not be allowed in free exercise challenges because it would require judges to determine "centrality" of religious beliefs in applying the compelling interest test in the free exercise context. Id. at 884-85 (limiting the *Sherbert* balancing test to unemployment compensation field). See also Julia E. Pusateri, Note, Church of Lukumi Babalu Aye, Inc. v City of Hialeah: The Burdening of Free Exercise: The Solidification of the Employment Division v. Smith Doctrine and the Congressional Response, 38 ST. LOUIS U. L. J. 1041 (1994).


(a) In General.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

b) Exception.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in the furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.


43. 42 U.S.C. § 2000bb. The Act’s findings and purposes state, in relevant part: Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Consti-
the original standard of the compelling interest/least restrictive means test. After the enactment of RFRA, courts across the nation applied either standard, depending on whether courts in that jurisdiction had found RFRA constitutional.

In City of Boerne, v. Flores, the Supreme Court held that RFRA was

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
(3) governments should not substantially burden religious exercise without compelling justification;
(4) in Employment Division v. Smith, ... the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interest.

(b) Purposes
The purposes of this chapter are—
(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) ... and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.


45. This depended on whether courts in the area vigorously applied RFRA. This may have been determined by the judge, panel, or nature of the claim. For example, in Sullivan v. Sasnett, 91 F.3d 1018 (7th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3370 (Oct. 29, 1996), vacated and remanded, 117 S. Ct. 2502 (1997), the Seventh Circuit held that RFRA is a valid exercise of Congress's power under section five of the Fourteenth Amendment. The Seventh Circuit must now reconsider Sullivan in light of City of Boerne v. Flores. Conversely, in Keeler v. Cumberland, 928 F. Supp. 591 (D. Md. 1996), the court held that RFRA exceeds Congress's power under section five of the Fourteenth Amendment and violates the separation of powers. See also Scott C. Idleman, The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power, 73 TEX. L. REV. 247, 256 (1994). Clearly, City of Boerne v. Flores has eliminated this issue by holding that RFRA is unconstitutional in regards to state claims. 117 S. Ct. 2157, 2171-72 (1997), rev'g, 73 F.3d 1352 (5th Cir. 1996). Whether RFRA is unconstitutional with regards to federal claims is an open question. The Eighth Circuit will soon decide whether RFRA restricts federal law. See Christians v. Crystal Evangelical Free Church, 89 F.3d 494 (8th Cir. 1996), vacated and remanded 117 S. Ct. 2502 (1997). "In Boerne, the Court ruled RFRA unconstitutional as applied to state law. So the question remaining in [this] case was whether federal law—in this case bankruptcy law—is restricted by the act.” David E. Rovella, Tithing Topic for Courts, Congress, NAT. L.J., Dec. 22, 1997, at A6.
unconstitutional in regard to state law. Specifically, the Court held that RFRA added substantive matter to the Fourteenth Amendment which overstepped the bounds of Congress’ enforcement power under Section 5. The Court found that RFRA’s claim of enforcing the constitutional right to freedom of religion, via the compelling state interest/least restrictive means test, actually changed “what the right is.” Thus, RFRA was not a proper exercise of Congress’ remedial power because it was too strong a remedy for claims in state courts against religious freedom. Furthermore, RFRA is ineffective because it “is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.” Accordingly, RFRA’s standard of review is inapplicable to state laws.

State courts must also consider the standard their state’s constitution mandates, for a state’s constitutional standard can be higher than the federal standard. For example, in State v. Miller, the Wisconsin Supreme Court decided that the state constitutional standard provided greater protection than the federal Constitution. The court then applied the compelling state interest/least restrictive means test to ensure greater protection. A court’s analysis may also begin with a determination of whether the conduct in question is secular, versus

46. 117 S. Ct. at 2171-72.
47. U.S. CONST. amend. XIV, § 5. “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” Id.
48. City of Boerne, 117 S. Ct. at 2164.
49. The Court elaborated on the enormity of RFRA’s power: RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.... Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. Id. at 2170 (citations omitted).
50. Id. at 2171.
51. See WIS. CONST. art I, § 18. This provision is called the Freedom of Conscience Clause and provides in relevant part: “The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed;... nor shall any control of, or interference with, the rights of conscience be permitted.” Id.
52. State v. Miller, 549 N.W.2d 235, 238-39 (Wis. 1996). In Miller, the Wisconsin Supreme Court found that that interpretation of the First Amendment does not constrain the state’s constitutional right to worship is. Id. at 239.
53. Id. at 240.
"ministerial" or "ecclesiastical." If a court determines the conduct is purely secular or outside religious doctrine, the analysis is like that of any other action. If the court finds the conduct "ministerial" or "ecclesiastical," then a court, depending on the jurisdiction, may use a different level of constitutional review. This determination can be a stumbling block for a court attempting to review an act of a religious organization.

While extreme cases are easy, the fundamental troubles for courts are situations in which, for example, a priest is acting as a secular counselor. Logically, it seems that a priest would be unable to separate his

54. Jocz v. Labor and Indus. Review Comm'n, 538 N.W.2d 588, 598 (Wis. Ct. App. 1995). Here, the court found that a "determination [of ]whether an activity is religious or secular' must give considerable, if not decisive weight to the religion's own vision of the distinction." Id. at 598 (quoting STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 142 (1994)). Carter explains that an American culture that marginalizes religion and emphasizes the separation of church and state is unnecessary and that the two can coexist without one taking a back seat to the other. Id.

55. The general test in Wisconsin for defining whether employment is secular or "ministerial" is if "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered [ministerial or ecclesiastical]." Jocz, 538 N.W.2d at 598 (quoting Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164-69 (4th Cir. 1985)).

56. In fact, this is how many courts avoid a more complicated standard of review. For example, in cases of sexual abuse, a court will decide that sexual abuse is automatically outside the realm of church doctrine. See, e.g., Moses v. Diocese of Colorado, 863 P.2d 310,321 (Colo. 1993) (A plaintiff must plead that the relationship was a "matter of purely ecclesiastical concern.").

While this analysis may be correct regarding the defendant clergyman, it becomes far more complicated as applied to a religious organization. How can a court determine that a religious organization's conduct is not "ecclesiastical" regarding its actions towards a clergyman? See O'Reilly & Strasser, supra note 7, at 45-46.

The reconciliation and counseling of the errant clergy person involves more than a civil employer's file reprimand or three day suspension without pay for misconduct. Mercy and forgiveness of sin may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices.

Id.; see also Karen Ann Ballotta, Comment, Losing Its Soul: How the Cipolla Case Limits the Catholic Church's Ability To Discipline Sexually Abusive Priests, 43 EMORY L.J. 1431, 1432 (1994) (Religious organizations have begun to revise their policies regarding sexual abuse of clergy, but internal solutions must adhere to canon law.). Of course, it is the religious organization's traditional approach to discipline that has caused the uproar.

Others believe that when the religious organizations fail, it is left to the state to ensure that appropriate measures are taken against offending clergy so that the sexual misconduct does not recur. See Beth Wilbourn, Note, Suffer the Children: Catholic Church Liability for the Sexual Abuse Acts of Priests, 15 REV. LITIG. 251, 252 (1996).

57. See supra note 41 and accompanying text.
religious beliefs from his counseling, and therefore his job would be at least partly "ministerial." Purely secular behavior is even more difficult to determine when a court intends to evaluate the administrative actions of a religious organization. This distinction gives courts a tremendous degree of discretion and the ability to mold the legal reasoning to fit the court's desired outcome. Arguably, a court, in reviewing a religious organization's decisions, will be involving itself, at least in part, in religious doctrine. This Comment asserts that when it is unclear whether the conduct is "ministerial" or "secular," as it will usually be when a religious organization is involved, a court should assume that the conduct is "ministerial" or "ecclesiastical," unless a plaintiff can clearly establish secular behavior. This apparently harsh presumption counterbalances the liabilities that a court eventually may have to impose on a religious organization.

B. The Establishment Clause

Again, one of the purposes of the Establishment Clause is to protect religious organizations from state or federal governments helping or hindering a religious institution. The immunities the Establishment Clause grants to religious organizations to be free from government intrusion, however, is limited. First, the Establishment Clause does not grant religious organizations blanket immunity from suit, but it does prohibit civil courts from adjudicating controversies that would require courts to interpret or decide matters of religious doctrine or faith. This facet of the Establishment Clause reveals the core of this anomalous issue, which is to decide when a claim requires interpretation of church doctrine.

In Everson v. Board of Education, the Supreme Court voiced some

58. See O'Reilly & Strasser, supra note 7, at 43-45; see also RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 21.12 (2d ed. 1992).

59. A court should not impute what it believes to be secular behavior of the clergy onto the behavior of the religious organization. This appears to be what happens in many cases in which a religious organization's employment decisions are immediately deemed secular. See Moses, 863 P.2d at 321; see also Erickson v. Christenson 781 P.2d 383, 386 (Or. Ct. App. 1989) (holding that because a sexually abusive relationship arose out of a pastor's duties, he was within the scope of his employment, and thus the church was responsible).

60. Undeniably, a religious organization's employment decisions will be interwoven with church doctrine. See O'Reilly & Strasser, supra note 7, at 43-45. While categorizing a religious organization's behavior as secular may be an easy way out for a court, it also may violate the First Amendment.

61. See Olston v. Hallock, 201 N.W.2d 35, 39-40 (Wis. 1972) (The Wisconsin Supreme Court refused to review a priest's discharge because it was "outside the province of judicial review.").
specific prohibitions against the government. One of these prohibitions is that no state or federal government can set up an official church. Another is that one may not be punished for his or her religious beliefs. Yet another, more appropriate restriction is that government may not participate in the affairs of religious organizations. While the Court in *Everson* claimed that these prohibitions came only from the Establishment Clause, they are also protected by the Free Exercise Clause. This is one example of the overlap of the two doctrines and why courts sometimes confuse their application.

The Supreme Court developed a test in *Lemon v. Kurtzman* to determine whether governmental action violates the Establishment Clause. First, the governmental action must have a secular legislative purpose. Second, the government action's primary effect must neither advance nor inhibit religion. Finally, the government action must not foster an excessive government entanglement with religion. If the government can satisfy each of the conditions, the action will be held valid.

The third "excessive entanglement" prong of the *Lemon* test reflects the principle that courts will strenuously avoid inquiry into the truth of particular religious doctrines or practices. This is especially relevant regarding internal church affairs unless a court can apply neutral rules of law to purely secular behavior. Although plaintiffs are entitled to judicial review of their controversies, courts have no authority to resolve questions that require judicial interpretation of religious doctrine. The Supreme Court has been attempting to develop a standard to deal with internal church affairs under the Establishment Clause for some time.

One approach for determining if a plaintiff, court, or government is excessively entangled in religious doctrine is the "neutral principles" approach which arose in *Jones v. Wolf*. The issue in *Jones*, regarding a property dispute, was whether civil courts, consistent with the Establishment Clause, "could resolve the dispute on the basis of 'neutral

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63. Id. at 5.
64. Id.
65. 403 U.S. 602 (1971).
66. Id. at 605. While this seems like a clear-cut test, its application has been problematic. See supra note 58.
principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church.” The principle in *Jones* suggests that if an issue is completely secular in operation, a court can apply "neutral principles of law," and if a court must resolve a religious controversy, a court must defer the resolution of the doctrinal issue to the appropriate religious entity.

The question of what qualifies as a “neutral principle” of law is an anomalous one. In *Watson v Jones*, the Supreme Court classified, into three headings, issues concerning religious organization’s property rights. This classification enables the court to determine whether a court could hear cases regarding property rights. Although this case predates the incorporation of the First Amendment to the states, these classifications are still used today.

*Jones v. Wolf* suggests that under the Establishment Clause, civil courts are not allowed to review the decisions of religious organizations, and thus cannot analyze or interpret religious doctrine. However:

[C]ivil courts [can] adjudicate the rights under the [facts of the case] without interpreting or weighing church doctrine but simply by engaging in the narrowest kind of review of a specific church decision—i.e., whether that decision resulted from fraud, collusion, or arbitrariness. Such review does not inject the civil

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70. Id. at 597.
71. Id. at 599.
72. 80 U.S. (13 Wall.) 679 (1871).
73. Id. at 704.
74. One theory espouses that when property is conveyed for the purposes of religious worship, a court will enforce it as a trust. *Watson*, 80 U.S. at 704. However, a court will not determine what actions of a religious organization would create a “substantial departure” from religious doctrine that may violate the initial grant of the trust. *See Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (holding if intra-church property dispute required interpreting and weighing church doctrine, a court could not intervene; if, however, neutral principles of law could be applied without determining underlying questions of religious doctrine, a court could intervene).
75. 443 U.S. at 570. The appointment of a chaplain is one example. In *Gonzales v. Roman Catholic Archbishop*, the Supreme Court held that appointment of a chaplain was a “canonical act, [and] it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possess them. 280 U.S. 1, 16 (1929). In 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.” Id. This is does not mean there is a general exception for cases involving fraud, collusion or arbitrariness. *See Serbian Eastern Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 712-15 (1976) (forbidding judicial inquiry into whether the churches decision-making body properly followed its own rules of procedure in removing a bishop from office).
courts into substantive ecclesiastical matters.\textsuperscript{76}

Whether \textit{Jones} applies only to property disputes is an open-ended question, but courts have interpreted \textit{Jones} to allow adjudication of any claim that would likely arise out of a corporation.\textsuperscript{77} This Comment assumes for this argument that in Establishment Clause analysis, \textit{Jones} should be interpreted not only to apply to property disputes, but also to disputes that would be likely to arise out of a corporation.\textsuperscript{78} Thus, civil courts can narrowly review specific church decisions, if they are secular in operation (\textit{i.e.}, the government will not be excessively entangling itself in religious doctrine), without violating the Establishment Clause.\textsuperscript{79}

\section*{III. Theories of Recovery}

Case law from across the nation offers a variety of recovery theories used by plaintiffs injured by sexual misconduct of clergy attempting to recover money damages from the religious institutions connected to the injuring clergy. This section gives a brief overview of the various theories of recovery, with a focus on negligent supervision.\textsuperscript{80} This section also shows that no theory of recovery used against a religious organization is completely separable from church doctrine. For any claim to be constitutional in Wisconsin under a Free Exercise analysis, it must meet a heightened standard of review. Furthermore, for a claim to survive under an Establishment Clause analysis, a court must be able to apply "neutral principles" of law. This Comment suggests the only theory that can meet both these levels of constitutional review is negligent supervision and that courts should analyze these claims in a fact intensive, case-by-case analysis.

\subsection*{A. Clergy Malpractice}

Clergy malpractice is similar to claims that arise in a counseling set-

\begin{enumerate}
\item \textit{Jones}, 443 U.S. at 607. Thus, a review of a religious organization's decision must be narrowly construed, and a court must not review whether a religious organization is following its own doctrines. \textit{Id}.
\item See \textit{Moses v. Diocese of Colorado}, 863 P.2d 310, 320 (Colo. 1993).
\item This follows the Colorado Supreme Court's reasoning in \textit{Moses}. \textit{Id}. at 320-21.
\item "Entanglement is a judicially proscribed overextension of government involvement, including actions of the courts, into the beliefs and internal affairs of the religious institution." O'Reilly & Strasser, \textit{supra} note 7, at 45 (citing Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994); Hobbie v. Unemployment Appeals Comm's of Fla., 480 U.S. 136 (1987); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)).
\item For every theory of recovery, there are jurisdictions that are both for and against allowing that recovery. See generally Joseph B. Conder, Annotation, \textit{Liability of Church or Religious Society for Sexual Misconduct of Clergy}, 5 A.L.R. 5th 530 (1993).
\end{enumerate}
ting. Traditionally, courts recognize that a secular counselor owes a duty of care to a patient.81 Because of the patient's vulnerability, the counselor is in a position to possibly take advantage of a patient.82 Clergy malpractice follows the same theory. However, until recently,83 no court had allowed a cause of action for clergy malpractice.84 When a court attempts to use this theory against a religious organization for its clergy's acts, this theory fails. First, most courts have noted that imposing a professional standard of care on religious counselors is practically impossible85 because it would force a court to create, for example, a "reasonable bishop" norm that would necessarily require a court and jury to interpret religious doctrine.86 This is true because implicit in

83. New Jersey is the first state to allow a cause of action for clergy malpractice on an appellate level. See F.G. v. MacDonell, 677 A.2d 258 (N.J. Super. Ct. App. Div. 1996), aff'd in part, rev'd in part, remanded, 696 A.2d 697 (N.J.). In F.G., a woman sought counseling from the minister of her church. Id. at 267. Another minister then subsequently revealed the relationship to the parish during a sermon. Id. The New Jersey Superior court stated, "[w]e perceive no impenetrable barrier, on the limited record before us, to establishing a standard of care applicable to cleric-counselors in the context of an allegation that the counselor used his position to sexually exploit the counselee." Id. at 264. Apparently, this court believed that an examination of the claim required no examination of church "dogma or ritual"; therefore, there existed no interference with the First Amendment. Id. at 264-65. On review, the New Jersey Supreme Court held that courts could, without invoking the First Amendment, resolve a claim that a former rector, while being a pastoral counselor, breached his fiduciary duty by invoking sexually inappropriate behavior. Id. at 701. The court also held a claim of clergy malpractice raised First Amendment free exercise issues; therefore, that claim was barred. Id. at 701-02. Furthermore, the parishioner could maintain a claim against the former rector for negligent infliction of emotional distress arising from the rector's breach of fiduciary duty. Id. at 705. The court remanded the case to the trial court for a hearing to determine whether, under neutral principles of law, a court could decide parishioner's allegations against second clergyman without becoming entangled in religious doctrine. Id. at 698.

84. Many states have denied clergy malpractice claims. See, e.g., Sanders v. Casa View Baptist Church, 898 F. Supp. 1169, 1179 (N.D. Tex. 1995) (holding that clergy malpractice not allowed under Texas law because it would mean the courts evaluation of religious doctrine); see also Isely v. Capuchin Province, 880 F. Supp. 1138 (E.D. Mich. 1995) (claims for professional negligence equivalent to clergy malpractice and did not state a cause of action under law).

85. Some have attempted to establish a workable standard of care that a religious organization owes to a member. See Constance Frisby Fain, Clergy Malpractice: Liability For Negligent Counseling and Sexual Misconduct, 12 MISS. C. L. REV. 97, 99-104 (1991). This article proposes a standard of care, discusses judicial responses to these types of claims, and reviews how churches are responding to such claims. Id. at 99-102. Specifically, religious organizations are implementing training programs and renovating organization policy in an attempt to limit their liability. Id. at 118-22.

86. The term "bishop," as used here, is not meant to restrict the example to leaders of the Catholic faith. Any member of any religious organization that has supervisory authority and would be qualified to testify that a reasonable clergy member, in the same or similar
judging the conduct of a religious organization is the judgment of the doctrines and canons underlying that conduct. Second, to avoid clergy malpractice, courts primarily find other causes of action in which it may still consider religious doctrine, but not excessively so. Finally, courts have voiced their worry that this theory of recovery would cause the court to go down a "slippery slope" involving difficult and unconstitutional questions of liability.

**B. Respondeat Superior**

Another common theory of recovery plaintiffs attempt in these claims is respondeat superior, which focuses on an employer's vicarious liability for the acts of its employees that are within the scope of their employment. Wisconsin, like many other states, does not recognize this as a viable theory of recovery against religious organizations. The counseling position would not permit a sexual relationship between a clergy member and a organization member.

87. *See Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wis. 1995). The *Pritzlaff* court found that this theory would create a "reasonable bishop" norm that would necessarily require some inquiry into church doctrine. *Id.* at 790. This may encourage a challenger to attack a religious organization's beliefs in such concepts as penance, admonition, and reconciliation when arguing the reasonableness of the church's actions toward the offending clergy. *See* O'Reilly & Strasser, *supra* note 7, at 47. An example of this is Roman Catholic Canon law that forbids a bishop from dismissing a priest who commits child sexual abuse if, at the time of the incident, the priest was physically or psychologically impaired. 1983 Code c. 1324, §§ 1-3. A court or jury will then have to evaluate the "reasonableness" of this church law.

88. *See Byrd v. Faber*, 565 N.E.2d 584, 587 (Ohio 1991). The court found that clergy malpractice "does not address any aspect of the clergy-communicant relationship not already actionable." *Id.* The court did not want the claimant to recover several times for the same injury. *Id.* at 586.


90. *Shannon v. City of Milwaukee*, 289 N.W.2d 564, 568 (Wis. 1980); *see also* RESTATEMENT (SECOND) OF AGENCY § 219 (1) (1957) (An employer can be held vicariously liable for its employee's negligent acts while the employee is acting within the scope of his or her employment).

91. Wisconsin law requires that even in a secular atmosphere, in respondeat superior it is difficult to prove that a counselor's sexual exploitation of a patient is in the scope of the counselor's employment. *See* Block v. Gomez, 549 N.W.2d 783 (Wis. Ct. App. 1995).

Other states have found that in a religious setting, a clergy's sexual exploitation of a parishioner is not within a clergy member's scope of employment. *See* Destefano v. Grabrian, 763 P.2d 275, 286-87 (Colo. 1988) (finding that there was no basis to impute vicarious liability to a diocese for a priest's conduct because the conduct was contrary to the church's principles); *see also* Amato v. Greenquist, 679 N.E.2d 446 (Ill. Ct. App. 1997) (holding that contentions that pastor and bishop breached duties as fiduciaries were not actionable and that plaintiff could not establish the church defendants' liability under a respondeat superior theory); Konkle v. Henson, 672 N.E.2d 450, 454 (Ind. Ct. App. 1996) (While the First Amendment did not bar respondeat superior claims, a court must still determine whether the "minister
key problem with this theory is that plaintiffs must prove that the clergy's acts were within the scope of their employment with the religious organization. Because sexual misconduct is rarely, if ever, within the scope of a clergy member's employment, this theory of recovery fails to state a viable claim of action.

C. Breach of Fiduciary Duty

Plaintiffs have also claimed that a fiduciary relationship existed between a member of the clergy, a religious organization, and a member of the religious organization, and that breach of this fiduciary duty caused the plaintiff's injuries. In other words, the religious organization had a fiduciary duty and owed the plaintiff for his or her injuries. Courts have distinguished this nonprofessional standard of care from the one relating to clergy malpractice. Laws relating to this claim vary from state to state, but the determinative factor in this claim is whether the state laws require that a property interest exist between the religious organization and the plaintiff. While this theory appears more

92. See Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 789 (Wis. 1995) cert. denied 116 S. Ct. 920 (1996); L.N.N. v. Claude, 522 N.W.2d 879, 886 (Wis. Ct. App. 1996); see also Ward, supra note 16, at 24. In these cases, the courts found that sex was clearly not part of the clergy member's position, therefore, outside the scope of employment and not subject to claims of respondeat superior. See also Gibson v. Brewer, 952 S.W.2d 239, 245-46 (Mo. 1997); Byrd v. Faber 565 N.E.2d 584, 588 (Ohio 1991); Konkle v. Henson, 672 N.E.2d 450, 457 (Ind. Ct. App. 1996). Other challenges have been made as to whether the clergy is actually "employed" by the diocese under the rules of law. See, e.g., Moses v. Diocese of Colorado, 863 P.2d 310, 331-33 (Colo. 1993) (Rovira, J., concurring in part and dissenting in part.). But cf. DeBose v. Bear Valley Church of Christ, 890 P.2d 214 (Colo. Ct. App. 1994). This approach to respondeat superior considers whether the alleged conduct arose within the time and space limits of the employment and whether the employee may at least be partially motivated to serve the employer. Id. at 230. Under these circumstances, this approach allows for recovery under respondeat superior.

93. Some have not given up their attempt to revive the theory of respondeat superior as a viable theory of recovery for plaintiffs in such cases. See, e.g., Wilbourn, supra note 56, at 270.


95. The main difference between the two causes of action is that clergy malpractice requires a professional standard of care, while a fiduciary duty does not. Id; see also Hester v. Barnett, 723 S.W.2d 544, 550-51 (Mo. Ct. App. 1987) (delineating the difference between clergy malpractice and fiduciary duty standards of care).

96. Some courts require a property interest among their elements of a fiduciary relationship. See Moses, 863 P.2d at 321. The court here relies on the definition that, "a fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Id. (quoting RESTATEMENT (SECOND) OF TORTS § 874 cmt.a (1979)). This somewhat looser interpretation found that a clergy-parishioner relationship is not always a fiduciary relationship, but
plausible than clergy malpractice because there is no professional standard of care, it still requires a court or jury to establish a standard of care that may require excessive interpretation of religious doctrine. Although this standard may be less involved in religious doctrine than ones discussed thus far, this Comment suggests that in these situations, the Wisconsin Supreme Court, and future plaintiffs, should rely on the least intrusive theory of negligent supervision that does not violate the federal or state constitutions.

D. Negligent Hiring and Retention

One of the most common theories of recovery is negligent hiring and retention. For negligent hiring or retention, a plaintiff usually must establish that a governing religious body was negligent in hiring or retaining a clergy member because he or she was otherwise unfit. The Wisconsin Supreme Court has held that such a claim "requires interpretation of church canons and internal church policies and practices." Other states have allowed such a claim because their courts believe review of negligent hiring and retention does not require inquiry into religious practice or doctrine. Apparently, whether a court allows a

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97. This line of argument suggests that because the duty is not professional, liability for breach of the employer's duty can be determined by secular principles, therefore avoiding an "reasonable archbishop" norm. Instinctively, when any jury has to establish a duty of care for one clergy member to another, it seems impossible not to cross into interpretation of religious laws. See O'Reilly & Strasser, supra note 7, at 44.

98. This is not to say that the duty on a religious organization would not be high. See Jennifer L. Wallace, Comment, Tort Law—Fiduciary Theory Imposes Higher Duty and Direct Liability on Church For Clergy Sexual Misconduct—Tenetry v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), 28 SUFFOLK U. L. REV. 331, 339 (1994) (The fiduciary theory of recovery imposes a higher duty of care on the church and holds it directly liable to its parishioners.).

99. Negligent hiring and retention, while may be treated as different torts, will be treated as one claim in this Comment because the Wisconsin Supreme Court has treated it as one claim. See Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995), cert. denied, 116 S. Ct. 920 (1996).

100. Id.

101. Id.

102. See Konkle v. Henson, 672 N.E.2d 450, 455 (Ind. Ct. App. 1996). This court stated that "review only requires the court to determine if the Church Defendants knew of Henson's inappropriate conduct." Id. at 456. This court, however, coupled negligent hiring with negligent supervision. Id. at 454-56. This Comment will argue that while one claim may be reasonable, the other is excessively entangled with the Constitution. Cf. Moses v. Diocese of Colorado, 863 P.2d 310, 328 (Colo. 1993) (The court found that the Diocese had a duty to exercise reasonable care in hiring and that the Diocese should have anticipated the degree of contact with other persons the hired would have had when deciding on whether to hire.).
claim for negligent hiring and retention depends on whether a court believes that the religious organizations actions are separable from their religious doctrine.\(^\text{103}\) Arguably, this kind of inquiry into the hiring and retention decisions of a religious institution will intrude upon religious rules and beliefs because a court would necessarily have to consider religious doctrine when reviewing hiring or firing decisions.\(^\text{104}\) Therefore, to avoid inevitable entanglement of religious and secular laws, the Wisconsin Supreme Court has also disapproved of this theory in *Pritzlaff v. Archdiocese of Milwaukee.*\(^\text{105}\)

### E. Negligent Supervision

Negligent supervision is defined as liability arising from a person’s negligence or recklessness in the supervision of activity of his or her servants or other agents.\(^\text{106}\) Liability under negligent supervision occurs

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\(^{103}\) It appears that whether a claim requires a state to interpret religious doctrine depends on the state. For example, the Colorado Supreme Court, in *Moses v. Diocese of Colorado*, 863 P.2d 310, 320 ( Colo. 1993), found that the plaintiff’s claim of negligent hiring was permissible because it “does not involve disputes within the church and are not based solely on ecclesiastical or disciplinary matters which would call into question the trial court’s power to render a judgment against the defendants. Our decision does not require a reading of the Constitution or Canons of the Protestant Episcopal Church.” *Id.* Conversely, the Wisconsin Supreme Court, in *Pritzlaff* found that a similar claim of negligent supervision was barred because “the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one . . . require interpretation of church canons and internal church policies and practices.” *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wis. 1995). *See also* *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997) (A priest’s ordination is a quintessentially religious matter, “whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church.”) (citing *Serbian E. Orthodox Diocese v. Millivojevich*, 426 U.S. 696, 720 (1976)). Curiously, the court in *Gibson* relied on *Agostini v. Felton*, a Supreme Court case dealing with whether teachers from secular schools could teach special programs at parochial schools. *See Agostini v. Felton*, 117 S. Ct. 1997 (1997) (*cited with approval in Gibson*, 952 S.W.2d at 248).

\(^{104}\) For example, “Roman Catholic canon law does not permit the bishop to summarily dismiss the priest who admits child sexual abuse if the priest was psychologically or physically impaired at the time of the abuse incident.” *See* O’Reilly & Strasser, *supra* note 7, at 48 (quoting 1983 Code c. 1324, §§ 1-3). In addition, the United States Supreme Court has stated that, “[f]reedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

\(^{105}\) 533 N.W.2d 780 (Wis. 1995); *see also* *infra* notes 133-45 and accompanying text.

\(^{106}\) *L.L.N. v. Clauder*, 563 N.W.2d 434, 445 (Wis. 1997) (citing *RESTATEMENT (SECOND) OF AGENCY § 213 (1957)*). Wisconsin still has yet to formally recognize that a claim for negligent supervision exists. The Wisconsin Supreme Court has twice assumed, without deciding, that such a cause of action exists in Wisconsin. *See L.L.N.*, 563 N.W.2d at 445; *Pritzlaff*, 533 N.W.2d at 789. Apparently this question will be answered in *Miller v. Wal-Mart Stores, Inc.*, 1997 WL 106240 (Wis. App. 1997), *cert. granted*, 568 N.W.2d 302 (Wis. 1997).
only if the employer "knew or should have known that its employee would subject a third party to an unreasonable risk of harm." Thus a court must first ask if the religious organization had rights of supervision over the actual wrongdoer (the agency question). If the answer to this question is yes, the questions are then whether the supervisor owed the plaintiff a duty to properly supervise the actual wrongdoer and whether the supervisor breached that duty (the tort question). Whether a plaintiff's claim originally is based on tort or agency theories de-

107. L.L.N., 563 N.W.2d at 445 (citing RESTATEMENT (SECOND) OF AGENCY § 213 cmt.d. (1957)). The Restatement further explains:

Liability results under the rule stated in this Section ... because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. The employer is subject to liability only for such harm as is within the risk. If, therefore, the risk exists because of the quality of the employee, there is liability only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause harm.

Id.

108. RESTATEMENT (SECOND) OF TORTS § 317 (1965), regarding negligent supervision, states in relevant part:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, ... and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

Id. Thus this standard limits situations of sexual misconduct in which a court can hold a religious organization liable to only the situations in which the religious organization could possibly control sexual misconduct by its clergy.


109. RESTATEMENT (SECOND) OF AGENCY § 213 (1957), regarding negligent supervision, states:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless

(a) in giving improper or ambiguous orders or in failing to make proper regulations; or

(b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
pends upon what the plaintiff originally pleads. 110

Under an Establishment Clause analysis, some courts have not allowed claims for negligent supervision because the court has held the claim is excessively entangled with religious organizations, in violation of the First Amendment. Others have found that negligent supervision claims are allowable because a court can analyze the claim under "neutral principles" of law. 111 This Comment contends that the two-question analysis described above is a "neutral principle" of law that does not require interpretation of religious doctrines and thus does not excessively entangle the court in religious doctrine. First, while the question of whether the defendant religious organization had the right to supervise falls on a cases-by-case analysis, a court can determine this question without interpreting religious doctrine simply; a court can analyze the relationship between the supervisor and the clergy member and apply "neutral principles" of law. 112 Furthermore, courts can also

(c) in supervision of the activity; or
(d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Id. This may be a more lenient standard than the definition of negligent supervision based in tort theory. However, negligent supervision claims inherently require questions that involve both tort and agency theory, and it is up to the court adopting the definition to choose the definition it finds does not violate state or federal constitutions.


112. The First Amendment only prohibits a court from determining underlying questions of religious doctrine and practice. See Presbyterian Church in the U. S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969). Furthermore, the "principle of neutrality embodied in the Establishment Clause does not prevent government from enforcing its most fundamental constitutional and societal values by means of uniform policy, neutrally applied." Bob Jones Univ. v. Blumenthal, 639 F.2d 147, 154 (4th Cir. 1980). The court in Bob Jones went on to state "[w]e agree that Government must maintain an attitude of neutrality toward all religions. But certain governmental interests are so compelling that conflicting religious practices must yield in their favor." Id. (citations omitted).
apply "neutral principles" of law to determine "duty" and "breach".\textsuperscript{113} A court can analyze the supervisory interests that are a concern here secularly, without having to interpret or cast judgment on any religious doctrine, thus not excessively entangling the court in religious doctrine. Clearly, there exists a fine line that a court must be careful not to cross. If the supervisory interest involves religious doctrine, a court cannot allow a claim of negligent supervision. However, if the facts dictate that the supervisory interest is secular in nature, then a court may allow a claim of negligent supervision against a religious organization. For example, if a priest was assigned to teach softball, and a diocese knew or should have known of the priest's sexually predatory history, they should be subject to a claim of negligent supervision. Arguably, the nature of the supervision, which here is clearly secular in nature, would dictate whether a court could allow the claim.

This Comment also contends that negligent supervision claims also do not conflict with a Free Exercise Clause review. First, Wisconsin has a compelling state interest in this area. Encouraging religious organizations to end a clergy member's cycle of repeated sexual misconduct is undoubtedly a compelling state interest.\textsuperscript{114} State statutes protecting children and adults from sexual misconduct reflect this idea.\textsuperscript{115}

Second, allowing claims for negligent supervision is the least intrusive means the state can use to enforce this compelling state interest. All the theories previously discussed will excessively entangle a court into an analysis of a religious organization's doctrinal beliefs. For example, respondeat superior fails because sexual misconduct by a member of the clergy is rarely, if ever, part of the scope of the clergy member's employment under the religious organization.\textsuperscript{116}

113. This is exactly what the Colorado Supreme Court did in \textit{Moses}, 863 P.2d at 327-28 (in which it analyzed negligent hiring and supervision of an errant clergy member).

The court could further ensure the rights of the Diocese by adopting the analysis in \textit{Dayton Christian Schools, Inc., v. Ohio Civil Rights Commission}, 766 F.2d 932 (6th Cir. 1985). In assessing whether a statute challenged under the First Amendment Establishment Clause fostered excessive entanglement between religion and government, the court considered the character of the institution affected, the type of burden placed on that institution, and the resulting church-state relationship. \textit{Id.} at 945.

114. \textit{See} Prince v. Massachusetts, 321 U.S. 158 (1944) (The government's interest in preventing trusted authority figures from sexually abusing children is certainly a compelling state interest.).

115. Although Wisconsin has not enacted a statute dealing with this issue specifically, it has enacted a statute to create a civil cause of action for acts constituting a therapist's sexual exploitation. \textit{See} WIs. STAT. § 895.70 (1996). This cause of action is most like situations in which a plaintiff sues a priest who was acting as a counselor.

116. \textit{See supra} notes 90-93 and accompanying text.
malpractice and fiduciary duty claims require a court to determine a reasonable standard of care for a religious organization, and a court can easily substitute these claims with the less intrusive "reasonableness" standard in a negligent supervision claim.117 Similarly, a claim of negligent hiring and retention is also far too intrusive because it requires a court to determine the decision making policies imbedded in the canons of a religious organization.118

Negligent supervision is a claim that is the least intrusive of these claims, and it eliminates the need for other causes of action. Under this theory, a church's liability would arise only when a church knew or should have known about the misconduct and allowed it to continue.119 This theory allows a church the religious freedom to hire and retain whomever it wants. The only requirement this theory imposes is that when a religious organization knows or should know of clergy misconduct, it removes the priest from a position in which sexual misconduct may happen again. The "reasonableness" of the religious hierarchy's behavior, while still subject to a court and jury, is the least intrusive of all the claims and can be limited to decisions that are secular in nature.120 A religious organization should be held accountable and not be

117. See supra notes 80-88, 94-98 and accompanying text. Other states have found that not allowing negligent supervision claims is not an establishment of religion, and therefore does not conflict with the Free Exercise Clause. See, e.g., Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997) ("Not recognizing the cause of negligent failure to supervise clergy is not an establishment of religion because it is a 'nondiscriminatory religious-practice exemption.'") (quoting Employment Div. v. Smith, 494 U.S. 872, 876, 879 (1990)). The court in Gibson allowed a claim for "intentional failure to supervise." Gibson, 952 S.W.2d at 248. Specifically, [a] cause of action for intentional failure to supervise clergy is stated if (1) a supervisor (or supervisors) exists; (2) the supervisor (or supervisors) knew that harm was certain or substantially certain to result; (3) the supervisor (or supervisors) disregarded this known risk; (4) the supervisor's inaction caused damage; and (5) the other requirements of the Restatement (Second) of Torts, section 317 are met. This cause of action requires a supervisor. The First Amendment does not, however, allow a court to decide issues of church government—whether or not a cleric should have a supervisor.

Id. Thus, while it appears at first glance that this may be an less constitutionally-problematic alternative to negligent supervision claims, the determination of who is or is not a supervisor may give rise to the same kinds of constitutional hurdles that a negligent supervision claim does.

118. See supra notes 99-104 and accompanying text.
120. The belief that negligent supervision is the least intrusive means for a court to review a claim against a religious organization falls on a case-by-case analysis based on the tenets of the religious doctrine. For example, supervision may be the least intrusive form of governmental involvement under the Catholic faith, but not under Jewish faith. However, many courts have found that negligent supervision claims do not require interpretation of religious doctrine, and thus the review of religious doctrines and canons may be unnecessary.
able to hide behind a blanket of immunity by simply stating that their supervision decision, no matter how secular in nature, involves religious doctrine. Thus, the law would break the vicious circle of abuse a religious organization creates when it routinely transfers a clergy member to a new and similar situation for his sexual misconduct will be broken, and Wisconsin courts would impose the least amount of intrusion into the religious organization's doctrinal beliefs. Hence, the Wisconsin Supreme Court should have allowed this cause of action because it best serves the interests of both the State of Wisconsin and its religious organizations.

IV. REVIEW OF WISCONSIN CASE LAW

Wisconsin case law on this topic is scarce. However, Wisconsin does have a few cases that fall within the realm of this issue. This section provides an overview of Wisconsin case law that developed the level of constitutional review, discusses Wisconsin case law, and sets forth detailed descriptions of Pritzlaff and L.L.N.

A. General Constitutional Review

The first significant Wisconsin case to involve the traditional federal level of constitutional review is Wisconsin v. Yoder,\textsuperscript{121} which reached the United States Supreme Court. In Yoder, the Supreme Court held that the First and Fourteenth Amendments prevented a state from compelling Amish parents to make their children, who had already graduated the eighth grade, attend a formal high school until they were sixteen.\textsuperscript{122} The conflict here involved Wisconsin state statutes compelling children to attend school until they were sixteen, and an Amish religious claim that children should not attend formal schooling after the eighth grade.\textsuperscript{123} The Supreme Court used the compelling state interest/least restrictive means test first presented in Sherbert v. Verner\textsuperscript{124} to hold that the state statutes violated the Amish's claims for free exercise of religion.\textsuperscript{125}


122. Id. at 234.
123. Id. at 215.
125. \textit{See} Yoder, 406 U.S. at 220.
In *Olston v. Hallock*,\(^{126}\) the Wisconsin Supreme Court found, under the Constitution, it could not review a religious organization’s decision to terminate a minister.\(^{127}\) They found an Episcopal diocese decision to discharge a priest because of “differences” between the congregation and the priest was “outside the province of judicial review, and that such review would be unconstitutional.”\(^{128}\) Another, more recent case is *Black v. St. Bernadette Congregation*.\(^{129}\) In *Black*, the Wisconsin Court of Appeals was unwilling to decide matters of internal church government. The court held that these religious doctrines were at the heart of the church’s infrastructure, and therefore outside the scope of judicial review.\(^{130}\)

In *State v. Miller*\(^{131}\) the Wisconsin Supreme Court found that the Wisconsin State Constitution affords religious organizations greater protection than the federal Constitution. The court held that requiring members of an Amish religious organization to display the slow-moving vehicle emblem on their buggies violated their Wisconsin State Constitutional right to freedom of conscience.\(^{132}\) The free exercise claim in *Miller* is fundamental to the issue here because the Wisconsin Supreme court clarified that the “Wisconsin Constitution ... provides stronger protection of religious freedom than that envisioned in the federal constitution.”\(^{133}\) The court achieved this stronger protection by applying the compelling interest/least restrictive alternative analysis.\(^{134}\) Thus, despite whether the United States Supreme Court keeps the lower “neutral laws of general applicability” standard of *Smith* or adopts the heightened standard of constitutional review, *Miller* dictates that when Wisconsin state courts review free exercise claims, they must, under the state constitution, follow the compelling interest/least restrictive alter-

\(^{126}\) 201 N.W.2d 35 (Wis. 1972).

\(^{127}\) *Id.* at 40.

\(^{128}\) *Id.* at 40-41.


\(^{130}\) *Id.*

\(^{131}\) 549 N.W.2d 235 (Wis. 1996).

\(^{132}\) *Id.* at 237.

\(^{133}\) *Id.* The court went even further to state that:

> [F]reedom of conscience as guaranteed by the Wisconsin Constitution is not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision. We hold that our state constitution provides an independent basis on which to decide this case.

*Id.*

\(^{134}\) While the Wisconsin State Constitution protection is “stronger” than what RFRA offered, Wisconsin applies the same test as RFRA to assure religious organization’s rights when evaluating free exercise claims. *Id.* at 240.
native analysis for freedom of conscience claims against religious organizations.

B. Pritzlaff v. Archdiocese of Milwaukee

The Wisconsin Supreme Court examined an Archdiocese free exercise defense in Pritzlaff v. Archdiocese of Milwaukee. In Pritzlaff, the Plaintiff sued a Catholic priest, claiming that he had used his position in the clergy to force her into a relationship many years earlier. She also claimed the Archdiocese was negligent in hiring, retaining, and supervising the Priest, as the Archdiocese knew or should have known of the Priest's conduct. The Archdiocese raised the Free Exercise Clause as its defense.

Pritzlaff is interesting for several reasons. First, in its analysis the court found that the statute of limitations barred the plaintiff's claim. Therefore, the court had no duty to decide such an important, constitutional issue, namely whether the Archdiocese was accountable under negligent hiring and supervision for the acts of its clergy. The court did, however, go on to decide these issues. The court concluded that even if the statute of limitations did not bar the plaintiff's claim, Pritzlaff would still fail to state a claim against the Archdiocese for which a court could grant relief. The court first noted that it has still not determined whether such a cause of action (negligent hiring, retention, or supervision) exists in Wisconsin. The court then states "we assume, but do not decide, that [such a claim] does [exist]," but then proceeds to examine the elements of each claim.

This raises a second interesting facet of Pritzlaff. In a brief discus-

136. Id. at 782-83.
137. Id. at 789.
138. Id. at 794 (Abrahamson, J. dissenting). Justice Abrahamson's candid dissent clearly explains why the decision regarding negligent hiring, retention, and supervision was unnecessary.

The court refuses to decide a straightforward issue of state tort law, that is whether the state recognizes a tort of negligence in hiring, retaining, training or supervising employees. But the majority eagerly reaches out to decide a federal constitutional issue. The majority holds that if such a tort existed in this state, it would be barred in this case by the First Amendment.

Id. Justice Abrahamson further cites the basic rule dictating that "[a] court should not consider constitutional issues unless such a decision is essential to the determination of the question before the court." Id. (quoting State v. Hamilton, 356 N.W.2d 169, 171 (Wis. 1984)).

139. See Pritzlaff, 533 N.W.2d at 789.
140. Id. at 790.
sion of negligent hiring and retention, the court noted that "determining what makes one competent to serve as a Catholic priest... would require interpretation of church canons and internal church policies and practices," and that the First Amendment thus prevented it.4 The court then went on to hold that "state inquiry into the training and supervision of clergy is a closer issue... because under some limited circumstances such questions might be able to be decided without determining questions of church law and policies, the First Amendment nonetheless prohibits it under most if not all circumstances." So the supreme court assumed, without deciding, that there may be a cause of action for negligent supervision, but that the First Amendment probably does not allow such inquiry.4 This language provides the exception the Wisconsin Court of Appeals then uses in L.L.N. to allow L.L.N.'s claim of negligent supervision.

Finally, what is interesting in Pritzlaff is what the Wisconsin Supreme Court does not say. The court, in its analysis of the constitutionality of a claim for negligent supervision, does not apply the free exercise (compelling state interest/least restrictive means) analysis, much less the "neutral laws of general applicability" standard from Smith. Instead, it did an end-run analysis that went straight to discussion of the "chilling effect" such a claim would have on ecclesiastical authorities, and a "scope of employment [analysis]" that a claim for negligent supervision does not require. While Pritzlaff is the case most religious organizations hold up in their defense, it arguably could have opened the door to negligent supervision claims.

141. The court in Pritzlaff treats this claim, as does this Comment, as one claim. Id.
142. Id.
143. Id. at 791.
144. One can understand Justices Abrahamson's opinion that the "court refuses to decide a straightforward issue of state tort law[.]"] Id. at 794 (Abrahamson, J., dissenting). The issue of whether Wisconsin recognizes the tort of negligent supervision should be decided in Miller v. Wal-Mart Stores, Inc., 1997 WL 106240 (Wis. App. 1997), cert. granted, 568 N.W.2d 302 (Wis. 1997).
145. While employers may not have a duty to supervise off-duty employees, clearly a court can determine this on a case-by-case analysis. Id. at 791 (citing Tichenor v. Roman Catholic Church of New Orleans, 32 F.3d 953, 960 (5th Cir. 1994)).
146. Id. at 791. The Wisconsin Supreme Court assumed, without deciding, that a claim for negligent supervision exists, and it followed the definition provided in the RESTATEMENT. See L.L.N. v. Clauder, 563 N.W.2d 434, 443 (Wis. 1997). The rule dictates that the servant be acting outside the scope of his employment. Id.
147. Specifically, the language that later courts have relied on to argue that Pritzlaff opens a door is the Wisconsin Supreme Court's reference to negligent supervision being "a closer issue" and "because under some limited circumstances such questions might be able to be decided without determining questions of church law and policies." Pritzlaff, 533 N.W.2d
C. Analogous Cases

The Wisconsin Court of Appeals applied the Free Exercise Clause analysis in *Jocz v. Department of Industry, Labor and Human Relations* 148 and was unwilling to entangle itself in church doctrine regarding an employment setting. The plaintiff in *Jocz* was a female employee of a seminary who filed a complaint with the Department of Industry, Labor, and Human Relations, claiming the seminary discriminated against her because of her sex. 149 The Wisconsin Court of Appeals in *Jocz* found that if a court finds that an employment position at issue was purely "ministerial" or "ecclesiastical" by definition, 150 the Federal and State Constitution's religious protection clauses prevented the state from enforcing its employment discrimination law. 151 *Jocz* was the first case to interpret and apply the ruling in *Pritzlaff*. 152 The court in *Jocz* encouraged the argument that a court will no longer allow a religious organization to challenge civil laws in which purely secular conduct is concerned. 153 Arguably, religious organizations can now be held accountable in Wisconsin, at least regarding its secular activity.

*Block v. Gomez* occurred in a secular setting, but still is relevant because it involved a clinic's liability for actions of its counselor. 154 In *Block*, a patient who had a sexual relationship with her counselor brought an action against the counselor and the drug clinic. The Wisconsin Court of Appeals found that the counselor's actions were outside the scope of his employment; therefore, a claim of respondeat superior against the clinic failed. 155 This case emphasizes the court's reluctance to apply the theory of respondeat superior, even in a secular setting. With the heightened standard of review used for cases involving religious organizations, this theory will undoubtedly always fail.

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149. *Id.* at 590-91.
150. *See supra* note 54 and accompanying text.
151. *See Jocz*, 538 N.W.2d at 597.
152. *See Ward, supra* note 16, at 28 n.2 ("[P]laintiffs in Wisconsin have begun to attack and distinguish the First Amendment holding [in *Pritzlaff*], especially through the use of *Jocz* . . . .").
153. *See Jocz*, 538 N.W.2d at 597.
155. *Id.* at 787-88.
D. L.L.N. v. Cluder, Wisconsin Court of Appeals

The Wisconsin Court of Appeals, in *L.L.N. v. Cluder*,¹⁵⁶ used the free exercise language from *Pritzlaff* regarding negligent supervision and held that the Establishment Clause of the First Amendment did not bar a negligent supervision claim against a diocese.¹⁵⁷ In *L.L.N.*, the plaintiff while a patient at a hospital, entered into a sexual relationship with a priest who was counseling at the hospital.¹⁵⁸ She brought a claim against the Diocese for negligent supervision.¹⁵⁹ Interestingly, for its defense, the Diocese used the *Pritzlaff* decision, claiming that *Pritzlaff* held that the First Amendment prohibits a claim for negligent supervision involving a religious organization.¹⁶⁰ The court in *L.L.N.*, however, found that *Pritzlaff* did not preclude a claim for negligent supervision, stating that *L.L.N.*’s claim was one of the “limited circumstances” in which a court could allow a negligent supervision claim without intruding into church policy.¹⁶¹ The plaintiff in *L.L.N.* based her negligent supervision claim on the priest’s actions as a counselor and not on his priestly duties.¹⁶² Thus, the court found it easier to separate these duties from the rules of the church.¹⁶³

While the court in *L.L.N.* tried to open the door for claims under negligent supervision against religious organizations as articulated in *Pritzlaff*, the constitutional level of review the court used should be examined under both the Establishment and Free Exercise Clauses because of the courts’ unpredictable analysis of these claims. While the court analyzed this case under the Establishment Clause, Wisconsin...
courts, in the past, have analyzed these claims under the Free Exercise Clause.\textsuperscript{164} Therefore, this Comment will analyze L.L.N.’s claim under both levels of constitutional review.

Regarding the Establishment Clause, the court found that a court must “determine, under neutral rules of law, whether, under the facts, a reasonable person would know or should have known that Clauder’s placement as hospital chaplain was likely to result in harm.”\textsuperscript{165} In \textit{L.L.N.}, the court held that the sexual relationship between the priest and the woman had no grounding in Catholic doctrine or faith, and that in resolving the claim, the fact finder would not have to interpret or weigh church doctrine.\textsuperscript{166} Therefore, there was no entanglement issue regarding the Establishment Clause, and the court could review the claim.

The court in \textit{L.L.N.} did not analyze a defense for the Diocese under the Free Exercise Clause, but this analysis is revealing as well.\textsuperscript{167} Interestingly, five days before the Wisconsin Court of Appeals decided \textit{L.L.N}, the Wisconsin Supreme Court decided \textit{Miller}.\textsuperscript{168} \textit{Miller} raised the constitutional level of review for cases involving religious organizations,\textsuperscript{169} thus granting the defendant/Diocese in \textit{L.L.N.} greater protection, at least regarding free exercise claims. Arguably, the \textit{L.L.N.} court should have held that the Diocese was entitled to the heightened constitutional level of review afforded by \textit{Miller}.

The Wisconsin Supreme Court could have found that L.L.N.’s claim for negligent supervision existed even under the Free Exercise Clause analysis, although the Diocese’s decisions are “ministerial” and require the heightened standard of a compelling state interest/least restrictive alternative analysis.\textsuperscript{170} Under this standard, the Wisconsin Supreme

\textsuperscript{164} As stated, religious organizations generally raise the Free Exercise Clause as a defense, and a plaintiff or court finds those privileges are too broad. A plaintiff or court then answers this claim by raising the Establishment Clause, and saying the broad privileges are an establishment of religion. What analysis one sees in an opinion may be a function of where the case is in the trial process. For example, the court in \textit{L.L.N} may have been analyzing the claim under the Establishment Clause because the judge at the trial court level already decided that a grant of free exercise would result in an establishment of religion. \textit{Id.}

\textsuperscript{165} \textit{Id.} at 886 (emphasis added).

\textsuperscript{166} \textit{Id.} at 883-85.

\textsuperscript{167} Usually religious organizations raise both the Establishment Clause and the Free Exercise Clauses as their defenses. The supreme court may wish to address the free exercise defense in the future.

\textsuperscript{168} State v. Miller, 549 N.W.2d 235 (Wis. 1996).

\textsuperscript{169} \textit{Id.} at 240.

\textsuperscript{170} It is unclear whether the defendant in \textit{L.L.N} pleaded the defense used in \textit{Miller}, that the claim violated their rights of conscience under Article I, Section 18 of the Wisconsin
Court should have applied the four-part test outlined in *Miller.*171 Under the *Miller* four-part test, the Diocese would first have to prove that it has a sincerely held religious belief.172 Clearly, for an established Diocese, the Diocese could easily satisfy this burden.173

Second, the Diocese must prove that the application of the state law burdens its religious beliefs.174 For purposes of this argument, this Comment will assume that the Diocese knew liability for negligent supervision claims is a burden on its religious doctrine.175 Logically, a legal system will burden a religious organization that now has to reevaluate how to supervise its clergy.

The third part of the test shifts the burden to the state to prove that the law is based on a compelling state interest.176 As stated, the state will probably establish this using state statutes177 as evidence of its strong interest in eliminating repeated sexual assault to adults and mi-

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171. *Id.* at 237.
172. *Id.* This gives rise to the issue of what is a sincerely held religious belief, and what standards does a judiciary use to determine this? The Supreme Court has attempted to answer this question in *United States v. Seeger,* 380 U.S. 163 (1965), and *Welsh v. United States,* 398 U.S. 333 (1970). The Supreme Court attempted to define the term “religious training and belief” within meaning of the Universal Military Training and Service Act, which exempts from training those who oppose to participation in war because of their religion. *See* 50 U.S.C. App. § 456(j) (1990). For example, the Supreme Court said the test might be “[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.” *Seeger,* 380 U.S. at 176. Of course, this would only define religion within this particular federal statute. This issue is beyond the scope of this Comment.
173. For example, in *Miller,* the defendants were members of the Old Order Amish. The court found that their horse drawn buggy was an “expression of their religious beliefs.” 549 N.W.2d at 241.
174. *Id.*
175. This is a logical assumption because religious supervision decisions will then have to factor in possible civic consequences. Moreover, any civil liability will impose monetary obligations on the Diocese.
176. *See Miller,* 549 N.W.2d at 241.
177. Wisconsin law allows civil claims for a therapist’s sexual exploitation. *See* WIS. STAT. § 895.70 (1996). Interestingly, this statute’s definition of “therapist” includes “a physician, psychologist, social worker, marriage and family therapist, professional counselor, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed or certified by the state, who performs or purports to performs psychotherapy.” § 895.70(e) (emphasis added).

Wisconsin also has many criminal statutes prohibiting sexual misconduct against adult and children. For example, Wisconsin has a criminal statute that if an organization knows a therapist is committing sexual exploitation, it has a duty to report. *See* WIS. STAT. § 940.22 (1997); *see also* WIS. STAT. § 940.225 (1997) (sexual assault of an adult); WIS. STAT. § 948.02 (1997) (sexual assault of a child).
Finally, the state must prove that a less restrictive alternative cannot serve this compelling state interest. In such a case, the state must argue that negligent supervision is the least intrusive means of ending a priest’s cycle of sexual misconduct. By holding the Diocese responsible for removing the priest from situations in which he may harm a parishioner, the Diocese insures the state that the Diocese will not just transfer the priest to a new parish. Liability for negligent supervision by the Diocese will only be found if a jury finds that the Diocese failed to exercise reasonable care to control the priest from intentionally harming L.L.N. and that the Priest acted outside the scope of his employment.

A court cannot decide the Diocese’s decisions on hiring, retention, or church policies. For these reasons, negligent supervision is the least intrusive means of enforcing the state’s interest. Thus, under either a Free Exercise or Establishment Clause analysis, negligent supervision against a religious organization does not violate state or federal constitutions, regardless of whether the claim is based in agency or tort theories.

E. L.L.N. v. Clauder, Wisconsin Supreme Court

The only issue the Wisconsin Supreme Court decided in L.L.N. was “whether the Diocese is entitled to summary judgment on L.L.N.’s claim that it negligently supervised Clauder.” The court reviewed the relevant facts as follows. Clauder and L.L.N. began their relationship in 1988 while Clauder served as a chaplain at a hospital in Madison. Clauder and L.L.N. met through Father Hebl, who was a pastor at a nearby church. Clauder initially met L.L.N. at the hospital to discuss complications in her pregnancy, but they began seeing each other outside the hospital after L.L.N. suffered a miscarriage. Their affair began in June of 1990 and lasted until May of 1991. After the relationship ended, L.L.N. informed a Bishop of her sexual relations with Clauder. Another Bishop asked Hebl if he had any knowledge of this tendency in

178. See Miller, 549 N.W.2d, at 240.
179. See Davis v. USX Corp., 819 F.2d 1270, 1274 (4th Cir. 1987) (applying the RESTATEMENT (SECOND) OF TORTS § 317). While the court may impose a reasonable standard to an employer, this Comment assumes that the court would impose a reasonable standard of a Diocese, which requires the compelling state interest/least intrusive means test.
180. 563 N.W.2d 434, 437 (Wis. 1997).
181. Id. at 437.
182. Id.
183. Id.
Clauder. Hebl then stated that several years ago he had observed Clauder and another woman in a strange incident. Specifically, "Hebl heard Clauder yell for help from his private room in the rectory. When Hebl entered Clauder's room, he found Clauder restraining a woman on the floor by straddling her body and holding down her hands. Clauder was bleeding from a bite on his wrist." Hebl never reported this incident to anyone until notifying the Bishop.

L.L.N. claimed that because of the incident Hebl witnessed, "the Diocese knew or should have known that Clauder posed a risk of abusing his position as a hospital chaplain to sexually exploit patients whom he counseled." The Diocese claimed it was entitled to summary judgment because: 1) The First Amendment barred L.L.N.'s claim for negligent supervision, and 2) based on the facts, the Diocese did not know, nor should it have known, of Clauder's sexual activity. Before proceeding to the issue of negligent supervision, the court once again avoided officially recognizing negligent supervision as a claim in Wisconsin, instead "assum[ing] that such a claim exists, without deciding the issue." 183

1. The Majority

The court held that the Diocese was entitled to summary judgment for two reasons. First, the court held that the First Amendment pro-

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184. Id.
185. Id. at 438. Hebl, in his deposition, explained the incident as follows:
Q. Among other things, did it raise the question in your mind about whether there were some sexual activities going on between Father Clauder and [this woman]?
A. Let me put this kind of spin on it... obviously she attacked him, it seemed that way, and he was defending himself. You can put any interpretation you want on that. I saw no visual signs, none whatsoever of any sexual attack or intimacy or behavior, none whatsoever. Now, a person out there could say, "Well, that must have happened or could have happened." I did not put that spin on it.
Q. Was that a concern or suspicion that you had or did you dismiss that as not a realistic possibility?
A. I never accused him ever of anything along this line, any of the priests. I just don't, wouldn't think that's their behavior. . .
Q. Now, even though you didn't accuse [Clauder] of any sexual involvement with [the woman], was that a thought that was in you mind as a possibility?
A. Oh, yeah, I think with the circumstances under which this happened, there could be that possibility... but... I would never, never accuse him of it . . .

Id. at 437-38.
186. Id
187. Id. at 440.
188. Id. at 439 (citing Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 783 (Wis. 1995), cert denied, 116 S. Ct. 920 (1996)).
hibited the negligent supervision claim. Furthermore, the court held that even if the First Amendment did not bar L.L.N.'s negligent supervision claim, the facts of this case did not establish a genuine issue of material fact.\textsuperscript{189}

The court first analyzed the First Amendment issue under the Establishment Clause's entanglement doctrine.\textsuperscript{190} The court reviewed its decision in \textit{Pritzlaff v. Archdiocese of Milwaukee}\textsuperscript{191} and found that the apparent opening for negligent supervision claims did not apply. The court found that L.L.N.'s claim required that the Diocese knew or should have known of Clauder's propensity for sexual activity would require the court to interpret religious doctrine. The court reasoned that Hebl had no position of authority over Clauder. The court also reasoned that, to review Clauder's consensual sexual relationship with an adult, "a court would be required to consider and interpret the vow of celibacy in order to determine whether the Diocese negligently supervised Clauder."\textsuperscript{192} Thus the court held that to review L.L.N.'s claim, it would have to review Clauder's vow of celibacy, this was clearly entangled with church doctrine; therefore, the First Amendment precluded it.\textsuperscript{193}

The court further held that even if the First Amendment did not preclude L.L.N.'s claim for negligent supervision, "the undisputed facts and all reasonable inferences drawn therefrom [did] not establish a genuine issue of material fact in regard to the element of notice."\textsuperscript{194} The court used other jurisdictions to review the elements of a claim of negligent supervision. It found that "an employer is liable for negligent supervision only if it knew or should have known that its employee would

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{Id.} at 440. The court correctly noted "that excessive governmental entanglement with religion will occur if a court is required to interpret church law.... However, it is equally well-settled that a court may hear an action if it will involve the consideration of neutral principles of law." \textit{Id.}

\textsuperscript{191} 533 N.W.2d at 780; \textit{see also supra} notes 134-45 and accompanying text.

\textsuperscript{192} \textit{See L.L.N.}, 563 N.W.2d at 443-44. The court reasoned that:

\begin{quote}
[I]n order to hold the Diocese liable for breach of a duty of care to L.L.N., a court would be required to determine that constructive knowledge of Clauder's involvement with [the initial woman] should have triggered a different response by the Diocese, because such involvement exposed a bad attribute of Clauder's character. . . . Yet in order to make this determination, a court would be required to consider the vow of celibacy, since sexual acts committed by single consenting adults are not legally wrong, but instead become wrong only under church doctrine.
\end{quote}

\textit{Id.} at 444.

\textsuperscript{193} \textit{Id.} at 445.

\textsuperscript{194} \textit{Id}
subject a third party to an unreasonable risk of harm.\textsuperscript{195} The court held that "it is illogical to conclude that Clauder was likely to abuse his position as a chaplain to engage vulnerable patients in sexual intercourse."\textsuperscript{196} Thus, there existed no genuine issue of material fact, and the court granted the Diocese summary judgment.

2. The Dissent

The dissent felt that not only was there a genuine issue of material fact, but that the majority wrongly and unnecessarily decided the First Amendment issue. First, the dissent argued that there existed a genuine issue of material fact.\textsuperscript{197} The dissent felt that there was a reasonable inference that Clauder's behavior was not that of "consensual sexual relationship," but possibly one of "sexually assaultive behavior."\textsuperscript{198} Furthermore, it was negligent of the Diocese to keep Clauder in the position of hospital chaplain considering the incident of which Hebl was aware, and that Clauder would be continually dealing with women who may be vulnerable as a result of their hospitalization.\textsuperscript{199} The dissent takes a more extensive look at the deposition material and concludes there existed adverse facts on the record for which a jury should decide whether it was reasonable that Hebl "knew or should of known that the incident he witnessed between Clauder and [a previous woman] was sexually assaultive in nature."\textsuperscript{200} Thus, according to the dissent, there existed a genuine issue of material fact, and the Diocese should not have been allowed its motion for summary judgment.

Second, the dissent argued that the majority \textit{unnecessarily} decided the First Amendment issue. One clear rule of Wisconsin courts is "as a basic rule of judicial decision making, a court should not reach a constitutional issue unless it is essential to the disposition of the case."\textsuperscript{201}

\textsuperscript{195} Id.

\textsuperscript{196} Id. at 446. The court went further to state, "[e]ven if the Diocese had constructive knowledge of Clauder's sexual relationship with [the initial woman], this would not have put the Diocese on notice" of Clauder's alleged propensity to abuse his position as chaplain to engage patients in sexual intercourse. \textit{Id.}

\textsuperscript{197} Id. at 448 (Bradley, J., dissenting).

\textsuperscript{198} Id.

\textsuperscript{199} Id. at 448-49.

\textsuperscript{200} Id. at 450.

\textsuperscript{201} Id. (citing City of Franklin v. Crystal Ridge, Inc., 509 N.W.2d 730, 734 n.8 (Wis. 1994); Ziegler Co. v. Rexnord, Inc., 407 N.W.2d 873, 882 (Wis. 1987); S.B. v. Racine County, 406 N.W.2d 408, 409 (Wis. 1987); Labor and Farm Party v. Elections Bd., 344 N.W.2d 177, 179 (Wis. 1984); Kollasch v. Adamany, 313 N.W.2d 47, 52 (Wis. 1981); State v. State Fair Park, Inc., 124 N.W.2d 612, 613 (Wis. 1963); Witek v. State, 86 N.W.2d 442, 444 (Wis. 1957); Smith v. Journal Co., 73 N.W.2d 429, 432 (Wis. 1955); State ex rel. Rosenhein v. Frear, 119
Thus, if the majority felt the claim could be resolved by summary judgment, there was no need to decide the constitutional issue.

Furthermore, the dissent argued that the majority wrongly decided the First Amendment issue. First, the dissent felt the First Amendment issue was wrongly decided because Clauder’s breach of the celibacy vow “proves nothing of legal significance” and “adds nothing to L.L.N.’s negligent supervision claim, [so] a court has no occasion to consider or interpret the vow. The First Amendment is not implicated.” Therefore, the majority was wrong to state that celibacy could not give a religious organization notice, yet it would be a “necessity” to inquire into celibacy to bar a negligent supervision claim.

The dissent further asserted that the First Amendment issue was wrongly decided because religious organizations should be held accountable for the negligent acts of their employees. “[C]ontrary to the majority’s conclusion, the Diocese may be charged with constructive notice through Hebl regardless of whether he supervised Clauder. Hebl’s knowledge will be imputed to the Diocese so long as Hebl obtained the knowledge in the course of his employment and within the scope of his authority.” Specifically, a jury could determine if an employer-employee relationship existed between the Diocese and Hebl under “neutral rules of agency.”

The dissent also realized this theory of recovery may be the only one to pass First Amendment scrutiny, and that otherwise, religious organizations are immune from tort liability. In recognizing the broad implications of the majority’s ruling, the dissent noted that this decision will also bar negligent supervision claims against religious organizations that ignore or hide the actions of priests who sexually molest children.

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N.W. 894, 896 (Wis. 1909)). Arguably, the court does this to prudently settle both the constitutional issue and the plaintiff’s claim. This leaves no open question and significantly reduces the chances the Supreme Court will review the case.

202. L.L.N., 563 N.W.2d at 451 (Bradley, J., dissenting).
203. Id. (quoting Majority op. at 446).
204. Id. at 452 (quoting Ivers & Pond Piano Co. v. Peckman, 139 N.W.2d 57, 59 (1966); 3 C.J.S. Agency § 432 (1973)).
205. Id.
206. Id. Specifically, negligent supervision is “perhaps the only means of imposing tort liability on a church or similar institution. If courts were not permitted to determine the legal relationship between religious organizations and their clerics, religious organizations would be effectively immunized from tort liability.” Id.
207. Id. at 453.
V. EVALUATION AND PROPOSAL

This Comment asserts that the Dissent correctly reasoned the issues in *L.L.N.* by noting that the majority's unnecessary, erroneous, and overreaching decision will have an extremely adverse effect on victims of a clergy member's sexual abuse and that it gives blanket immunity to religious organizations. First, as the dissent clearly stated, the majority's decision of the First Amendment issue was unnecessary because the court had already granted the Diocese summary judgment. One fundamental rule of judicial decision-making is not to decide constitutional issues if the case can be disposed of on other grounds.\(^{208}\) Apparently, as *Pritzlaff* reflects, some members of the Wisconsin Supreme Court are comfortable violating this rule of judicial decision-making in claims against religious organizations.\(^{209}\) Courts should not foreclose a victim's right to recover unnecessarily. The First Amendment immunities granted to religious organizations in *L.L.N.* and *Pritzlaff* were superfluous to the direct claim. This suggests that the Wisconsin Supreme Court went out of its way to protect religious organizations.

The *L.L.N.* court's First Amendment analysis provides further evidence that *L.L.N.* is a convoluted attempt to protect religious organizations. *Pritzlaff* clearly leaves room for claims of negligent supervision against religious organizations.\(^{210}\) The court in *L.L.N.*, as did the court in *Pritzlaff*, relied on policy issues to protect religious organizations, but *L.L.N.* used convoluted reasoning to bar the First Amendment claim instead of directly stating it was deciding a policy issue.

The majority’s reliance on interpreting Clauder’s vow of celibacy as the basis for barring the First Amendment claim is, as the dissent clearly points out, of no legal significance.\(^{211}\) Clearly, the court could

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208. *See supra* note 201 and accompanying text.


210. “Although state inquiry into the training and supervision of clergy is a closer issue than inquiry into hiring and retention practices because under some limited circumstances, such questions might be able to be decided without determining questions of church law and policies....” *Id.* at 791. The court did state such analysis would be banned in many instances, but again relied not on entanglement issues but on policy issues. *Id.* (“Any award of damages would have a chilling effect leading indirectly to state control over future affairs of a religious denomination....”). Arguably, the majority in *L.L.N.* conducted the type of invasive review of religious dogma that it claims is to be avoided—i.e., conducting an invasive analysis to protect a religious organization, but not to hold it liable. To allow invasive review to protect a religious organization seems inconsistent.

211. *See supra* notes 202-03 and accompanying text. Arguably, counsel for L.L.N.
analyze Clauder’s relationship with L.L.N. without reviewing Clauder’s vow of celibacy because this vow has no relevance to the negligent supervision claim. The facts of L.L.N. construct a scenario in which Wisconsin could have allowed claims for negligent supervision against religious organizations. The court needed only to apply neutral rules of agency, as it would for a secular entity. In determining this agency relationship, the court did not need to consider religious doctrine.

Finally, L.L.N.’s broad implications give religious organizations blanket immunity from suit. By not allowing negligent supervision

should have never even mentioned “celibacy” during oral argument. 563 N.W.2d at 444. Counsel claimed that Hebl’s witness of initial incident should have provoked an inquiry by Hebl because the incident showed Clauder “had no regard for his vow of celibacy.” Id. at 444. As the dissent states, “[n]one of L.L.N.’s claims against the Diocese even mentions the word ‘celibacy.’” Id. at 451 (Bradley, J., dissenting). It follows that had L.L.N.’s counsel never mentioned celibacy in oral argument, he would not have granted the majority its First Amendment bar to the negligent supervision claim.

212. Id. at 451 (Bradley, J., dissenting). L.L.N.’s situation can be compared to secular adult relationships in which a court, in interpreting the negligent supervision claim, could easily apply neutral principles of law. For example, a relationship could exist between rehabilitative counselor and patient. Arguably, the only reason celibacy is relevant to this claim is its bizarre way of giving notice and barring the claim simultaneously. Justice Bradley’s point, and this author agrees, is that regardless of the celibacy issue, Hebl witnessed what a jury could find to be “sexually assaultive” behavior, which has nothing to do with celibacy, but everything to do with a negligent supervision claim.

213. The dissent lays out what is necessary for the negligent supervision claim:
[T]he record must support the existence of a genuine issue of material fact on the following issues: 1) that Clauder was an employee of the Diocese at all relevant times; 2) that Clauder engaged in sexually harmful behavior toward T.E., and later used his position as a hospital chaplain to sexually exploit L.L.N.; 3) that Hebl knew or should have known that Clauder engaged in sexually harmful behavior toward T.E.; and 4) that Hebl’s knowledge is imputable to the Diocese. Id. at 448 (Bradley, J., dissenting). Clearly, a court could apply neutral principles of law to each step of this analysis. As stated, other jurisdictions have found that negligent supervision claims do not interfere with the constitution. For example, in Kenneth R. v. Roman Catholic Diocese of Brooklyn, the New York Supreme Court found that the First Amendment did not bar negligent supervision and retention claims because imposition of such liability would not violate constitutional and statutory guarantees of free exercise of religion and separation of church and State. The court, under a free exercise analysis, found that “[R]eligious entities have some duty to prevent injuries incurred by persons in their employ whom they have reason to believe will engage in injurious conduct.” 229 A.D.2d 159, 165, 654 N.Y.S.2d 791, 796 (N.Y. App. Div. 1997) (citing Konkle v. Henson, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996)); L.L.N. v. Clauder, 552 N.W.2d 879 (Wis. Ct. App. 1996); Erickson v. Christenson, 781 P.2d 383, 386 (Or. Ct. App. 1989); Gallas v. Greek Orthodox Archdiocese of N & S Am., 587 N.Y.S.2d 82 (N.Y. Sup. Ct. 1991); Jones v. Trane, 591 N.Y.S.2d 927(N.Y. Sup. Ct. 1992). The Illinois Court of Appeals held, under a free exercise analysis, that a claim of negligent supervision against a religious organization would not require a court to interpret religious doctrine. See Bevin v. Wright, 656 N.E.2d 1121, 1124 (Ill. App. Ct. 1995) (“We cannot conclude from plaintiffs’ complaint that their cause of action against [the church] will infringe upon, or place a burden upon, the church’s freedom to exercise its religion.”).
claims, arguably the most neutral of all recovery claims, the Wisconsin Supreme Court has sealed the opening Pritzlaff might have allowed for victims to recover from religious organizations. For victims of sexual abuse by clergy members, this may mean there is no legal recourse against the religious organization, no matter how egregious the organization's conduct. Courts may decide differently if approached with a case in which the sexual misconduct breaks a state law, such as a rape or pedophile situation. However, religious organizations now have free reign to place its employees anywhere, no matter how predatory the employee's behavior may be. This is not the kind of religious freedom the First Amendment was meant to protect.

If Wisconsin was concerned about infringing on the First Amendment, the Wisconsin Supreme Court could have installed a safety measure to ensure that possible claims of negligent supervision against religious organizations do not unduly encroach on the organization's rights guaranteed by the Federal or Wisconsin State Constitutions. To ensure this, the Supreme Court should require a stricter negligent supervision claim. Thus, it could permit a claim against a religious organization only when the harm to the plaintiff is substantially certain to result or when the church disregards a high risk of harm to the plaintiff. Or the court could adopt an even stricter standard and only permit a claim against a religious organization if the organization had actual knowledge or constructive knowledge putting it on notice and causing inquiry into the potential risk of harm. If the Wisconsin Supreme Court finds the safeguard of heightened pleadings insufficient, it can supplement it with a stricter theory of negligent supervision and protect the constitutional rights of religious organizations.

The Wisconsin Supreme Court could have also required a heightened standard of pleading for claims of negligent supervision against a

214. This would be similar to the court limiting the definition of defamation to ensure the strength of the claim. See New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964); see also Daryl L. Wiesen, Note, Following The Lead of Defamation: A Definitional Balancing Approach to Religious Torts, 105 YALE L.J. 291 (1995). Wiesen analyzes how the Supreme Court limited the definition and damages of the tort claim for defamation, arguing that courts should apply this theory for the tort claim of intentional infliction of emotional distress against religious organizations and clergy. Id. at 292.

religious organization, much like the one required for fraud. The goal of protecting the religious freedom of a religious organization is important enough to require that plaintiffs plead the operative facts with particularity for a plaintiff to survive a motion to dismiss. Specifically, a plaintiff should be required to plead that the diocese had actual or constructive knowledge putting it on notice and causing inquiry into the potential risk of harm. Therefore, if there exists a risk, and the Diocese had notice to inquire, it was obligated to inquire.

VI. CONCLUSION

Religious organizations do not have blanket immunity from tortious behavior. More specifically, public sentiment mandates that religious organizations may no longer learn of a priest's sexual misconduct and promptly ship the priest off to another parish where it often happens again. Others have suggested solutions such as mandatory reporting statutes for religious organizations. Any court’s analysis must first delicately balance the interests of both the state and the religious organization to guarantee both the rights endowed to each by federal and state constitutions. The principles involved are vague, and if there is a doubt whether state laws intrude upon a religious organization’s doctrine, a court should assume that the laws do because any analysis of a religious organization’s internal decision making will necessarily inter-

216. The Federal Rules of Civil Procedure 9(b), states, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” FED. R. CIV. P. 9(b).

217. See Byrd v. Faber, 565 N.E.2d 584, 589 (Ohio 1991) (imposing a heightened standard of pleading on claims of negligent hiring and retention).

218. See FED. R. CIV. P. 12(b)(6).


Courts also attempt to increase a religious organizations liability by making the statute of limitations more permissible. See, e.g., Franis S. Ainsa, Permissive Statute of Limitation Policies, 36 CATH. LAW 83 (1995). This will not work in Wisconsin because the Wisconsin Supreme Court is unwilling relax statute of limitations’ mandates. See Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995), cert. denied, 116 S. Ct. 920 (1996).

221. See Smith, supra note 220 and accompanying text.
pret religious doctrine.

If a court's analysis focuses on the Establishment Clause, a court must find it can apply "neutral principles" of law to a religious organizations' secular behavior.222 Under a free exercise analysis, constitutional level of review under Wisconsin law dictates that a court must find a religious organization has a sincere belief that the state's intrusion is burdensome. Furthermore, the state must prove it has a compelling state interest in intruding upon the religious doctrine and that its chosen means is the least restrictive means for doing so.223 While the federal standard is somewhat dynamic on this point, Wisconsin courts can rely on the state standard.

Most theories of recovery would violate the Wisconsin Constitution because they require the interpretation of religious doctrine or do not meet the compelling interest/least restrictive means test. The only theory of recovery that satisfies these tests is a claim of negligent supervision because it is the least intrusive on religious doctrine.224

The Wisconsin Court of Appeals in L.L.N. v. Clauder allowed the plaintiff's claim of negligent supervision because of an exception it found in Pritzlaff v. Archdiocese of Milwaukee, which otherwise stands for the rule that Wisconsin will not allow claims that intrude on religious doctrine. The dissent was correct in noting that the Wisconsin Supreme Court's decision in L.L.N. unnecessarily decided a First Amendment issue because the court had already (erroneously) found for summary judgment for the Diocese. Furthermore, had the court correctly found a material issue of fact existed, the First Amendment did not bar L.L.N.'s negligent supervision claim because negligent supervision claims can be decided on neutral principles of law, and thus do not entangle the court in religious doctrine.

Finally, if the state wants more protection for religious organizations, it can limit negligent supervision to a strict definition. Wisconsin could further insure a religious organization's constitutional rights if the state requires a heightened standard of pleading for negligent supervision claims against religious organizations.

Because victims of clergy's sexual misconduct need compensation for injury, and because religious organizations have not effectively ended this kind of behavior on the part of their clergy, Wisconsin should have allowed plaintiffs to recover from religious organizations

222. See supra notes 24-26 and accompanying text.
223. See supra notes 41, 51-52 and accompanying text.
224. See supra notes 117-18 and accompanying text.
under negligent supervision claims. To ensure that the state does not excessively entangle itself in religious doctrines and canons or limit the free exercise of religious organizations, Wisconsin should avoid theories of recovery attempted in other jurisdictions that unnecessarily intrude upon religious doctrine. The claim of negligent supervision satisfies the problem, is least intrusive to religious doctrine, can be decided on neutral principles of law, yet still allows an injured plaintiff recourse for recovery.

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