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ABSTRACT

Recent years have witnessed the proliferation of allegations concerning sexual abuse by clergymembers, along with its concealment by institutional leaders, in a variety of religious communities in the U.S. Many victim-survivors report being doubly injured when they have attempted to obtain redress from religious institutions for the harms they have suffered. Increasingly, they have turned to tort law as a venue for obtaining compensation and effecting changes in policy. Of the numerous causes of action victim-survivors have invoked against religious institutions, especially the Roman Catholic Church, this Article focuses on *respondeat superior* vicarious liability. It identifies and assesses four ways courts have evaluated *respondeat superior* claims against the institutions where accused clergymembers have worked. One approach has been categorically to dismiss vicarious liability claims related to clergy sexual abuse; another has been to allow such claims only when an abuser's actions can be cognized as mistaken attempts to perform authorized job responsibilities. In a third approach, courts have considered whether sexual abuse is a characteristic risk of religious ministry. The approach that best achieves the rationales for vicarious liability and best balances the interests of all parties is the fourth, a fact-intensive inquiry that investigates what courts have called the "causal nexus" or "close connection" between the specific circumstances of a tort and the authority with which an employer has clothed an alleged offender.

I. INTRODUCTION

When someone whom a religious institution holds out as a representative of the divine commits sexual abuse, who should bear the earthly liability? And should it matter whether the institution had forewarning about the abuse or should have taken precautions to prevent it? These are but two of the important legal questions prompted by recent revelations about sexual abuse by clergymembers[1] in a variety of religious institutions, especially the Roman Catholic Church. Exploring the contours of the tort doctrine of *respondeat superior* vicarious liability, this Article identifies the four ways courts have assessed *respondeat superior* claims against institutions that employ alleged perpetrators. Of these four approaches, the one that best balances the interests of all parties is a fact-intensive one that has been formulated by courts both in the U.S. and overseas. Some jurisdictions have dubbed this method the "close connection test," while others have focused on the "causal nexus" between the specific circumstances of a tort and the authority with which an employer has clothed an alleged offender.

At the start, it is necessary to emphasize that sexual abuse at the hands of a clergymember often carries tragic consequences for victim-survivors. One prominent psychotherapist has dubbed it the "soul-murder" of a young or vulnerable person who may spend the remainder of life struggling to regain the capacity to trust other human

1. Throughout this Article, I employ the term "clergymember" to refer generically to employees whom religious institutions hold out as possessing ministerial authority, that is, authority that is specifically religious rather than administrative. Religious traditions employ a variety of nomenclatures to designate such leaders; within Christianity, these differences are driven by the radically divergent theologies of ministry and leadership that denominations have developed. This usage is technically imprecise in the context of Roman Catholicism, where as a matter of canon law the clergy comprises only those who have received the sacrament of holy orders—bishops, priests, and deacons—not religious sisters, brothers, or others who, despite having professed vows, are not ordained. *See* 1983 CODE C.207, §§ 1–2.

beings, let alone believe in an ultimate reality.[2] Studies have catalogued the negative sequelae of sexual abuse, including difficulties in forming and maintaining personal relationships, obtaining employment, and succeeding at work; serious mental health challenges, including dissociation and depression; and rates of substance abuse and suicide that far exceed national averages.[3] Those victimized by clergymembers experience these harms in a distinctive way, since, very often, they or their families trusted their abusers to uphold the moral standards of their religious tradition—in short, trusted them to stand in the place of God.

A substantial number of victim-survivors have reported being doubly injured when they have attempted to obtain redress for the harms they have suffered.[4] Victim-survivors have experienced the injuries their abuses originally inflicted to be compounded when religious leaders have covered up abuse or placed an institution's reputation ahead of the needs of the injured. And so, haltingly at first and then increasingly as the scope of clergy sexual abuse and its concealment have come to light, victim-survivors have turned to courts both to effect institutional change and to obtain the compensation that religious institutions have often failed to provide.

Clergy sexual abuse, tort law, and constitutional law intersect in complex and sometimes surprising ways. Among the issues are the applicability of the so-called church autonomy doctrine and its relationship to a "neutral principles" approach to litigation involving religious institutions,[5] the relevance of other First Amendment

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2. *See generally* MARY GAIL FRAWLEY-O'DEA, PERVERSION OF POWER: SEXUAL ABUSE IN THE CATHOLIC CHURCH 8 (2007) (quoting the classic formulation of LEONARD SHENGOLD, SOUL MURDER (1989)).

3. *Id.* at 22–36.

4. *Id.* at 132–37.

5. The classic "neutral principles" case is *Watson v. Jones*, 80 U.S. 679 (1871). The "church autonomy" doctrine has been severely criticized by Marci

defenses to discovery and liability,[6] the proposed tort of clergy malpractice,[7] the availability of civil Racketeer Influenced and Corrupt Organizations (RICO) Act causes of action,[8] and the implications for tort plaintiffs when religious institutions declare bankruptcy to manage their liability.[9] While there is substantial scholarship on these and other legal problems,[10] commentators have written comparatively little about *respondeat superior* vicarious liability, which many courts, practitioners, and commentators have rejected as inapplicable to clergy sexual abuse lawsuits.

Hamilton in her numerous writings. *See, e.g.*, Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099 (2004); Marci A. Hamilton, *The Rules against Scandal and What They Mean for the First Amendment's Religion Clauses*, 69 MD. L. REV. 115 (2009); Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why It Is Not Protected under Religious Liberty Constitutional Provisions*, 18 WM. & MARY BILL RTS. J. 953 (2010). For defenses of the church autonomy doctrine, see, e.g., Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431 (2011).

6. *See, e.g.*, Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219 (2000).

7. *See generally* Emily C. Short, Comment, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice*, 57 OKLA. L. REV. 183 (2004). Cases rejecting a distinctive tort of clergy malpractice include *Destefano v. Grabrian*, 763 P.2d 275, 285 (Colo. 1988); *Amato v. Greenquist*, 679 N.E.2d 446, 451 (Ill. App. Ct. 1997) (entertaining negligence claims against clergy, but only when directed "at conduct other than the defendants' performance of their clerical duties").

8. *See generally* Nicholas R. Mancini, Comment, *Mobsters in the Monastery? Applicability of Civil RICO to the Clergy Sexual Misconduct Scandal and the Catholic Church*, 8 ROGER WILLIAMS U. L. REV. 193 (2002). Few civil RICO actions have been pursued in the context of clergy abuse, but a recent suit filed against the Catholic diocese of Buffalo, New York, included RICO as a cause of action. Michael Mroziak, *Attorney's Lawsuit against Diocese Includes RICO Action*, WBFO (Aug. 16, 2019), https://news.wbfo.org/post/attorneys-lawsuit-against-diocese-includes-rico-action.

9. *See generally* Simon W. Bright, Comment, *The Costly Exercise of Religion: Issues on Diocesan Bankruptcy Estate Formation and First Amendment Implications*, 69 OKLA. L. REV. 695 (2017).

10. *See generally* JAMES T. O'REILLY & MARGARET S.P. CHALMERS, THE CLERGY SEX ABUSE CRISIS AND THE LEGAL RESPONSES (2014); Jeffrey R. Anderson et al., *When Clergy Fail Their Flock: Litigating the Clergy Sexual Abuse Case*, 91 AM. JUR. TRIALS 151 (2004); Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law*, 31 FORDHAM URB. L.J. 549 (2004).

To be sure, a majority of U.S. courts have dismissed *respondeat superior* causes of action against religious institutions, sometimes in a perfunctory or conclusory manner. However, a minority of U.S. courts, as well as prominent courts in other common-law jurisdictions, have imposed vicarious liability in cases where tortfeasors have taken advantage of the authority religious institutions have conferred upon them to cultivate and then violate their victims' trust. By replacing the traditional "scope of employment" test for *respondeat superior* vicarious liability with a fact-intensive inquiry into the connection between the abuse and the abuser's duties, these courts have remained faithful to the rationales underlying the doctrine of vicarious liability, including deterrence, compensation, and the allocation of risks to the parties that generate them.

Because this Article draws most of its examples from litigation involving abuse claims against the Roman Catholic Church,[11] it is especially worth noting that Catholicism has not been the only religious tradition in which sexual abuse has been reported and concealed. In the past year alone, there have been well-publicized scandals concerning sexual misconduct by Buddhist monks,[12] Episcopal priests,[13]

11. Perhaps unsurprisingly for the world's largest organized religion, which operates the world's oldest bureaucracy, forms of ministry in the Catholic Church are numerous. As observed *supra* note 1, this Article uses the term "clergymember" in a broad, vernacular sense.

12. *See, e.g.*, Kimberley Phillips, *A Culture of Clerical Immunity in Myanmar Is Putting Children at Risk of Abuse*, TIME (Dec. 6, 2018, 2:30 AM), https://time.com/5470903/clerical-sexual-abuse-children-buddhist-monks-myanmar/; Lusha Zhang & Philip Wen, *Buddhist Monk Master in China Resigns After Sexual Misconduct Allegations*, REUTERS (Aug. 15, 2018, 1:59 AM), https://www.reuters.com/article/us-china-harassment-religion/buddhist-monk-master-in-china-resigns-after-sexual-misconduct-allegations-idUSKBN1L00HR.

13. *See, e.g.*, David Crary, *Episcopal Church Confronts Past Role in Sexual Exploitation*, ASSOCIATED PRESS (Oct. 15, 2018), https://www.apnews.com/f64e7e1d40c8432fbad07496096daefa.

Conservative rabbis,[14] and evangelical pastors,[15] among other religious leaders. But the Catholic Church is the largest religious institution worldwide, and in U.S. courts the greatest number of abuse lawsuits have involved Catholic clergymembers. In recent years, grand juries and attorneys general in Maine, Massachusetts, New Hampshire, New York, Pennsylvania, and other states have undertaken investigations into the scope of abuse and its concealment within the church.[16]

During the nearly thirty-five years since reports of sexual abuse by Catholic clergy first came to public notice, tort litigation has played a substantial role in exposing the scope of the problem, with more than 3,000 civil lawsuits filed and more than $3 billion paid out in settlements to date.[17] In total, more than 6,700 Catholic priests and 19 bishops who served between the years 1950 and 2016 have been accused of abusing more than 18,500 victims.[18] Although deference to religious institutions in general, and the Roman Catholic Church in particular,[19] may have

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14. *See, e.g.*, Jared Foretek, *Sex Abuse Allegations Hit Home for Conservative Movement*, WASH. JEWISH WEEK (Dec. 6, 2017), https://www.washingtonjewishweek.com/42751/sex-abuse-allegations-hit-home-for-conservative-movement/news/.

15. *See, e.g.*, Elizabeth Dias, *Her Evangelical Megachurch Was Her World. Then Her Daughter Said She Was Molested by a Minister*, N.Y. TIMES, June 10, 2019, at A1; Robert Downen, Lise Olsen & John Tedesco, *Abuse of Faith: 20 Years, 700 Victims: Southern Baptist Sexual Abuse Spreads as Leaders Resist Reforms*, HOUS. CHRON. (Feb. 10, 2019), https://www.houstonchronicle.com/news/investigations/article/Southern-Baptist-sexual-abuse-spreads-as-leaders-13588038.php.

16. *See, e.g.*, OFFICE OF ATTORNEY GEN., COMMONWEALTH OF PA., REPORT I OF THE 40TH STATEWIDE INVESTIGATING GRAND JURY (2018) [hereinafter GRAND JURY REPORT (2018)].

17. *Data on the Crisis: The Human Toll*, BISHOP ACCOUNTABILITY, http://www.bishop-accountability.org/AtAGlance/data.htm (last visited July 24, 2019).

18. *Id.*; *see also* SECRETARIAT OF CHILD AND YOUTH PROT. & NAT'L REVIEW BD., U.S. CONFERENCE OF CATHOLIC BISHOPS, 2018 ANNUAL REPORT (2019).

19. *See* DAN B. DOBBS ET AL., THE LAW OF TORTS § 329 (2d ed. 2018).

contributed to the quiet settlement or dismissal of many early suits, tort litigation has become "one of several institutional venues in which policy responses to clergy sexual abuse were forged."[20] Litigation and associated media coverage has helped to publicize what Timothy Lytton has dubbed a "plaintiffs' framing of clergy sexual abuse."[21] Plaintiffs' attorneys have characterized abuse "as an institutional failure," not, as some religious employers have presented it, as the terrible, but independent and perhaps even unpreventable, misconduct of a small number of depraved clergy.[22] This framing appears not only in tort suits but also grand jury reports (e.g., the 2018 Pennsylvania grand jury's report, which declared that dioceses operated a "circle of secrecy," working from "a playbook for concealing the truth"[23]) and media narratives (e.g., the 2015 Academy Award-winning film *Spotlight*,[24] which documented the efforts of *Boston Globe* journalists to uncover the church's attempts to conceal abuse and hide abusers).

Clergy abuse plaintiffs have invoked numerous causes of action. Because Catholic clergymembers typically have few assets (and some, such as monks and nuns, have taken vows of poverty and are therefore inherently judgment-proof), plaintiffs have sought to recover not only against their abusers but also against the institutions that employed them, including parishes, dioceses and their bishops, provinces and other administrative units of religious orders, and church-operated institutions, such as hospitals, schools, and universities.[25] Whereas plaintiffs have typically alleged

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20. TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE 6 (2008).

21. *Id.* at 101.

22. *Id.* at 87.

23. GRAND JURY REPORT (2018), *supra* note 16, at 299, 3.

24. SPOTLIGHT (Open Road Films 2015).

25. At the risk of oversimplification, the Latin Rite of the Roman Catholic Church employs two overlapping systems of organization. (The Latin Rite comprises the vast majority of Catholics globally and is distinct from the Eastern Catholic Churches, such as the Byzantine Catholic Church.) The better-known

battery, assault, and intentional and negligent infliction of emotional distress directly against abusers, against religious employers they have tended to plead various forms of negligence (especially negligent hiring, supervision, and retention), along with breach of fiduciary duty and vicarious liability.

Plaintiffs have faced substantial challenges in negligence and fiduciary duty litigation. Some early claims were barred by state charitable immunity laws.[26] Until recently, when some state legislatures began to relax statutes of limitations or open windows for the revival of older claims many plaintiffs found that their suits were time-barred.[27] Religious employers have frequently invoked First Amendment defenses, arguing (with varying degrees of success) that decisions to ordain, assign, reassign, or remove clergymembers are matters of religious discipline that are unreviewable by courts because they are reserved to ecclesiastical authorities.[28] Institutional defendants have

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structures are those of the diocesan ("secular") clergy: the church divides the world geographically into dioceses, which it then subdivides into parishes. Dioceses are governed by bishops nominated by the pope, while parishes are entrusted to pastors chosen by the local bishop. At the same time, religious orders and their members are governed through parallel structures: for global orders such as the Jesuits, Franciscans, and Dominicans, the heads of geographical provinces are appointed by and answer to a worldwide superior general, usually based in Rome. There are many exceptions to these observations. In the United States, the church is organized civilly in a complicated variety of ways, not all of which correspond to canonical structures. For discussion of the organization of the Catholic Church, see generally THOMAS J. REESE, INSIDE THE VATICAN (1998).

26. *See, e.g.*, Schultz v. Roman Catholic Archdiocese of Newark, 472 A.2d 531, 537–38 (N.J. 1984), *limited by* Hardwicke v. Am. Boychoir Sch., 902 A.2d 900 (N.J. 2006).

27. On the relationship between the statute of limitations and sexual abuse, memories of which victims frequently suppress for years, see, e.g., *Doe v. Salesian Society*, 71 Cal. Rptr. 3d 565 (Ct. App. 2008); Theodore R.A. Ovrom, Note, *Reasonable for Whom? Developing a More Sensible Approach to the Discovery Rule in Civil Actions Based on Childhood Sexual Abuse*, 103 IOWA L. REV. 1843 (2018); Deborah A. Connolly et al., *Twenty-Six Years Prosecuting Historic Child Sexual Abuse Cases: Has Anything Changed?*, 23 PSYCHOL. PUB. POL'Y & L. 166 (2017).

28. *See, e.g.*, Destefano v. Grabrian, 763 P.2d 275, 283–89 (Colo. 1988); Moses

also invoked the priest-penitent privilege to shield church documents, including clergy personnel files, from discovery.[29] Some courts have held that, absent special circumstances, religious institutions do not owe fiduciary duties to members and their families.[30] But even in those negligence suits where courts resolve such threshold matters in plaintiffs' favor, often there is insufficient evidence for a plaintiff to prove that church leaders should have been aware of the risk that a particular clergymember posed.[31]

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v. Diocese of Colorado., 863 P.2d 310, 318–21 (Colo. 1993); L.L.N. v. Clauder, 563 N.W.2d 434, 440–45 (Wis. 1997); Sonnier v. Roman Catholic Diocese of Lafayette, No. 6:16-CV-1229, 2017 WL 778153, at *4 (W.D. La. Jan. 18, 2017); Davis v. Church of Jesus Christ of Latter Day Saints, 852 P.2d 640 (Mont. 1993). *But see, e.g.*, Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791, 796 (App. Div. 2d Dep't 1997); JC2 v. Grammond, 232 F. Supp. 2d 1166, 1170 (D. Or. 2002).

29. *See, e.g.*, Soc'y of Jesus of New England v. Com., 808 N.E.2d 272 (Mass. 2004).

30. *See, e.g.*, H.R.B. v. J.L.G., 913 S.W.2d 92, 98–99 (Mo. Ct. App. 1995). *But see* Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 989 F. Supp. 110, 117 (D. Conn. 1997).

31. This is not to say that all plaintiffs who have initiated causes of action for negligence and breach of fiduciary duty have been unsuccessful. There is not space here for full treatment of negligence cases against religious institutions, but see generally LYTTON, *supra* note 20. Among other cases where causes of action for breach of fiduciary duty have survived threshold challenges, see *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1232 (Me. Sup. Jud. Ct. 2005).

II. *RESPONDEAT SUPERIOR* VICARIOUS LIABILITY IN GENERAL

Many plaintiffs have invoked *respondeat superior* vicarious liability as an additional or alternative cause of action in suits against religious employers. Generally speaking, vicarious liability constitutes an exception to tort law's rule that liability follows fault: a party held vicariously liable for the tort of another is obligated to pay damages even if it is blameless for the injury that occurred. Vicarious liability is therefore a form of strict liability: so long as a person for whose actions a vicariously liable defendant is responsible commits a tort in qualifying circumstances, then judgment lies even where the defendant took all appropriate precautions.[32]

In the U.S., vicarious liability functions as a subset of the law of agency.[33] Scholars have offered competing accounts of the origins and development of vicarious liability, tracing its roots to Roman and early Germanic law. Among several forms of vicarious liability, the doctrine of *respondeat superior*, Latin for "let the master answer," holds an employer liable for injuries caused by its employees.[34]

Several well-recognized limitations cabin the reach of *respondeat superior* vicarious liability. One, captured in the distinction between "detour" and "frolic," holds an employer liable when an employee commits a tort on a brief, usually authorized diversion from the normal course of duty, but not when the employee departs significantly from the employer's business.[35] A second limitation restricts *respondeat superior*

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32. *See generally* PAULA GILIKER, VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE (2010); ANTHONY GRAY, VICARIOUS LIABILITY: CRITIQUE AND REFORM (2018).

33. GRAY, *supra* note 32, at 89.

34. Two primary rationales have been advanced for this doctrine. One, the "servant's tort theory," explains that the doctrine imposes liability on employers for the wrongful conduct of their employees; the other, the "master's tort theory," deems the employer liable by attribution. GILIKER, *supra* note 32, at 13.

35. The classic treatment of this distinction is Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923).

vicarious liability to situations where the relationship between the tortfeasor and vicariously liable defendant is that of employee-employer.[36] Vicarious liability has typically not been imposed in cases involving independent contractors and other non-employees who may act, or be seen to act, on a defendant's behalf;[37] it has, however, sometimes been imputed to volunteers.[38] Third, the "borrowed servant" doctrine comes into play where a tortfeasor may be, or may act as, the employee of more than one employer simultaneously.[39] Its contours vary among jurisdictions, but many courts impose *respondeat superior* vicarious liability on the "borrowing" employer (say, a general contractor who leased a crane from an equipment rental company and arranged for the rental company's employees to operate it) if the plaintiff can show that the original employer (the rental company) allowed its employee to work for the borrowing employer and if at the time of the tort the employee's work was in practice under the borrowing employer's control.[40]

But the most significant limitation on the doctrine of *respondeat superior* vicarious liability, and the one on which this Article will focus, limits the doctrine's operation to cases

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36. A parallel doctrine, that of apparent agency vicarious liability, applies when the relationship is agent-principal rather than employee-employer. *See* Stephen M. Bainbridge, AGENCY, PARTNERSHIPS & LLCS 43–45, 79 (3d ed. 2018). For its application in the intentional tort context, see, e.g., *Moses v. Diocese of Colorado*, 863 P.2d 310, 329–31 (Colo. 1993). Few cases involving clergy sexual abuse have invoked the apparent agency doctrine, and this Article does not consider it further. Nor does this Article examine the sporadic cases in which plaintiffs have asked courts to impose vicarious liability on religious employers for ratifying clergymembers' torts. *See, e.g.*, Brownlee v. Catholic Charities of Archdiocese of Chicago, No. 16-CV-00665, 2018 WL 1519155 (N.D. Ill. Mar. 28, 2018); Gagne v. O'Donoghue, No. CA 941158, 1996 WL 1185145 (Mass. Super. Ct. June 26, 1996).

37. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

38. *Id.* at § 225.

39. *See* DANIEL S. KLEINBERGER, AGENCY, PARTNERSHIPS, AND LLCS 132 (4th ed. 2012).

40. *See id.* at 133; *see, e.g.*, Parker v. Vanderbilt Univ., 767 S.W.2d 412, 416 (Tenn. Ct. App. 1988); *see also* Morgan v. ABC Mfr., 710 So. 2d 1077, 1079–82 (La. 1998).

where a tortfeasor is acting within the scope of her or his employment. The modern "scope of employment" test emerged from the practice of judges who, historically, inquired whether the actions of a "servant" were for the benefit or purpose of the "master"; they held the master vicariously liable only if the answer was yes.[41] In the U.S., the *Restatement (Second) of Agency* offers the most influential test for determining whether an employee is acting within the scope of employment:

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.[42]

Debates about the interpretation of these provisions, and of

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41. GRAY, *supra* note 32, at 12–20.

42. RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW. INST. 1958); *cf. id.* § 209. The *Third Restatement* offers a somewhat broader formulation:

> An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (AM. LAW. INST. 2006). By abandoning the framework of the *Second Restatement*, in which a plaintiff bears the burden of proving each of the four elements of § 228(1)(a)–(d), the *Third Restatement* is more friendly to plaintiffs. While most of the cases this Article discusses below cite the *Second Restatement*, the *Third Restatement* better reflects the results of these and similar cases.

counterpart common-law rules in various states and countries, form the backdrop to almost all the cases discussed below.

But if *respondeat superior* vicarious liability runs counter to the usual rules of tort law, why have courts imposed it? "It is fair to say that it has proven to be extremely difficult to articulate a unifying rationale for the law regarding vicarious liability."[43] Courts have struggled to map the boundaries of *respondeat superior* vicarious liability in ways that limit its reach only to cases where an employer can reasonably, or perhaps even morally, be said to bear responsibility for employees' torts. It is not surprising, therefore, that courts have often turned to public policy rationales, far more here than in regard to other tort doctrines.

Courts and commentators typically cite three rationales for *respondeat superior* vicarious liability.[44] The first of them concerns deterrence. The threat of being held strictly liable for employees' torts should prompt employers to take measures to minimize the risk that injuries will occur. For instance, employers might screen prospective employees more carefully, discipline or discharge careless employees more rigorously, and install safety mechanisms more comprehensively. When they know courts will impose liability even in the absence of fault, employers will have an incentive to minimize risk—or, at least, so goes the theory. Proponents of this rationale have suggested that vicarious liability is particularly effective where it may not be possible for a fact-finder to determine whether an employer has been negligent; in such instances, vicarious liability can serve as a practical substitute for negligence.[45] Yet critics have

43. GRAY, *supra* note 32, at 21.

44. KLEINBERGER, *supra* note 39, at 101.

45. *See generally* Catherine M. Sharkey, *Institutional Liability for Employees' Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages*, 53 VAL. U. L. REV. 1 (2018).

cautioned that vicarious liability does not necessarily produce the promised deterrence. Where the cost of implementing safeguards is higher than the cost of paying judgments, an employer will have no economic motivation to act.

A second rationale involves compensation. Where employees are judgment-proof, vicarious liability can increase the chance that victims will receive compensation for injuries. And related to compensation is a third rationale, the one most strongly advocated by law and economics scholars. They have noted that vicarious liability efficiently allocates to employers the costs of torts arising from their business. Employers, unlike victims and employees, generally have the capacity to spread such costs across their operations, whether by increasing prices or rates or purchasing liability insurance.[46] Several commentators have described this rationale in enterprise risk terms: that is, vicarious liability assigns to an employer the full cost its operations impose on society at large.[47] Other scholars have used alternative language, describing the rationale as that of "balancing the damage inflicted by agents in the course and scope of their agency against the benefit that the principal gets from the agent's work."[48]

But while courts have broadly embraced vicarious liability in negligence cases, most jurisdictions have been hesitant to do so when torts are intentional. This is particularly true for sexual abuse and other forms of sexual misconduct. Because sexual torts rarely advance (or even

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46. *See generally* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965).

47. *See, e.g.*, Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1246 (1984).

48. Kelly W.G. Clark et al., *Of Compelling Interest: The Intersection of Religious Freedom and Civil Liability in the Portland Priest Sex Abuse Cases*, 85 OR. L. REV. 481, 489 (2006).

seek to advance) an employer's interest, and because employers do not authorize or permit sexual misconduct, courts have routinely found, under the scope of employment test, that these intentional torts do not fall within the scope of employment and cannot be imputed to employers. Many courts have treated this conclusion as so self-evident that they have resolved the issue as a matter of law.

Dismissing *respondeat superior* vicarious liability cases where employees have committed sexual misconduct is one of four approaches that courts have taken. The other three, which courts have not always distinguished with clarity, permit but seek to limit the reach of *respondeat superior* vicarious liability. In one line of cases, courts have imposed liability where they have been able to cognize an employee's sexual misconduct as a misguided attempt to perform authorized duties. In a second line of cases, courts have held employers liable for intentional torts that can be said to be characteristic risks of their enterprise. Still other courts have undertaken fact-intensive inquiries into the relationship between an employee's authorized responsibilities and the tort being alleged.

Each of the next four Parts describes one of these approaches, highlighting its advantages and disadvantages with reference to cases involving private employers. Numerous other cases have involved sexual misconduct by employees of the state—e.g., police officers, other law enforcement personnel, and government officials—but this Article deliberately omits them from further consideration. These cases implicate the doctrine of sovereign immunity and involve claims about the coercive authority with which society clothes public officials, especially police officers.[49]

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49. I am grateful to Jed Shugerman for this point. Cases where governments have been held vicariously liable for the sexual misconduct of law enforcement officers include *Mary M. v. City of Los Angeles*, where the court observed that "[p]olice officers occupy a unique position of trust in our society" and that "[t]hose who challenge an officer's actions do so at their peril." 814 P.2d 1341, 1342 (Cal. 1991). California courts have generally refused to apply *Mary M.* to tortfeasors

Private employees, by contrast, do not wield authority over life and death, arrest, incarceration, or deportation. Even though some religious institutions teach their followers that clergymembers may be able to affect their standing in the afterlife, courts have typically not analogized their authority with that of police and other public employees.

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other than police. *See, e.g.*, Z.V. v. Cty. of Riverside, 189 Cal. Rptr. 3d 570, 576–80 (Ct. App. 2015). Among similar cases, see *St. John v. United States*, 240 F.3d 671 (8th Cir. 2001); *Red Elk v. United States*, 62 F.3d 1102 (8th Cir. 1995); *Cox v. Evansville Police Department*, 107 N.E.3d 453 (Ind. 2018). *But see* Primeaux v. United States, 181 F.3d 876, 882 (8th Cir. 1999) (refusing to impose liability on the Bureau of Indian Affairs for a rape perpetrated by one of its officers, noting that the officer was "unarmed, out of uniform, and off duty, insofar as his law enforcement responsibilities were concerned").

III. FIRST APPROACH: NO *RESPONDEAT SUPERIOR* VICARIOUS LIABILITY

As seen above, a majority of U.S. courts have elected not to impose vicarious liability on employers for the sexual misconduct of their employees. A sampling of cases illustrates the courts' tendency to find, under the scope of employment test, that sexual misconduct is simply not within a tortfeasor's duties. In Georgia, a court dismissed a *respondeat superior* claim against an employee's former employer, holding that her supervisor's sexual harassment was "not in furtherance of [the defendant's] business but independent of the relation of master and servant."[50] A boarding school likewise escaped *respondeat superior* liability for a teacher's sexual misconduct with one of his students because his actions were "personal in nature and unrelated to the performance of [his] employment duties."[51] In Connecticut, a court granted summary judgment in favor of another boarding school in similar circumstances, dismissing a *respondeat superior* claim for intentional infliction of emotional distress because the plaintiff could not show that the school intended its teacher to abuse him.[52]

Even where the circumstances of a tortfeasor's employment have facilitated sexual misconduct, most courts have persisted in refusing to impose vicarious liability. In *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, a hospital lab technician purported to perform an ultrasound examination on a pregnant woman but penetrated her with his fingers and ultrasound wand.[53] The Supreme Court of California affirmed a grant of summary judgment for the

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50. Cox v. Brazo, 303 S.E.2d 71, 73 (Ga. Ct. App. 1983), *aff'd*, 307 S.E.2d 474 (Ga. 1983); *see also* Doe v. Fulton-DeKalb Hosp. Auth., 628 F.3d 1325, 1333 (11th Cir. 2010).

51. Doe v. Vill. of St. Joseph, 415 S.E.2d 56, 57 (Ga. Ct. App. 1992).

52. Doe v. Hotchkiss Sch., No. 3:15-CV-160 (VAB), 2019 WL 1099027, at *15 (D. Conn. Mar. 8, 2019).

53. 907 P.2d 358, 359–60 (Cal. 1995).

hospital, holding that because the technician "simply took advantage of solitude with a naïve patient to commit an assault," therefore "his motivating emotions were not causally attributable to his employment," and "those personal motivations were not generated by or an outgrowth of workplace responsibilities, conditions, or events."[54] A lower California court relied on *Lisa M.* in a subsequent case involving a scoutmaster who repeatedly molested a member of his troop during overnight events. The court was emphatic: "we reject the proposition that simply because the scoutmaster/scouting relationship provided the opportunity" for the abuse, the Scouts should be held vicariously liable for the scoutmaster's misconduct.[55]

Courts have hesitated to impose vicarious liability for the sexual misconduct of employees generally, but they have been especially reticent to do so for clergy. In many jurisdictions, courts have held, as a matter of law, that no reasonable factfinder could conclude that sexual misconduct is within the scope of a clergymember's employment. Paradigmatic of the numerous cases of this variety is *Tichenor v. Roman Catholic Church of Archdiocese of New Orleans*, in which the Fifth Circuit upheld a grant of summary judgment for two religious employers.[56] Ronald Tichenor alleged that his boyhood priest, Dino Cinel, had taken sexually explicit photographs and videos of him, as well as "performed illicit acts upon him."[57] Tichenor sued the priest, the parish, and the local archdiocese. Both the district court and the Fifth Circuit rejected his *respondeat superior* theory, the Fifth Circuit doing so in two paragraphs that

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54. *Id.* at 364; *see also* Piedmont Hosp., Inc. v. Palladino, 580 S.E.2d 215, 216 (Ga. 2003); G.L. v. Kaiser Found. Hosp., Inc., 757 P.2d 1347, 1350 (Or. 1988).

55. Juarez v. Boy Scouts of Am., Inc., 97 Cal. Rptr. 2d 12, 24 (Ct. App. 2000).

56. 32 F.3d 953 (5th Cir. 1994). Many commentators trace public awareness of sexual abuse by Catholic clergy in the U.S. to another Louisiana case, that of Gilbert Gauthe. *See generally* JASON BERRY, LEAD US NOT INTO TEMPTATION (1992).

57. *Tichenor*, 32 F.3d at 957.

merit quotation in full:

> We reject the contention that Cinel was acting within the scope of his employment. Although a priest's duties are less susceptible to definition than, say, a store clerk, we can nonetheless outline the basics. It is a priest's duty to represent the word of God, as embodied in the Scriptures. The central aspect of that duty is to aid people in their relationship with God and, also, the Church. Moreover, it is his duty to help others—whose paths may have wandered—to find safety and security in the doctrines of Catholic theology.
>
> It would be hard to imagine a more difficult argument than that Cinel's illicit sexual pursuits were somehow related to his duties as a priest or that they in any way furthered the interests of St. Rita's, his employer. Instead, given Cinel's vow of celibacy and the Catholic Church's unbending stand condemning homosexual relations, Cinel's acts represent the paradigmatic pursuit of "some purpose unrelated to his master's business".[58]

The Fifth Circuit's logic is straightforward: as a matter of law, a priest's employment responsibilities cannot include sexual abuse. Cinel's torts are by definition unrelated to his employment and cannot advance his employer's interests; therefore, religious employers cannot be held vicariously liable under *respondeat superior*. In *Tichenor*, the court amplified these general rules with specific observations about the Catholic Church's teachings concerning the behavior of clergy. For the court, the fact that the Church prohibits sexual activity on the part of priests and strongly rejects same-sex relations confirms that Cinel's actions must fall outside the scope of his employment.

Numerous courts have dismissed *respondeat superior* causes of action against religious employers in similar terms, sometimes applying the scope of employment test in detail,[59]

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58. *Id.* at 959–60 (footnotes omitted).

59. *See, e.g.*, Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66, 71 (D. Conn. 1995); H.R.B. v. J.L.G., 913 S.W.2d 92, 97 (Mo. Ct. App. 1995); Alpharetta First United Methodist Church v. Stewart, 472 S.E.2d 532, 535–36 (Ga. Ct. App. 1996); L.L.N. v. Clauder, 563 N.W.2d 434, 436 (Wis. 1997); N.H. v. Presbyterian Church (U.S.A.), 998 P.2d 592, 599 (Okla. 1999); Doe v. Liberatore, 478 F. Supp. 2d 742, 758 (M.D. Pa. 2007); Lara v. Legionaries of Christ, No. X03HHDCV106016974S, 2011 WL 4347919, at *4 (Conn. Super. Ct. Aug. 30,

other times in more conclusory fashion.[60] In litigation involving Catholic clergy, courts have echoed the observation in *Tichenor* that the church specifically forbids its priests to engage in sexual conduct. Therefore, "[w]hen a priest has sexual intercourse with a parishioner it is not part of the priest's duties nor customary within the business of the church."[61] In perhaps the strongest statement of this variety, the Supreme Court of Kentucky commented that to allow *respondeat superior* causes of action "would in effect require the diocese to become an absolute insurer for the behavior of anyone who was in the priesthood."[62] Even in cases involving other religious traditions, courts have repeatedly quoted the remark in *Tichenor* that "[i]t would be hard to imagine a more difficult argument" for clergy sexual abuse plaintiffs to make.[63]

Distressing though this approach has been to many

2011); Bernie v. Catholic Diocese of Sioux Falls, 821 N.W.2d 232, 237 (S.D. 2012).

60. *See, e.g.*, Gibson v. Brewer, 952 S.W.2d 239, 245–46 (Mo. 1997); Dumais v. Hartford Roman Catholic Diocese, No. X07CV010077631S, 2002 WL 31015708, at *1 (Conn. Super. Ct. July 31, 2002).

61. Destefano v. Grabrian, 763 P.2d 275, 287 (Colo. 1988).

62. Osborne v. Payne, 31 S.W.3d 911, 915 (Ky. 2000).

63. *E.g.*, Kennedy v. Roman Catholic Diocese of Burlington, Vermont, Inc., 921 F. Supp. 231, 233 (D. Vt. 1996); *Bernie*, 821 N.W.2d at 239; Doe v. Kanakuk Ministries, No. 3:13–CV–3030–G, 2014 WL 3673029, at *7 (N.D. Tex. July 24, 2014). Occasionally, courts that have rejected *respondeat superior* causes of action have distinguished the cases before them from the exceptional sets of circumstances, which will be discussed in the following three Parts, in which other courts have occasionally imposed vicarious liability. *See, e.g.*, Doe v. Villa Marie Educ. Ctr., No. FBTCV165032101S, 2017 WL 3671352, at *4 (Conn. Super. Ct. July 20, 2017); Givens v. St. Adalbert Church, No. HHDCV126032459S, 2014 WL 5094304, at *3 (Conn. Super. Ct. July 17, 2014); Gough v. St. Peters Episcopal, No. CV106012967S, 2011 WL 2611747, at *3 (Conn. Super. Ct. June 2, 2011). In California, where an employer can be held vicariously liable for torts that are foreseeable within the context of a particular employment situation, courts have held specifically that sexual assault is not a foreseeable outcome of the duties that clergymembers or religious schoolteachers are hired to perform. *See, e.g.*, Rita M. v. Roman Catholic Archbishop, 232 Cal. Rptr. 685, 690 (Ct. App. 1986) ("It would defy every notion of logic and fairness to say that sexual activity between a priest and a parishioner is characteristic of the Archbishop of the Roman Catholic Church."); Jeffrey E. v. Cent. Baptist Church, 243 Cal. Rptr. 128, 130 (Ct. App. 1988).

victim-survivors of sexual abuse, it does possess some advantages. First, it recognizes that employees who commit sexual misconduct are not acting on their employers' behalf. It acknowledges that employers—and perhaps religious employers in a particular way—do not intend their employees to commit sexual misconduct and often take measures to prevent it, and so this approach upholds the general tort principle that liability is not imposed without fault. Because this approach allows courts simply to dismiss *respondeat superior* claims as a matter of law, it does not necessitate inquiries into the internal communications, decisions, or doctrines of religious institutions, which in turn avoids the constitutional challenges that can arise when courts examine religious employers' personnel practices. Therefore, this approach affirms what some commentators have called the doctrine of church autonomy. It likewise promotes judicial economy, because it enables courts to dispose of vicarious liability causes of action with minimal litigation.

But these advantages come at a price. Because this approach bars plaintiffs from recovering from religious employers unless they are able to make out a case for negligence or another cause of action, it lowers the chance that those injured by clergy sexual abuse will be able to obtain redress. As noted above, plaintiffs often find it difficult to prevail in negligence claims against religious employers. Sometimes there is insufficient evidence that an institution knew or should have known about an employee's misconduct, especially if a particular victim was the first to be abused by that employee. Moreover, institutions often raise constitutional objections to the investigation of their internal practices. Because abusive clergymembers are often judgment-proof, a bar to recovery against religious employers often renders plaintiffs unable to receive the resources necessary to address the harms inflicted upon them. At the same time, as appears in greater depth below, this approach fails to acknowledge the reality that the

authority with which employers, especially religious employers, clothe their employees may facilitate the commission of sexual torts. In numerous cases, victims and their families have asserted that, but for an abuser's status as a clergymember, they would not have afforded him or her the access and trust that facilitated episodes of abuse.

IV. SECOND APPROACH: *RESPONDEAT SUPERIOR* VICARIOUS LIABILITY FOR MISGUIDED ATTEMPTS

The following Parts describe three forms of reasoning that courts have used to hold employers vicariously liable for employee sexual misconduct. The approaches are all heavily fact-dependent, yet each in a different way. "That *respondeat superior* decisions often turn on subtle distinctions in the facts, to be left to the province of the fact finder, is due in large part to the fact that there is no bright line to apply in determining when liability attaches to the employer."[64]

Some courts have imposed liability on the theory that tortfeasors were engaged in misguided attempts to carry out authorized job responsibilities. It does not appear that courts have used this method of reasoning with regard to sexual misconduct in secular workplaces; the seminal cases have all involved other torts. In *Pelletier v. Bilbiles*, a young man working in a candy shop owned and operated by his father beat a customer who had littered on the shop floor.[65] The jury returned a verdict in the customer's favor, but the trial court entered judgment notwithstanding the verdict, holding as a matter of law that *respondeat superior* vicarious liability did not apply.[66] The Supreme Court of Connecticut set aside the judgment, reasoning that the jury had not been unreasonable when it found that the son's actions constituted "an extremely forceful, although misguided, method of discouraging patrons" from littering.[67] Even though the shop owner had not specifically authorized his son to assault unruly customers, he had instructed him to ensure that customers did not misbehave; the fact that the son chose a violent method of implementing this directive did not absolve the father from liability.[68] A lower Connecticut

64. Webb v. United States, 24 F. Supp. 2d 608, 614 (W.D. Va. 2000).

65. 227 A.2d 251, 252 (Conn. 1967).

66. *Id.* at 252–53.

67. *Id.* at 253.

68. *Id.*

court, applying *Pelletier*, subsequently held the Young Men's Christian Association liable for injuries caused by an employee who punched a patron in the head during a lunchtime basketball game.[69] Among the employee's responsibilities was keeping order during games that occasionally became rowdy, and the court found that the employee had beat the patron "in a misguided attempt to maintain order on the basketball court."[70] As in *Pelletier*, the court held it not to be a valid defense that the employer had not authorized, much less condoned, the employee's activities.[71]

In another Connecticut case citing *Pelletier*, the court employed analogous reasoning to allow a *respondeat superior* claim against a religious order to survive summary judgment.[72] In *Mullen v. Horton*, the plaintiff sought pastoral and psychological counseling from a priest of the Missionary Oblates of Mary Immaculate who was also a practicing psychologist. About eight months into the treatment, Horton and Mullen began to engage in sexual activity during their counseling sessions, for which Horton billed Mullen's insurance company.[73] The court held that the Oblates benefited from Horton's employment as a psychologist, not least because his vow of poverty meant that all proceeds from his practice were paid to the order.[74] A reasonable factfinder could conclude that Horton was acting within the scope of his employment in one of two ways: either by construing his sexual activities as a misguided means of conducting pastoral counseling or by finding that the sexual

69. Glucksman v. Walters, 659 A.2d 1217, 1219–20 (Conn. App. Ct. 1995).

70. *Id.* at 1220.

71. *Id.*

72. Mullen v. Horton, 700 A.2d 1377, 1381 (Conn. App. Ct. 1997), *overruled on other grounds by* Cefaratti v. Aranow, 141 A.3d 752 (Conn. 2016).

73. *Id.* at 1379.

74. *Id.* at 1380.

activities grew out of counseling he was hired to provide.[75] Distinguishing cases in which priests had "wholly abandoned [their] pastoral duties," the court concluded that whether Horton was carrying out his work in a misguided way was a disputed issue of fact meriting trial.[76]

Yet another case of this sort arose in Oregon, whose distinctive *respondeat superior* jurisprudence I will examine in Part VI. In *John Doe 105 and Jane Doe 101 v. Archdiocese of Portland in Oregon*, the court considered the complaints of two plaintiffs who alleged that a nun had abused them while serving as their schoolteacher. She held one plaintiff's penis while he urinated, hit him with books, and pushed him into chalkboards, and she refused the other plaintiff permission to go to the bathroom during class, insisting instead that she sit in her own excrement.[77] The court denied the religious employer's motion for summary judgment, holding in part that it could be found vicariously liable if the factfinder concluded that the nun's actions constituted misguided attempts to promote classroom discipline.[78]

Like the previous approach, characterizing employee sexual misconduct as a misguided attempt to perform job responsibilities has advantages and disadvantages. As in *Pelletier* and *Glucksman*, some cases do feature circumstances in which employees, seeking to achieve the outcomes desired by their employers, genuinely do so overzealously, even violently. This approach provides an avenue for plaintiffs to recover where such a fact pattern obtains. But it often stretches credulity to characterize sexual misconduct in these terms. To the extent that the priest in *Mullen* appears to have acted to satisfy his own

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75. *Id.* at 1380–81. The second form of reasoning resembles the approach discussed *infra* Part VI.

76. *Id.* at 1383.

77. Doe 105 v. Archdiocese of Portland in Oregon, No. CV 07-1130-PK, 2008 WL 11389644, at *3 (D. Or. Jan. 8, 2008).

78. *Id.* at *7.

desires, for instance, it is not credible that he was performing his duties in mistaken fashion. The nun in *Does 105 and 101* presents another instance of what the court called "classroom discipline taken too far," but the facts recited in the court's opinion seem insufficient to determine whether the nun thought of herself, or a reasonable observer would have found her, to have been enforcing discipline.[79] Herein lies a potential constitutional problem, because making such determinations requires courts to distinguish reasonable from misguided forms of ministry within any given religious tradition, a matter normally reserved to ecclesiastical authorities.

79. *Id.*

V. THIRD APPROACH: *RESPONDEAT SUPERIOR* VICARIOUS LIABILITY FOR CHARACTERISTIC RISKS

In the next approach to *respondeat superior* vicarious liability, courts have held employers liable for employees' intentional torts that, as a matter of law, they deem characteristic risks of the employers' enterprise. The distinction between this approach and that discussed in the next Part, which seeks to identify the relationship between a *specific* tort and a particular employee's job responsibilities, is a nuanced one that parties and even some courts have blurred.

Exemplary of this third approach is *Ira S. Bushey & Sons, Inc. v. United States*. *Bushey* involved both a state employer and misconduct not of a sexual nature, and it is therefore readily distinguishable from cases involving clergy sexual abuse. Nevertheless, the *Bushey* court's analysis has been so influential in the development of the "characteristic risks" approach that it requires discussion. *Bushey* involved an intoxicated sailor who, in returning from shore leave, severely damaged a drydock and Coast Guard vessel.[80] Reasoning that the doctrine of *respondeat superior* is grounded "in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities," Judge Henry Friendly concluded that the sailor's conduct "was not so 'unforeseeable' as to make it unfair to charge the Government with responsibility."[81] Even though the Coast Guard might not have been able to foresee the sailor's precise actions, Judge Friendly wrote, it is well enough known that sailors on shore leave drink to excess; the United States, by creating or tolerating circumstances in which such conduct might create injury, is liable for its employees' torts.[82]

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80. Ira S. Bushey & Sons, Inc. v. United States., 398 F.2d 167, 168 (2d Cir. 1968).

81. *Id.* at 171.

82. *Id.* at 172; *see also* Taber v. Maine, 67 F.3d 1029, 1037 (2d Cir. 1995).

Some years later, a California appellate court relied on *Bushey*, and refined Judge Friendly's reasoning, in a case involving a subcontractor whose employees became intoxicated on a job site and battered employees of the general contractor in an altercation over a bulldozer.[83] In *Rodgers v. Kemper Construction Co.*, the court cited California's primary rationale for *respondeat superior* vicarious liability: that an employer, rather than a victim or tortfeasor, is best positioned to absorb and spread the risk of injury.[84] When, the court asked, is a risk so typical of an enterprise that employers should be held liable as a matter of policy? Its answer is worth quoting in full:

> One way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, "foreseeability" in this context must be distinguished from "foreseeability" as a test for negligence. . . . "[F]oreseeability" as a test for *Respondeat superior* merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.[85]

As the court noted, with regard to intentional torts the concept of foreseeability entails something other than it does in the determination of proximate cause. For the court's purposes, foreseeability denotes a typical or characteristic risk of a particular kind of business, a risk that a court could find sufficiently inherent in the industry that it would be fair to assign the risk to employers rather than injured parties. The *Rodgers* court concluded that it was foreseeable in this sense that a subcontractor's employees would come in contact with the employees of other contractors on the site, that such contacts would result in disagreements and

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83. Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 146–47 (Ct. App. 1975).

84. *Id.* at 148.

85. *Id.* at 148–49 (citations omitted) (citing 2 HARPER & JAMES, THE LAW OF TORTS 1375–78 (1956)).

altercations, and that injuries would result.[86]

Bushey and *Rodgers* have numerous progeny, cases in which courts have identified activities that, rather than being related to a specific employee's job responsibilities, are characteristic of a particular *kind* of enterprise. The Supreme Court of Minnesota has been particularly active in applying this approach to employee sexual misconduct. In *Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd.*, a patient sued the clinic that employed a therapist who had touched her sexually during their counseling sessions. The clinic's policies barred all sexual contact between therapists and patients, but at trial, an expert testified that "sexual relations between a psychologist and a patient is [sic] a well-known hazard and thus, to a degree, foreseeable and a risk of employment."[87] On appeal, and over the strenuous objection of a dissenting justice, the court found that this testimony justified a remand for further factual development.[88] This result highlights the blurry boundary between an approach to *respondeat superior* vicarious liability concerned with characteristic risks and a somewhat different approach, discussed in the following Part, that inquires into the circumstances of a particular tort. Had the court employed a pure characteristic risks approach, a remand would not strictly have been necessary.

The Minnesota high court revisited the issue in subsequent cases. In *P.L. v. Aubert*, which involved a schoolteacher who engaged in sexual activity with a student on school property and during school hours, the court clarified its holding in *Marston*. "It was the foreseeability of the risk that determined the outcome of the *Marston* case," but in *P.L.* there was insufficient evidence that teacher-

86. *Id.* at 150.

87. Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 311 (Minn. 1983).

88. *Id.* at 311; *see also id.* at 312–14 (Peterson, J., dissenting).

student sexual relationships are a "well-known hazard."[89] In *Fahrendorff ex rel. Fahrendorff v. North Homes, Inc.*, where an employee of a group home for children in crisis was accused of assaulting them sexually, the court again relied on expert testimony to the effect that such conduct is a "well-known hazard" (i.e., a characteristic risk) of group homes. The court held that a *respondeat superior* cause of action should survive despite incomplete evidence concerning the perpetrator's job responsibilities or the specific circumstances of the assaults, because "sexual abuse by a group home parent is sufficiently common in the group home industry that, as a matter of fairness, an employer engaged in that business should bear the loss associated with such abuse as a foreseeable cost."[90]

Only in recent years have courts employed this approach in lawsuits involving sexual misconduct by employees of religious institutions. In a Connecticut case, *Nelligan v. Norwich Roman Catholic Diocese*, the court acknowledged that most jurisdictions have barred *respondeat superior* claims for clergy sexual misconduct but noted that relevant facts had recently come to light. Citing a comprehensive study of sexual abuse claims in the Catholic Church published by John Jay College of Criminal Justice, the court observed that the "number of reported allegations of sexual assaults by priests has risen so dramatically that one must wonder whether [earlier judges] would be so quick to conclude that there could not possibly be a factual dispute over whether such molestation could take place within the scope of a priest's employment."[91] In *P.K. v. Hartford Roman Catholic Diocese Corp.*, the court employed an identical rationale in refusing to dismiss a *respondeat superior* claim

89. P.L. v. Aubert, 545 N.W.2d 666, 668 (Minn. 1996).

90. Fahrendorff *ex rel.* Fahrendorff v. N. Homes, Inc., 597 N.W.2d 905, 912 (Minn. 1999).

91. Nelligan v. Norwich R.C. Diocese, No. CV020099218S, 2004 WL 574330, at *2 (Conn. Super. Ct. Mar. 5, 2004).

against a different Connecticut diocese.[92] The study that both these courts cited, which the U.S. Conference of Catholic Bishops commissioned from a prominent secular research institution, garnered wide praise for its rigor; it concluded that approximately 4 percent of priests in ministry had credibly been accused of sexual misconduct.[93]

In *Nelligan* and *P.K.*, the import of the John Jay study was not that it established sexual abuse to be within the scope of a priest's employment, but rather that "it can no longer be said, as a matter of law, that such conduct represents one of those exceptional cases in which the servant's digression from duty is so clear cut that the disposition of the case is a matter of law."[94] The court in *P.K.* explicitly labeled this a question of the "foreseeability of the unauthorized conduct in question," drawing analogies with illicit sexual contact between a therapist and client and (perhaps remembering, but not citing, *Pelletier* and *Glucksman*) altercations at stores and on basketball courts.[95] Neither Connecticut court referred to out-of-state cases such as *Bushey* and *Rodgers*, but their reasoning is analogous. If it can be demonstrated that a particular kind of injury is "a generally foreseeable consequence of the activity," then it is appropriate to impose vicarious liability when an employee's conduct "is not so unusual or startling that it would seem unfair."[96]

The number of courts that have employed this approach to clergy sexual misconduct remains tiny. One court has

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92. P.K. v. Hartford Roman Catholic Diocesan Corp., No. 3:13–CV–00211–WWE, 2014 WL 4536626, at *4 (D. Conn. Sept. 11, 2014).

93. JOHN JAY COLL. OF CRIMINAL JUSTICE, CITY UNIV. OF N.Y., THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950–2002 4 (2004).

94. Nelligan, 2004 WL 574330, at *2 (quoting Mullen v. Horton, 700 A.2d 1377, 1383 (Conn. App. 1997)); *see also* P.K., 2014 WL 4536626, at *4.

95. P.K., 2014 WL 4536626, at *3.

96. Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 148–49 (Ct. App. 1975).

sharply narrowed the availability of *respondeat superior* for characteristic risks created by religious employers, requiring that evidence proffered to establish the foreseeability of religious sexual abuse be precisely on point. In the same year *Nelligan* was decided, another Connecticut plaintiff cited the John Jay study in opposition to a religious order's motion to dismiss, but the court noted that the plaintiff had alleged abuse by a nun rather than a priest. "There are no comparable statistics or studies involving sexual abuse, or allegations of such abuse, by nuns."[97] The court granted the religious employer's motion.

Advocates seeking to establish that sexual abuse is foreseeable within religious institutions now have additional studies on which to draw, and as research into the causes and scope of the Catholic sexual abuse crises has proliferated, foreseeability arguments may be increasingly likely to succeed.[98] Jeffrey Anderson, one of the attorneys most active in representing clergy sexual abuse plaintiffs, has argued that internal church documents concerning abuse, which date back to the mid-1980s, constitute strong evidence of a characteristic risk.[99] Moreover, insurers that previously sold general liability policies that covered clergy sexual misconduct have ceased doing so, requiring that institutions now purchase separate insurance against a risk the insurers perceive to be characteristic of religious settings.

An approach to *respondeat superior* vicarious liability that asks whether a risk is characteristic of a particular kind of enterprise holds numerous attractions. It provides a relatively efficient means of allocating risks to the enterprises that create them, rather than letting injuries fall

97. Sparano v. Daughters of Wisdom, Inc., No. X08CV030199399, 2004 WL 1730183, at *4 (Conn. Super. Ct. July 1, 2004).

98. *See, e.g.*, JOHN JAY COLL. OF CRIMINAL JUSTICE, CITY UNIV. OF N.Y., THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950–2002 (Supp. 2006).

99. Anderson et al., *supra* note 10, § 19.

on those who derive no upside benefit. Under this approach, both religious and secular employers would have the benefit of knowing whether they will generally be subject to liability for certain kinds of torts, and they would therefore be able to decide whether to purchase insurance. As courts clarify over time which risks are characteristic of which kinds of enterprises, greater judicial economy would result.

But this approach is not without substantial drawbacks as well. Chiefly, while it is true that certain enterprises do entail certain risks, there is a fine line between identifying risks and trafficking in stereotypes. The drunken sailor whom the court described in *Bushey* is not far from a caricature, and it is uncertain on what sources of information Judge Friendly drew in framing his opinion. To the extent that such characterizations reflect stereotypes, they may perpetuate implicit or explicit biases against those who work in socially undesirable or stigmatized professions. If this approach were to perpetuate bias against members of religious groups, it would surely offend what the Supreme Court has called the "clearest command of the Establishment Clause . . . that one religious denomination cannot be officially preferred over another."[100] And even if the threat of stereotyping can be overcome, this approach raises complicated questions about the legal application of social science. Thinking about the John Jay College study that the courts in *Nelligan* and *P.K.* cited, one might ask, for instance, what rate of occurrence of a particular tort is high enough for courts to deem it a characteristic risk; or what sample size, geographic reach, methodology, and level of statistical confidence a study must rely upon in order to count as evidence. The likelihood of disagreement about the answers

100. Larson v. Valente, 456 U.S. 228, 244 (1982). The stereotype of the Catholic priest as sexual predator has an extensive pedigree. *See, e.g.*, Angela Berlis, *Celibate or Married Priests? Polemical Gender Discourse in Nineteenth-Century Catholicism*, *in* GENDER AND CHRISTIANITY IN MODERN EUROPE: BEYOND THE FEMININIZATION THESIS 57 (Patrick Pasture et al. eds., 2012). I am grateful to James P. McCartin for this reference.

to these questions represents a disadvantage for this approach in regard to fundamental fairness and judicial economy.

VI. FOURTH APPROACH: FACT-INTENSIVE ANALYSIS OF THE CAUSAL CONNECTION OR NEXUS BETWEEN EMPLOYMENT RESPONSIBILITIES AND TORT

Only one approach to *respondeat superior* vicarious liability for employee sexual misconduct remains to be discussed, the one this Article will argue is the most effective. This approach focuses on the relationship between an employee's responsibilities and the tort being alleged, but not in the categorical manner of the characteristic risk approach. Instead, courts employing this fourth approach ask whether an employee's tortious conduct "arises out of and is reasonably incidental to the employee's legitimate work activities."[101] Other courts have framed the inquiry in different terms, asking whether the tortious conduct bears a sufficiently close connection to or exists in a sufficient causal nexus with the particular employee's job responsibilities.

This Part unfolds in three movements. First, it explores cases taking this approach that have involved secular employers.[102] Second, it investigates similar cases specifically involving sexual misconduct by the employees of religious institutions. Among U.S. jurisdictions, the Oregon Supreme Court has developed a particularly discriminating approach to these cases. Finally, it places U.S. courts in dialogue with their counterparts in several common-law countries that have explicitly developed a "close connection test" as a substitute for the traditional "scope of employment" test for *respondeat superior* vicarious liability.

A. Introducing Causal Connection Analysis

Courts have asked about the connection or nexus between tort and employment in cases involving both sexual and non-sexual misconduct. In *Leafgreen v. American Family Mutual Insurance Co.*, an insurance agent took advantage of

101. Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 348 (Alaska 1990).

102. In addition to the cases discussed below, see, e.g., *State v. Schallock*, 941 P.2d 1275 (Ariz. 1997); *VECO, Inc. v. Rosebrock*, 970 P.2d 906 (Alaska 1999).

his relationship with clients who were also personal friends; he arranged for their home to be burglarized on a date when he knew they would be out of town.[103] After the agent was arrested and pled guilty, the clients sued the insurance company that employed him. The Supreme Court of South Dakota explained that principals, including employers, may be held vicariously liable "for tortious harm caused by an agent where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which actually caused the injury."[104] The court cited numerous cases standing for the proposition that an employer is liable where it "put the agent in a position to commit" a tort, where "the agent's position facilitate[d] the consummation of" the tort, or where the tort was "well within the insignia of office with which [the agent] had been clothed."[105] These inquiries are highly dependent on the particulars of a tort and a set of employment duties; certainly, they are matters about which reasonable judges and finders of fact will disagree. Indeed, in *Leafgreen* the majority concluded that there was not a sufficient nexus between employment and tort to hold the insurance company liable. The burglary occurred five weeks after the agent took advantage of his professional role to visit his clients and gather information about their valuables; the agent learned about his clients' absence from their home because of his friendship rather than his business relationship with them; and the stolen property was in any case covered under policies issued by the employer. But the minority dissented vigorously, insisting that the insurance company "cannot wash its hands. It clothed [the agent] with an aura of honesty and respectability."[106]

South Dakota courts have applied *Leafgreen* to find that

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103. 393 N.W.2d 275, 276–77 (S.D. 1986).

104. *Id.* at 280.

105. *Id.* at 278–79.

106. *Id.* at 282 (Henderson, J., dissenting).

there was a sufficient causal nexus between employment and tort in cases involving a ranch hand who shot a hunter,[107] a bank employee who issued fraudulent promissory notes,[108] an employee of a heating and air conditioning company who assaulted a competitor's employee,[109] and a manager of an apartment complex who sexually harassed a subordinate.[110] Yet the same courts have reached the opposite conclusion in cases where the connections between employment duties and torts were less evident. In *Plamp v. Mitchell School District No. 17-2*, for instance, the court found that there was no evidence that a teacher who beat one of his students was acting in connection with his duties.[111]

Courts in other jurisdictions have proceeded similarly. In *Doe v. Samaritan Counseling Center*, a 1990 case from Alaska, the plaintiff filed suit after a counselor whom she had been seeing for emotional and spiritual support touched her sexually during counseling sessions.[112] On the plaintiff's *respondeat superior* claim, the trial court granted summary judgment for the center, but the state supreme court reversed. The majority looked to a Ninth Circuit case, *Simmons v. United States*,[113] where the court had imposed *respondeat superior* liability in connection with another therapist who took advantage of his client sexually.[114] The

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107. Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177, 177–81 (S.D. 1987).

108. Olson v. Tri-Cty. State Bank, 456 N.W.2d 132, 132–35 (S.D. 1990).

109. Kirlin v. Halverson, 758 N.W.2d 436, 441–44 (S.D. 2008).

110. Stanley v. Hall, No. CIV.05-5104-KES, 2006 WL 3138824, at *1, *14–15 (D.S.D. Oct. 31, 2006). Numerous jurisdictions beyond South Dakota have adopted this approach, including Iowa, *e.g.*, Godar v. Edwards, 588 N.W.2d 701, 705 (Iowa 1999); Riggan v. Glass, No. 06-0396, 2007 WL 911888, at *3 (Iowa Ct. App. Mar. 28, 2007), and Delaware, *e.g.*, Smith v. Liberty Mut. Ins. Co., 201 A.3d 555, 563–64 (Del. Super. Ct. 2019).

111. 565 F.3d 450, 462–63 (8th Cir. 2009); *see also* Hass v. Wentzlaff, 816 N.W.2d 96, 104–05 (S.D. 2012).

112. Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 345 (Alaska 1990).

113. Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986).

114. Moore, J., in dissent, took aim directly at *Simmons*, writing that "[c]onduct constituting an intentional violation of professional ethical standards

court found that the sexual contact had taken place in the setting of the tortfeasor's professional counseling activities. From *Simmons*, the Alaska court drew the lesson that "where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities," then the conduct is motivated to serve the employer.[115]

B. Causal Connection Analysis in Clergy Sexual Misconduct Cases

This approach to employees' intentional torts has proven effective with regard to clergy sexual misconduct as well. It appears first to have been used in reference to Catholic clergy abuse in *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, a Connecticut case from 1997.[116] The plaintiff, Frank Martinelli, was between 13 and 15 years old when Father Laurence Brett was assigned to his parish. Brett cultivated the trust of a small group of boys who were interested in the Catholic liturgy, forming them into an informal club he dubbed "Brett's Mavericks."[117] Martinelli alleged that Brett sexually assaulted him on at least three occasions, and he sued Brett and the local diocese after retrieving suppressed memories of the incidents.[118] In Connecticut, the scope of employment test for *respondeat superior* vicarious liability turns on whether "the employee was furthering the employer's business."[119] Martinelli argued, and the court found, that "at least certain aspects of the relationship between plaintiff and Father Brett advanced the Diocese's interests," specifically, the dissemination of knowledge about

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for personal benefit cannot be considered reasonably incidental to the profession." *Samaritan Counseling Ctr.*, 791 P.2d at 352 (Moore, J., dissenting).

115. *Id.* at 348 (majority opinion).

116. 989 F. Supp. 110 (D. Conn. 1997).

117. *Id.* at 112–13.

118. *Id.* at 112.

119. *Id.* at 117–18 (quoting Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66, 70 (D. Conn. 1995)).

Catholic liturgy.[120] Decisive in the court's reasoning were facts which linked two acts of abuse with Brett's administration of the sacraments. On one occasion, Brett allegedly performed oral sex on Martinelli after hearing his confession; on another, he allegedly induced Martinelli to perform oral sex on him by telling him that it was a way of receiving communion.[121] "Such circumstances," the court wrote, "in which sexual abuse was directly connected with the administration of sacraments in the context of a broader effort by the abuser to educate and interest the victim in liturgical reform," are sufficient for Martinelli's *respondeat superior* claim to survive summary judgment.[122] "[P]laintiff has raised a genuine dispute as to whether or not Father Brett's sexual activities represented a total departure from the Diocese's business."[123]

Similarly, in another Connecticut case, *Doe v. Norwich Roman Catholic Diocesan Corp.*, the plaintiff alleged that her parish priest had abused her in counseling sessions whose purpose the court characterized as "bring[ing] plaintiff closer to the Church and her religious faith, thereby increasing financial donations to the Church and volunteer time spent by plaintiff and her family in furtherance of the Church's business."[124] As in *Martinelli* and *Mullen*, the court in *Doe* found that the plaintiff's assertions about the purpose of the

120. *Martinelli*, 989 F. Supp. at 118.

121. Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 414 (2d Cir. 1999); *see also Martinelli*, 989 F. Supp. at 118 (where the trial court states these facts euphemistically).

122. *Martinelli*, 989 F. Supp. at 118.

123. *Id.* Subsequently, the trial court dismissed Martinelli's *respondeat superior* cause of action from the bench, for reasons not in the record. *See* Nelligan v. Norwich R.C. Diocese, No. CV020099218S, 2004 WL 574330, at *1 (Conn. Super. Ct. Mar. 5, 2004).

124. 309 F. Supp. 2d 247, 252 (D. Conn. 2004). The court had previously granted summary judgment for the diocese on the plaintiff's *respondeat superior* claim but allowed her to file an amended complaint alleging additional facts that connected the sexual assaults with Sullivan's work on behalf of the church. Doe v. Norwich Roman Catholic Diocesan Corp., 268 F. Supp. 2d 139, 143 (D. Conn. 2003).

counseling sessions were sufficient to connect her abuser's actions with his employment duties. It denied the diocese's motion to dismiss.[125]

In Pennsylvania as well, a court imposed *respondeat superior* vicarious liability on a religious employer. In *Nardella v. Dattilo (No. 2)*, a priest pursued a sexual relationship with an adult woman whom he had counseled during the final illness and death of her mother.[126] Their relationship developed in the context of pastoral counseling sessions that took place on church property. Analyzing the *Second Restatement* elements for the scope of employment, the court reasoned that the priest's conduct was of the type he was hired to perform, that it occurred for the most part within the time and space limits of his employment, and that he acted in part "to serve his employer by facilitating plaintiff's return to the Catholic church."[127] The court therefore denied the religious employer's motion to dismiss. Subsequent Pennsylvania courts, as well as federal courts applying Pennsylvania law, have declined to follow *Nardella*, although it has never specifically been overruled.[128]

Of U.S. jurisdictions, the one with the most distinctive and plaintiff-friendly *respondeat superior* jurisprudence is Oregon.[129] Beginning with a 1988 case, *Chesterman v. Barmon*, the Supreme Court of Oregon has expanded the scope of *respondeat superior* vicarious liability to include intentional torts that, while not committed within the scope of employment in the usual sense, constitute the

125. *Doe*, 309 F. Supp. 2d at 252.

126. 36 Pa. D. & C.4th 364, 366 (Ct. C.P. 1997).

127. *Id.* at 377–78.

128. *See, e.g.*, Doe 6 v. Pa. State Univ., 982 F. Supp. 2d 437, 443 n.8 (E.D. Pa. 2013) (declining to impose *respondeat superior* vicarious liability on university over well-publicized sexual misconduct by member of football coaching staff).

129. *See generally* Michael J. Sartor, *Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct: The Implications of* Fearing v. Bucher, 62 WASH. & LEE L. REV. 687 (2005); Clark et al., *supra* note 48; LYTTON, *supra* note 20, at 56–58.

consequences of actions that *were* performed within the scope of employment.[130] In *Chesterman*, the defendant corporation's employee took a hallucinatory drug to improve his performance at work; later, still feeling its effects, he broke into the plaintiff's home and sexually assaulted her.[131] While the trial court granted summary judgment for the employer, the Supreme Court of Oregon reversed, holding that where there is a "time-lag" between an employee's action and a subsequent harm, *respondeat superior* analysis should focus on "the *act* on which vicarious liability is based and not on when the act results in *injury*."[132] In other words, when acts undertaken within the scope of employment later produce harm, the employer is just as liable as if the act and injury were simultaneous.[133]

The court first applied its *Chesterman* analysis to clergy sexual abuse in *Fearing v. Bucher*, which it decided in 1999.[134] Fearing sued his alleged abuser, the local archdiocese, and the abuser's religious order, asserting that he had been the victim of a prolonged period of grooming that culminated in sexual assaults. As the court put it, Fearing contended that Bucher had "gained the trust and confidence of plaintiff's family as a spiritual guide and priest and as a youth pastor and mentor"; in so doing, Bucher had "also won the friendship and admiration of plaintiff himself."[135] On Fearing's theory, which both the trial and appellate courts rejected, the steps that Bucher had taken to develop a pastoral relationship and bond of trust fell squarely within the scope of his employment as a priest and youth pastor; they were actions such a minister would be expected to undertake. The state high court held that a reasonable jury

130. 753 P.2d 404, 406 (Or. 1988).

131. *Id.*

132. *Id.* at 407.

133. *See id.*

134. 977 P.2d 1163 (Or. 1999).

135. *Id.* at 1165.

could find that Bucher's actions, at least at first, were "motivated by a desire to fulfill his priestly duties" and that the sexual assaults "were the culmination of a progressive series of actions that began with and continued to involve Bucher's performance of the ordinary and authorized duties of a priest."[136] Citing *Chesterman*, the court held that for the purposes of *respondeat superior* analysis, "the focus properly is directed at whether the complaint contains sufficient allegations of Bucher's conduct that was within the scope of employment that arguably resulted in the acts that caused plaintiff's injury."[137] But the court was careful not to broaden the scope of liability to include all acts that arise out of employment responsibilities. It is not enough for the circumstances of employment merely to provide an employee the "opportunity" to commit an intentional tort. Rather, there must be a closer connection between employment and tort: the acts within the scope of employment must be "a necessary precursor" to the tort, and the tort must be "a direct outgrowth" of the employment-related conduct.[138] All of these, the court stressed, are detailed inquiries properly left to finders of fact.

Like the courts in *Mullen*, *Martinelli*, *Doe*, and *Nardella*, the court in *Fearing* found that there was a sufficiently close connection between an abusive clergymember's responsibilities and alleged sexual misconduct to impose liability on a religious employer. But Oregon's rule provides greater scope for *respondeat superior* than either Connecticut's or Pennsylvania's: it opens the door to liability even when employment-related activities and sexual torts are remote in time. The Oregon high court took a similar position in a companion case, *Lourim v. Swensen*, which involved a Boy Scout leader who, like Bucher, had taken advantage of his position to cultivate the trust of a young

136. *Id.* at 1167.

137. *Id.*

138. *Id.* at 1168.

person whom he went on to abuse.[139]

Fearing and its progeny unfolded against the backdrop of major scandals that led to the bankruptcy of the Archdiocese of Portland in 2004. The archdiocese became the first of at least twenty-three Catholic dioceses and religious orders to seek bankruptcy protection.[140] Its bankruptcy petition listed at least sixty outstanding lawsuits alleging abuse by employees, and the resolution of these cases provided Oregon state courts and federal courts applying Oregon law with numerous opportunities to test the boundaries of the state's vicarious liability doctrine.[141]

In some cases, Oregon courts found that there was an insufficient causal connection between a perpetrator's duties and a plaintiff's injuries for religious employers to be held liable. One plaintiff alleged that when he was seven or eight years old and scraped his knees in a fall, a priest in clerical garb walked by, offered to help, and took him to the basement

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139. 977 P.2d 1157, 1160 (Or. 1999). See also *Bray v. American Property Management Corp.*, 988 P.2d 933 (Or. Ct. App. 1999), where a parking garage attendant stabbed a patron whom he had previously been instructed not to allow to park in the garage. The court concluded that although the stabbing itself was not within the scope of the attendant's employment, nevertheless, as in *Fearing* and *Lourim*, the jury could have found that his conduct was "merely the culmination of a progressive series of actions that involved [the attendant's] ordinary and authorized duties." *Id.* at 936 (quoting *Lourim*, 977 P.2d at 1160). A number of courts, however, have criticized the *Fearing* line of decisions. *See, e.g.*, Bernie v. Catholic Diocese of Sioux Falls, 821 N.W.2d 232, 238–39 (S.D. 2012).

140. For a regularly updated list of diocesan and religious order bankruptcies, see *Bankruptcy Protection in the Abuse Crisis*, BISHOP ACCOUNTABILITY, http://www.bishop-accountability.org/bankruptcy.htm (last visited October 27, 2019).

141. Alan Cooperman, *Archdiocese of Portland, Ore., Declares Bankruptcy*, WASH. POST, July 7, 2004, at A01. Outside the scope of this article is the question of whether punitive damages can or should be imposed in the context of *respondeat superior* vicarious liability. The court in *Wood v. Archdiocese of Portland in Oregon*, No. 3:11-CV-1126-PK, 2012 WL 950188, at *7 (D. Or. Mar. 20, 2012), declined to do so, finding no "coherent policy rationale" for extending the reach of *Chesterman* and *Fearing* to punitive damages. *See generally The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296 (1961).

of a nearby church. On the pretext of examining the plaintiff's knees, the priest had him take his pants down and then fondled and penetrated him.[142] The court held that even though the priest was dressed as a clergyman and the assault occurred in a church basement, the priest's conduct lacked a sufficient connection with his official duties. The court stressed that the priest had no previous relationship with the plaintiff or his family, the plaintiff had not been active in the priest's parish, and the plaintiff did not remember meeting the priest until the alleged assault.[143] Even though the Catholic Church generally expects priests to be compassionate and parishioners to be obedient to clergy, there was no evidence that caring for injured children was among this priest's "*particular* employment duties in the parish."[144] Therefore, the diocese was not vicariously liable.[145]

Fearing's distinction between situations where employment merely provides the "opportunity" for misconduct and where the misconduct is a "direct outgrowth" of employment-related activities has sometimes proven difficult to apply. In another case arising from the Portland bankruptcy, a court granted summary judgment against a

142. Schmidt v. Archdiocese of Portland in Oregon, 180 P.3d 160, 162 (Or. Ct. App. 2008). Schmidt's suit also included allegations against a second priest, who he claimed masturbated in his presence when he was a high school student. *Id.* at 161. The trial court found that this second claim was time-barred, *id.* at 163–64, and the appellate court agreed, declining to reach the issue of vicarious liability, *id.* at 173–74. The state supreme court reversed on the statute of limitations and remanded the case for further fact-finding regarding vicarious liability. Schmidt v. Mt. Angel Abbey, 223 P.3d 399, 409–10 (Or. 2009). The appellate court concluded that Schmidt's allegations were sufficient to satisfy the *Fearing* standard for vicarious liability. Schmidt v. Archdiocese of Portland in Oregon, 234 P.3d 990, 993 (Or. Ct. App. 2010).

143. *Schmidt*, 180 P.3d at 177–78.

144. *Id.* at 178 (emphasis added).

145. This line of analysis appears in a different guise in a malpractice claim Schmidt later filed against his original attorney in which he alleged that, had the attorney engaged in sufficient fact-finding about the incident that occurred when Schmidt was a young boy, Schmidt would have prevailed under *Fearing*. Schmidt v. Slader, 327 P.3d 1182, 1183 (Or. Ct. App. 2014).

plaintiff who alleged that a priest serving as a school principal took him out of his first-grade class, ostensibly for disciplinary purposes, and raped him.[146] The court found that the priest's misconduct fell on the "opportunity" side of the distinction: "The act of enforcing discipline within an educational institution is not, in itself, a precursor to abuse, nor is sexual abuse a direct outgrowth of, or engendered by, the enforcement of discipline."[147] The court stressed that the abuse was not the culmination of actions legitimately within the scope of the priest's employment, as had been the case in *Fearing*.[148]

Fearing's analysis epitomizes the fine-grained nature of the causal connection approach to *respondeat superior* vicarious liability. Decisions after *Fearing* have often turned on slight factual distinctions within and among cases. In *Jane Doe 130 v. Archdiocese of Portland in Oregon*, for instance, the plaintiff's alleged abuser was her uncle. She testified that he began abusing her while he was a seminarian, and she alleged that he continued doing so for seven years after his ordination, even though he was never assigned to any of the parishes where she and her parents were members.[149] The court found that her uncle's behavior constituted the kind of "grooming" for which church employers had been held liable in *Fearing*, but it cautioned that because the abuse had begun before he became an archdiocesan employee, the church could not be found

146. Doe 130 v. Archdiocese of Portland in Oregon, No. CV. 07-1732-PK, 2008 WL 656021, at *2 (D. Or. Mar. 6, 2008).

147. *Id.* at *8.

148. *Id.* See also *Sapp v. Roman Catholic Archbishop of Portland in Oregon*, No. CV 08-68-PK, 2008 WL 1849915, at *12 (D. Or. Apr. 22, 2008), where the court granted the archdiocese's motion to dismiss a *respondeat superior* claim against a priest who had hired the plaintiff to mow the parish lawn before assaulting him sexually. As in *Doe 130*, the court in *Sapp* found that the priest's status served "[a]t most . . . to create an opportunity for a sexual predator to prey upon his victim." *Id.*

149. Doe 130 v. Archdiocese of Portland in Oregon, 717 F. Supp. 2d 1120, 1126 (D. Or. 2010).

vicariously liable for his actions prior to ordination.[150] Although the court allowed the plaintiff's complaint to survive a motion to dismiss, it warned that she had pled few facts that established that "*any* of the abuse she suffered was a consequence of actions [the priest] took in furtherance of his employment duties."[151]

C. Foreign Courts and the Causal Connection Approach

These cases from Oregon reveal some of the advantages and drawbacks of an approach to *respondeat superior* vicarious liability that focuses on the nature of the relationship between employment and tort. But the U.S. is not the only common-law country where courts have undertaken analysis of this sort. Courts in Commonwealth countries have grappled openly with the public policy reasons for imposing *respondeat superior* vicarious liability, and in doing so, they have come to articulate with increasing clarity what some jurists have dubbed the "close connection test."

In Canada, then-Justice McLachlin of the country's supreme court urged that courts "should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct.'"[152] Where there is a close enough connection between an employee's tort and conduct authorized by virtue of an employment relationship, she continued, "vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence."[153] She was writing for a unanimous court in *Bazley v. Curry*, decided in

150. *Id.* at 1136.

151. *Id.*

152. Bazley v. Curry, [1999] 2 S.C.R. 534, para. 41 (Can.). On *Bazley* and related cases, see generally Kevin E. Davis, *Vicarious Liability, Judgment Proofing, and Non-Profits*, 50 U. TORONTO L.J. 407 (2000).

153. *Bazley*, 2 S.C.R. at para. 41.

1999, where a former resident of a group home for emotionally troubled children sued the foundation that operated the home for sexual abuse perpetrated by an employee. Although the foundation had no previous knowledge of the employee's conduct and in fact discharged him when another victim complained, the plaintiff asked the court to hold the foundation vicariously liable.[154]

The trial court applied the traditional Commonwealth test for the scope of employment, finding that the abuse did not fall into the category of "acts authorized by the employer." But it had occurred while the employee was putting his victim to bed, something which the foundation had authorized. The trial court therefore found the abuse to be an example of "unauthorized acts that are so connected with acts that the employer has authorized that they may rightly be regarded as modes—although improper modes—of doing what has been authorized."[155] Both the intermediate appellate court and the supreme court affirmed. Justice McLachlin wrote that, regarding employees' intentional torts, courts should eschew the language of misguided "modes" and simply ask:

> whether the wrongful act is *sufficiently related* to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the *creation or enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires. . . . Incidental connections to the employment enterprise, like time and place (without more), will not suffice.[156]

She then enumerated five factors for determining whether there is a sufficient connection between the tort and the circumstances of employment:

> (a) the opportunity that the enterprise afforded the employee to

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154. *Id.* at paras 1–5. For discussion, see GRAY, *supra* note 32, at 79–82.

155. *Bazley*, 2 S.C.R. at para. 6 (quoting P.A.B. v. Curry, [1995] 9 B.C.L.R. 217, para. 4 (Can. B.C. S.C.)).

156. *Id.* at para 41.

> abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.[157]

Justice McLachlin concluded that the foundation had created an environment that "nurtured and brought to fruition" its employee's abuse. In addition, the abusive conduct was not a "mere accident of time and place, but the product of the special relationship of intimacy and respect the employer fostered, as well as the special opportunities for exploitation of that relationship it furnished. Indeed, it is difficult to imagine a job with a greater risk for child sexual abuse."[158]

The U.K. House of Lords confronted similar issues in the 2001 case *Lister v. Hesley Hall Ltd.*, where the former residents of a school boarding house sued the school over acts of sexual abuse perpetrated by the house warden.[159] Five Law Lords wrote opinions in *Lister*, overturning the previous

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157. *Id.*

158. *Id.* at para. 58. On the same day that it handed down its decision in *Bazley*, the Supreme Court of Canada reached a contrary result in a related case. In *Jacobi v. Griffiths*, the perpetrator of sexual assault was employed to supervise volunteers and organize events for a non-profit organization. A 4-3 majority applied Justice McLachlin's analysis but distinguished the facts of *Jacobi* from those of *Bazley*. The justices held that the circumstances of employment had not clothed the employee with authority under the guise of which he was enabled to commit abuse; instead, the abuse had occurred only when he abandoned his duties. There was therefore not a sufficiently "strong link" between employment and abuse to justify the imposition of vicarious liability. Jacobi v. Griffiths, [1999] 2 S.C.R. 570, para. 86 (Can.).

159. Lister and Others v. Hesley Hall Ltd. [2001] UKHL 22, [2002] 1 AC (HL) 215 (appeal taken from Eng.), https://publications.parliament.uk/pa/ld200001/ldjudgmt/jd010503/lister-1.htm.

English precedent and holding the school vicariously liable. Strongly applauding the reasoning of *Bazley*, Lord Steyn and Lord Hutton concluded that the warden's "torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable."[160] Lord Clyde also endorsed Canada's "significant connection" test, finding that the warden's employment afforded him the opportunity, close contact, and authority that enabled him to abuse the children in his care.[161] Although he found for the plaintiffs, Lord Hobhouse declined to embrace the reasoning of *Bazley*, averring that "an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application."[162] For him, the traditional scope of employment test should remain the governing rule, and he sided with the trial court that had heard *Lister*, which held the school vicariously liable not for the abuse itself, but for the warden's failure to report it.[163] Lord Millett, in contrast, regarded the trial court's approach to be "sophistry"; he thought the school should be held liable on a variation of enterprise risk theory, because the school had a duty of care for the boys and the warden had abused the position of trust in which the school had placed him.[164]

Subsequent U.K. decisions have expounded on *Lister*, not least because, as Lord Phillips wrote for a unanimous supreme court in *Catholic Child Welfare Society v. Various Claimants*, "[t]he test of 'close connection' approved by all tells one nothing about the nature of the connection."[165] To

160. *Lister*, UKHL at para. 28 (Lord Steyn); *see also id.* at para. 52 (Lord Hutton). For discussion, see GRAY, *supra* note 32, at 36–39.

161. *Lister*, UKHL at para. 50 (Lord Clyde).

162. *Id.* at para. 60 (Lord Hobhouse); *see also* GRAY, *supra* note 32, at 48 ("It is somewhat puzzling that a country can wholeheartedly adopt the approach taken in the leading courts of a comparable nation, while at the same time refusing to sign up to the policy analysis that fundamentally underpinned those decisions.").

163. *Lister*, UKHL at para. 62.

164. *Id.* at paras. 82–84 (Lord Millett); GRAY, *supra* note 32, at 38.

165. [2012] UKSC 56, [para. 74] (appeal taken from Eng.).

fill this lacuna, Lord Phillips framed criteria for testing whether it is "fair, just and reasonable to impose vicarious liability on the employer." These include whether the employer or employee is more likely to have the means to compensate the victim and whether the employment relationship created the risk of the tort the employee committed.[166] Some, but not all, of Lord Phillips's criteria resemble those that Justice McLachlin identified in *Bazley*; taken together, they articulate what is effectively an enterprise risk approach. Lord Phillips summarized the inquiry thus:

> Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.[167]

The language of these landmark Canadian and British decisions is not identical to that of the U.S. cases discussed earlier. All these courts, however, share an overall approach to disputes in which institutions have clothed employees with authority that employees misused by committing abuse.[168] Using the language of "close connection" and

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166. *Id.* at para. 35.

167. *Id.* at para. 86.

168. Courts in a third (former) Commonwealth country, South Africa, have employed similar reasoning. In the apartheid-era case *Minister of Police v. Rabie*, one court held that liability for employees' intentional torts should vicariously be imputed to employers either when an employee subjectively believes the tort to advance the employer's interest or when there is a "sufficiently close link between the servant's acts for his own interests and purposes and the business of his master." 1986 (1) SA 117 at 134 C–E para. 8 (S. Afr.). The post-apartheid Constitutional Court heard *NK v. Minister of Safety and Security*, where three police officers had offered to help a stranded young woman get home and then subsequently raped her. It recited with approval the holdings of *Bazley*, *Jacobi*, and *Lister* and unanimously reiterated the *Rabie* standard. Justice O'Regan concluded that embracing the "spirit, purpo[se,] and objects" of South African constitutional guarantees, including the right to freedom from violence,

"causal nexus," these courts have articulated with increasing clarity a valuable framework for vicarious liability.

D. Advantages and Disadvantages

Like the three previous approaches, the causal connection approach has both advantages and disadvantages. For religious employers, one advantage is that this approach ensures that liability is not imposed simply because a tortfeasor happens to be an employee.[169] Second, the causal connection approach avoids problems that ensue when courts must decide whether to cognize sexual abuse as falling within the scope of an employee's duties. In *Fearing* and its progeny, Oregon courts have helpfully distinguished conduct authorized by an employer (e.g., the cultivation of trust and the development of a personal relationship between a clergymember and future victim) from subsequent sexual torts for which the authorized conduct paved the way.[170] Thus, this approach acknowledges the extent to which religious traditions clothe clergymembers with spiritual authority. When clergymembers misuse this authority, it is not that sexual abuse comes to fall within their employment responsibilities; rather, but for the abusers' standing in the religious community, victims would not have been nearly as vulnerable. The fact-intensiveness of the causal connection approach provides victims with an avenue to recovery where a clergymember's abuse of spiritual authority contributed to their susceptibility. This approach applies the same analysis to claims against secular and religious employers, employing

necessitated such an approach. *NK v. Minister of Safety & Sec.* 2005 (6) SA 419 (CC) at para. 45 (S. Afr.). For extensive discussion, see Albert Jacob van Eeden, The Constitutionality of Vicarious Liability in the Context of the South African Labour Law: A Comparative Study (Jan. 2014) (unpublished L.L.M. thesis, University of South Africa) (on file with author).

169. *See, e.g.*, Ambrosio v. Price, 495 F. Supp. 381, 383–85 (D. Neb. 1979) (finding religious employer not vicariously liable when priest caused a car accident while traveling to pay a social call on personal friends).

170. *See* Fearing v. Bucher, 977 P.2d 1163, 1167–68 (Or. 1999).

neutral principles and thereby avoiding constitutional challenges.

But this fact-intensiveness cuts against the causal connection approach as well. It is not likely to promote judicial economy, since it requires factfinders to engage in fine-grained analysis of the relationship between a tort and a clergymember's job responsibilities. Both in the U.S. and overseas, when courts have developed tests to determine whether the connection between tort and employment is sufficiently close, they have invoked ambiguous factors and standards rather than bright-line rules. Courts have found it particularly difficult to separate cases in which employment created an "opportunity" for abuse from those in which it was "a necessary precursor."[171] Finally, to the extent that distinctions are elusive and may in practice turn on a factfinder's perception of a particular employer and its employees, as well as to the extent that this approach necessitates discovery into a tortfeasor's job responsibilities in the context of the overall conduct of an employer's workplace, it might reasonably be asked whether the causal connection approach is truly one of strict liability, or instead a hybrid form of negligence.

171. *Id.* at 1168.

VII. ASSESSING THE APPROACHES

Its drawbacks notwithstanding, the causal connection approach best achieves the public policy rationales for imposing *respondeat superior* vicarious liability on religious institutions. This concluding Part compares the four approaches discussed above and also asks, but answers in the negative, whether a negligence regime might perform better than any form of strict liability.

To be sure, strict liability has categorical disadvantages. Numerous commentators have observed that strict liability regimes contravene a fundamental principle of Anglo-American tort law, which is that liability follows fault. Critics allege that strict liability fails to provide corrective justice, because it imposes liability even where there is nothing to correct; they also complain that strict liability over-incentivizes litigation while over-deterring activities that, notwithstanding their risks, may greatly benefit society. Although in recent decades U.S. courts have expanded strict liability in areas such as manufacturing defects, and legislatures have created strict liability regimes such as workers' compensation, the trend overall has been against strict liability.

As we have seen, the traditional rationales for strict liability include deterrence for dangerous activities, compensation for those who have suffered injuries, and the efficient spreading of risk and losses. The causal connection approach achieves each of these ends, yet not at the cost of expanding liability so radically as to hold employers responsible for all their employees' intentional torts. Let us consider each of the rationales in turn.

First, there is deterrence. It might seem that in comparison to strict liability, a negligence regime would better incentivize religious employers to take care in the selection, training, discipline, and dismissal of their employees. Under negligence, a religious employer's design and implementation of appropriate mechanisms for hiring,

supervising, and retaining ministers would constitute evidence that it had taken reasonable care and should not be held liable. As numerous commentators have observed, however, negligence regimes may encounter constitutional difficulties when they seek to assess the reasonableness of a religious institution's personnel practices. Religious employers' decisions to ordain, assign, move, discipline, or defrock clergymembers have been held to be beyond judicial review, falling clearly within the ambit of the much-contested "ministerial exception" doctrine.[172] The Supreme Court has held that judicial review of such decisions violates both Religion Clauses of the U.S. Constitution: the Free Exercise Clause by infringing upon a church's right to manage its internal governance, and the Establishment Clause by creating excessive entanglement between government and religion.[173]

With U.S. courts becoming increasingly sympathetic to church autonomy defenses, an appropriately cabined vicarious liability regime presents a lower risk that courts will abstain from adjudicating tort actions against religious employers. Employers may object that *respondeat superior* still requires courts to pass judgment on what constitutes a

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172. See *supra* notes 6–7 and, most recently, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). *But see* Savin v. City and Cty. of San Francisco, No. 16-CV-05627-JST, 2017 WL 2686546, at *7 (N.D. Cal. June 22, 2017) (holding that the ministerial exception doctrine does not preclude courts from considering whether employment is "primarily religious in nature").

173. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012). The notion of "excessive entanglement" classically appears in the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), but has come in for widespread criticism. The Supreme Court's approach to its recent Establishment Clause cases suggests that *Lemon*'s days are numbered. In one case, four justices refused to apply *Lemon* to the facts of a dispute that concerned government funding for the upkeep of a large war memorial in the shape of a Latin cross, while a fifth proposed to overrule *Lemon* outright. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081–82 (2019); *id.* at 2093 (Kavanaugh, J., concurring). This Term, only one justice cited *Lemon* in a case involving taxpayer support for scholarships at religiously affiliated schools, referring to *Lemon*'s "infamous test." Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2265 (2020) (Thomas, J., concurring).

ministerial employee's authorized duties, but the cases discussed above reveal that courts are not incapable of accomplishing this task by employing neutral principles instead of making judgments that are essentially religious in character.

But if a strict liability regime appears to outperform negligence with regard to deterrence, which approach to *respondeat superior* vicarious liability should courts adopt? The first approach, where there is no vicarious liability for clergymembers' sexual misconduct, is obviously a non-starter. The second, which imposes strict liability for an employee's "misguided attempt" to perform authorized job responsibilities, might result in some measure of deterrence, but it applies to only a small minority of cases. As noted above, most religious employees who have allegedly committed sexual abuse have not done so in order to perform their official duties. For the second approach to create substantial deterrence, courts would have to regard many intentional torts as misguided attempts, a position that often would stretch credulity. At the same time, a focus on misguided attempts could create constitutional problems of its own, as it would require courts to distinguish between appropriate and inappropriate ways of performing ministry within any particular religious tradition; this might reasonably be considered an exercise of religious rather than legal judgment. The third approach, focused on characteristic risks, would achieve greater deterrence for employees of certain kinds of religious institutions. But it would do so at the (potentially constitutionally significant) cost of stereotyping those same traditions, as well as of not holding religious employers liable when employees commit forms of misconduct that courts deem not to be characteristically associated with the tradition in question. None of these approaches performs as successfully as the one for which this Article has been arguing, because the causal connection approach only imposes liability where a tort is clearly related to a perpetrator's specific duties. To achieve

this end, however, the causal connection approach does require courts to engage in discovery about a particular tortfeasor's duties in the context of a particular religious institution's operations. Such discovery would likely steer clear of the constitutional problems apt to arise in discovery about the nature of an institution's supervision of its employees, but plaintiffs will likely still encounter objections rooted in the notion of church autonomy.

The next rationale for strict liability is compensation, ensuring that persons who have been harmed receive redress. As a practical matter, victims of sexual misconduct by ministerial employees are likely to receive compensation only if they are able to win a judgment against a religious employer. Religious employees are not highly remunerated, and few carry individual liability insurance. In the Roman Catholic Church, denominationally specific practices make compensation even harder to come by: members of religious orders take vows of poverty that prohibit them, at least in theory, from owning substantial property, while diocesan priests are expected to live simply and not accumulate wealth.[174] The situation for plaintiffs is less dire outside the Catholic Church, but most religious employees do not possess substantial assets.[175] Therefore, to have the chance of being made as whole as a monetary award can permit, victims must be able to pursue religious employers. Yet the constitutional considerations already discussed may inhibit a victim's ability to win a negligence judgment, and in any case, negligence causes of action may be unavailable to victims where an employer did not have reason to know that an employee posed a risk.

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174. *See* 1983 CODE C.668, §§ 1, 3 (requiring religious to give away temporal possessions prior to taking first vows and to transfer to their order all subsequent income); *id.* at C.282, § 1 (specifying that "[c]lerics are to foster simplicity of life and are to refrain from all things that have a semblance of vanity").

175. *See* U.S. BUREAU OF LABOR STATISTICS, *May 2018 National Occupational Employment and Wage Estimates*, https://www.bls.gov/oes/current/oes_nat.htm (last visited Aug. 23, 2019).

Of the four approaches to *respondeat superior* vicarious liability, again the first approach does not stand to produce compensation for victims. The approach involving misguided attempts does so only to the extent that sexual misconduct truly occurs in such circumstances, or to the extent that courts are willing to cognize abuse as misguided ministry. The characteristic risks approach, likewise, provides compensation only when misconduct falls within the parameters of what a court is willing to recognize as a characteristic risk of religious ministry, either in general or in a particular tradition. The causal connection approach, in contrast, stands a better chance of ensuring that victims are compensated for injuries that occur when religious employees misuse the authority granted them. While many disputes will end in pretrial settlements, in the cases that do go to trial the level of compensation awarded plaintiffs is not likely to be unreasonable: a recent empirical study has demonstrated that jurors are likely to award lower damages against vicariously liable defendants than against defendants who injured plaintiffs directly.[176]

It is with regard to the spreading of risk and the allocation of losses that the causal connection approach most outshines negligence and the other approaches to *respondeat superior* liability. If causes of action for negligence run aground for constitutional reasons, or if they are unsuccessful because an employer was unaware that hiring or retaining an employee created a risk, then a negligence regime will be unable to allocate the cost of sexual misconduct to that employer. The first approach to *respondeat superior* vicarious liability squarely refuses to allocate losses to employers; the misguided attempts approach does so only in a small minority of cases; and the characteristic risks approach does so only in the predetermined set of circumstances that courts choose to associate with a particular religious tradition.

176. Justin Sevier, *Vicarious Windfalls*, 102 IOWA L. REV. 651, 651 (2017).

The causal connection approach, in contrast, stands a strong chance of distinguishing torts that are closely bound up with the risks and losses created by a particular enterprise from those where such a relationship is attenuated or absent. The cases reviewed above indicate that courts and factfinders are capable of making nuanced judgments about the relationship between employment and tort. Consider, for instance, the numerous cases that emerged from the Portland archdiocese's bankruptcy. The courts that applied *Fearing* carefully examined whether each alleged tort possessed the necessary causal relationship with a clergymember's official duties. In cases like *Schmidt*, courts decided that the connection was more accidental than causal; in cases like *Jane Doe 130*, courts let uncertain claims proceed; and in cases like *Fearing* itself, courts refused to let religious employers off the hook where clergymembers had misused and manipulated their authority in order to create conditions in which they were able to perpetrate sexual abuse. This fine-grained sorting of factual details resembles the manner in which courts have responded to sexual misconduct on the part of police and other state employees, neither permitting all such cases to proceed nor cutting off liability as the traditional scope of employment rule might have dictated.

But it is insufficient to establish that courts are capable of discerning whether an employee's tort is sufficiently associated with an enterprise that the employer should be held vicariously liable. That is a necessary precondition to the question of whether courts should actually impose liability. As a matter of public policy, religious employers are best situated to bear and spread the risk of losses caused by the misconduct of their ministers. Many religious employers possess substantial assets or have the capacity to raise additional funds through collection plates, other forms of philanthropy, and auxiliary enterprises. They are able, in some cases admittedly not without substantial cost, to take out insurance that would pay compensation to the victims of

clergy sexual abuse. Moreover, they are able to enact policies that deter such misconduct, including through the selection, training, discipline, retention, and termination of their employees. And they are free as well to establish, and invite victims of clergy sexual abuse to take part in alternatives to tort litigation, such as the compensation funds that several U.S. Catholic dioceses have recently created.[177] Few of these things are true of religious employees, who are frequently unable to make injured persons whole out of their own pockets. Of victim-survivors, alleged abusers, and religious employers, therefore, employers are the cheapest cost avoiders. The causal connection approach enables courts to discern where the circumstances of employment enabled a perpetrator to commit misconduct.

This approach, whether articulated as a "causal nexus" or "close connection" test, or in other terms, is not perfect. Like all forms of vicarious liability, it is subject to the criticism that even when courts instruct juries not to take questions of negligence into account, concerns about moral blame may "tend to seep into the analysis."[178] To the extent that finders of fact, whether consciously or unconsciously, may be biased toward or against a particular religious group, or religious groups in general, it is possible that either deference or animus could affect the application of this approach. The extent of factfinding necessary to implement the causal connection approach may attenuate the gains in judicial economy normally associated with vicarious liability regimes. And as has been noted above, the standards that courts have developed for determining whether the connection between tort and employment is sufficiently close are vague and by no means self-interpreting. In the end, however, the causal connection approach represents a fairer and more just balancing of the interests of victim-survivors,

177. *See, e.g.*, *Independent Reconciliation and Compensation Program*, ARCHDIOCESE OF N.Y., https://archny.org/ircp (last visited Aug. 24, 2019).

178. GRAY, *supra* note 32, at 51.

perpetrators, and religious employers than other approaches to vicarious liability or a negligence regime. By engaging in carefully limited factfinding and cabining *respondeat superior* vicarious liability only to those cases where a religious employee has manipulated the authority granted by her or his employer in order to commit sexual abuse, this approach focuses squarely on torts that would not have occurred but for the specific forms of social standing, coercive authority, and spiritual power with which religious employers have too often clothed abusers.