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Subordination of the Public Good

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SUBORDINATION OF THE PUBLIC GOOD: *Swanson v. Roman Catholic Bishop,* 692 A.2d 441 (Me. 1997)

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I. INTRODUCTION

The already-clouded waters surrounding First Amendment considerations relating to the potential tort liability of religious organizations for the sexual misconduct of their clergy just got even muddier. The heated debate over judicial resolution of the First Amendment issues involved in these cases will likely expand as victims of alleged clergy sexual misconduct continue to target churches and neither alleged victims nor the churches they have sued can look to a definitive treatment of their claims by the courts. Unfortunately for those stuck in the middle of these disputes, the recent decision in *Swanson v. Roman Catholic Bishop of Portland*[1] has done little to clarify the debate, providing no clear

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[1] 692 A.2d 441 (Me. 1997).

guidance for courts attempting to adjudicate these claims, and has instead set an unwarranted and unfortunate precedent.

The core issue of *Swanson* is whether a claim of negligent supervision may be pursued against a religious organization based on a failure to properly supervise one of its clergy members who allegedly initiated a sexual relationship with a parishioner that he was counseling in his capacity as parish priest.[2] The Supreme Judicial Court of Maine recently held in *Swanson* that this claim is constitutionally barred as violating both the First Amendment of the U.S. Constitution and Article I, Section 3 of the Maine Constitution.[3]

Constitutional jurisprudence is filled with cautions regarding "slippery slopes" and "chilling effects" with regard to any weakening of the religion clauses of the First Amendment. That same jurisprudence, however, also clearly advocates a balancing of legal interests, even with regard to the religion clauses. The *Swanson* court seemingly ignores a line of precedent under both the U.S. and Maine Constitutions which would require a balancing of societal interests and makes only a cursory examination of the relevant public policy considerations involved. In doing so, the court sets an unfortunate precedent in two ways. First, this decision could impact any case where a negligent tort claim is brought against a church where issues of church governance are even slightly implicated. Even claims alleging that the church had actual knowledge that a particular clergyman presented a risk to members of the public will be impacted by this decision. Second, the decision sets forth a clear implication that a societal interest in protecting individuals from improper sexual advances by those in a position of trust is not a sufficiently

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[2] *Id.*

[3] *Id.* The First Amendment to the United States Constitution reads in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Article I, Section 3 of the Constitution of the State of Maine reads:

> All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship;-and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.

ME. CONST. art. I, § 3.

compelling interest to outweigh what is arguably a modest imposition on the employment relationship between clergy and church.

This Note will argue that the *Swanson* court failed to apply the proper constitutional considerations with regard to both the Maine and United States Constitutions in deciding this case. Section II outlines the background of this case, including the arguments of both parties, and details the reasoning behind the court's holding.[4] Section III analyzes the decision in *Swanson* and concludes that the correct use of precedent relating to the application of neutral principles[5] of law and permissible inquiry by the courts[6] would have allowed a negligent supervision claim against the diocese to be heard. Discussed in detail is the assertion that the court failed to consider fully the public policy arguments required under both the U.S. Constitution and the Maine Constitution.[7] Section IV of this Note concludes that the *Swanson* decision sets a precedent that will negatively affect the rights of members of the public who have valid claims against religious organizations for failing to supervise potentially harmful clergy members by failing to properly examine and weigh the significant societal interest in protecting the public from sexual misconduct. In doing so this decision provides precedent for the use of the religion clauses by religious organizations to abdicate responsibility for the misconduct of their clergy members that harm the public.

II. BACKGROUND

The situation that brought Ruth and Albert Swanson to court is one that has unfortunately been recounted in many courtrooms recently—a betrayal by a priest in whom they had placed their trust and hopes for a stronger marriage and a lack of accountability from those who supervised that priest. This section will detail the facts of the case, as recounted by the Maine Supreme Court, and note the procedural history that led to the appeal. The lower court opinion will be explained in detail and a full explanation of the Maine Supreme Court's holding and reasoning will be given.

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4 *See infra* notes 8-60 and accompanying text.

5 *See infra* notes 62-74 and accompanying text.

6 *See infra* notes 75-92 and accompanying text.

7 *See infra* notes 93-108 and accompanying text.

A. The Facts of Swanson v. Roman Catholic Bishop

Ruth and Albert Swanson brought a complaint in a Maine state court against Father Maurice Morin, the counseling priest; the Roman Catholic Bishop of Portland, a corporation sole; and Bishop Joseph Gerry.[8] The last two named defendants can be collectively referred to as "the church" and it is only the claims against these defendants that the Maine Supreme Court addressed.[9]

In their complaint, the Swansons alleged that they sought counseling from Father Morin during a difficult time in their marriage, hoping that he would help them to work out some marital problems in anticipation of a remarriage ceremony to be performed by the church.[10] Father Morin worked with the couple together and with Mrs. Swanson individually.[11] It was during these individual sessions that the Swansons allege that Father Morin initiated a sexual relationship with Mrs. Swanson.[12] On at least two occasions, Mr. Swanson confronted Father Morin with his suspicions regarding Mrs. Swanson; on the first occasion to tell Father Morin that his wife was "infatuated with another man," and on the second occasion to confront Father Morin with his knowledge that the other man was the priest himself.[13] The Swansons claimed that on both occasions Father Morin stated that he was handling the situation and never admitted to Mr. Swanson that he was engaged in a sexual relationship with Mrs. Swanson.[14] Mr. Swanson later discovered that his wife and Father Morin had indeed had a sexual relationship.[15] As a result, the couple is now divorced and undergoing extensive counseling and therapy.[16]

The Swansons also alleged, in connection with their claims against the church, that Father Morin was not properly supervised and that prior to Father Morin's relationship with Mrs. Swanson the Bishop had actual notice of a previous situation in which Father Morin was romantically involved with at least one other woman.[17] It was further alleged that the

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[8] Swanson v. Roman Catholic Bishop, 692 A.2d 441, 442 (Me. 1997).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Appellees' Brief at 2, Swanson v. Roman Catholic Bishop, 692 A.2d 441 (Me. 1997) (No. CUM-96-305).

Bishop did not advise anyone of this fact at the parish where Father Morin was assigned.[18]

B. Lower Court Opinion

Ruth and Albert Swanson, though divorced, filed a joint complaint against both Father Morin and the church.[19] The three counts filed against the church included negligent selection, training and supervision, and breach of fiduciary duty and fraud, but it is only the negligence count that will be addressed here.[20] After significant discovery activity on both sides, the church filed a motion to dismiss the Swansons' claims on constitutional grounds, citing violations of both the U.S. and Maine Constitutions.[21] The superior court dismissed the negligent selection and training claims, but allowed the negligent supervision claim to proceed.[22] This interlocutory order was reported to the Maine Supreme Court under a state rule allowing questions of law of sufficient importance and doubt to be heard despite the fact that the order here was not a final judgment.[23]

The superior court, in its interlocutory order, addressed only the negligence claims against the church—those of negligent selection, training and supervision—and determined that, while the selection and training claims failed on constitutional grounds, the negligent supervision claim should proceed.[24] The issue was framed by the court in terms of "whether [a] civil court can adjudicate the claims presented by the plaintiffs without excessive entanglement in religious doctrine or polity."[25] After a detailed analysis of U.S. Supreme Court constitutional precedent, the superior court held that claims against religious organizations regarding the negligent selection and/or training of priests are barred by the First Amendment, regardless of whether those priests have or are suspected of

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[18] *Id.*

[19] *Swanson*, 692 A.2d at 442. The claims against Father Morin included intentional and negligent infliction of emotional distress, breach of fiduciary duty, and negligent counseling. The claims against Father Morin are not relevant to this Note and were not addressed by either the superior court in its interlocutory order or the Maine Supreme Court on appeal.

[20] *Id.* The breach of fiduciary duty and fraud counts were dismissed by agreement of the parties prior to appeal and will not be discussed by this Note. *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 443.

[24] Swanson v. Morin, No. CV-93-1006, slip op. at 8-9 (Me. Super. Ct., Cum. Cty., Dec. 21, 1995).

[25] *Id.* at 6.

having abused members of the public.[26] The reason for this holding was that it "has been and should remain the sole dominion of religious organizations" to determine who will become a member of its clergy and how that clergy member should be trained in the doctrines of the church.[27] The lower court did not believe, however, that negligent supervision claims[28] presented the same problem. The opinion emphasized a strong public policy component in its considerations, noting that churches must allow scrutiny by the courts when they choose to conduct themselves so as to leave a priest in contact with the public who it knows presents a real risk to the public.[29] The court recognized the potential risk of some entanglement in issues of religious doctrine, but made an effort to minimize that entanglement by setting forth strict limitations on what allegations would be addressed.[30] The lower court stated that it hoped these limitations would result in the "application of secular standards to secular conduct" and would involve fact-finding into matters which could be considered almost entirely secular.[31] As a final note, the lower court stated that requiring a church to respond reasonably to a threat of harm to the public by members of its clergy should not be viewed as excessive and impermissible entanglement.[32]

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[26] *Id.* at 8.

[27] *Id.* at 9.

[28] A claim of negligent supervision requires the complainant to establish several elements, but at a minimum it presumes that a principal has a duty to supervise those it controls. A finding of an employment or agency relationship is a prerequisite to any such claim. *See* Moses v. Diocese of Colorado, 863 P.2d 310, 323-27 (Colo. 1993). A person who operates his business through agents or employees can be subject to liability for harm caused by that employee's actions if the employer or principal is negligent in supervising those actions—a finding of negligence requiring that the employer knew or had reason to know that the employee is likely to subject others to an unreasonable risk of harm. *See* RESTATEMENT (SECOND) OF AGENCY § 213(b), cmt. d (1958); *see also* Destefano v. Grabrian, 763 P.2d 275, 287-88 (Colo. 1988). Liability would result, not from the relationship of the parties, but because the employer knew or had reason to believe that an undue risk of harm existed and the employer would be subject to liability only for the harm that would be within that known risk. *Id.* at 287.

That duty is further defined to require the employer to exercise reasonable care in controlling his employee, even while acting outside the scope of his employment, to prevent that employee from intentionally harming others or creating an unreasonable risk of harm to them under certain circumstances. RESTATEMENT (SECOND) OF TORTS § 317 (1979). One of those circumstances is where the employer knows or has reason to know that he has the ability to control his employee and knows or has reason to know of a necessity for exercising that control. *Id.*

[29] Swanson v. Morin, No. CV-93-1006, slip op. at 8-9 (Me. Super. Ct., Cum. Cty., Dec. 21, 1995).

[30] *Id.*

[31] *Id.* at 10-11.

[32] *Id.* at 11.

C. Holding of the Supreme Judicial Court of Maine

1. The Majority Opinion

On appeal to the Supreme Judicial Court of Maine, Chief Justice Wathen framed the issue in the majority opinion somewhat differently from the lower court. He stated that the court had to decide "whether courts may constitutionally impose and enforce a duty of employee supervision derived from secular agency principles against a religious organization."[33] The church argued on appeal that the same constitutional principles that would bar the negligent selection and training claims should also bar the negligent supervision claim.[34] The high court agreed.[35]

In support of its holding, the court began with an examination of constitutional precedent. The court first explained that both the U.S. Constitution and the Maine Constitution guarantee every citizen the right to the free exercise of religion and prohibits the establishment of religion by government.[36] As a part of the prohibition on establishment, courts have generally held that states may not interfere in matters concerning religious doctrine or organization and must maintain a neutral stance regarding those matters.[37]

The court noted that these principles "severely" limit the role courts may play, but recognized that free exercise is not inhibited "merely by opening [its] doors to [civil] disputes" involving religious organizations.[38] The court then cited several cases which support the use of neutral principles of law in resolving church-related disputes, though in resolving the dispute the court may not consider doctrinal matters or pass on their validity.[39]

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[33] Swanson v. Roman Catholic Bishop, 692 A.2d 441, 442 (Me. 1997).

[34] *Id.*

[35] *Id.*

[36] *Id.* at 443.

[37] *Id.* The court cites two U.S. Supreme Court cases in support of this contention: *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (holding that state court cannot interpret matters of strictly ecclesiastical concern in applying common law) and *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952) (holding that the state could not force a transfer of church governing authority because freedom to select clergy is within the sole power of the church itself).

[38] *Swanson*, 692 A.2d at 443 (citing Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 449 (1969)).

[39] *Swanson*, 692 A.2d at 443. The court cites: *Graffam v. Wray*, 437 A.2d 627 (Me. 1981); *Jones v. Wolf*, 443 U.S. 595 (1979); and *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church*, 393 U.S. 440 (1969).

The Swansons argued on appeal that neutral tort and agency principles could be applied to adjudicate the negligent supervision claim and, further, that inquiring into what knowledge the church had of the risk presented by Father Morin would involve nothing more than applying secular standards to secular conduct.[40] In dismissing this argument, the court reasoned that comparing the relationship of a religious organization with its clergy to relationships in the business world necessarily created a risk of constitutional violation and "exploration of the ecclesiastical relationship [was] itself problematic."[41] In addition, the court felt that determining the existence of an agency relationship would require the trial court to examine church doctrine and this would not be permissible.[42]

The court continued by acknowledging that other courts have ruled that negligent supervision claims against religious organizations can be resolved without determining questions of religious doctrine.[43] The majority concluded, however, that those courts failed to "fully address[] the fundamental issue in this case"—that constitutionally protected beliefs in penance, forgiveness, and mercy would be implicated in any attempt to impose secular duties and liabilities on a religious organization's relationship with its clergy.[44] Because these beliefs govern the ecclesiastical relationship, the court held that clergy members cannot be treated as common law employees.[45] According to the court, pastoral supervision is within the sole control of a religious organization and "any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination."[46]

Again, the court recognized authority from other courts for allowing negligent supervision claims to proceed, specifically where the complainant alleges actual knowledge by the religious organization that its clergy member presented a potential risk, but concluded that these courts "failed to maintain the appropriate degree of neutrality required by the United States and Maine Constitutions."[47] Although it recognized that the religion clauses of the First Amendment have been interpreted to require a balancing of interests between the religious freedoms infringed upon and

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[40] *Swanson*, 692 A.2d at 444.

[41] *Id.*

[42] *Id.* The court cites for support *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (holding that to "probe deeply enough into the allocation of power within a church so as to decide . . . religious law . . . would violate the First Amendment").

[43] *Swanson*, 692 A.2d at 444, 445.

[44] *Id.*

[45] *Id.* at 445.

[46] *Id.* (citing Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991)).

[47] *Swanson*, 692 A.2d at 445.

the societal interests involved, the Maine court stated that "certain civil rights protected in secular settings are not sufficiently compelling to overcome certain religious interests."[48]

The opinion concluded by stating that, on the facts of this case, to impose a secular duty of supervision on a religious organization would restrict its freedom to interact with its clergy in a way it sees fit and that there was no sufficient societal interest involved that would outweigh the religious freedoms inhibited.[49]

2. The Dissent

The dissent by Justice Lipez, joined by Justice Dana, raised two main objections—first, that the court passed on a constitutional question prematurely[50] and second, that the court was not necessarily correct in holding that this case was barred on the basis that it dealt only with matters of religious belief and internal church policy.[51]

The first objection notes the fact that Maine has yet to recognize negligent supervision as an independent source of tort liability, thus to hold that constitutional considerations barred this claim would be premature.[52] Also, the procedural posture of this case should have dictated that the court decline to hear this dispute.[53] If constitutional considerations barred this claim, based "on the facts of the case," that qualification did not sit well with the procedural posture of the case, given the fact that the action at issue was a motion to dismiss.[54] Justice Lipez stated that a fully developed record is necessary to make a decision based on constitutional issues—and that record cannot be fully developed in the pleadings of the parties.[55] In addition, the dissent noted that only at trial could the limitations imposed by the lower court opinion be tested and after full discovery a trial might not even be necessary.[56]

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[48] *Id.* (citing Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990)).

[49] *Swanson*, 692 A.2d at 445.

[50] *Id.* at 447.

[51] *Id.* at 448.

[52] *Id.* at 446-47.

[53] *Id.*

[54] *Id.* at 447-48. The ruling at the lower court level arose from a motion to dismiss filed by the defendants. *Id.* The motion was filed after extensive discovery by both parties, but the claims had not yet been litigated in a courtroom. *Id.* at 442.

[55] *Id.* at 447-48.

[56] *Id.* at 448.

The second objection took issue with the majority's characterization of the situation as involving a purely doctrinal dispute which the court would be barred from adjudicating on constitutional grounds.[57] Justice Lipez pointed out that even if Maine did recognize tort liability for negligent supervision the fact that the claims included allegations that the church caused the Swansons' emotional distress and psychological damage emphasized that the court was "not dealing solely with matters of religious belief or internal church policy."[58] In addition, the dissent noted that a balancing of interests was required in order to make a judgment as to the constitutional ramifications of allowing this claim to proceed.[59] Finally, the rights of the Swansons to assert their claim had to be balanced against the potential burden on the church of continuing with the litigation process.[60]

III. ANALYSIS

This Note will argue that the *Swanson* court incorrectly concluded that a suit against a religious organization and its officials for the negligent supervision of a member of its clergy violated principles of religious freedom protected by the U.S. and Maine Constitutions. Applying neutral principles of law to a church-related dispute does not require an unacceptable examination of church doctrine or policies. Even if that examination requires the court to look at the hierarchical relationships within the church, it is only extensive inquiry that is constitutionally forbidden. Further, employing the law of torts and agency to a suit against church officials here would not have required the courts to pass on questions of doctrinal interpretation. It would have merely required the court to examine church policies and actions in secular terms. Finally, whatever small intrusion may occur in the analysis by this court, it is surely outweighed by balancing the interests of society and state in protecting its citizens from the sexual misconduct of other citizens.[61]

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[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] For a general discussion of the depth of the problem, see James T. O'Reilly and Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 32-36 (1994). Virtually no denomination has been immune to suit—Protestant, Catholic, Buddhist, and Jewish organizations have all been the target of lawsuits based on the alleged sexual misconduct of clergy members. *Id.* at 35.

A. A Neutral Principles of Law Approach

The Swansons' claim can be resolved by using neutral principles of law, and thus does not raise the danger of unacceptable judicial examination of religious doctrine or policies. While the *Swanson* court recognized the applicability of neutral principles in the present case, it seemed to misunderstand or misapply the type of inquiry that has been allowed by the Supreme Court in resolving church-related disputes.

The U.S. Supreme Court has held time and again that while its role in resolving church-related disputes is limited to some degree, it is permitted to apply neutral principles of law in adjudicating them.[62] This principle was noted with approval by the *Swanson* court opinion.[63] As the Supreme Court stated in *Jones v. Wolf*, the "nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application."[64] In applying neutral principles to a dispute within a religious organization, a court cannot resolve the dispute on the basis of a religious doctrine or practice, and where a religious doctrine is the basis for a claim, that dispute is one of purely ecclesiastical concern and the court cannot adjudicate it.[65]

Where religious doctrine is not the basis of the claim, the Supreme Court has held that courts do not inhibit free exercise merely by hearing the claim.[66] Further, the Court has even approved the examination of pertinent church documents, such as constitutions, charters and rules of governance, so long as they are analyzed in purely secular terms.[67] Therefore, so long as the court does not attempt to resolve doctrinal controversy that may underlie the general dispute, neutral principles of secular law may be applied directly to disputes involving religious organizations without necessarily violating constitutional boundaries between church and state.

Neutrality exists if the object of the law is to promote some societal value or behavior; neutrality does not exist if the object of the law is to infringe upon or restrict religious practices because of their religious motivation.[68] The only cases where the Supreme Court has held that the

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[62] *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 449 (1969).

[63] *Swanson*, 692 A.2d at 443.

[64] 443 U.S. at 604.

[65] *See id.* at 603-04.

[66] *Presbyterian Church*, 393 U.S. at 449.

[67] *See, e.g.*, Maryland & Va. Church v. Sharpsburg Church, 369 U.S. 367, 367-68 (1970).

[68] *See* Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 533 (1993).

First Amendment barred the application of a neutral and generally applicable law to religiously-motivated actions were cases where other constitutional rights, such as freedom of the press or freedom of speech, were implicated.[69] In the present case, the generally-applicable and neutral principles of agency and tort are involved.[70] No attempt to regulate religious belief can be shown and the object of the law in these areas is to promote important societal values and behaviors, not to infringe upon or restrict religious practices.

The Maine Constitution and Maine state court jurisprudence also provide clear authority for the application of neutral principles of law to disputes involving religious organizations. In addition to the approval of this practice by the *Swanson* court, previous opinions of the Maine Supreme Court have adopted the neutral principles approach.[71] In *Graffam v. Wray*, the Maine high court held that where internal disputes primarily concern religious doctrine, church polity or organization, and only incidentally concern other secular matters, the courts cannot involve themselves and must defer to that church's highest ecclesiastical authority.[72] If the claim at issue is based upon doctrine (as opposed to indirectly affecting it) and the rights allegedly violated are those defined exclusively by the church itself, no involvement in the dispute is permitted; however, where the rights violated are those conferred by the state, neutral principles of law may be applied.[73]

The Swansons' claim clearly falls into the category of claims based on rights conferred by the state, not rights defined by the church itself. The Swansons did not claim that the church violated any doctrine and the right they claim was violated—the right to be protected from the sexual misconduct of others—was not a right created by the church. Further, adjudication of the claim does not require the court to interpret or pass on the efficacy of any particular church doctrine. The common laws of agency and tort have created a cause of action for negligent supervision and are the source of any potential liability on the part of the church.[74] It seems clear, then, that neutral principles of law may be applied in this situation.

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[69] *See* Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 881 (1990).

[70] *See supra* note 28 and accompanying text.

[71] Swanson v. Roman Catholic Bishop, 692 A.2d 441, 442-43 (Me. 1997).

[72] Graffam v. Wray, 437 A.2d 627, 633 (Me. 1981) (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976)).

[73] *Graffam*, 437 A.2d at 633.

[74] *See supra* note 28.

B. Within the Limits of Permissible Inquiry—The Negligent Supervision Claim in Context

The mere analysis of the hierarchical structure of the church in order to determine issues of apparent or actual authority does not necessarily impair free exercise or create an undue risk of entanglement. There are numerous examples of other types of disputes, such as property and trust cases, involving religious organizations where the courts have involved themselves and have been able to maintain neutrality toward church doctrine and polity.[75] A question is raised, then, by the *Swanson* court's attempt to draw an arbitrary line of neutrality at a point prior to any examination of church organization and ecclesiastical relationships. If the courts could apply principles of generally applicable and neutral law in property and trust cases, why should a dispute involving the neutral principles of tort and agency law be treated differently?

Even if the examination of a religious organization's hierarchical structure requires the court to look at some religious law, it is only extensive inquiry and intrusion into religious law and polity that is forbidden. The Supreme Court has stated that finding a conflict between religion and governmental obligations is only the beginning of the court's inquiry, not the end of it.[76] The Supreme Court has held that a court oversteps its bounds in examining the allocation of power within a church only when it "probes deeply enough . . . so as to decide . . . religious law."[77] That is a far cry from drawing a line of neutrality before the examination itself. To hold, as the Maine Supreme Court did, that mere inquiry into the relationship between the church and its clergy is "problematic" and creates a risk of constitutional violation would be to ignore U.S. Supreme Court jurisprudence relating to permissible inquiry by the courts.[78] This holding

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[75] *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979) (resolving a church property dispute by examining church documents to determine whether a trust had been created); *Serbian*, 426 U.S. at 709 (recognizing that where a dispute over the control of church property could be resolved without extensive inquiry into religious law and polity the court need not defer to the highest ecclesiastical tribunal of the church involved, but where the case was at base a religious controversy and not merely a property dispute, the court was required to defer to the church's authority); Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 445 (1969) (finding that the state has a legitimate interest in resolving property disputes, including disputes over ownership of church property which are properly within the jurisdiction of a civil court applying neutral principles of property law).

[76] *See* United States v. Lee, 455 U.S. 252, 257 (1982) (holding that to impose the requirements of the social Security System on members of the Amish faith accomplished an overriding governmental interest and further accommodating the Amish faith through exemptions would impair the maintenance of a sound tax system).

[77] *Serbian*, 426 U.S. at 709.

[78] Swanson v. Roman Catholic Bishop, 692 A.2d 441, 444 (Me. 1997).

also ignores Maine precedent which affirms that neutral principles of law can be applied to disputes involving churches, so long as those principles are applied without extensive inquiry into religious law and polity.[79]

Given these principles, merely examining the hierarchical structure of a religious organization to obtain evidence of an agency or employment relationship between the organization and its clergy, without passing on the validity of its structure or system of authority, would not seem to be an impermissible intrusion. What would be the nature of that intrusion? Knowing that he might be held to a particular level of accountability in the supervision of his employees can have an effect on how an employer conducts himself and interacts with those employees. For example, he may keep more detailed records of dealings with employees and pay closer attention to the activities of those employees within his area of supervision. He may decide to increase his presence in situations with employees where he has become aware of potential problems that could arise. There is no denying that these types of behavioral changes would have a subtle effect on his relationship with his employees, but it is not such a substantial change that the church employer here is effectively being controlled by the state in carrying on the business and work of the church.

Analysis of the law of agency and tort as it applies to a suit against church officials for the negligent supervision of a member of its clergy would not have raised serious questions of doctrinal interpretation.[80] The

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[79] *See, e.g.*, Parent v. Roman Catholic Archbishop, 436 A.2d 888, 890 (Me. 1981) (endorsing a neutral principles of law approach to disputes involving churches, but holding that, on the facts of the case, determining the existence of a trust relationship in order to resolve a property dispute would require the court to assess the scope of a bishop's authority under canon law and this was an impermissible inquiry).

[80] This approach has been widely adopted by state and federal courts in the adjudication of claims against churches for the negligent supervision of their clergy. *See* F.G. v. MacDonell, 696 A.2d 697, 702-03 (N.J. 1997) (applying neutral principles to adjudicate a claim of clergy sexual misconduct and holding that the First Amendment was not violated where conduct at issue could not be said to have been an "expression of a sincerely held religious belief" and no evaluation of theology or doctrine was required of the court); *see also* L.L.N. v. Clauder, 552 N.W.2d 879, 885 (Wis. Ct. App. 1996) (holding that the court could inquire into a negligent supervision claim based on alleged sexual misconduct by a priest "without fostering an impermissible entanglement in church, policy, law and governance"); Isely v. Capuchin Province, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995) (finding that matters pertaining to the supervision of clergy could be decided without determining questions of church law and policies). There are, however, opinions to the contrary. *Cf.* Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) (finding that hindsight determination of negligent supervision claims was inappropriate and unconstitutional and would have a "chilling effect leading indirectly to state control of the future conduct of affairs of a religious denomination"); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 791 (Wis. 1995), *cert. denied*, 116 S. Ct. 920 (1996) (acknowledging that in some circumstances inquiry into the supervision of clergy might be able to be decided without determining doctrinal questions, but was not permissible in the instant case where there was no allegation of any knowledge by the church of prior misconduct and where the church's supervision would be judged "in light of their religious beliefs" (quoting *Schmidt*, 779 F. Supp. at 332)).

law is well-established and well-defined as to what elements are required in an employment relationship to extend liability to an employer for the misconduct of an employee.[81] As the lower court attempted to do, allegations to be addressed at trial could have been limited to those that would be almost entirely secular in nature.[82] Those limitations could have been restricted to: (1) what the Bishop knew regarding the risk presented by Father Morin; (2) when he knew it; (3) what action he took or did not take to reduce that risk; and (4) whether those were actions of a reasonable supervisor under the circumstances.[83] No question, for example, need have been asked regarding the actions of a "reasonable Bishop."

The *Swanson* court stated that even mere comparison of church employment relationships with secular employment relationships creates constitutional problems,[84] but given the opinions of the U.S. Supreme Court relating to permissible inquiry discussed above,[85] that seems to be an overstatement of their argument. Allowing the claim to proceed under these limitations would not have necessarily raised questions of impermissible inquiry and, if the proceedings entered an area of excessively intrusive inquiry, the court would have had the power to pull the offending party back within the bounds set by the lower court.

The *Swanson* court contended that they were barred from adjudicating this dispute because doctrinal matters of forgiveness and mercy were directly implicated.[86] The only support given for this contention came from a Wisconsin case which briefly quotes a law review article.[87] Unfortunately, no serious discussion of these matters was taken up by the court which leaves the reader guessing as to just what the court weighed in this determination and how it arrived at its conclusion.

These same issues would arise in a case where it is claimed that a religious organization failed to properly supervise a member of its clergy who had known tendencies toward or a past history of murder. Is the *Swanson* court saying that even there, if issues of forgiveness and mercy are implicated, the courts can neither involve themselves nor subject the

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[81] *See supra* note 28 and accompanying text.

[82] Swanson v. Morin, No. CV-93-1006, slip op. at 10 (Me. Super. Ct., Cum. Cty., Dec. 21, 1995).

[83] *Id.* at 10-11.

[84] Swanson v. Roman Catholic Bishop, 692 A.2d 441, 444 (Me. 1997).

[85] *See supra* notes 62-77 and accompanying text.

[86] *Swanson*, 692 A.2d at 445.

[87] *Id.* (citing Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995), *cert. denied*, 116 S. Ct. 920 (1996) (quoting James T. O'Reilly and Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 47 (1994))).

religious organization to liability? If a priest hears the confession of a parishioner who states an intent to commit murder, he has an obligation to alert law enforcement authorities of that intent in order to prevent harm to a member of the public. It would be irrational to hold that there would be no corresponding obligation for the church itself to warn the public of a potential threat posed by a priest who is known to pose a serious threat of violence or at the least, supervise him in such a manner as to reasonably reduce that threat. Also, issues of forgiveness and mercy arise more appropriately in the area of discipline than in supervision. It is not argued that church officials failed to properly discipline Father Morin, just that they failed to properly supervise him.[88] Maintaining a supervisory presence that would have discouraged Father Morin from engaging in his alleged sexual misconduct and abuse of the counseling relationship with the Swansons need not have involved any issues of forgiveness or mercy.

Another argument in support of allowing a negligent supervision claim to proceed is that it presents a much closer question of potential constitutional violations than do negligent selection and training claims. A negligent supervision claim does not involve the same issues of church doctrine and governance as claims of negligent selection and training claims which were properly dismissed by the lower court.[89] Negligent selection and training claims have not enjoyed much success.[90] These holdings have been based primarily on the belief that determining who will speak for the church and what they will be trained to teach and preach is properly left to determination by the church's highest ecclesiastical body.[91] These issues are not, however, particularly relevant in a discussion of proper supervision. Appropriate supervision of an employee does not require particular forms of discipline or particular training to be given to the supervised employee by the church, and no determination of doctrine need be made by the court. In the present case, the court may have needed to examine some facts regarding the hierarchical structure of the church to determine who was in a position to supervise Father Morin and what control over his employment those persons had evidenced in the past to

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[88] Appellees' Brief at 2, *Swanson*, 692 A.2d 441 (No. CUM-96-305).

[89] *See generally* Isely v. Capuchin Province, 880 F. Supp. 1138 (E.D. Mich. 1995) (negligent hiring claim dismissed); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991) (dismissal of negligent hiring claim upheld); Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985) (suit by woman who was denied ordination dismissed). *But see* Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993) (negligent hiring claim upheld), *cert. denied*, 511 U.S. 1137 (1994).

[90] *See supra* note 89.

[91] *See, e.g.*, Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952).

examine issues of apparent or actual authority. As noted above, however, that inquiry should have been permissible.[92]

C. *A Balancing of Interests*

In adjudicating a negligent supervision claim against a religious organization, it is a given that some intrusion into the religious arena will inevitably take place. However, that intrusion does not in itself bar the courts from involvement in the dispute. Under both the U.S. and Maine Constitutions, a balancing of legal interests is required in order to determine whether that intrusion is outweighed by a sufficient societal interest. It is here that the *Swanson* court departed most significantly from established precedent. Its analysis of this balancing of interests was cursory, conclusory, and incorrect under both U.S. Supreme Court and Maine precedent.

In saying that those courts that have allowed this type of claim to proceed have failed to maintain the appropriate degree of neutrality, the *Swanson* court makes an incorrect assumption about what neutrality requires. The First Amendment of the U.S. Constitution encompasses two concepts—the freedom to act and the freedom to believe—and where no attempt to regulate religious belief is shown, neutral laws of general applicability have been consistently upheld, even where they incidentally burden religious practices.[93] The First Amendment allows the courts to reach actions which subvert public order and violate social duties.[94] If this was not the case, every person with a claimed religious belief could become a law unto himself merely by stating a religious motivation for his actions that would effectively become superior to the civil laws that govern our societal relationships. [95]

Conduct has always been subject to regulation for the protection of society, but the power to regulate must not be exercised so as to unduly

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[92] *See supra* notes 75-83 and accompanying text.

[93] *See* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

[94] *See, e.g.*, United States v. Lee, 455 U.S. 252, 260 (1982) (explaining that the maintenance of an organized society requires that some religious practices give way to the common good); American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 399 (1950) (asserting that legitimate attempts to protect the public from the "present excesses of direct, active conduct, are not presumptively bad because they interfere with . . . and restrain the exercise of First Amendment rights"); and *Cantwell*, 310 U.S. at 303-04 (arguing that the state may enforce the peace and promote good order of the community without unconstitutionally invading protected liberties).

[95] *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1878).

infringe a protected freedom, even in the pursuit of a permissible goal.[96] Not every burden on religion is unconstitutional[97] and the state may impose limitations on religious liberty when it can show that those limits are necessary to accomplish a compelling governmental interest.[98] Moreover, legitimate attempts by government to protect the public are not presumptively bad because they interfere with or restrain the free exercise of religion.[99] The constitutionality of a burden or intrusion on a religious organization will depend on the importance of the governmental interest and the degree of interference accommodating a religious practice would have on that interest.[100]

The language of the Maine Constitution and its case law clearly require consideration of the public peace and the public good in any analysis of the right to the free exercise of religion and in no way grants blanket immunity to religious organizations for tort claims. Article I, Section 3 provides that no person shall be restricted in the practice of their chosen religion according to the dictates of their own conscience, so long as that person does not "disturb the public peace."[101] That same section also notes that all persons "demeaning themselves peaceably, as good members of the State," will have equal protection of the laws of Maine.[102] Accordingly, religious societies are still subject to the secular rule of law and religious freedoms are limited by the right of the public to good order.[103] To make that judgment, a balancing of societal interests by the courts vis-a-vis the protection of religious freedom is required.

The *Swanson* court incorrectly assumed that imposing liability and an award of damages in a negligent supervision claim would have a "chilling effect leading indirectly to state control over the future conduct of affairs

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[96] *See Cantwell*, 310 U.S. at 303-04.

[97] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (where a state interest in protecting children through child labor laws was held to override the practice, encouraged by the child's religion, of distributing literature on the streets).

[98] *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (stating that only those interests of the "highest order" can outweigh claims to the free exercise of religion).

[99] *See* American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 399 (1950).

[100] *Id.*

[101] ME. CONST. art. I, § 3.

[102] *Id.*

[103] This contention has support in Maine jurisprudence as well. Several cases from Maine's highest court have noted that sufficient societal or state interests can outweigh restrictions on the freedom of religious practice. *See, e.g.*, Blount v. Dep't of Educ. & Cultural Servs., 551 A.2d 1377, 1380, 1385 (Me. 1988) (where the state showed a compelling interest was served by requiring attendance at a public school—in ensuring the quality of education—which was sufficient to outweigh contentions by parents of home-schooled children that this would violate religious beliefs); Dotter v. Maine Employment Sec. Comm'n, 435 A.2d 1368, 1371 (Me. 1981) (where the state failed to establish a compelling state interest to justify interference with a religious practice).

of a religious denomination."[104] Imposing liability here would rely on no religious precepts for its support because liability rests ultimately on (1) what an employer knew or should have known regarding an undue risk of harm to others posed by a person employed by them and (2) whether that employer exercised reasonable care under the circumstances to prevent that employee from posing an unreasonable risk of harm to others.[105] Liability does not arise from the relationship of the parties other than that the employer has a duty to supervise the employee.[106] Furthermore, while church officials may need to consider secular principles relating to the supervision of their employees, it does not follow that they are necessarily restricted from particular interaction with members of the clergy in order to conform to those secular standards. In any case, whether imposition of liability in this case would truly have a "chilling effect" on church-clergy relationships can only be properly evaluated by a full consideration of the competing interests and potential burdens on the church involved, a task that the *Swanson* court declined to take on.

While the *Swanson* court recognized the fact that other courts have ruled that negligent supervision claims may be heard, it rejected their arguments based on a belief that those courts failed to maintain a proper degree of neutrality.[107] Some of those cases included situations where, as was alleged in *Swanson*, the church clearly had notice that a particular clergyman was dangerous.[108] In discounting these contrary opinions, the court diminishes an important state interest in protecting its citizens from the sexual misconduct of other citizens (including clergymen) in order to avoid an arguably modest intrusion on the clergy-church relationship.

The court acknowledged that the Supreme Court has consistently held that the religion clauses of the First Amendment require a balancing of interests, but concluded that some rights are "not sufficiently compelling to overcome certain religious interests" and that to impose a secular duty of supervision on a religious organization would serve no sufficient societal interest.[109] While it is certainly true that not all societal interests will be

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[104] Swanson v. Roman Catholic Bishop, 692 A.2d 441, 445 (Me. 1997) (quoting Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991)).

[105] *See supra* note 28.

[106] *See supra* note 28.

[107] *Swanson*, 692 A.2d at 445.

[108] *Id.* (citing Konkle v. Henson, 672 N.E.2d 450 (Ind. App. 1996); Jones v. Trane, 153 Misc. 2d 822 (N.Y. Sup. Ct. 1992); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991)). *See also* Appellees' Brief at 2, *Swanson*, 692 A.2d 441 (No. CUM-96-305).

[109] *Swanson*, 692 A.2d at 445 (citing Minker v. Baltimore Annual Conference of the United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990). This case, however, dealt with age

deemed important enough to outweigh inhibitions on religious practice, the court provided no explanation of just what societal interest might have been served here. How could the court really weigh, as required by the Supreme Court, the competing interests involved in this case without identifying those interests? The simple answer is that they could not and they did not.

Allowing a claim against the church to be heard would not have interfered with the operations of the church to any greater degree than the discovery process already had and only at trial could the reasonableness of the supervisory action taken be fully explored. Only then could any reasoned balancing of interests be evaluated—with all the facts and arguments developed by both parties and placed on the table.

IV. CONCLUSION

The analysis by the Maine Supreme Court of the constitutional issues surrounding the potential liability in tort of churches for the misconduct of their clergy was disappointing. The court seemingly detailed a comprehensive analysis of the relevant U.S. constitutional precedent regarding the religion clauses, but upon deeper study it is evident that the court ignored, or treated with only a cursory inspection, case law that provides a strong basis for a contrary holding. This deficiency is most notable in the fact that the court provided only superficial analysis of the public policy goals and competing interests involved in a controversy of this sort. The court also failed to take into account the very real goal of the Maine Constitution of securing religious freedom while still maintaining public order and providing for the protection of its citizens.

This decision unfortunately implies that a societal interest in protecting individuals from improper sexual advances by those in a position of trust is not a compelling enough interest to outweigh what is arguably a modest imposition on the employment relationship between clergy and church. In doing so, the court subordinated the public good to the claims of those who would try to avoid responsibility for their negligence by hiding behind the religion clauses.

The best interests of the public would have been better served if the court had allowed the negligent supervision claim to have fully developed at trial. In balancing the interests of the church against those of the public at large, who bears the greatest risk of harm in having claims of this sort

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discrimination issues relating to the selection and retention of a particular clergy member and is not on point here.

dismissed? The church, who might need to make some changes in the way it supervises its employees, especially when it has notice that a clergy member poses a potential risk of serious harm to the public? Or the possible victim of that clergy member who has placed her trust in the church to act in her best interest?

Finally, whatever the arguments about whether allowing this type of claim to go forward will start us down a "slippery slope" toward state control of religion, no one can seriously argue that no good would be served by doing so. Three important public policy objectives would profit from this course. First, allowing these claims to proceed to trial would provide public notice to the community of a potential (at least alleged) risk. Second, the court would be an objective third party in adjudicating the claim and religious issues would be removed from consideration. Third, notice would be given to those persons in religious organizations who are in a position to make a difference that this type of misconduct on the part of clergy members will not be tolerated and the organization itself, being closest to the situation, needs to take a proactive role in preventing abuse.