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ARTICLE

HELPING #CHURCHTOO ABUSE VICTIMS HOLD RELIGIOUS ENTITIES ACCOUNTABLE IN CIVIL CASES

Peter B. Janci[†]

I. INTRODUCTION

"Ending child sex abuse is the most effective action we can take to improve the human condition on earth."[‡] I have spent the last thirteen years working towards that aspiration—representing hundreds of individuals who were sexually abused as children in cases against institutions of trust. Despite helping clients attain some significant successes in cases involving other institutions of trust, I remain deeply concerned about the epidemic of child sexual abuse that has gone largely unaddressed within the Protestant world. This problem has continued quietly for decades (and probably centuries).

Through my work, I have seen first-hand the profound and lasting impact that child sexual abuse in the church context has on survivors. Though imperfect, the moniker of "survivor" [1] is fitting in many ways, as the lives of those who have been sexually abused as children are forever marked and

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‡. This quote is attributed to advocate Monique Hoeflinger. I was introduced to this quote by a tremendous advocate for the eradication of child abuse named Randy Ellison, author of BOYS DON'T TELL: ENDING THE SILENCE OF ABUSE (2011).

1. Throughout this article I use the terms "survivor" and "victim" largely interchangeably. By these terms, unless stated otherwise, I simply mean one who has suffered abuse. There are differing preferences among those who themselves have suffered such abuse.

altered—separated into before and after—by the abuse they suffer.[2] Sexual abuse in the religious context carries with it an overlay of spiritual betrayal and attendant unique and complex harms.[3] Psychological researchers have found that "[t]he brain appears to remember and process betrayal trauma differently than other traumas . . . . On top of the direct sinister effects of being sexually assaulted by a [member of the clergy], these institutional betrayals lay an extra thick, sticky coating of shame, disgust, alienation and loss."[4] And the impact of abuse in the church ripples out to victims' spouses, children, families, and community.[5]

2. CATE FISHER ET AL., THE IMPACTS OF CHILD SEXUAL ABUSE: A RAPID EVIDENCE ASSESSMENT, 44 (2017) [hereinafter IICSA Report: The Impacts of Child Sexual Abuse] ("[B]eing a victim and survivor of CSA [child sexual abuse] is associated with *an increased risk of adverse outcomes in all areas of victims and survivors' lives*. Additionally, long-term longitudinal research suggests that, in many cases, these adverse outcomes are not just experienced over the short and medium term [the initial months and years] following abuse, but instead *can endure over a victim and survivor's lifetime*.") (emphasis added) (footnote omitted). As one victim of sexual violence recently explained, "Most people say development is linear, but for survivors it is cyclic. People grow up, victims grow around: we strengthen around the place of hurt, become older and fuller, but the vulnerable core is never gone." CHANEL MILLER, KNOW MY NAME 307 (2019).

3. *See* Joan M. Cook & Jennifer J. Freyd, *Why victims of Catholic priests need to hear more than confessions*, CONVERSATION (Jan. 16, 2019), https://theconversation.com/why-victims-of-catholic-priests-need-to-hear-more-than-confessions-109866.

4. *Id.* The original quote refers to assault by a "priest." This article focuses on abuse in the Protestant context, wherein that position is more commonly identified as a "pastor." In any event, the same underlying dynamic exists. Studies show sexual abuse frequently impacts the faith and spirituality of victims. *See, e.g.*, Victor I. Veith et al, *Keeping Faith: The Potential Role of a Chaplain to Address the Spiritual Needs of Maltreated Children and Advise Child Abuse Multi-Disciplinary Teams*, 14 LIBERTY UNIV. L. REV. 351, 355 (2020) (noting that "[i]n a qualitative study of thirty-nine forensic interviewers from twenty-two states who had conducted more than 42,000 forensic interviews, researchers noted that most of the interviewers had encountered children raising spiritual or religious questions during the forensic interview or interview process"). Furthermore, "[i]n a review of thirty-four studies reporting on a total of 19,090 adult survivors of child maltreatment, scholars noted that most studies found abuse damaged the faith of children, often by damaging the victim's view of and relationship with God." *Id.* at 356.

5. IICSA Report: The Impacts of Child Sexual Abuse, *supra* note 2, at 82 ("Victims and survivors are at increased risk of experiencing issues such as poor relationship stability, interpersonal violence and sexual dysfunction . . . . Negative parenting outcomes can also manifest as a result of victims and survivors' internal lack of belief or confidence in their own parenting capability. These negative outcomes can be compounded where individuals are also suffering from depression.") (footnotes omitted).

Awareness about the abuse epidemic within the Protestant world is growing.[6] However, while the Protestant church in America often thinks of itself (and holds itself out) as "different" or "set apart," to date, the actions of the Church in response to #ChurchToo abuse tell a different story. From my vantage point, the internal dynamics at play in large Protestant institutions are largely indistinguishable from those of most "secular," for-profit corporations desperately trying to avoid liability.[7] When a victim comes forward about abuse, many church leaders grab the same tired "defense playbook" that ultimately dehumanizes and reinjures the victims, denies the truth of the Church's culpability, and disfigures the soul of the Church.

The full reality of the sickness in our religious institutions can be difficult for the faithful to accept.[8] There are still many more who have difficulty accepting a much needed "cure"—namely, more civil liability for religious organizations. When it comes to the #ChurchToo[9] epidemic, while criminal prosecutions of predators are important, they are not enough and do little to influence the conduct of enabling institutions. Instead, civil liability is essential to help quell the epidemic of child sexual abuse in Protestant religious institutions. To do *the most* to help survivors, eradicate abuse in religious institutions, and improve our religious institutions, we must

6. *See, e.g.*, Casey Quackenbush, *The Religious Community Is Speaking Out Against Sexual Violence With #ChurchToo*, TIME (Nov. 22, 2017), https://time.com/5034546/me-too-church-too-sexual-abuse/. Recent gains in awareness about abuse in the Protestant church are largely the result of the dedication and hard work of many courageous survivors and lay advocates, including bloggers, who have refused to remain silent. *See, e.g.*, Sarah Stankorb, *The Crusading Bloggers Exposing Abuse in Protestant Churches*, WASH. POST (June 3, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/06/03/feature/the-crusading-bloggers-exposing-sexual-assault-in-protestant-churches/.

7. Religious organizations also often invoke the First Amendment as a shield and a sword. Properly pled, civil claims for child sexual abuse focus on the conduct of the organization and its agents—not the religious organization's beliefs—and thereby do not run afoul of First Amendment protections. *See, e.g.*, Kelly W.G. Clark, Kristian S. Roggendorf & Peter B. Janci, *Of Compelling Interest: The Intersection of Religious Freedom and Civil Liberty in the Portland Priest Sex Abuse Cases*, 85 OR. L. REV. 481, 512–13, 513 nn.75–76 (2006).

8. *See* Boz Tchividjian, *'Spotlight': It's not just a Catholic problem*, RELIGION NEWS SERV. (Dec. 7, 2015), https://religionnews.com/2015/12/07/spotlight-its-not-just-a-catholic-problem/ ("[M]any Protestant leaders who aren't shy about speaking out on a wide variety of spiritual and cultural issues will often refuse to speak out against specific cases of child sexual abuse.").

9. *See, e.g.*, Eliza Griswold, *Silence Is Not Spiritual: The Evangelical #MeToo Movement*, NEW YORKER (June 15, 2018), https://www.newyorker.com/news/on-religion/silence-is-not-spiritual-the-evangelical-metoo-movement; Kerri Miller & Kelly Gordon, *Women of Faith: The #ChurchToo movement shines a light on sex abuse in evangelicalism*, MPR NEWS (June 12, 2019), https://www.mprnews.org/story/2019/06/12/women-of-faith-what-is-the-church-too-movement.

empower victims of child sexual abuse to use the civil justice system to reach both the local bodies and the upper echelons of Protestant religious institutions.

Part I of this article will discuss the important and unique intangible and tangible benefits that survivors obtain through civil actions against religious institutions. As discussed therein, utilizing the tool of civil justice against large religious denominations, confederations, and conferences—i.e., the entities with the most influence and resources to effect organization-wide change—enforces institutional integrity, encourages important reforms, and increases public trust and confidence in such institutions.[10] Perhaps most importantly, the tool of civil justice creates powerful incentives to increase the safety of children entrusted to the care of religious institutions now and in the future.

Part II of this article will address the legal theories and approaches that survivors and their advocates can use to reach religious institutions through civil lawsuits. As discussed in that section, options include taking a broader view of traditional torts (such as negligence and fraud), as well as pushing for expansions of tort remedies that have thus far only been available in a small minority of states (such as vicarious liability of employing organizations for the sexual abuse committed by their agents).

Finally, Part III of this article will briefly discuss whether a viable alternative exists that religious organizations could employ to avoid civil litigation entirely.

II. PART I: WHY CIVIL JUSTICE MATTERS IN THE #CHURCHTOO CONTEXT

Imposing liability on churches and upper echelon religious organizations is critically important. As discussed below, access to civil justice provides victims both an important venue to be heard and an opportunity for meaningful redress. Civil suits also increase transparency and scrutiny for religious entities regarding their child protection efforts (and omissions). Such transparency and scrutiny lead to reforms and cultural changes within churches that increase the safety of children in the church today and in the future.

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10. My arguments are not intended to be limited to only church denominations. They are equally applicable to Protestant missionary, educational, and parachurch organizations. For a discussion of laws applicable to sexual assault in the university context, see generally, Laura L. Dunn, *Mutual Is Not Always Equitable: The Misuse of Mutual No Contact Orders in Title IX Proceedings Addressing Sexual Misconduct*, 14 LIBERTY UNIV. L. REV. 283 (2020).

A. *Value for Victims: Acknowledgement and Redress*

Any policy analysis regarding child abuse prevention and response measures should begin with the consideration: "*What is good for victims?*"[11] There are many people ready to fight for what is good for a religious institution—whether motivated by sectarian pride or the common instinct to root for the powerful.[12] In contrast, the voice of the victimized and vulnerable is too often forgotten or ignored in these discussions.[13]

Reaching large religious institutions in civil suits is unabashedly good for victims of abuse, providing an important acknowledgment of the multi-faceted harm they have suffered. On a moral and emotional level, it provides an acknowledgment not only that the abuse happened, and the church context or setting of the abuse, but also that the abuse is evidence of systemic failures by the church itself.[14] When an adult in a position of church authority

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11. *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS., PREVENTING CHILD SEXUAL ABUSE WITHIN YOUTH-SERVING ORGANIZATIONS: GETTING STARTED ON POLICIES AND PROCEDURES (2007); *see also* BASYLE TCHIVIDJIAN & SHIRA M. BERKOVITS, THE CHILD SAFEGUARDING POLICY GUIDE FOR CHURCHES AND MINISTRIES (2017).

12. *See, e.g.*, Christine Schiavo, *Catholic League accuses Attorney General Shapiro of fanning 'flames of contempt' for the church*, MORNING CALL (Sept. 24, 2018), https://www.mcall.com/news/pennsylvania/mc-nws-pa-grand-jury-catholic-league-20180922-story.html ("In a court filing . . . the Catholic League for Religious and Civil Rights called the recent Pennsylvania grand jury investigation into the sexual abuse of children by priests 'government-sanctioned religion-based targeting' that 'violates the rights of Catholics.'")

13. *See also* RACHEL HURCOMBE ET AL., TRUTH PROJECT THEMATIC REPORT: CHILD SEXUAL ABUSE IN THE CONTEXT OF RELIGIOUS INSTITUTIONS 3 (2019) ("The protection of the reputation of the religious institution and individual perpetrators at all costs meant victims and survivors said they were often disbelieved, discredited and not supported after disclosing their experiences of sexual abuse both as children and as adults."); Emma Green, *Why Does the Catholic Church Keep Failing on Sexual Abuse?*, ATLANTIC (Feb. 14, 2019), https://www.theatlantic.com/politics/archive/2019/02/sean-omalley-pope-francis-catholic-church-sex-abuse/582658/ (discussing the challenges the Catholic Church is facing in addressing issues of abuse) ("There's the U.S. bishops' conference, which, in November, could not agree on even a symbolic nod toward the need for accountability.").

14. *Spotlight (2015) – Stanley Tucci as Mitchell Garabedian*, IMDB, https://www.imdb.com/title/tt1895587/characters/nm0001804 (last visited Feb. 21, 2020) (As the victim's attorney states in the movie Spotlight—the dramatization about the Boston Catholic abuse scandal—"If it takes a village to raise a child, it takes a village to abuse one."). For a discussion about the importance of acknowledgement to the healing of survivors, see also generally, Tracy L. Morris PhD, Julie A. Lipovsky PhD & Benjamin E. Saunders, *The Role of Perpetrator Acknowledgement in Mediating the Impact of Child Sexual Assault: An Exploratory Study*, 5(3) J. CHILD SEXUAL ABUSE 95, 95–96 (1996) (finding that victims "whose

abuses a child, that only occurs as a result of errors and omissions by those within the church who have failed to properly and protactively safeguard those children.

The enabling errors and omissions can fall along a spectrum of culpability—from ignorance about child protection to willful facilitation or cover-up. When a child is abused in connection with a church or religious organization, it is of central importance to the victim that his or her suffering is acknowledged, not just as a private injury resulting from the personal fall of the perpetrator, but also as a failing *by the church body and leadership*.

Viewed in this way, civil accountability for the church and denomination—including meaningful compensation for the victim—puts the Church's "money where its mouth is."[15] It acknowledges the gravity and convergence of the transgressions by both the perpetrator and the church. It demonstrates the Church's sincere recognition of its role in allowing the harm, and reaffirms the Church's solemn duties to protect the vulnerable in its care going forward.

In addition, civil accountability and resulting financial compensation to the victim also serve practical (if only partial) restorative functions. Sexual abuse has a serious cost for victims—not only psychologically, emotionally, and spiritually, but also economically.[16] Statistics are staggering: true economic losses over a lifetime of a victim are in the hundreds of thousands of dollars if not more.[17] Civil accountability shifts some burdens of the impact of abuse (namely, economic)—the only such impacts that *can* be shifted—to the responsible parties most capable of bearing it.

While monetary compensation cannot "undo" the abuse or erase its effects, it can ease the substantial life-long burden suffered by victims of

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perpetrator had not acknowledged [the abuse] . . . were rated higher on symptoms of PTSD than were those in the acknowledging group.").

15. Even where most or all compensation to a victim is paid by the liability insurer for a religious entity, this still helps the victims and results in increased insurance premiums that must be paid by the insured entity.

16. IICSA Report: The Impacts of Child Sexual Abuse, *supra* note 2, at 14 ("CSA has also been associated with increased unemployment/time out of the labour market, increased receipt of welfare benefits, reduced incomes and greater financial instability.").

17. *One Year's Losses for Child Sexual Abuse in U.S. Top $9 Billion, New Study Suggests*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (May 21, 2018), https://www.jhsph.edu/news/news-releases/2018/one-years-losses-for-child-sexual-abuse-in-us-top-9-billion.html; *The Impact of Child Sexual Abuse*, DARKNESS TO LIGHT, https://www.d2l.org/the-issue/impact/ (last visited Feb. 22, 2020).

#ChurchToo abuse. It is ignorant at best and dishonestly self-serving at worst for churches to cast aspersion on victims for seeking compensation.[18]

B. *Increased Safety for Children Entrusted to the Church*

Not only does civil accountability help past victims of #ChurchToo abuse, it also plays an important role in increasing the safety of those who are vulnerable today. Unfortunately, corporations (including nonprofit and religious) have a human impulse towards denial when it comes to child sexual abuse.[19] They often do not want to believe and will not accept that child sexual abuse is happening within their organization. Many large youth-serving organizations (religious and secular) have refused to proactively and voluntarily take meaningful action (and invest resources) to protect children.[20] In sum, without civil liability, the cold, hard, corporate calculus

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18. For a first-hand account of the stigma that victims of sexual violence face for considering monetary compensation, see CHANEL MILLER, KNOW MY NAME 299–300 (2019) ("I was tempted to turn down the money entirely, my pride too big. Mostly, I feared the guilt and shame and stigma that arrives when any victim receives any sum of money. . . . I'd never received a penny from the criminal justice system. . . . Victims receive heat when given any sum. Few acknowledge that healing is costly. That we should be allocating more funds for victims, for therapy, extra security, potential moving costs, getting back on their feet, buying something as simple as court clothes. . . . *Preventing assault is so much cheaper than trying to address it after the fact.*") (italics in original).

19. Joshua Pease, *The Sin of Silence*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/05/31/feature/the-epidemic-of-denial-about-sexual-abuse-in-the-evangelical-church/.

20. Jim Yardley, *Abuse by Clergy Is Not Just a Catholic Problem*, N.Y. TIMES (Apr. 13, 2002), https://www.nytimes.com/2002/04/13/us/abuse-by-clergy-is-not-just-a-catholic problem.html (Joyce Seelen, a lawyer who has handled fifty cases of clerical abuse said, "In my practice, I have not seen institutions taking steps to correct the problem . . . . Every one of the churches that we've been successful against walked into court and said, 'We didn't know, and if we had known, we would have done something.' Over and over and over, what we saw was they didn't know because they didn't want to know."); *see e.g.*, Faisal Rashid & Ian Barron, *The Roman Catholic Church: A Centuries Old History of Awareness of Clerical Child Sexual Abuse (from the First to the 19th Century)*, 27 J. CHILD SEXUAL ABUSE 778, 778 (2018) (finding that the Catholic Church was aware for centuries about the problem of sexual abuse by clergy, but did not implement effective child protection policies or practices and instead "developed a culture of secrecy using clandestine organizational management models and institutional laws . . . ."). Similarly, although documentation shows that Boy Scouts of America were aware of the problem of adult scout leaders sexually abusing boys as early as the 1930s, the Boy Scouts did not inform Scouts or otherwise acknowledge this problem or implement any child protection training or policies until the 1980s. *Compare* "Boy Scouts Head Explains 'Red' List," N.Y. TIMES, June 9, 1935, at N4 (explaining that between the inception of the Boy Scouts in 1910 and 1935, approximately 1,000 scout leaders who had sexually abused boy scouts were documented by the Boy Scouts) *with The Boy Scouts Youth Protection Timeline*, L.A. TIMES

reveals that there is some perceived cost (time, economic, reputational, etc.) to enacting prevention measures and, historically, there has been little cost felt by the organization when a child is victimized in a local church. The lax state of child protection efforts in many Protestant churches—coupled with significant occurrences of child sexual abuse—suggest that same calculation has been run by the upper echelons of many Protestant institutions (including denominations, conventions, conferences, and the like). Meanwhile, these entities usually possess or have access to a plethora of resources and information about *how* child abuse is occurring in their churches as well as the most knowledge about particular vulnerabilities within their programs. Such entities also have the most significant influence—and usually the most resources—to thoroughly effectuate child protection within the broader organization, including at the local church level. To allow large religious organizations to shirk liability is to accept that children will continue to be sexually abused in the church—and the profound rippling effects will continue.

Civil accountability—i.e., requiring that churches pay for the harm allowed—changes the calculation for the benefit of children. Civil lawsuits make it more expensive to ignore the problem than it is to work towards fixing the problem. Civil lawsuits incentivize protective action in the future, even if driven only by the organization's concern for its bottom line. This increases safety for children who are in the church's care today. As the late, great attorney for clergy abuse victims, Kelly W.G. Clark, often said, "[T]o the extent that the Catholic Church is a safer place than it was twenty-five years ago it's not because the bishops got the Holy Spirit. It's because they got sued. Over and over and over again."[21]

C. *Impact on the Church: Transparency, Reform, and Trust*

Not only does civil accountability help victims and increase safety for the vulnerable within the church, but it also improves the health of the Church itself—even if the process is painful.

As referenced above, right now, many large religious organizations are engaging in a pattern of systemic denial that has long allowed abuse to

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(Aug. 4, 2012), https://documents.latimes.com/boy-scouts-youth-protection-timeline/ (noting first acknowledgements of problems of abuse in scouting and first implementation of child protection policies in the 1980s).

21. *Kelly Clark Compares Mormon Adventist And Catholic Clergy Sex Abuse Cases*, YOUTUBE (Nov. 6, 2009), https://youtu.be/FmiY2nJ1WGw?t=94; *see, e.g.*, Aimee Green, *Portland case has pushed Boy Scouts to better protect kids from abuse, attorneys say*, OREGONIAN (Sept. 2, 2010), https://www.oregonlive.com/portland/2010/09/portland_case_has_pushed_boy_s.html.

flourish. The purpose is simple: because legal liability is correlated to the control a corporate entity has over a perpetrator or negligent local church, large Protestant denominations and similar institutions strategically seek to avoid the appearance of the requisite control that would support such liability. In other words, large religious organizations—where the power and resources are most concentrated—strategically feign powerlessness over local churches and clergy to avoid a finding of civil responsibility for abuse.

A recent example of this impulse could be observed in the context of the Southern Baptist Convention (SBC). As the Houston Chronicle reported in advance of the 2019 annual meeting of the Southern Baptist Convention, an executive committee debate occurred about abuse prevention measures.[22] One executive committee member was quoted as warning against adopting a proposal requiring the SBC conduct inquiries into how their churches handle abuse allegations.[23] The reasoning for this opposition was essentially that taking protective action could weaken the organization's ability to claim powerlessness later in defending lawsuits by victims. This committee member was quoted as saying that: "If you have some little child who's been abused by some pastor or whatever, [a lawsuit against the SBC] may be a long shot, . . . [b]ut why open [the SBC's] checking account to that case?"[24]

Those taking this approach would have us believe that the SBC has the authority to terminate the membership of churches for taking unorthodox

22. John Tedesco & Robert Downen, *Southern Baptist Convention claims no control over local churches. But new rules, lawsuit may test that argument*, HOUSTON CHRON. (Sept. 5, 2019), https://www.houstonchronicle.com/news/houston-texas/houston/article/Southern-Baptist-Convention-claims-no-control-14416397.php. For a more thorough history of the problem of sexual abuse in the Southern Baptist Conference and the response thereto, *see also* DEE ANN MILLER, ENLARGING BOSTON'S SPOTLIGHT: A CALL FOR COURAGE, INTEGRITY, AND INSTITUTIONAL TRANSFORMATION (2017).

23. Tedesco & Downen, *supra* note 21.

24. Tedesco & Downen, *supra* note 21. *See also* Bill Bowden & Francisca Jones, *Former Arkansas pastor abused boy, says lawsuit; leaders failed to report it, lawyer says*, ARK. ONLINE (Jan. 4, 2020, 8:58 AM), https://www.arkansasonline.com/news/2020/jan/04/pastor-abused-boy-says-lawsuit-20200104/ (quoting Arkansas sexual abuse victims' attorney Joshua Gillispie as saying: "It's a legal facade, a disingenuous legal facade that they've kept up in a very obvious way, that these churches are independent. . . . The Convention derives monetary and other benefits from these member churches. They do have some degree of supervisory control over these churches" and "When leaders don't take responsibility for the actions under their influence and control, change does not occur. In 2020, organizations that tolerate child sex abuse and throw their hands in the air . . . those organizations don't have a place in civilized society.").

positions on cultural issues (such as sexual orientation),[25] but can do nothing to require training or safety protocols to prevent child sexual abuse by its ministers.[26]

This is just one example of a widespread and commonly used tactic. Numerous other large and powerful national youth-serving organizations have made hollow claims about their inability to control what happens at the local level.[27] These "powerlessness" narratives are often fundamentally dishonest corporate "shell games." Most often, these organizations have the raw ability and influence to create change *if and when they want to*.[28] Not only does this strategic corporate conduct result in failures to intervene to stop

25. *See* Jack Jenkins, *Southern Baptists Kick Out Gay-Friendly Church*, THINKPROGRESS (Sept. 24, 2014), https://thinkprogress.org/southern-baptists-kick-out-gay-friendly-church-169ca3d4e98/ ("[T]he SBC's highest committee voted unanimously to 'disfellowship'—or effectively break ties with—New Heart Community Church in La Mirada, California because it voted in May to become a 'third way' church, or a congregation where members 'agree to disagree' about homosexuality and not cast judgment on one another. The committee held that the church 'does not presently meet the definition of a cooperating church' under the SBC's constitution, which outlaws congregations that 'act to affirm, approve or endorse homosexual behavior.'") (last visited Feb. 22, 2020).

26. *But see* Robert Downen, *Southern Baptists unveil abuse reporting process, but critics say it fails to ensure anonymity*, HOUSTON CHRONICLE (Dec. 3, 2019), https://www.houstonchronicle.com/news/houston-texas/houston/article/Southern-Baptists-unvail-abuse-tip-line-don-t-14878683.php (showing that this argument did not win the day at the 2019 executive committee meeting and, instead, the SBC executive committee ultimately found the power to adopt the credentialing committee); Bowden & Jones, *supra* note 23 (quoting a representative for the Arkansas Baptist State Convention as saying: "The suit demonstrates a misunderstanding of Baptist church polity. The Convention does not control member churches and has no authority to remove a pastor of a local church . . . .").

27. In the author's experience litigating against large youth organizations, the author has repeatedly observed such arguments from organizations including the Boy Scouts of America, the Boys and Girls Clubs of America, the Seventh-day Adventist Church, and numerous other religious and secular organizations. *Compare*, *e.g.*, Anderson v. Boy Scouts of America, Inc., 589 N.E.2d 892, 893 (Ill. App. Ct. 1992) (where Boy Scouts of America "argued that [it] did not supervise or exercise any control over the day-to-day activities of local scouting units or the volunteer adult leaders of these units") *with* Doe v. Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints, No. 1:09-cv-00351-BLW, 2012 WL 3782454, at *15 (D. Idaho Aug. 31, 2012) (finding that "[t]he Boy Scouts of America is a vertically integrated organization. The national organization sits at the top. It sets the goals of the national organization and standards for local leadership, and relies on the lower levels to implement those goals. The lower levels include the local Councils[,] . . . the local scout leaders[,] and troop committees. The national Boy Scouts organization controls the local Councils, charging them with carrying out the purposes of the Boy Scouts of America at the local level. . . . The local Councils are the proverbial 'boots on the ground.' As explained by one past BSA executive, the local Councils are the 'eyes and ears' for the national organization").

28. *See, e.g.*, Jenkins, *supra* note 24.

existing abuse, it is also affirmatively creating a more dangerous environment by attracting predators who are emboldened because they are aware of gaps in the defenses. This allows abuse to flourish in the church.[29]

This duplicity and lack of integrity self-inflicts a grave wound on the organization itself. For a religious organization claiming to operate on spiritual principles, such cynicism and duplicity allows a moral and spiritual rot to set in and fester within the church.

The civil justice system can serve as an effective cure. Civil lawsuits provide an important public avenue for transparency regarding the nature and scope of the abuse occurring within religious institutions, as well as the institutional responses to known abuse and the risks of abuse. The public scrutiny attendant to such civil cases increases the accountability of religious institutions—both to constituents and the larger public. Leaders of religious organizations, which can otherwise be protected within insular and sycophantic echo chambers, are forced into a venue where they must explain and answer for their conduct before members of the larger community. Such scrutiny and resulting public criticism often create significant pressure for much-needed reforms—including the aforementioned implementation of increased child protection efforts. All of these factors help to reshape the culture within religious institutions, which is an important intangible component of robust child protection.[30] "Sunlight," as they say, is "the best of disinfectants."[31]

In sum, public civil lawsuits reveal and call out dishonest behavior by these organizations. Civil justice brings pressure for change to bear and helps clean out the rot that flows from dishonesty. It is ultimately a healthy thing—even if painful—to require that the Church be held to the standards it espouses and align its actions with its stated values. This realignment also begins a slow

29. *See, e.g.*, Joe Navarro, *Why Predators Are Attracted to Careers in the Clergy*, PSYCHOLOGY TODAY (Apr. 20, 2014), https://www.psychologytoday.com/us/blog/spycatcher/201404/why-predators-are-attracted-careers-in-the-clergy (discussing a list of 15 reasons why predators join religious organizations).

30. TCHIVIDJIAN & BERKOVITS, THE CHILD SAFEGUARDING POLICY GUIDE FOR CHURCHES AND MINISTRIES 2 ("Churches can level the playing field by cultivating a proactive culture of protection that prioritizes their children's safety").

31. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY, *Chapter V: What Publicity Can Do* at 1, LOUIS D. BRANDEIS SCH. OF L. LIBR., (originally published Dec. 20, 1913), https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v.

process of earning back the trust of the betrayed and increasing public confidence in these institutions.[32]

III. PART II: HOW TO BRING CASES

Given the unique ability of the civil justice system to address the epidemic of child sexual abuse in the Protestant church, survivors of #ChurchToo abuse need effective advocates to help them navigate that system. This begs the question: how do attorneys effectively hold religious organizations accountable? While many theories exist—and there is some variation across jurisdictions—the most promising approaches include negligence, fraud, and an expanded vicarious liability.

A. *Negligence*

The most classic and flexible tort—negligence—has always served as somewhat of a "catch-all." It allows a jury to apply the values of the community when considering whether conduct by an organization was unreasonable under the circumstances and thereby caused harm to another.[33]

A common conceptualization of negligence in abuse cases is the focus on a negligent response to a known danger of abuse by a particular perpetrator. When involving abuse by a church employee or agent, these are often styled as claims for "negligent retention" or "negligent supervision." However, advocates for victims of #ChurchToo abuse need to resist narrow issue framing that would unnecessarily curtail the liability of churches or denominations. For example, corporate defendants (including religious organizations) will often frame the question of foreseeability as narrowly as possible; i.e., "Did *this* church know that this *particular perpetrator* was going to abuse this *particular victim* in this particular way?" Many jurisdictions recognize a much broader concept of foreseeability that can encompass the type of behavior we see from large religious organizations.[34]

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32. For more on the concepts of "institutional betrayal" and importance of institutional trust, see generally Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOLOGIST, no. 6, Sept. 2014, at 575–87.

33. "[O]ur legal system has entrusted negligence questions to jurors, inviting them to apply community standards." W. KEETON ET AL., PROSSER AND KEETON ON LAWS OF TORTS § 37, pp. 235-37 (5th ed. 1984).

34. For cases where foreseeability was found due to prior knowledge, see Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326, 1338 (Or. 1987) (en banc) (determining that a reasonable factfinder could find sexual assault on school grounds to have been a foreseeable risk where a woman was reportedly sexually assaulted on the grounds fifteen days earlier and there were allegations of other attacks as well. The case recognizes that the concept of foreseeability refers to "generalized risks of the type of incidents and injuries that occurred

A broader conceptualization of negligence begins with the recognition that regional or national religious corporations are charged with the knowledge of all information known to (or reasonably knowable by) their

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rather than predictability of the actual sequence of events."); Fuhrer v. Gearhart-By-The-Sea, Inc., 760 P.2d 874, 877 (Or. 1988) ("There may be specific duties established by statute, status or relationship, but the absence of such duties does not insulate a defendant from liability. In the absence of a duty arising from a source of that kind, a defendant may be liable for conduct which is unreasonable in the circumstances if that conduct results in harm to a plaintiff and the risk of harm to the plaintiff or the class of persons to whom the plaintiff belongs was foreseeable."); McLeod v. Grant Cty. Sch. Dist. No. 128, 255 P.2d 360, 362–63 (Wash. 1953) (en banc) ("The harm which came to appellant was not caused by the direct act or omission of the school district, but by the intervening act of third persons. The fact that the danger stems from such an intervening act, however, does not of itself exonerate a defendant from negligence. If, under the assumed facts, such intervening force is reasonably foreseeable, a finding of negligence may be predicated thereon. . . . [T]he question is whether the actual harm fell within a general field of danger which should have been anticipated.") (citations omitted); *see also* Marquay v. Eno, 662 A.2d 272, 281 (N.H. 1995) ("A school may be liable for abuse of a student by a school employee outside of school hours where there is a causal connection between the particular injury and the fact of employment."); Edson v. Barre Supervisory Union No. 61, 933 A.2d 200, 205 (Vt. 2007) ("[W]here the former Department of Social and Rehabilitation Services (SRS) failed to protect two sisters from their stepfather—despite several reports of sexual abuse by the girls, school officials, and a babysitter, as well as an admission by the stepfather—we determined that SRS had a duty to anticipate the continued sexual abuse of the girls and could therefore be held liable for injuries suffered as a result of the stepfather's actions.") (citing Sabia v. State, 669 A.2d 1187, 1195–96 (Vt. 1995)); Sabia v. State, 669 A.2d 1187, 1196 (Vt. 1995) ("[I]n this case a reasonable jury could conclude that SRS should have anticipated Laplant's continued abuse of plaintiffs, and that SRS's failure to assist the girls was one of the proximate causes of the abuse."); *cf.* Raleigh v. Indep. Sch. Dist. No. 625, 275 N.W.2d 572 (Minn. 1978); Calkins v. Cox Estates, 792 P.2d 36 (N.M. 1990). For cases finding liability without an express duty or without prior notice about the particular harm-causing agent, see Fuhrer v. Gearhart-By-The-Sea, Inc., 760 P.2d 874, 877-78 (Or. 1988) (Personal representative of deceased hotel guest brought action against hotel and state for failure to warn of hazards of ocean surf in which guest died while trying to rescue children. The court held that "[w]hether negligence involves the commission of a negligent act or the taking of no action when the lack of action creates a foreseeable unreasonable risk of harm, the analysis should be the same . . . . A defendant may be liable if the defendant can reasonably foresee that there is an unreasonable risk of harm, a reasonable person in the defendant's position would warn of the risk, the defendant has a reasonable chance to warn of the risk, the defendant does not warn of the risk, and the plaintiff is injured as a result of the failure to warn."); Quadrozzi v. Norcem, Inc., 509 N.Y.S.2d 835, 836–37 (N.Y. App. Div. 1986) ("[T]he *employer* need not have foreseen the precise act or the exact manner of injury so long as the general type of conduct may have been reasonably expected, i.e. general foreseeability exists."); Doe v. Coe, 135 N.E.3d 1, 16 (Ill. 2019) ("[T]o impose a duty to supervise, only general foreseeability is required in an employment context . . . . it is generally foreseeable that *abuse* could occur in programs providing adults with unsupervised access to children.") (emphasis added).

agents.[35] Thus, with a regional or national organization, the "wide-angle" view of "notice" looks to what the corporation knows about this *type* of risk—that is, all instances of child sexual abuse across the organization—not merely red flags about "Pastor Smith" and his interactions with "Jane Doe." Under this type of macro-level negligence, one looks to what the corporation learned from various sources or reports from anywhere within its geographic reach over a longer period leading up to the abuse—and the larger institutional response to that knowledge.

Reframing the analysis by taking a "wide-angle" or "macro-level" view can be very effective. Using this type of approach, I was part of the team that took the Boy Scouts of America through a six-week civil negligence trial in 2010.[36] In that case, we looked at what the national youth-serving organization knew. Based on its internal records, it knew that over 1,200 individual scout leaders were accused of sexually abusing Scouts across the United States between 1965 and 1985.[37] This evidence established the Boy Scouts' awareness of a sustained, systemic, organization-wide problem—child sexual abuse by scout leaders—which posed a danger to all individuals in the same class as our clients (a Scout).[38] The evidence also showed that the organization undertook no meaningful protective actions before its scout leader abused our client.[39] That theory and evidence resulted in a $19.9 million verdict for the victim

35. *See* Doe v. Or. Conf. of Seventh-Day Adventists, 111 P.3d 791, 795 (Or. Ct. App. 2005) ("A corporation is not a sentient being and, therefore, cannot know, be aware of, or discover anything, except through the agency of its . . . employees, and it generally is charged with knowledge of facts that its agents learn within the scope of their employment. . . . [T]he 'acts' of a corporation constitute the acts of its agents performed within the scope of their work for the corporation") (citations and internal quotation marks omitted); State v. Oregon City Elks, 520 P.2d 900, 903 (Or. Ct. App. 1974) ("Since a corporation is not a natural person, it can, by definition, act only through its officers and agents."). An agent's knowledge acquired within the scope of the agency is often imputed to the principal, regardless of whether the agent actually communicates that knowledge to the principal. *See, e.g.*, Hogan v. Alum. Lock Shingle Corp., 329 P.2d 271 (Or. 1958); Marian Estates v. Emp't Dept., 976 P.2d 71 (Or. Ct. App. 1999).

36. *See* Jack Doe 1 v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 280 P.3d 377 (Or. 2012) (popularly known as "Kerry Lewis v. Boy Scouts of America").

37. *Id*. at 380 ("The trial court conducted a bifurcated trial of Lewis's claims. During phase one, the jury heard evidence related to liability, compensatory damages, and liability for punitive damages. During that phase, Lewis offered all 1,247 files into evidence, each file as a separate exhibit. Each file apparently contains information related to one alleged perpetrator of abuse, not one act of abuse and not one victim of abuse. The court received each file into evidence, over BSA's objections.").

38. WILLIAM BARTON, RECOVERING FOR PSYCHOLOGICAL INJURIES 505–06 (3d ed. 2010).

39. *Id*. at 506–07.

(including $18.5 million in punitive damages).[40] This same type of approach—looking at the wider scope of knowledge and broader course of conduct—can be applied to large religious organizations.

Furthermore, advocates for victims should consider other more specific forms of negligent conduct that may have contributed to the abuse the victim suffered. Did the denomination fail to implement or enforce adequate protective policies (such as mandatory reporting to civil authorities)? Did it fail to train its leaders about how to prevent child abuse? Did it fail to educate parents and youth about the dangers? The importance of training staff and educating children and parents is all the more important because abuse most commonly takes place outside of services and often off premises, as perpetrators seek to avoid detection or intervention by others.[41] The fact that the abuse does not take place at the church does not insulate the church from liability for this type of negligence. Rather, this pattern of sexually predatory behavior is well-known, foreseeable, and must be protected against.[42] As one expert in the field recently testified:

> [The] purpose of a youth-serving policy on sexual abuse, is not to prevent sexual abuse at the facility, in front of other kids, or overt and obvious grooming. Self-interest takes care of that. It is to prevent [perpetrators] from contacting kids outside the service and relying on their status as . . . church members or priests or people like that. That's why . . . those

40. *Jack Doe 1,* 280 P.3d at 380 ("At the conclusion of phase one, the jury awarded compensatory damages in the amount of $1.4 million and found BSA liable to Lewis for punitive damages. At the conclusion of phase two, the jury returned a verdict of over $18 million in punitive damages.").

41. *See* JOHN JAY COLL. OF CRIMINAL JUSTICE, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950–2002* 68 (2004), http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/the-nature-and-scope-of-sexual-abuse-of-minors-by-catholic-priests-and-deacons-in-the-united-states-1950-2002.pdf (Studied and collected information about the nature of the abuse of minors by Catholic priests between 1950 and 2002, finding that "[m]any appear to use grooming tactics to entice children into complying with the abuse and the abuse frequently occurs in the home of the alleged abuser or victim."); *see also id.* at 7 ("[A]buse occurred in a variety of locations . . . in the priest's home or the parish residence (40.9%), in the church (16.3%), in the victim's home (12.4%), in a vacation house (10.3%), in school (10.3%), and in a car (9.8%). The abuse allegedly occurred in other sites, such as church outings or in a hotel room, in less than 10% of the allegations."); Arthur Denney et al., *Child Sexual Abuse in Protestant Church Congregations: A Descriptive Analysis of Offense and Offender Characteristics,* RELIGIONS (Jan. 18, 2018), https://www.mdpi.com/2077-1444/9/1/27/htm#B68-religions-09-00027 (finding that 41% of all alleged sexual abuse occurred within the priest's home).

42. *See* JOHN JAY COLL. OF CRIMINAL JUSTICE, *supra* note 40, at 68.

> kinds of standards are included. It's not because everything happens at the church. It's that the church . . . has a responsibility to set reasonable safety rules that would decrease and hopefully, really prevent child sexual abuse by any other volunteers or staff members.[43]

Courts in some jurisdictions have expressly recognized the responsibilty of Churches to take reasonable steps to prevent off-site abuse. For example, in *C.J.C. v. Corporation of Catholic Bishop of Yakima*,[44] the Supreme Court of Washington held that a church's special relationship with the children of their congregation gave rise to a duty to protect the children from foreseeable harm, which may include abuse that takes place off of church premises and outside of church-sponsored activities. The Supreme Court of Washington found four factors decisive in finding the existence of a duty: (1) the special relationship between the church and the abuser associated with the church, (2) the special relationship between the church and the victims of abuse, (3) the alleged knowledge of the risk of harm possessed by the church, and (4) the causal connection between the abuser and the church.[45]

The court in *C.J.C.* found that under these circumstances, the church's duty to protect was not limited to on-premises conduct: "[W]e simply do not agree with the Church that its duty to take protective action was arbitrarily relieved at the church door."[46] The court went on to state, "Where a protective special relationship exists, a principal is not free to ignore the risk posed by its agents, place such agents into association with vulnerable persons it would otherwise be required to protect, and then escape liability simply because the harm was accomplished off premises or after hours."[47] "[T]he focus is not on the where or when the harm occurred, but on whether the Church or its individual officials negligently caused the harm by placing its agent into association with the plaintiffs . . . ."[48] This approach is consistent with other cases that recognize a duty to prevent

43. Transcript of Proceedings on Appeal at 641–42, Doe v. First Christian Church of the Dalles, (Dec. 12, 2019) (No. 16CV18445) (testimony of Dr. Anna Salter).

44. C.J.C. v. Corp. of the Catholic Bishop, 985 P.2d 262, 276–77 (Wash. 1999).

45. *Id.* at 275.

46. *Id.*

47. *Id.*

48. *Id.*

intentionally inflicted harm where the defendant has a special relationship with either the tortfeasor or the victim.[49]

B. *Fraud and Misrepresentation*

Other "classic" torts can similarly be employed in an expanded way to seek redress for clergy sexual abuse in the Protestant church. Fraud and misrepresentation claims offer a similar opportunity to impose liability by taking a wider-angle view of a regional or national religious organization's knowledge and conduct.

Borrowing from the "Big Tobacco" cases, some jurisdictions have recognized a macro-level theory of "fraud in the air" when it comes to child sexual abuse.[50] This theory essentially holds that, when an organization knows of an ongoing and systemic danger inherent in its organization or program, it cannot withhold that information while at the same time assuring the participants and the public that the organization is "safe," "wholesome," or similar; to do so is intentionally deceptive and removes the victim's (or the victim's parents') opportunity for self-protection.[51] In such a case, it is not

49. Other cases have held that other institutions of trust can similarly be liable in negligence for off-premises abuse. *See, e.g.*, Marquay v. Eno, 662 A.2d 272, 281 (N.H. 1995) ("Liability based on negligent hiring or retention is not limited to abuse that occurs during the school day. A school may be liable for abuse of a student by a school employee outside of school hours where there is a causal connection between the particular injury and the fact of employment."); Fazzolari v. Portland Sch. Dist., 734 P.2d 1326, 1337–38 (Or. 1987) (noting that school district's special duty of care toward its students extends beyond school hours and campus boundaries); N.L. v. Bethel Sch. Dist., 378 P.3d 162, 164, 168 (Wash. 2016) (en banc) (holding that school district could be liable in negligence for sexual assault of student lured off campus by assailant).

50. Schwarz v. Philip Morris, Inc. (*In re* Estate of Schwarz), 135 P.3d 409, 423 (Or. Ct. App. 2006) ("We hold, based on all of the above evidence, that the jury could reasonably infer that defendant engaged in a continuing *course of conduct* in which it *represented to the public* that it would conduct research and disclose its results to the public over a period of time."(emphasis added)), *aff'd sub nom*, Schwarz v. Philip Morris Inc. (Estate of Schwarz), 235 P.3d 668 (Or. 2010); Williams v. Philip Morris, 48 P.3d 824, 831–32 (Or. Ct. App. 2002) (recognizing common-law claim of fraud arising out of representations made to the consumer public rather than to a specific individual), *vacated sub nom,* Philip Morris USA Inc. v. Williams, 540 U.S. 801 (2003).

51. *See, e.g.*, Doe v. Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, No. 1:09-cv-00351-BLW, 2012 WL 3782454, at *5 (D. Idaho Aug. 31, 2012) ("[F]rom the beginning, Doe alleged that the Church Defendants failed to disclose the known dangers of pedophilic Scoutmasters."). Regarding eliminating the opportunity for self-protection, see, e.g., Doe v. Goff, 716 N.E.2d 323, 329 (Ill. App. Ct. 1999) (Breslin, J., dissenting) (disagreeing with majority that scout leader's sexual abuse of a boy scout was unforeseeable) ("Think about it. Each year thousands of young boys wave goodbye to mom and dad and go off to attend

necessary that there be intent to defraud any particular person, "but the representation must of course have been intended for the public, or for a particular class of persons to which the complainant belonged."[52] When an unknowing participant reasonably relies on this "fraud in the air" and suffers abuse as a result, the deceptive organization can be held liable.

In some jurisdictions, "[a]ctionable fraud may be committed through the concealment of material facts as well as by affirmative and positive misrepresentations."[53] Affirmative statements need not be made in order to be liable for fraud; silence or concealment of facts can be the basis for a fraud action.[54] Even representations or statements that are literally true may be actionable if the representation creates a false impression under the circumstances.[55] Fraud can also be based on "proof that the defendant concealed a fact concerning relevant behavior of a third party presently known to it."[56]

An example of an affirmative statement that may assure participants and the public that the organization is "safe" and "wholesome" is the Boy Scout Oath.[57] Value statements like the Scout Oath are clear, affirmative statements about the about the goals, standards, and characteristics embodied by the organization and its members. Where such statements are knowingly held out to the public even though the person or entity making the statements

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remote boy scout outings . . . . [N]o phone, no parents, no police, no teachers, none of the usual safety nets. Just the birds and the bears and the Boy Scout leaders. If that is not a description of taking custody so as to deprive one of normal opportunities of protection, I do not know what is.").

52. *Schwarz*, 135 P.3d at 423 ("We hold, based on all of the above evidence, that the jury could reasonably infer that defendant engaged in a continuing *course of conduct* in which it *represented to the public* that it would conduct research and disclose its results to the public over a period of time.") (emphasis added); *Williams*, 48 P.3d at 831–32 (recognizing common-law claim of fraud arising out of representations made to the consumer public rather than to a specific individual).

53. Ogan v. Ellison, 682 P.2d 760, 765 (Or. 1984) (quoting Musgrave v. Lucas, 238 P.2d 780, 784 (Or. 1951)).

54. Whitlatch v. Bertagnolli, 609 P.2d 902, 905 (Or. Ct. App. 1980).

55. Sheets v. B & B Pers. Sys., 475 P.2d 968, 972 (Or. 1970) ("Fraud may be predicated upon an equivocal, evasive or misleading answer calculated to convey a false impression even though it may be literally true . . . .") (quoting Dahl v. Crain, 237 P.2d 939, 947 (Or. 1951)).

56. Caldwell v. Pop's Homes, Inc., 634 P.2d 471, 477 (Or. Ct. App. 1981).

57. *Mission & Vision,* BOY SCOUTS OF AM., https://www.scouting.org/legal/mission/ (last visited Jan. 30, 2020) ("The mission of the Boy Scouts of America is to prepare young people to make ethical and moral choices over their lifetimes *by instilling in them the values of the Scout Oath and Law*.") (emphasis added). The Scout Oath provides: "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight." *Id.*

knows (or should know) that they were false, a court may find an actionable misrepresentation.[58]

Similarly, organizations can be liable in fraud for their silence under some circumstances. For example, many jurisdictions hold that concealment, including omissions and half-truths, can support an actionable claim for fraud:[59]

> To communicate a representation, it is not necessary that the party should speak words or write a message. The desired result may be accomplished ofttimes by conduct. Indeed, the tongue and the pen are only two of the numerous means of transmitting messages. The buoy in the harbor tells the navigator of the hidden rock, or shoal, without the use of pen or tongue; the lighthouse silently services its purpose. One who draws a check upon a bank represents thereby that he has a deposit to meet the demand. Paul Revere and his lantern needed no words to supplement the message which was conveyed to all who saw.[60]

Typically, silence can support a fraud claim under two theories: (1) active concealment and (2) non-disclosure. An affirmative, fraudulent representation can take the form of active concealment. Concealment does not require a duty to disclose and is not limited to situations where the speaker made a statement that, absent disclosure of material facts, was misleading to the listener.[61] Such concealment can be accomplished through

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58. *See, e.g.*, Doe v. Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints, No. 1:09-cv-00351-BLW, 2012 WL 3782454, at *4–5 (D. Idaho Aug. 31, 2012).

59. *See* Whitlatch v. Bertagnolli, 609 P.2d 902, 905 (Or. Ct. App. 1980) (noting that affirmative statements need not be made in order for a person to be liable for fraud and that silence or concealment of facts can be the basis for a fraud action) (citing Millikin v. Green, 583 P.2d 548 (Or. 1978); Musgrave v. Lucas, 238 P.2d 780 (Or. 1951)). Even representations or statements that are literally true may be actionable if the representation creates a false impression under the circumstances. Sheets v. B & B Pers. Sys. of Or., Inc., 475 P.2d 968, 972 (Or. 1970) (quoting *Dahl*, 237 P.2d at 947) ("Fraud may be predicated upon an equivocal, evasive or misleading answer calculated to convey a false impression even though it may be literally true . . . ."). Fraud can also be based on "proof that the defendant concealed a fact concerning relevant behavior of a third party presently known to it." *Caldwell*, 634 P.2d at 477.

60. Pennebaker v. Kimble, 269 P. 981, 984 (Or. 1928); *see also* Williams v. Philip Morris, Inc., 48 P.3d 824, 832 (Or. Ct. App. 2002) (quoting *Pennebaker*, 269 P. at 984).

61. Paul v. Kelley, 599 P.2d 1236, 1238 (Or. Ct. App. 1979) (citing RESTATEMENT (SECOND) OF TORTS §§ 550–51) (noting that where fraud is based on *actual concealment,* as opposed to *simple non-disclosure,* a *duty to speak is not required*) (emphasis added).

> words or acts which create a false impression [and thereby] cover[] up the truth . . . or which remove an opportunity that might otherwise have led to the discovery of a material fact . . . [such as] sending one who is in search of information in a direction where it cannot be obtained . . . [or] a false denial of knowledge by one in possession of the facts.[62]

"Non-disclosure," on the other hand, is an affirmative misrepresentation where a duty to disclose arises.[63] A "*nondisclosure* of material facts *can be* a form of misrepresentation where the defendant has made *representations which would be misleading without full disclosure.*"[64] Actionable fraud may lie where the parties were in a fiduciary or special relationship at the time the failure to disclose took place.[65] A fraud claim may also be supported by a speaker's failure to disclose information in circumstances in which a reasonable person would expect a full disclosure of facts.[66] For example, a duty to disclose will arise where a speaker acquires information that would make a previous representation untrue or misleading and fails to correct the previous statement.[67] As with any representation, a church or denomination has a duty to disclose any facts that, absent disclosure, might make its representations misleading.[68]

If a church induces parents and youth into a relationship whereby youth leaders were entrusted with the unsupervised care of children and the church also possessed knowledge about a history or problem of child sexual abuse within the church, a reasonable jury could find that the church failed to

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62. *Id.* at 1238–39 (quoting WILLIAM L. PROSSER, LAW OF TORTS, § 106 (4th ed. 1979)) (third and sixth alterations are partially in original).

63. *See, e.g.*, U.S. Nat'l Bank of Or. v. Fought, 630 P.2d 337, 346 (Or. 1981).

64. Elizaga v. Kaiser Found. Hosps., Inc., 487 P.2d 870, 873 (Or. 1971) (en banc) (emphasis added) (citing WILLIAM L. PROSSER, LAW OF TORTS, § 101 (3d ed. 1964)).

65. *E.g.*, Gardner v. First Escrow Corp., 696 P.2d 1172, 1176 (Or. Ct. App. 1985) ("Fraud may be predicated on a failure to disclose material facts when the parties have a fiduciary relationship.").

66. *See* Heverly v. Kirkendall, 478 P.2d 381, 382 (Or. 1970) (citing Prosser, *supra* note 61, at § 101) ("Misrepresentation may be made by statements which are literally true but under the circumstances create a false impression.").

67. *See, e.g.*, Millikin v. Green, 583 P.2d 548, 550 (Or. 1978).

68. *See, e.g.*, Meade v. Cedarapids, Inc., 164 F.3d 1218, 1222 (9th Cir. 1999) (quoting *Elizaga*, 487 P.2d at 873) (noting that "nondisclosure of material facts can be a form of misrepresentation where the defendant has made representations which would be misleading without full disclosure").

disclose, or affirmatively misrepresented, a foreseeable danger about which they had a duty to speak.

In sum, fraud provides an avenue for survivors of #ChurchToo abuse to hold religious entities civilly accountable when their statements and actions misrepresent the safety of the organization or conceal or deny knowledge about the dangers of child sexual abuse therein.

C. *Vicarious Liability*

While familiar torts are helpful, advocates for victims should also push for more tools to hold religious organizations accountable for child sexual abuse. One such tool is vicarious liability. Although the traditional rule is that a principal cannot be vicariously liable for the intentional tort of an agent, some courts are inclined to expand the reaches of vicarious liability where the agent uses his position of trust to accomplish the child sexual abuse.[69] This type of expanded vicarious liability is particularly important where evidence of notice or knowledge (for negligence and fraud purposes) is controlled and concealed by the potentially liable organization.

The policy considerations undergirding an expanded vicarious liability are several. First, courts have acknowledged that when an organization receives the benefits of the services of an agent, it should also bear the costs inflicted on others by that agent. Additionally, this type of strict liability also incentivizes organizations to supervise their agents more closely. Finally, when the proof requirements are met for vicarious liability, Courts have held that it is fairer for the organization to bear the shiftable (economic) burdens that flow from abuse to the principal—rather than the abused individual bearing all costs.

The most robust example of this type of expanded vicarious liability being applied in child sexual abuse contexts can be found in the laws of the state of Oregon.

1. Respondeat Superior: The Oregon Approach

Oregon is unique in its decision to embrace the use of vicarious liability to hold organizations accountable for abuse that is inflicted by their employees and volunteers.[70] Referred to as *respondeat superior,* Oregon allows a form of

69. Jennifer K. Weinhold, *Beyond the Traditional Scope-of-Employment Analysis in the Clergy Sexual Abuse Context*, 47 U. LOUISVILLE L. REV. 531, 537–39 (2009).

70. Lourim v. Swensen, 977 P.2d 1157, 1160–61 (Or. 1999) (citing Kowaleski v. Kowaleski, 385 P.2d 611, 613 (Or. 1963) ("It is well established that one can be a servant even though the service is performed gratuitously.").

"strict liability that imposes liability on a defendant without regard for the defendant's fault."[71]

The policy rationale underlying Oregon's version of *respondeat superior* is to consciously reallocate risk away from innocent parties and place it on those who benefit from actions ostensibly taken in their name:

> *Respondeat superior* is applied as a policy of risk allocation and the master benefits from the servants' work. The master rather than the innocent plaintiff is better able to absorb and distribute the risk.[72]

The key determination underlying whether a party is a principal's agent for purposes of *respondeat superior* is whether the principal has the right to control the agent.[73] In the abuse context, this is usually proven by showing that the employee or volunteer who was authorized by the church to build trust with children, used the authorized activities to groom the child for abuse, and then ultimately used the grooming to accomplish the abuse.

Chesterman v. Barmon established Oregon's modern test for *respondeat superior.*[74] Under *Chesterman*, a principal is responsible for an agent's harmful conduct when it results from acts that are "within the [agent's] scope of employment."[75] As discussed below, a principal's liability attaches under *Chesterman* even where the tortious conduct (including sexual abuse) was itself outside the formal agency of the tortfeasor.[76]

The Oregon Supreme Court applied the rule from *Chesterman* to the context of child sexual abuse in two landmark companion cases: *Fearing v. Bucher* (involving child sexual abuse by a Catholic priest) and *Lourim v. Swensen* (involving child sexual abuse by a volunteer Boy Scout leader).[77] These cases established that a principal can be liable for sexual abuse

71. G.L. v. Kaiser Found. Hosps., Inc., 757 P.2d 1347, 1348 (Or. 1988).

72. Farris v. U.S. Fid. & Guar. Co., 542 P.2d 1031, 1035 (Or. 1975) (citation omitted) (emphasis added).

73. Cain v. Rijken, 717 P.2d 140, 144 (Or. 1986) ("In determining whether the principal should be subject to vicarious liability for the acts of an agent, this court examines what control the principal exercises over the agent.").

74. Chesterman v. Barmon, 753 P.2d 404, 406 (Or. 1988).

75. *Id.*

76. Fearing v. Bucher, 977 P.2d 1163, 1166 n.4 (Or. 1999) (holding that because "an employee's intentional tort rarely, if ever, will have been authorized expressly by the employer," "it will virtually always be necessary *to look to the acts that led to the injury to determine if* those *acts were within the scope of employment*") (emphasis added).

77. *Id.* at 1166; Lourim v. Swenson, 977 P.2d 1157, 1159–60 (Or. 1999).

committed by its agents where acts in the course and scope of employment "led to" or "resulted in" the abuse.[78]

Fearing held that an employer may be liable for its employee's intentional sexual abuse of a child where the performance of the employee's job duties led to the abuse.[79] In *Fearing*, the Court held that the allegations, taken as true, would satisfy all three *Chesterman* factors because: (1) the employee, a priest, used his position "to spend large periods of time alone with plaintiff," and thereby to gain the opportunity "to touch him physically, and then to assault him sexually"; (2) the grooming behavior occurred "*in connection with* [the priest's] employment as youth pastor and priest" (i.e., "within the time and space limitations of his employment"); and (3) in undertaking the grooming behavior, the priest was motivated by a desire, "at least partially and initially, to fulfill [the priest's] employment duties"—and that these duties "generally were of a kind and nature that was required to perform as youth pastor and priest."[80]

Similarly, in *Lourim*, the Oregon Supreme Court held that the Boy Scouts of America (and its local chapter) could be liable under *respondeat superior* for the sexual abuse of a minor by a volunteer scout leader.[81] The Court in *Lourim* utilized an analysis nearly identical to that used in *Fearing*.[82]

The complaint in *Lourim* alleged that the Boy Scout troop leader was a friend, guide, and mentor to the plaintiff.[83] The complaint further alleged that the troop leader used his authority as troop leader to "socialize with the plaintiff," to "spend time alone with him," and to "gain the opportunity to touch him physically."[84] The court in *Lourim* held that if the allegations were taken as true, a jury could reasonably conclude that the abuser's performance of duties as scout leader was a "necessary precursor" to the sexual abuse, and that the abuse was therefore "a direct outgrowth of" and "engendered by conduct that was within the scope of [the tortfeasor's] employment."[85]

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78. *See* Schmidt v. Archdiocese of Portland in Or., 234 P.3d 990, 992 (Or. Ct. App. 2010) (citing *Fearing*, 977 P.2d at 1166) ("The court said that, although the sexual assaults themselves were outside the scope of Bucher's employment, the archdiocese could still be found vicariously liable if acts that were within Bucher's scope of employment resulted in the acts which led to the plaintiff's injury.").

79. *Fearing*, 977 P.2d at 1166–67.

80. *Id.* at 1166 (emphasis added).

81. *Lourim*, 977 P.2d at 1160.

82. *Id.* ("[T]he proper focus . . . [is] whether the complaint contained sufficient allegations of employee conduct that arguably *resulted in* the acts that led to plaintiff's injury.").

83. *Id.* at 1159.

84. *Id.*

85. *Id.* at 1160.

The foundation of both *Fearing* and *Lourim* is the rationale that in determining whether a principal is vicariously liable for an intentional tort by an agent, "it usually is inappropriate for the court to base its decision . . . on whether . . . the intentional tort itself was committed in furtherance of any interest of the employer or was of the same kind of activities that the employee was hired to perform."[86] Because such circumstances "rarely will occur and are not, in any event, necessary to vicarious liability," the proper focus is on whether precursor conduct "within the scope" of the employee's employment "*resulted in* the acts that caused the plaintiff's injury."[87]

More recently, in another child sexual abuse case, *Schmidt v. Archdiocese of Portland in Oregon*, the Oregon Court of Appeals acknowledged that while "grooming" (meaning using a position of trust to accomplish abuse) would be "*sufficient* to establish the connection between the employment and the abuse," grooming is not required. [88] Instead, under Oregon law, the "necessary employment connection [to support vicarious liability] is established by evidence that acts within the defendant's employment resulted in the acts that caused the plaintiff's injury."[89]

In sum, Oregon law has regularly recognized that a youth-serving organization can be vicariously liable for child sexual abuse by its agents. All the law requires is that some activity within the tortfeasor's service "resulted in" or "led to" the tort. Oregon provides a roadmap for other states who wish to expand civil accountability for youth-serving organizations even in the absence of "smoking gun" evidence of negligence and fraud.[90]

2. Other Jurisdictions

While Oregon has the most robust body of case law supporting vicarious liability for child sexual abuse, there are some "glimmers of hope" in other jurisdictions that suggest that a similar approach may be viable elsewhere. For example, in Arizona, the Supreme Court considered a similar issue in a sexual harassment case and noted:

> [I]n determining course and scope in a sexual harassment case, we must realize that employers never adopt resolutions

86. Fearing v. Bucher, 977 P.2d 1163, 1167 (Or. 1999).

87. *Id.* (emphasis added).

88. Schmidt v. Archdiocese of Portland, 234 P.3d 990, 993 (Or. Ct. App. 2010).

89. *Id.* (citing *Fearing*, 977 P.2d. at 1166).

90. *See, e.g.*, Ruling on Defendants' Motion to Dismiss, Doe v. Boy Scouts of America, No. LACE119851 (Iowa Dist. Ct. May 14, 2012) (declining to dismiss an abuse case in an Iowa District Court and using the Oregon decisions as persuasive authority).

> authorizing sexual harassment. Nor do they grant such authority in job descriptions or employment manuals
>
> . . . .
>
> Conduct within the scope of employment may be either of the same nature as that authorized *or* incidental to that authorized.[91]

The court in *Schallock* looked beyond the job description to other factors, including but not limited to, when and where the conduct occurred, whether there was evidence that the employer was aware of inappropriate behavior and did not intervene to limit that behavior, whether the employer would have reason to expect that such an act might be done (i.e., an individual who engages in sexually harassing behavior would also sexually assault or rape), and whether the act, at least in part, was motivated by a purpose to serve the employer rather than to solely serve personal motives unconnected to the employer's business.[92]

The court went on to state that acts "may be found in the scope even if forbidden or done in a forbidden manner and even if consciously criminal or tortious."[93] Arizona's position on an employer's responsibility for criminal acts committed in the course and scope of employment was reaffirmed in *Higgins v. Assmann Electronics, Inc.*, where the court stated:

> Although Meyer's act was criminal, *see* Restatement § 229(2)(j), *Schallock* held that 'acts may be found in the scope even if forbidden or done in a forbidden manner, and even if consciously criminal or tortious.' . . . 'The question is whether at the time the injury occurred the employee was performing a service in furtherance of his employer's business, not whether it was done in a manner exactly as the

91. State v. Schallock, 941 P.2d 1275, 1282 (1997) (emphasis added).

92. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY §§ 229(1), 229(2)(c), 235 (AM. LAW INST. 1958) ("Many factors are to be considered in determining whether conduct not expressly authorized is so incidental as to be within course and scope, including time and place of the conduct . . . . Another factor is the previous relation between master and servant . . . . A third relevant factor is whether 'the master has reason to expect that such an act will be done' . . . . [Another factor] is the purpose of the acts: to be within the course and scope, the act must be, at least in part, motivated by a purpose to serve the master rather than solely to serve personal motives unconnected to the master's business. But here again, and particularly in a sexual harassment case, the act in question is not the ultimate tortious act but rather conduct related to the tort.")).

93. *Id.* at 1284 (quoting RESTATEMENT (SECOND) OF AGENCY §§ 230–31 (AM. LAW INST. 1958)) (internal quotation marks omitted).

employer prescribed."[94]

Similarly, in *Hardwicke v. American Boychoir School*, the New Jersey Supreme Court expanded the scope of liability that a corporation has with regard to the conduct of its employees.[95] *Hardwicke* involved allegations of child sexual abuse of a boarding school student by the school's adult music director.[96] The Court held that even if the conduct may have occurred outside the scope of the employee's employment, the employer could be held vicariously liable under the theory of *respondeat superior* for the intentional conduct of its employees.[97]

3. Other Agency-Based Liability Theories

Even when the formal agency relationship under the *respondeat superior* doctrine is unavailable, other doctrines may be used to hold a religious organization vicariously liable. Such theories may include "apparent authority," "agency by estoppel," and "aided by agency."

As discussed below, some states are moving towards expanded vicarious liability under an "aided by agency" theory. The "aided by agency" theory is another way of recognizing that, where a perpetrator uses his position within the organization to accomplish the abuse, the organization bears some responsibility. Similarly, theories of "apparent agency," "apparent authority," and "agency by estoppel" also provide other avenues. These are particularly appropriate where a large organization intentionally creates the impression that a church or perpetrator is "part" of the larger organization and then the latter tries to retroactively distance itself to avoid liability.

a. Aided by agency

The Restatement (Second) of Agency section 219(2)(d) carves out an exception to the traditional vicarious liability scope-of-employment analysis.[98] Under section 219(2)(d), a principal is vicariously liable for the acts of its employee, even if such acts fall outside the scope of employment, when (1) "the [agent] purported to act or to speak on behalf of the principal and there was reliance upon *apparent authority*" (apparent authority), or (2) "[the agent] was *aided in accomplishing* the tort by the existence of

94. Higgins v. Assmann Elecs., Inc., 173 P.3d 453, 461 (Ariz. Ct. App. 2007) (quoting Ortiz v. Clinton, 928 P.2d 718, 723 (Ariz. Ct. App. 1996)) (internal citation omitted).

95. Hardwicke v. Am. Boychoir Sch., 902 A.2d 900, 911–13 (N.J. 2006).

96. *Id.* at 903.

97. *Id.* at 920.

98. *See* RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW INST. 1958).

the agency relation (aided by agency)."[99] The United States Supreme Court has taken a broad view and recognized that this exception to the Restatement creates two distinct bases for liability—one based on apparent authority and the other based on the existence of the employer-employee relationship.[100]

Under section 219(2)(d), a principal is held liable for the intentional tort of its employee if that employee was aided in accomplishing the tort by the existence of the agency relationship, regardless of whether the harm-causing activity fell within the scope of employment.[101] This exception exists to address situations when it would be inequitable to deny a tort victim recovery against the tortfeasor's employer, even if traditional principles of vicarious liability would not otherwise allow recovery. Generally, in jurisdictions that follow a broad interpretation of section 219(2)(d), the courts avoid the traditional *respondeat superior* analysis altogether and instead evaluate the principal's liability based on the degree to which the employment relationship facilitated the employee's intentional tort.[102] The court then determines, based on the degree of relationship, whether imposing liability on the principal comports with the policy objectives that justify the imposition of vicarious liability.[103]

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99. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. LAW INST. 1958) (emphasis added).

100. *See* Jennifer K. Weinhold, *Beyond the Traditional Scope-of-Employment Analysis in the Clergy Sexual Abuse Context*, 47 U. LOUISVILLE L. REV. 531, 543 n. 63 (2009) ("Faragher v. City of Boca Raton, 524 U.S. 775, 801–02 (1998). The City, however, contends that § 219(2)(d) has no application here. It argues that the second qualification of the subsection, referring to a servant '**aided** in accomplishing the tort by the existence of the **agency** relation,' merely "refines" the one preceding it, which holds the employer vicariously liable for its servant's abuse of apparent authority. But this narrow reading is untenable; it would render the second qualification of § 219(2)(d) almost entirely superfluous (and would seem to ask us to shut our eyes to the potential effects of supervisory authority, even when not explicitly invoked). The illustrations accompanying this subsection make clear that it covers not only cases involving the abuse of apparent authority, but also cases in which tortious conduct is made possible or facilitated by the existence of the actual **agency** relationship. See Restatement § 219, Comment e . . . .") (emphasis added).

101. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) cmt. e (AM. LAW INST. 1958).

102. Weinhold, supra note 98, at 540–41.

103. See Mark E. Roszkowski & Christie L. Roszkowski, *Making Sense of Respondeat Superior: An Integrated Approach for Both Negligent and Intentional Conduct*, 14 S. CAL. REV. L. & WOMEN'S STUD. 235, 273 (2005). However, some courts are concerned that in a broad interpretation of aided by agency an employee is "always aided in accomplishing the tort by the existence of the agency relation because his responsibilities provide proximity to and contact with the victim." Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995). As a result, some jurisdictions have narrowed the theory in two ways. First, an employer is "liable only if the tort was 'accomplished by an instrumentality, or through conduct associated with the agency

There are a few examples of the successful application of these principals in similar contexts. In *Costos v. Coconut Island Corp.*, the defendant corporation (a resort) was held vicariously liable for its manager's torts when the manager raped a guest using his key card to access the guest's room.[104] *Costos* stands for the proposition that employers should be vicariously liable for torts committed by employees outside the scope of their employment if those torts were committed by the authority which the employee's job created.[105]

Similarly, in *Sherman v. State Dept. of Pub. Safety*, the Delaware Supreme Court adopted the Aided by Agency doctrine in a case where the Plaintiff sued the State for assault, battery, and rape, arising out of an officer's threat to have the arrestee incarcerated for shoplifting unless she engaged in sex with him.[106] In so doing, the court noted that they took "into account the critical difference between police officers . . . and employees of most other businesses."[107] The question remains how such reasoning would apply to other special relationships (such as clergy-parishioner).

To date, courts have adopted and applied the aided by agency theory inconsistently, if at all.[108] Those who have adopted it differ in the scope of its application, limiting it to specific torts or specific principle/agent contexts

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status.'" *Id.* Second, the exception can only be used in instances of reliance or deceit. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998).

104. Costos v. Coconut Island Corp., 137 F.3d 46, 47 (1st Cir. 1998).

105. *Id.* at 47–50.

106. Sherman v. State Dept. of Pub. Safety, 190 A.3d 148, 154–55 (Del. 2018).

107. *Id.* at 181.

108. The "aided by agency" or "aided in accomplishing" language did not appear in the common law until the Restatement (Second) of Agency promulgation of § 219(2)(d) in the 1950s. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. LAW INST. 1958). The Restatement Second's language is unclear, and courts have struggled with how broadly or narrowly to interpret the theory. Furthering the confusion, in 2006, the Restatement (Third) of Agency was produced and failed to adequately address the Restatement Second's aided by agency language by neither adopting it nor refuting it. Instead, the Restatement Third provides a broad statement that the Restatement no longer needs the 219(2)(d) language because "[t]he purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents." RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (AM. LAW INST. 2006). Thus, jurisdictions that recognize the aided by agency doctrine typically follow the language of the Restatement Second and vary in its application. *But see* Doe v. Newbury Bible Church, 933 A.2d 196, 198 (Vt. 2007) (Vermont Supreme Court held that a church is not subject to vicarious liability for the tortious acts of its pastor if the pastor was allegedly aided in accomplishing the tort by the existence of the agency relation with the church. Court distinguished a pastor from a police officer.) (*citing* Doe v. Forrest, 853 A.2d 48 (Vt. 2004)).

(i.e., police officer tortfeasors).[109] Still, there appears to be opportunities in some jurisdictions for tenacious advocates to expand the opportunities for justice for victims of #ChurchToo abuse through these types of approaches.

b. Apparent authority

Section 2.03 of the Restatement (Third) of Agency defines "apparent authority" as "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."[110] Apparent authority, when present, trumps actual restrictions that the principal may have privately imposed on the agent. The question is whether it would reasonably appear to a third party that the principal has conferred authority on an agent. The rationale for imposing liability under apparent authority is so "[a] principal may not choose to act through agents whom it has clothed with the trappings of authority and then determine at a later time whether the consequence of their acts offers an advantage."[111]

Simiarly, "Agency by Estoppel" protects third parties who justifiably rely on a belief that an actor is an agent and act on that belief to their detriment.[112] The doctrine is applicable when the party against whom estoppel is asserted has made no "manifestation that an actor has authority as an agent," but a third party believes that the actor is an agent and has "justifiably [been] induced" by that belief to undergo a "detrimental change in position."[113]

The Restatement (Second) of Agency does not distinguish between apparent authority and agency by estoppel.[114] However, the Restatement (Third) of Agency expressly distinguishes apparent authority[115] from agency by estoppel.[116] Some practitioners struggle with utilizing the theories due to confusion flowing from the following factors: 1) a majority of courts use many of these terms ("ostensible agency," "apparent agency," "apparent authority," and "agency by estoppel")inconsistently or interchangeably; 2) the Restatements are unclear as to applicability to tort actions; and 3) when

109. *See e.g.*, Doe v. Forrest, 853 A.2d 48 (Vt. 2004); *Sherman*, 190 A.3d 148 (Del. 2018).

110. RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. LAW INST. 2006).

111. RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. c (AM. LAW INST. 2006).

112. *See* RESTATEMENT (THIRD) OF AGENCY § 2.05 (AM. LAW INST. 2006).

113. *See* RESTATEMENT (THIRD) OF AGENCY § 2.05 (AM. LAW INST. 2006).

114. Jones v. HealthSouth Treasure Valley Hosp., 206 P.3d 473, 480 (Idaho 2009).

115. *See* RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. LAW INST. 2006). *See also* RESTATEMENT (THIRD) OF AGENCY § 7.08 (AM. LAW INST. 2006).

116. *See* RESTATEMENT (THIRD) OF AGENCY § 2.05 (AM. LAW INST. 2006).

analyzing these theories, some courts mix and match the standards found in different sections of the Restatement.[117] Despite the confusion, these theories provide a potentially powerful tool in helping victims of abuse pursue civil justice against religious organizations.

Jurisdictions that follow the Restatement (Second) have used the theory of agency by estoppel to hold defendants liable for abuse.[118] In *Bowman v. Home Life Insurance Co. of America*, the plaintiffs applied for health insurance with the insurance company.[119] The insurance company employed an underwriter who later impersonated a physician and performed an intimate examination on the plaintiffs.[120] The court applied the apparent authority doctrine and found the insurance company liable for the torts of its underwriter.[121] The court reasoned that by providing the underwriter with the information about the plaintiffs and the ability to ask them questions about their health, the insurance company provided him with apparent authority to gain access to a substantial amount of information.[122] The court continued by stating, "Although he went further than his instructions indicated and committed the tort on the plaintiffs, this was a kind of deceit which was well within the insignia of office with which he had been clothed."[123]

Similarly, in *Applewhite v. Baton Rouge*, two law enforcement officers ordered the plaintiff to get into their car then forcibly raped her.[124] The court reasoned that "where it is found that a law enforcement officer has abused the 'apparent authority' given such persons to act in the public interest, their employers have been required to respond in damages."[125] The approach from *Applewhite* and *Bowman* may provide avenues for victims of sexual abuse to

117. *See* RESTATEMENTS (SECOND) OF AGENCY §§ 247–49, 253–64, 219(2)(d) (AM. LAW INST. 1958); RESTATEMENT (SECOND) OF TORTS § 429 (AM. LAW INST. 1965); RESTATEMENTS (THIRD) OF AGENCY § 2.03 (apparent authority), § 7.08 (principle liability in tort under apparent authority), § 2.05 (agency by estoppel) (AM. LAW INST. 2006).

118. Agency by estoppel is not expressly mentioned as a theory by which a principal can be held liable in tort. *See* RESTATEMENT (THIRD) OF AGENCY ch. 7 (AM. LAW INST. 2006). Agency by estoppel requires a "detrimental change of position" which is defined as "an expenditure of money or labor, an incurrence of a loss, or subjection to legal liability, not the loss of the benefit of a bargain." RESTATEMENT (THIRD) OF AGENCY § 2.05 cmt. b (AM. LAW INST. 2006).

119. Bowman v. Home Life Ins. Co. of Am., 243 F.2d 331, 332 (3d Cir. 1957).

120. *Id.* at 333.

121. *Id.* at 334.

122. *See id.*

123. *See id.*

124. *See* Applewhite v. City of Baton Rouge, 380 So. 2d 119, 120 (La. Ct. App. 1979).

125. *Id.* at 122.

impose vicarious liability on churches or denominations even where the necessary legal tests for agency of the perpetrator cannot be met.

There are other efforts percolating among the cadre of lawyers who do this work to expand application of classic torts to obtain justice for victims of abuse, including public nuisance,[126] civil conspiracy,[127] and infliction of emotional distress.[128] Others are pursuing novel theories, such as state RICO actions.[129] Whatever the approach—revisiting "classic torts," expanding existing law, or attempting novel theories—a foundational truth remains: #ChurchToo abuse survivors deserve the advocates' best creativity, tenacity, and most zealous advocacy in seeking justice and making change.

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126. Lisa Washington, *Judge Allows Lawsuit Alleging Pittsburgh Diocese Created 'Public Nuisance'*, CBS PITTSBURGH (Jan. 9, 2020), https://pittsburgh.cbslocal.com/2020/01/09/pittsburgh-catholic-diocese-public-nuisance-lawsuit/.

127. Amanda Hoskins, *Ruling Could Open Door for New Lawsuits in Clergy Sexual Abuse Cases*, LOC. 21 NEWS (July 22, 2019), https://local21news.com/news/local/ruling-could-open-door-for-new-lawsuits-in-clergy-sexual-abuse-cases.

128. In *Crouch v. Trinity Christian Center of Santa Ana, Inc.*, the 13-year-old plaintiff was drugged and raped by a 30-year-old church employee. 39 Cal. App. 5th 995, 998 (Cal App. 4th 2019). When the plaintiff reported the abuse to her grandmother, Jan Crouch (an officer and Director of Trinity Christian Center), Crouch yelled at the girl, told her she was stupid, and that the rape was her fault. *Id.* A jury found in favor of the plaintiff on a claim for intentional infliction of emotional distress. *Id.* The California Court of Appeals affirmed the jury's verdict. *Id.* The jury found in the plaintiff's favor on her cause of action for IIED, reasoning:

> We do not hesitate to exclaim "Outrageous!" when presented with the facts of Jan Crouch's behavior toward Carra. Flying into a tirade at a 13-year-old girl who had been drugged and raped and yelling at her that she was stupid and it was her fault is extreme and outrageous conduct that exceeds that bounds of decency tolerated in a civilized community. Such conduct is not mere insults, indignities, petty oppressions or other trivialities. At age 13, Carra suffered a horrible, traumatic, and life-altering experience. Yelling at her that she was stupid and it was her fault was cruel, intolerable, and obviously certain to produce severe emotional harm.

Id. at 1007-08.

129. Joseph O'Brien, *What We Need to Know About RICO*, NAT'L CATH. REG. (Aug. 27, 2019), http://www.ncregister.com/daily-news/what-we-need-to-know-about-rico ("On Aug. 14, 22 plaintiffs filed a federal RICO suit against the Diocese of Buffalo, the Society of Jesus, parishes, high schools and others for an alleged 'pattern of racketeering activity' that allowed for and hid clerical sexual abuse.").

IV. PART III: ANOTHER PATH FORWARD?

Despite the epidemic of child sexual abuse in Protestant religious organizations, some devout Christians take issue with the use of the civil justice system as an agent of change for the church. Earlier in my career, I was much more sensitive to these views. More than a decade later, I have seen many situations where churches and religious organizations are among the worst offenders, either in allowing abuse or revictimizing survivors in how they response to abuse disclosures. Two examples illustrate this point.

In the first example, I worked on a group of cases where a church selected a youth leader knowing he had just been released from prison for child molestation. The Church then turned a blind eye to obvious warning signs and reports of concerns over the course of a decade while he abused dozens of boys.[130] In the face of such callous disregard, it is unreasonable to expect abuse survivors to forgo litigation, and instead, put their trust in the very institution that knowingly allowed their torment, in hopes that it will voluntarily take appropriate action.

I have also observed many situations where churches and religious organizations have failed to demonstrate any compassion in responding to victims who come forward seeking answers and acknowledgement. As a second example, I currently have a case[131] where the Church allowed an adult, who they knew was accused of abuse, to continue to participate in the youth group. Later, he abused multiple minor girls—including my client. After years of suffering, my client was finally ready and able to address what happened. My client earnestly desired a peaceful resolution: give the church an opportunity to avoid litigation by making protective policy changes and compensating her for the value of past and future treatment costs. With those instructions, I sent a letter offering to resolve the case, without filing a lawsuit, if the church would agree to those terms. It was a generous offer, but it was important to my client that the church have the opportunity to do the right thing. The response? A letter, not from church leadership, but from the church's insurance company denying all liability and implying that my client and others were lying about what had happened. In the face of such a response, a civil lawsuit is the victim's only effective alternative to giving up and going away quietly.

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130. Aimee Green, *Lawsuit Accuses Seventh-day Adventist Church in 1970s of Supporting Convicted Child Molester's Habit*, OREGONIAN (Aug. 26, 2014), https://www.oregonlive.com/portland/2014/08/lawuit_accuses_seventh_day_adv.html.

131. Given that this example is currently in litigation, I am withholding identifying information.

Given the pervasiveness of these types of attitudes and actions by religious organizations confronted with abuse from within, most survivors and advocates find civil justice to be the only viable path available. If it takes the "hammer" of civil litigation to accomplish this change, so be it.

There may be another path—a "third way" forward—that can make civil litigation unnecessary. It is not complicated, but it is a narrow path. And only religious organizations themselves can choose to follow it. Such an alternative requires that the religious organization voluntarily and proactively:

- Accept responsibility for abuse that is inflicted by religious leaders or in the church context;
- Seek out and humbly listen to victims—hearing them, seeking understanding, and embracing the truth they share;[132]
- Sharing the organizations secrets about abuse, including the documents and information kept by the organization about the perpetrator, information learned by the organization, and the organization's response;
- Repent and lament as an organization for the entity's role in allowing abuse;
- Choosing not to rely on technical affirmative defenses like the statute of limitations. (This is essential because the organization cannot coherently affirm the unending pain and suffering the victims suffer and at the same time tell them they are undeserving of redress—or the church's culpability is immaterial—because the victim "waited too long.");
- Proactively seek out and make meaningful amends to victims (including individual compensation) instead of waiting for victims to come forward with demands; and,

132. For a discussion on the supportive role that clergy can play in assisting victims with making healthy disclosures see, Victor I. Veith et al, *Keeping Faith: The Potential Role of a Chaplain to Address the Spiritual Needs of Maltreated Children and Advise Child Abuse Multi-Disciplinary Teams*, 14 LIBERTY UNIV. L. REV. 351, 370–71 (2020).

- Embrace a culture of child protection as a top priority—going the extra mile to do everything reasonably possible to protect against future abuse.

Following this path requires conviction, a willingness to act out of courage, and a prioritization of the wellbeing of victims over the rights of the institution. In following this path, motivations matter and cannot be "faked" or "mimicked" as a defensive ploy.[133] To succeed, this approach must flow from an attitude of genuine care and concern for victims. While this alternative can be effective, "the gate is *narrow* and the *way* is hard . . . and those who find it are few."[134]

V. CONCLUSION

We can and should hope and pray for the day when religious organizations will voluntarily adopt a "third way" approach to reconciliation with #ChurchToo abuse survivors. However, the grave and long-standing consequences of wide-spread child sexual abuse in the Protestant world mandates action now. We cannot wait for the Protestant Church to "get religion." Until that day arrives, the aims of helping victims heal and eradicating #ChurchToo abuse requires that we utilize all available effective tools. And civil lawsuits against religious organizations are among the most effective tools available for survivors and their advocates.

133. "Forgiving and being reconciled to our enemies or our loved ones are not about pretending that things are other than they are. It is not about patting one another on the back and turning a blind eye to the wrong. True reconciliation exposes the awfulness, the abuse, the pain, the hurt, the truth. It could even sometimes make things worse. It is a risky undertaking, but in the end it is worthwhile, because in the end only an honest confrontation with reality can bring real healing. Superficial reconciliation can bring only superficial healing." Desmond Tutu, *Truth and Reconciliation*, GREATER GOOD MAG. (Sept. 1, 2004), https://greatergood.berkeley.edu/article/item/truth_and_reconciliation.

134. *Matthew* 7:14 (English Standard Version) (emphasis added).