Secrecy and Settlements: Is the New Jersey Charitable Immunity Act Justified in Light of the Clergy Sexual Abuse Crisis

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Available at: http://digitalcommons.law.villanova.edu/vlr/vol50/iss2/5
2005

SECRECY AND SETTLEMENTS: IS THE NEW JERSEY CHARITABLE IMMUNITY ACT JUSTIFIED IN LIGHT OF THE CLERGY SEXUAL ABUSE CRISIS?

I. INTRODUCTION

A. Overview of the Problem

In tort law, there is one basic question: who will pay the damages? This question is particularly relevant in the clergy sexual abuse crisis currently impacting the Roman Catholic Church. In the majority of states,

1. See Frank J. Vandall et al., Torts: Cases and Problems 1 (2d ed. 2003) (explaining that question of who will be responsible for paying damages underlies all tort actions); Frank L. Maraist, Of Envelopes and Legends: Reflections on Tort Law, 61 La. L. Rev. 153, 153 (2002) (noting that tort law requires resolution of only one issue: whether it is preferable to impose cost upon actor or victim).


3. See Wells, supra note 2, at 1202 (describing concerns raised as result of sexual abuse in church); see also Angela C. Carmella, The Protection of Children and

(261)
victims can seek damages from both the abusive clergy member and the church.\textsuperscript{4} Access to the church’s funds is important because priests typically have limited assets.\textsuperscript{5} In New Jersey, however, victims of clergy sexual

\textit{Young People: Catholic and Constitutional Visions of Responsible Freedom, 44 B.C. L. REV. 1031, 1041 (2003) ("[F]or cases of clergy sexual abuse of minors, a jurisdiction's approach is critical to whether a victim can sue for damages.")}. Disclosure of clergy sexual abuse has led to public demands for compensation. See Wells, supra note 2, at 1202. “Even the most restrained voices have demanded that the victims be compensated and the offenders be punished.” Id. “Large civil judgments” are one component of the remedy sought. Id. For example, in a current civil action against Cardinal Bernard Law and Bishop Howard Hubbard, one plaintiff is seeking $5 million. See Michele Morgan Bolton, \textit{Diocese Asks for Time to Appeal Trial Location; Church Leaders Want Sex Abuse Lawsuit to Be Heard in Albany, TIMES UNION (Albany, N.Y.), Oct. 14, 2004, at B8 (describing monetary damages sought in clergy sexual abuse action)}. The plaintiff is alleging that priest Dozia Wilson sexually abused him in the early 1980s. See id. (reporting character of allegations). He is further alleging that both Law and Hubbard knew about Wilson’s pedophilic behavior and, despite this knowledge, protected the priest by transferring him among different parishes. See id. (describing cause of action against Law and Hubbard). The $5 million judgment plaintiff is seeking is not anomalous when compared to other civil judgments awarded nationwide. See, e.g., Maggie Mulvihill, \textit{Church Crisis; Insurers, Church Usually Settle Sex Abuse Cases, BOSTON HERALD, Feb. 10, 2002, at 6 (noting that Texas jury awarded eleven victims of clergy sexual abuse $119.6 million); David O’Reilly, Camden Diocese Agrees to Settle Sex-Abuse Suit, PHILA. INQUIRER, Mar. 14, 2003, at A01 (remarking that twenty-three plaintiffs in clergy sexual abuse action sought $50 million). It is important to keep in mind, however, that the church often settles these civil actions for amounts less than that sought by plaintiffs. See Mulvihill, supra at 6 (“[C]hurch officials nearly always settle to avoid embarrassing and public courtroom battles.”). For example, in Texas, after a jury awarded $119.6 million to eleven victims of clergy sexual abuse, the Catholic Archdiocese for San Antonio negotiated a settlement of $35.9 million. See id. (explaining that church did not actually pay amount awarded by jury). 4. See Patrick J. Schiltz, \textit{The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty, 44 B.C. L. REV. 949, 957 (2003) (“In a typical clergy sexual misconduct lawsuit, the plaintiff sues the pastor who committed the abuse, the congregation that employed him, and the religious organization with which the pastor and congregation were affiliated.”); see also RESTATEMENT (SECOND) OF TORTS § 895E cmt. d (1979) [hereinafter RESTATEMENT TORTS] (stating that majority of jurisdictions abolished charitable immunity); Mark Chopko, \textit{Stating Claims Against Religious Institutions, 44 B.C. L. REV. 1089, 1089–90 (2003) (warning that “[t]he demise of charitable immunity generally, and its limitation in virtually every jurisdiction means that [religious organizations] must pay attention to their legal relationships and conduct”); James T. O’Reilly & JoAnn M. Strasser, \textit{Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues, 7 ST. THOMAS L. REV. 31, 60 (1994) (explaining that judicial abandonment of charitable immunity in tort actions against religious entities began in 1950s and is now majority position). 5. See Schiltz, supra note 4, at 957 (noting that most “pastors are judgment-proof”); see also U.S. DEP’T OF LABOR, \textit{Occupational Outlook Handbook: Roman Catholic Priests [hereinafter Occupational Handbook], at http://stats.bls.gov/oco/ocos063.htm (last visited Dec. 1, 2004) (providing average salary for Roman Catholic priests). Priests’ salaries vary depending on the particular diocese. See id. (explaining lack of uniformity in priests’ salaries). A 2002 survey of the National Federation of Priests’ Councils revealed that average salaries range between $15,291 and $18,478 per year. See id. (providing average salary figures for Roman Catholic priests). Benefits such as room and board are not included in these figures. See id.
abuse cannot reach into the church coffers. The New Jersey Charitable Immunity Act shields the church from tort liability in order to ensure its assets are not depleted.


7. See N.J. STAT. ANN. § 2A:53A-7 (West 2004) (establishing charitable immunity for “nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes”). The Charitable Immunity Act states:

   a. No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association.

   c. Nothing in this section shall be deemed to grant immunity to: (1) any trustee, director, officer, employee, agent, servant or volunteer causing damage by a willful, wanton or grossly negligent act of commission or omission, including sexual assault and other crimes of a sexual nature; (2) any trustee, director, officer, employee, agent, servant or volunteer causing damage as the result of the negligent operation of a motor vehicle; or (3) an independent contractor of a nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes.

Id.; see also Schultz, 472 A.2d at 537 (discussing legislative intent of Act). Subsection (c) of the Charitable Immunity Act applies only to individuals—the individuals named in this section are not immune from liability if they “[cause] damage by a willful, wanton, or grossly negligent act... including sexual assault.” See N.J. STAT. ANN. § 2A:53A-7(c) (West 2004) (creating exception to immunity provided to individuals under Charitable Immunity Act). Notably, if an individual affiliated with a charitable organization does commit a grossly negligent act, the charitable organization retains its immunity. See John Chadwick, N.J. Law Still Blocks Suits on Sex Abuse by Clergy; Church Fights Bills to Limit Immunity, The Rec. (Bergen County, N.J.), May 2, 2003, at A01 (noting that, even where employees of charitable organizations are grossly negligent, “the organization as a whole cannot be held liable.”). The distinction is important because, in the Roman Catholic Church, only the church itself has the resources needed to recompense victims of clergy sexual abuse—priests typically have meager assets insufficient to pay large tort judgments.
Clergy sexual abuse of minors has long plagued the Catholic Church. During the early 1980s, scandal erupted, bringing the problem to the forefront of the American conscience. Specifically in 1983, victims of Roman Catholic priest Gilbert Gauthe filed numerous lawsuits alleging the priest had sexually abused them as minors. This litigation was the

For a discussion of the limitations of priests' assets and the importance of access to church funds, see supra note 5 and accompanying text.


10. See Schiltz, supra note 4, at 952–53 (describing litigation resulting from Gauthe’s abuse). Revelations about Gilbert Gauthe’s pedophilic behavior began “after one of his loyal flock of alter boys was hospitalized with rectal bleeding.” DePalma, supra note 9, at A1 (recounting discovery of Gauthe’s abuse). Gauthe ultimately admitted to abusing thirty-seven boys, but did not apologize for his actions. See id. (discussing Gauthe’s admission). The church paid thirty-five of the victims settlements, which amounted to “hundreds of thousands of dollars each.” Id.; see also Fred Bayles, Abuse Victims Say It’s Not About the Money, USA Today, Sept. 10, 2003, at 8D (listing Gauthe settlement among one of the “larger known settlements”). Most settlements included confidentiality agreements. See DePalma, supra note 9, at A1 (noting reluctance to discuss Gauthe settlements). Two civil cases did go to trial and juries awarded damages in excess of $1 million. See id. (discussing civil actions against Gauthe). Information is only available regarding one of the civil actions, brought by Glenn and Faye Gastal on behalf of their minor son, because the court sealed most documents filed in lawsuits against Gauthe. See Kathy Sawyer, Priest’s Child-Molestation Case Traumatizes Catholic Community, Wash. Post, June 9, 1985, at A6 (“[P]arents and church officials kept the matter quiet to protect the children.”). The Gastals brought a $12 million civil action against Gauthe and the Roman Catholic Church. See Jury Awards $1 Million to Boy Among 36 Molested by Priest, Chi. Tribune, Feb. 8, 1986, at 3C (describing Gastals’ civil action). Testimony during the trial revealed that Gauthe began abusing the victim when he was seven years old. See id. (same). The jury awarded the victim $1 million. See id. (same). In addition to civil actions, Gauthe also faced criminal prosecution. See Doyle & Rubino, supra note 8, at 549 (discussing criminal proceedings against Gauthe). He pled guilty to thirty-nine counts of sexual battery and the court sentenced him to twenty years in prison. See id. (same); see also DePalma, supra note 9, at A1 (discussing Gauthe’s plea bargain and subsequent release from prison); Goodstein, supra note 2, at 1 (recounting Gauthe’s punishment and its costs on society).
“spark” that ignited the church sexual abuse scandal.11 Following the revelations about Gauthe, there was a marked rise in clergy sexual misconduct litigation.12

In 2002, the church scandal heated up with a renewed fervor.13 In January of that year, the Boston Globe uncovered evidence that Roman Catholic priest John Geoghan had abused over one hundred and thirty boys in the past thirty years.14 The priest had bounced from parish to parish, 11. See Schiltz, supra note 4, at 952 (characterizing Gauthe litigation as “spark” that ignited victims’ anger over abuse); see also Doyle & Rubino, supra note 8, at 554 (“There is little doubt that the publicity surrounding the [Gauthe] case was a major catalyst for the legal and cultural explosions that have rocked the Catholic Church.”); Timothy Liam Epstein, Note, Surviving Exemption: Should the Church Exemption to ERISA Still Be in Effect?, 11 ELDER L.J. 395, 414 (2003) (noting that Gauthe litigation “broke open the modern scandal”); Nicholas Wapshott, Devious Priest at Heart of National Scandal, TIMES (London), Aug. 25, 2003, at 13 (characterizing Gauthe’s abuse as event propelling clergy sexual abuse to “national issue”).


13. See Pam Belluck, Scandals in the Church: The Overview; Law, Citing Abuse Scandal, Quits as Boston Archdiocese and Asks for Forgiveness, N.Y. TIMES, Dec. 14, 2002, at A6 (recounting most recent eruption in clergy abuse scandal); Cathy Lynn Grossman, A Guide to Issues, Players at U.S. Bishop’s Summit, USA TODAY, Dec. 10, 2002, at 1OD (explaining that clergy sexual abuse reached crisis level after events in January 2002 “reignited a smoldering problem”); see also BETRAYAL, supra note 2 (describing Boston Globe’s revelations about Father John Geoghan and Cardinal Bernard Law, which unleashed wave of media attention on clergy sexual abuse); O’Brien, supra note 2, at 373 (noting that “current scandal” began in January 2002 when Boston Globe reported Geoghan’s sexual abuse of minors). Although it was clergy sexual abuse cases involving Cardinal Law in Boston that reignited the scandal, the Boston revelations “started a chain reaction” nationwide. See Martin Kasendorf et al., Boston Church Scandal Starts Chain Reaction, USA TODAY, Dec. 19, 2002, at 13A (describing impact of Boston revelations). In 2002, bishops across the country began admitting to wrongdoing and hundreds of priests resigned or were dismissed. See id. (same). The 2002 scandal was distinguishable in some ways from the one in the early 1980s. See O’Brien, supra note 2, at 373 (pointing out difference in 2002 reports of clergy sexual abuse from reports in 1980s). For example, there was a large amount of media coverage concentrated in a short amount of time. See id. ( remarking that Boston Globe published many articles in a short time period about clergy sexual abuse); cf. Matthew Felling, Sex, Lies, and Vaticangate, WORLD AND I, Dec. 1, 2002, at 60 (describing extensive media coverage and offering explanation for it). Additionally, there was a growing perception that “some underlying systemic cause” had contributed to the scandal. See O’Brien, supra note 2, at 373 (identifying additional reason 2002 scandal differed from clergy sexual abuse scandal in 1980s); see also Eileen McNamara, Church Ills Run Deep, BOSTON GLOBE, Jan. 27, 2002, at B1 (noting that church must address “systemic ills” underlying abuse scandal). Finally, victims bringing actions during the 2002 scandal did so as adults rather than as children, while victims in the 1984 Gauthe scandal brought contemporaneous actions following the revelation that an alter boy had been sexually abused. See DePalma, supra note 9, at A1 (describing difference between 2002 and 1980s clergy sexual abuse scandals). “[U]nlike the adults in Boston who have...brought complaints about events decades old, [victims of Gilbert Gauthe] could confront their abuser and see him punished when they were still boys.” Id.

14. See Belluck, supra note 13, at A6 (describing revelations in abuse scandal resulting from Boston Globe’s investigation). See generally Michael Rezendes, Church Allowed Abuse By Priest For Years Aware of Geoghan Record, Archdiocese Still Shuttled Him.
parish, victimizing mainly prepubescent males. Despite Cardinal Bernard Law’s knowledge of Geoghan’s transgressions, the cardinal repeatedly allowed the priest to return to church parishes. Following the Boston Globe’s revelations, hundreds of people across the United States raised allegations of clergy sexual abuse. The flood of new allegations raised questions about the role of the church in the scandal—specifically, questions arose as to whether there was an “underlying systemic cause.”

The New Jersey legislature chose to revive charitable immunity in 1958, more than twenty years before the media exposed the clergy sexual abuse scandal in the 1980s. The revelations about clergy sexual abuse did not alter New Jersey courts’ willingness to apply charitable immunity—

from Parish to Parish, Boston Globe, Jan. 6, 2002, at A1 (discussing Geoghan’s abuse and Cardinal Law’s knowledge of abuse). The Boston Globe uncovered the evidence about Geoghan after reviewing “public files” of the pending civil lawsuits against the priest. See id. (describing unearthing of evidence as unprecedented, yet “remarkably skeletal” due to sealed documents). The newspaper was also instrumental in effectuating the release of previously sealed documents from “lawsuits about the church’s supervision of Geoghan.” See id. (commenting on Boston Globe’s successful motion to have documents released to public).

15. See Rezendes, supra note 14, at A1 (discussing Geoghan’s actions and victims).

16. See id. (describing Geoghan’s reassignments to multiple parishes). In 1984, Cardinal Law was aware of Geoghan’s previous sexual abuse. See id. (explaining Cardinal Law’s knowledge during Geoghan’s transfers among parishes). “[C]omplaints that Geoghan had abused children at [St. Brendan’s in Dorchester, Massachusetts] prompted Law to remove him.” Id. Notwithstanding this knowledge, Cardinal Law transferred Geoghan to St. Julia’s parish in Weston, Massachusetts, where the priest assumed responsibility for several youth groups. See id. (same). Allegations of sexual abuse in St. Julia’s parish surfaced. See id. (noting Geoghan’s pattern of abuse continued). Geoghan received treatment as a result of the new allegations. See id. (discussing response to allegations of Geoghan’s abuse). Upon completion of treatment, however, the Boston Archdiocese permitted Geoghan to return to St. Julia’s. See id. (same). There, Geoghan resumed his sexual abuse of minors. See id. (noting pattern of abuse continued). “The civil and criminal allegations Geoghan faces . . . suggest that he allegedly abused at least 30 more boys after Law sent him to [St. Julia’s] in 1984—both before and after the half year’s [treatment] in 1989.” Id.


18. See O’Brien, supra note 2, at 373 (“[T]his particular scandal was dominated by the ‘growing and widespread persuasion that the scandal had occurred not simply because of the moral weakness that touches us all . . . but because there is some underlying systemic cause.’”); see also McNamara, supra note 13, at B1 (expressing opinion that “systemic ills” contributed to scandal).

the New Jersey Supreme Court applied the Charitable Immunity Act in *Schultz v. Roman Catholic Archdiocese*. In *Schultz*, the court extended immunity to the church in negligent hiring actions arising out of the sexual abuse of minors. Because a bevy of new allegations nationwide recently renewed questions about church liability, the time has come to reevaluate the statute and its place in an environment where clergy sexual abuse of minors is an unfortunate reality.

**B. Overview of the Note**

This Note discusses the New Jersey Charitable Immunity Act in light of the Catholic clergy sexual abuse scandal. Part II tracks the development of the New Jersey Charitable Immunity Act. Part III explains the justifications for charitable immunity and explores the applicable counterarguments. Part IV considers whether the Charitable Immunity Act is both appropriate and effective in light of the clergy sexual abuse scandal in the Roman Catholic Church. Specifically, this Note considers whether the church itself contributed to the scandal and whether the economic justification for the Act can be reconciled with the financial reality of settlements entered into by the church. Finally, Part V concludes that New Jersey should amend the Charitable Immunity Act to reduce the impedi-

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21. See id. at 536 (stating holding). In *Schultz*, the New Jersey Supreme Court held that a victim of clergy sexual abuse could not hold the archdiocese employing the abuser liable under the theory of negligent hiring. See id. (stating that cause of action was negligence in hiring). The archdiocese was a charitable organization under the meaning of the Act. See id. (discussing characteristics of charitable organizations). For a discussion of *Schultz*, see infra notes 78–91 and accompanying text.
23. For a discussion of the development of charitable immunity in New Jersey, from English common law to present, see infra notes 30–91 and accompanying text.
24. For a discussion of justifications for the charitable immunity doctrine and, more specifically, the New Jersey Charitable Immunity Act, see infra notes 92–134 and accompanying text.
25. For a discussion of the New Jersey Charitable Immunity Act in the context of the clergy sexual abuse scandal, see infra notes 135–222 and accompanying text.
26. For a discussion of the church’s role in the clergy abuse crisis and its payment of large settlements to abuse victims, see infra notes 149–222 and accompanying text.
ments victims of clergy sexual abuse encounter in negligent hiring and supervision actions against the church.\textsuperscript{27}

In the interest of conciseness, this Note will focus on the Roman Catholic Church because it is the "largest institutional church in America."\textsuperscript{28} It is important to note that clergy sexual abuse of minors is not unique to any particular denomination.\textsuperscript{29}

II. NEW JERSEY CHARITABLE IMMUNITY ACT

A. Historical Development of New Jersey Charitable Immunity Act

1. Adoption of Common Law Doctrine

In 1925, New Jersey adopted the common law doctrine of charitable immunity, derived from English common law, in \textit{D'Amato v. Orange Memorial Hospital}.\textsuperscript{30} In \textit{D'Amato}, the New Jersey Supreme Court considered whether a charitable hospital should be liable for its nurses' negligence.\textsuperscript{31} The court looked to decisions from three states for guidance.\textsuperscript{32} All ruled

\textsuperscript{27} For a discussion of conclusions about the applicability and effectiveness of the New Jersey Charitable Immunity Act, see infra notes 223–43 and accompanying text.

\textsuperscript{28} \textit{See} \textit{O'Brien}, \textit{supra} note 2, at 365 (discussing size of Roman Catholic Church in United States). The United States Conference of Catholic Bishops reports that, in 2003, there were 63.4 million Catholics in the United States, which represented 23\% of the country's population. \textit{See U.S. CONFERENCE OF CATHOLIC BISHOPS, Catholic Information Project (Dec. 2003)}, at http://www.usccb.org/comm/cip.htm (providing statistics about number of Catholics, parishes and priests nationwide).

\textsuperscript{29} \textit{See} \textit{O'Reilly & Strasser}, \textit{supra} note 4, at 34 (explaining that clergy sexual abuse is not unique to any one denomination). Multiple religious denominations have faced allegations of clergy sexual abuse. \textit{See id.} (explaining that Roman Catholic Church is not only institutional church that has experienced problem of clergy sexual abuse).

Since 1991, at least four rabbis of major congregations have lost their positions due to claims of sexual relations with congregation members. Buddhist teachers have been accused of exploiting women at Zen communities in the United States. The United Methodist Church reported in a 1990 survey that nearly 23 percent of the laywomen had been sexually harassed, 17 percent by their own pastor and 9 percent by another minister. In a survey of evangelical ministers, 23 percent admitted to engaging in sexually inappropriate conduct . . . . Id. In addition to affecting multiple denominations, clergy sexual abuse has impacted countries outside the United States. \textit{See Doyle & Rubino, supra} note 8, at 551 (describing clergy sexual abuse in other countries).

\textsuperscript{30} 127 A. 340, 341 (N.J. 1925) (holding that charitable hospital is immune from tort liability); \textit{see also} Bottari, \textit{supra} note 19, at 61–62 (tracing historical development of charitable immunity).

\textsuperscript{31} \textit{See D'Amato}, 127 A. at 340 (stating facts and issues of case). Plaintiff suffered injuries during her hospital stay when she fell during a transfer from a wheelchair to a hospital bed. \textit{See id.} (describing injury).

\textsuperscript{32} \textit{See id.} at 341 (examining case law from New York, Pennsylvania and Massachusetts). Specifically, the court relied on \textit{Schloendorff v. Society of New York Hospital}, 105 N.E. 92, 93 (N.Y. 1914) (holding that hospital is not liable for negligence of employees), \textit{Cable v. Sisters of St. Francis}, 75 A. 1087, 1088 (Pa. 1910) (holding
in favor of charitable immunity.\(^{33}\) Without elaboration beyond a summary of the three cases, the court concluded "public policy requires that a charitable institution maintaining a hospital be held not liable for injuries resulting to patients through negligence or carelessness of its physicians and nurses."\(^{34}\) The court did not, however, identify the specific public policy objective it believed charitable immunity advances.\(^{35}\) Regardless, the court's decision effectively introduced immunity to charitable organizations within the state.\(^{36}\)

that public charity is not liable for its servants' torts) and *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 436 (1876) (holding that hospital is not liable for negligence of employees). See id. (highlighting existing case law). In *Schloendorff*, plaintiff was injured during an unauthorized operation. See *Schloendorff*, 105 N.E. at 93 (stating facts). As a result of the surgery, plaintiff developed gangrene and "some of her fingers had to be amputated." See id. (same). The court applied the doctrine of charitable immunity and held that the hospital was not liable. See id. at 95 (discussing holding). Plaintiff in *Gable* was also staying in a hospital. See *Gable*, 75 A. at 1088 (stating facts). In order to warm plaintiff's hospital bed, nurses placed bottles of hot water in it. See id. (same). After one nurse rearranged the bottles around plaintiff's body, hot water leaked and scalded plaintiff, who was "unconscious and helpless in the bed." See id. (same). The court applied the doctrine of charitable immunity and did not hold the hospital liable. See id. (discussing holding and rationale). Plaintiff in *McDonald* fractured his leg. See *McDonald*, 120 Mass. at 434 (stating facts). He alleged that agents of defendant hospital "negligently and unskillfully" treated him, thereby causing permanent injuries. See id. (same). The court applied charitable immunity and held that the hospital was not liable for plaintiff's injuries. See id. at 436 (discussing holding and rationale).

33. See *D'Amato*, 127 A. at 341 (summarizing holdings in *Schloendorff*, *Gable* and *McDonald*); see also *McDonald*, 120 Mass. at 436 (stating holding); *Schloendorff*, 105 N.E. at 93 (same); *Gable*, 75 A. at 1088 (same). The *Schloendorff* court summed up its reasoning by explaining, "[a] hospital opens its doors without discrimination to all who seek its aid .... In this beneficent work, it does not subject itself to liability for damages though the ministers of healing whom it has selected have proved unfaithful to their trust." *Schloendorff*, 105 N.E. at 95.

34. *D'Amato*, 127 A. at 341 (explaining court's rationale).

35. See *Collopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276, 280 (N.J. 1958) (remarking that "the Chancellor did not document his expression of public policy, nor did he discuss the underlying reasons for the court's conclusion that it should then declare the immunity").

2. Abolishment of Common Law Doctrine

Following a judicial decision that recognized a qualification on charitable immunity, 37 a trilogy of cases decided in 1958 abolished the common law doctrine in New Jersey. 38 The court rejected immunity in a negligence action against a nonprofit charitable hospital facility in Collopy v. Newark Eye and Ear Infirmary. 39 The court extended its holding in Collopy to all charitable institutions, regardless of the particular charitable aim, in Dalton v. St. Luke's Catholic Church. 40 In doing so, the court silenced arguments that the Collopy holding “should be limited so as to exclude churches and similar charitable immunities.” 41 Finally, the court reaffirmed its position by holding that charitable immunity was unavailable to the Y.M.C.A. in Benton v. Y.M.C.A. 42

In Collopy, the court rationalized its holding by exploring several problems with charitable immunity. 43 First, the court emphasized that the English decision that established the doctrine of charitable immunity was

37. See Jewell v. St. Peter's Parish, 76 A.2d 917, 918–19 (Hudson County Ct. 1950) (holding that charitable immunity is unavailable where activity is unconnected to church's primary function). Plaintiff in Jewell attended a festival on defendant church's property. See id. at 918 (stating facts). While there, plaintiff fell on a stairway. See id. (same). She alleged that the defendant's negligence caused “the faulty condition of the stairway.” See id. (stating plaintiff's cause of action). Defendant church argued that it was immune from tort liability arising out of its servants' negligence. See id. (noting defendant's reliance on charitable immunity). The court rejected defendant's argument because “what attracted plaintiff to defendant's building and there engaged her [was] essentially unrelated to defendant's institutional life and work.” See id. at 919 (discussing qualification on charitable immunity). That is, the activity was strictly secular rather than ecclesiastical. See id. (explaining reason for qualification).


39. See Collopy, 141 A.2d at 287 (stating holding). In Collopy, the plaintiff suffered injuries after falling out of a hospital bed. See id. at 277 (stating facts). The bed did not have “suitable guardrailing.” See id. (same). After the fall, defendant hospital released plaintiff without informing him that he had sustained injuries. See id. (same). The court did not accept the hospital's argument that charitable immunity precluded liability for hospital negligence. See id. at 287 (discussing court's reasoning).

40. See 141 A.2d 273, 274 (N.J. 1958) (“The New Jersey cases which applied either the immunity or the exception thereto recognized no distinction which turned on the issue of whether the particular charity catered primarily to the well-being of the body, the mind or the spirit . . . .”); see also Bottari, supra note 19, at 65 (discussing extension of Collopy holding in Dalton).

41. Dalton, 141 A.2d at 274 (explaining that there is “no basis” for limiting holding in Collopy to hospitals at exclusion of “churches and similar charitable institutions”).

42. See Benton, 141 A.2d at 299 (holding that charitable immunity does not apply to organization).

later overruled. 44 Dicta by Lord Cottenham in Duncan v. Findlater 45 and Feoffees of Heriot's Hospital v. Ross 46 provided the basis for charitable immunity in England. 47 Adhering to this dicta, the court held in Holliday v. St. Leonard, Shoreditch 48 that the vestry of a parish was immune from tort liability. 49 Nevertheless, charitable immunity was short-lived. 50 Five years later, the court rejected Lord Cottenham's dicta in Mersey Docks Trustees v. Gibbs. 51 In 1871, the court reversed Holliday in Foreman v. Mayor of Canterbury. 52 Subsequent English cases followed both Mersey Docks and Foreman and refused to recognize charitable immunity. 53

Mindful of the changes in English law, the New Jersey Supreme Court in Collopy 44 criticized the adoption of charitable immunity in the United States. 54 Massachusetts was the first state to adopt the doctrine in McDonald v. Massachusetts General Hospital. 55 The McDonald court mistakenly applied Holliday, which had since been overruled, and held that a charitable

44. See Collopy, 141 A.2d at 278 (discussing tenuous basis of charitable immunity in light of English common law); see also Bottari, supra note 19, at 61–62 (chronicling development of charitable immunity in England and its subsequent abolishment).

45. 7 Eng. Rep. 934 (H.L. 1839) (holding that trustees are not liable for negligence of persons who are not trustees' servants).

46. 8 Eng. Rep. 1508, 1510 (H.L. 1846) (refusing to award damages out of trust fund because doing so would divert funds from original purpose). "To give damages out of trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." Id.


49. Id. (denying recovery against parish for injury resulting from highway defect).

50. See Collopy, 141 A.2d at 278 (remarking that court quickly overthrown holding in Holliday).

51. 11 Eng. Rep. 1500 (1866) (rejecting principle of charitable immunity expressed in Holliday); see also Brown, 234 S.E.2d at 875 (discussing demise of charitable immunity in English common law).

52. 6 Q.B. 214 (1871); see also Brown, 234 S.E.2d at 875 (discussing abolishment of charitable immunity in English common law).


54. See Collopy, 141 A.2d at 278 (explaining that McDonald introduced charitable immunity to United States "rel[ying] entirely on the Holliday case without recognizing that it had already been overruled"). For a discussion of McDonald, see infra notes 55–57 and accompanying text.

55. 120 Mass. 432, 436 (1876) (adopting charitable immunity doctrine); see also Collopy, 141 A.2d at 278 (noting that American courts first considered issue of charitable immunity in McDonald); Bottari, supra note 19, at 62 (stating that "Massachusetts court applied the Holliday result in a case of first impression in this country").
hospital is immune from tort liability. The courts’ misplaced reliance on *Holiday* was not revealed until 1942, when Justice Rutledge delivered his opinion in *President of Georgetown College v. Hughes*. This opinion exposed the "historical error" courts committed by relying on *Holiday*. Following this revelation, state courts, which had previously adopted charitable immunity in reliance on *McDonald*, began rejecting the doctrine.

56. See *McDonald*, 120 Mass. at 436 (adopting charitable immunity doctrine); see also Jennifer S. Anderson, Comment, *All True Histories Contain Instruction: Why HMOs Cannot Avoid Malpractice Liability Through Independent Contracting with Physicians*, 29 McGeorge L. Rev. 323, 331 (1998) ("Charitable immunity, as applied in the United States, was based on a jurisprudential mistake."); John R. Feather, Comment, *The Immunity of Charitable Institutions from Tort Liability*, 11 Baylor L. Rev. 86, 88–89 (1959) (describing *McDonald* court’s application of *Holiday* as "error"). The *McDonald* court summarized the holding in *Holiday*:

Where actions have been brought against commissioners of public works serving gratuitously, for negligence in carrying on the work, by which injury has occurred, it has been held that they were not liable if proper care had been used by them in selecting those who were actually to perform the work.

Anderson, *supra*, at 331. The court then expressly adopted this holding as law. See *id.* (stating that liability cannot extend beyond that discussed in *Holiday*).

57. See *Collopy*, 141 A.2d at 278 (noting state courts’ adherence to decision in *McDonald*); see, e.g., Downes v. Harper Hosp., 60 N.W. 42, 43 (Mich. 1894) (adopting charitable immunity and citing *McDonald* in support of decision); Perry v. House of Refuge, 63 Md. 20, 26–28 (Md. 1885) (adopting charitable immunity in reliance on *McDonald* and English common law).

58. 130 F.2d 810, 815–16 (D.C. Cir. 1942) (describing adoption of charitable immunity in United States as "accidental"); see also *Collopy*, 141 A.2d at 278 (discussing impact of Justice Rutledge’s opinion in *Hughes*); Bottari, *supra* note 19, at 62 (explaining significance of Justice Rutledge’s opinion).

59. See Bottari, *supra* note 19, at 62 (recounting development and subsequent demise of charitable immunity). In his opinion, Justice Rutledge criticized the adoption of charitable immunity. See *Hughes*, 130 F.2d at 816 (exposing error courts made in relying on English common law). He stated:

Massachusetts adopted the repudiated rule of [*Holiday*] in [*McDonald*] and Maryland followed [*The Feoffees of Heriot’s Hospital v. Ross*] in *Perry v. House of Refuge*. Apparently both courts acted in ignorance of the English reversal. In any event, they resurrected in America a rule already dead in England, and thereby gave Lord Cottenham’s dictum a new lease on life in the New World.

*Id.* (citation omitted).

Next, the New Jersey Supreme Court critically evaluated the court's reasoning in *D'Amato*. As discussed above, *D'Amato* relied on three state court decisions from New York, Massachusetts and Pennsylvania. One of these decisions was *McDonald*, which relied on the previously overruled decision in *Holliday*. Another decision cited in *D'Amato*, *Schloendorff v. Society of New York Hospital*, was overturned prior to *Collopy*. After noting the weak precedent used by the *D'Amato* court, the *Collopy* court further criticized *D'Amato* on the grounds that the "public policy" justification was not sufficiently supported.

Finally, the New Jersey Supreme Court supported its decision in *Collopy* by identifying changes in society's mores. The court recognized that at the time the court decided *D'Amato*, public policy may have supported

jection of doctrine stemmed from both revelation of "historical error" and "evolving public needs").

61. See *Collopy*, 141 A.2d at 280 (pointing out that *D'Amato* relied on problematic precedent and did not fully explain how "public policy" justified its holding).


63. See id. (citing and relying on *McDonald*).

64. 105 N.E. 92 (N.Y. 1914).

65. See *Collopy*, 141 A.2d at 280 (explaining that *Schloendorff* was overruled in 1957 by *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957)). In *Bing*, the court rejected charitable immunity for hospitals. See *Bing*, 143 N.E.2d at 8–9 (reasoning that "hospitals should . . . shoulder the responsibilities borne by everyone else"). The court explained that hospital exemption from respondeat superior should cease. See id. at 8 (noting "[l]iability is the rule, immunity the exception"). Furthermore, the court expressed its opinion that charitable immunity no longer served society’s interests. See id. at 9 (explaining reason for abolishing charitable immunity). It stated, "[t]he rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded." Id.

66. See *Collopy*, 141 A.2d at 280 (commenting on lack of documentation for Chancellor’s “expression of public policy”). “[T]he only ground advanced in *D'Amato* in support of its holding” was flawed. See id. (criticizing reasoning in *D'Amato*). “[T]he Chancellor did not document his expression of public policy, nor did he discuss the underlying reasons for the court's conclusion that it should then declare the immunity.” Id.

67. See id. at 282 (“It may perhaps be that when *D'Amato* was rendered in 1925 it accurately represented the then prevailing notions of public policy. But times and circumstances have changed and we do not believe that it faithfully represents current notions of rightness and fairness.”); see also President of Georgetown Coll. v. Hughes, 130 F.2d 810, 824 (D.C. Cir. 1942) (“Changes in the law and in the organization and mores of community life have taken away [the] major force [of the chief arguments for sustaining charitable immunity].”). Fostering the development of charitable organizations and encouraging donations were the public policy reasons offered in support of charitable immunity. See Feather, supra note 56, at 93–94 (discussing evolution of public policy justification for charitable immunity).

After charitable organizations became more entrenched in American society, however, public policy concerns shifted to concern for individuals. See id. at 94. “Immunity inclines a person to carelessness and disregard for the rights of
charitable immunity. The court explained that public policy had since changed, placing greater emphasis on general principles of fairness and due care by all. Increased availability of insurance further impacted the court’s determination by providing reassurance that charitable funds would not diminish completely as a result of charitable immunity’s abolishment.

3. Legislative Response

In response to the New Jersey Supreme Court’s abolishment of charitable immunity, the New Jersey legislature immediately reinstated the doc-

oxers, while liability inclines a person to care and dutiful consideration for the safety of others.”

68. See Collopy, 141 A.2d at 282 (acknowledging that D’Amato may have represented prevailing public policy notions at time of decision). But see Lester W. Feezer, The Tort Liability of Charities, 77 U. Pa. L. Rev. 191, 193 (1928) (expressing opinion that by 1928 “social concepts” had evolved to point where charitable immunity was no longer responsive to societal needs).

69. See Collopy, 141 A.2d at 282 (discussing evolution of society’s conception of public policy); see also Bing, 143 N.E.2d at 9 (commenting on modern perceptions of justice and fairness).

70. See Collopy, 141 A.2d at 282 (citing Lokar v. Church of the Sacred Heart, 133 A.2d 12, 24 (N.J. 1957) (Wachenfeld, J., concurring)) (emphasizing that availability of insurance makes charitable immunity less important); see also Hughes, 130 F.2d at 828 (citing availability of insurance as one reason for rejection of charitable immunity by District of Columbia Court of Appeals in 1942); Daniel A. Barfield, Better to Give Than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?, 29 Val. U. L. Rev. 1193, 1195 (1995) (citing “development of... advanced insurance industry” as reason majority of jurisdictions “repudiated or substantially limited” charitable immunity); Thomas G. Kelch, Toward a Non-Property Status for Animals, 6 N.Y.U. Envtl. L.J. 531, 548-49 (1998) (“The increasing size of charities and their ability to obtain insurance has had an impact on the charitable immunity doctrine... [it] has been forsaken due to changes in the world of insurance.”). But cf. Schiltz, supra note 4, at 956–58 (discussing problems with liability insurance for churches confronted with clergy sexual abuse litigation); Charles Robert Tremper, Compensation for Harm from Charitable Activity, 76 Cornell L. Rev. 401, 411 (1991) (expressing opinion that increased insurance costs have played role in “charitable immunity counter-trend”). Victims often report clergy sexual abuse a number of years after it occurs. See Schiltz, supra note 4, at 956 (discussing difficulty locating insurance policy held at time of abuse when victims do not report abuse until many years later).

When a church is sued for misconduct that occurred in 1960, it is unlikely that the church will be able to identify the company that insured it at that time. Even if the church can identify the insurer, it likely cannot prove the scope or limits of its coverage... when churches [do] locate old insurance policies, they usually find that the limits of coverage are grossly inadequate. A $10,000 liability policy provided ample protection in 1960; it does not in 2003.

Id. Churches have also encountered difficulty because “for the past decade or so, policies that insure churches have excluded coverage for liability arising out of sexual misconduct.” Id. at 956–57; see also O’Reilly & Strasser, supra note 4, at 69–70 (explaining that some insurance companies “provid[e] lower coverage limits on sexual molestation claims than under the general liability coverage”).
trine. The legislature included an expiration date of June 30, 1959 for the law reinstating charitable immunity. On June 11, 1959, the expiration date became moot when the state governor signed the New Jersey Charitable Immunity Act into law. To date, this Act is still in place.

71. See Bottari, supra note 19, at 66 (stating that New Jersey legislature "resurrected" charitable immunity when it signed sections 16:1-48 to 53 of Revised Statutes into law on July 22, 1958). The language of this statute reviving charitable immunity and the New Jersey Charitable Immunity Act enacted in 1959 were identical, with one exception—the first statute had an expiration date. See id. at 66 (explaining development of Charitable Immunity Act).

72. See id. (stating expiration date of statute). There are various explanations for the expiration date. See id. (speculating about reasons legislature initially included expiration date for charitable immunity statute). One possibility is that the legislature included an expiration date in case public opposition arose in response to the statute. See id. (same). There has also been speculation that the legislature intended the statute to provide charities with enough time to procure liability insurance. See id. (same).

73. See N.J. STAT. ANN. § 2A:53A-7 (West 2004) (establishing charitable immunity with no fixed expiration date).

74. See id. (reflecting current status of charitable immunity in New Jersey). Although the Charitable Immunity Act is still in place, members of the legislature have repeatedly proposed bills to amend the Act. In February 2000, New Jersey state Senators Joseph F. Vitale and Louis C. Bassano introduced a bill to modify the Charitable Immunity Act. See S. 965, 209th Leg., 2000-01 Sess. (N.J. 2000) (attempting to modify Charitable Immunity Act to give minor victims of sexual abuse redress against charitable organizations). It stated:

The immunity from civil liability granted to a nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes pursuant to the provisions of [the New Jersey Charitable Immunity Act] shall not apply in any civil action which alleges that the negligent hiring or supervision of any employee resulted in a sexual offense being committed against a person under the age of 18 who was a beneficiary of the nonprofit organization. As used in this section, "sexual offense" means any crime defined in chapter 14 of Title 2C of the New Jersey Statutes.


2. d. Nothing in [the Act] shall be deemed to grant immunity to any nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes for the negligent hiring or negligent supervision of any agent or servant of such corporation, society or association which resulted in sexual abuse, sexual assault or other crimes of a sexual nature committed against a person who was a beneficiary of the corporation, society or association.
The Charitable Immunity Act shields any “non profit corporation, society or association organized exclusively for religious, charitable or educational purposes” from tort liability arising from negligence.\textsuperscript{75} The Act

\begin{quote}
3. Notwithstanding any other provision of law to the contrary, a nonprofit corporation, society or association shall be liable for the negligent hiring or negligent supervision of any agent or servant of such corporation, society or association which resulted in sexual abuse, sexual assault or other crimes of a sexual nature committed against a person who was a beneficiary of the corporation, society or association.
\end{quote}

\textit{Id.} After its introduction in the state senate, the bill was referred to the Senate Judiciary Committee, where it remained until the end of the legislative session. \textit{See} \textit{Bills 2002–2003, supra} (providing bill’s history). An identical bill introduced in the state assembly suffered the same fate—after its referral to the Assembly Judiciary Committee, it remained there for the duration of the legislative session. \textit{See A. 2141, 210th Leg., 2002–03 Sess. (N.J. 2002)} (proposing identical amendment); \textit{see also Bills 2002–2003, supra} (providing bill’s history). Although legislators again proposed this amendment in 2004 in the state senate and assembly, it has not advanced beyond referral to the respective judiciary committees. \textit{See S. 283, 211th Leg., 2004–05 Sess. (N.J. 2004)} (proposing identical amendment in Senate in 2004); \textit{A. 2109, 211th Leg., 2004–05 Sess. (N.J. 2004)} (proposing identical amendment in Assembly in 2004); \textit{see also New Jersey Legislature, Bills 2004–2005} [hereinafter \textit{Bills 2004–2005}], at http://www.njleg.state.nj.us/bills/BillView.asp (last visited Dec. 1, 2004) (providing bill’s history). Another bill, proposed in January 2004 by Senator Vitale and Senator Nia H. Gill, has had greater success. \textit{See S. 540, 211th Leg., 2004–05 Sess. (N.J. 2004)} (proposing modification of Charitable Immunity Act to permit lawsuits against charitable organizations that negligently hire or supervise employees who sexually abuse minors); \textit{see also Bills 2004–2005, supra} (providing bill’s history). The language of the 2004 Vitale/Gill bill is identical to the 2000 Vitale/Bassano bill and the 2002 Vitale bill. \textit{Compare S. 540, 211th Leg., 2004–05 Sess. (N.J. 2004), with S. 965, 209th Leg., 2000–01 Sess. (N.J. 2000), and S. 843, 210th Leg., 2002–03 Sess. (N.J. 2002); see also A. 2512, 211th Leg., 2004–05 Sess. (N.J. 2004)} (proposing amendment in assembly identical to 2004 Vitale/Gill senate bill). The proposed legislation would allow beneficiaries to sue charitable organizations when the organizations negligently hire or supervise employees who sexually abuse minors. \textit{Vitale Statement, supra} note 22 (explaining purpose of Vitale/Gill bill). In his statement to the Senate Judiciary Committee, Vitale explained that “[t]he Charitable Immunity Act was originally designed to remove the threat of lawsuits to charitable organizations by beneficiaries of that organization . . . . However, with the increased prevalence of sex-abuse cases coming to light, charitable immunity edicts across the country have been coming under closer scrutiny than ever before.” \textit{News From NJ. Senate Democrats, Charitable Immunity Testimony} (Jan. 26, 2004), at http://www.njsendems.com/Releases/04/January/Vitale%20Charitable%20Immunity%20Testimony%2001-26-04.htm (transcribing testimony of Senator Vitale at Senate Judiciary Committee meeting). Unlike identical bills in previous legislative sessions, the Senate passed the 2004 Vitale/Gill bill. \textit{See Bills 2004–2003, supra} (providing bill’s history). The bill then moved to the assembly, where the Assembly Financial Institutions and Insurance Committee considered it. \textit{See id.} (posting steps bill has taken during 2004 legislative session). On November 8, 2004, the bill was reported out of the Assembly Financial Institutions and Insurance Committee. \textit{See id.} (same). To date, the assembly as a whole has not voted on the Vitale/Gill bill. \textit{See id.} (same).


a. No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall
distinguishes between beneficiaries and nonbeneficiaries of charitable works—charitable immunity applies only where the beneficiary suffers injury.\textsuperscript{76} It represents a minority position among United States jurisdictions.\textsuperscript{77}

\textit{Id.} While individuals affiliated with charitable organizations are not immune from liability resulting from gross negligence, the organization does retain immunity where its employees have committed grossly negligent acts. For a discussion of the distinction between the immunity afforded to individuals affiliated with charitable organizations and the organizations themselves, see \textit{supra} note 7 and accompanying text.

\textsuperscript{76} \textit{See id.} (establishing beneficiary/nonbeneficiary distinction for charitable immunity in tort actions arising out of negligence). "[I]mmunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association." \textit{Id.} (emphasis added). In evaluating whether a plaintiff is a beneficiary for the purposes of the Charitable Immunity Act, the court must consider "whether the institution pleading the immunity, at the time in question was engaged in the performance of the charitable objectives it was organized to advance." Anasiewicz v. Sacred Heart Church, 181 A.2d 787, 790 (N.J. Super. Ct. App. Div. 1962); see also Rupp v. Brookdale Baptist Church, 577 A.2d 188, 191 (N.J. Super. Ct. App. Div. 1990) (adhering to beneficiary status test established by Anasiewicz).

4. Applying the Charitable Immunity Act to the Catholic Church Sexual Abuse Scandal

In *Schultz v. Roman Catholic Archdiocese*, decided two decades after the enactment of the New Jersey Charitable Immunity Act, the New Jersey Supreme Court insulated the church from liability in a negligent hiring action resulting from clergy sexual abuse. The victim was a prepubescent male who attended a school owned by the archdiocese and participated in a parish-sponsored Boy Scout troop. A Franciscan brother, Robert Coakley, served as both a teacher in the school and scoutmaster for the troop. While at Boy Scout camp, Coakley allegedly forced the victim to participate in “sexual contact.” Coakley allegedly continued this behavior when school resumed. Despite the fact that Coakley threatened the victim not to report the abuse, the victim informed his parents of the situation. Ultimately, despite medical and psychological care, the victim committed suicide. In response, his parents brought a negligent hiring action against the archdiocese. The court held that the defense of charitable immunity was available to charities, including the church, sued by their beneficiaries under the theory of negligent hiring.
Schultz reflects the conflict between morality and the duty to uphold the law.87 The court admitted that its “natural sympathies favor [finding an exception to charitable immunity].”88 Nevertheless, the court was obligated to give effect to the legislature’s intent—liberal interpretation of the statute.89 Despite this obligation, the court offered the following thoughts on the applicability of charitable immunity: “Perhaps the time has come
two years before the court decided Schultz. Despite the prevalence of negligent hiring actions in clergy sexual abuse litigation against the church, some scholars have raised First Amendment concerns about this cause of action. See Chopko, supra note 4, at 1115 (noting that negligent hiring actions may involve judicial inquiry into religious beliefs); see also O’Reilly & Strasser, supra note 4, at 43 (raising constitutional question of “[h]ow deeply into the incardination process and the canonical suspension power . . . a federal or state judge [can] immerse herself, before the constitutional line is crossed?”).

Negligent hiring actions are not the only theories victims of clergy sexual abuse may pursue in an action against the church. See Chopko, supra note 4, at 1111–24 (discussing various theories of liability). Vicarious liability is one possibility. See Schiltz, supra note 4, at 958 (discussing priests’ role as “agents of diocese”). But cf. Chopko, supra note 4, at 1113–14 (noting that “overwhelming majority rule [is] that religious organizations are not liable for sexual assaults committed by those who minister for them under the doctrine of respondeat superior”). Negligent supervision, often discussed simultaneously with negligent hiring, is another option for victims seeking to hold the church liable. See Arnold, supra, at 42–43 (describing relationship between negligent hiring and negligent supervision). The question in negligent supervision actions is “whether religious leaders were in possession of information which, if acted upon, could have prevented the harm upon which the lawsuit is based.” Chopko, supra note 4, at 1116.

A third possible theory of liability is breach of fiduciary duty. See Schiltz, supra note 4, at 961 (explaining that use of this type of action is increasing); see, e.g., Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.2d 409, 429 (2d Cir. 1999) (applying fiduciary duty theory). Much like negligent hiring and supervision, however, constitutional barriers may impede success. See Chopko, supra note 4, at 1116–17 (“Of those courts that have reached the constitutional issue, many have rejected fiduciary duty claims against churches on constitutional grounds.”).

87. See Schultz, 472 A.2d at 539 (“Others must reconcile the issues of moral responsibility. As to legal responsibility, we find that the act charged here is negligence in hiring. Under New Jersey’s Charitable Immunity Act a charity is not liable for negligence.”); see also Harold P. Southerland, Sovereignty, Value Judgments, and Choice of Law, 38 BRANDEIS L.J. 451, 500 (2000) (“[N]one of [the New Jersey Supreme Court justices] bothered to disguise their distaste for the policy reflected in the [Charitable Immunity Act] or for the result which it compelled. But . . . [the] court saw itself as an instrument of state policy and bowed to the will of the legislature.”).

88. Schultz, 472 A.2d at 535 (expressing dilemma presented by case).

89. See id. at 539 (noting that court was not free to interpret statute in light of common law because liberal construction is statutorily prescribed); see also Monaghan v. Holy Trinity Church, 646 A.2d 1130, 1135 (N.J. Super. Ct. App. Div. 1994) (stating that court should liberally construe Charitable Immunity Act). The legislature expressed its intent that courts construe the Charitable Immunity Act liberally. See N.J. STAT. ANN. § 2A:53A-10 (West 2004). The statute states: [The Charitable Immunity Act] shall be deemed to be remedial and shall be liberally construed so as to afford immunity to the said corporations, societies and associations from liability as provided herein in furtherance of the public policy for the protection of nonprofit corporations, societies
for the Legislature to consider again the scope of the law and its intended application to new theories of liability."\textsuperscript{90} Members of the New Jersey legislature recently heeded this advice and proposed legislation that would abolish charitable immunity in New Jersey.\textsuperscript{91}

III. JUSTIFICATIONS AND COUNTERARGUMENTS FOR CHARITABLE IMMUNITY

A. Justifications in General

Proponents of charitable immunity offer several justifications for the doctrine.\textsuperscript{92} There is no consensus about which rationale is, in fact, the primary justification.\textsuperscript{93} Absent such a consensus, charitable immunity has become both "controversial" and "complex."\textsuperscript{94}

1. Trust Fund Theory

The trust fund theory for charitable immunity is based on the idea that charitable funds are held in trust and, as a result, the charity cannot use the funds to pay tort liability judgments.\textsuperscript{95} The theory emphasizes the
inviolability of donor intent. That is, payment of tort damages from charitable funds "would be to divert funds from the purpose intended by the author of the trust." Critics point out several flaws in the trust fund theory. First, tort claimants are not always precluded from reaching trust funds to satisfy tort judgments. Second, because donors' funds would not be exempt if they continued to hold them as their own, donors cannot "confer immunity upon [the funds]" simply by donating them to a charity. Finally, the trust fund theory cannot justify the immunization of charities where only charitable beneficiaries are injured.

In Feoffees of Heriot's Hospital, Lord Cottenham remarked, "[t]o give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." Feoffees of Heriot's Hospital v. Ross, 8 Eng. Rep. 1508, 1510 (H.L. 1846).

See Restatement Torts, supra note 4, § 895E cmt. c (explaining that charitable donations should not "be diverted from the purposes intended by their donors and applied to the payment of liabilities in tort"); Feezer, supra note 68, at 199 ("[T]he fund created by the benefactors of the charity would be diverted from the purpose for which it was set apart [if the charity used the fund to pay tort damages]."); see also Hughes, 130 F.2d at 822 (including concerns about upholding donor intent among arguments in favor of charitable immunity); Feather, supra note 56, at 89-90 (noting that donor intent/trust fund theory are based on English common law decisions).

See Restatement Torts, supra note 4, § 895E cmt. c (discussing weaknesses of trust fund justification); Feezer, supra note 68, at 199-200 (same); Wells, supra note 2, at 1215 (same); Feather, supra note 56, at 91-92 (same).

See Restatement Torts, supra note 4, § 895E cmt. c (criticizing concept that charitable funds are subject to impenetrable trust); see also Hughes, 130 F.2d at 823 (noting that trusts are no longer unreachable by tort claimants). "A person to whom the trustee has incurred a liability in the course of the administration of the trust can by a proceeding in equity reach trust property and apply it to the satisfaction of his claim under the circumstances stated in §§ 268-271 A." Restatement (Second) of Trusts § 267 (1959).

See Restatement Torts, supra note 4, § 895E cmt. c (describing inability of donors to make their assets immune); cf. Wells, supra note 2, at 1215 (commenting on unlikely possibility that "every donor has stipulated that his or her gift cannot be used for liability costs").

See Feather, supra note 56, at 91 (explaining that trust fund theory only justifies "complete immunity"); see also Feezer, supra note 68, at 199 (noting that refusal to apply charitable immunity where nonbeneficiary is injured weakens trust fund theory). The trust fund theory weakens when the beneficiary/stranger distinction is made for application of charitable immunity because it permits diversion of donor intent in some circumstances. See Feather, supra note 56, at 91 (illustrating that beneficiary/stranger distinction causes structure of trust fund theory to collapse). Where strangers (nonbeneficiaries) are injured, donor intent is diverted because charities may use trust funds to pay judgments. See id. (same).
2. Inapplicability of Vicarious Liability

The next rationale offered in support of charitable immunity is that vicarious liability is inapplicable to charities because they receive no financial gain for services provided. Vicarious liability imposes strict liability on employers for employees' torts committed while the latter are acting within the scope of their employment. In the context of the clergy sexual abuse scandal, the church contends that sexual abuse of minors is outside the scope of clerics' employment and is, therefore, insufficient grounds for imposition of liability.

Generally speaking, the argument that vicarious liability does not apply absent a "gain" by the employer misinterprets the law. Vicarious liability depends on the employer-employee relationship rather than on profitability. Moreover, analyzing the rationale in the context of the clergy sexual abuse scandal has led scholars to the conclusion that vicarious liability may, in fact, be appropriate. First, within the hierarchy of the Roman Catholic Church, "priests function as the agents of the dioceses." In addition, vicarious liability may be proper because "institutional structure gives rise to vicarious liability. Vicarious liability can be imposed under the theory of respondeat superior.

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102. See Restatement Torts, supra note 4, § 895E cmt. c (explaining that inapplicability of vicarious liability is one rationale for charitable immunity); Wells, supra note 2, at 1214 (same); Feather, supra note 56, at 90 (same).

103. See James A. Henderson, Jr. et al., The Torts Process 136 (6th ed. 2003) (explaining vicarious liability); Vandall, supra note 1, at 1041 (discussing basic concept of vicarious liability). "The classic vicarious liability scenario involves an employer being held liable for the negligent tort of an employee committed while the employee was acting in the scope of his or her employment." Id.

104. See Schiltz, supra note 4, at 958 (discussing church response to vicarious liability claims arising out of clergy sexual abuse).

105. See Restatement Torts, supra note 4, § 895E cmt. c (stating that theory "runs counter to the whole law of vicarious liability"); Feather, supra note 56, at 93 (noting that theory is founded on "faulty premise").

106. See Restatement Torts, supra note 4, § 895E cmt. c (explaining that vicarious liability depends on "the employment of the servant, the employer's direction and control over his conduct and the furtherance of the enterprise that [the employer] has set in motion"); Feather, supra note 56, at 93 (noting that employer's delegation of duties gives rise to respondeat superior).

107. See Schiltz, supra note 4, at 958-59 (discussing principal-agent relationship that can give rise to vicarious liability). Vicarious liability can be imposed under the theory of respondeat superior. See O'Reilly & Strasser, supra note 4, at 39 (explaining operation of respondeat superior in clergy sexual abuse actions against church). Liability may arise if the employee commits a tort while acting within the scope of his employment "or if other conditions of the principal-agent relationship are satisfied." See id. (same). "A master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion." Restatement (Second) of Agency § 216 (1958); see also Wells, supra note 2, at 1222 (concluding that exceptions exist to inapplicability of vicarious liability theory, which relate to clergy sexual abuse).

108. See Schiltz, supra note 4, at 958-59 (concluding that hierarchal structure gives rise to principal-agent relationship between priests and dioceses). The principal-agent relationship can give rise to vicarious liability. See id. at 958 (noting
tional negligence” has been a component of the clergy sexual abuse scandal.¹⁰⁹ Scholars have concluded that the church’s hierarchical and internal discipline structures contributed to an institutional approach that fueled the scandal.¹¹⁰

3. Assumption of the Risk/“Implied Waiver” Theory

A third theory supporting charitable immunity advances the argument that beneficiaries of charities also assume the risk of the charity’s negligence.¹¹¹ That is, one benefiting from charitable works “accepts them as they are given” and “by implication agrees to ‘waive’ the liability and assert no claim in tort against his benefactor.”¹¹² Sustaining this argument requires proof that the beneficiary waived tort claims both voluntarily and with full knowledge of the risk.¹¹³ Proof of these elements is difficult because recipients of charitable services have come to expect reasonable care.¹¹⁴ When recipients submit to charitable organizations, they

that existence of principal-agent relationship is fiercely litigated). But cf. John H. Mansfield, Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty, 44 B.C. L. Rev. 1167, 1171–72 (2003) (explaining that difficulty arises from characterizing church-priest relationship as principal-agent relationship because “the prohibition against answering religious questions forbids looking to church law or structure to see if such a relationship exists”).

¹⁰⁹. See Wells, supra note 2, at 1222 (identifying three relevant factors, including institutional negligence, that impact vicarious liability analysis). When analyzing whether it is appropriate to impose vicarious liability on charitable organizations, there are three relevant factors: (1) whether the charity charges for its services and raises substantial funds; (2) the amount of damages sought by plaintiff; and (3) whether “institutional negligence” is involved. See id. (enumerating factors). To determine whether there is “institutional negligence,” “[t]he question is whether the negligent conduct is really attributable to employees or whether it represents the conscious policy of the institution.” Id.

¹¹⁰. See Doyle & Rubino, supra note 8, at 615 (discussing impact of hierarchical structure on bishops’ responses to clergy sexual abuse); Wayne A. Logan, Criminal Law Sanctuaries, 38 Harv. C.R.-C.L. L. Rev. 321, 321 (2003) (discussing impact of church’s preference for internal disciplining of abusive clergy). For a discussion of the church’s hierarchal and internal discipline structures and their impact on the clergy sexual abuse scandal, see infra notes 149–89 and accompanying text.

¹¹¹. See RESTATEMENT TORTS, supra note 4, § 895E cmt. c (discussing “waiver” theory as justification for charitable immunity); Feezer, supra note 68, at 202 (noting that waiver theory gained prominence in 1901); Wells, supra note 2, at 1215–16 (describing assumption of risk rationale for charitable immunity); Feather, supra note 56, at 90 (characterizing justification as “‘implied waiver’ theory” and noting that it frequently arises in negligence actions against charitable hospitals). “The substance of this theory is that by accepting the services of a charity, the beneficiary impliedly waives liability or assumes the risk of the charity’s negligent employees.” Feather, supra note 56, at 90.

¹¹². RESTATEMENT TORTS, supra note 4, § 895E cmt. c (discussing assumption of risk rationale).

¹¹³. See Wells, supra note 2, at 1216 (describing elements of assumption of risk theory: voluntary and knowing waiver).

¹¹⁴. See RESTATEMENT TORTS, supra note 4, § 895E cmt. c (“The recipient in fact understands and expects that he will be treated with reasonable care . . . ”). This theory is especially difficult to support when the plaintiff is not a beneficiary
are not necessarily cognizant of the legal principles implicit in the waiver theory. A waiver, then, "would be wholly fictitious."

4. Public Policy

Finally, a general "public policy" justification seeks to ensure the continued viability of charitable enterprises. Proponents of charitable immunity contend that donations may decrease if donors know charities may use their funds to pay tort claims. A decrease in charitable funds may have substantial impact on the services offered by a charity, thereby injuring the charitable beneficiaries as a whole.

of the charity's works. See Wells, supra note 2, at 1216 (illustrating flaw in the assumption of risk rationale). "It can hardly be supposed that one who is struck by a charitable bloodmobile has made a knowing and voluntary waiver of his rights." Id. (noting illogical result where waiver theory is applied to nonbeneficiary).

115. See Feather, supra note 56, at 92 (discussing illogical results created by waiver theory). Patients in charitable hospitals are illustrative of the difficulty encountered in sustaining the implied waiver theory: "[a] patient entirely unskilled in legal principles, his body racked with pain, his mind distorted with fever, is held to know, by intuition, the principle of law that courts after years of travail have at last produced." Id. (quoting Lindler v. Columbia Hosp., 81 S.E. 512, 515 (S.C. 1914) (Fraser, J., dissenting)).


117. See RESTATEMENT TORTS, supra note 4, § 895E cmt. c (discussing public policy objective of encouraging charitable entities); Feezer, supra note 68, at 206 (noting that public policy argument in favor of charitable immunity relies on notion that charities perform "quasi-governmental work by performing a function which the government must otherwise undertake"); O'Reilly & Strasser, supra note 4, at 60 (explaining that public policy justification advocates encouragement of "charitable endeavors" because charities provide benefits to society); Feather, supra note 56, at 90–91 (describing public policy justification as "practical basis for all of the [other] theoretical bases"). In Ettlinger v. Trustees of Randolph-Macon College, 31 F.2d 869 (4th Cir. 1929), the court summarized the public policy rationale:

A policy of the law which prevents [a charity's beneficiary] from suing it for the torts of its agents and servants, and thus taking for [the beneficiary's] private use the funds which have been given for the benefit of humanity, which shields gifts made to charity from the hungry maw of litigation and conserves them for purposes of the highest importance to the state, carries on its face its own justification, and, without the aid of metaphysical reasoning, commends itself to the wisdom of mankind. Ettlinger, 31 F.2d at 872.

118. See RESTATEMENT TORTS, supra note 4, § 895E cmt. c (discussing fear that donations will be discouraged if charities can use them to pay tort judgments); Birnbaum, supra note 95, at 478 (noting that courts were concerned judgment awards against charities may discourage charitable donations); see also Schiltz, supra note 4, at 964 ("The people in the pews do not seem anxious to increase their donations to help pay the costs of litigation."); Wells, supra note 2, at 1215 (noting that charitable immunity prevents defeat of donor intent and discouragement of charitable gifts).

119. See Schiltz, supra note 4, at 964-65 (explaining impact of litigation costs on churches). "Because it is not realistic to expect donations to increase, churches have no alternative but to pay for litigation by cutting back on the services they provide." Id. at 964 (noting "cutting back" may range from disposing of invest-
The consequence of this position is that the injured party must bear the cost of a charity's liability.120 The Restatement (Second) of Torts admonishes this result, emphasizing the public interest "in proper care and treatment, and the compensation of harm done."121 Another corollary to the public policy rationale is that it forces a charitable contribution from the victim.122

B. Justifications for New Jersey Charitable Immunity Act

1. Justification as Expressed by New Jersey Legislature

When enacting the Charitable Immunity Act, the New Jersey legislature focused on economic justifications for the doctrine.123 The legislature emphasized the consequence of abolishing charitable immunity—possible depletion of charitable funds.124 Accordingly, it structured the Charitable Immunity Act "so that the organization's funds could be put to better use in funding charitable works, instead of funding the cost of litiga-

ment property to closing schools and shelters to meet financial obligations of litigation expenses); see also Birnbaum, supra note 95, at 478 (noting that at inception of public charities, courts agreed to shield them from tort liability in order to foster their development).

120. See Wells, supra note 2, at 1214 ("We can free charities from liability costs only by transferring them to injured parties.").

121. RESTATEMENT TORTS, supra note 4, § 895E cmt. c (providing justifications for charitable immunity).


[A] policy exempting a charitable organization from having to compensate for harm caused by it is equivalent to requiring an injured individual to make an unwilling contribution to that organization in the amount of the compensation which would be due him had he been injured by a noncharitable entity. Such coerced donations are inimical to the whole concept of charitable donation and service. They are, to say the least, distinctly uncharitable.

Id. (describing charitable immunity as uncharitable); see also Wells, supra note 2, 1214-15 (exploring concept of "forced contribution"); Feather, supra note 56, at 86 (noting that, when plaintiffs cannot recover due to charitable immunity of defendant institution, they are effectively forced "to contribute to the maintenance of [the] charitable institution").


124. See Schultz, 472 A.2d at 537 (describing legislature's primary concern—continued economic viability of charitable organizations—during consideration of Charitable Immunity Act).
tion against an organization."\textsuperscript{125} The legislature did not focus on the historical inconsistencies in the doctrine that troubled the court in \textit{Collopy}.\textsuperscript{126}

2. \textit{Justification as Interpreted by the New Jersey Supreme Court}

In \textit{O'Connell v. State},\textsuperscript{127} the New Jersey Supreme Court evaluated the legislative history of the Charitable Immunity Act and offered its own interpretation of the legislature's intent.\textsuperscript{128} The court found "that preservation of a charity's assets was only one of a number of purposes propelling the [Charitable Immunity Act's] enactment."\textsuperscript{129} The assumption of the risk rationale was also influential in the legislature's decision.\textsuperscript{130} The inclusion of the "beneficiary/stranger" distinction in the Act led the court to this conclusion.\textsuperscript{131} First, use of the term "beneficiary" is associated with the assumption of the risk justification.\textsuperscript{132} Second, inclusion of the term cannot be reconciled with the primary justification for the Act: preservation of charitable assets.\textsuperscript{133} As the court explained, "[t]he imposition of tort liability has the potential to deplete a charitable fund regardless of whether the judgment is paid to a beneficiary or a stranger."\textsuperscript{134}

\textsuperscript{125} Vitale Statement, supra note 22 (stating rationale for substance of statute—preservation of charitable funds).

\textsuperscript{126} See Schultz, 472 A.2d at 537 (explaining that New Jersey legislature did not strive for consistency with common law conception of charitable immunity while drafting Charitable Immunity Act).

\textsuperscript{127} 795 A.2d 857 (N.J. 2002).

\textsuperscript{128} See id. at 859 (explaining that court's goal was to determine legislative intent when interpreting statutes). In \textit{O'Connell}, the court considered whether a university was entitled to charitable immunity, despite its failure to pay judgments from the funds of the educational institution. See id. at 858-59 (providing facts and procedural posture of case).

\textsuperscript{129} Id. at 864 (interpreting legislative history to discern intent).

\textsuperscript{130} See id. (discussing evidence that waiver theory influenced New Jersey legislature).

\textsuperscript{131} See id. (explaining that term "beneficiary" is associated with waiver theory); see also Wells, supra note 2, at 1222 ("[T]he distinction between suits by a charitable beneficiary and suits by a stranger will not be relevant once we dismiss the assumption of the risk rationale for charitable immunity.").

\textsuperscript{132} See \textit{O'Connell}, 795 A.2d at 864-65 (discussing connection between use of "beneficiary/stranger" distinction in Charitable Immunity Act and assumption of risk rationale). The assumption of the risk rationale for charitable immunity justifies the imposition of immunity where charitable beneficiaries are injured. See id. (citing 5 \textsc{Fowler V. Harper et al., The Law of Torts \textsection 29.16, 759-60} (2d ed. 1986)). The Charitable Immunity Act immunizes charities under these circumstances. See \textsc{N.J. Stat. Ann. \textsection 2A:53A-7} (West 2004) (immunizing charitable organizations against negligence claims by beneficiaries).

\textsuperscript{133} See \textit{O'Connell}, 795 A.2d at 864 (noting that public policy justification—preservation of charity's assets—cannot fully explain inclusion of beneficiary/stranger distinction).

\textsuperscript{134} Id. (same).
IV. CHARITABLE IMMUNITY AND THE CATHOLIC CLERGY SEXUAL ABUSE SCANDAL

Consideration of the New Jersey Charitable Immunity Act in the context of the clergy sexual abuse scandal has sparked a movement for abolition of the doctrine in situations involving sexual abuse of minors. The unique character of the scandal may justify this response. First, clergy sexual misconduct in the Catholic Church has produced more than occasional victims. Second, the church has played a direct role in enabling clergy sexual abuse to reach epidemic proportions. Finally, the propensity of New Jersey's dioceses to settle clergy misconduct lawsuits has under-

135. For a discussion of proposed amendments to the Charitable Immunity Act that would eliminate immunity where charities negligently hire or supervise employees who sexually abuse minors, see supra note 74 and accompanying text.

136. See Doyle & Rubino, supra note 8, at 555 (noting that church inefficiencies in addressing clergy sexual abuse has encouraged victims to seek relief from civil court system). Clergy sexual abuse victims have expressed frustrations with the response of church leadership to allegations of abuse. See id. (describing perceptions of post-1984 victims of clergy sexual abuse); O'Brien, supra note 2, at 375 (criticizing church's response to clergy sexual abuse scandal as unresponsive to "horror visited upon the victims"). Victims are concerned that the church "minimizes their claims" and that it responds to allegations with "[e]mpty assurances that perpetrators would be properly dealt with." Doyle & Rubino, supra note 8, at 555.


138. See Coughlin, supra note 2, at 977 (concluding that bishops' failure to abide by canon law contributed to the current crisis); Janice Villiers, Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship, 74 DENV. U. L. REV. 1, 19 (1996) (discussing church shortcomings that contributed to continuation of abuse, namely transferring abusive priests among parishes); Rod Dreher, Catholic Hierarchy Responsible for Abusive Priests, PATRIOT LEDGER (Quincy, Mass.), Jan. 23, 2002, at 13 (blaming church's "tepid response" to abuse scandal for victims' injuries and financial toll on church); see also Doyle & Rubino, supra note 8, at 615 ("Sexual abuse committed by clergy members is not something isolated from the dynamics of the Church's power structure."); Smith, supra note 2, at 412 (noting church hierarchy's "obsession" with protecting abusive priests); Michael Paulson, Abuse Scandal Angers Conservative Catholics, BOSTON GLOBE, Mar. 27, 2002, at A1 (expressing conservative Catholics' opinion that church hierarchy is responsible for clergy sexual abuse scandal); U.S. CONFERENCE OF CATHOLIC BISHOPS, Charter for the Protection of Children & Young People (2002) [hereinafter Charter], at http://www.usccb.org/ocyp/charter.htm ("As bishops, we acknowledge our mistakes and our role in that suffering, and we apologize and take responsibility for too often failing victims and our people in the past."). For a discussion of the impact the church hierarchical structure and internal discipline had on clergy sexual abuse, see infra notes 149–89 and accompanying text.
mined the Act's legislative intent—ensuring economic prosperity of charitable entities.139

A. Clergy Sexual Abuse Is Distinct from Occasional Injury

The clergy sexual abuse scandal has revealed the expansive character of the problem, which scholars and bishops alike have characterized as a crisis.140 The Charitable Immunity Act values the benefit of charitable works to society over the "occasional" victim.141 Statistical data, however, calls into question whether victims of clergy sexual abuse are actually "occasional" victims.142

Clergy sexual abuse of minors is "widespread."143 Results of a research study commissioned by the United States Conference of Catholic Bishops (UCCB) illustrate the problem's scope.144 Out of one hundred and ninety-five dioceses and eparchies participating in the study, all but seven had received allegations that at least one of their priests had sexually abused a minor.145 Within American dioceses, victims have accused ap-

139. For a discussion of settlement agreements entered into by New Jersey's five dioceses, see infra notes 204-18 and accompanying text.

140. See, e.g., Coughlin, supra note 2, at 977 (characterizing clergy sexual abuse as crisis); O'Brien, supra note 2, at 365 (describing clergy sexual abuse scandal as "the crisis within the American Catholic Church"); Charter, supra note 138 (stating in Preamble of Charter that "[t]he Church in the United States is experiencing a crisis without precedent in our times").

141. See Bottari, supra note 19, at 85 ("It is submitted that the far-reaching benefits of bona fide charitable, educational, and religious organizations outweigh the harm suffered by the occasional plaintiff who has sustained an injury.") (emphasis added); see also Jonathan Cardi, Note, Apportioning Responsibility to Immune Non-parties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts, 8 IOWA L. REV. 1293, 1321 (1997) ("The primary justification for charitable immunity is that society’s interest in maintaining charities outweighs the interest in compensating the limited number of resulting tort victims."). The dictionary defines "occasional" as "encountered, occurring, appearing, or taken at irregular or infrequent intervals." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 816 (9th ed. 1987).

142. See John Jay Study, supra note 137 (reporting that 10,667 individuals alleged clergy sexual abuse of minors between 1950 and 2002).

143. See O'Brien, supra note 2, at 365 (describing clergy sexual abuse as "so widespread, so horrendous, and so clandestine"); John Jay Study, supra note 137 (providing statistics illustrating extent of clergy sexual abuse crisis). Eighty-one percent of victims were male. See id. (describing offense characteristics). The largest group of victims were between ages eleven and fourteen. See id. (same). It was not unusual for clergy sexual abuse to affect multiple children in a family. See id. ("Of those who alleged abuse... 17.2% of them had siblings who were also allegedly abused.").

144. See John Jay Study, supra note 137 (providing statistical data relating to church clergy sexual abuse scandal). But see Schiltz, supra note 4, at 955 (expressing opinion that no studies provide reliable estimates). Other research studies, however, report similar findings. See, e.g., Arnold, supra note 86, at 26 (discussing results of study conducted by Graduate Theological Union); Goodstein, supra note 2, at 1 (discussing results of New York Times survey).

145. See John Jay Study, supra note 137 (providing statistical data relating to church clergy sexual abuse scandal).
proximately four percent of Catholic priests and deacons of sexually abusing them while the victims were minors. 146 The study estimates that 4,392 priests and deacons have abused 10,667 minors between 1950 and 2002. 147 The prevalent abuse evidenced by these statistics illustrates that clergy sexual misconduct does not occur infrequently. 148

B. Institutional Roots of Clergy Sexual Abuse

"Sexual abuse committed by clergy members is not something isolated from the dynamics of the church’s power structure.” 149 Both the hierarchical structure and the preference for internal discipline have contributed to the church scandal. 150 An examination of each sheds light on the choices bishops and dioceses made when responding to allegations of clergy sexual abuse. 151

1. Hierarchical Structure of Catholic Church

The church hierarchy is one of the main reasons church authorities have faltered in effectively responding to allegations of clergy sexual

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146. See id. (same).
147. See id. (same).
148. See id. (illustrating that clergy sexual abuse impacted large number of dioceses and victims between 1950 and 2002).
149. Doyle & Rubino, supra note 8, at 615 (explaining that actual sexual abuse cannot be understood without considering church’s structural influence); see also McNamara, supra note 13, at B1 (characterizing “official tolerance of pedophilia” as “the most obvious sign to institutional dysfunction”); National Catholic Reporter, Church in Crisis: Interview of Dr. Leslie Lothstein by Katherine DiGiulio (June 17, 2002) [hereinafter Lothstein Interview], available at http://www.natcath.com/NCR-Online/archives/081602/lothstein.htm (explaining that clergy sexual abuse “goes right to the heart and system and structure of the church”).
150. See Doyle & Rubino, supra note 8, at 558, 587, 615 (discussing impact of hierarchical structure on bishops’ responses to clergy sexual abuse); Logan, supra note 110, at 321, 330–36 (discussing impact of church’s preference for internal disciplining of abusive clergy). For a discussion of the church hierarchy’s role in the clergy sexual abuse scandal, see infra notes 152–73 and accompanying text. For a discussion of the church’s internal discipline structure and its role in the scandal, see infra notes 174–89 and accompanying text.
151. See Doyle & Rubino, supra note 8, at 558, 587 (describing hierarchical structure and bishops’ responses to clergy sexual abuse); Logan, supra note 110, at 330–36 (discussing internal discipline and practice of shielding priests from civil authorities).
abuse. 152 In the church, individuals hold power. 153 The pope is the “supreme authority.” 154 Further down the hierarchy, the pope appoints bishops. 155 Bishops or archbishops control the “geographic division[s] of the Church, known as diocese[s] or archdiocese[s].” 156 Both the pope and bishops enjoy a tremendous amount of power. 157 The pope “possesses plenary power with respect to judicial, legislative, and executive functions for the entire Catholic Church.” 158 Bishops possess the same powers in each diocese, although they are under the pope’s ultimate authority. 159

The church hierarchy lacks “checks and balances,” which increases the potential for abuse of power. 160 To defend this arrangement, church officers rely on the proposition “[t]hat the hierarchical government sys-

152. See Doyle & Rubino, supra note 8, at 558 (identifying church governmental structure as predominant reason church did not adequately use canon law to address clergy sexual abuse); see also Smith, supra note 2, at 409–10 (attributing church’s failure to address clergy sexual abuse to church institutions “designed to protect priests”); Lothstein Interview, supra note 149 (blaming clergy sexual abuse on church structure). The church hierarchy places a premium on protecting its priests. See Smith, supra note 2, at 409–10 (noting that, though it is natural for people to feel outrage toward pedophiles, church does not react with similar outrage when abuser is priest).

153. See Doyle & Rubino, supra note 8, at 558. (classifying church structure as “monarchical”).

154. See id. (identifying pope’s role in hierarchy).

155. See id. (describing manner by which bishops attain power in church hierarchy).

156. See id. (identifying bishops’ power base); see also Lothstein Interview, supra note 149 (quoting National Review Board member, who characterized geographic divisions as “fiefdoms” controlled by bishops).

157. See Doyle & Rubino, supra note 8, at 558, 601–02 (explaining that both pope and bishops enjoy nearly absolute power with minimal oversight).

158. Id.

159. See id. (contrasting pope’s power to that of bishops). But cf. John H. Garvey, The Pope’s Submarine, 30 SAN DIEGO L. REV. 849, 858–59 (1993) (noting that there are some limits to hierarchal dominance).

[T]hough there is no denying the hierarchical structure of the Catholic Church, it is a mistake to suppose that all teaching authority operates from the top down. The Church’s bishops are not by training or occupation its best informed members on questions of politics, science, social science, or even theology. The laity are expected to make practical, prophetic, and scholarly contributions.

Id. (describing expectation of laity contribution to church).

160. See Garvey, supra note 159, at 858–59 (discussing problem with hierarchical structure); see also Lothstein Interview, supra note 149 (noting that those at top of hierarchy, including bishops, “evolve a role of invincibility, invulnerability, omniscience and omnipotence”). Members of the National Review Board, formed by the United States Conference of Catholic Bishops in response to the clergy abuse scandal, learned much about the church hierarchy and its power dynamics. See Jason Berry, Board Got Rare Look at Hierarchical Ways, NAT’L CATHOLIC REP. (Mar. 12, 2004), available at http://natcath.org/NCR_Online/archives2/2004a/031204/031204c.htm (discussing hierarchy and church resistance to changing status quo). One member emphasized the lack of communication among dioceses and between bishops and the Vatican. See id. (quoting National Review Board member, Leon Panetta).
tem is divinely inspired and constructed.” The consequence of the church structure is that it has empowered bishops to address clergy sexual abuse in a manner inconsistent with canon law.

The Code of Canon Law directly addresses clergy sexual abuse. Canon 1395.2 states:

If a cleric has otherwise committed an offense against the sixth commandment of the Decalogue with force or threats or publicly or with a minor below the age of sixteen, the cleric is to be punished with just penalties, including dismissal from the clerical state if the case warrants it.

In addition to constituting a violation of Canon 1395.2, clergy that engage in sexual acts with minors also violate Canons 227 and 1389. Following
allegations that a cleric has violated one of the above-mentioned canons, bishops must follow procedures outlined in the Code. The Holy See may impose penal sanctions on bishops failing to do so.

Despite the thorough treatment of clergy sexual abuse in the Code, bishops have underutilized the processes outlined within it. The hierarchical structure has allowed this result because bishops operate virtually unchecked. Rather than use the proscribed penalties, “bishops opted for a therapeutic approach to the exclusion of correcting the grave injury [of clergy sexual abuse] through the rule of canon law.” Many bishops who abuses ecclesiastical power or function is to be punished in accord with the seriousness of the act or omission not excluding deprivation from office unless a penalty for such abuse has already been established by a law or a precept.” Id.

166. See Coughlin, supra note 2, at 980–81 (discussing investigatory and judicial prongs of procedures outlined in 1983 Code); Doyle & Rubino, supra note 8, at 556–58 (detailing procedural requirements for investigation and judicial proceedings). After receiving “facially valid” information about sexual abuse, which may include “rumor[s], hearsay, and anonymous sources,” bishops must investigate. See id. at 556–57 (likening investigatory process to “a common law grand jury”). During this process, bishops must document their actions and findings. See id. (describing administrative requirements). If, following the investigation, judicial proceedings are warranted, a panel of three “collegiate judges” will conduct the proceedings. See Alesandro, supra note 164, at 284 (discussing judicial proceedings); Doyle & Rubino, supra note 8, at 556–57 (same). In some instances of “clear or notorious cases, however, permanent dismissal may be imposed on a guilty cleric through a simple administrative procedure.” Coughlin, supra note 2, at 981.


168. See Alesandro, supra note 164, at 258 (“Most bishops have been loath to invoke the process in the Code of Canon Law for the punitive dismissal of the priest from the clerical state.”); Doyle & Rubino, supra note 8, at 558 (noting that, despite its existence, canon law addressing clergy sexual abuse “has rarely been utilized”); see also Coughlin, supra note 2, at 978 (stating that “many—and perhaps most—bishops declined to implement and enforce the rule of canon law”).

169. See Doyle & Rubino, supra note 8, at 558 (discussing lack of limitations on bishops’ power). Cardinal Bernard Law’s transfer of abusive priest John Geoghan among church parishes illustrates the discretion afforded to bishops in addressing clergy sexual abuse. For a discussion of Cardinal Law’s response to allegations that Father John Geoghan sexually abused minors, see supra notes 14–16 and accompanying text.

170. Coughlin, supra note 2, at 986 (describing response that was contrary to canon law); see Goodstein, supra note 2, at 1 (discussing use of treatment centers and their inefficiencies). But see Doyle & Rubino, supra note 8, at 587 (contending that bishops viewed sexual abuse as “moral failing” rather than psychological impairment).
sent abusive priests to treatment centers.\textsuperscript{171} These bishops sometimes enabled the abusive priests to return to their ministries following ineffective treatment.\textsuperscript{172} They did not, however, consistently disclose the priests' previous abuse.\textsuperscript{173}

2. Internal Discipline Structure of the Catholic Church

While the church hierarchical structure contributed to the extent of the sexual abuse scandal, the church preference for internal discipline had a similarly detrimental effect.\textsuperscript{174} The church handled allegations of

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\textsuperscript{171} See Coughlin, supra note 2, at 986–87 (describing influence of therapeutic approach on bishops' responses to clergy sexual abuse). Bishops' preference for therapeutic treatment was not malicious. See id. at 987 (same). In fact, it was consistent with "a general trend" in the 1970s and 1980s. See id. (same). Psychologists at that time believed that reform was possible through treatment. See id. (same). Furthermore, bishops' use of psychological treatment probably comported with the advice of lawyers. See id. (same). Unfortunately, treatment did not sufficiently cure "true pedophiles who commit serial sexual abuse." Id. In 2002, bishops responded to the abuse scandal by discarding the therapeutic approach to clergy sexual abuse. See id. at 990 (chronicling reform approach taken by bishops following their realization that therapeutic approach was not solving crisis). They "elected to correct the decades-long absence of canonical response with a rule of strict criminal liability." Id.
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\textsuperscript{172} See Doyle & Rubino, supra note 8, at 572 (discussing bishops' responses to psychologists' recommendations). Church-affiliated treatment centers, frequently used to help sexually abusive clergics, were largely ineffective. See id. at 570–71 (explaining that clergy approach to sexual dysfunction was no different, and no more successful, than approach used in middle ages). For example, the Paraclete Fathers' program, located in Minnesota, did not isolate sufficiently abusive priests from parishioners. See id. (criticizing treatment center's policy, which permitted priests to work at church parishes on weekends). More importantly, bishops did not consistently abide by psychologists' recommendations following a priest's treatment. See id. at 572 (noting that bishops allowed priests to return to parishes because they both misconstrued and ignored psychologists' recommendations). The director of psychology at the Institute of Living, a facility that has treated sexually abusive priests, recommends that these priests continue receiving treatment during their lives and do not return to active ministry. See Lothstein Interview, supra note 149 (expressing frustration with bishops' decision to return abusive priests to ministry).
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\textsuperscript{173} See Doyle & Rubino, supra note 8, at 572 (discussing bishops' secrecy). James Gill, Jesuit priest and psychologist, rationalized bishops' nondisclosure of past abuse by explaining, "the Catholic Church, a secretive organization by nature, '[w]as] unaccustomed to the full disclosure required in treatment centers.'" Id. Still, revelations about previous nondisclosure bred even more hostility among those criticizing the transfer of abusive priests to new parishes. See O'Reilly & Strasser, supra note 4, at 33 (describing reactions of church critics to bishops' nondisclosure).
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\textsuperscript{174} See Carmella, supra note 3, at 1032 (noting church's treatment of clergy sexual abuse as "internal personnel matters" made it unable to properly address crisis); see also Logan, supra note 110, at 321 ("[T]he Catholic Church itself, rather than acting decisively to end the victimizations and facilitate prosecutions, had engaged in a systematic effort to shield predator priests dating back several decades."); Lothstein Interview, supra note 149 (expressing dissatisfaction with internal discipline structure).
\end{quote}
clergy sexual abuse internally, excluding civil authorities. There is speculation as to why the church chose to do so. The church may have believed its discipline policies were adequate. However, the policies were not utilized. Another, more cynical possibility is that the church wished to keep private "potentially damaging internal documents." Regardless of the reason for the disposition to internal policing of its own, the historic role of "sanctuary" supplements an understanding of the church's treatment of abusive clergy.

For hundreds of years, Christian churches provided sanctuary from criminal liability. Most all criminals could obtain protection and, "[i]f sanctuary were successfully secured, the church would not surrender the beneficiary unless the party seeking custody would attest that the al-

175. See Doyle & Rubino, supra note 8, at 587 (remarking that bishops failed to contact civil authorities even if reporting statutes required them to do so); Logan, supra note 110, at 332 (describing instances in which bishops protected abusive priests from civil authorities). The practice of protecting abusive clergy from civil authorities is now changing. See id. at 334 (describing recent church acquiescence). The church has recently "bowed to public pressure and grudgingly disclosed the names of priests accused of sexual abuse over the decades." Id. (same).

176. See Logan, supra note 110, at 335 (considering possible reasons why church favored internal discipline that permitted abuse to continue).

177. See id. (offering "benign explanation" for church's actions). Church perceptions about the character of abusive priests may have increased its confidence in the internal discipline structure. See Goodstein, supra note 2, at 1 (explaining that clergy regarded sexual abusers as sinners rather than criminals).

178. For a discussion of the bishops' failure to address clergy sexual abuse in accordance with canon law, see supra notes 168-73 and accompanying text.

179. See Logan, supra note 110, at 335 (suggesting "less benign" reason for church's actions). Hiding harmful documents may have been an aspect of the church's "damage control." See id. (discussing explanations for church's willingness to protect abusive priests). Bishops purposely purged priests' files to prevent use of the files in lawsuits. See Smith, supra note 2, at 412 (quoting Aric Press et al., Priests and Abuse, Newsweek, Aug. 16, 1993, at 42-43).

180. See Logan, supra note 110, at 330-36 (discussing elements of sanctuary in bishops' response to clergy sexual abuse). "[T]here is no mistaking the vestiges of sanctuary in the [c]hurch's response to allegations of abuse by its priests, euphemistically referred to as being 'in between assignments.'" Id. at 336. Despite warnings in 1985 that clergy sexual abuse had become a widespread problem in the church, church officials failed to take permanent actions against abusive priests. See id. (commenting on church response to warnings by 1985 internal oversight board). Instead, the church sent the priests for treatment and later returned them to new parish assignments. See id. (noting that warnings of clergy abuse did not lead to changes in church structures or reports to civil authorities).

181. See id. at 323-24 (describing long history of sanctuary in church). Although the church developed sanctuary "to extend protection to the innocent maliciously pursued, to the injured, to the oppressed, and the unfortunate . . . [in time it was] so much extended that the most atrocious and guilty of malefactors could be found enjoying immunity within sacred walls and bidding defiance to the civil power." Id. at 325 (quoting Norman MacLaren Trenholme, The Right of Sanctuary in England: A Study in Institutional History 9 (1903)).
leged wrongdoer would remain free from immediate harm.\textsuperscript{182} Sanctuary steadily declined, however, in the seventeenth century.\textsuperscript{183}

Despite the demise of official sanctuary, the clergy abuse scandal has revealed that "the Church proved remarkably effective in affording sanctuary to abusive priests since the early 1960s."\textsuperscript{184} The practice of transferring previously abusive priests to new parishes is illustrative of that sanctuary.\textsuperscript{185} For example, the church protected Father John Geoghan and Father Paul Shanley, both of whom were accused of sexually abusing minors.\textsuperscript{186} Rather than alerting civil authorities, the church transferred the men to various parishes for almost three decades.\textsuperscript{187} Both continued their patterns of abuse, victimizing more minors at each subsequent parish.\textsuperscript{188} The church's internal response, then, permitted clergy sexual abuse in these circumstances to continue.\textsuperscript{189}

3. Recent Changes in Church Structure and Policy

Recently, the church responded proactively to the institutional causes of clergy sexual abuse.\textsuperscript{190} At its summer 2002 meeting in Dallas, Texas, the church reevaluated its response to clergy sexual abuse at June 2002 meeting of UCCB; Charter, supra note 138 (altering church practices in response to clergy sexual abuse of minors).

\textsuperscript{182}Id. at 325. In England, church sanctuary protected approximately one thousand people a year. See id. at 329 (explaining pervasiveness of sanctuary).

\textsuperscript{183}See id. at 329 (explaining reasons for demise of sanctuary). Sanctuary diminished as judicial processes became more fair and effective. See id. (explaining that sanctuary protected accused from "immediate blood revenge"). Additionally, the state wished to exert control over the fraudulent debtors and "political enemies of the King" who had taken advantage of church sanctuary. See id. (explaining that use of sanctuary by these individuals contributed to demise of sanctuary).

\textsuperscript{184}See id. at 331 (discussing role played by church in shielding abusive priests from legal punishment).

\textsuperscript{185}See id. at 332 (discussing transfer of two abusive priests to illustrate vestiges of sanctuary in church's actions).

\textsuperscript{186}See id. (specifying instances where church protected known sexual pedophiles); see also Frank Bruni, Crime and Punishment; Prosecuting the Church, N.Y. Times, Apr. 14, 2002, at 4 (discussing church's knowledge of Shanley's abuse and his subsequent transfers); Rezendes, supra note 14, at A1 (tracing Geoghan's abusive history). For a discussion of Geoghan's abusive behavior and his transfer to multiple parishes, see supra notes 14–16 and accompanying text.

\textsuperscript{187}See Logan, supra note 110, at 332 (explaining manner in which church protected Geoghan and Shanley); Bruni, supra note 186, at 4 (discussing Shanley's transfer to California and Manhattan Catholic guest houses despite knowledge of sexual abuse allegations against Shanley); Rezendes, supra note 14, at A1 (discussing Geoghan's various reassignments).

\textsuperscript{188}See Logan, supra note 110, at 332 (noting that transferring Geoghan and Shanley did not stop cycle of abuse); Rezendes, supra note 14, at A1 (describing Geoghan's pattern of sexual abuse).

\textsuperscript{189}See Logan, supra note 110, at 335 (expressing opinion that protection of abusive priests contributed to continuation of clergy sexual abuse); see also McNamara, supra note 13, at B1 (characterizing church response to clergy sexual abuse as "most obvious sign of institutional dysfunction").

\textsuperscript{190}See Logan, supra note 110, at 336 (explaining that church reevaluated its response to clergy sexual abuse at June 2002 meeting of UCCB); Charter, supra note 138 (altering church practices in response to clergy sexual abuse of minors).
the UCCB adopted the Charter for the Protection of Children & Young People ("Charter").191 In the Charter's Preamble, the bishops acknowledged the "crisis" in the church and accepted responsibility for their role in the scandal.192 Moreover, the bishops addressed the veil of secrecy that previously shrouded clergy sexual abuse and expressed a preference for openness.193 To counteract past ills, the Charter established new policies to address abuse in the church.194

The Vatican responded negatively to policies established by the Charter.195 The UCCB considered the Vatican's concerns and responded by

191. See Charter, supra note 138 (establishing new church procedures to respond to clergy sexual abuse of minors); see also Logan, supra note 110, at 336 (describing institutional changes proposed by Charter); O'Brien, supra note 2, at 371–72 (describing UCCB meeting and characterizing adoption of Charter as response to "American model of accountability, repentance, and restitution").

192. See Charter, supra note 138 ("As bishops, we acknowledge our mistakes and our role in that suffering, and we apologize and take responsibility for too often failing victims and our people in the past.").

193. See id. (acknowledging secrecy in Preamble and incorporating policy of openness in Article 7). The Charter addresses the church's historical preference for secrecy by requiring openness with law enforcement and the community at large. See id. (announcing new church procedures in recognition of current clergy sexual abuse crisis). Dioceses must report allegations of clergy sexual abuse of minors to public authorities. See id. (same). This policy change could help dioceses reduce the financial strain created by the clergy sexual abuse scandal because, by reporting sexual abuse to civil authorities, the dioceses' liability will decrease or be eliminated. See Smith, supra note 2, at 418 (discussing advantages of reporting priests' abuse). In addition to requiring reports to civil authorities, the Charter prohibits confidentiality agreements except in extenuating circumstances. See Charter, supra note 138 (announcing new church procedures). Furthermore, each diocese must “develop a communications policy that reflects a commitment to transparency and openness.” Id.

194. See Charter, supra note 138 (enumerating new policies to address clergy sexual abuse). The Charter instituted procedures to promote healing, to ensure effective responses, to promote accountability and to prevent future abuse. See id. (same). To facilitate its goals, the Charter built a multi-layer hierarchy of oversight entities. See id. (same). First, it required that dioceses have review boards comprised mainly of laypeople who “advise [the dioceses’ bishops] in [their] assessment of allegations of sexual abuse.” See id. (same). Second, to ensure uniform compliance with procedures, the Charter created the Office for Child and Youth Protection to aid dioceses in their implementation of Charter programs. See id. (same). Finally, the Charter required a National Review Board to monitor the Office of Child and Youth Protection. See id. (same). Its envisioned responsibilities include approving recommendations and commissioning a study to enable a clearer understanding of clergy sexual abuse. See id. (same).

195. See Logan, supra note 110, at 337 (discussing Vatican’s disagreement with Charter’s “zero tolerance” policy and mandatory reporting to civil authorities); see also Frank Bruni, The Vatican Is Rejecting an Erosion of Authority, N.Y. TIMES, Oct. 20, 2002, at A1 (explaining that Vatican’s negative response stemmed from concerns that Charter opened church to oversight by laypeople disconnected with church hierarchy). The Vatican expressed concerns that the Charter’s “zero tolerance” policy did not comport with “[c]hurch notions of due process and fairness.” Id. The Vatican disagreed with the mandatory reporting requirement because it would threaten the bishop-priest relationship. See id. (explaining Vatican’s concern that distrustful relationship would develop between bishops and priests).
developing the Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons ("Norms"). The Norms softened the Charter's "zero tolerance" policy, which required the removal of priests when there are credible accusations of sexual abuse of minors. Under the Norms, priests found guilty of sexually abusing minors will lose ministerial authority but will not automatically be dismissed from the clerical state. Additionally, the Norms altered the Charter's requirement that bishops report all sexual abuse of minors to civil authorities. Under the Norms, bishops must only report to civil authorities when civil law in that jurisdiction requires them to do so.

While the Charter and Norms are positive steps in addressing the problem of clergy sexual abuse, reporting patterns of clergy sexual abuse victims suggest that revelations of pre-Charter/Norms abuse will continue


197. See Logan, supra note 110, at 337 (explaining differences between Charter and Norms).

198. See Norms, supra note 196 (explaining that priest must "lead a life of prayer and penance" if not dismissed from clerical state).

199. See Logan, supra note 110, at 338 (explaining differences in reporting requirements between Charter and Norms). Compare Charter, supra note 138 ("Dioceses/eparchies will report an allegation of sexual abuse of a person who is a minor to the public authorities."). with Norms, supra note 196 ("The diocese/eparchy will comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and will cooperate in their investigation.").

200. See Norms, supra note 196 (softening reporting requirement of Charter). Victims' groups were displeased with the Norms. See Logan, supra note 110, at 338 (remarking that victims' displeasure was not surprising). They viewed the Norms as "considerably less ambitious" than the Charter. See id. (describing victims' groups preference for Charter over Norms). The groups expressed concerns that the changes did not effectively address secrecy or the church's power of discretion. See id. (explaining victims' criticism of Norms).
in the coming years.\footnote{Victims often delay in reporting abuse.} Therefore, the church’s institutional changes do not negate the need to reexamine charitable immunity.\footnote{C. Financial Reality

In response to allegations of clergy sexual abuse, many dioceses across the country have entered into settlement agreements with victims.\footnote{The settlements are admirable because they provide expedited compensation.} The choice to settle claims with victims, however, has not come

\footnote{201. See Doyle & Rubino, supra note 8, at 607 (noting that adults brought many clergy sexual abuse actions against church, alleging they were victims of sexual abuse as minors). The emotional trauma, unique to clergy sexual abuse, is one explanation for the delayed reporting. See id. (offering potential reason for delayed reporting of clergy sexual abuse). “The victims are mentally and emotionally impeded to such a profound degree, that they are unable to come forward because of the overpowering experience with the cleric.” Id.; see also Smith, supra note 2, at 413 (explaining that victims of clergy sexual abuse often delay revealing abuse because it may destroy their “belief system”).

202. See Doyle & Rubino, supra note 8, at 607 (discussing delayed reports of clergy sexual abuse). Many clergy sexual abuse victims do not bring actions against the church until they reach adulthood. See Goodstein, supra note 2, at 1 (quoting physician who treated abuse victims and noting that many victims do not report abuse until their mid-20s). This phenomenon is common to sexual abuse of minors in general. See David McCord, Criminal Law: Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence, 77 J. CRIM. L. & CRIMINOLOGY 1, 61 (1986) (explaining that experts acknowledge “that it is not unusual for a child to delay in reporting sexual abuse”). Delayed reporting presents a problem in some states because statutes of limitations may preclude litigation. See Schiltz, supra note 4, at 954 (commenting on states’ statutes of limitation). Many states, however, have adopted a delayed discovery rule. See id. (explaining attempts of many states to alleviate statute of limitations problems for victims who bring allegations of abuse many years after incident). Under a delayed discovery rule, the statute of limitation is triggered only when “the victim knows or reasonably should know, that [he or] she has been injured by sexual abuse.” See id. (discussing delayed discovery rule).

203. For a discussion of amendments to the Charitable Immunity Act, proposed since adoption of the Charter and Norms, see supra note 74 and accompanying text.

204. See O’Reilly & Strasser, supra note 4, at 37 (characterizing expenses for lawsuits or settlements as theme in clergy sexual abuse scandal); Schiltz, supra note 4, at 951 (noting that high cost of settlements are consequence of clergy sexual abuse litigation); Rita Ciolli, Still Waiting for Judgment Day, NEWSDAY, Oct. 26, 2003, at A03 (observing that many dioceses across country have chosen to settle clergy sexual abuse claims with victims). Due to confidentiality agreements entered into by the church prior to “official court filings,” it is impossible to know the exact amount the church has paid in civil settlements to date. See Logan, supra note 110, at 392–393 (discussing costs church has incurred in protection of abusive priests).

205. See Wells, supra note 2, at 1227 (advocating settlements because they compensate victims quicker than legal system). But see Mark A. Sargent, Legal Defense: When Sued, How Should the Church Behave?, VILL. MAG. (2002), available at http://www.publicrelations.villanova.edu/magazine/archives/summer2002/legal. defense.htm (“Even the mere attempt to negotiate the amount of a cash settlement to a lower level than that demanded by the plaintiff may be thought of as a
without a price.\textsuperscript{206} Settlement costs are extremely high and have crippled some dioceses.\textsuperscript{207}

Although the Charitable Immunity Act shields New Jersey dioceses from tort liability arising out of clergy sexual abuse, the dioceses have nevertheless chosen to enter into settlement agreements, which have drained large sums from their funds.\textsuperscript{208} New Jersey dioceses reported their settlement costs as part of the survey commissioned by the UCCB.\textsuperscript{209} The Paterson Diocese reported paying $2.8 million in settlements and legal nasty lawyerly trick reflecting the church’s basic unwillingness to accept its responsibilities.”).

\textsuperscript{206.} See O’Reilly & Strasser, \textit{supra} note 4, at 37 (explaining that treating victims of abuse is expensive component of settlements); Schiltz, \textit{supra} note 4, at 951 (noting that churches must expend “hundreds of millions of dollars” in legal fees and settlements); see also \textit{John Jay Study}, \textit{supra} note 137 (providing statistical data about cost to church of clergy sexual abuse). In many states, dioceses have paid multi-million dollar settlements. \textit{See} Epstein, \textit{supra} note 11, at 416–17 (listing settlement amounts for various dioceses). In 2002, for example, the Diocese of Tucson, Arizona, settled eleven lawsuits for close to $15 million. \textit{See id.} (highlighting settlement figures for particular dioceses). In 2003, the Archdiocese of Louisville, Kentucky entered into a settlement for $25.7 million, and the Archdiocese of Seattle, Washington agreed to settle 15 lawsuits for $7.87 million. \textit{See id.} (same).

The survey commissioned by the UCCB revealed the total cost of clergy sexual abuse on dioceses between 1950 and 2002. \textit{See} \textit{John Jay Study}, \textit{supra} note 137 (providing statistical data about cost of clergy sexual abuse scandal). Excluding the $85 million settlement recently entered into by the Boston Archdiocese, the nation’s dioceses have expended $499,582,192.35. \textit{See id.} (same). This figure includes victim compensation and treatment, priest treatment and attorney fees. \textit{See id.} (explaining cost components considered in study). It excludes the amount covered by insurance. \textit{See id.} (same). Victim compensation and treatment combined cost dioceses a total of $439,941,289.59. \textit{See id.} (reporting costs minus attorneys’ fees awarded).

\textsuperscript{207.} See Epstein, \textit{supra} note 11, at 416 (stating that average settlements in United States reached $1 million by early 1990s); Mickey Giokajlo, \textit{Church Pays $4 Million to 4for Abuse; Archdiocese Selling Land to Raise Money}, CHI. TRIB., July 10, 2003, at 1 (discussing consequences of high settlement costs for Archdiocese of Chicago); Editorial, \textit{Room for Boston College}, \textit{BOSTON GLOBE}, Apr. 23, 2004, at A22 (discussing Boston Archdiocese’s decision to sell property to pay for recent $85 million settlement). Large settlements have led dioceses to sell real estate and reduce services offered to parish members. \textit{See} Epstein, \textit{supra} note 11, at 417 (noting that Diocese of Dallas sold property to pay for 1997 settlement); Giokajlo, \textit{supra} (reporting that Archdiocese of Chicago has sold real estate and closed schools to address its debt); \textit{Room for Boston College}, \textit{supra} (discussing Boston Archdiocese’s sale of “the archdiocesan complex in Brighton” to Boston College).

\textsuperscript{208.} See Chadwick, \textit{supra} note 7, at A01 (noting that Charitable Immunity Act has not prevented New Jersey dioceses from paying large settlements to victims of clergy sexual abuse).

\textsuperscript{209.} See generally \textit{In Paterson Diocese, 4% Were Accused of Sex Abuse; Church Report Serves as a Start for Dialogue}, DAILY REC. (Morristown, N.J.), Feb. 28, 2004, at 1A [hereinafter \textit{Paterson Diocese}] (explaining reason for dioceses’ disclosure). In addition to reporting information about clergy sexual abuse to the UCCB, dioceses also informed their parishioners of the statistics. \textit{See id.} (noting that dioceses distributed church-run newspapers with clergy abuse statistics to parishioners).
fees. The Camden Diocese paid more than twice that amount—$5.7 million. Combined, New Jersey's five dioceses have paid $12.8 million in settlements and counseling for victims of clergy sexual abuse.

New Jersey dioceses offer various explanations for their willingness to settle clergy sexual abuse cases in spite of the Charitable Immunity Act. First, some believe settlements to be the “best option” because the lawsuits often include many plaintiffs. Second, diocesan officials cite “a loophole in the law [since corrected] that made them uncomfortable with using [charitable immunity] as a defense in every case.” Finally, settlements may be beneficial because they allow a more expeditious recovery for victims. The Camden Diocese, in particular, expressed this sentiment. In a statement released by the Diocese of Camden following a settlement with twenty-three plaintiffs, Bishop Nicholas DiMarzio expressed this sentiment.

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210. See id. (discussing statistics reported by Paterson Diocese). The Paterson Diocese is comprised of three counties: Morris, Sussex and Passaic. See id. (describing geographic area within Paterson Diocese). Over the past fifty years, the diocese has had credible accusations of sexual abuse relating to thirty priests and one deacon. See id. (discussing prevalence of abuse in Paterson Diocese). Out of New Jersey's five dioceses—Paterson, Camden, Metuchen, Trenton and the Archdiocese of Newark—the Paterson Diocese had the highest percentage of priests accused of sexual abuse. See id. (comparing abuse allegations among New Jersey dioceses).

211. See id. (providing results of church-initiated review that tabulated amounts paid in settlements and fees by various dioceses in New Jersey). Compared to the five New Jersey dioceses, Camden paid the most in settlement and counseling costs. See id. (same). The Camden Diocese received media attention in 2003 for a $880,000 settlement with twenty-three plaintiffs. See id. (describing high-profile New Jersey clergy sexual abuse action). The plaintiffs in that litigation alleged abuse occurring between the 1960s and 1980s.

212. See id. (reporting aggregated costs for all New Jersey dioceses). The $12.8 million paid by New Jersey dioceses contributes to the $772 million total spent by Roman Catholic dioceses nationwide in addressing the clergy sexual abuse scandal. See Cathy Lynn Grossman & Anthony DeBarros, Church Struggles with Change, USA TODAY, Nov. 8, 2004, at 1D (reporting total amount spent by church in scandal to date).

213. See Chadwick, supra note 7, at A01 (reporting two reasons diocesan officials provided for entering into settlement agreements: large number of plaintiffs and previous loophole in statute that made officials hesitant to use statute's protection); see also Diocese of Camden, Settlement Reached in Sexual Abuse Case (Mar. 13, 2003) [hereinafter Camden Settlement], at http://www.camdendiocese.org/pdf/statement.FINAL.pdf (expressing hope that settlements aid victims in recovery).

214. See Chadwick, supra note 7, at A01 (identifying one reason given by dioceses for settling).

215. Id. Until a 1995 amendment to the Charitable Immunity Act altered the statute, victims could not sue employees or volunteers who were grossly negligent. See id. (reiterating reasons given by diocese for not using Charitable Immunity Act as defense). This previous loophole made some officials hesitant to invoke the protection of the Act. See id. (same).

216. See Wells, supra note 2, at 1227 (praising settlements because they enable victims to avoid slow legal proceedings).

217. See Camden Settlement, supra note 213 (expressing hope that settlement with twenty-three plaintiffs will expedite healing process). In a statement released following the Camden Diocese's $880,000 settlement with twenty-three alleged vic-

http://digitalcommons.law.villanova.edu/vlr/vol50/iss2/5
plained, "I am hopeful that this reconciliation will speed the process of healing for those who have been harmed in any way."

Diocesan decisions to settle clergy sexual abuse lawsuits may undermine the legislative intent of the Charitable Immunity Act. The legislature reinstated charitable immunity in order to preserve the assets of charitable entities. Instead, settlements have depleted millions of dollars from New Jersey dioceses. Although technically immune from liability arising out of negligent supervision or hiring, the church has compensated victims rather than rely on the protection of the Act.

V. CONCLUSION

Since its dubious inception in this country, a majority of states have abolished the doctrine of charitable immunity. Specifically, the revelation that English courts rejected the doctrine, combined with evolving societal priorities, impacted state court decisions. New Jersey, however, has resisted the majority rule and has retained charitable immunity. The New Jersey Charitable Immunity Act provides nearly complete protection to charitable entities in tort actions arising out of negligence.

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218. Id. The plaintiffs were not entirely pleased with the settlement entered into by the Diocese of Camden. See O'Reilly, supra note 3, at A01 (reporting Camden Diocese settlement). They had sought $50 million from the diocese, but received only $880,000. See id. (same). However, plaintiffs were pleased "they had succeeded in helping to expose clergy sex abuse." See id. (same).


220. See Schultz, 422 A.2d at 537 ( remarking that legislature emphasized economic consequences of abolishing charitable immunity).

221. See Paterson Diocese, supra note 209, at 1A (providing settlement figures for New Jersey dioceses). For a discussion of settlements entered into by the church in New Jersey, see supra notes 204--22 and accompanying text.

222. See Chadwick, supra note 7, at A01 (explaining that Charitable Immunity Act has not hindered New Jersey dioceses' willingness to settle claims for large sums).

223. See RESTATEMENT TORTS, supra note 4, § 895E cmt. d (commenting that majority of states have abolished charitable immunity); see also Chopko, supra note 4, at 1089--90 ( remarking that almost all jurisdictions limit charitable immunity).

224. See Botari, supra note 19, at 62--63 (explaining that rejection of doctrine stemmed both from revelation that English abolished charitable immunity and "evolving public needs").


226. See id. (enumerating parameters of charitable immunity in New Jersey). Employees of charitable organizations receive less protection—they are not immu-
Consideration of the Charitable Immunity Act in light of the clergy sexual abuse scandal has impacted the argument that the New Jersey legislature should amend the statute. Several aspects of the scandal are relevant to a critique of charitable immunity in clergy sexual abuse actions. First, clergy sexual abuse victims are distinguishable from the occasional victims of negligence the Act originally contemplated. Next, church hierarchal and internal discipline structures created an environment in which clergy members could continuously abuse minors under a veil of secrecy. The church did not intentionally seek to achieve this result. The widespread nature of the abuse was the unfortunate consequence of mistakes the church admits to making. Finally, the response of New Jersey dioceses to clergy sexual abuse litigation reveals that the Act is not serving its purpose, as originally contemplated by the legislature. The legislature revived charitable immunity in New Jersey to preserve charitable funds. Yet, New Jersey dioceses have repeatedly settled actions.
brought by plaintiffs.\textsuperscript{235} In doing so, the dioceses have expended millions of dollars from the church coffers.\textsuperscript{236}

Because charitable immunity in clergy sexual abuse actions may not be appropriate or effective based on the number of victims, the church's role in the abuse and the propensity of state dioceses to settle claims, the New Jersey legislature should consider taking the suggestion offered in \textit{Shultz}—reconsideration of the Act and its "application to new theories of liability."\textsuperscript{237} The state legislature can alter the Charitable Immunity Act by carving out an exception to immunity where negligence has resulted in the sexual abuse of a minor.\textsuperscript{238} Church officials oppose this option because they fear "costly lawsuits" will result.\textsuperscript{239} Still, despite the protection offered by the Act, New Jersey dioceses have not avoided costly settlements.\textsuperscript{240}

Until the legislature commits to changing the New Jersey Charitable Immunity Act, options for victims of clergy sexual abuse remain limited to collecting damages from the meager assets of their abusers.\textsuperscript{241} Although state dioceses have proven willing to settle, victims are not guaranteed recovery because the church can effectively claim immunity.\textsuperscript{242} Therefore,

\textsuperscript{235} See Chadwick, \textit{supra} note 7, at A01 (discussing New Jersey dioceses' willingness to settle clergy sexual abuse claims).

\textsuperscript{236} See \textit{Paterson Diocese, supra} note 209, at 1A (reporting that New Jersey dioceses expended $12.8 million in settlements and victims' counseling).

\textsuperscript{237} See \textit{Schultz}, 472 A.2d at 539 (expressing opinion that charitable immunity may become inappropriate as new theories of liability develop).

\textsuperscript{238} See S. 540, 211th Leg., 2004-05 Sess. (N.J. 2004) (proposing amendment to New Jersey Charitable Immunity Act that would allow victims to sue charitable organizations where organizations' negligence allowed sexual abuse of minors to occur). For a discussion of proposed amendments to the Charitable Immunity Act, see \textit{supra} note 74 and accompanying text.

\textsuperscript{239} See Chadwick, \textit{supra} note 7, at A01 (noting that diocesan officials oppose amending Charitable Immunity Act because of potential costs and because they have already taken action to solve clergy sexual abuse crisis).

\textsuperscript{240} See id. (explaining that in spite of Charitable Immunity Act, New Jersey dioceses still enter into expensive settlement claims); \textit{Paterson Diocese, supra} note 209, at 1A (reporting total amount expended by New Jersey dioceses for settlements and victims' counseling).

\textsuperscript{241} See Chopko, \textit{supra} note 4, at 1090 n.1 (explaining that charitable beneficiaries cannot sue charitable entities under theory of negligence); see, e.g., \textit{Schultz}, 472 A.2d at 536 (holding that Charitable Immunity Act precludes archdiocesan liability in negligent hiring action stemming from clergy sexual abuse).

\textsuperscript{242} See Chadwick, \textit{supra} note 7, at A01 (pointing out that, although New Jersey dioceses have settled claims, state courts continue to uphold charitable immunity, which prevents lawsuits against church from moving forward).
the Charitable Immunity Act exacerbates the harm inflicted by clergy sexual abuse.\textsuperscript{243}

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\textsuperscript{243} See id. (recounting two-fold injury in \textit{Schultz}). Christopher Schultz’s brother, Richard, summed up the impact of the court’s decision by explaining that “his family was destroyed [first] by his brother’s [suicide] and then by the court’s decision [to apply the Charitable Immunity Act].” \textit{Id.}