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Church Liability for Clergy Sexual Abuse: Have Time and Events Overthrown Swanson v. Roman Catholic Bishop of Portland?

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CHURCH LIABILITY FOR CLERGY SEXUAL ABUSE: HAVE TIME AND EVENTS OVERTHROWN SWANSON v. ROMAN CATHOLIC BISHOP OF PORTLAND?

I. INTRODUCTION

In Swanson v. Roman Catholic Bishop of Portland, Albert and Ruth Swanson sued their former pastor, Father Maurice Morin, after the couple's marriage counseling sessions with Father Morin led to a sexual relationship between Father Morin and Mrs. Swanson. The Swansons brought claims against Father Morin for negligent and intentional infliction of emotional distress and negligent pastoral counseling. They also sued the Roman Catholic Bishop of Portland, a corporation, and Bishop Joseph Gerry in his personal capacity (collectively referred to as the "Church") for negligence in selecting, training, and supervising Father Morin. The Maine Superior Court dismissed the claims against the Church for negligent selection and training of Father Morin, holding that enforcement of those claims in a religious setting would violate constitutional protections of free exercise of religion. The Superior Court did, however, allow the Swansons' claim of negligent supervision to proceed against the Church.

The Swansons' negligent supervision claim against the Church then came before the Maine Supreme Judicial Court, sitting as the Law Court, on interlocutory order based on the motion of the parties. A divided Law Court held that secular agency principles requiring employee supervision cannot be applied to a church

2. Id. ¶ 2, 692 A.2d at 442.
3. Id. ¶ 3, 692 A.2d at 442.
4. Id. ¶ 1, 692 A.2d at 442.
5. Id. ¶¶ 1, 5, 692 A.2d at 442. The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Similarly, the Maine Constitution provides that, "[a]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences . . . provided he does not disturb the public peace." Me. Const. art. 1, § 3. It is interesting to note that the Maine Constitution places a restriction on free exercise of religion with the clause "provided he does not disturb the public peace"—a restriction on free exercise not found in the language of the First Amendment to the United States Constitution. In dismissing the Swansons' negligent selection and training claims against the Church, however, the Superior Court seemed to rely equally on both the Maine and the United States constitutions. See Swanson v. Morin, No. CV-93-1006, slip op. at 9 (Me. Super. Ct. Cum. Cty., Dec. 21, 1995) (Saufley, J.). Likewise, in dismissing the negligent supervision claim against the Church, the Law Court seemed to rely equally on both the Maine and the United States constitutions. See Swanson v. Roman Catholic Bishop of Portland, 1997 ME 63, ¶ 13, 692 A.2d at 445.
6. Swanson v. Morin, No. CV-93-1006, slip op. at 9 (Me. Super. Ct. Cum. Cty., Dec. 21, 1995) (Saufley, J.). Although the Superior Court found that the selection and training of clergy was within the "sole dominion of religious organizations," such that judicial scrutiny of this process would constitute excessive entanglement into church doctrine, the court did not find excessive entanglement with respect to negligent supervision claims. Id. at 10-11. The Superior Court noted, that "as a matter of public policy, the church must allow the scrutiny of the courts . . . where it has chosen to act in a way that has left a priest in contact with the public when that priest is known to present a real risk to that public." Id. at 9.
7. Swanson v. Roman Catholic Bishop of Portland, 1997 ME 63, ¶ 1, 692 A.2d at 442.
and its clergy because state enforcement of a church's duty to oversee its employees violates the free exercise of religion clauses of the United States and Maine constitutions.\(^8\)

This Note will argue that, although the First Amendment ruling in *Swanson* has not been overruled, its force, minimal in the first place, has diminished in light of recent current events—most notably, the sexual abuse scandals within the Catholic Church.\(^9\) *Swanson*’s broad, seven-year-old constitutional holding lacks value as a precedent and should not be upheld under the doctrine of stare decisis. Accordingly, the *Swanson* decision should be overturned the next time a similar case comes before the Law Court. Before this can happen, however, the Law Court will have to deal with an antecedent issue that the *Swanson* Court avoided: whether Maine agency law recognizes the tort of negligent supervision as a cause of action under agency principles in any employer/employee situation.\(^10\)

Part II of this Note provides a general background of the *Swanson* case, including an analysis of Justice Wathen’s majority opinion and Justice Lpiz’s dissenting opinion. Part III analyzes the treatment of negligent supervision in states other than Maine, and how those states have applied the tort of negligent supervision to the ecclesiastical realm using neutral principles of agency and tort law. Part IV addresses the uncertainties of Maine law regarding the tort of negligent

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8. *Id.* § 13, 692 A.2d at 445.

9. While this Note focuses on the weakening of *Swanson*’s broad free exercise protection as a result of recent church scandals, other current events have had a similar weakening effect on other constitutional rights. For instance, new national security concerns since the terrorist attacks of September 11, 2001, prompted security regulations that have had a diminishing effect on traditional notions of privacy. The most notable, as well as the most comprehensive, among these new security regulations is the USA Patriot Act of 2002. *See generally*, Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA Patriot Act*, 80 Duq. L. Rev. 375 (2002) (providing detailed background information about the USA Patriot Act and discussing the ways in which the disclosure and surveillance provisions of the Act impact constitutional rights to privacy). Just as traditional privacy rights must be undermined in the interest of national security, free exercise rights must too be subject to some compromise in the interest of protecting society from clergy misconduct—an interest that recent disturbing events have shown is in need of attention. For a collection of brief yet poignant essays regarding the need for constitutional rights to be flexible in response to societal changes, see *Special Report: Rethinking the Bill of Rights*, *Jungle Law*, Oct.-Nov. 2003, 35. In her featured essay on the First Amendment, Jeanine Pirro, a New York District Attorney, nicely sums up the issue: “It’s time for the First Amendment to leave its ivory tower and take a look at today’s world as it really is.” *Id.* at 38.

10. Maine courts have held employers vicariously liable for their employees’ negligence, under the doctrine of respondeat superior, but only when those employees were acting negligently within the scope of their employment. *See, e.g.*, Brennan v. Stone Coast Brewing Co., No. Civ.A. CV-01-555, 2003 WL 1618509, at *2 (Me. Super. Ct. Cum. Cty., Jan. 21, 2003) (Crowley, J.). An employee’s act is considered to be within the scope of his employment only if:

(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;
(c) it is actuated, at least in part, by a purpose to serve the master, and
(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

*Id.* (citing *RESTATEMENT (SECOND) OF AGENCY § 228(1)* (1958)). In a sexual abuse situation, the requirement that the employee be within the scope of his employment would be difficult to satisfy. Thus, plaintiffs in these cases invoke negligent supervision as an independent cause of action against employers who fail to take precautions against known risks posed by their employees.
supervision, arguing that the failure in Swanson to decide whether Maine recognizes agency principles of negligent supervision continues to prevent clear judicial guidance on the issue. Part V argues that Swanson should not be upheld under the doctrine of stare decisis because the decision was faulty when it was decided nearly seven years ago, and significant societal changes since then render Swanson poor precedent. Part VI concludes that the Law Court should clarify Maine's position regarding the tort of negligent supervision in general. Clarification of the general tort principle would ultimately allow the Court to overrule Swanson and apply the tort of negligent supervision to a religious setting in a neutral manner, without violating the First Amendment.

II. BACKGROUND OF THE SWANSON CASE

Plaintiffs, Albert and Ruth Swanson, had been thinking about renewing their wedding vows and remarrying each other in a Catholic ceremony. To further consider this possibility, the couple sought counseling services from their clergyman, Father Maurice Morin. Father Morin interviewed the couple together and then began to counsel Mrs. Swanson individually. The counseling relationship between Mrs. Swanson and Father Morin evolved into a sexual relationship. When Mr. Swanson suspected that his wife was having an affair, he again sought counseling from Father Morin. Father Morin confirmed Mr. Swanson's suspicions, and indicated that he was "working with Mrs. Swanson on this issue." Soon after, Mr. Swanson found out that the man with whom his wife was having an affair was Father Morin himself. Difficult divorce proceedings followed, during which the Swanson's son committed suicide. The couple experienced extreme emotional distress and incurred substantial costs for their divorce litigation and for ongoing marriage counseling.

The Swansons filed suit against Father Morin individually, for negligent and intentional infliction of emotional distress and negligent pastoral counseling. Additionally, the Swansons filed claims against the Church for negligent selection, training, and supervision of Father Morin. The Superior Court dismissed the claims against the Church for negligent selection and training, holding that enforcement of those claims would require excessive entanglement into religious doctrines, violating free exercise of religion. However, finding that an analysis of the negligent supervision claim could be accomplished by applying "secular

12. Id.
13. Id.
14. Id.
15. Id. ¶ 3, 692 A.2d at 442.
16. Id.
17. Id.
18. Id. ¶ 4, 692 A.2d at 442.
19. Id.
20. Id.
21. Id. The Swansons also sued the Church for breach of fiduciary duty and fraud, but those claims were dismissed prior to the appeal, pursuant to an agreement among the parties. Id. ¶ 1, 692 A.2d at 442 n.2.
standards to secular conduct,” the Superior Court denied dismissal of the negligent supervision claim. According to the only issue on interlocutory appeal before the Law Court was the negligent supervision claim against the Church.

The Church argued, on appeal, that the Superior Court erred in allowing the negligent supervision claim because litigation of the claim would require excessive entanglement into church doctrines. The Church maintained that “any inquiry by a secular court into the selection, training, appointment, supervision, discipline and removal of clergy will necessarily entail an inquiry into religious doctrine and a ruling on the propriety of conduct pursuant to the religious doctrine.” On the other hand, the Swansons argued that neutral principles of law could be applied to the employer/employee relationship involving the Church and Father Morin, without violating the First Amendment. The Swansons averred that “[n]egligent supervision claims require inquiry into matters that are almost entirely secular.” The Swansons further argued the Law Court should affirm the Superior Court’s allowance of the negligent supervision claim because public policy requires courts to adjudicate such claims when a church fails to protect the public from known risks.

In a split decision, the Law Court vacated the judgment permitting the claim against the Church for negligent supervision, and the case was remanded with instructions to dismiss the one remaining count against the Church. The Law Court held that secular agency principles requiring employee supervision cannot be applied to a church and its clergy because enforcement of a church’s duty to oversee its employees violates the Constitution’s protection of free exercise of religion. Unfortunately, however, the Law Court left undecided whether or not Maine recognizes a cause of action under secular agency principles for negligent supervision.

Writing for the majority, then-Chief Justice Daniel E. Wathen noted, “[w]e have never decided that the negligent supervision of an employee constitutes an independent basis for liability on the part of an employer. Assuming that it does, however, we conclude that constitutional considerations bar such a claim against

23. Id. at 11. Then Superior Court Justice Saufley stated in her opinion that, “[r]equiring a church to respond reasonably to threat of harm to the public by members of the clergy cannot be found to be excessive entanglement.” Id.


26. Id. at 10.


28. Id. at 8.

29. Id. at 47-48. The Swansons contended, “[i]f civil courts are prohibited from adjudicating negligent supervision claims relating to a priest whom a church knows presents a real threat of harm to the public, then the common good is subjugated to the idiosyncrasies of any and all religious doctrines.” Id. at 48.


31. Id. The Court stated that “[t]he imposition of secular duties and liability on the church as a ‘principal’ will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest.” Id. ¶ 12, 692 A.2d at 445.
the church in this case." 32 Thus, without any analysis or ruling regarding negligent supervision as a cause of action generally, the Law Court ruled on constitutional grounds and dismissed the negligent supervision claim against the Church.33 The Court was quite broad in its constitutional ruling, holding that whenever "a civil court undertakes to compare the relationship between a religious institution and its clergy with the agency relationship of the business world, secular duties are necessarily introduced into the ecclesiastical relationship and the risk of constitutional violation is evident."34 However, as discussed herein, significant case law and legal authority indicate otherwise.35

The Law Court acknowledged that other jurisdictions have held that negligent supervision claims against religious organizations do not violate the First Amendment because the claims can be addressed neutrally, without determining church doctrines.36 Yet the Swanson Court decided that these courts "have not fully addressed the fundamental [First Amendment] issue" and "have failed to maintain the appropriate degree of neutrality required by the [Constitution]."37 Still, many

32. Id. ¶ 5, 692 A.2d at 443-44.
33. Id. ¶ 1, 692 A.2d at 442.
34. Id. ¶ 10, 692 A.2d at 444. The majority opinion is formulated in abstract terms: "[t]he exploration of the ecclesiastical relationship is itself problematic. To determine the existence of an agency relationship based on actual authority, the trial court will most likely have to examine church doctrine governing the church's authority over Morin." Id. (emphasis added). Thus, the Law Court bases its opinion on the assumption that the application of agency principles will automatically involve excessive entanglement in church doctrines, thereby implying that a church can never be liable for the misconduct of its clergy.
35. See infra, Part III.
37. Id. ¶ 13, 692 A.2d at 445. While the Swanson Court criticizes other jurisdictions for failing to maintain the appropriate degree of neutrality in permitting negligent supervision claims against religious organizations, the Court does not provide guidance as to what degree of neutrality is required in actions against a church. Other courts, including the United States Supreme Court, however, have given guidance. For example, the Supreme Court has determined that review of certain church documents in civil litigation does not violate free exercise of religion under the First Amendment. See, e.g., Jones v. Wolf, 443 U.S. 595, 604 (1979) (recognizing that a court may examine church documents, if the document can be scrutinized in "purely secular terms"—i.e. if the court is not required to rely on religious precepts in determining the question before it). Based on the Supreme Court's guidance regarding admissibility of church documents in civil suits, state courts have made such documents discoverable by adverse parties. See, e.g., Hutchinson v. Luddy, 606 A.2d 905, 906 (Pa. Super. Ct. 1992) (holding that disclosure of relevant, non-privileged church documents to an adversary in a civil suit does not constitute impermissible interference with free exercise of religion). Additionally, the Supreme Court gives wide deference to courts in allowing neutral principles of common law into actions against religious organizations. See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("The protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."); Employment Div. v. Smith, 494 U.S. 872, 881 (1990) (holding that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections"); see also Ivy B. Dodes, Note, "Suffer the Little Children...": Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children by Faith Healers, 16 Hofstra L. Rev. 165, 176-77 (1985) (recognizing that, in adjudicating claims against churches, standards of reasonableness under common law principles "can be accomplished without delving into the constitutionally protected area of church doctrine and internal regulations"). Additionally, for a general overview of excessive entanglement issues and related Supreme Court
courts have continued to rule on negligent supervision claims against churches, using neutral principles of law and carefully balancing the interest in religious freedom against the interest in protecting public welfare. 38

At the end of its opinion, the Court briefly acknowledged that the interest in protecting free exercise of religion is subject to a balancing against certain societal interests. 39 Courts have long recognized this “balancing of interests” principle, and have applied the balancing test in order to protect a variety of societal interests. 40 However, without discussing the societal interests against which the First Amendment must be balanced, the Swanson Court concluded on interlocutory report that the case presented no societal interest outweighing the constitutional requirement of religious protection. 41 The Court simply dismissed the Swanson’s claim as being among “certain civil rights . . . not sufficiently compelling to overcome certain religious interest.” 42

Justice Kermit Lipez dissented, joined by Justice Dana, objecting on the grounds that the majority decision was decided prematurely and unnecessarily. 43 First, the dissent argued that the majority opinion neglected the Law Court’s long-established principle of avoiding constitutional rulings on interlocutory report because

guidelines, see James T. O’Reilly & Joann M. Strasser, Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues, 7 St. Thomas L. Rev. 31 (1994). In sum, O’Reilly and Strasser note that “Supreme Court precedent suggests that if objective, well established concepts can be applied in a strictly secular manner, there is no impermissible First Amendment entanglement of the civil court with church norms.” Id. at 43-44.

38. In applying negligent supervision principles, courts need only look to what the employer knew about the risks posed by its employee, when the employer knew about these risks, and whether the employer acted reasonably in taking action to reduce those risks. See Restatement (Second) of Tortes § 317 (1965); Restatement (Second) of Agency § 213 (1958). As many courts have held, examination of these negligent supervision issues does not involve excessive governmental entanglement into church doctrine. See infra Part III.B.


40. See, e.g., United States v. Lee, 455 U.S. 252, 260 (1982) (recognizing that some religious freedoms must give way to the common good); see also Am. Communications Ass’n, C.I.O., v. Douds, 339 U.S. 382, 398-99 (1950) (recognizing that First Amendment freedoms are not absolute, and must be balanced against the interest of maintaining public order and protecting society, and stating that “[t]he exercise of particular First Amendment rights may fly in the face of the public interest in the health of children . . . or of the whole community”) (citations omitted); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (holding that societal interest must be weighed against the right to free exercise of religion and that religious “[c]onduct remains subject to regulation for the protection of society”). See generally Dodes, supra note 37, at 168 (noting “[t]he modern trend in deciding whether a civil court may adjudicate a controversy involving clergy as defendants has been to weigh the competing state interest to be advanced by the determination of a particular controversy against the possible infringement of defendant’s First Amendment rights”).


42. Id. (quoting Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990)).

43. Id. ¶¶ 13-15, 692 A.2d at 445-46 (Lipez, J., dissenting).
the record has not been fully developed.\textsuperscript{44} Noting that the First Amendment ruling requires a weighing of societal interests against the constitutional interest being protected, the dissent asserted that a proper balancing of these interests cannot be maintained without a fully-developed trial record.\textsuperscript{45} The dissent also noted that the constitutional decision was unnecessary at this stage of the litigation.\textsuperscript{46} Justice Lipez pointed out that, if the Court had properly remanded the case with instruction for further discovery, the trial would have proceeded against Father Morin, and only if and when Father Morin was found liable for negligence would the negligent supervision issue against the Church need to have been decided.\textsuperscript{47}

Additionally, Justice Lipez noted that, as a matter of logic, the Court should have decided the general issue of whether or not Maine recognizes the tort of negligent supervision as an independent cause of action against any employer before ruling against its application in a specific context.\textsuperscript{48} Justice Lipez stated that “[i]nstead of assuming that the church could be liable for negligent supervision, and addressing the constitutional issues on the basis of an assumption, we should first decide whether we will recognize that theory of liability in Maine.”\textsuperscript{49} Accordingly, Justice Lipez contended that the majority erred both in deciding a constitutional issue not properly before the Law Court and in leaving the general question regarding the tort of negligent supervision unanswered.\textsuperscript{50}

III. THE LAW OF NEGLIGENT SUPERVISION IN ECCLESIASTIC SETTINGS AS APPLIED IN OTHER STATES

A. Negligent Supervision as a General Tort in Other States

Many of the states that do recognize the tort of negligent supervision as an independent cause of action against an employer generally do so through the adoption of Restatement (Second) of Torts, Section 317, Duty of Master to Control

\textsuperscript{44} Id. ¶ 16, 692 A.2d at 446 (Lipez, J., dissenting). Specifically, Justice Lipez favored the long-term judicial policy of refraining from “opinions on constitutional law whenever a nonconstitutional resolution of the issues renders a constitutional ruling unnecessary.” Id. ¶ 15, 692 A.2d at 446 (Lipez, J., dissenting) (citing Your Home, Inc. v. City of Portland, 432 A.2d 1250, 1257 (1981)). Justice Lipez further cautioned that the Law Court “should be especially reluctant to decide a constitutional issue on an interlocutory report when, as here, the issue arises in an area of the law in which the U.S. Supreme Court cases offer limited guidance and there remains significant doctrinal uncertainty.” Id. ¶ 16, 692 A.2d at 446-47 (Lipez, J., dissenting).

\textsuperscript{45} Id. (Lipez, J., dissenting). See, e.g., Larry v. Geoghan, 2000 WL 1473579 (Mass. Super. 2000) (holding that dismissal of negligent supervision claims against a church on First Amendment grounds is premature where the church’s clergy allegedly sexually abused children). The Massachusetts Superior Court held that adjudication of these claims requires a “delicate balance between the freedom to exercise religion and the demands placed on all persons, clerical and others, to refrain from conduct with harmful potential to others,” and “requires the courts to avoid sweeping, categorical decisions.” Id. at *3.

\textsuperscript{46} Swanson v. Roman Catholic Bishop of Portland, 1997 ME 63, ¶ 17, 692 A.2d at 447 (Lipez, J., dissenting).

\textsuperscript{47} Id. (Lipez, J., dissenting).

\textsuperscript{48} Id. (Lipez, J., dissenting).

\textsuperscript{49} Id. (Lipez, J., dissenting).

\textsuperscript{50} See id. (Lipez, J., dissenting).
Conduct of Servant. For example, in *Davis v. USX Corp.*, the Fourth Circuit ruled that an employee may have a valid negligent supervision claim under South Carolina law against her employer, USX Corporation, based on her claim that her boss had sexually harassed her. The *Davis* Court cited Section 317 and determined that "[u]nder a theory of negligent supervision, [an employer] may be held liable for a failure to exercise reasonable care to control an employee from intentionally harming third parties while acting outside the scope of his employment."

Similarly, in *Platson v. NSM, America, Inc.*, the Illinois Court of Appeals found Section 317 relevant in allowing a plaintiff’s claims against her employer, NSM, for failing to supervise a fellow NSM employee who allegedly assaulted the plaintiff. The court held that, because NSM had knowledge of its employee’s inappropriate behavior toward the plaintiff on previous occasions, NSM knew or should have known the employee posed a threat to the plaintiff, and therefore breached its duty under Section 317 to exercise reasonable care to protect the plaintiff from harm.

Additionally, many states allow negligent supervision as an independent cause of action under *Restatement (Second) of Agency*, Section 213, Principal Negligence or Reckless. For instance, in *Wheeler Tarpeh-Doe v. United States*, Linda Wheeler Tarpeh-Doe, a government employee, sued the United States government for negligent supervision of a physician at a United States’ embassy clinic in Liberia, where she was stationed when she gave birth to her child. Allegedly due to the embassy physician’s negligence, the plaintiff’s newborn child contracted spinal meningitis, resulting in permanent brain injury. The District of Columbia

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51. **Restatement (Second) of Torts** § 317 (1965). Restatement § 317 provides:

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

(a) the servant

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

(ii) is using a chattel of the master, and

(b) the master

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

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

*Id.*

52. 819 F.2d 1270, 1273-74 (4th Cir. 1987) (citing *Restatement (Second) of Torts* § 317 (1965)).

53. *Id.*


55. *Id.* at 1284-86.

56. *Id.* See also Konkle v. Henson, 672 N.E.2d 450, 454-56, 460 (Ind. Ct. App. 1996) (recognizing Indiana’s adoption of *Restatement (Second) of Torts* § 317 and holding that § 317 provides a basis for negligent supervision as an independent cause of action against an employer).

57. *Restatement (Second) of Agency* § 213 (1958). Section 213 provides that “[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the supervision of the activity.” *Id.*


59. *Id.* at 431.

60. *Id.*
Circuit held that, because the physician was under the defendant’s control and the defendant permitted or failed to prevent the doctor’s negligence in treating the mother and child, the government was liable for negligent supervision of the physician under Section 213.61

In fact, the District of Columbia, along with several other jurisdictions, has recognized negligent supervision claims as an independent cause of action against employers under both agency and tort principles. For example, in International Distributing Corp. v. American District Telegraph Co.,62 the plaintiff sued a security alarm company for negligent supervision when its employees entered plaintiff’s store and stole liquor, using keys obtained from their employer for the purported purpose of servicing the alarm system in plaintiff’s store.63 The Court of Appeals for the District of Columbia held that, under RESTATEMENT (SECOND) OF AGENCY, Section 213(c), “[i]t is clear that an employer may be liable for negligent breach of its duty to supervise its employees,” and that, under RESTATEMENT (SECOND) OF TORTS, Section 317, “an employer has a duty to supervise . . . its employees . . . [and] [t]his duty extends even to activities which . . . are outside the scope of employment.”64

As these cases indicate, negligent supervision claims essentially call for an analysis of neutral common law agency and tort principles regarding reasonable conduct. Under such an analysis, a court can determine whether or not a church employer acted reasonably in responding to known risks posed by its clergy without an impermissible probe into constitutionally protected religious doctrine.

B. Negligent Supervision Against Churches in Other States

In the 1990s, the years leading up to Swanson, many states had applied neutral principles of law in permitting negligent supervision claims against churches, in their capacity as employers, when their failure to adequately supervise employees results in harm to individuals. A notable example was a case having facts astonishingly similar to the facts in Swanson, Bivin v. Wright.65 In Bivin, a husband and wife brought a claim against First Baptist Church of Energy, alleging negligent supervision of its minister, Reverend James H. Wright, who engaged in a sexual relationship with the wife during the course of marital counseling.66 As a result of the minister’s negligent counseling and sexual misconduct, the plaintiffs suffered extensive damages, including emotional distress and medical expenses for psychological therapy and for treatment of venereal diseases contracted from Rever-

61. Id. at 454.
63. Id. at 138.
64. Id. at 139. See also Bruchas v. Preventative Care, Inc., 553 N.W.2d 440, 443 (Minn. Ct. App. 1996) (recognizing that “Minnesota courts have analyzed claims for negligent supervision under both the RESTATEMENT (SECOND) OF AGENCY § 213 and the RESTATEMENT (SECOND) OF TORTS § 317”); Nelson v. Gillette, 571 N.W.2d 332, 340 (N.D. 1997) (applying both agency law and tort law in allowing a negligent supervision claim against Kidder County, North Dakota, for a county social worker’s misconduct).
66. Id. at 1122-23. The Bivins also sued Reverend Wright, individually, claiming intentional infliction of emotional distress, negligent infliction of emotional distress, breach of fiduciary duty, alienation of affection and criminal conversation, assault and battery, and marriage counselor malpractice. Id. The only issue before the Appellate Court of Illinois, however, was the negligent supervision claim against the Church. Id. Thus, the procedural posture as well as the facts in Bivin closely resembled those in the Swanson case.
end Wright. An Illinois trial court dismissed the plaintiffs’ negligent supervision claim against the church, holding that the claim was barred by the First Amendment. The Illinois Court of Appeals reversed the lower court’s dismissal, and allowed the negligent supervision claim to proceed against the church. Taking an approach contrary to the Swanson majority’s approach, the Bivin court noted that “the minister’s sexual misconduct was not rooted in the church’s religious beliefs and was outside the boundaries of the church’s ecclesiastical beliefs and practices. Thus, resolving this dispute may not require any interpretation of church doctrine or any regulation of ecclesiastical activity.”

Similarly, in the 1996 case of Konkle v. Henson, an Indiana Court of Appeals allowed a child victim of sexual molestation by a priest to bring a claim of negligent hiring and supervision against a church. Because the minister’s actions were not “religiously motivated,” the court held that secular agency principles could be applied, and liability could be found against the church defendants if they “knew of [the minister’s] inappropriate conduct, yet failed to protect third parties from him.” The court held that its decision called for the application of “secular standards to secular conduct, which is permissible under First Amendment standards.” The court stated that “[t]o hold otherwise would be to extend the protections beyond that included within the First Amendment and cloak churches with an absolute and exclusive immunity for their actions.”

In cases decided just after Swanson, other states continued to recognize the tort of negligent supervision, even in a church setting. For example, in Smith v. O’Connell, another case involving sexual abuse by a priest, a federal court for the District of Rhode Island recognized that “a law establishing standards of conduct does not implicate the free exercise clause unless adherence to those standards interferes with some religious activity.” The court found “no indication that the reasonably prudent person standard established by tort law and the requirements of Roman Catholic doctrine are incompatible,” because “defendants

67. Id. at 1123.
68. Id. at 1122.
69. Id. at 1123-24.
70. Id. at 1124.
72. Id. at 456. It should be noted that, generally, when a clergy’s negligence results in injuries to a child, as was the case in Konkle, courts have been more protective of societal interests when balancing those interests against the free exercise of religion clause. See, e.g., Gagne v. O’Donoghue, 1996 WL 1185145, at *8 (Mass. Super. Ct. June 26, 1996) (allowing a negligent supervision claim against a religious organization when it knew its clergy had sexually abused children and holding that the “court will not afford constitutional protection to such alleged behavior under the guise that it constituted ecclesiastical conduct”); Kenneth R. v. Roman Catholic Diocese, 654 N.Y.S.2d 791, 796 (App. Div. 1997) (holding that children victimized by a priest’s sexual abuse can bring negligent supervision claims against a Diocese that had notice of a priest’s propensity for sexual molestation of children because they are not barred by the First Amendment).
73. Konkle v. Henson, 672 N.E.2d at 456.
74. Id.
75. Id.
77. Id. at 78 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993)).
do not claim that the Roman Catholic Church either condones or tolerates sexual abuse."\textsuperscript{78} The court concluded that well-established principles of tort law could be applied neutrally, without excessive entanglement into church doctrine.\textsuperscript{79} Therefore, the Smith Court allowed the negligent supervision claim against the church defendants to proceed.\textsuperscript{80}

Similarly, in 1998, in \textit{Rosado v. Bridgeport Roman Catholic Diocesan Corp.},\textsuperscript{81} the Connecticut Superior Court held that a negligent supervision suit against a church whose former priest allegedly sexually abused plaintiffs when they were minors did not require the court to intrude into the church’s constitutionally protected religious practices.\textsuperscript{82} In denying dismissal of the negligent supervision claim, the Rosada court ruled that the “plaintiffs’ claims can be adjudicated by purely neutral secular principles or standards.”\textsuperscript{83} The court recognized that “[t]o rule otherwise would result in declaring the state and its inhabitants unable to seek redress when clergy are accused of endangering the welfare and safety of minors, regardless of state law in place to protect such minors from the very abuses alleged.”\textsuperscript{84}

More recently, other jurisdictions have declined to follow the constitutional holding in Swanson and have allowed negligent supervision claims in ecclesiastic settings. A recent example is \textit{Malicki v. Doe},\textsuperscript{85} a Florida case involving claims by a minor and an adult parishioner that a priest had sexually molested them on a religious organization’s premises.\textsuperscript{86} The plaintiffs sued the religious organization for negligent supervision, among other claims.\textsuperscript{87} In Malicki, the Florida Supreme Court held that a negligent supervision claim may be brought against the Church if the plaintiffs could show, through neutral, “classic” agency principles, that “the Church Defendants either knew or should have known that its priest, Father Jan

\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} at 81-82.
\textsuperscript{80} \textit{Id.} See also Smith v. Privette, 495 S.E.2d 395, 398 (N.C. Ct. App. 1998) (holding that the First Amendment did not bar negligent supervision claims against a church based on a minister’s sexual misconduct because the court need only inquire as to whether or not the church knew of the minister’s propensity for sexual misconduct); Doe v. First Presbyterian Church, 710 N.E.2d 367, 372 (Ohio Ct. App. 1998) (allowing a negligent supervision claim against a church to proceed to the jury for determination as to whether the church knew or should have known of its clergy’s harmful propensities); C.J.C. v. Corp. of the Catholic Bishop of Yakima, 985 P.2d 262, 277 (Wash. 1999) (holding that “[t]he First Amendment does not provide churches with absolute immunity to engage in tortious conduct” and that “[s]o long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles”).
\textsuperscript{81} 716 A.2d 967 (Conn. Super. Ct. 1998).
\textsuperscript{82} \textit{Id.} at 973.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} 814 So. 2d 347 (Fla. 2002).
\textsuperscript{86} \textit{Id.} at 352.
\textsuperscript{87} \textit{Id.}
Malicki] had the propensity to commit sexual assaults and molestations."⁸⁸ Accordingly, the Malicki court held that the First Amendment did not bar claims of negligent hiring and supervision against a church for its priest's sexual misconduct because the court did "not foresee ‘excessive’ entanglement in internal church matters or in interpretation of religious doctrine or ecclesiastical law."⁹⁹

In short, case law in other states reveals a national trend toward recognition of negligent supervision generally, and allowance of its application in religious settings.⁹⁰ Due to the increase in revelations of sex scandals within the church and resulting litigation, it is likely that this trend will grow.⁹¹

IV. THE LAW OF NEGLIGENT SUPERVISION IN MAINE REMAINS UNCLEAR

The Swanson Court acknowledged that it had never ruled on whether or not negligent supervision exists as an independent cause of action against an employer in the State of Maine.⁹² Nevertheless, the Court unfortunately ignored the opportunity to clarify Maine's position regarding the tort of negligent supervision generally.⁹³ After clarifying the negligent supervision issue, the Court could have re-

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⁸⁸. Id. The Malicki court, while recognizing a split of authority on this issue, noted: Substantial authority in both the state and federal courts concludes that the right to religious freedom and autonomy protected by the First Amendment is not violated by permitting the courts to adjudicate tort liability against a religious institution based on a claim that a clergy member engaged in tortious conduct such as sexual assault and battery in the course of his or her relationship with a parishioner. These courts conclude that there is no impermissible interpretation of religious doctrine because the courts are applying a neutral principle of generally applicable tort law. Id. at 358 (internal footnote omitted).

⁸⁹. Id. at 364.

⁹⁰. For a brief overview regarding the treatment of sexual misconduct liability in all fifty states, including citations to cases addressing the First Amendment defenses, see Catalina J. Sugayan, Coverage and Liability Issues in Sexual Misconduct Claims, (Charles H. Watts & Thomas E. Schaeffer eds., American Re-Insurance Company) (2002), available at http://www.anre.com/content/et/sexual_misconduct_2002.pdf (last visited December 3, 2003). Of the sixteen states that have addressed negligent supervision claims in a church setting as of the American Re-Insurance Company's 2002 publication, only Maine, Missouri, and Wisconsin have held flatly that the First Amendment precludes negligent supervision claims against churches, while Colorado, Connecticut, Florida, Illinois, Indiana, Massachusetts, Minnesota, New York, North Carolina, Ohio, Rhode Island, Vermont, and Washington have allowed such claims in various situations. See id.

⁹¹. See infra Part V for the argument that Swanson should be overruled, in part because significant societal changes and emerging views since these revelations of clergy sexual misconduct render Swanson poor precedent.

⁹². Swanson v. Roman Catholic Bishop of Portland, 1997 ME 63, ¶ 9, 692 A.2d at 434-44.

⁹³. See id. Concealedly, the facts of Swanson may not have ultimately supported imposing liability upon the Church for negligent supervision of Father Morin under secular agency principles, the First Amendment issue aside. However, the Swansons contended that Bishop Gerry had actual notice of Father Morin's propensity for sexual misconduct, and subjected Mrs. Swanson to psychological harm by failing to supervise Father Morin's counsel sessions. Brief of Appellees at 5, Swanson v. Roman Catholic Bishop of Portland, 1997 ME 63, 692 A.2d 441 (No. CUM-96-305). In fact, the Swansons alleged that, after litigation against the Church became apparent, the "Bishop still attempted to cover up its negligent supervision by meeting with and advising Ruth Swanson without the consent of her legal counsel." Id. at 38. In denying the Church's Motion to Dismiss the negligent supervision claim, the Maine Superior Court found the Bishop's actual knowledge of Father Morin's propensity for sexual misconduct quite significant. Swanson v.
manded the case for further discovery, as Justice Lipez suggested in his dissenting opinion. Then, the First Amendment issue would have properly come back to the Law Court only if the additional discovery supported a negligent supervision claim based on secular negligent supervision principles, which the Law Court could have outlined on the interlocutory report. However, the Law Court decided the case instead on the abstract assumption that the State of Maine recognized the tort of negligent supervision, and then jumped to the constitutional ruling.

In ruling on the constitutional issue, the Law Court only briefly touched upon the balancing of interests test that has been outlined by the Supreme Court for dealing with the free exercise of religion clause. Although acknowledging that a balancing of societal interests is required in free exercise of religion cases, the Law Court concluded that no interest existed in Swanson, without providing guidance as to what societal interests would limit the protection of free exercise. Furthermore, lacking clear judicial guidance from the Law Court regarding negligent supervision claims, Maine courts are unable to reach the balancing test referred to in a cursory manner in Swanson.

For example, in a 1999 case, Bryan R. v. Watchtower Bible & Tract Society, the Law Court affirmed dismissal of a complaint for negligent supervision against a religious organization when a plaintiff claimed negligence on the part of the church because an adult member of the church had sexually abused him as a child. The Court again dodged the question of whether or not the tort of negligent supervision exists in Maine by ruling on a more narrow ground, finding no liability against the church because the original tortfeasor was neither the church defendant's employee nor its agent. Further, the Court noted, "we are not called upon to determine whether the 'balancing of interests' we referenced in Swanson may require a different result when a child, rather than an adult, is injured by an agent of the church."

Morin, No. CV-93-1006 slip op. at 6 (Me. Super. Ct. Cum. Cty., Dec. 18, 1995) (Saufley, J.). The Church did not rebut the allegations of its prior actual knowledge and subsequent cover up in its brief, but simply excluded these allegations from the issues in its case. See Brief of the Appellants at 7, Swanson v. Roman Catholic Bishop of Portland, 1997 ME 63, 692 A.2d 441 (No. CUM-96-305). Instead, the Church focused its argument on the free exercise clause, asserting complete religious immunity from negligent supervision claims. See generally Brief of the Appellants, Swanson v. Roman Catholic Bishop of Portland, 1997 ME 63, 692 A.2d 441 (No. CUM-96-305). In any event, the case presented an ideal opportunity for the Law Court to analyze the negligent supervision issue generally, and to provide judicial guidance on Maine's position regarding negligent supervision before ruling it out in religious settings.

95. See id. § 9, 692 A.2d at 443-44.
96. Id. § 13, 692 A.2d at 445. In discussing the balancing of interests requirement, the Swanson Court does not refer directly to any of the United States Supreme Court decisions that require this balancing of interests test and provide guidance as to how such a balancing of interests should be accomplished. Id. For a brief overview of these balancing principles, see supra Part II and note 40.
98. 1999 ME 144, 738 A.2d 839.
99. Id. § 29, 738 A.2d at 848.
100. See id. § 9 n.2, 738 A.2d at 843.
101. Id.
In 2002, the Maine Superior Court was called upon to engage in this balancing of interests test in a case that involved the sexual abuse of a child by an agent of a church. The Swanson decision, however, prevented the Maine Superior Court from considering the balancing of interests test. In Fortin v. Melville, an adult brought negligent supervision claims against his former church for injuries caused by his former priest, who had sexually abused the plaintiff when he was a child. The Superior Court felt constrained by "the sweeping language of [Swanson]" and therefore concluded that plaintiff's claims required "the application of secular agency principles rejected in Swanson." Accordingly, the Superior Court dismissed the negligent supervision claims against the church, with no mention of the balancing of interests test.

Since Swanson, other occasions have arisen in which the Law Court may have provided guidance as to whether or not Maine recognizes the tort of negligent supervision generally, yet Maine courts continue to bypass the issue and dispose of these cases on other grounds. For example, in Hinkley v. Penobscot Valley Hospital, Hinkley brought suit to recover for damages suffered after a severe allergic reaction from a penicillin-like drug, Augmentin. When Hinkley was in Penobscot Valley Hospital, a physician's assistant negligently prescribed the penicillin-like drug, even after Mr. Hinkley informed the employee that he was allergic to penicillin. Penobscot Valley Hospital and the supervising doctor, Noah Nesin, were named as defendants based on plaintiff's claims of negligent supervision. Declining to address the issue of negligent supervision, the Law Court instead dismissed the claim on the narrow grounds that the Maine Tort Claims Act (MTCA) precluded liability not only against the hospital as a government entity, but also against the doctor as a government employee. The Court stated, "we have never before recognized the independent tort of negligent supervision . . . because we find that Nesin was a government employee under the MTCA, we need not address that issue."

103. Id. at *1.
104. Id. at *2.
105. See id. The Superior Court concluded that "[s]ince all the plaintiff's claims against the church depend on application of secular agency principles rejected in Swanson, the dismissal will be as to all counts." Id. This Superior Court decision is currently on appeal to the Law Court, presenting an opportunity to address the flawed Swanson decision, or at least a chance to engage in the balancing of interests test so cursorily mentioned in Swanson. See Swanson v. Roman Catholic Bishop of Portland, 1997 ME 63, ¶ 13, 692 A.2d 441, 445. Perhaps the interest in protecting children from sexual abuse will outweigh protecting religious interests under the First Amendment; see Bryan R. v. Watchtower Bible & Tract Soc'y, 1999 ME 144, ¶ 9 n.2, 738 A.2d 839, 843. See also supra note 72 and accompanying text.
106. 2002 ME 70, 794 A.2d 643.
107. Id. ¶ 2-3, 794 A.2d at 644-45.
108. Id. ¶ 2, 794 A.2d at 644.
109. See id. ¶¶ 1, 3, 794 A.2d at 644-45.
110. See id. ¶ 16, 794 A.2d at 647. The Maine Tort Claims Act states that "except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages. When immunity is removed by this chapter, any claim for damages shall be brought in accordance with the terms of this chapter." 14 ME. REV. STAT. ANN. tit. 14 (West 2003).
that Justice Lipez objected to in the Swanson majority opinion: assumed that a tort of negligent supervision exists, and then held that it cannot be applied to the specific incident—again, declining the opportunity to decide whether or not Maine even recognizes the tort of negligent supervision in any employer/employee relationship.\(^{112}\)

Similarly, in a 2002 case, Napieralski v. Unity Church of Greater Portland,\(^{113}\) the plaintiff, a life insurance agent, brought suit against a church for negligent supervision of its priest, who allegedly asked the plaintiff to his home to discuss a life insurance policy, and then sexually assaulted the plaintiff.\(^{114}\) The Law Court stated two issues arising from the plaintiff's negligent supervision claim against the church: (1) whether the Court should “for the first time, recognize a cause of action for negligent supervision” and (2) whether the Court should overrule Swanson and apply the tort of negligent supervision in an ecclesiastical setting.\(^{115}\) Avoiding Swanson, the Law Court affirmed dismissal of the negligent supervision claim against the church not on constitutional grounds, but instead disposed of the claim on the narrow facts of the case.\(^{116}\)

A key factor that defeated plaintiff’s negligent supervision claim against the church in the Napieralski case was that the priest’s sexual misconduct occurred at his house, and not on church grounds.\(^{117}\) Therefore, ironically, the Law Court easily applied neutral agency principles in dismissing the claim, holding that “the employee retains rights of privacy and quiet enjoyment in the residence that are not subject to close supervision or domination by the employer.”\(^{118}\) The Court concluded, “[b]ecause on these facts we do not adopt a cause of action for negligent supervision, we do not reach Swanson and we affirm the judgment of the Superior Court.”\(^{119}\) Again, the Law Court seemed to leave room for adoption of negligent supervision as an independent cause of action given an appropriate set of facts, which could lead to the Court’s reaching Swanson if those facts occurred within a religious setting. But the Law Court still leaves Maine guessing as to what set of facts would be appropriate for the recognition of the tort of negligent supervision.

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112. See id.
114. Id. ¶ 2, 802 A.2d at 392.
115. Id. ¶ 1, 802 A.2d at 392.
116. See id.
117. Id. ¶ 8, 802 A.2d at 393. Even though the church owned the house in which the priest lived, the Court determined that the house did not constitute “the employer’s premises.” Id. ¶ 9, 802 A.2d at 393.
118. Id. ¶ 8, 802 A.2d at 393.
119. Id. ¶ 1, 802 A.2d at 392 (emphasis added). See also Mahar v. StoneWood Transp., 2003 ME 63, ¶ 11, 823 A.2d 540, 543. In Mahar, the Law Court held that neither Restatement (Second) of Torts § 317 nor Restatement (Second) of Agency § 213 could be satisfied to support a negligent supervision claim on the facts at hand. Id. ¶ 1, 823 A.2d at 541. Here, plaintiff brought a negligent supervision claim against a driver’s employer, after an incident of road rage resulted in the driver’s assaulting plaintiff. Id. ¶ 11, 823 A.2d at 543. The Law Court declined to impose negligence against the employer because the prior driving record did not involve violent acts that would make that driver’s negligence foreseeable by the employer. Id. The Law Court stated “[w]e have not yet recognized the independent tort of negligent supervision of an employee.... Even were we to adopt negligent supervision as an independent tort... the facts of this case do not support such a cause of action.” Id. ¶¶ 10-11, 823 A.2d at 543 (emphasis added).
supervision in Maine. Thus, nearly seven years since Swanson, Maine law regarding negligent supervision continues to be unclear.

V. DISCUSSION: SWANSON IS POOR PRECEDENT AND SHOULD BE OVERRULED

As a result of the lack of judicial guidance from the Law Court regarding the application of negligent supervision as an independent cause of action, tort liability against employers remains uncertain, and Swanson remains untouched. The Law Court should clear up the uncertainty surrounding negligent supervision and acknowledge once and for all that Maine law allows for negligent supervision principles in employer/employee settings. The recognition of negligent supervision as an independent cause of action against employers will ultimately lead to its application in the religious realm, which will ultimately lead to an overhaul of the Swanson decision. In fact, Swanson v. Roman Catholic Bishop of Portland is a prime example of a case to which the doctrine of stare decisis should not apply.

The United States Supreme Court has overruled precedent cases when “facts have so changed, or come to be seen differently, as to have robbed the old rule of significant application or justification,” and when subsequent developments have undermined their doctrinal underpinnings. For example, in a 2003 decision, Lawrence v. Texas, the United States Supreme Court held that a law against consensual homosexual conduct violated the Fourteenth Amendment. In so holding, the Supreme Court had to overturn its 1986 decision in Bowers v. Hardwick, finding that a similar Georgia statute was valid under the Fourteenth Amendment. The Lawrence Court noted, that while “[t]he doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law . . . [i]t is not, however, an inexorable command.” The Court

120. Because the Law Court’s guidance regarding the validity of negligent supervision as a cause of action has been unclear, the Maine Superior Court’s analysis of the tort of negligent supervision is also murky, and it too bypasses the issue and disposes of cases by holding that such a tort, even if recognized, would not apply to the facts of the cases at hand. See, e.g., Angelica v. Drummond, Woodsum & MacMahon, PORSC-CV-02-15 (Me. Super. Ct. Cmm. Cty., Sept. 9, 2003) (Humphrey, J.). In Angelica, the Superior Court adopted this very approach as late as September 2003 in dismissing claims against a law firm for negligent supervision based on allegations that one of its attorneys negligently represented the plaintiff and breached his fiduciary duties to her. See id. at 6. Noting that “[t]he Law Court appears to have declined to recognize the tort or adopt § 317 of the Restatement [(Second) of Torts],” the Superior Court decided the case on an assumption, as was done in Swanson, holding “[e]ven if Maine were to recognize the tort and adopt § 317 of the Restatement, the record does not support such a claim against [the defendant law firm].” Id. (emphasis added).

121. Under the doctrine of stare decisis, a court may overturn its decisions when there is “convincing justification . . . to demonstrate that a later decision overruling the first was anything but . . . an unjustified repudiation of the principle on which the Court staked its authority in the first instance.” Planned Parenthood v. Casey, 505 U.S. 833, 867 (1992).

122. Id. at 855.


125. Id. at 574, 578-79.

126. Bowers v. Hardwick, 478 U.S. 186 (1986). The Supreme Court in the overturned Bowers case had declined to extend the fundamental right of privacy to include the right of sexual conduct between consenting adults in their own private quarters, and therefore held that such conduct was not protected under the Fourteenth Amendment. Id. at 190.

127. Lawrence v. Texas, 539 U.S. at 577.
acknowledged society’s emerging views regarding the need for protection of due
process rights for gay and lesbian citizens. Accordingly, finding no societal
reliance on the Bowers decision—in fact, finding defects in and uncertainty re-
garding the decision—the Lawrence Court found compelling reasons to overrule
the precedent it set in Bowers. As was the case with the Bowers decision, compelling reasons exist that jus-
tify overruling the Swanson decision. Defects in the broad and premature Swanson
holding have resulted in continued uncertainty regarding the tort of negligent su-
ervision, and uncertainty regarding the constitutional implications of applying
negligent supervision in the religious realm. Additionally, subsequent events
have changed the way in which society views the factual and legal underpinnings
behind Swanson, particularly regarding the need to balance free exercise of reli-
gion against the protection of citizens from religious institutional harm. The most
notable events precipitating these emerging views are the recent sex scandals sur-
rrounding the Roman Catholic Church and the Boston Archdiocese. The scan-
dals have transformed an institution formerly considered worthy of faith, protec-
tion, and respect into one of mistrust, disrepute, and fear.

In early 2002, the nation was shocked by revelations of sexual misconduct
within the Catholic Church, and even more shocked by the fact that church offi-
cials knew of the dangers their clergy imposed on third parties, and failed to pro-
tect third parties from harm. On January 12, 2002, the Boston Globe revealed that
church officials settled several cases of sexual misconduct in order to keep the
claims quiet. Globe sources had “learned the identities of nearly 40 of the
priests and former priests for whom the archdiocese has settled claims of sexual
abuse.” Following were several criminal and civil suits that further uncovered
specific acts of negligence among church officials, who had knowledge, and failed

128. See id.
129. Id. See also Brown v. Board of Education, 347 U.S. 483, 494-95 (1954) (overruling precedent set in Plessy v. Ferguson, 163 U.S. 537 (1896)). The Brown Court declined to sustain Plessy’s holding, which was a validation of racial segregation laws, because society’s under-
standing of the facts surrounding the Plessy decision had changed significantly. Id. Therefore, the Supreme Court found convincing justification for overturning the prior precedent in Plessy. Id.
130. See supra Part IV.
131. The Catholic Church is not a lone subject of the recent scandal exposure that has im-
pelled the public outcry for regulation and accountability. As a result of recent scandals within
institutions from religious organizations to some of the largest publicly traded companies, soci-
etal interest in regulating those institutions has been on the rise. Although Americans formerly
trusted and had faith in the churches and the reputable corporations to which they were affilia-
ted, society now recognizes the potential for harm when large institutions are left unchecked.
McNamara states “[b]reakdowns in leadership, from the church to the boardroom, call out for seri-
sous, independent analysis of the forces that lead to a lack of accountability in so many once-
revered institutions.” Id.
132. Walter V. Robinson, Scores of Priests Involved in Sex Abuse Cases; Settlements Kept
133. Id. See also, Gregory D. Kesich, Crisis Affirmed Bishop’s Calling, MAINE SUNDAY TELE-
GRAM, Mar. 28, 2004 at A1 (reminding the public that “[t]hree years after the first child sex-
abuse revelations made the news, it is now known that the Boston Archdiocese ... systemati-
cally hushed up allegations of sexual abuse of children. Offending priests were often quietly
reassigned to new parishes, where some abused again.”).
to act upon the knowledge, that their clergy members' inappropriate behavior posed risks to parishioners. For example, in April 2002, it became clear that, prior to settling lawsuits against former Rev. Paul R. Shanley,134 "[f]or more than a decade, Cardinal Bernard F. Law and his deputies ignored allegations of sexual misconduct against Rev. Paul R. Shanley and reacted casually to complaints."135 During approximately the same time period, the Archdiocese of Boston agreed to pay thirty million dollars in settlements to people who were molested by former priest John J. Geoghan136 "in a case that has deeply embarrassed the cardinal for its revelations that he assigned Geoghan to a Weston, Massachusetts parish in 1984 knowing he had molested children."137

Because of these disturbing developments in the Roman Catholic Church, facts regarding the prominence of sexual misconduct within free reigning religious organizations are seen quite differently today than when Swanson was decided seven years ago. The nation has come to recognize the sad truth that church employees cause great public harm—and although church officials are aware of this fact, they often fail to take preventative action.138 These developments have seriously un-

136. John J. Geoghan is a former Massachusetts priest who was found guilty of child molesta-
138. See, e.g., Janna Satz Nugent, A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy, 30 Fla. St. U.L. Rev. 957, 975 (2003) (recognizing “the compelling need to protect both adult and minor parishioners from clergy sexual misconduct, and to prevent the Church’s sustained efforts to hide or ignore that misconduct, meets the requirements of the court’s strict scrutiny” and concluding “the Supreme Court should find that negligent hiring, supervision and retention, as applied to a religious institution, is constitutional under the Free Exercise Clause”). See also Scott C. Idleman, Tort Liability, Religious Entities, and the Decline of Constitutional Protection, 75 Ind. L.J. 219, 219 (2000) (noting, “[n]ot only has tort litigation against religious entities increased in recent years, thus generating more challenges to the [free exercise of religion] principle, but this increase has been accompanied by the public’s growing sympathy for the victims of clergy exploitation,” leaving state court judges “less sensitive to broader constitutional limitations”).

Interestingly, nearly ten years ago, and three years before Swanson was decided, at least two commentators predicted these emerging views regarding scandal within religious organizations and the accompanying abatement of free exercise protection. See O’Reilly & Strasser, supra note 37, at 34. James T. O’Reilly and JoAnn M. Strasser recognized the potential for church scandals to alter the way in which society views the need to regulate churches. O’Reilly & Strasser, supra note 37, at 34. The authors predicted that “[o]ne highly publicized [church scandal] case may lead to changes in the law that will make religious organizations more vulnerable to lawsuits and will change the way that many Roman Catholic dioceses deal with abuse allegations.” O’Reilly & Strasser, supra note 37, at 34. Since then, there have been several highly publicized church scandals, and society is ready to hold church officials accountable if they know about sexual abuse risks and fail to supervise clergy to protect third parties from harm.

Additionally, as the revered Oliver Wendell Holmes, Jr. observed over 100 years ago, with these changes in societal opinion inevitably come changes in the law. Holmes eloquently
dermined the doctrinal underpinnings of Swanson's broad protection of free exercise of religion; current events and emerging views undermine Swanson's justification for giving churches blanket immunity from liability for negligent supervision of its clergy when the church knows of a clergy member's propensity for misconduct and fails to prevent parishioners from harm.

Further evidence of the ever-weakening Swanson holding are the many decisions in other jurisdictions, discussed in this Note, which run contrary both to Swanson's substantive constitutional ruling, as well as the procedural posture in which it was rendered. Many courts, first having recognized the general application of negligent supervision as a cause of action, have declared that negligent supervision claims against religious organizations are not a violation of the First Amendment. The manner in which other states have dealt with the tort and constitutional issues presented in Swanson highlights an underlying flaw in Swanson's holding: its constitutional ruling was premature and unnecessary. In other jurisdictions, courts have first discussed the state's law underlying negligent supervision claims generally, and then decided whether or not neutral principles of negligent supervision may be applied in religious settings. For example, in Konkle v. Henson, the court began its analysis by first recognizing that the State of Indiana has adopted Restatement (Second) of Agency, Section 213, which provides a cause of action for the tort of negligent supervision. The court then applied Indiana's recognized cause of action for negligent supervision to a church setting, holding that neutral common law principles could be applied in religious settings without violating the First Amendment.

Even in the states that do not allow common law negligent supervision claims in a religious setting, the courts decided the First Amendment issue only after having recognized liability for negligent supervision generally. For instance, in a Missouri case, Gibson v. Brewer, decided the same year as Swanson, parents and their son brought claims against a church for negligent supervision of its priest, who allegedly touched the son in a sexually offensive manner. Citing the Restatement (Second) of Torts, Section 317, and to Missouri case law that follows Section 317, the court first recognized that the tort of negligent supervision exists as an independent cause of action against an employer in Missouri, and then decided that its application against the church in this case violated the First Amend-

remarked in his famous article, The Path of the Law:

[a] decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self evident, no matter how ready we may be to accept it.

Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 466 (1897). The Swanson decision represents the type of law that is open to reconsideration due to changes within the public mind; it should be overruled to reflect current public opinion regarding the need to protect society from church scandal.

139. See supra Part III.B.
140. See supra Part III.B.
142. Id. at 454-55.
143. Id. at 456.
144. 952 S.W.2d 239 (Mo. 1997).
145. Id. at 243.
Accordingly, before the Gibson court ruled on the First Amendment issue, it made certain the issue was timely and necessary. This is the approach Justice Lipez recommended in the Swanson case, avoiding the constitutional issue and saving that issue for when it was more appropriately timed. Unfortunately, Lipez was in the minority on the Law Court that day. A new day has come, however, and with it, a new understanding of the harms that can arise when a religious organization turns a blind eye to how its clergy are conducting themselves.

In sum, the doctrine of stare decisis cannot justify upholding the flawed Swanson decision. Society's understanding of the facts surrounding the case has changed so significantly that it's doctrinal underpinnings have been undermined and it should be overruled in the interest of adhering to changing views and norms.

VI. CONCLUSION

The Law Court assumed for the sake of its ruling that negligent supervision is a valid cause of action, and therefore ruled on the constitutional issue without first deciding whether the tort of negligent supervision even exists in Maine. Now, seven years later, the Law Court still has not answered this, and the Court has avoided reaching Swanson's constitutional ruling by continuing to dodge the negligent supervision question. When the next appropriate case arises, the Law Court should decide, once and for all, if a cause of action exists against an employer for negligent supervision of its employees. Indeed, when the Law Court is ready to recognize the tort of negligent supervision, as it has been recognized in most other states, the tort will ultimately need to be reexamined in the context of a church, thereby presenting an opportunity to overrule Swanson when a similar case inevitably arises. Maine should seize this opportunity. At the very least, the Law Court should clarify negligent supervision principles in general employer/employee contexts. Maine courts could then reach the balancing of interests test, which was briefly referred to in Swanson, when negligent supervision claims arise against churches under fact situations that differ from the facts in Swanson. Given a proper balancing test in a case involving a clergy member's known sexual abuse of a child, for example, Swanson's broad constitutional protection of religious interests may well be outweighed by society's interests in protecting the welfare of children.

Because of the significant changes in public opinion and legal doctrine since the Swanson case was decided, the seven-year-old constitutional ruling is a perfect example of questionable judicially-made law that need not be upheld, even in light of strong adherence to the doctrine of stare decisis. Other courts have already responded to these realities and have declined to apply the First Amendment principles in Swanson. Instead, churches are being held liable for negligent supervision of their clergy when church officials fail to protect third parties from known

146. Id. at 247-48.
147. Id.
149. See id.
risks. In the interest of protecting society from the widespread sexual abuse within churches, Maine must also take on the judicial responsibility of making churches accountable for their negligence in failing to supervise dangerous clergy members. The Law Court can no longer allow the Swanson decision to stand in the way of this responsibility.

Sonia J. Buck