

## SURVIVING EXEMPTION: SHOULD THE CHURCH EXEMPTION TO ERISA<sup>1</sup> STILL BE IN EFFECT?

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*As a result of the current sexual abuse scandal in the Roman Catholic Church, financial difficulties have arisen in dioceses across the country. There is the possibility that the mounting costs of legal fees and compensation paid to sexual abuse victims will leave the Church with insufficient funds to finance pension plans for clergy and lay workers. In this note, Timothy Liam Epstein examines the Church's exemption to ERISA's minimum funding requirement for pension plans, in light of its current financial crisis. He explores the climate in which ERISA was enacted and whether, given the recent scandal and related financial difficulties, the Church exemption should stand. Mr. Epstein notes that, due to the potential costs involved for an already financially burdened institution, now may not be the most appropriate time to challenge the Church exemption, but that the question has arisen for just that*

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The author would like to thank his late great-aunts Edith and Sr. Dorothy Franklin, RSCJ, for inspiring him to write this note, and the good men of the Society of Jesus for his own spiritual and intellectual formation. AMDG.

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1. 29 U.S.C. § 1001(a) (2000). ERISA stands for the Employee Retirement Income Security Program, which focuses on benefit plans and the “lack of . . . adequate safeguards concerning their operation . . . [and] that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans.” *Id.*

reason—if ERISA provides no protection, there may be no pension funds for retiring lay workers and clergy. Additionally, Mr. Epstein suggests that it is difficult to prove the existence of an actual threat to the pensions due to the lack of reporting required of the Church by the Internal Revenue Service and because many Church financial records are sealed. Mr. Epstein concludes that without ERISA's protection, the threat will not be fully realized until it is upon the Church and its employees.

Cardinal Joseph Bernadin of Chicago, head of the second largest Catholic diocese in the country, meets members of the news media for what will be his best-remembered and most widely chronicled public appearance of the year. The subject is child sexual abuse by his priests. He announces the results of an eight-month review of the problem in his diocese, saying thirty-four priests over four decades have engaged in sexual misconduct with minors. He announces a toll-free number for complaints about sexually abusive priests. What he doesn't announce is that dealing with the public alarm over sexually abusive priests is now taking up nearly a quarter of his work time. At moments, it has reduced him to tears. And it is costing his diocese millions of dollars in legal fees, lawsuit settlements and psychiatric bills. Some priests in the Chicago area are beginning to express doubts—only half-jokingly—that there will be pension funds left for them when they retire.<sup>2</sup>

The question of the religious exemption to the Employee Retirement Income Security Program, commonly known as ERISA, is particularly appropriate now in light of the current sexual abuse scandal in the Roman Catholic Church (the Church).<sup>3</sup> If the retirement funds are not separated, or protected in some way, there is the possibility that reparations paid to sexual abuse victims will drain retirement funds, either directly or indirectly, in ways such as the sale of real estate,<sup>4</sup> of which rent monies may have been feeding the

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2. ELINOR BURKETT & FRANK BRUNI, A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE AND THE CATHOLIC CHURCH 201 (1993).

3. See generally JASON BERRY, LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN (2000); BLESS ME FATHER FOR I HAVE SINNED: PERSPECTIVES ON SEXUAL ABUSE COMMITTED BY ROMAN CATHOLIC PRIESTS (Thomas G. Plante ed., 1999) [hereinafter BLESS ME]; INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (2002).

4. Real estate is, arguably, the greatest material asset of the Church. See PHILIP JENKINS, PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS 129 (1996). "In 1984 the Chicago archdiocese alone reported assets of \$2.3 billion in real estate and securities, the New York archdiocese, \$1.2 billion – and these figures do not include property of colleges, hospitals, and religious orders located in those metropolitan areas." *Id.* "[T]he institutional continuity of the church depended on the maintenance of its property . . ." *Id.* at 134.

retirement coffers.<sup>5</sup> Further, as a result of the financial crises that have arisen in dioceses across the United States, bankruptcies also implicate retirement funds not held in trust.<sup>6</sup> It must be noted that church plans are not just for the clergy and orders, but lay workers in churches and associated projects, as well, although many dioceses and orders have separate plans within.<sup>7</sup> In *Walz v. Tax Commission of New York City*, the U.S. Supreme Court held that “[f]ew concepts are more deeply embedded in the fabric of our national life . . . than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.”<sup>8</sup> The American tradition for religious exemption runs deep, but the concept has remained largely unquestioned.<sup>9</sup> Maybe in light of the recent crisis in the Church, that exemption should be questioned.

This note will first discuss the ERISA statute and its enactment, focusing on the climate in which one of the most significant laws in this country came to fruition. Second, the note will define the Church’s exemption to ERISA coverage. Then, the note will explore how the current sexual abuse problem has put the Church in what many have regarded as a financial crisis. Finally, this note will explore whether ERISA’s exemption for the Church should stand in light of the recent scandal and accompanying financial difficulties the Church is experiencing.

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5. The dramatic aging of the clergy must be kept in mind when discussing monies devoted towards those priests “retiring,” or rather, leaving active service to a community. “The median age for the 46,041 U.S. Catholic priests today is 60. That number inevitably will creep higher as the priest population continues to grow older and the number of newly ordained fails to keep pace with the number of priests who die or resign.” John Monczunski, *The Priesthood in Peril*, NOTRE DAME MAG., Autumn 2002, available at <http://www.nd.edu/~ndmag/au2002/priests.html>.

6. Although some have threatened and others have sought advice about it, there is no record of bankruptcy by any diocese. See Walter V. Robinson & Stephen Kurkjian, *Archdiocese Weighs Bankruptcy Filing: Facing Lawsuits, Cardinal’s Aides Urge Chapter 11*, BOSTON GLOBE, Dec. 1, 2002, at A1; Victor L. Simpson, Associated Press, *Sex Abuse Claims Putting Financial Pressure on Church, but Vatican Doesn’t Bail Out Dioceses* (Dec. 11, 2002), <http://www.poynter.org/dg.lts/id.46/aid.13073/column.htm>. It may still be inferred, however, that if there was no protection of retirement monies through a trust, those monies could be seized by creditors.

7. 29 U.S.C. § 1002(33)(C)(ii) (2000).

8. 397 U.S. 664, 676–77 (1970).

9. “Legal scholarship on church plans is not prolific.” Alison M. Sulentic, *What Catholic Social Teaching Says to Catholic Sponsors of Church Plans*, 17 J. CONTEMP. HEALTH L. & POL’Y 1, 4 n.17 (2000).

For purposes of brevity and clarity, as well as current world attention on the Church, this note will focus on the Roman Catholic Church, while acknowledging that abuses and malfeasance occur in other organized religions as well.<sup>10</sup>

## I. Retirement Plans for the Church

### A. The Enactment of ERISA

“A pension is not a gift from the employer. It has become universally recognized by employers, by workers, and by unions that pension benefits are part of an employee’s compensation. It is the other half of the paycheck.”<sup>11</sup> In the congressional debates concerning ERISA, Representative Dominick Daniels (D-NJ) expressed his support for ERISA not as a regulation of an employment gratuity, but as a protection of property.<sup>12</sup> ERISA was enacted to protect pensions that were being funded by employees against the elimination or severe reduction in retirement benefits as a result of mismanaged funds, bad investments, inadequate funding, plant closures, market changes, company purchases and mergers, bankruptcies, and fraud.<sup>13</sup> In one well-publicized instance, the employer, Studebaker of South Bend, Indiana, simply was not funding pensions at all, despite telling employees that the funds were present.<sup>14</sup> Unfortunately, the Studebaker plant closure and subsequent pension plan termination were not anomalies.<sup>15</sup> A joint study by the Labor and Treasury Departments revealed that in 1972, 1227 plans were terminated at a loss of \$49 mil-

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10. The following is a list of websites devoted to abuse victims of various non-Catholic religious workers: <http://www.eskimo.com/~tlotus/ari.html> (Eastern spiritual teachers); <http://hidingbehind.home.att.net> (Episcopalian clergy); <http://www.pokrov.org> (Orthodox Church); <http://www.silentlambs.org> (Jehovah’s Witness); <http://www.theawarenesscenter.org> (Judaism); <http://www.childpro.org> (Mormon).

11. 120 CONG. REC. 29,214 (1974).

12. *Id.*

13. *Id.* at 4277, 4315, 29,211.

14. *See id.* at 4310, 4443 (explaining that Studebaker closed in 1964, with pension plan terminations following).

15. *Id.* at 4445 (stating that workers with less than thirty years of experience at General Steel and American Zinc plants in Illinois lost their entire contributions and their jobs, with many too old to find other employment, and others too young for Social Security benefits); *id.* at 4446 (describing similar situations with Westinghouse and Perkins Machine and Gear Co. plant closings); *id.* at 29,213 (discussing one of Detroit’s major newspaper’s shut down in 1960, which resulted in a lump-sum payment of merely \$160 for its more than 400 employees).

lion to 19,400 plan participants<sup>16</sup> (or 42,000 claimants when including beneficiaries).<sup>17</sup> The average loss was \$2,500 per individual.<sup>18</sup> Social Security alone could not cover the need<sup>19</sup> of those who found “disappointment [of their retirement expectations] . . . after a long and fruitful life of toil.”<sup>20</sup>

Until ERISA, private pension plans were characterized by Representative Patricia Schroeder (D-Colo.) as having “gross deficiencies in organization and gross inequities in distribution of benefits.”<sup>21</sup> “For too long we [Congress] have permitted tragedies in which the hope of a pension becomes a broken promise.”<sup>22</sup> Existing state and federal laws were ineffective in preventing most of the problems associated with private pensions.<sup>23</sup> By 1974, the year of ERISA’s enactment, 36 million American workers were participating in some type of pension or retirement plan.<sup>24</sup> From 1940 until 1970, the number of pension plan participants had nearly doubled every ten years, with combined pension resources in 1974 totaling more than \$150 billion, then annually increasing at a rate of \$10 billion.<sup>25</sup>

A special task force was assembled by the Ninety-second Congress to study all aspects of private pension plans, from fiduciary re-

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16. *Id.* at 4443.

17. *Id.* at 4445.

18. *Id.* at 4310.

19. *Id.* at 29,210.

20. *Id.* at 4308.

21. *Id.* at 4444.

22. *Id.*

23. *Id.* at 29,932. This is an important point here because one potential argument against the need of having ERISA coverage for church plans is that state contract and tort law provide adequate remedies, but ERISA was enacted because the protection afforded by the states was simply not enough. *Id.*

24. *Id.* at 4277, 4446.

25. *Id.* at 4277; *see also id.* at 4306, 4310, 4315, 4442–46. Representative Melvin Price (D-Ill.) and Representative Hugh L. Carey (D-N.Y.) suggested that the number of Americans covered by private pensions would reach 42 million by 1980, with assets exceeding \$225 billion. *Id.* at 4445–46. President Ford’s figures appeared to vary as evidenced by his statement at the bill’s signing on September 2, 1974. Statement by the President upon Signing the Employee Retirement Income Security Act of 1974, 10 WKLY. COMP. PRES. DOC. 1084 (Sept. 2, 1974).

From 1960 to 1970, private pension coverage increased from 21.2 million employees to approximately 30 million workers. During this same period, assets of these private plans increased from \$52 billion to \$138 billion. And they are now increasing at a rate of \$12–15 billion a year. It will not be long before such assets become the largest source of capital in our economy.

*Id.*

sponsibility and beneficiary insurance to funding and vesting.<sup>26</sup> From the task force, the work of pushing through what was described as “the most significant legislation to emerge from Congress in recent years”<sup>27</sup> rested with four congressional committees: House Education and Labor, House Ways and Means, Senate Finance, and Senate Labor and Public Welfare.<sup>28</sup>

ERISA was not designed to mandate employers to set up private pension plans, but to provide “improved Federal standards” to a system that was viewed as being on the verge of collapse and to reduce the negative effects of bankruptcies and fund mismanagement on pension plans.<sup>29</sup> Congress’s solution was two-fold: (1) employers are required to “make payments toward the principal of the unfunded accrued liabilities” of private pension plans; and (2) insurance policies are set up to protect the pension accounts from bankruptcy.<sup>30</sup> ERISA’s supporters believed the bill would “transform what has been up to now an amalgam of giant lotteries into a sensible, standardized, supervised plan of retirement income for older persons in America.”<sup>31</sup>

On Labor Day, September 2, 1974, President Ford signed the Pension Reform Bill into law, to “alleviate the fears and the anxiety of people who are on the production lines or in the mines or elsewhere”<sup>32</sup> and “to bring some order and humanity into this welter of different and sometimes inequitable retirement plans within private

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26. 120 CONG. REC. 4278 (1974).

27. *Id.* at 4310; *see also id.* at 4442 (characterizing the proposed legislation as “clearly one of the most important bills which will reach this floor for consideration this year”); *id.* (predicting “far-reaching and lasting effects upon the lives of many Americans”); *id.* at 4444 (“[L]egislation to protect private pension plans is long overdue. It is perhaps our most important piece of unfinished business.”); *id.* at 29,961 (describing the legislation as “one of the most significant pieces of social legislation to pass the Congress since the 1930’s”).

28. President’s Remarks at the Bill Signing Ceremony at the White House, 10 WKLY. COMP. PRES. DOC. 1084 (Sept. 2, 1974).

29. 120 CONG. REC. 4278 (1974). “By establishing minimum standards we [Congress] hope to prevent pension plan failures and thereby avoid the consequential calamity suffered by innocent victims.” *Id.* at 29,959.

30. *Id.* at 4315. The fiduciary requirements of ERISA work directly to curb the “human” abuse of pension plans, defending against misappropriation and malfeasance of funds. *Id.* at 29,932. “The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.” *Id.*

31. *Id.* at 4444.

32. President’s Remarks at the Bill Signing Ceremony at the White House, 10 WKLY. COMP. PRES. DOC. 1084 (Sept. 2, 1974).

industry.”<sup>33</sup> Although excited about the protection being offered by the bill, many regarded ERISA as just a step to increase protection of retirement assets—a foundation for future work.<sup>34</sup> As of 1974, about one-half of the employees in private employment did not have pension benefits.<sup>35</sup> However, extending pension benefits to workers who did not already have retirement accounts was not among the purposes of the act.<sup>36</sup> Many members of Congress regarded ERISA as a step or foundation, not the “end-all be-all” for existing pension plans.<sup>37</sup> Senator Richard S. Schweiker (R-Penn.) stated during the debates on August 22, 1974, “I want to emphasize that this legislation is not the end of the road . . . I would urge my colleagues not to forget pension reform, simply because we are passing the bill today.”<sup>38</sup> Members of the House, including Representative Edward George Biester (R-Penn.), echoed Senator Schweiker’s concerns:

While I support the bill now before us as a considerable improvement over the present approach, I feel it could be stronger in the protection it affords the American worker covered by its provisions. Although this measure is not a final answer to the problems of the private pension plan system, once it is enacted and we have the opportunity to observe its impact over a period of time we will be in a position to evaluate its effects and then recommend whatever changes may be warranted.<sup>39</sup>

ERISA would be revisited, as suggested by Representative Biester, after its passing in 1974.<sup>40</sup>

Over the past twenty-eight years, however, one area has lacked consideration for amendment: the church exemption. The church exemption to ERISA was brought up during the committee meetings

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33. Statement by the President upon Signing the Employee Retirement Income Security Act of 1974, 10 WKLY. COMP. PRES. DOC. 1085 (Sept. 2, 1974).

34. 120 CONG. REC. 4315, 29,210, 29,213, 29,214 (1974).

35. *Id.* at 4310.

36. This prompted activists like Ralph Nader to declare ERISA to be “a terrible disappointment.” *Id.* at 29,196. Some members of Congress, including Representative Michael Joseph Harrington (D-Mass.), did acknowledge this as a fault of the bill: “A final criticism is the insufficient motivation for companies to establish new pension plans.” *Id.* at 29,214.

37. *Id.* at 4445, 4446, 29,196, 29,211, 29,961.

38. *Id.* at 29,961; *id.* at 4445 (stating that the bill “represent[s] only a beginning in solving some of the problems in our private pension system”); *id.* at 4446 (“The bill certainly does not represent nor promise utopia.”) *id.* at 29,196; (“not convinced that the provisions contained in our conference report are the penultimate solution to all the problems of retirement security for our work force”); *id.* at 29,211 (acknowledging that the proposed legislation is “not a perfect bill”).

39. *Id.* at 4444.

40. See generally ERISA: SELECTED LEGISLATIVE HISTORY 1974–1986 (1988).

and floor debates in the Senate and House, but each time, the “exemption” was simply a passing reference, with no actual discussion of why the exemption existed.<sup>41</sup> An interesting dichotomy exists here between government and church plans. There is a significant discussion in the *Congressional Record* as to why government plans are exempt, with discussion immediately following the mention of church plans and government plans both being exempt.<sup>42</sup> Yet, no reasoning or justification is given as to why church plans are also exempt. “The committee exempted Government plans from the new higher requirements because adequate information is not now available to permit a full understanding of the impact these new requirements would have on Government plans.”<sup>43</sup> It would seem to be too much of a jump to assume the same reasons for exemption would also apply to church plans, but Congress has given no hints as to their intent here. Similarly, it was argued that “public employees should be afforded at least as much protection and given equal consideration in our tax laws as those workers in the private sector.”<sup>44</sup> Church employees would seem to be able to adopt a similar argument, but no representative or senator spoke of such a protection in the *Congressional Record*.

In support of ERISA, Representative Herman T. Schneebeli (R-Penn.) acknowledged that he and his fellow Congressmen would be “busy for many years attacking those [uncontemplated] problems.”<sup>45</sup> Unfortunately, recent financial problems with religious organizations were not contemplated by the Ninety-second and Ninety-third Congresses.

## B. The Church Plan Exception

Under section 1003(b) of ERISA, the scope of its coverage is limited by certain exemptions, including one for churches.<sup>46</sup> “The provisions of this subchapter shall not apply to any employee benefit plan if . . . (2) such plan is a church plan (as defined in section 1002(33) of

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41. 120 CONG. REC. 29,204 (1974); *id.* at 29,201 (mentioning only tax-exempt institution, not “church”).

42. *Id.* at 29,201.

43. *Id.* at 4296.

44. *Id.* at 4306.

45. *Id.* at 29,196.

46. 29 U.S.C. § 1003(b) (2000).



this title) with respect to which no election has been made under section 410(d) of Title 26.”<sup>47</sup>

Section 1002 of ERISA provides definitions important for understanding the specific applications of the act to church plans.<sup>48</sup> A “church plan” is a plan set up by a church, or an association of churches, like the Southern Baptist Convention, that qualifies as a tax-exempt charitable organization.<sup>49</sup> The broad definition of a “church plan” is limited, however, by the next subsection, which states that plans established to benefit employees and their beneficiaries who work in unrelated trades, such as maintenance workers who only service church properties a fraction of the time, will not be included in the definition of church plans if less than the majority of the beneficiaries are found to not have a church as their primary employer.<sup>50</sup> A church plan is one that while being “established and maintained” by a church for its employees, also includes a plan that is maintained and administered by a third-party corporation or partnership if the third party holds as its “principle purpose” the maintenance of the church plan for pension benefits of the church beneficiaries, so long as the church or group of churches remains the principal.<sup>51</sup>

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47. *Id.* § 1003. “To exempt churches, one must know what a church is.” *De La Salle Inst. v. United States*, 195 F. Supp. 891, 903 (N.D. Cal. 1961). In 1978, the Internal Revenue Service (IRS) laid out fourteen possible criteria to be followed in determining whether an organization was in fact a “church,” of which the Church satisfies all criteria. See Wendy Gerzog Shaller, *Churches and Their Envoiable Tax Status*, 51 U. PITT. L. REV. 345, 353 (1990) (citing Jerome Kurtz, Address at P.L.I. Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), reprinted in PRENTICE-HALL FED. TAXES ¶ 54, 820 (Prentice-Hall 1978)).

48. 29 U.S.C. § 1002 (2000).

49. *Id.* § 1002(33)(A); see also *Duckett v. Blue Cross & Blue Shield of Ala.*, 75 F. Supp. 2d 1310 (M.D. Ala. 1999) (having the name “Baptist” in the employer’s title did not generate church plan exemption under ERISA); *Friend v. Ancillia Sys. Inc.*, 68 F. Supp. 2d 969, 972 (N.D. Ill. 1999) (using the following factors submitted in opinion letters by the Department of Labor in determination of church plan: (1) who controls the entities sponsoring the plan, (2) if the operation furthers the goals of the church or order, (3) if the entity is listed in a religious directory, (4) if the organization is a non-profit under § 501(c)(3) of the Internal Revenue Code, and (5) if members of the order or church sit on the board of directors). See section 501(c)(3) of the Internal Revenue Code for what qualifies as a tax-exempt non-profit organization. I.R.C. § 501(c)(3) (West 2003).

50. 29 U.S.C. § 1002(33)(B).

51. *Id.* § 1002(33)(C)(i). “An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.” *Id.* § 1002(33)(C)(iv). Church schools and hospitals are likely to qualify as an associate organization. JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONFERENCE ON ERISA, 93D CONG., reprinted in ERISA: SELECTED LEGISLATIVE HISTORY 1974–1986 6 (1988). “[A] church-run college or hospital may

To receive a pension from a church plan, one must first be an employee of a church.<sup>52</sup> For purposes of ERISA, a “church employee” includes: (1) a working minister (ordained, commissioned, or licensed), regardless of how he or she is compensated; (2) an employee of a tax-exempt organization as defined by section 501(c)(3) of the Internal Revenue Code (I.R.C.) that is associated with or controlled by a church or group of churches, like a mission or a school; and (3) those who have since separated themselves from the service of the church or church association and stand to receive pension benefits.<sup>53</sup>

Churches can lose the exemption from ERISA coverage in two ways: (1) the church may fail to meet a requirement outlined in the exemption to the Act;<sup>54</sup> or (2) the church may elect ERISA coverage,<sup>55</sup> which once taken is irrevocable.<sup>56</sup>

The “church plan election” . . . offers the occasion for sponsors of eligible plans to judge whether the civil legislation governing employee benefits adequately comports with the obligations prescribed by their religious missions. It is, of course, possible that

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fit within this definition, if supported by facts . . .” Gary Q. Cvach et al., *Exempt Organizations: Distinguishing Church Plans Under ERISA and the Code*, TAX ADVISER, June 1996, at 338, 338. “A number of letter rulings have noted that the definition of church plan includes church-run hospitals, retirement homes and other such facilities.” *Id.*

52. 29 U.S.C. § 1002(33)(C).

53. *Id.* § 1002(33)(C)(ii).

54. *Id.* § 1002(33)(D)(i)–(ii).

(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the corrections period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

*Id.*

55. I.R.C. § 410(d)(1) (West 2003).

If the church or convention or association of churches which maintains any church plan makes an election under this subsection (in such form and manner as the Secretary may by regulations prescribe), then the provisions of this title relating to participation, vesting, funding, etc. (as in effect from time to time) shall apply to such church plan as if such provisions did not contain an exclusion for church plans.

*Id.*

56. *Id.* § 410(d)(2). “An election under this subsection with respect to any church plan shall be binding with respect to such plan, and once made, shall be irrevocable.” *Id.*

such a decision might be based solely on the estimated impact of ERISA compliance on the employer's balance sheet.<sup>57</sup>

### C. Reasoning Behind the Church Plan Exemption

As previously stated, no reasoning appears in the *Congressional Record* regarding why churches are exempted from ERISA coverage.<sup>58</sup> Some theories are possible upon analysis of how the legislature has traditionally treated religious institutions, as well as the reasoning behind the enactment of ERISA to meet the needs of minimum funding and joint-trusted plans.<sup>59</sup>

“Historically, Congress has preferred churches over other tax exempt organizations and has excepted them from many substantive and procedural requirements.”<sup>60</sup> Churches have no constitutional right to exemption from civil law,<sup>61</sup> yet Congress and individual states have traditionally afforded churches protections not given to other organizations, even other non-profit and tax-exempt organizations.<sup>62</sup> Churches are not bound to the same notification rules as other non-profits under section 501(c)(3) of the I.R.C.<sup>63</sup> Churches need not make any proof of their status, as it is presumed unless they file contrary

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57. Sulentic, *supra* note 9, at 5.

58. The other exempt plans were those of the government, with the reasoning given that there was not a qualified understanding of the possible impact that the federal requirements would have on government plan funds or membership. See 120 CONG. REC. 4296 (1974).

59. E-mail from Matthew Justin Vance, ErisaAdvisoryOpinions.com, to Timothy Liam Epstein, law student, University of Illinois College of Law (Feb. 3, 2003, 12:26:00 EST) [hereinafter Vance] (on file with author).

60. Shaller, *supra* note 47, at 355; see also *id.* at 355 n.64 (listing various church exemptions).

61. Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 915–48 (1992).

[E]vidence does not support the position that . . . [there is] a general constitutional right of religious exemption. Moreover, that various state statutes (or even constitutions) expressly granted religious exemptions from military service and other specified civil obligations hardly suggests that such exemptions were rights under the United States Constitution—let alone that a general religious exemption from civil law was a right under any American constitution.

*Id.* at 948.

62. Generally, churches have been exempted from procedural requirements like disclosure of assets and filing because these requirements were thought to be ineffective in tax-law administration. Shaller, *supra* note 47, at 356. Additionally, some might argue that the church has enjoyed congressional exception to certain tax and retirement plan requirements because of the “historical and special economic relationship between the church and its clergy.” *Id.*

63. *Id.* at 357.

evidence.<sup>64</sup> The First Amendment of the U.S. Constitution also prohibits legal action that concerns religious questions such as ecclesiastical law, scriptural interpretation, and theological doctrine.<sup>65</sup>

Traditionally, tort suits against the clergy for abuse of children were barred under the First Amendment by the majority of the judiciary.<sup>66</sup> The traditional holding is that these suits fall under the prohibition of adjudication of resolution of religious questions.<sup>67</sup> This principle has been challenged of late, however, with great success due to a growing public sympathy for the victims of abuse, a building lack of respect for the Church hierarchy, and what some believe to be, “an undervaluation of the First Amendment concerns at stake.”<sup>68</sup> Despite the waning power of the First Amendment with regards to exemption from tort for churches, it is possible that the traditional exemption from civil liability was a motivating factor in giving unquestioned exemption to churches from ERISA protection.<sup>69</sup> As the judiciary traditionally was unwilling to intervene when employees of churches committed torts against third parties, Congress was unlikely to go even further into church affairs by directing how church employee benefits should be regulated.

Another reason for exemption may be that churches were not seen as part of the pension plan crisis that was contemporary with ERISA’s enactment. In the years leading up to the enactment of ERISA, there were few or no requirements by states to have corporations provide minimum funding to the pension plans of employees.<sup>70</sup> One case from the House debates on ERISA tells of the manager of a laundry in Brooklyn, New York, who used the retirement fund of his employees as collateral for a personal loan.<sup>71</sup> Following bankruptcy, the workers not only received no paychecks or severance, but lost their pension, as well.<sup>72</sup> Another case describes employees having

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64. *Id.* The IRS is further restricted as to what examinations and inquiries it may make into church finances and status. *Id.* at 358.

65. Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 220–23 (2000). “The bias in favor of churches has been explained as necessary to ensure the constitutionally-required separation between church and state.” Shaller, *supra* note 47, at 355–56.

66. Idleman, *supra* note 65, at 219.

67. *Id.*

68. *Id.*

69. Vance, *supra* note 59.

70. *Id.*

71. 120 CONG. REC. 4278 (1974).

72. *Id.*

their pension benefits cut off when the owner sold the business to another company that “felt no obligation in his behalf, and apparently had no legal obligation” to continue paying pension benefits.<sup>73</sup> At the time of ERISA’s enactment, the idea of a church “going under” might not have appeared in the realm of possibility to the legislature, nor would consolidation of orders. Absent such risks, there would be no need to establish minimum funding requirements for church plans, thus no need for churches to be covered by ERISA.<sup>74</sup> Unfortunately, dioceses of the Church in the United States, most notably the Archdiocese of Boston, are seeking or discussing declaration of bankruptcy due in part to the financial stress of settlements and damage awards from the sexual abuse scandal.<sup>75</sup> Further, consolidation of religious orders between provinces and between distinct orders is also taking place, as a result of costs and the lack of new participants in religious life.<sup>76</sup> “Pension plans are another area that needs careful attention when provinces or orders merge. There are complex issues involved when orders or provinces have different types of retirement plans. Such issues must be resolved before the entities come together.”<sup>77</sup>

Finally, Congress may not have taken heed of a possible need to have federal protection of church plans because one of the reasons the legislators stepped into the arena of private pension plans was to curb abuses of unions and management in funding and maintenance of joint-trusted plans.<sup>78</sup> As there is little to no union membership within church organizations, the concern of minimum funding taking place by both unions and employers would appear to be a non-issue.<sup>79</sup>

In the legislative history of ERISA, there is no explicit mention of any particular reasons for a church exemption to federal pension protection under the Act.<sup>80</sup> One can only guess that the traditional exemptions that the Church held (partly under the First Amendment), as

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73. *Id.* at 4277–78.

74. Vance, *supra* note 59.

75. Robinson & Kurkjian, *supra* note 6; Simpson, *supra* note 6.

76. *News You Can Use: Legal Issues Challenge Non-Profit, Religious Organizations*, NON-PROFIT UPDATE (Burke, Warren, MacKay & Serritella, P.C., Chicago, Ill.), Mar. 1999, at 3, <http://www.burkelaw.com/library/mar99.pdf>.

77. *Id.* at 3–4.

78. Vance, *supra* note 59.

79. *Id.*

80. See 120 CONG. REC. 29,201 (1974) (mentioning only tax-exempt institution, not church).

well as churches not fitting into the model of employers that Congress had in mind, contributed to the granting of such an exemption.

#### D. Actual Church Plans

“The [Roman] Catholic Church, the largest religious organization in the United States, is four times larger than the next largest religious denomination.”<sup>81</sup> Every diocese in the United States, as well as every distinct order of nuns, brothers, priests, and monks, is financially separate.<sup>82</sup> Further, although the relationship between the Vatican and the dioceses in the United States is strong, the Holy See and the “American flock” are financially distinct for purposes of providing retirement benefits for clergy and lay workers.<sup>83</sup> One might also argue that, for a time, the U.S. government cut “financial” ties with the American religious, as up until 1972, working religious were excluded from Social Security.<sup>84</sup>

“Canon law stipulates that the diocesan bishop must provide suitable support and housing for all clergy upon their retirement from active service.”<sup>85</sup> For the American Church, the United States Conference of Catholic Bishops (USCCB) has provided a template for dioceses to follow in order to comply with this rule of Canon, or Church law.<sup>86</sup> However, it is important to note that the recommendations of the USCCB in regards to clergy retirement are not binding, as each diocese is financially separate from any national body, as well as the Vatican.<sup>87</sup> As a result, dioceses implement various retirement programs; some have defined contribution plans, while others have annu-

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81. Sylvia M. Demarest, *Foreword* to BLESS ME, *supra* note 3, at ix, x. In 1996, Fr. Thomas Doyle put the number of U.S. Catholics at 59 million, of which 50,000 were priests (including active and retired), 344 were bishops, 45 were archbishops, and 11 were cardinals. Memorandum from Thomas Doyle, O.P., J.C.D., to Sylvia Demarest 20 (May 16, 1996), <http://www.theharrowing.com/doyle.html>.

82. U.S. CONFERENCE OF CATHOLIC BISHOPS, FINANCE/ACCOUNTING: DIOCESAN FINANCIAL REPORTING, at <http://www.usccb.org/finance/dfr.htm> (Sept. 25, 2003).

83. See Simpson, *supra* note 6.

84. NAT'L RELIGIOUS RETIREMENT OFFICE, RETIREMENT FUND FOR RELIGIOUS, <http://www.usccb.org/nrro/english%20bulletin.pdf> (last visited Nov. 11, 2003).

85. U.S. CONFERENCE OF CATHOLIC BISHOPS, COMPENSATION OF PRIESTS: PENSION AND OTHER POST-RETIREMENT BENEFITS, at <http://www.usccb.org/bishops/dfi/pension.htm> (June 3, 2003) [hereinafter BISHOPS].

86. *Id.* Benefit plans do not have to be written out, and may be accounted for on a “pay-as-you-go (cash) basis.” *Id.*

87. *Id.*

ity-like plans.<sup>88</sup> Whatever their plan, dioceses are bound by the Gospel and Canon Law to provide financial benefits to their retirees.<sup>89</sup>

As each diocese is different, an inquiry into what the Church actually does for retirees is best done at the local level. For purposes of scale, this note will focus on the Archdioceses of Chicago and Boston, the Order of the Sacred Heart, and the Society of Jesus (the Jesuits).

In Chicago, the Archdiocese bills individual parishes what it is owed in a given time period for certain archdiocesan expenses, including contributions to the general pension fund.<sup>90</sup> Certain funds from the parishes are then allocated to the pension fund, where they are kept separate from other general funds.<sup>91</sup> The Archdiocese of Chicago (Chicago) believes that this not only makes “good business sense,” but it is “the right thing to do by the employees of the Archdiocese . . . and is good for the reputation of the Church.”<sup>92</sup> Chicago has no insurance of their pension fund, as there is no perceived threat of bankruptcy or challenge to the pension funds.<sup>93</sup> Chicago does maintain a fiduciary liability insurance policy in case of claims of breach of fiduciary duty by a beneficiary to a pension plan, which would cover legal fees and possible damages from such a claim.<sup>94</sup>

The Jesuits, one of the largest religious orders of the Church, is divided into ten provinces within the United States;<sup>95</sup> each province provides its own separate retirement plan.<sup>96</sup> The additional vows of poverty and obedience that the Jesuits take distinguish them from diocesan clergy who only take the vow of chastity.<sup>97</sup> The Jesuits do not have individual monies, but rather live communally, including their retirement funds.

In the Chicago Province of the Society of Jesus (the Chicago Province), the Jesuits have a “community support plan” for their men

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88. *Id.*

89. *Id.*

90. Telephone Interview with Matthew Kaminski, Risk Manager, Archdiocese of Chicago (Feb. 25, 2003).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. SOCIETY OF JESUS, WHO ARE THE JESUITS, NUMBERS, at [http://www.jesuit.org/sections/default.asp?SECTION\\_ID=187&SUBSECTION\\_ID=216](http://www.jesuit.org/sections/default.asp?SECTION_ID=187&SUBSECTION_ID=216) (last visited Sept. 14, 2003). On January 1, 2003, there were 20,408 Jesuits worldwide. *Id.*

96. Telephone Interview with Fr. Francis Cluff, Assistant Treasurer, Society of Jesus, New England Province (Feb. 25, 2003).

97. *Id.*

that are over seventy years of age, which allows the Province to give support to individual communities.<sup>98</sup> When a community can no longer provide adequate care for one of their members, the brother or father is transferred to their home in Clarkston, Michigan.<sup>99</sup> The costs for the home, which basically functions as a nursing home, are split between the Chicago Province and the Detroit Province.<sup>100</sup> The Chicago and Detroit Provinces budget for the home based on the number of individuals present, with recalculation taking place following the death of a community member.<sup>101</sup> The state provides no funding because the facility is not licensed.<sup>102</sup>

The lay workers of the Chicago Province are covered under the Loyola University (Chicago) Employee Retirement Plan.<sup>103</sup> The Loyola plan not only covers the lay provincial workers and University workers, but the University Medical Center, St. Ignatius High School, Loyola Academy, and the Jesuit Retreat League.<sup>104</sup> No plans run by Loyola are “church plans” as defined under ERISA.<sup>105</sup> Thomas Kelly, the plan administrator for Loyola, states that the lay plans have been fairly independent of the Jesuits since their inception in 1956, but did not know why Loyola did not elect exemption after ERISA’s enactment.<sup>106</sup>

In the New England Province, the Jesuits have a “retirement community”<sup>107</sup> in Weston, Massachusetts, where elderly and infirm priests and brothers live.<sup>108</sup> Fr. Francis Cluff, S.J., the Assistant Treasurer for the New England Province, states that the clergy retirement

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98. Telephone Interview with Fr. Dan Flaherty, Treasurer, Society of Jesus, Chicago Province (Mar. 5, 2003).

99. *Id.*

100. *Id.* The Detroit Province similarly sends its “retirees” to the home in Clarkston, Michigan. *Id.*

101. *Id.*

102. *Id.*

103. Telephone Interview with Thomas Kelly, Vice President of Human Resources and Plan Administrator, Loyola University Chicago (Mar. 5, 2003); *see also* HUMAN RESOURCES, LOYOLA UNIV. CHI., LOYOLA UNIVERSITY BENEFITS OPTIONS FOR 2003, at <http://www.luc.edu/resources/hr/benefits/2003/index.shtml> (last visited Sept. 14, 2003).

104. Kelly, *supra* note 103.

105. *Id.*

106. *Id.*

107. “Retirement” takes on different connotations with the religious, as their vocation is still intact. Retirement for the religious in the Church would seem to be more of a winding down of active duties, with some doing more and some doing less in terms of their priestly, brotherly, or sisterly duties. *Id.*

108. Cluff, *supra* note 96.



fund is budgeted for, but that is not enough, so the state does help to cover the costs of the facility.<sup>109</sup> The lay workers' plan for the New England Province, though, is shared with the Archdiocese of Boston.<sup>110</sup>

In the Archdiocese of Boston, lay workers are covered under a pension plan for which they qualify with five or more years of working at least twenty-hour weeks.<sup>111</sup> The plan is based strictly on employer contributions, and is qualified under ERISA.<sup>112</sup> Clergy of the Archdiocese of Boston, on the other hand, are covered under a fund not governed by ERISA.<sup>113</sup> The fund trust for Boston priests is segregated from general funds, the investments of which are managed by an investment board led by the Chancellor of the Archdiocese.<sup>114</sup> Retirement funds are strictly based off of parish collections at Christmas Eve, Christmas Day, and Easter Sunday masses.<sup>115</sup> The normal age of retirement from active service is seventy-five, when retirees are assigned to either parish rectories or nursing homes depending on their health.<sup>116</sup>

The Society of the Sacred Heart of Jesus (RSCJ), founded by St. Madeleine Sophie Barat in 1800, has close to 3500 women working in more than 500 communities in forty-five countries, serving as educators, social workers, doctors, nurses, and lawyers, of which, 465 sisters currently work in the United States.<sup>117</sup> Teacher's Insurance and Annuity Association College Retirement Equities Fund (TIAA-CREF) administers RSCJ plans.<sup>118</sup> Originally, all workers, lay and sisters, were

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109. *Id.*

110. *Id.*

111. Telephone Interview with Cora Walker, Archdiocese of Boston, Lay Worker Benefits Department (Apr. 3, 2003).

112. *Id.*

113. Telephone Interview with Donna San Felippo, Archdiocese of Boston, Clergy Retirement Fund (Apr. 3, 2003).

114. *Id.*

115. *Id.*

116. *Id.*

117. Telephone Interview with Sr. Maureen O'Halloran, RSCJ, Treasurer, Sisters of the Sacred Heart (Mar. 10, 2003); *see also* U.S. PROVINCE, RELIGIOUS OF THE SACRED HEART, at <http://www.rscj.org> (last visited Sept. 14, 2003). RSCJ is from the French "*Relieuse du Sacre Coeur de Jesus.*" U.S. PROVINCE, RELIGIOUS OF THE SACRED HEART, ABOUT THE COMMUNITY, FAQs, at <http://www.rscj.org> (last visited Sept. 14, 2003).

118. Telephone Interview with Barbara Kiawitz, Business Manager, Woodlands Academy of the Sacred Heart, Lake Forest, Illinois (Mar. 5, 2003); *see also* TEACHER'S INS. AND ANNUITY ASS'N COLLEGE RETIREMENT EQUITIES FUND, ABOUT TIAA-CREF, at [http://www.tiaa-cref.org/a\\_company/index.html](http://www.tiaa-cref.org/a_company/index.html) (last visited Sept. 4, 2003) (providing details on TIAA-CREF).

under the same plan, but now there is some variety, though all are administered by TIAA-CREF.<sup>119</sup> If a nun worked at one of the RSCJ schools, she would receive a paycheck and subscribe to the school's qualified retirement plan with TIAA-CREF, thus rendering the plan funds segregated and invested by the third party, TIAA-CREF.<sup>120</sup> Nuns that are not employed by a school have the province directly contribute to its individual retirement account, acting as the employer.<sup>121</sup> Therefore, all RSCJ retirement plans, for lay workers and sisters, are qualified under ERISA. The retirement account of each nun is in her name and as such the individual sister has the funds directly deposited to the retirement fund, with monies going to the retirement community in Albany, New York, or the smaller community in Menlo Park, California.<sup>122</sup> Both facilities are non-licensed, but do appreciate funding through the individual retired sisters' Social Security funds, and individual medical care funding through Medicare.<sup>123</sup>

#### E. Summary of Church Plans

The Church enjoys favorable tax status, as well as an exemption from ERISA regulation, and the I.R.C. appears to mirror ERISA on this point.<sup>124</sup> Nothing in ERISA or the I.R.C. requires churches to provide retirement accounts or funds to their employees, but while ERISA completely exempts coverage for churches, the I.R.C. has requirements of certain retirement funds regardless of their exempt status.<sup>125</sup> Pertinent to this inquiry is the requirement that certain funds, including any pension fund where money is taken from an individual's pay as part of a contribution to the fund, must be trusted or separated from other general funds.<sup>126</sup> An exempted organization, like a church, may have qualified or non-qualified plans as defined by the I.R.C., with some being subject to this trust requirement.<sup>127</sup> In this case, a trusted plan under the I.R.C. avoids the problem of pension funds be-

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119. O'Halloran, *supra* note 117. A little bit more than half of those covered under the original plan of the Sacred Heart community are lay workers. *Id.*

120. See Kiawitz, *supra* note 118.

121. See O'Halloran, *supra* note 117.

122. *Id.*

123. *Id.*

124. Telephone Interview with Rudy (ID#31-01-139), Internal Revenue Service, Department of Non-Profit Entities (Feb. 25, 2003).

125. *Id.*

126. *Id.*

127. *Id.*

ing garnished in the event of a bankruptcy or lawsuit.<sup>128</sup> However, churches are able to sponsor non-qualified retirement plans where the funds are not trusted, and thus not separated from general funds, and therefore are subject to garnishment in the case of lawsuit or bankruptcy.<sup>129</sup>

The question then arises whether it is possible for a church with a non-qualified, non-trusted plan, to insure against its pensioners resulting as unsecured creditors following a bankruptcy. Two possibilities arise: annuity purchase for the individual or a “rabbi trust” for the institution.<sup>130</sup> Even if church plans do not have the liquidity to settle pension claims, it is possible that an individual could purchase an annuity from an insurance company that would cover a pension claim by that individual.<sup>131</sup> Thus, the pension claim would be paid out by an insurance company to the beneficiary regardless of the church’s financial situation.<sup>132</sup> Annuities, though, may only be held on the individual level, so institutionally, an organization may have what is known as a “rabbi trust” or a “rabbi trust with triggers,” whereby a trust is triggered by the institution for an individual once a “triggering event” occurs, like church income from donations dropping below a certain level.<sup>133</sup> Once the event occurs, there is an automatic transfer of the trust to the individual, which may be beyond the reach of creditors.<sup>134</sup> It is unclear how many orders or dioceses have these types of protections in place or if they are applicable to the retirement plans or funds of those groups.

Without such safeguards, the problem may arise where there is no money left in the unprotected retirement coffers and there is no annuity or trust to be tapped, leaving retiring participants in church plans out-of-luck, something ERISA was enacted to prevent from happening.

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128. *Id.*

129. *Id.*

130. See DAVID BINNS, FOUNDATION FOR ENTERPRISE DEV., RABBI TRUSTS, at <http://www.fed.org/onlinemag/july98/tips.html> (last visited Sept. 14, 2003).

131. Vance, *supra* note 59.

132. *Id.*

133. See AM. BENEFIT CORP., BENEFIT SECURITY, at <http://www.americanbenefit.com/benscrty.htm> (last visited Sept. 14, 2003).

134. *Id.* Although a rabbi trust is designed to protect the individual’s plan assets from all events outside of corporate bankruptcy, many cases of deferred compensation have reached their beneficiaries, despite bankruptcy of the corporation. *Id.* (citing Christopher Drew & David Cay Johnston, *Special Tax Breaks Enrich Savings of Many in the Ranks of Management*, N.Y. TIMES, Oct. 13, 1996, at 1.).

## II. The Abuse Scandal

Fr. Thomas Doyle, at a Canon Law Society meeting in 1986, exclaimed that the priest sexual abuse problem was “the most serious crisis that we in the Church have faced in centuries.”<sup>135</sup> At the time of Fr. Doyle’s statement, the American Church had an estimated value of \$200 billion.<sup>136</sup> The seriousness and amount of allegations that have surfaced in recent years created not only a crisis of faith for many Catholics, but also a potential financial crisis resulting from settlements of abuse claims.

Dr. Glen Galbard of the Menninger Clinic finds the “most striking thing” about the abuse problem with priests, specifically, is “the number who went into the profession as a way of dealing with those very impulses.”<sup>137</sup> In the mid-1980s, the St. Luke Institute in Suitland, Maryland, conducted a three-year survey of 130 priests with sexual behavior problems, of which seventy involved issues with children.<sup>138</sup> The results of the study were never reported to the laity who had contact with the “problematic” clergy.<sup>139</sup> Estimates from the Jesuit magazine, *America*, suggest six percent of the clergy have been abusive, or 2,500 priests, with an estimated 100,000 child and adolescent victims in their wake.<sup>140</sup>

The case that broke open the modern scandal was that of Fr. Gilbert Gauthe in Louisiana. The Diocese of Lafayette offered an average of \$450,000 to victims between 1983 and 1984 for damages and therapy.<sup>141</sup> Some of the victims refused the Church’s offer, went to court,

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135. JENKINS, *supra* note 4, at 37. Fr. Doyle, a canon lawyer (an attorney that practices the law of the Church), worked in the Vatican Embassy in the mid-1980s when he coauthored an infamous report to bishops on the expected loss from the priest sexual abuse scandal. BERRY, *supra* note 3, at x.

136. JENKINS, *supra* note 4, at 129.

137. BURKETT & BRUNI, *supra* note 2, at 51.

138. *Id.* at 30.

139. *Id.* Some studies suggest two percent of American priests act on a “persistent attraction to children,” with another four percent displaying “occasional, or secondary, sexual interest” in children. *Id.* at 38. Studies of Protestant clergy abuse suggest abuse at levels of two to three percent, with less media attention likely resulting from a higher level of openness in dealing with the problem than the Roman Catholic Church. *Id.* It should be noted, however, that some suggest a larger focus on what may be regarded as a proportional level of abuse with Protestant groups due to a lingering anti-Catholic slant in American society and media. See Christopher Shea, *The Last Prejudice? Philip Jenkins Argues that Anti-Catholic Bigotry Is on the Rise—Even Among Catholics*, BOSTON GLOBE, July 27, 2003, at E1.

140. BERRY, *supra* note 3, at x.

141. BURKETT & BRUNI, *supra* note 2, at 203.

and ultimately received larger settlements.<sup>142</sup> By 1993, \$20 million had been paid out as a result of Gauthé's abuses alone, with diocesan employees losing jobs as a result.<sup>143</sup>

Soon after the revelations from Louisiana, the story of Fr. James Porter broke. Porter abused children from Rhode Island, Massachusetts, and New Hampshire, to Minnesota, Texas, and New Mexico, with fifty-four known victims in seven years in Massachusetts alone.<sup>144</sup> Compensation was demanded from the Church, but in Massachusetts, there was a \$20,000 limitation on recoverable damages from a charitable institution.<sup>145</sup> District Attorney Paul Walsh stated that he had 200 complaints about Fr. Porter, with ninety-seven actually being filed in Massachusetts, Minnesota, and New Mexico.<sup>146</sup>

Arguably, the epitome of the current problem of abuse and liability from hierarchical knowledge of abuse, is the example of the Archdiocese of Boston, and the now retired Cardinal Bernard Law, who was Archbishop of Boston since 1984.<sup>147</sup> The most publicized case within Boston, and arguably the United States, is that of Fr. John Geoghan who had credible allegations of child molestation brought against him, and as a result, underwent treatment.<sup>148</sup> Physicians recommended that he return to a parish as part of his therapy, and Cardinal Law agreed with the recommendation, but did not inform the

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142. *Id.*

143. BERRY, *supra* note 3, at 141; BURKETT & BRUNI, *supra* note 2, at 203; JENKINS, *supra* note 4, at 36. Fr. Gerard Frey, the Bishop of Lafayette, wrote a letter to employees announcing the financial difficulties of the diocese, and resulting effects:

Even with these changes, it will also be necessary to reduce the present number of central office personnel . . . . In expressing my gratitude to each and every one of you, I want you to know that I am sensitive to the fact that your personal needs may make it necessary for you to seek employment elsewhere. To you and to those whose positions are terminated, I say that I have asked the Vicars to assist you in whatever way they can to find employment elsewhere.

BERRY, *supra*, at 141. *But see id.* at 286 (stating that Lafayette Diocese losses expected to be \$22 million by 1990).

144. BURKETT & BRUNI, *supra* note 2, at 16–19.

145. *Id.*; JENKINS, *supra* note 4, at 128. The Massachusetts limitation and the general debate over damages in this case prompted one writer to ask: "How much does it cost to rape a child in the state of Massachusetts?" *Id.* at 130.

146. BURKETT & BRUNI, *supra* note 2, at 24.

147. BBC News, *Cardinal Testifies at Abuse Probe*, at <http://news.bbc.co.uk/2/hi/americas/2799433.stm> (Feb. 25, 2003).

148. Sacha Pfeiffer, *Geoghan Preferred Preying on Poorer Children to Therapist, Priest Cited Sexual Revolution*, BOSTON GLOBE, Jan. 7, 2002, at A1.

family parish of St. Jean's about Geoghan's past.<sup>149</sup> Geoghan molested again.<sup>150</sup> In September of 2002, the Archdiocese of Boston accepted a settlement of \$10 million for eighty-six of Geoghan's alleged victims.<sup>151</sup>

By 1992, the average settlement amount in the United States was \$1 million per victim.<sup>152</sup> Not just dioceses, but orders have felt the strain as well, evidenced by a \$40 million suit against the Christian Brothers in 1989.<sup>153</sup> Nuns have also been sued for abuse within orders as well as in order-run institutions like orphanages.<sup>154</sup> "From a legal point of view, such charges vastly expand the range of potential actions to include virtually any church-run orphanage or institution, and the trend makes potential litigants of thousands of former inmates of such homes."<sup>155</sup>

Abuse cases seemed to explode across the United States in dioceses and archdioceses. In 1989, facing a \$25 million debt and heavy legal fees, the Archdiocese of Chicago under Cardinal Bernadin continued to sell real estate and close schools.<sup>156</sup> Between 1993 and the beginning of 2003, Chicago announced an additional \$16.8 million in payments on abuse claims.<sup>157</sup> Lawsuits totaled \$500 million against the Archdiocese of New York in 1994, just from the abuses of one priest, Fr. Edward Pipala.<sup>158</sup> In the summer of 1997, a Dallas, Texas,

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149. *Id.*

150. *Id.*

151. Michael Paulson & Thomas Farragher, *Ex-Priest Geoghan Attacked, Dies; Cleric at the Center of Sex Abuse Crisis Assaulted in Prison*, BOSTON GLOBE, Aug. 24, 2003, at A1. At the age of sixty-eight, Geoghan was murdered in prison on August 23, 2003, by a fellow inmate. *Id.*

152. JENKINS, *supra* note 4, at 130. This figure is arrived at by simple arithmetic, for between 1982-92, 400 priests were accused of sexual abuse, with \$400 million being paid out. BERRY, *supra* note 3, at ix.

153. JENKINS, *supra* note 4, at 47, 130.

154. *Id.* at 48. One nun sued her order for \$3.7 million for molestation by her mother superior in the 1960s. *Id.* Another woman sued the Carmelite order for \$13 million for physical and mental abuse incurred 30 years earlier at an orphanage in Canada. *Id.*

155. *Id.*

156. BERRY, *supra* note 3, at 340.

157. Mickey Ciokajlo, *Church Pays \$4 Million to 4 for Abuse; Archdiocese Selling Land to Raise Money*, CHI. TRIB., July 10, 2003, at 1, 2003 WL 59281809. Further real estate sales, including the possibility of selling up to ten pieces of land, with parcels measuring between two and one hundred twenty acres, are being evaluated to help pay future settlements. *Id.* All of the property is undeveloped land initially purchased as possible land for schools or churches. *Id.* In the meantime, the Archdiocese may be forced to take out short-term loans paid upon sale of the property. *Id.* Chicago Archdiocesan spokesmen say that no parishioner donations will be used to pay any abuse claims. *Id.*

158. JENKINS, *supra* note 4, at 129.

jury awarded \$120 million to the eleven victims of Fr. Rudy Kos, however, parties settled post-verdict for \$30.6 million.<sup>159</sup> The diocese faced bankruptcy if the jury award was paid.<sup>160</sup> Seventy percent of the settlement was paid by insurance, but to cover the other thirty percent, the Diocese of Dallas had to sell property.<sup>161</sup> The year 2002 saw the Diocese of Providence, Rhode Island, paying out \$14.25 million to thirty-six sexual abuse victim claims,<sup>162</sup> while the Diocese of Tucson, Arizona, paid out almost \$15 million in settling eleven lawsuits.<sup>163</sup> Six and a half million dollars was agreed to by the Diocese of Manchester, New Hampshire, to be paid to sixty-one alleged victims in May 2003.<sup>164</sup> The Archdiocese of Louisville, Kentucky, settled abuse claims from 243 people in June 2003 for \$25.7 million.<sup>165</sup> Finally, in September 2003, the Archdiocese of Seattle, Washington, agreed to pay \$7.87 million to settle lawsuits brought by fifteen men against one priest, Fr. James McGreal.<sup>166</sup>

The most publicized settlement, and largest known, to date was executed by the Archdiocese of Boston, where the new Archbishop, Sean O'Malley, served as a large catalyst in the talks.<sup>167</sup> On September 9, 2003, the Archdiocese agreed to pay out \$85 million to over 500 people claiming to be victims of sexual abuse by members of the

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159. BERRY, *supra* note 3, at xiv.

160. *Id.*

161. *Id.*

162. Walter V. Robinson & Stephen Kurkjian, *Archdiocese to Mortgage Property to Raise Needed Cash*, BOSTON GLOBE, Sept. 10, 2003, at A15. The summer residence of the Bishop of Providence was put up for sale to help pay their settlement. *Id.*

163. Ciokajlo, *supra* note 157, at 1, 2003 WL 59281809.

164. Ralph Ranalli (with Associated Press material), *Church, Victims Reach Deal in N.H.; \$6.5M Agreement Ends 61 More Abuse Claims*, BOSTON GLOBE, May 23, 2003, at A1.

165. Peter Smith, *Archdiocese to Pay Victims \$25.7 Million for Sex Abuse; Louisville Settlement 2nd Largest in U.S.*, COURIER-J. (Louisville, Ky.), June 11, 2003, at 1A. The Louisville Archdiocese had \$61.8 million in investments. *Id.* The settlement funds will be placed in a court-controlled escrow account. *Id.* Contributions will also be made by the local Franciscan community, which was also named in nineteen of the lawsuits. *Id.* Prior to the settlement, the Archdiocese announced a salary freeze, budget cuts by \$2 million per year, and a cut of twelve percent of the work force (thirty-four employees). *Id.* Insurance will not be paying any portion of the Archdiocese's settlement. *Id.*

166. Janet I. Tu, *Settlement Reached in Suit over Sex Abuse by Priest; Seattle Archdiocese to Pay 15 Men \$7.87 Million*, SEATTLE TIMES, Sept. 12, 2003, at A1. A sixteenth man did not join the settlement. *Id.*

167. See Roderick Macleish, Jr., Editorial, *O'Malley Helps Church Walk the Walk*, BOSTON GLOBE, Sept. 27, 2003, at A11. Mr. Macleish is a partner at Greenberg Traurig, LP, which represented 240 of the alleged abuse victims in their lawsuits against the Archdiocese of Boston. *Id.*

clergy.<sup>168</sup> Each claimant would receive anywhere from \$80,000 to \$300,000, to be decided upon by a mediator, while parents claiming a loss of consortium for their abused children would receive a set payment of \$20,000.<sup>169</sup> Travelers and Kemper, the insurers of the Archdiocese, have balked at contribution to the settlement, though talks are still ongoing.<sup>170</sup> As the Archdiocese has only \$15 million in funds to contribute from recent real estate sales, O'Malley plans to mortgage property to aid in the payment of the settlement.<sup>171</sup> Prior to O'Malley's arrival, Cardinal Law, then the head of the Archdiocese of Boston, was in the process of seeking Chapter 11 bankruptcy.<sup>172</sup> However, the option was rejected when the Archdiocese received a \$38 million loan from the Knights of Columbus, a Catholic charity, in exchange for a mortgage on chancery property.<sup>173</sup> None of these funds are available for the \$85 million settlement.<sup>174</sup>

Knowing negligence suits against a diocese on the conduct of a priest and his superiors, or criminal sexual charges against individual priests will not reach as far as the Pope on the liability trail, plaintiffs and prosecutors have attempted class action lawsuits, Racketeer Influenced and Corrupt Organizations (RICO) suits, and federal Mann Act (transportation across state lines for an immoral purpose) lawsuits, in an effort to expand the liability.<sup>175</sup>

Abuse victims and their families file suits alleging "failure to monitor troubled priests" and "failure to safeguard parishioners," costing between \$100,000 and \$500,000 to settle.<sup>176</sup> Child abuse expert, Ken Wooden, describes the litigation process in the abuse cases: "It's called liability trail. You get a Doberman pinscher attorney, he sniffs the trail. Who does it lead to? It leads to the bishop who assigned the priest. Then they pay."<sup>177</sup> However, the Church is more vulnerable to

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168. Kevin Cullen & Stephen Kurkjian, *Church in an \$85M Accord Tentative Record Pact with 552 over Abuse*, BOSTON GLOBE, Sept. 10, 2003, at A1.

169. *Id.*

170. Robinson & Kurkjian, *supra* note 162. A 2002 archdiocesan analysis of church insurance funds revealed that for the period between September 1977 and March 1983, Kemper had \$25 million in insurance funds to cover abuse claims, while for the period from April 1983 until March 1989, Travelers had \$65 million to pay. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. JENKINS, *supra* note 4, at 131-32.

176. BURKETT & BRUNI, *supra* note 2, at 202-03.

177. *Id.* at 203.



damages than other faiths because of the strong links to the hierarchy, allowing easier proof of respondeat superior.<sup>178</sup> As there is still a strong link to the Church as part and parcel of victims' faith, many victims would like an apology or a simple acknowledgment of their pain.<sup>179</sup> Much to the chagrin of many clergy members, acknowledgment of pain or apology may be a legal admission of guilt, which Church attorneys refuse to allow.<sup>180</sup>

In 1985, the Doyle-Peterson-Mouton Report, commissioned by the Church, was issued to American bishops estimating that by 1995, Church losses from sexual abuse lawsuits, legal fees, and therapy for priests would reach \$1 billion.<sup>181</sup> Despite the estimates, there is no comprehensive record of losses by the Church, as each of the 188 American dioceses is not obliged to share financial figures with each other or a central administration like the National Conference of Catholic Bishops (NCCB).<sup>182</sup> The only diocesan authoritative obligation is to the Vatican, who may not have done the math, might not want to release it if they had, and either way, the dioceses are paying the settlements and fees, not the Vatican.<sup>183</sup>

The consequence of paying out these large amounts is going to be reduced services by the church and greater burdens on the parishes. These large settlements are going to have consequences for dioceses for years if not decades, to come, because [dioceses]

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178. *Id.*; JENKINS, *supra* note 4, at 129. The hierarchy is further solidified as many dioceses operate as a corporation sole, meaning that the bishops "take total control of all real estate, stocks and assets in their diocese, and no internal or external check can limit their power. The individual bishop and his aides reign as a one man corporation." *Id.* (quoting LAWRENCE LADER, *POLITICS, POWER AND THE CHURCH: THE CATHOLIC CRISIS AND ITS CHALLENGE TO AMERICAN PLURALISM* 101 (1987)).

179. JENKINS, *supra* note 4, at 136.

180. *Id.*

181. BURKETT & BRUNI, *supra* note 2, at 203; JENKINS, *supra* note 4, at 37, 129 (arguing that substantial monies spent on damages, legal expenses, and therapy lend credibility to this estimate). Some have argued, however, that these figures are "ridiculous," though, not for their result, but the lack of information used to calculate them. BURKETT & BRUNI, *supra* note 2, at 204. The authors of *A Gospel of Shame* argue for one thing that attorneys' fees make up a significant portion of the tabulation, but it is "impossible" to guess different hours worked, on different cases, at different rates, in different places. *Id.* Also, where does insurance pick up, and when is the diocese left with the tab? *See id.* Are prohibitively high premiums for insurance being taken into account if they are actually paid? *See id.*

182. BURKETT & BRUNI, *supra* note 2, at 204.

183. *Id.* A great deal of money paid out during the on-going abuse scandal has come from diocesan insurance policies, but how much remains uncertain. *Id.* at 205. For further discussion of insurance, see *id.* at 205-06; JENKINS, *supra* note 4, at 137.

don't have . . . printing press[es] for money in the basement. This money that's being paid out is money that will not be to support church services in the future.<sup>184</sup>

It is hard to imagine unprotected "church services" funds for retirement not being implicated in some way by this financial crisis.

### III. Should the Religious Exemption to ERISA Still Be in Place?

It may be argued that a claimant to benefits from a church pension plan would be better off not covered by ERISA because ERISA solely provides equitable relief, with no punitive damages, and limits other statutory remedies, while state contract law would likely afford greater remedies.<sup>185</sup> Although state contract law may provide greater relief to a claimant than those remedies allowable under ERISA, a difficulty arises when a suit against a church plan is initiated, and there are no funds to pay out to the claimant. The Church in the United States has paid out over \$1 billion in settlements and damages over the abuse scandal, with much more likely to follow,<sup>186</sup> and some dioceses may be in the process of declaring bankruptcy as a result. If a diocese has its retirement coffers drained by reparations and legal fees, or if financial difficulties have pushed the diocese even further into bankruptcy, a pensioner would simply be an unsecured creditor.<sup>187</sup> In a federal bankruptcy proceeding, the monies available to unsecured creditors would be whatever non-exempt assets were left over after the secured creditors collected their share.<sup>188</sup>

"Consideration should be given to pre-funding pension and post-retirement benefit plans. Insufficient liquid assets may result in a diocese's inability to meet its obligation to retired priests."<sup>189</sup> The previous statement was posted to the official website of the USCCB on November 15, 2002, as a "recommendation" to all dioceses in the United States to pre-fund and segregate pension plans, or else *fail* in

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184. Michael Paulson, *Terms Leave Archdiocese Facing New Strains*, BOSTON GLOBE, Sept. 10, 2003, at A1 (quoting Fr. Thomas J. Reese, editor of *America*, a Jesuit magazine).

185. Vance, *supra* note 59.

186. Sandra Marquez, *New California Law Expected to Shift Focus of Priest Scandal West*, ASSOCIATED PRESS, Jan. 16, 2003, at WESTLAW, All News Plus Wires.

187. Vance, *supra* note 59.

188. *Id.*

189. BISHOPS, *supra* note 85.

the obligation to care for retired priests.<sup>190</sup> The recommendations of the USCCB are simply that, as there exists no diocesan obligation to follow it, unlike ERISA, which would obligate dioceses to pre-fund and segregate retirement plans.

It is critical to note that the previous statement by the USCCB, and the proscribed format in maintaining a pension fund or plan made available to dioceses, is not the first effort by the American Church to protect retired clergy.<sup>191</sup> In 1988, the Retirement Fund for Religious (Retirement Fund) was established by American Church officials as the underfunding of Church retirement coffers became apparent.<sup>192</sup> The work of the Retirement Fund is all the more difficult as there are “more than double the number of religious who are older than 80 than those younger than 50 years of age.”<sup>193</sup> The work of the Retirement Fund is supplemental to the existing retirement funds and plans not under the protection of ERISA that suffer not only from fewer wage earners to support retirees, but possibly from declining donations and dissipated funds due to the abuse crisis.

ERISA was enacted to deal with the problem that those holding pensions in ERISA exempt church plans could potentially face if the church entered into bankruptcy. Not only does ERISA establish minimum funding requirements for pension plans, but the Act establishes what is known as the “Anti-Alienation Rule,” which places a virtual trust requirement on assets that are earmarked for pension funds.<sup>194</sup> The Anti-Alienation Rule of ERISA, unlike what is generally found in state contract law, requires a separation of pension funds from general funds, establishing protection in the form of a trust.<sup>195</sup> Having church plans subject to a rule like the Anti-Alienation Rule would negate the need for this inquiry into the solvency of church pension funds in light of mounting financial pressure on the Church. Further, having a federal rule like the Anti-Alienation Rule in effect would allow uniformity across the country for church plans, eliminat-

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190. *Id.*

191. NAT'L RELIGIOUS RETIREMENT OFFICE, OUR MISSION, at <http://www.usccb.org/nrro/mission.htm> (last visited Nov. 11, 2003).

192. *Id.*

193. *Id.*

194. 29 U.S.C. § 1056(d) (2000). “(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.” *Id.*; see Vance, *supra* note 59.

195. Vance, *supra* note 59.

ing the disparity between states that require separation of pension funds or some type of insurance on those funds.<sup>196</sup>

An argument has been made for the Church to elect church coverage under ERISA to keep in line with goals of the faith.<sup>197</sup> The argument focuses on Catholic social teaching, including the concept of a “just wage,” in having Church plan administrators elect coverage under ERISA as the proper moral response to another challenge in the “modern world.”<sup>198</sup> The faith-based argument on ERISA election may be strengthened by the USCCB’s strong recommendation to dioceses to pre-fund and separate retirement plans for the clergy.<sup>199</sup> Although the “moral” argument may be sound under theological and philosophical principles, the application to the current problem is moot if the Church or its dioceses do not elect coverage. The discussion should take place in the legislature.

Finally, it is possible that even before getting to the financial pressure that the recent scandal has placed on the Church, and the possible moral obligations of the Church hierarchy to elect ERISA coverage, the Church exemption to ERISA may no longer be constitutional in light of *Texas Monthly, Inc. v. Bullock*.<sup>200</sup> In *Texas Monthly*, the publisher of a non-religious magazine brought suit against the state because his magazine was required to pay a sales tax<sup>201</sup> from which religious periodicals were exempt.<sup>202</sup> The publisher claimed that the exemption for religious periodicals was a violation of the Establishment Clause, and the U.S. Supreme Court agreed.<sup>203</sup> “The Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.”<sup>204</sup>

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196. It is important to note that the Internal Revenue Service may also play a role here by the regulations that it sets up for non-profits under section 501(c)(3) of the Internal Revenue Code. I.R.C. § 501(c)(3) (West 2003).

197. Sulentic, *supra* note 9, at 1, 5.

198. *Id.* at 2, 5.

199. BISHOPS, *supra* note 85.

200. 489 U.S. 1 (1989).

201. In 1985, Texas Monthly, Inc. paid under protest \$149,107.74 in sales tax. *Id.*

202. Exemption from Texas sales tax was given to “[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.” *Id.* at 5 (quoting TEX. TAX CODE ANN. § 151.312 (1982) (current version at TEX. TAX CODE ANN. § 151.321 (2002))).

203. *Id.* at 5.

204. *Id.* at 8–9 (citing *Gillette v. United States*, 401 U.S. 437, 450 (1971)).

The Supreme Court acknowledged that there is no problem with incidental benefits to religion, as the interests of churches and government are often similar,<sup>205</sup> but when the Court had approved past benefits to churches, those benefits were also felt by “a large number of nonreligious groups as well.”<sup>206</sup> Professor Wendy Shaller, in her article *Churches and Their Envidable Tax Status*, argues that in light of the *Texas Monthly* decision, the church exemption to ERISA may no longer be constitutional,<sup>207</sup> for as Justice Scalia’s dissent suggests, religious exemptions like the one present in the Texas Tax Code “permeate the state and federal codes, and have done so for many years.”<sup>208</sup> Shaller argues that church employees should enjoy the same federal protections as every other tax-exempt institution, as every organization but churches and the military have to comply with ERISA.<sup>209</sup> In line with the opinion in *Texas Monthly*, though, an almost exclusive exemption to churches, and not other secular non-profit organizations, would appear to run in opposition to the Establishment Clause,<sup>210</sup> and thus be unconstitutional. Although Professor Shaller believes that the aim of giving protection to church plan beneficiaries was not necessary in light of church finances, the over \$1 billion losses to the abuse scandal and the aging clergy may challenge this assumption.<sup>211</sup>

In light of the current financial situation in the Church, now might not be the most appropriate time for a challenge to the exemption to take place because of the potential costs draining an already fiscally damaged institution. However, the question is arising now for just that reason: if there is no protection from ERISA, there may be no pension funds to collect for retiring lay workers and clergy.

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205. *Id.* at 10.

206. *Id.* at 10–11.

207. Shaller, *supra* note 47. “The implied message of the recent Supreme Court decision in *Texas Monthly v. Bullock* has questioned the constitutionality of singling out churches, among all exempt organizations, for preferential treatment.” *Id.* at 345.

208. *Texas Monthly, Inc.*, 489 U.S. at 33. Justice Scalia goes on to provide a litany of examples of religious exemptions from every state in the Union and the District of Columbia. *Id.* at 33 n.3 (Scalia, J., dissenting).

209. Shaller, *supra* note 47, at 361. It appears, however, that Professor Shaller makes a distinction between clergy and lay plans. “In the case of plans established or maintained by religious organizations for the benefit of employees engaged in activities not substantially identified with the primary role of the religious organization, such employees should obtain the benefits of coverage under this Act.” *Id.*

210. *Id.* at 362.

211. “[T]he secular aim of providing protection for employees may not be necessary in the case of church employees . . . since churches have historically provided adequately for their own ministers’ retirement.” *Id.*

An analysis of the financial strain on the Church is difficult to precisely calculate because many of the records are sealed.<sup>212</sup>

To *seal* means that any financial settlements and in some cases all documents related to the case are sealed by the court. In some instances compensated victims are sworn to secrecy and the financial settlement they receive can be revoked if they reveal its amount or circumstances. This policy relegates even proven cases to a secret system inaccessible to analysis.<sup>213</sup>

The National Conference of Catholic Bishops “never released a reliable accounting of financial losses, perhaps out of fear that donations to the Church would fall off in protest.”<sup>214</sup> However, relying solely on media reports, it is evident that dozens of abusers and hundreds of victims have come to light, resulting in “hundreds of millions paid out in lawsuits” and “bankrupt dioceses.”<sup>215</sup> Cardinal John O’Connor of New York argued that “[l]awsuits based on an assumption that the Church is a bottomless financial well are simply unjust.”<sup>216</sup> Bankruptcies of dioceses, or the simple possibility of such, renders the assumption unfounded as well.

Due to the lack of reporting required of the Church by the IRS, and a lack of overall statistics gathered by the NCCB or the Holy See, it is difficult to know if there is an actual threat to the pensions of church lay workers and clergy. Even if there is no danger to church retirement plans, which is difficult to imagine with the current dollar amounts being paid out by dioceses across the country, it appears that with a lack of ERISA protection of church pensions, the danger will not be realized until the problem is upon the Church and its workers.

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212. A. Richard Sipe, *The Problem of Prevention in Clergy Sexual Abuse*, in BLESS ME, *supra* note 3, at 111, 116.

213. *Id.*

214. BERRY, *supra* note 3, at x.

215. Thomas G. Plante, *Conclusion: Sexual Abuse Committed by Roman Catholic Priests: Current Status, Future Objectives*, in BLESS ME, *supra* note 3, at 171.

216. JENKINS, *supra* note 4, at 135.