

## ARTICLES

### THE BISHOP'S ALTER EGO: ENTERPRISE LIABILITY AND THE CATHOLIC PRIEST SEX ABUSE SCANDAL

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In 1968, William Sheffield visited the ancient Hospice du Grand St. Bernard in Switzerland, a monastery of the Canons Regular of St. Augustine, a Roman Catholic religious order of priests. While in Switzerland, Sheffield contracted with the cleric in charge, Father Bernard Cretton, to buy a St. Bernard dog for \$175 plus the \$125 freight to ship the dog to Sheffield's home in California. Sheffield was to pay the price in \$20 installments and Cretton agreed to ship the dog upon receipt of the first \$20.<sup>1</sup>

Sheffield made three \$20 payments, but the monastery refused either to ship a dog or to refund his money. Sheffield then sued in California state court for the price of his substitute dog (\$200) and his non-refunded \$60. In the suit, he named Cretton, the Canons Regular, the Vatican, the Pope, and the local archdiocese (in the person of then-presiding Archbishop of San Francisco).<sup>2</sup>

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<sup>1</sup> Roman Catholic Archbishop v. Superior Court, 93 Cal. Rptr. 338, 340 (Ct. App. 1971).

<sup>2</sup> *Id.* A diocese is defined in Catholic canon law as the "portion of the people of God which is entrusted to a bishop." CODEX IURIS CANONICI c.369 (Canon Law Soc'y of Am. trans., 1983) [hereinafter CIC-1983]. In practice, the dioceses are the geographic regions into which the Church is divided for administrative purposes. Each diocese is subdivided into local parishes. *Id.* c.374, § 1. An archdiocese "is generally a diocese whose bishop exercises metropolitan authority within a province composed of the archdiocese and several suffragan dioceses; occasionally such a diocese stands by itself outside the provincial structure." 1 NEW CATHOLIC ENCYCLOPEDIA 634 (2d ed. 2003). The title of archbishop is bestowed, *inter alia*, on a "metropolitan," i.e., "the head of an ecclesiastical Province (or regional group of dioceses), and it may be said that today in the West every metropolitan is an

Although Sheffield apparently was able to serve process on and obtain personal jurisdiction with respect to the Archbishop of San Francisco, he faced significant obstacles in doing so with respect to both the Pope and the monastic defendants. In an attempt to circumvent those problems, Sheffield invoked the alter ego doctrine.

The complaint alleged that defendants Archbishop and the Canons Regular of St. Augustine were controlled and dominated by defendants Roman Catholic Church, the Bishop of Rome and the Holy See, such that there existed a

“unity of interest and ownership between all and each of the defendants,” that the Archbishop and the Canons Regular were a “mere shell and naked framework which defendants Roman Catholic Church, The Bishop of Rome, and The Holy See, have used and do now use as a mere conduit for the conduit of their ideas, business, property, and affairs,” and that all defendants are “alter egos” of each other.<sup>3</sup>

The court rejected Sheffield’s argument, holding that the “uncontroverted” evidence that “the Archbishop had no dealings with the Canons Regular negates any possibility that the Archbishop so controlled and dominated that organization so as to be liable for its actions under the ‘alter ego’ doctrine.”<sup>4</sup>

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archbishop,” and “the diocesan bishop of a diocese that is outside any ecclesiastical province but itself is not a metropolitan see.” *Id.* at 632. The terms Vatican, “Apostolic See,” or “Holy See” refer generally to the Pope and the various executive, legislative, and judicial offices of the Roman Curia, which act in the Pope’s name and by his authority. See CIC-1983, *supra*, cc.360–61. The Holy See is “a *sui generis* entity which has acquired an international legal status similar to a state under customary international law.” Anne Hsiu-An Hsiao, *Is China’s Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force Under International Law?*, 32 NEW ENG. L. REV. 715, 724–25 (1998). According to Catholic canon law, the Pope is “the head of the college of bishops, the Vicar of Christ, and the pastor of the universal Church on earth. By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely.” CIC-1983, *supra*, c.331. In U.S. law, the Pope is regarded as the head of state of the Vatican. See *Doe v. Roman Catholic Diocese*, 408 F. Supp. 2d 272, 280–82 (S.D. Tex. 2005) (holding that Pope Benedict XVI, as head of the Holy See, was entitled to head-of-state immunity from suit).

<sup>3</sup> *Roman Catholic Archbishop*, 93 Cal. Rptr. at 340 (emphasis omitted).

<sup>4</sup> *Id.* at 342. The question of whether Sheffield would have obtained jurisdiction over any of the non-U.S. resident defendants is beyond the scope of this article. One of the authors (Bainbridge) was informed by one of his colleagues who teaches Civil Procedure that the Pope would not be a proper defendant, just as the CEO of a corporation would not be a proper defendant to a suit alleging that subordinate agents of the corporation had breached a contract. Moreover, the United States currently accords the Vatican status as a foreign sovereign (i.e. a State), which

Thus ended a seemingly trivial case, but one that in fact presages issues of substantial present day import for the Catholic Church. Indeed, the question of whether various Catholic institutions are alter egos of one another or part of a single enterprise became vitally consequential when the sex abuse by Catholic priests scandal broke.<sup>5</sup> Since 1950, more than 11,500 abuse claims have been filed.<sup>6</sup> At least 1,500 abuse cases were pending as of mid-2003, with at least 500 pending against the Archdiocese of Boston alone.<sup>7</sup> As of the beginning of 2006, there were pending more than 560 abuse cases against just the Los Angeles Archdiocese.<sup>8</sup> It was estimated that the worst 50 cases pending in Los Angeles could lead to jury awards of \$5 million each.<sup>9</sup> The total direct costs to the Catholic Church of the priest abuse litigation are predicted to range from \$2 to \$3 billion.<sup>10</sup>

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means that the Pope should enjoy immunity as the head of a foreign state. In addition, § 1605(a)(2) of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11 (2000), in effect creates subject matter jurisdiction over foreign states for commercial activity but only if the activity is “carried on in the United States by the foreign state.” So, for example, the purchase of the dog in Switzerland would not be covered. Section 1605 provides for service of process in various ways, but it would not be relevant because of the lack of subject matter jurisdiction.

In the event that these procedural hurdles were overcome by a priest sex abuse plaintiff, Mark Sargent observes that the “strong tradition of episcopal independence,” which “leaves bishops without any significant supervision in their actual administration of the diocese,” would also make “Vatican liability for diocesan obligations unlikely.” Mark A. Sargent, *The Diocese After Chapter 11*, 29 SETON HALL LEGIS. J. 427, 431 (2005).

<sup>5</sup> See generally U.S. CONFERENCE OF CATHOLIC BISHOPS, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES: A RESEARCH STUDY CONDUCTED BY THE JOHN JAY COLLEGE OF CRIMINAL JUSTICE, <http://www.usccb.org/nrb/johnjaystudy/index.htm> [hereinafter U.S. CONFERENCE, JOHN JAY STUDY]. The problem of pastoral sex abuse, of course, is not limited to the Catholic Church. 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, 34 (1994) (“[T]here appears to be no distinction among denominations.”).

<sup>6</sup> *Catholic Church's Costs Pass \$1 Billion in Abuse Cases*, N.Y. TIMES, June 12, 2005, at 133.

<sup>7</sup> Daniel Lyons, *Sex, God & Greed*, FORBES, June 9, 2003, at 66.

<sup>8</sup> Jean Guccione & Glenn F. Bunting, *Talks on Sex Abuse by Priests Are Restarted*, L.A. TIMES, Jan. 6, 2006, at A1.

<sup>9</sup> *Id.*

<sup>10</sup> Ken Kusmer, *Clergy Abuse Scandal's Cost May Top \$2 Billion*, AKRON BEACON J., July 10, 2005, at A7. No implication is intended that pastoral abuse of parishioners is a problem unique to the Catholic Church.

The key institutional defendant in most of these cases is the diocese to which the priest-offender was assigned.<sup>11</sup> Typically, the diocese is held directly liable for negligent hiring or supervision of priests; more rarely, the diocese may be held vicariously liable for a priest's sexual misconduct.<sup>12</sup> When the plaintiff seeks to enforce a judgment against diocesan assets, a potentially critical legal issue is whether assets nominally owned by the diocese are in fact held in trust by the diocese for the benefit of local parishes, schools, or other church actors.<sup>13</sup> In other cases, however, the critical issue is whether diocesan creditors can reach the assets of separate legal entities under some version of alter ego liability. It is with this latter class of cases that this Article is concerned.

Part I of this Article provides the relevant background by examining the legal structure of Catholic dioceses and entities that are affiliated to varying degrees with dioceses, such as separately incorporated parishes, missions, chapels, schools, charities, and cemeteries. In many U.S. dioceses, all Church assets are owned by a single corporation, typically a corporation sole,<sup>14</sup> by virtue of which the local bishop becomes the legal

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<sup>11</sup> Catholic priests are categorized as either diocesan or religious depending on the Church authority to which they are responsible. Diocesan priests work in parishes, schools, or other Catholic institutions as assigned by the bishop of their diocese. Religious priests belong to a religious order, such as the Jesuits, Dominicans, or Franciscans. Of the various Catholic officials alleged to have committed sexual abuses, 69.4% were diocesan priests and 22.1% were religious order priests (the remaining alleged abusers included deacons, bishops, seminarians, and others). U.S. CONFERENCE, JOHN JAY STUDY, *supra* note 5, at 42. This article is concerned solely with the application of alter ego and related doctrines to Catholic dioceses and entities related to a diocese.

<sup>12</sup> See O'Reilly & Strasser, *supra* note 5, at 39, 49 ("Most courts faced with clergy sexual misconduct have declined to attribute such indirect liability to an institutional hierarchy that lacked notice of the misconduct" but "[s]everal recent cases have witnessed the successful utilization of negligence theories."); see also *Destefano v. Grabrian*, 763 P.2d 275, 287 (Colo. 1988) (declining to hold the diocese vicariously liable for a priest's sexual misconduct because "sexual intercourse with a parishioner is not part of the priest's duties nor customary within the business of the church" but noting that "the diocese may be directly liable for negligently supervising" the priest).

<sup>13</sup> See, e.g., *In re Roman Catholic Archbishop*, 335 B.R. 842, 866 (Bankr. D. Or. 2005) ("Because the parishes are not separately incorporated, as they could be under Oregon religious corporations law, they cannot hold title to real property. They are not separate from, but are merely a part of debtor.")

<sup>14</sup> "A corporation sole is one consisting of one person only, and his successors in some particular station, who are incorporated by law in order to give them some legal capacities and advantages, particularly that of perpetuity." *Doe v. Gelineau*,

titleholder of all Church-affiliated property in the diocese.<sup>15</sup> For example, the Catholic Archbishop of Boston, a corporation sole, holds title to all Church-related property, including parishes, schools, and churches, in about eighty-eight cities and towns.<sup>16</sup> As a legal matter, these holdings belong to the corporation sole and could be used to satisfy tort judgment against the corporation sole. As noted, however, the Church argues that many of the assets are held in trust by the corporation sole and therefore should not be used to satisfy the corporation sole's debts.

Although the single corporation sole for over a century has been a standard legal structure under which many Catholic dioceses are organized, other dioceses long have separately incorporated at least some of their affiliated juridic persons.<sup>17</sup> In an apparent response to the liability crisis resulting from the priest sex abuse scandal, moreover, there seems to be a growing trend for diocesan assets to be divided among multiple incorporated entities.<sup>18</sup> Indeed, critics claim that the Church thus is "us[ing] the intricacies of corporate law to shelter . . . assets from plaintiffs alleging sexual abuse by priests."<sup>19</sup> In May 2002, for example, when the Denver Archdiocese incorporated five parishes separately from the diocese, critics accused the Church of doing so to shield assets from the claims of sexual abuse plaintiffs.<sup>20</sup>

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732 A.2d 43, 45 n.3 (R.I. 1999) (internal quotation marks omitted). "Its successor becomes the corporation on his death or resignation, [and has been] limited in the main today to bishops and heads of dioceses." *Id.*

<sup>15</sup> William F. McCarthy, *Diocesan Asset Management Strategies: The Civil Law Perspective*, 37 CATH. LAW. 117, 118 (1996).

<sup>16</sup> E-mail from Walter V. Robinson, Boston Globe Staff, to Aaron H. Cole (Dec. 27, 2002) (on file with Aaron H. Cole).

<sup>17</sup> See McCarthy, *supra* note 15, at 124 (noting a Massachusetts diocese that has had separately incorporated parishes since the 1870s).

<sup>18</sup> Cf. Milo Geyelin, *Earthly Assets: Besieged Church Tries to Protect Vast Real Estate—Fearing Sex-Abuse Awards, Dioceses Restructure; Incorporating the Parish—'We Did It for Clarification,'* WALL ST. J., May 15, 2002, at A1 (quoting allegations by plaintiffs' lawyers that the diocese "started going through their assets and shoving them back to local parishes"). This trend provides a two-way protection. In the first, the principle of limited liability means that the assets of separately incorporated parishes or other Church-affiliated entities are immune from claims by diocesan creditors. Where parish operations generate liability for the separately incorporated parish, limited liability will insulate diocesan assets from parish creditors.

<sup>19</sup> Geyelin, *supra* note 18.

<sup>20</sup> Jennifer Levitz, *Roman Catholic Bishop*, PROVIDENCE J., Aug. 18, 2002, at A1; see also Frank Gibney, Jr., *Can a Church Go Broke?*, TIME, June 3, 2002

Although separate incorporation of diocesan assets implicates a number of legal doctrines,<sup>21</sup> alter ego claims likely will play a central role in any litigation seeking to reach the assets of such corporations for the benefit of diocesan creditors.<sup>22</sup> Accordingly, Part II of this Article sets out the relevant legal principles and provides guidance for their application to the special problems posed by litigation against religious corporations.

## I. THE CORPORATE STRUCTURE OF THE CATHOLIC CHURCH IN THE UNITED STATES

A business corporation is the principal of its employee-agents and, accordingly, incurs contractual or tort obligations because of its agents' actions.<sup>23</sup> As with any other principal, the corporation may be held vicariously liable for the actions of its agents.<sup>24</sup> Because the law generally does not regard a corporation as the agent of its shareholders, however, those shareholders may not be held vicariously liable for the firm's torts or debts.<sup>25</sup>

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("[S]everal dioceses have persuaded plaintiffs to accept reduced settlements, on the grounds that they could not afford to pay more. . . . [Meanwhile] leaders divide church property among dozens if not hundreds of separate corporations.").

<sup>21</sup> For example, under appropriate circumstances, a transfer of assets into a new corporation could be attacked as a fraudulent conveyance. *See, e.g., Carr Enters., Inc. v. United States*, 539 F. Supp. 528, 528 (D.S.D. 1982) (finding a fraudulent conveyance where taxpayers involved in an income tax dispute with the federal government transferred assets to two corporations, which they controlled, and then transferred the stock in those corporations to a newly formed church of which taxpayers constituted two of the three church trustees, as well as the minister); *Voorhees v. Presbyterian Church*, 5 How. Pr. 58 (N.Y. Sup. Ct. 1850) (holding that fraudulent conveyance law was applicable to transfer of assets to a religious corporation).

<sup>22</sup> *See Roundtable Discussion: Religious Organizations Filing for Bankruptcy*, 13 AM. BANKR. INST. L. REV. 25, 35 (2005) ("[I]f the parishes actually happen to be different corporations, which is a possibility, then the claimants will look at alter ego claims and what control the diocese is exercising over those different parishes and assets.").

<sup>23</sup> *See* RESTATEMENT (SECOND) OF AGENCY § 140 (1958) (setting out basic principles governing principal's liability for contracts entered into by agent); *id.* § 219 (same for torts committed by agent).

<sup>24</sup> *See, e.g., Parker v. Domino's Pizza, Inc.*, 629 So. 2d 1026, 1029 (Fla. Dist. Ct. App. 1993) (holding franchisor-corporation vicariously liable for acts of franchisee-agent); *Humble Oil & Refining Co. v. Martin*, 222 S.W.2d 995, 997 (Tex. 1949) (same).

<sup>25</sup> *Cf.* RESTATEMENT (SECOND) OF AGENCY § 14M cmt. a (stating that ownership of a majority of the stock of a corporation standing alone does not make the corporation the owner's agent).

A traditional explanation for this rule is that the corporation is a legal person separate from its shareholders.<sup>26</sup> Hence, it is the corporation that incurs the debt or commits the tort and the corporation which must bear the responsibility for its actions. Although this explanation obviously is highly formalistic,<sup>27</sup> “the notion of corporate personhood has long been a settled convention in our law.”<sup>28</sup> In turn, the doctrine of corporate veil piercing (a.k.a. the alter ego doctrine) is invoked where the shareholders have failed to respect the corporation’s separate personhood.<sup>29</sup>

The alter ego doctrine applies not only to shareholders of a single closely held corporation, but also to corporate groups. Where a subsidiary corporation is unable to satisfy the claims against it, the subsidiary’s creditors may seek to have the parent corporation and/or other subsidiaries of the same parent treated as alter egos of the debtor corporation. In effect, the alter ego doctrine thus ignores the separate legal personality of the individual members of the corporate group and treats them as a single legal person for liability purposes.<sup>30</sup>

Likewise, when a diocese is sued, a preliminary question is whether the law will treat the diocese and its affiliates, such as parishes, schools, hospitals, and charities, as separate legal persons, such that the assets of the latter are not available to

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<sup>26</sup> Cf. *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569–70 (7th Cir. 1985) (holding that veil piercing remedy could be invoked where, *inter alia*, “the separate personalities of the corporation and the individual [or other corporation] no longer exist” (alteration in original)).

<sup>27</sup> James McConvill & Mirko Bagaric, *Opting Out of Shareholder Governance Rights: A New Perspective on Contractual Freedom in Australian Corporate Law*, 3 DEPAUL BUS. & COM. L.J. 255, 256 (2005) (“[C]ontractarians view the corporation not as a separate and distinct legal entity with its own personality and post office box, but rather as a ‘nexus of contracts,’ a label representing the series of contracts exchanged and performed between suppliers, creditors, employees, employers and other stakeholders.”).

<sup>28</sup> *Reading Int’l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 327 (S.D.N.Y. 2003).

<sup>29</sup> See, e.g., *Nobody in Particular Presents, Inc. v. Clear Channel Commc’ns, Inc.*, 311 F. Supp. 2d 1048, 1072 (D. Colo. 2004).

A subsidiary is the alter ego of its parent when (1) there is such a unity of interest and lack of respect given to separate identity of parent and subsidiary that personalities and assets of parent and subsidiary are indistinct, and (2) adherence to the corporate fiction sanctions fraud, promotes injustice, or leads to an evasion of legal obligations.

*Id.*

<sup>30</sup> See *infra* notes 88–100 and accompanying text (discussing application of alter ego doctrine to corporate groups).

satisfy claims against the former. As we shall see, although canon law treats these entities as legally separate persons, secular law does not. In the face of potentially crippling liabilities arising out of the priest sex abuse scandals, some dioceses have responded by incorporating such affiliates, so as to claim the limited liability benefit that follows from creation of separate legal persons.

A. *Background: The Hierarchical Constitution of the Church*

The Catholic Church is governed by bishops. The doctrinal basis for their power arises out of the apostolic succession; i.e., their position as successors to the original twelve apostles of Jesus Christ: “The Bishops . . . succeed the apostles”;<sup>31</sup> “[t]o the apostles and their successors Christ has entrusted the office of teaching, sanctifying and governing in his name and by his power.”<sup>32</sup>

The Pope’s authority arises from the same source; it “has its foundation in the fact that he is a bishop,”<sup>33</sup> a successor to the apostles. Uniquely among bishops, however, the Pope’s position in the hierarchical constitution of the Church is further grounded in his position as successor to Peter, the head of the apostles: The “bishop of the Roman Church, in whom continues the office given by the Lord uniquely to Peter, the first of the Apostles, and to be transmitted to his successors . . . possesses supreme, full, immediate and universal power in the Church, which he is always able to exercise freely.”<sup>34</sup>

A bishop governs a definite territory, known as a “particular church” or “diocese.”<sup>35</sup> A bishop within his diocese “has all ordinary, proper and immediate power.”<sup>36</sup> The diocesan bishop thus possesses legislative, executive, and judicial power.<sup>37</sup>

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<sup>31</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 938 (2d ed. 1997).

<sup>32</sup> *Id.* ¶ 873; *see also id.* ¶ 881 (“This pastoral office of Peter and the other apostles . . . is continued by the bishops under the primacy of the Pope.”)

<sup>33</sup> NEW COMMENTARY ON THE CODE OF CANON LAW 435 (John P. Beal et al. eds., 2000) [hereinafter COMMENTARY].

<sup>34</sup> CIC-1983, *supra* note 2, c.331. The situation is complicated because canon law recognizes that the college of bishops also exercises “‘supreme and full’ power in the Church,” albeit “only together with the pope.” COMMENTARY, *supra* note 33, at 433.

<sup>35</sup> CIC-1983, *supra* note 2, c.368 (“Particular churches, in which and from which the one and only Catholic Church exists, are first of all dioceses.”).

<sup>36</sup> *Id.* c.381, § 1.

<sup>37</sup> *Id.* c.391.

According to canon law, each diocese is divided into “distinct parts or parishes.”<sup>38</sup> As dioceses are entrusted to the care of a bishop, parishes are entrusted to the care of a pastor, who “carries out the functions of teaching, sanctifying and governing.”<sup>39</sup> Among other things, the parish priest is responsible for administering the temporal goods or assets of the parish in accordance with the rules of canon law.

*B. The Separate Personhood of Parishes and Dioceses in Canon Law*

Canon law views both a diocese and its individual parishes as distinct juridic persons.<sup>40</sup> The commentary to Canon 393 thus provides that “[o]nce it has been legitimately erected, a diocese possesses juridic personality.”<sup>41</sup> Likewise, per Canon 515, the parish “possesses juridic personality.”<sup>42</sup> Just as the bishop represents the diocese in its juridic affairs,<sup>43</sup> the parish priest represents the parish in all its juridic affairs.<sup>44</sup>

In canon law, “ownership of goods belongs to that juridic person which has acquired them legitimately.”<sup>45</sup> Accordingly, canon law views assets of a specific parish as being owned by the parish rather than the diocese.<sup>46</sup> Assets of parishes and other

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<sup>38</sup> *Id.* c.374, § 1.

<sup>39</sup> *Id.* cc.515, 519.

<sup>40</sup> See J. Michael Fitzgerald, *The Official Catholic Directory: Civil and Canon Law Requirements*, 30 CATH. LAW. 107, 120 (1986) (“A juridic person is also an artificial being, but is created by canon law and endowed with certain rights and responsibilities of its own. It is an aggregate of person or things.”). Canon law distinguishes between public juridic persons, “whose personality is conferred upon them by law (e.g., dioceses, parishes, religious institutes),” which may “act ‘in the name of the Church,’” and “private juridic persons [which] receive their personality only by decree of competent authority and act only in their own name.” COMMENTARY, *supra* note 33, at 1456. The status of certain Catholic entities, such as hospitals and schools, as public or private depends on the terms of the decree by which they were created. *Id.*

<sup>41</sup> COMMENTARY, *supra* note 33, at 529.

<sup>42</sup> CIC-1983, *supra* note 2, c.515, § 3.

<sup>43</sup> COMMENTARY, *supra* note 33, at 529. Juridic acts or affairs are those to which canon law assigns legal character—i.e., the law attaches “juridic consequences to them”—such as “sale of property, contracting marriage, religious profession, conferral of an office.” *Id.* at 177.

<sup>44</sup> CIC-1983, *supra* note 2, c.532. The parish, like the diocese, is a non-collegial juridic person; its “members do *not* determine its actions through common decision making.” COMMENTARY, *supra* note 33, at 681.

<sup>45</sup> CIC-1983, *supra* note 2, c.1256.

<sup>46</sup> COMMENTARY, *supra* note 33, at 1457 (“Thus, property legitimately acquired

public juridic persons within a diocese thus are ordinarily administered by the priest who governs the entity in question, and not by the diocesan bishop.<sup>47</sup>

To be sure, canon law exhorts the bishop to “exercise careful vigilance” over ecclesiastical goods within his diocese to foster observance of the laws of the Church regarding the administration of temporal goods.<sup>48</sup> This responsibility flows from the bishop’s general duty to “protect unity of the universal Church” by promoting “common discipline” and urging the “observance of all ecclesiastical laws.”<sup>49</sup> Even so, however, the bishop only administers the ecclesiastical goods of the diocese, not the ecclesiastical goods of other public juridic persons, such as parishes, that reside within the diocese.<sup>50</sup>

The Church has poorly translated into secular terms the canon law understanding of the relationship between diocese and parish. The next section explores the significant divergence between the requirements of canon law and the dominant secular forms of organization chosen by the Church hierarchy in the United States.

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by a parish—which, by law, is a juridic person—is owned by the parish, not by the diocese, which is a distinct juridic person.” (citation omitted)).

<sup>47</sup> *Id.* at 1477.

The administrator of ecclesiastical goods is ordinarily the person who directly governs the public juridic person to whom the goods belong. Thus, for example, a pastor is the administrator of the temporal goods belonging to a parish. A diocesan bishop is the administrator of goods belonging to the public juridic person known as the diocese, but he is not the administrator of parochial and all other ecclesiastical goods situated within the diocese.

*Id.* (citations omitted). Ecclesiastical goods are the temporal assets of a public juridic person. *Id.* at 1458.

<sup>48</sup> CIC-1983, *supra* note 2, c.1276.

<sup>49</sup> *Id.* c.392, § 1.

<sup>50</sup> This understanding of the principle of separate administration by public juridic persons of their own goods is implied by Canon 1279, which provides for the bishop to intervene in cases of a negligent administrator, and to appoint administrators for a “public juridic person which does not have its own administrators by law.” *Id.* c.1279. Such a provision would be unnecessary if the bishop was the administrator of the goods of all public juridic persons within the diocese. Furthermore, while the bishop, in his supervisory role under canon 1276, may “issue appropriate regulatory instructions for the administration of ecclesiastical goods,” he “cannot derogate from the law (e.g., by attempting to take away from pastors their right and duty to administer the goods of the parishes).” COMMENTARY, *supra* note 33, at 1477.

C. *The Diocese in Secular Corporate Law*

The Catholic Church claims to be independent from civil authority with respect to the acquisition, possession, administration, and disposition of its temporal goods.<sup>51</sup> Nevertheless, seemingly recognizing the realities of life in modern secular regulatory nations, canon law urges that Church assets be maintained so as to ensure their protection under civil law.<sup>52</sup> In the United States, the Church has done so by availing itself of incorporation under state law.

American corporation law offers religious organizations a number of statutory forms through which they can gain “legal recognition, status and rights, particularly the right to acquire and hold property.”<sup>53</sup> Among these are the unincorporated association, the charitable trust, a not-for-profit corporation, a religious corporation, and the corporation sole.<sup>54</sup> In states where the final option is available, it has been the usual choice for Catholic dioceses.

The corporation sole was developed in mid-fifteenth century England as a vehicle for ownership of ecclesiastical property.<sup>55</sup> It was designed to prevent church property from being treated, by the law, as personal property of the incumbent bishop or rector. In the eyes of the law, the current officeholder, his successor, and predecessor were a corporation—a legal single person—so that gifts or conveyances to the current officeholder were considered the property of the successor.<sup>56</sup> Upon the death, resignation, or removal of the predecessor officeholder, “the successor to the office becomes the corporation” and is vested with the title of all property held by the predecessor.<sup>57</sup>

The adoption of the corporation sole form by American law resulted principally from lobbying during the nineteenth century

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<sup>51</sup> CIC-1983, *supra* note 2, c.1254.

<sup>52</sup> *Id.* c.1274, §§ 1, 5.

<sup>53</sup> Patty Gerstenblith, *Associational Structures of Religious Organizations*, 1995 BYU L. REV. 439, 439–40 (1995).

<sup>54</sup> *Id.* at 441.

<sup>55</sup> EDWARD JENKS, *THE BOOK OF ENGLISH LAW* 118–19 (P. B. Fairsted ed., 6th ed. 1967) (“[The] Crown is the only common law lay corporation sole. . . . But the examples of ecclesiastical corporations sole are numerous. Every diocesan bishop, every rector of a parish, is a corporation sole.”)

<sup>56</sup> Gerstenblith, *supra* note 53, at 455–56.

<sup>57</sup> *Id.* at 454–55.

by Catholic bishops.<sup>58</sup> The bishops' motivation likely arose out of the controversy over trusteeism.<sup>59</sup> In the mid-nineteenth century, some lay parishioners claimed that then-existing laws under which their churches had been incorporated granted the lay members of the church parochial administrative powers and even the right to choose and dismiss pastors. In 1854, "trusteeists, conspiring with newly elected state legislators of the anti-Catholic Know-Nothing Party, procured in New York, Pennsylvania, and elsewhere laws intended to compel all Catholic parishes to adopt the . . . trustee form of incorporation," which would have imposed Congregationalist (democratic) politics on the Catholic church despite the clear hierarchical structures mandated by Church teaching.<sup>60</sup>

By obtaining legal recognition of the corporation sole and then incorporating dioceses as such, American bishops were able to turn back the trusteeists. In a corporation sole, as noted, "all, or nearly all, church-related assets are civilly owned by a single corporation whose sole member is the diocesan bishop."<sup>61</sup> At least insofar as intra-Church disputes are concerned, courts have generally deferred to the argument that the corporation sole

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<sup>58</sup> *Id.* at 456.

<sup>59</sup> According to one summary of the trusteeism controversy:

Whereas in earlier years, laypeople had sometimes been allowed to help manage parish life, by the mid-nineteenth century priests were roundly condemning lay initiatives as a "trusteeism" contrary to the right ordering of a hierarchical church. In the same spirit, bishops asserted their unqualified right to assign or reassign priests. Taking advantage of American law, bishops constituted themselves "corporations sole," which enabled them to hold all church property in a diocese in their own names.

THE READER'S COMPANION TO AMERICAN HISTORY 954 (Eric Foner & John A. Garraty eds., 1991).

<sup>60</sup> 14 NEW CATHOLIC ENCYCLOPEDIA 324–25 (1967). Similarly, the so-called "incorporation movement" among Catholic colleges and universities sought to separately incorporate these institutions so as to free them from "from their sponsoring religious orders, enlarge their boards of trustees to include lay men and women, and change the structure and governance of these institutions away from a parochial, pervasively religious model." William W. Bassett, *The American Civil Corporation, the "Incorporation Movement" and the Canon Law of the Catholic Church*, 25 J.C. & U.L. 721, 725 (1999). According to one view of the matter, the movement "used the instrumentality of the American civil corporation to open Catholic higher education to ecumenism, scientific progress and diversity." *Id.* It should be noted that the great majority of Catholic universities have no connection with a diocese whatsoever; i.e., they are not diocesan institutions, but were founded and run by independent religious orders, and are now controlled by independent boards.

<sup>61</sup> COMMENTARY, *supra* note 33, at 1457.

owns parish property. Hence, for example, claims by parishioners to the property of parishes ordered to be closed have failed. In such cases, courts have treated the diocesan bishop as holding legal title to the parish property through the corporation sole.<sup>62</sup>

Although the corporation sole's widespread use in the American Catholic Church thus arose out of—and solved—a theological dispute, it has been very controversial within the Church. First, and most crucially, it is impossible to square the use of the corporation sole with canon law.<sup>63</sup> As we have seen, the Church, as a matter of doctrine and canon law, is composed of numerous united but distinct entities, subject in varying ways and degrees to ecclesiastical control.<sup>64</sup> Each separate entity possesses rights (including rights of ownership) that are enforceable, under church law, against the other entities.<sup>65</sup> The assets of the Catholic Church, under canon law, thus do not belong to a single owner. Instead, Church assets “belong to many owners: the Apostolic See, individual dioceses, institutes of consecrated life, societies of apostolic life, parishes, other public juridic persons, private juridic persons, and natural persons individually and in association.”<sup>66</sup>

Accordingly, centralization of “ownership and control of all church property within a diocese is contrary to the law of the Church.”<sup>67</sup> The use of a corporation sole to hold title to the ecclesiastical property of the juridic persons within the diocese's territory thus is a significant distortion of the Church's polity. Indeed, in 1911, the Holy See told the American bishops that it disapproved of using a single corporation sole as the single legal owner of all property within a diocese; indeed, the Holy See encouraged the separate incorporation of individual parishes.<sup>68</sup> Presumably, the same would be true where a diocese civilly

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<sup>62</sup> See, e.g., *Fortin v. Roman Catholic Bishop*, 625 N.E.2d 1352, 1354, 1357 (Mass. 1994); *Parent v. Roman Catholic Bishop*, 436 A.2d 888, 890 (Me. 1981).

<sup>63</sup> Mary Judith O'Brien, R.S.M., *Instructions for Parochial Temporal Administration*, 41 CATH. LAW. 113, 134 (2001).

<sup>64</sup> See *supra* Part II.C.1.

<sup>65</sup> Cf. COMMENTARY, *supra* note 33, at 173 n.72 (explaining that ecclesiastical tribunals “exist for the vindication of the rights of physical or juridic persons”). See generally CIC-1983, *supra* note 2, cc.1400–1500 (discussing the legal rights of juridic persons).

<sup>66</sup> COMMENTARY, *supra* note 33, at 1452.

<sup>67</sup> *Id.* at 1457.

<sup>68</sup> See *id.*

incorporated using some other statutory form, such as a nonprofit or religious corporation, holds secular legal title to the ecclesiastical property of all juridic persons within the diocese.

Second, incorporation as a corporation sole exposes the assets of parishes and other juridic persons, which in canon law are the property of such persons, to the claims of creditors of the diocese. Conversely, by centralizing civil ownership in a single entity, the corporation sole also exposes “all parochial and other church-related assets within a diocese to satisfy creditors’ claims against any individual parish or institution.”<sup>69</sup> Again, the same concerns would arise where a diocese civilly incorporated as a nonprofit or religious corporation claiming secular legal title to the ecclesiastical property of parishes and other juridic persons within the diocese.

In an apparent attempt to mitigate these concerns, bishops whose dioceses are incorporated as a corporation sole have argued that they hold legal title to parish assets in trust and for the benefit of the parish.<sup>70</sup> This line of defense was prominently tested in the Archdiocese of Portland’s bankruptcy case.<sup>71</sup> The Archdiocese had been incorporated as a corporation sole under Oregon law.<sup>72</sup> Only one of the 124 parishes with the Archdiocese had been separately incorporated.<sup>73</sup> The three Catholic high schools within the Archdiocese were not separately incorporated.<sup>74</sup> When the Archdiocese declared bankruptcy under the weight of numerous priest sex abuse claims, the Archbishop claimed that the bulk of the Archdiocese’s assets were in fact held in trust for the benefit of the unincorporated parishes and other juridic persons within the diocese.<sup>75</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.,* Schilling v. Malone, No. CA-5411, 1981 WL 6128, at \*1 (Ohio Ct. App. Feb. 18, 1981) (holding that the bishop, in his capacity as holder of the property in trust, was a proper defendant to a suit arising out of an injury that occurred on parish property).

<sup>71</sup> For an overview of bankruptcy law as applied to a diocesan bankruptcy, see John B. Jarboe, *Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments*, 37 CATH. LAW. 153 (1996).

<sup>72</sup> *In re* Roman Catholic Archbishop, 335 B.R. 842, 849 (Bankr. D. Or. 2005).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 850.

<sup>75</sup> *See id.* at 848; *see also* Andrew Harris, *Forgive Us Our Debts: The Boston Archdiocese May File for Chapter 11 Bankruptcy*, NAT’L L.J., Dec. 16, 2002, at A1 (quoting Walter W. Miller, Jr., a bankruptcy law professor at Boston University, who “calls identification of the archdiocese’s property ‘the heart of the whole thing’”).

The Bankruptcy Court first held that the religion clauses of the First Amendment did not deprive the court of jurisdiction over the question of whether the assets purportedly held in trust were properly part of the bankruptcy estate and thus subject to the claims of the Archdiocese's creditors.<sup>76</sup> The court then held that those same clauses did not require the court to defer to canon law in determining the ownership of the assets in question.<sup>77</sup> Next, the court held that Oregon state corporation law likewise did not require the court to defer to canon law in determining the ownership of the assets in question.<sup>78</sup>

Turning to the merits, the court noted that “[e]ven debtor’s own canon law expert acknowledges that being a separate juridic person under canon law does not give that juridic person a civil law identity.”<sup>79</sup> The court further explained:

In fact, unincorporated religious associations are not legal persons that may take title to real property in their names. Because the parishes are not separately incorporated, as they could be under Oregon religious corporations law, they cannot hold title to real property. They are not separate from, but are merely a part of debtor.<sup>80</sup>

The court likewise rejected the Archbishop’s argument “that, even if the parishes are not legal entities that can hold title to real property, they have sufficient legal existence to allow them to be beneficiaries of a trust.”<sup>81</sup>

Neither the First Amendment nor the bankruptcy law issues posed by the Portland litigation are within the scope of this Article. Instead, the Portland litigation is relevant to the analysis herein for several other reasons. First, assuming the result holds up on appeal (if any) and is followed in other jurisdictions, it highlights the validity of the liability exposure concerns that have long plagued the corporation sole form. The assets of all juridic persons in a diocese incorporated as a corporation sole are, in fact, at risk of being seized to satisfy the claims of creditors either of the diocese and/or individual juridic persons.

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<sup>76</sup> See *In re Roman Catholic Archbishop*, 335 B.R. at 851–53.

<sup>77</sup> See *id.* at 854.

<sup>78</sup> See *id.* at 855–59.

<sup>79</sup> *Id.* at 865–66.

<sup>80</sup> *Id.* at 866 (citation omitted).

<sup>81</sup> *Id.* at 867.

Second, there is a civil law solution at hand; namely, separate incorporation of each juridic person. As the Portland bankruptcy judge observed:

Debtor has chosen to organize its operations under a corporation sole. It chose to separately incorporate (or allow the separate incorporation of) St. Elizabeth Parish; it could also have chosen to incorporate the other parishes as religious corporations, by which they would gain a civil legal status and could exercise the powers granted to such corporations, including the power to hold and dispose of property and to sue and be sued. Debtor did not, however, choose to do that, and gives no reason why it could not, under state law, have separately incorporated the parishes or in some other way organized itself to protect the canonical ownership rights, if any, of the schools and parishes.<sup>82</sup>

Where a diocese avails itself of that option and separately incorporates the various juridic persons within it, however, a new issue arises; namely, whether the law will treat those separate corporations as being mere alter egos of the Bishop's corporation sole.

## II. APPLYING THE ALTER EGO DOCTRINE TO DIOCESES AND OTHER JURIDIC PERSONS

In at least some dioceses, concerns about liability exposure appear to have trumped any lingering historical concerns related to trusteeism. Indeed, critics claim that the Church is attempting to judgment-proof<sup>83</sup> dioceses by separately incorporating parishes and other juridic persons within the diocese.<sup>84</sup> Although there are various legal doctrines that

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<sup>82</sup> *Id.*; see also Jill S. Manny, *Governance Issues for Non-Profit Religious Organizations*, 40 CATH. LAW. 1, 1 (2000) ("The most popular and perhaps the best way to effectively reduce risk is to separately incorporate the parishes, the dioceses, and the various organizations that support the parishes and dioceses, such as fundraising entities.").

<sup>83</sup> See generally Lynn Lopucki, *The Essential Structure of Judgment Proofing*, 51 STAN. L. REV. 147, 149–51 (1998) (describing the basic structure of judgment proofing as the legal separation of a single enterprise into an operating (liability-generating) entity and an asset-holding entity so that "judgment creditors of the operating entity are not legally entitled to recover their judgments from the assets of the owning entity," while the two entities continue, through a contractual relationship, to function as a single enterprise).

<sup>84</sup> See, e.g., Geyelin, *supra* note 18 (quoting allegations by plaintiffs' lawyers that the diocese "started going through their assets and shoving them back to local parishes"); Gibney, *supra* note 20.

plaintiffs may invoke to raise such claims in litigation against a diocese, the alter ego doctrine is likely to play a particularly prominent role in any such case. If the doctrine is successfully invoked, after all, the court will treat the diocese and any separately incorporated juridic persons as a single enterprise whose collective assets are subject to the claims of creditors of the diocese (or of a parish, as the case may be).<sup>85</sup>

#### A. *The Law of Enterprise Liability*

Although judges often refer to something they call the alter ego doctrine, that phrasing conflates two distinct corporate law doctrines: (1) piercing the corporate veil and (2) enterprise liability. The distinction between veil piercing and enterprise liability is subtle, especially when one is dealing solely with corporate groups rather than individual shareholders, but it is critical. Properly understood, veil piercing is a vertical form of liability—it provides a mechanism for holding a shareholder personally liable for the corporation's obligations. Enterprise liability provides a horizontal form of liability—it offers a vehicle for holding the entire business enterprise liable.<sup>86</sup>

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<sup>85</sup> In theory, any juridic person affiliated with a diocese is potentially at risk of being deemed an alter ego of the diocese. In practice, however, many non-parish juridic persons, such as hospitals and schools, are “highly regulated public service institutions,” which likely exercise considerable independence. Bassett, *supra* note 60, at 726. In addition, since the 1960s, in “Catholic hospitals, schools, colleges and universities . . . lay leaders have replaced or at least complemented clerical leadership.” Sargent, *supra* note 4, at 429. Since the issues such institutions present under the alter ego doctrine will likely differ from those raised by the parish-diocese relationship, this section focuses exclusively on the latter relationship.

<sup>86</sup> In the leading case of *Walkovszky v. Carlton*, for example, plaintiff Walkovszky complained that the corporation that employed the driver of the taxi cab that had injured him, along with its numerous sister corporations, had no separate existence but rather were components of defendant Carlton's single business enterprise. 18 N.Y.2d 414, 416, 223 N.E.2d 6, 7, 276 N.Y.S.2d 585, 587 (1966). The court held that the corporate veil may not be pierced simply because the defendant corporation is part of a larger enterprise. *Id.* at 419, 223 N.E.2d at 9, 276 N.Y.S.2d at 589. Because the mere fact that a corporation is part of a larger enterprise is insufficient to justify veil piercing, splitting a single business up into many different corporate components thus will not result in the controlling shareholder being held personally liable for the obligations of one of the corporate entities. At most, only the larger corporate combined as a whole could be held liable. *Id.* at 421, 223 N.E.2d at 10, 276 N.Y.S.2d at 591. The distinction thus drawn between Carlton's personal liability exposure and the potential liability of the corporate group nicely illustrates the remedial distinction between veil piercing (a vertical form of shareholder liability) and enterprise liability (vertical liability among the entity members of a corporate group).

As applied to an incorporated diocese, veil piercing thus would result in the diocesan bishop being held personally liable for the diocese's obligations.<sup>87</sup> In most cases, this will not be the result desired by plaintiffs at least in so far as enforcing a judgment is concerned, since bishops rarely will have deep pockets. Instead, plaintiffs normally would be seeking a form of enterprise liability in which the diocese and any separately incorporated parishes are treated as part of a single enterprise for liability purposes.<sup>88</sup> Accordingly, references to the alter ego doctrine in this article should be understood as referring to enterprise liability.

In any event, as illustrated by the St. Bernard case discussed at the outset,<sup>89</sup> courts have adapted the business corporation law alter ego doctrine to analyze the relationship of juridic persons within the Church for civil law purposes. In *Doe v. Gelineau*,<sup>90</sup>

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<sup>87</sup> Where the plaintiff is a creditor of a separately incorporated parish, veil piercing might come into play if the court draws an analogy between the parish-diocese relationship and that of a subsidiary to a parent corporation. As such, the court might pierce the parish's corporate veil to reach the assets of the diocese, perhaps going on to invoke the reverse veil piercing doctrine to reach the assets of other separately incorporated parishes within the diocese.

Another possibility is that the plaintiff may seek to pierce the corporate veil of the diocese to reach the world-wide assets of the Vatican, analogizing the relationship between the Vatican and the diocese to that of a parent and subsidiary corporation. See David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 B.C. L. REV. 1181, 1191 (2003). Indeed, in the St. Bernard dog case with which this Article opened, the court noted that the plaintiff might have "raised a triable issue of fact as to whether the Canons Regular of St. Augustine is an 'alter ego' of the Pope." *Roman Catholic Archbishop v. Superior Court*, 93 Cal. Rptr. 338, 342 (Ct. App. 1971). Because we assume that the Vatican and the Pope would be protected by sovereign immunity, however, this Article does not assess the question of possible enterprise liability of the Vatican. See *supra* notes 2–4 (discussing the legal status of the Pope and the Holy See).

<sup>88</sup> The author Bainbridge has pointed out elsewhere that the parent-subsidary corporation relationship should be treated as a species of enterprise liability rather than as a question of veil piercing:

To say that the subsidiary is the parent's alter ego and that the parent is therefore liable for the subsidiary's obligations, after all, differs only semantically from saying that the parent and the subsidiary are a single business enterprise. In either case, a successful plaintiff will be able to reach the combined assets of the parent and subsidiary. Put another way, in the corporate group context, what has been labeled "veil piercing" has been, in substance, enterprise liability all along. That being the case, courts ought to shed the misleading label and call the analysis by its true name.

Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 532 (2001).

<sup>89</sup> See *supra* notes 1–4 and accompanying text.

<sup>90</sup> 732 A.2d 43 (R.I. 1999).

for example, plaintiffs claimed to have been abused while residing at the Saint Aloysius Home.<sup>91</sup> The Home was a d/b/a of the Rhode Island Catholic Orphan Asylum Corporation.<sup>92</sup> Although the Home thus was separately incorporated from the local diocese, plaintiffs invoked the alter ego doctrine in an effort to hold the Diocese of Providence, a Rhode Island corporation sole, liable for acts of agents of the Home.<sup>93</sup>

The Rhode Island Supreme Court set forth the alter ego doctrine as follows:

Although the criteria for piercing the corporate veil of limited liability vary with the particular circumstances of each case, one overriding factor is omnipresent: the corporate entity should be disregarded and treated as an association of persons only when the facts of a particular case render it unjust and inequitable to consider the subject corporation a separate entity. Such facts may be present, for example, when the corporate entity 'is used to defeat public convenience, justify wrong, protect fraud, or defend crime. When a parent-subsidiary relationship is involved, we have stated that in order to impose liability on a parent corporation for the torts of its subsidiary, it must be demonstrated that the parent dominated the finances, policies, and practices of the subsidiary. On the other hand, when two corporations are connected through common-stock ownership, we will respect the separateness of each entity unless the totality of circumstances surrounding their relationship indicates that one of the corporations is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of the other. The burden of proof in corporate-veil-piercing cases rests upon the party asking the court to disregard the corporate entity and impose liability on some other party.<sup>94</sup>

The Court then held "that these above-stated principles" derived from the law of business corporations applied to the religious corporations at bar.<sup>95</sup>

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<sup>91</sup> *Id.* at 45–46

<sup>92</sup> *Id.* at 45.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 48–49 (citations and internal quotation marks omitted).

<sup>95</sup> *Id.* at 49; *see also* *Medlock v. Medlock*, 642 N.W.2d 113, 126 (Neb. 2002) (holding in a divorce proceeding that a nonprofit religious corporation operated by the ex-husband was the ex-husband's alter ego and that the corporation's assets therefore should have been included in the marital estate for purposes of dividing the couple's property); *Goldstein v. Scott*, 439 N.E.2d 1039, 1048 (Ill. App. 1982) (finding that a church was the alter ego a separately incorporated ministry).

Although the precise statement of the relevant standard differs from one state to another, in all states the two basic issues are those identified by the *Gelineau* court, namely: (1) such a high degree of control that the various entities have effectively lost their separate existence, and (2) the abuse of that control in a way deemed unjust or inequitable. In a leading precedent, *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.*,<sup>96</sup> the promoters of a real estate venture split the business into two corporations: one that owned the land and one that was to provide construction services.<sup>97</sup> The land corporation had all the assets, while the construction company incurred all the debts.<sup>98</sup> Plaintiff was a supplier who sold building materials to the construction corporation.<sup>99</sup> When the debt was not paid, he attempted to reach the assets of the land corporation. The court allowed plaintiff to do so, setting forth a standard for invoking enterprise liability requiring a two-pronged showing: (1) such a high degree of unity of interest between the two entities that their separate existence had de facto ceased and (2) that treating the two entities as separate would promote injustice.<sup>100</sup>

*B. Application of the First Prong to a Diocese and Separately Incorporated Juridic Persons*

As applied to the typical sex abuse case, the first prong of the alter ego standard will require a showing that the diocese exercised such a high degree of control over separately incorporated parishes that the latter effectively had no separate existence. In Part I of this Article, we saw that canon law treats each juridic person as separate, owning its own ecclesiastical

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Adaptation of doctrines developed in the context of business corporations to the non-profit context is common. Many non-profit corporation statutes, for example, rely heavily on the business corporation statute model for guidance. See Gerstenblith, *supra* note 53, at 440. As a result, courts generally do not “treat the corporation sole differently than other legal structures.” *Id.* at 460.

<sup>96</sup> 333 P.2d 802 (Cal. Ct. App. 1958); see also HAROLD MARSH, JR. & R. ROY FINKLE, *MARSH’S CALIFORNIA CORPORATION LAW* 1416 (3d ed. 1990) (“The *Pan Pacific* case may be considered to have adopted the so-called ‘enterprise entity theory’ . . .”).

<sup>97</sup> *Pan Pacific*, 333 P.2d at 805–06.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 805.

<sup>100</sup> See *id.* at 806; see also *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 1 Cal. Rptr. 2d 301, 318 (Ct. App. 1991) (adopting the *Pan Pacific* standard in an explicitly enterprise liability theory case).

property, and being administered by the local parish priest (or comparable official). While the diocese possesses some powers of taxation, regulation, and oversight, the separate personhood of each juridic person is a foundational principle of the canon laws governing the organization of the Church.

Despite the Supreme Court's holding in *Serbian Eastern Orthodox Diocese v. Milivojevich*<sup>101</sup> that the First Amendment's religion clauses require civil courts to "defer to the result reached by the highest authority within the church,"<sup>102</sup> it appears highly unlikely that courts will defer to canon law in applying the first prong of the alter ego doctrine. In *General Council on Finance & Administration, United Methodist Church v. California Superior Court*,<sup>103</sup> the General Council was named as one of several defendants in a California state court case in which plaintiffs had brought securities fraud and contract claims in connection with the failure of a California corporation.<sup>104</sup> Plaintiffs claimed that the General Council, which was an Illinois not-for-profit corporation, was the failed corporation's alter ego.<sup>105</sup> After a hearing, in which the California trial court considered evidence about the General Council's "role in the structure of the Methodist Church," including "testimony of church officials and experts and statements set forth in the Book of Discipline, which contains the constitution and bylaws of the Methodist Church," the court rejected the General Council's motion to dismiss for lack of jurisdiction.<sup>106</sup> After the California appellate courts declined to intervene, the case landed before then-Justice William Rehnquist. In denying the General Council's request for a stay pending review of its petition for certiorari, Rehnquist stated that:

[A]pplicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this.

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<sup>101</sup> 426 U.S. 696 (1976).

<sup>102</sup> Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 112 (1998).

<sup>103</sup> 439 U.S. 1369 (1978).

<sup>104</sup> *Id.* at 1369.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. But this Court never has suggested that those constraints similarly apply outside the context of such intra-organization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.<sup>107</sup>

Although Rehnquist did not speak for the full court, the distinction he drew between intra-church disputes, where courts must defer to canon law, and disputes between the Church and some third party, where courts need not do so, likely would be followed by courts applying the alter ego doctrine in priest sex abuses cases.<sup>108</sup>

In *Medlock v. Medlock*,<sup>109</sup> for example, the Nebraska Supreme Court was asked to invoke the alter ego doctrine in a case arising out of a divorce proceeding.<sup>110</sup> The ex-wife claimed that assets of a religious nonprofit corporation operated should be treated as part of the marital estate for purposes of dividing their property.<sup>111</sup> The ex-husband claimed that doing so would violate his rights under the First Amendment religion clauses.<sup>112</sup> The court disagreed, holding that “application of general rules of family law and corporate law to a situation involving a religious corporation offends neither the Establishment Clause nor the Free Exercise Clause.”<sup>113</sup>

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<sup>107</sup> *Id.* at 1372–73 (citations omitted).

<sup>108</sup> *Cf. In re Roman Catholic Archbishop*, 335 B.R. 842, 852–53 (Bankr. D. Or. 2005) (following Rehnquist’s opinion in determining which assets were within the diocese’s bankruptcy estate).

<sup>109</sup> 642 N.W.2d 113 (Neb. 2002).

<sup>110</sup> *Id.* at 124.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 128.

<sup>113</sup> *Id.* at 129. The assumption that courts will not treat canon law as controlling the analysis under the first prong of the alter ego doctrine finds additional support in a closely-related body of law arising out of car accidents involving priests. See generally Marianne Perciaccante, *The Courts and Canon Law*, 6 CORNELL J.L. &

In applying the civil law alter ego doctrine, courts thus are likely to look to the laundry list of factual considerations identified as relevant by secular corporation law rather than the principles of canon law.<sup>114</sup> A short version of such a list was used in the *Pan Pacific* case, in which the California court imposed enterprise liability on two corporations because: (1) both corporations were half of a single venture; (2) they had the same shareholders, directors, and officers; (3) they occupied the same premises; (4) they had common employees; and (5) neither was adequately capitalized.<sup>115</sup> Applying this list to the typical relationship of a diocese and separately incorporated parishes suggests that alter ego liability should not be imposed. Although both entities are part of a single Church, they serve very different functions within the Church.<sup>116</sup> Typically, the diocese and parish will occupy separate premises.<sup>117</sup> There may be some overlap of employees, officers, and directors, but usually not complete overlap; in particular, each parish priest is responsible for administering parish assets.<sup>118</sup> As for capitalization issues, they are discussed below.<sup>119</sup>

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PUB. POL'Y 171, 200–06 (1996). In these cases, plaintiffs have sometimes argued that the priests in question were agents of the diocesan corporation sole, such that the latter could be held vicariously liable in connection for the priests' conduct. *Id.* at 200–01. In order for an agency relationship to exist, of course, the principal must exercise control over the agent. Typically, courts have held that the canon law principles governing the bishop-priest relationship are not dispositive of that question, instead applying a standard civil law of agency analysis to the facts at bar. *Id.* at 202. Perciaccante explains that the sex abuse cases generally have not been resolved under agency law principles because principals generally are not vicariously liable for the intentional torts of their agents. *Id.* at 204. See generally Mark E. Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADVOC. 289, 317–19 (1993) (discussing liability of churches for sexual misconduct by ministers).

<sup>114</sup> See, e.g., *United States v. Jon-T Chem., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985) (“In lieu of articulating a coherent doctrinal basis for the alter ego theory, we have instead developed a laundry list of factors to be used in determining whether a subsidiary is the alter ego of its parent.”).

<sup>115</sup> *Pan Pac. Sash & Door Co. v. Greendale Park, Inc.*, 333 P.2d 802, 806 (Cal. Ct. App. 1958).

<sup>116</sup> See *supra* notes 35–39 and accompanying text (discussing functions of diocese and parish).

<sup>117</sup> See *supra* text accompanying note 38 (noting that dioceses are divided into multiple geographic parts).

<sup>118</sup> See *supra* text accompanying note 39.

<sup>119</sup> See *infra* part II.B.3.

A much longer version of the laundry list was set out in *Associated Vendors, Inc. v. Oakland Meat Co.*<sup>120</sup>:

A review of the cases which have discussed the problem discloses the consideration of a variety of factors which were pertinent to the trial court's determination under the particular circumstances of each case. Among these are the following: [1] Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; [2] the treatment by an individual of the assets of the corporation as his own; [3] the failure to obtain authority to issue stock or to subscribe to or issue the same; [4] the holding out by an individual that he is personally liable for the debts of the corporation; [5] the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities; [6] the identical equitable ownership in the two entities; [7] the identification of the equitable owners thereof with the domination and control of the two entities; [8] identification of the directors and officers of the two entities in the responsible supervision and management; [9] sole ownership of all of the stock in a corporation by one individual or the members of a family; [10] the use of the same office or business location; [11] the employment of the same employees and/or attorney; [12] the failure to adequately capitalize a corporation; [13] the total absence of corporate assets and undercapitalization; [14] the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; [15] the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; [16] the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; [17] the use of the corporate entity to procure labor, services or merchandise for another person or entity; [18] the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; [19] the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; [20] and the formation and

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<sup>120</sup> 26 Cal. Rptr. 806 (Ct. App. 1962).

use of a corporation to transfer to it the existing liability of another person or entity.<sup>121</sup>

The task of applying this unwieldy list was not simplified by the court's failure to provide guidance as to how the factors should be weighted or balanced; the court merely observed that in all prior California cases in which the veil had been pierced "several of the factors mentioned were present."<sup>122</sup>

In adapting the business corporation standard to corporations sole and other not-for-profit religious corporations, some of the *Associated Vendors* factors obviously must be disregarded. For example, the question of "identical equitable ownership in the two entities" is irrelevant because the entities in question here do not have owners. Likewise, some of the factors will have to be adapted to fit this rather different situation. Yet, even so, it seems possible to identify several different *Associated Vendors* factors that are more-or-less directly relevant to the relationship of a diocese to separately incorporated parishes.

#### 1. Control by the Bishop

One obvious issue suggested by the *Associated Vendors* list, especially the fifth through eleventh factors, is the extent to which the diocesan bishop controls the day to day affairs of the parishes. "Actual domination, rather than the opportunity to exercise control, must be shown."<sup>123</sup>

Data collected by Professor Robert Thompson from cases involving business corporations suggests that courts are likely to deem two (or more) entities to be alter egos where they share common business activities or have common employees.<sup>124</sup> Thompson found that courts were less likely to do so where the entities had common directors and officers, and thus concluded that "courts are looking beyond the formal overlap of shareholders, directors, and officers to see if businesses show other signs of intertwining between the corporation and the

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<sup>121</sup> *Id.* at 813–15 (citations omitted and enumeration added).

<sup>122</sup> *Id.* at 815.

<sup>123</sup> *Williams v. McAllister Bros.*, 534 F.2d 19, 21 (2d Cir. 1976) (citing *Berger v. Columbia Broad. Sys., Inc.*, 453 F.2d 991, 995 (5th Cir. 1972)).

<sup>124</sup> Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1064 (1991) (finding piercing rates of eighty-one percent and sixty-nine percent, respectively).

shareholder.”<sup>125</sup> Because a parish administered in accordance with the dictates of canon law generally will be engaged in different religious activities than the diocese and will be administered by the local priest rather than diocesan officials, this factor will weigh against deeming the parish and diocese to be alter egos.<sup>126</sup>

Although there are only a handful of directly relevant precedents, the case law involving alter ego claims against Catholic diocese is consistent with that prediction. In *Doe v. Gelineau*,<sup>127</sup> for example, the diocesan bishop served as the president and treasurer, and as director, of the Home. The court, however, held that enterprise liability should not be imposed merely because the same individual holds offices in both entities.<sup>128</sup> Instead, the plaintiffs were required to show that the bishop “so organized and controlled” the Home’s business and operations that the Home “was nothing more than a mere instrumentality of” the bishop.<sup>129</sup> As the court colloquially put it, however, plaintiffs were unable even to show that the bishop “was wearing his [diocesan] hat when he took any actions concerning” the Home.<sup>130</sup> Accordingly, the court declined to impose liability on an alter ego theory.

Presumably, the bishop’s canon law supervisory and oversight duties with respect to juridic persons within the diocese did not require a contrary finding. As we saw above, although the diocesan bishop possesses legislative, executive, and judicial power within his diocese, canon law entrusts the administration of the parish to the local priest.<sup>131</sup> So long as the diocesan bishop

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<sup>125</sup> *Id.*

<sup>126</sup> It is generally possible under civil law for an incorporated diocese to have an independent board of directors. See Manny, *supra* note 82, at 12. The existence of such a board would negate a number of the *Associated Vendors* factors relating to control.

<sup>127</sup> 732 A.2d 43 (R.I. 1999); see also *supra* notes 90–95 and accompanying text.

<sup>128</sup> *Gelineau*, 732 A.2d at 49 (citing *Landry v. St. Charles Inn, Inc.* 446 So. 2d 1246, 1251 (La. Ct. App. 1984)); see also *Custer Builders, Inc. v. Quaker Heritage, Inc.*, 41 A.D.2d 448, 451, 344 N.Y.S.2d 606, 609 (3d Dep’t 1973); *Richfood, Inc. v. Jennings*, 499 S.E.2d 272, 276 (Va. 1998).

<sup>129</sup> *Id.* (citing *Vucci v. Meyers Bros. Parking Sys.*, 494 A.2d 530, 536 (R.I. 1985)).

<sup>130</sup> *Id.* at 50.

<sup>131</sup> See *supra* notes 37–39 and accompanying text. Hence, in canon law, ordinary administration of the parish, which is defined as “the day-to-day direction of a parish,” is assigned to the parish priest. O’Brien, *supra* note 63, at 121 (citing CODEX IURIS CANONICI cc.527–30 (Canon Law Soc’y of Am. trans., 1998)).

respects that canonical distinction, it is difficult to argue that the parish is a mere instrumentality of the diocese.

*Taeger v. Catholic Family and Community Services*<sup>132</sup> confirms this conclusion. In this case, adoptive parents brought suit against a Catholic adoption agency for failing to disclose medical information about the birth mother.<sup>133</sup> The parents also sought to hold the diocese liable on an alter ego theory.<sup>134</sup> The court held that the parents would have to show that the diocese exercised “substantially total control over the management and activities of” the adoption agency in order to succeed.<sup>135</sup> In addition, the parents would have to show that the diocese “actually exercise[d] this control so that the [agency] bec[ame] ‘a mere instrumentality.’”<sup>136</sup>

There were a number of indicia of diocesan control over the agency. For example, the two entities prepared consolidated financial statements; the Bishop had some control of who was appointed to the agency’s board of directors; agency real estate had been titled as property of the diocesan corporation sole and the financial statements treated agency assets as unrestricted assets of the diocese; the financial statements referred to the agency as a “part of the Roman Catholic Diocese of Phoenix”; and the bishop was responsible for ensuring that the agency followed “the principles of the Roman Catholic faith.”<sup>137</sup> Despite these various indicia of diocesan control over CFCS, however, the court found that there was no “control over day-to-day operations, but only . . . an ability to control the board and the policies of CFCS.”<sup>138</sup> Accordingly, the court declined to hold that the agency was the diocese’s alter ego.

Because the control exercised by the Phoenix bishop over the adoption agency appears to have been consistent with the standards of canon law, a diocesan bishop who adheres to those standards in exercising control over the juridic persons within his jurisdiction can take substantial comfort from the *Taeger*

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<sup>132</sup> 995 P.2d 721 (Ariz. Ct. App. 1999).

<sup>133</sup> *Id.* at 724.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 733 (quoting *Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991)).

<sup>136</sup> *Id.* at 734 (quoting *Oldenburger v. Del E. Webb Dev. Co.*, 765 P.2d 531, 536 (Ariz. Ct. App. 1988)).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

decision. To be sure, the court did not defer to the canon law in making its decision; indeed, the court did not even reference canon law in this regard. The decision, however, at least implicitly suggests that alter ego liability will not be imposed even though a diocesan bishop exerts the degree of control over a separately incorporated juridic person necessary to satisfy the bishop's duty under canon law. Specifically, the bishop's obligation to "exercise careful vigilance" over ecclesiastical goods within his diocese, to foster observance of the laws of the Church regarding the administration of temporal goods, to "protect the unity of the universal Church" by promoting "common discipline," and to urge the "observance of all ecclesiastical laws."<sup>139</sup> Conversely, of course, a diocesan bishop who routinely meddles in parish administration not only violates canon law, but also renders both the diocese and its parishes vulnerable to joint liability on an alter ego theory.

Some claimants may argue for drawing a distinction between cases like *Taeger* and the priest sex abuse scandals based on the nature of the misconduct in question. In *Taeger*, the court emphasized that, "[t]o the extent the Bishop exercised any control over [the agency], it was ecclesiastical in nature and not substantive control over [the agency's] business operations."<sup>140</sup> Under canon law, a parish priest is appointed by the diocesan bishop. If the priest selected by the bishop goes on to abuse a parishioner, it may be argued that the bishop exercised sufficient control to satisfy this set of factors.

If made, such an argument should not prevail. The question is not merely whether the bishop exercises a power of appointment, but rather whether the bishop's control over parish and priestly functions is so extensive as to render the parish his "mere instrumentality."<sup>141</sup> In addition, this argument conflates the issue of direct liability of the corporation sole for the bishop's decision to appoint an abuser-priest, such as where it is claimed the bishop did so negligently, with alter ego liability. Claims

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<sup>139</sup> See *supra* notes 48–49 and accompanying text (outlining a diocesan bishop's duties under canon law).

<sup>140</sup> *Taeger*, 995 P.2d at 735.

<sup>141</sup> Cf. *Plate v. St. Mary's Help of Christians Church*, 520 N.W.2d 17, 20 (Minn. App. 1994) (declining to impose agency-law-based vicarious liability on a diocese for actions of a parish where "the Bishop has the exclusive power to hire and fire parish priests and the exclusive power to open and close parishes . . . [but] has nothing to do with the operation of the parish itself.").

premised on the bishop's power of appointment thus should not result in the diocese and its parishes being deemed one another's alter egos.<sup>142</sup>

## 2. Financial Ties

A second relevant set of considerations relate to financial dealings between the affiliated entities. Although the *Gelineau* court emphasized the lack of financial and business ties between the diocese and the Home, noting that the former did not provide "any financial support" to the latter,<sup>143</sup> the *Associated Vendors* factors do not compel a finding of alter ego liability simply because there are financial transactions between the entities in question.

In *Taeger*, for example, plaintiff offered expert testimony showing that the adoption agency's assets were treated as unrestricted diocesan assets in the entities' combined financial statements.<sup>144</sup> In addition, there was evidence the agency "used personnel forms and other personnel services of the Diocese."<sup>145</sup> Finally, the agency received some modest financial support from a diocesan charity. Despite these financial and personnel connections, the court declined to treat the agency as the diocese's alter ego.

Financial relationships become problematic only when they rise to the level of commingling of funds, the diversion of assets to non-corporate purposes, and the like.<sup>146</sup> As non-profit entities, dioceses and separately incorporated parishes must comply with the tax law principles against private inurement, private benefit, and excess benefits,<sup>147</sup> which collectively proscribe non-arm's length transactions and thus provide a legal structure insuring against the sort of problematic transactions that might trigger alter ego liability. Where the various entities further respect their separate corporate identities by acting as independent entities, maintaining separate corporate records, and properly

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<sup>142</sup> Such claims also would raise a greater possibility of judicial entanglement in the appointment and disciplinary decisions of the church hierarchy, which would raise special First Amendment concerns. See O'Reilly & Strasser, *supra* note 5, at 45 (discussing the problem of judicial entanglement).

<sup>143</sup> *Doe v. Gelineau*, 732 A.2d 43, 51 (R.I. 1999).

<sup>144</sup> *Taeger*, 995 P.2d at 734.

<sup>145</sup> *Id.*

<sup>146</sup> See *supra* text accompanying note 121.

<sup>147</sup> See *Manny*, *supra* note 82, at 5–12 (discussing these doctrines).

recording and accounting for related party financial transactions, courts should not invoke the alter ego doctrine.<sup>148</sup>

This prediction finds support in Thompson's data from business corporation cases. Thompson found, for example, that courts declined to pierce the corporate veil in 99% of the cases in which the court expressly noted that there were no facts to suggest a lack of substantive separation between the entities.<sup>149</sup> Likewise, courts declined to pierce in almost 95% of the cases in which they noted the absence of facts suggesting that the parties had failed to observe the corporate formalities.<sup>150</sup> These results are to be contrasted to cases in which the court found that there was no substantive separation between the entities or that the parties had failed to observe the corporate formalities, in which courts pierced the veil 85% and 67% of the time, respectively.<sup>151</sup> These results confirm that due regard for the formal separation of the parish and diocese, as mandated by canon law, should provide substantial secular legal protection against alter ego claims.<sup>152</sup>

### 3. Undercapitalization

A third consideration suggested by the *Associated Vendors* list is whether the diocese is adequately capitalized. In cases involving business corporations, courts pierce the corporate veil in over 73% of cases in which they conclude that the corporation

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<sup>148</sup> Cf. *In re Bowen Transports, Inc.*, 551 F.2d 171, 179 (7th Cir. 1977) (declining to pierce the veil of Delaware and Illinois business corporations owned by a common parent corporation and having identical officers and directors of all three corporations where the corporations acted as separate and independent entities, separate corporate records were maintained, and financial transactions between the corporations were recorded in the respective corporate ledgers).

<sup>149</sup> Thompson, *supra* note 124, at 1064–65 n.141.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1063 tbl.11.

<sup>152</sup> See Manny, *supra* note 82, at 17–18 (“A . . . step in maintaining distinct legal entities is to respect what will be termed ‘corporate niceties.’ This involves proper corporate maintenance achieved by following the requirements of state law. A non-profit religious organization should properly draft certificates or articles of incorporation and by-laws; maintain adequate records required under state and federal law; file properly prepared and reviewed annual reports; hold regular board meetings; and draft, review and approve minutes of those meetings. Furthermore, financial statements of the organization should be reviewed and approved by all officers and directors. These items provide the necessary papertrail to legitimize the organization’s corporate existence in those situations where it is challenged.”).

was undercapitalized,<sup>153</sup> while they decline to pierce in over 94% of cases in which the firm was not undercapitalized.<sup>154</sup>

While undercapitalization is one factor courts commonly consider that may result in personal liability when taken in conjunction with the factors we discussed earlier, it is not enough standing alone to result in enterprise liability for the diocese and its parishes.<sup>155</sup> Instead, “some ‘wrong’ beyond a creditor’s inability to collect” must be shown before the entities in question are deemed alter egos of one another.<sup>156</sup> As such, the inability of the diocese to satisfy the claims of its creditors is not sufficient to justify treating the diocese and its affiliated juridic persons as alter egos, nor is it conclusive evidence that the diocese itself was undercapitalized.

Courts have articulated various standards for determining whether an entity was undercapitalized for purposes of the alter ego doctrine. In Arizona, for example, the corporation’s financial situation must be “a sham,” meaning that “the amount of capital must be illusory or trifling.”<sup>157</sup> In South Dakota and Nebraska, undercapitalization “means capitalization very small in relation

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<sup>153</sup> Thompson, *supra* note 124, at 1063 tbl.11.

<sup>154</sup> *Id.* at 1064–65 n.141.

<sup>155</sup> See, e.g., Gartner v. Snyder, 607 F.2d 582, 588 (2d Cir. 1979) (“Although Enterprises was thinly capitalized, that alone is not a sufficient ground for disregarding the corporate form. We know of no New York authority that disregards corporate form solely because of inadequate capitalization.”).

<sup>156</sup> Sea-Land Servs., Inc. v. Pepper Source, 941 F.2d 519, 524 (7th Cir. 1991), *aff'd*, 993 F.2d 1309 (1993). Although the case *Minton v. Cavaney*, 364 P.2d 473, 474–76 (Cal. 1961), is usually cited for the proposition that undercapitalization alone suffices, this is arguably an inaccurate reading of that case. In *Minton*, the California Supreme Court found that a director of a swimming pool management company could be held personally liable for its debts because of the fact that his outlay of capital was “trifling” when compared to the substantial risks posed by conducting that kind of business. *Id.* at 475 (internal quotation marks omitted). This finding, however, was undoubtedly supported by additional circumstances including the director’s own statement that although the corporation “was duly organized,” it had “never functioned as a corporation.” *Id.* at 474. Thus, only when the corporation was admittedly a sham did undercapitalization amount to the requisite “abuse of the corporate privilege” that the court stated would trigger application of the alter ego doctrine. *Id.* at 475–76. In any event, this case probably is no longer good law even in its home jurisdiction. See *Arnold v. Browne*, 103 Cal. Rptr. 775, 783 (Ct. App. 1972) (treating undercapitalization as merely a relevant, but not dispositive, factor); *Harris v. Curtis*, 87 Cal. Rptr. 614, 617 (Ct. App. 1970) (rejecting the argument “that, per se, inadequate capitalization renders the shareholders . . . liable for the obligations of the corporation”).

<sup>157</sup> *Keams v. Tempe Technical Inst., Inc.*, 993 F. Supp. 714, 724 (D. Ariz. 1997) (internal quotation marks omitted).

to the nature of the business of the corporation and the risks the business entails measured at the time of formation.”<sup>158</sup> In California, the *Associated Vendors* list asks whether there was a “total absence of corporate assets.”<sup>159</sup> Another oft-cited standard, albeit one that originated in a dissent, asks whether “a corporation vested with a public interest” was “organized with capital insufficient to meet liabilities which are certain to arise in the ordinary course of the corporation’s business.”<sup>160</sup> There are common themes running through all of these tests. Either the founders of the business put funds into the corporation at the outset that were clearly insufficient to satisfy existing contractual and likely tort obligations or they have drained all profits out of the firm in the form of dividends or salaries paid to the controlling shareholders, leaving it with insufficient reserves to meet its likely obligations. Of particular relevance to dioceses facing the enormous claims brought by priest sex abuse victims<sup>161</sup> is an exception that provides that courts will not invoke the alter ego doctrine “where initially adequate finances dwindle under the pressure of competition, bad times or *extraordinary and unexpected liability*.”<sup>162</sup>

### C. Application of the Second Factor

Recall that the second prong of the alter ego standard requires the plaintiff to show that treating the entities in question as separate legal personalities would lead to an unjust or inequitable result. This vague standard gives judges little guidance but wide discretion.<sup>163</sup> The leading treatise on

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<sup>158</sup> *Kansas Gas & Elec. Co. v. Ross*, 521 N.W.2d 107, 115 (S.D. 1994) (quoting *Global Credit Servs. v. AMISUB*, 508 N.W.2d 836, 843 (Neb. 1993)).

<sup>159</sup> *Associated Vendors, Inc. v. Oakland Meat Co.*, 26 Cal. Rptr. 806, 813–15 (Ct. App. 1962).

<sup>160</sup> *Walkovszky v. Carlton*, 18 N.Y.2d 414, 427, 223 N.E.2d 6, 14, 276 N.Y.S.2d 585, 595 (1966) (Keating, J., dissenting).

<sup>161</sup> An anecdotal example of the size of the potential liabilities relative to diocesan assets is offered by a Dallas case “where a jury awarded \$120 million to victims of an abusive priest. In that case, the plaintiffs (former altar boys) reportedly settled for about \$30 million rather than force the church into what probably would have been a lengthy bankruptcy.” Brad Knickerbocker, *What Happens When a Church Goes Bankrupt*, CHRISTIAN SCI. MONITOR, July 9, 2004, available at <http://www.csmonitor.com/2004/0709/p02s01-usju.html>.

<sup>162</sup> *Walkovszky*, 18 N.Y.2d at 427, 223 N.E.2d at 13, 276 N.Y.S.2d at 595–96 (Keating, J., dissenting) (emphasis added).

<sup>163</sup> “A trial court’s ruling on such questions will be regarded as presumptively correct and will not be overturned on appeal unless clearly erroneous.” *Cheatle v.*

California corporate law states that California's standard "merely measures the rule by the length of the Chancellor's foot. The generalized phrases, 'sanction a fraud or promote injustice,' are useless in predicting the outcome of a particular case."<sup>164</sup> Benjamin Cardozo more succinctly complained that veil piercing is a doctrine "enveloped in the mists of metaphor."<sup>165</sup> Instead of reasoned analysis, courts typically fall back on what has been variously characterized as analysis by epithet and "reason[ing] by pejorative."<sup>166</sup>

Particularly in the context of the priest sex abuse litigation, where the behavior of many diocesan bishops has been sharply criticized, a judge or jury seeking to do rough justice may be tempted to simply slap the epithet "alter ego" on the diocese and its parishes. Yet, there are a number of doctrinal and policy reasons why courts should undertake a more thoughtful analysis. In doing so, the following considerations should receive particular emphasis.

#### 1. An Unsatisfied Judgment Is Not Enough

The mere fact that separate incorporation of the diocese and its parishes may result in insufficient assets to satisfy claims against the diocesan corporation sole is simply not enough to justify treating separately incorporated parishes as the diocese's alter egos. The prospect of an unsatisfied claim thus is not enough to meet the second prong of the alter ego test.<sup>167</sup> After all, why would a plaintiff invoke the doctrine if the corporation had enough assets to satisfy the claim?<sup>168</sup>

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Rudd's Swimming Pool Supply Co., Inc., 360 S.E.2d 828, 831 (Va. 1987).

<sup>164</sup> MARSH & FINKLE, *supra* note 96, at 1392.

<sup>165</sup> Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94–95, 155 N.E. 58, 61 (1926).

<sup>166</sup> Franklin A. Gevurtz, *Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 OR. L. REV. 853, 855 (1997); *see also* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 8 (1983) (using terms "metaphor or epithet").

<sup>167</sup> Associated Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 816 (Ct. App. 1962) ("[I]t is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced . . .").

<sup>168</sup> A closely related doctrine proscribes the invocation of alter ego principles so as to increase the size of a punitive damages award. *See* Walker v. Signal Cos., 149 Cal. Rptr. 119, 129 (Ct. App. 1978) ("The sole basis for holding [the parent] liable would be to enable the plaintiffs to obtain an increased award of punitive damages because of the substantial net worth of the parent. There is no factual justification to do so.").

## 2. Impact on the Exercise of Religion

Although it does not violate the First Amendment religion clauses for courts to invoke the alter ego doctrine in this context, the broad discretion given courts under the second prong of the standard makes it appropriate for courts to consider the impact of imposing alter ego-based liability on separately incorporated parishes and other religious entities. First, determining that a parish and a diocese are alter egos requires a court to disregard the canon law basis of separate incorporation and, moreover, may entangle the court in attempting to determine whether or not the diocesan bishop's conduct met the requirements of those laws. Inevitably, in such an inquiry it will be difficult to cabin the secular and the religious. Put another way, when a religious organization has chosen a particular legal structure so as to optimally conform its existence as a civil law organization to the church's teachings on hierarchy and structure, the church has made a decision that inextricably mixes the secular and the divine. Furthermore, the ongoing operation of the incorporated ministry requires compliance with canon law and Church doctrine. When a court disregards the structural and operational choices made by the diocese or parish by invoking the alter ego doctrine, even when done using nominally neutral principles, it necessarily becomes entangled in evaluating the manner in which the church has chosen to exercise its religion.

This concern seems especially pertinent given the historical context. The Catholic Church in the United States commonly chose a civil law structure that conformed poorly to the dictates of canon law—an incorporated diocese and unincorporated parishes whose property was nominally owned by the diocesan corporation—so as to solve the theological problem presented by the trusteeism movement. Once liability concerns took precedence, the Church began to reorganize its civil law structure by separately incorporating parishes and other juridic persons affiliated with the various dioceses. In doing so, the Church not only sought to avail itself of the civil law benefit of limited liability, but also brought its civil law structure into greater conformity with the canon law governing ownership of property by juridic persons. Invoking the alter ego doctrine so as to deprive the Church of the civil law shield of limited liability associated with separate incorporation thus inevitably implicates

theological questions associated with the Church's canonical structure.

This concern is particularly relevant to application of the alter ego doctrine. As we have seen, the doctrine rests in the first instance on questions of control. Yet, a certain degree of episcopal control over parishes is inherent in the theological and canonical structure of the Catholic Church:

[T]he Church is organized around the principle of apostolic succession. Bishops are not just managers. They are not accountable to congregations in the way pastors are in the Protestant tradition. They carry unique moral and spiritual authority, and have an ancient juridical status within canon law. While the People of God includes all of us, and not just the hierarchy, as laity our authority in the Church is limited, and not just with respect to doctrinal matters or sacramental functions. Our role in governance of dioceses and parishes has always been highly circumscribed . . . .<sup>169</sup>

Evaluating whether a Bishop improperly dominates a separately incorporated parish thus inevitably entangles a court with that "unique moral and spiritual authority" and also with the Bishop's "ancient juridical status within canon law."<sup>170</sup>

One might also take into account the impact of such a decision on the members of the church. In many dioceses, there are hundreds of separate juridic persons, each ministering to numerous worshippers and even non-Church members. If a court were to treat all of those juridic persons as alter egos of the diocese, the assets of many parishes and other ministries that had no connection with priest sex abuse would be made available to satisfy the claims of sex abuse plaintiffs. Inevitably, execution of a judgment against their assets would impede—if not destroy—the ability of these ministries to serve the needs of their congregants. Indeed, the mere threat of liability might do so. "Both church and society will suffer if the continuation of ministries prompted by compassion—ministries often involving risks—is stopped short by the nervous calculation of legal liabilities."<sup>171</sup>

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<sup>169</sup> Sargent, *supra* note 4, at 428–29.

<sup>170</sup> *Id.*

<sup>171</sup> EDWARD M. GAFFNEY, JR. & PHILIP C. SORENSEN, ASCENDING LIABILITY IN NONPROFIT ORGANIZATIONS viii-ix (Howard R. Griffin ed., 1984).

In turn, the impact of such liability—or even the risk of such liability—on parishioners inevitably redounds against the Church. If parishioners come to believe that donations to their local parish, which they expect to be used in the main for the benefit of the local church and its ministries, are being siphoned off to pay diocesan claims and legal bills, their attitude towards giving to the support of the parish will inevitably sour. In turn, this is likely to impact the morale and effectiveness of the parish priest and other local church workers, whose morale may already be in doubt due to the threat to their retirement and health benefits. Hence:

[R]eligious entities, like their secular counterparts, need the assurance that “corporate” independence will be respected. Religious entities, to a greater extent than their secular entities, rely on the unbridled goodwill of volunteers to make their operations run. Occasionally, religious entities seek to structure their operations as separate civil units to guard against the possibility that one unit (or the whole body) might be made more vulnerable by the actions of an individual acting on its behalf or even alone. Having chosen to plan operations in a particular way following the dictates of the civil law, religious entities should not bear the risk that these “corporate” structures will be imploded in litigation.<sup>172</sup>

To be clear, the point is not that application of the alter ego doctrine to religious corporations is unconstitutional. The law is quite definitely to the contrary.<sup>173</sup> The point is only that the broad equitable discretion of courts in applying the alter ego doctrine ought to include consideration of the impact on the ability of innocent Church members to freely exercise their religion.

### 3. Why and When Did the Juridic Persons Separately Incorporate?

There is nothing intrinsically fraudulent about deciding to incorporate or about dividing a single enterprise into multiple corporations.<sup>174</sup> Accordingly, incorporating an entity so as to get the benefit of limited liability by itself neither promotes injustice

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<sup>172</sup> Chopko, *supra* note 113, at 293–94.

<sup>173</sup> See *supra* notes 101–113 and accompanying text.

<sup>174</sup> See *Walkovszky v. Carlton*, 18 N.Y.2d 414, 420–21, 223 N.E.2d 6, 10, 276 N.Y.S.2d 585, 590–91 (1966).

nor sanctions a fraud: “[T]he law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities. Since society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that disregard of those separate corporate entities be approached with caution.”<sup>175</sup> Instead, there must be some element of unjust enrichment for the second prong to be satisfied.<sup>176</sup>

*Medlock v. Medlock*<sup>177</sup> nicely illustrates the sort of facts in which the requisite wrong is typically found to exist. Buddy and Linda Medlock were divorcing. Their assets previously had been transferred to Union Oaks, Inc., a Nebraska nonprofit religious corporation, which was operated by Buddy. Union Oaks “provided Buddy with a parsonage, the use of various vehicles, and a salary.”<sup>178</sup> The court determined that Union Oaks was Buddy’s alter ego, noting that:

Buddy made extensive personal use of corporate funds and assets and that Buddy carried on personal dealings in the name of the corporation. The record shows a nearly complete unity of interest between Buddy and Union Oaks. Buddy exercised nearly unfettered control of Union Oaks and regularly purchased vehicles, travel, and other goods and services in the corporate name for his family’s personal use.<sup>179</sup>

Not to include the religious corporation’s assets in the marital estate for purposes of dividing Buddy and Linda’s property thus would have worked a serious injustice to the latter.

Most priest sex abuses cases are unlikely to entail conduct by diocesan bishops resembling that of Buddy. Instead, the more likely scenario is illustrated by a 2004 article in the *Christian Science Monitor*, which reported that “the Roman Catholic Diocese of Tucson had sold or transferred assets worth \$5 million to other Catholic corporations over the past year. Church officials said this was part of normal church business, as well as a way to pay off abuse settlements from two years ago.”<sup>180</sup>

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<sup>175</sup> *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.*, 23 Cal. Rptr. 2d 555, 563 (Ct. App. 1993) (citation omitted).

<sup>176</sup> *Sea-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519, 522, 524 (7th Cir. 1991), *aff’d*, 993 F.2d 1309, 1311–12 (1993).

<sup>177</sup> 642 N.W.2d 113 (Neb. 2002).

<sup>178</sup> *Id.* at 119.

<sup>179</sup> *Id.* at 125.

<sup>180</sup> Knickerbocker, *supra* note 161.

Litigants described the sales “as a way of avoiding compensation for abuse.”<sup>181</sup>

Because the diocese and its parishes should not be deemed alter egos simply because the former has insufficient assets to satisfy creditor claims,<sup>182</sup> the question of *when* the entities in question were separately incorporated ought to loom larger than the question of *why* they were so incorporated when courts analyze the relationship between a diocese and affiliated, separately incorporated juridic persons. In a Massachusetts diocese, for example, separately incorporated parishes date back to the 1870s.<sup>183</sup> In Rhode Island, a nonprofit corporation holding Church-related assets was set up more than 100 years ago,<sup>184</sup> and the Providence Diocese incorporated most of its parishes in the early to mid-1900s.<sup>185</sup> Because decades-old separate incorporation of juridic persons hardly can be characterized as an attempt by the Church to escape liability in the current sex abuse cases, it is difficult to see how courts could find that respecting the separate legal personality of such entities promotes fraud or sanctions injustice, as the second prong requires.

In contrast, where a diocese only began separately incorporating parishes and other juridic persons after the priest sex abuse litigation began, the case for treating the diocese and such persons as alter egos becomes stronger. The case becomes even stronger if the diocesan bishop (or his predecessors) engaged in the various forms of misconduct identified by the National Review Board, including cover ups, continuing to assign known abusers to parish ministries, failure to punish repeat offenders, and the like.<sup>186</sup> As a California court put it in a case involving business corporations, “it would be unjust to permit those who control companies to treat them as a single or unitary enterprise

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<sup>181</sup> *Id.*

<sup>182</sup> *See supra* Part II.C.1.

<sup>183</sup> McCarthy, *supra* note 15, at 124.

<sup>184</sup> Geyelin, *supra* note 18.

<sup>185</sup> Levitz, *supra* note 20.

<sup>186</sup> *See* NAT'L REVIEW BD. FOR THE PROTECTION OF CHILDREN & YOUNG PEOPLE, A REPORT ON THE CRISIS IN THE CATHOLIC CHURCH IN THE UNITED STATES 96–129 (2004), available at <http://www.usccb.org/nrb/nrbstudy/nrbreport.pdf> (describing bishops' responses to sex abuse claims); *see also* O'Reilly & Strasser, *supra* note 5, at 33–34 (detailing similar accusations against dioceses).

and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity.”<sup>187</sup>

Yet, even with respect to such a diocese, there are still arguments to be considered on the other side. First, treating separately incorporated parishes as alter egos of the diocese denies them the statutory protection of limited liability. As we have seen, the law makes incorporation available as an option precisely so that parties can avail themselves of that protection. Alter ego thus takes back with one hand what the state has granted with the other. Second, because treating separately incorporated parishes as alter egos of the diocese would expose the parishes’ assets to the claims of diocesan creditors, even though the parish in question might never have had any cases of priest abuse, the ability of innocent parish priests and parishioners to freely practice their religion may be adversely affected. Finally, and perhaps most importantly, the law provides creditors with alternative remedies.

Where a diocese separately incorporates parishes and other agencies and transfers assets to these newly formed entities in hope of shielding those assets from creditors’ claims, the law provides creditors with a powerful tool: fraudulent transfer law.<sup>188</sup> The law governing fraudulent transfers is complex,<sup>189</sup> but has the virtue of being more squarely focused on the problematic behavior than is veil piercing. Fraudulent transfer law does not ask whether the entities observed various corporate formalities. Instead, the actual fraud variant of fraudulent transfer law asks whether the debtor transferred property with the intent to hinder the creditor by putting collateral beyond reach.<sup>190</sup> The constructive fraud variant asks whether the debtor received less than reasonably equivalent value for the property transferred and was insolvent at the time of the transfer or rendered

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<sup>187</sup> *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 1 Cal. Rptr. 2d 301, 317 (Ct. App. 1991).

<sup>188</sup> See *supra* note 21.

<sup>189</sup> Robert Clark pioneered the overlap between fraudulent transfer law and veil piercing, contending that fraudulent conveyance principles shed valuable light on veil piercing. See ROBERT C. CLARK, *CORPORATE LAW* 39 (1986). At the same time, however, he noted that the vague alter ego standards make it “easier for plaintiffs to prove their cases, and they give judges more flexibility and discretion.” *Id.* at 85. Our argument is that it is precisely those aspects of alter ego law that justify applying it sparingly, while leaving plaintiffs fraudulent transfer law as a remedy.

<sup>190</sup> CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* 420–22 (1997).

insolvent by the transfer.<sup>191</sup> Admittedly, neither of these are bright-line standards, but at least both are asking the right questions. In contrast, most of the factors considered in alter ego cases are “singularly lacking in *direct* relevance to the question of the existence, and the amount, of harm caused the outside creditor by the misbehavior of the controlling shareholder.”<sup>192</sup>

#### D. *The Basic Policy Rationale of the Alter Ego Doctrine*

As a final analytical step, it seems appropriate to ask whether the policy rationale for using the alter ego doctrine has relevance to the problems posed by the priest sex abuse cases. The alter ego doctrine developed as an equitable response to the problematic incentives limited liability creates for the owners of business corporations. In brief,<sup>193</sup> limited liability allows shareholders of a business corporation to externalize part of the risks and costs of doing business onto other corporate constituencies and, perhaps, even onto society at large.<sup>194</sup> By setting aside the corporate veil in appropriate cases, the alter ego doctrine forces shareholders to internalize at least some of those costs.<sup>195</sup>

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<sup>191</sup> *Id.* at 425.

<sup>192</sup> CLARK, *supra* note 189, at 85.

<sup>193</sup> For a more detailed treatment, see Bainbridge, *supra* note 88, at 480–84.

<sup>194</sup> See, e.g., Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 576 (1986) (“[E]ven economists convinced of the utility of limited liability . . . concede that limited liability raises serious problems because it enables the enterprise to externalize its costs.”); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1586 (1991) (“Limited liability does not simply offset positive externalities, but rather encourages excessively risky activity.”).

<sup>195</sup> Even if one assumes that some legal action is necessary to force diocesan bishops to internalize the costs associated with risky behavior on their part of that of their priests, the alter ego doctrine is an exceedingly blunt instrument for doing so. As the author Bainbridge has explained elsewhere:

[T]here is no reason to believe that veil piercing causes equity claimants to internalize the risks associated with their business’ operations. Both in rhetoric and application, the doctrine focuses on such irrelevancies as observation of organizational formalities and not on whether the equity claimants used their control to externalize risk. After all, it is clear that courts will not pierce the veil whenever the defendant externalized some costs onto third parties. . . .

It seems unlikely that veil piercing even inadvertently addresses concerns over negative externalities. As our review of the doctrine demonstrated, the law of veil piercing is remarkably vague. Indeed, the doctrine is nothing more than analysis by epithet. As a result, application of the doctrine is rare, unprincipled, and arbitrary. . . .

Even if one assumes that the religious activities of the Catholic Church generate negative externalities comparable to those associated with the business activities of civil corporations, the policy rationale behind the alter ego doctrine seems inapt as applied to the former. Diocesan bishops are already subject to a variety of pressures to internalize the risk of priestly misconduct: exposure of diocesan assets to liability, adverse media attention that reflects poorly both on a bishop's personal reputation and the Church he has taken a solemn sacramental oath to protect, and intra-church discipline.<sup>196</sup> Treating a diocese and all its affiliated juridic persons as a single religious enterprise for purpose of imposing liability with respect to past errors is therefore likely to impose significant costs on the ability of innocent parishioners to freely exercise their religion without significantly affecting the behavior of current bishops.

#### CONCLUSION

There is no constitutional bar to a court using the alter ego doctrine to treat a diocese and its separately incorporated parishes as a single enterprise for liability purposes in the priest sex abuse scandal litigation (or any other dispute, for that matter). The analysis in this paper, however, suggests that appropriate cases for invoking the alter ego doctrine in this context will be few and far between.

Two entities will be treated as alter egos where: (1) one entity exercises such a high degree of control that the other has effectively lost its separate existence, and (2) the controlling entity has abused its power of control in an unjust or inequitable manner. As to the former prong, a diocesan bishop who comports

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Equity claimants of a limited liability entity, moreover, can very effectively insulate themselves from veil piercing-based personal liability by complying with minimal organizational formalities and providing modest levels of capital and/or insurance. How can such a dysfunctional doctrine possibly create appropriate incentives for the equity claimants of either a corporation or LLC to optimally internalize the social costs of their business activities?

Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77, 96 (2005).

<sup>196</sup> The effectiveness of intra-church discipline as a constraint has been questioned. *See, e.g.*, Sargent, *supra* note 4, at 431 (“[B]ishops are constrained by canon law and are accountable at some level to the Holy See, especially on doctrinal matters, but a strong tradition of episcopal independence leaves bishops without any significant supervision in their actual administration of the diocese.”).

himself in accordance with the requirements of canon law is unlikely to exercise the requisite degree of day to day control over a separately incorporated parish. As to the latter prong, the courts have discretion to consider the potentially severe deleterious impact of liability on the ability of innocent parties to exercise religious practices implicating constitutionally-protected values. In other words, while the Free Exercise and Establishment clauses do not bar judicial application of the alter ego doctrine to churches, the values protected by those provisions appropriately may be weighed in the balance. Given the ready availability of alternative doctrines better suited to the problems at hand, particularly fraudulent transfer law, the case against invoking alter ego in this context thus becomes quite strong.