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DEFENDING A CLERIC'S RIGHT TO REPUTATION AND THE SEXUAL ABUSE SCANDAL IN THE CATHOLIC CHURCH

Michael J. Mazza*

I. INTRODUCTION

On Thursday evening, Father John, a well-respected Catholic priest with twenty-five years of service, receives a call from his bishop's secretary summoning him to a meeting at the chancery set for the following morning. Upon inquiring about the nature of the meeting, Father John is told that he will find out when he arrives. Slightly concerned, Father asks if he can bring an attorney, or at least a witness. He is told that will not be necessary, and that he should come alone. Entering the room Friday morning, Father John finds himself faced with not only his bishop, but the diocesan civil attorney, a canon lawyer, the vicar general, the head of the diocesan communications office, and the

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diocesan chancellor. More than a little intimidated, Father asks if there is a problem.

As a matter of fact, yes there is. He is informed that someone has made an accusation against him, though he is told neither the identity of the accuser nor the exact nature of the allegation. Nevertheless, Father John is advised that, as a precautionary measure, he is being relieved of his duties and that he cannot return to his rectory. He is asked to sign a document resigning his position as pastor, given that he will not be allowed on any diocesan property for the foreseeable future. He then learns that the diocese has already made the necessary arrangements for him to be admitted to an in-patient psychiatric facility specializing in the treatment of troubled priests. He is told that this facility will likely be his residence for the next six months, during which time cell phone and internet usage will be limited. Airline tickets have been purchased, the HIPAA forms are ready for his signature, and the diocese will pay for everything. In light of Father John's imminent departure, he is told, the vicar general will be celebrating all the parish Masses over the coming weekend, during which a statement will be read to his parishioners and printed in the Sunday bulletins distributed after each Mass. The diocese will also be issuing a press release stating that due to an accusation of sexual misconduct that is "not manifestly false or frivolous," Father John's priestly faculties have been revoked and he is being put on "administrative leave."[1] Father is assured that these public statements will also make clear that none of these actions should be taken as evidence of his guilt or innocence, only that the diocese is committed to "transparency" and to the care of all victims of sexual abuse.

Father John is stunned, but manages to assert that he has never sexually abused anyone in his entire life. At this point the civil lawyer points out that Father John will have an opportunity to tell "his side of the story" to the diocesan-appointed investigator, a former FBI agent hired to look into these claims. The investigator, in turn, will submit the results of the investigation to the diocesan "review board"—a group of lay people appointed by the bishop to advise him on how to proceed with such matters, as well as more generally on whether any priest is "suitable for ministry." The board, as Father John recalls hearing on another occasion, includes an outspoken advocate for victims of child sexual abuse, a pediatrician specializing in the treatment of survivors of sexual abuse, and a prominent local attorney. Father John's inquiry about whether he can be represented by civil or canonical counsel during this process is met with a curt reply from the canon lawyer, who says he has no right to one, and that in any event it is premature to be involving lawyers of any kind at this early point in the process.

The above hypothetical is a shockingly common occurrence in the United States at present.[2] Among the many reasons for this sad state of affairs is the influence of civil lawyers, working on behalf of the liability insurance companies they represent, who have helped to radically alter the relationship between bishops and priests in the United States.[3] Regardless of its causes, the situation today is very different than forty years ago and, at least in some ways, better. There is more awareness of the problem of abuse, better

1. *See* David A. Shaneyfelt & Joseph P. Maher, *Sacrificing Priests on the Altar of Insurance*, HOMILETIC PASTORAL REV. (Feb. 24, 2015), https://www.hprweb.com/2015/02/sacrificing-priests-on-the-altar-of-insurance.

2. *Id.*

3. *Id.*

training, and far fewer current cases.[4] Although the number of allegations of *current* child sexual abuse by Catholic clergy in recent years is extremely low (totaling eight, for example, in the most recent annual report), accusations of *past* child sexual abuse are still numerous.[5] According to the most recent annual report from the United States Council of Catholic Bishops, a total of 2,930 individuals made 3,103 separate allegations of child sexual abuse by Catholic clergy in the 2020–21 reporting year.[6] The vast majority of the 968 allegations deemed "credible" concerned the abuse of minor males[7] before the year 2000,[8] and over half of the total number of men accused (1,914) were already dead (1,035) when the accusations were made.[9] Moreover, nearly 42% of the total allegations received were ultimately determined to be either "unsubstantiated" (113) or "unable to be proven" (1,176).[10] As a result, the specter of being falsely accused hangs like a sword of Damocles over the heads of many of the roughly 37,000 Catholic priests presently living in the United States.[11] Even if a priest is ultimately put back into ministry—an outcome that is by no means certain—the damage done to his reputation can be both severe and enduring.[12]

Of particular concern to many of these clerics is the almost complete lack of due process given the accused once an accusation is made. Under the current praxis in the United States, the process described above involving the fictional Father John is not only permissible, but has become almost routine. This is due in large part to the so-called "Dallas Charter," an agreement adopted by the U.S. bishops at their annual meeting in Dallas in 2002, months after a series of explosive articles in *The Boston Globe* helped fuel a firestorm of criticism of the Church.[13] Dramatic steps were taken in response, including

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4. *See 2021 Annual Report: Findings and Recommendations*, UNITED STATES CONF. CATH. BISHOPS (May 2022), https://www.usccb.org/resources/2021%20CYP%20Annual%20Report.PDF%20(1).pdf (hereinafter *2021 Annual Report*).

5. *Id.* at vi–vii.

6. *Id.* at 23. The reporting period ran from July 1, 2020, to June 30, 2021, and included 192 dioceses and eparchies within the United States. Although both priests and deacons are considered "clergy" on account of their sacramental ordination, the number in the 2021 Annual Report of accused priests (1,707) dwarfs the number of accused deacons (23). *Id.* at 25. For that reason, among others, this article will focus largely on the plight of accused priests.

7. *Id.* at 36 ("The gender of 81 of the 967 alleged victims [deemed "credible"] reported between July 1, 2020, and June 30, 2021 was not identified in the allegation (8 percent). Among those for whom the gender of the victim was reported, 82 percent were male, and 18 percent were female.").

8. *2021 Annual Report*, *supra* note 4, at 37.

> For 90 of the allegations (9 percent) deemed credible between July 1, 2020, and June 30, 2021, no time frame for the alleged abuse could be determined. Among those where a time frame could be determined, 52 percent of all new allegations were said to have occurred or began before 1975, 44 percent between 1975 and 1999, and 4 percent since 2000.

Id.

9. *Id.* at 25.

10. *Id.* at 23.

11. The number of diocesan and religious order priests in the U.S., both active and retired, totaled 37,302 as of 2018. The number of permanent deacons that year was 18,977. *Clergy and Religious*, UNITED STATES CONF. CATH. BISHOPS, https://www.usccb.org/offices/public-affairs/clergy-and-religious (last visited Nov. 9, 2022).

12. *See, e.g.*, Andrea Cipriano, *Catholic Priests File Lawsuits to Fight False Sex Abuse Allegations*, CRIME REP. (Feb. 15, 2021), https://thecrimereport.org/2021/02/15/catholic-priests-file-lawsuits-to-fight-false-sex-abuse-allegations/#.

13. Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2002), https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html. *See also* Jon Henley, *How the Boston Globe Exposed the*

the promulgation of "Essential Norms" for diocesan policies dealing with allegations of sexual abuse of minors by priests or deacons.[14] Some of these new norms triggered concerns that the basic human rights of clerics—including their right to a good reputation—were not being respected.[15]

An analysis of the legitimacy of applicable canonical norms or the fundamental justice of current praxis in ecclesiastical circles is beyond the scope of the present study. Instead, this article will focus on the relatively narrow question of what happens *after* a priest, who wants to clear his name after having been falsely accused, has exhausted all of his available remedies under canon law. In other words, what recourse, if any, does a given priest have under the civil law in order to defend his right to reputation?

II. THE PARTIES TO THE ACTION

The priest alleging defamation would most often be the plaintiff in such an action. It is conceivable, however, that others may have a cause of action on behalf of the priest. Friends or relatives, for example, could file an action in the priest's name if he were incapacitated for some reason. Less certain is whether a civil judge in an American jurisdiction would permit a claim made by the living relations of a deceased priest that he had been defamed. While under Roman law heirs were allowed to bring defamation actions in order to protect the reputation of the decedent,[16] the American system tends to frown on extending reputational protection to the dead unless some property interest (such as a copyright or an artistic expression) is attached.[17] European systems, on other hand, are more amenable to recognizing a posthumous interest in reputation, due perhaps to a greater sensitivity to the importance of human dignity over and above other perceived goods—such as individual liberty or property rights and material wealth.[18]

Abuse Scandal that Rocked the Catholic Church, THE GUARDIAN (Apr. 21, 2010), https://www.theguardian.com/world/2010/apr/21/boston-globe-abuse-scandal-catholic.

14. *The Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, UNITED STATES CONF. CATH. BISHOPS, https://www.usccb.org/resources/essential-norms-diocesaneparchial-policies-dealing-allegations-sexual-abuse-minors (last visited Nov. 17, 2022). *See also* NICHOLAS CAFARDI, BEFORE DALLAS: THE U.S. BISHOPS' RESPONSE TO CLERGY SEXUAL ABUSE OF CHILDREN (2008). The original version of *The Charter for the Protection of Children and Young People*, frequently referred to as the "Dallas Charter," was released by the USCCB in June 2002. *Charter for the Protection of Children & Young People*, UNITED STATES CONF. CATH. BISHOPS (2002) https://bit.ly/2Sp7w6U (hereinafter *The Dallas Charter*).

15. *See, e.g.*, JOHN J. COUGHLIN, CANON LAW: A COMPARATIVE STUDY WITH ANGLO-AMERICAN LEGAL THEORY 72–74 (2011); Thomas G. Guarino, *The Dark Side of the Dallas Charter,* FIRST THINGS (Oct. 2, 2019), https://www.firstthings.com/web-exclusives/2019/10/the-dark-side-of-the-dallas-charter.

16. DIG. 47.10.1.4 (Ulpian, Ad Edictum 56). "Et si forte cadaveri defuncti fit iniuria, cui heredes bonurumve possessorres extitimus, iniuriarum nostro nomine habemus actionem: spectat enim ad existimationem nostram, si qua ei fiat iniuria. Idemque et si fama eius, cui heredes extitimus, lacessatur." *Id.* In the English translation:

> And if perchance the corpse should be contumeliously treated of a deceased to whom we are heirs or recipients of his estate, we have the action for insult in our own right; for it affects our own reputation, if any insult be directed at the corpse. The same applies if the good repute of one to whom we are heirs be damaged.

2 THE DIGEST OF JUSTINIAN 47.10.1.4 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., Univ. Penn. Press 1985).

17. RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 121 (2010).

18. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1152, 1209–10 (2004). *See also* Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-*

The next question is who might be the defendant in such an action? Thorny theological and canonical issues would certainly be raised if a priest were to sue his own bishop, but it would not be impossible.[19] A case involving a diocesan official as defendant would be less difficult, whether clerical or lay, although either employment law issues or religious liberty concerns might be of sufficient strength to encourage a civil judge to dismiss such a suit out of hand. A court may claim incompetence, for example, if a suit concerns the terms and conditions of the priest's employment with the diocese.[20] Both state and federal courts in the U.S. have shown great reluctance to wade into the employment practices of religious institutions—wary of violating the so-called "wall of separation" between church and state.[21] To cite one notable case from 2012, the U.S. Supreme Court held unanimously that the Establishment and Free Exercise Clauses of the First Amendment bar lawsuits brought by ministers against their churches claiming they had been fired in violation of employment discrimination laws.[22] Yet such jurisprudence does not necessarily mean that every decision made by an employer—to discriminate against an employee unfairly, to harm his reputation, or to treat him unjustly in some other way—will be protected simply out of deference to religious liberty.[23] In fact, to the extent that a hierarchical church has an internal process for the just adjudication of claims—as does the Catholic Church—such determinations ought to be given great weight by U.S. tribunals.[24]

Another possible route that a priest-plaintiff might want to pursue applies if a defamatory post has made its way onto the internet. In such a case, the dispositive question will be who is responsible for the post. A federal statute widely referred to as Section 230

Invention, 43 U.C. DAVIS L. REV. 79 (2009).

19. *See, e.g.*, Jameson Cook & Jamie Cook, *Suspended priest seeks return following favorable ruling from Vatican,* ROYAL OAK TRIB. (Apr. 29, 2021, 9:27 AM), https://www.dailytribune.com/2021/04/29/suspended-priest-seeks-return-following-favorable-ruling-from-vatican/ (discussing August 2020 lawsuit of archdiocesan priest Fr. Eduard Perrone against a fellow-archdiocesan priest, the vicar for clergy Msgr. G. Michael Bugarin, in Wayne County, Michigan). *See also* COLIN BARR, THE EUROPEAN CULTURE WARS IN IRELAND: THE CALLAN SCHOOLS AFFAIR (2010) (discussing the highly publicized litigation between a diocesan priest and his bishop in 19th century Ireland).

20. *See Financial Guidelines and Policies Manual for Parishes, Schools, and Early Childhood Centers*, DIOCESE OF ST. PETERSBURG, https://www.dosp.org/wp-content/uploads/2019/10/DOSPGuidlines.pdf (last updated Dec. 2011). While priests are generally considered employees of the diocese in which they are incardinated under both federal and state law, they are treated as "self-employed" for purposes of the social security and Medicare system. *Id.* at XV.1. This is due to the fact that clergy were originally excluded from the Social Security system when it was first established in the 1930s, and only later allowed to participate as "self-employed" participants. *Id.* at Appendix VI.

21. Everson v. Bd. Educ. Ewing Twp., 330 U.S. 1, 16 (1947). This oft-used expression is found nowhere in the U.S. Constitution, but appeared rather in a letter that Thomas Jefferson wrote to a group of Baptists in Danbury, Connecticut in January 1802. The letter was quoted by the U.S. Supreme Court in its *Everson* decision in 1947; the concept has played a large role in modern jurisprudence on Church-State relations in the U.S. *See* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2003).

22. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 191–92 (2012) (holding that a lay teacher was a "minister" for the purpose of the First Amendment analysis).

23. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2076 (2020) (Sotomayor, J., dissenting).

24. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (reversing a decision of the Illinois State Supreme Court after that court impermissibly injected itself into a religious dispute instead of simply recognizing the decision of the highest ecclesiastical tribunal of the hierarchical church).

of the Communications Decency Act of 1996 has generally been interpreted by U.S. courts as barring individual defamation claims against a wide range of internet service providers, including not only large access and service providers such as AT&T and Verizon, but also web-hosting or cloud computing companies, search-engines, social networking sites, e-commerce intermediaries, and interactive or participative platforms offering instant messaging or customer reviews.[25] As a result, internet intermediaries presently enjoy broad immunity from defamation lawsuits.[26] While there have been calls for a legislative correction in this area,[27] until such change occurs potential plaintiffs will have fewer options in the pursuit of their claims, being forced to sue the individual authors of allegedly defamatory statements themselves rather than those who publish such statements. This is especially problematic when allegedly defamatory statements are made anonymously via the internet. Given that the U.S. Supreme Court's First Amendment jurisprudence includes a constitutional right to engage in "anonymous speech,"[28] there appears little likelihood that such speech will be limited to any appreciable degree, at least for the present.[29] Thus, defamation plaintiffs—at least in the U.S.—will continue to face enormous hurdles in pressing such claims.[30]

Potential criminal prosecutions of defamation do not merit serious consideration in this context. First, they do not truly represent the vindication of a subjective right; rather, they represent action taken on behalf of the common good in the discretion of a government prosecutor. Moreover, as a practical matter, such actions are becoming increasingly rare due to the growing "decriminalization" of defamation through repeal of criminal statutes and shifting public opinion.[31]

III. THE PROPER FORUM

The next major issue is choosing a venue for the action. An American priest wishing to sue for defamation might have a choice among various states, depending on all the facts

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25. 47 U.S.C. § 230(f)(2) (defining an interactive computer service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ."). *See also* Caraccioli v. Facebook, Inc., 700 F. App'x 588 (9th Cir. 2017) (upholding dismissal of defamation, libel, and other related claims against Facebook based on Section 230 immunity).

26. *See* sources cited *supra* note 25.

27. *See, e.g.*, Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. TECH. 569 (2001); Robert D. Richards, *Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking*, 8 FIRST AMEND. L. REV. 176 (2009); Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65 (2012); *and* Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKELEY TECH. L.J. 1505 (2015).

28. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

29. *See* Richards, *supra* note 27, at 197–204 (discussing various attempts to compel discovery of the identity of certain anonymous posters).

30. The "Electronic Commerce Directive," issued by the European Parliament and the Council of the European Union in 2000, generally provides that internet service providers will not be held responsible for content they post if, among other things, they act "expeditiously" to remove or disable access to certain objectionable material upon being informed of it. 2000 O.J. (L 178) 46, https://bit.ly/2TUGTva. A similar "notice and take-down" regime has been proposed for the U.S., but has thus far not been adopted. Browne-Barbour, *supra* note 27, at 1556–59.

31. Vincente V. Mendoza, *The Decriminalization of Libel is Not the Way*, 82 PHILIPPINE L.J., 288, 288–92 (2008).

and circumstances, including when and where the defamation allegedly occurred. Generally, "publication" for purposes of defamation law occurs when a person diffuses material that bears a defamatory meaning.[32] The material may consist of spoken or written words, as well as pictures, sounds, or even conduct that carries a defamatory message.[33] Once the message is communicated to a third party, the reputation of the person to whom the statement refers is put at risk, and liability for defamation becomes a possibility.[34]

Under general principles of defamation law, every distinct publication of a defamatory statement can give rise to a separate cause of action.[35] In the United States, however, a "single publication rule" generally applies, meaning that only one cause of action may be brought for multiple publications of the identical work.[36] If a republication is intended to and actually does reach a new audience—such as the second edition of a book—the "single publication rule" would not apply, and an entirely new cause of action would accrue.[37] The same principles have been applied to the reception of radio and television broadcasts.[38] While the explosion of internet-based communication has raised new questions regarding the meaning and the enforcement of defamation laws in theory, it does not appear that traditional legal concepts are being radically reformed in light of the new technologies.[39] Thus, an internet communication, such as a web page, will likely be treated in the same way as a book regardless of venue. As a result, unless a webpage is substantially modified (as would be the case with subsequent editions of a book),[40] only the original posting of an allegedly defamatory web page would start the statute of limitations period. The alternative argument that a continuous web post represents a "continuing tort," tolling the statute of limitations until the web post is taken down, has not been applied to defamation actions in the United States.[41]

Where a publication occurs can be as important as *when* it occurs. Broadly speaking, a publication occurs for purposes of defamation law in the jurisdiction in which the statement appears, not where it was initially "manufactured."[42] The justification for this

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32. *See* Ostrowe v. Lee, 175 N.E. 505, 505 (N.Y. 1931) ("In the law of defamation, 'publication' is a term of art. A defamatory writing is not published if it is read by no one but the one defamed. Published, it is, however, as soon as read by any one else.").

33. *Id.* at 506 ("Any symbol suffices–pictures, hieroglyphics, shorthand notes–if only what is written is intelligible to him who reads.").

34. *See, e.g.*, Turner v. Boy Scouts of Am., 856 N.E.2d 106, 115 (Ind. Ct. App. 2006). In *Turner*, the court determined that certain communications made from a Boy Scouts executive to a volunteer scoutmaster who had been accused of misconduct had not been "published" for purposes of Indiana's defamation law. *Id.* at 111–12. The court remanded the case to the trial court for reconsideration, however, as to whether certain other "intra-organizational communications regarding Turner's alleged possession of child pornography" could be considered as having been "published." *Id.* at 115.

35. RESTATEMENT (SECOND) OF TORTS § 577A cmt. a (AM. L. INST. 1977).

36. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773 (1984).

37. *See* Firth v. New York, 775 N.E.2d 463, 465–67 (N.Y. 2002).

38. *See* Lehman v. Discovery Commc'ns, Inc., 332 F. Supp. 2d 534, 537–39 (E.D.N.Y. 2004).

39. *See, e.g.*, *Firth*, 775 N.E.2d at 466–67 (declining to hold, in a jurisdiction where the "single publication rule" was in effect, that each "hit" on an internet website should be considered a new "publication" that would retrigger the statute of limitations for a defamation action).

40. Wheeler v. Dell Publ'g Co., 300 F.2d 372, 375 (7th Cir. 1962).

41. *See, e.g.*, Atkinson v. McLaughlin, 462 F. Supp. 2d 1038, 1050 (D.N.D. 2006).

42. *See, e.g.*, Anselmi v. Denver Post, Inc., 552 F.2d 316, 319–20 (10th Cir. 1977) (holding that "a tort is not only complete at the place where the allegedly libelous material was published, but rather can have effects where the plaintiffs who are allegedly libeled reside.").

approach is self-evident in light of the purposes of defamation law, namely, the protection of an individual's reputation within his community.[43] Wherever the harm to reputation occurs, there is jurisdiction.[44] Beyond this general principle, there exist many permutations that are heavily dependent on the law applicable in any given jurisdiction.

In the United States, with a legal system generally less amenable to defamation plaintiffs than many other countries, courts in one state may exercise jurisdiction over a defendant from another state only if there exist sufficient ties to justify the exercise of judicial power.[45] Under state long-arm statutes, state law can provide the terms under which such jurisdiction can be exercised by their courts, always cognizant of the due process requirements of the Fourteenth Amendment to the Constitution.[46] Thus, a factual question arises—particularly important in cases involving the modern media and the internet—as to whether and to what extent the activity of a given defendant has provided enough of a "nexus" to the forum state to warrant the defendant being haled into court to defend himself against an accusation of defamation.[47]

With respect to postings on the internet, the Florida Supreme Court held that placing allegedly defamatory material on websites makes it available everywhere the material is "accessible."[48] Thus, when someone in the state actually "accesses" the material, it has been "published" for purposes of the defamation law, no matter where the original posting occurred.[49] The Ohio Supreme Court came to a similar judgment when deciding a case involving an unhappy customer from Virginia and an automotive equipment company in Ohio.[50] After the customer posted several negative reviews online, the company sued for defamation and intentional interference with contracts and business relationships.[51] In deciding the jurisdictional issue in favor of the business; i.e., that the customer had indeed made himself subject to the jurisdiction of Ohio courts by means of his online postings, the Ohio Supreme Court quoted favorably the following reflection:

> The rise in Internet-related disputes does not mean courts should ignore traditional jurisdiction principles. "'[T]he Internet does not pose unique jurisdictional challenges. People have been inflicting injury on each other from afar for a long time. Although the Internet may have increased the quantity of these occurrences, it has not created problems that are qualitatively more difficult.'"[52]

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43. *Id.* at 322–23.

44. *Id.*

45. Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (holding that in the instant case there were "sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations" against the defendant).

46. U.S. CONST. amend. XIV, § 1. *See also* OKLA. STAT. tit. 12, § 2004(F) (extending Oklahoma courts' jurisdiction to the limits of due process).

47. Comment, *Long-Arm Jurisdiction over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342, 347 n.40 (1967).

48. Internet Sols. Corp. v. Marshall, 611 F.3d 1368, 1370–71 (11th Cir. 2010) (remanding the case to the Florida state court after receiving a ruling from the Florida Supreme Court that an internet posting was sufficient to trigger personal jurisdiction in an action for defamation).

49. *Id.*

50. Kauffman Racing Equip. LLC v. Roberts, 930 N.E.2d 784 (Ohio 2010).

51. *Id.* at 788–89.

52. *Id.* at 789 (quoting Scott T. Jansen, *Oh, What a Tangled Web . . . The Continuing Evolution of Personal*

In ruling that jurisdiction attached, the court recognized that even though the defendant's postings "did not emanate from Ohio, those comments were received in Ohio."[53] Because the plaintiff showed that the comments had been viewed by people in Ohio and that the defendant knew that the target of his online attacks was likely to be harmed in Ohio, the court held that subjecting the defendant to Ohio's jurisdiction did not violate the fundamental principles of due process.[54] In support of its decision, the court cited a 1984 opinion from the U.S. Supreme Court, *Calder v. Jones*,[55] in which a Hollywood actress, Shirley Jones, sued an editor and a writer for the *National Enquirer*, a national magazine headquartered in Florida, for defamatory statements made in an October 1979 article about her.[56] The U.S. Supreme Court determined that a California court could indeed claim jurisdiction over the pair of Florida residents, given that the "effects" of their actions performed outside of California were sufficient to trigger jurisdiction:

> Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon [Jones]. And they knew that the brunt of that injury would be felt by [her] in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.[57]

Given the right set of circumstances—including a sufficiently motivated plaintiff—there is another civil law jurisdiction to which a defamed priest might want to turn: the Human Rights Council of the United Nations in Geneva. Given the Holy See's support for U.N. activity on behalf of human rights, such recourse is, at least theoretically, not impossible—however politically unpleasant and theologically problematic.[58] For instance, in an October 2014 intervention Apostolic Nuncio Archbishop Bernardito Auza took the occasion of a discussion on "the rule of law" to emphasize that the definition of such a fundamentally important rule is "both rationally and morally grounded upon the substantial principles of justice, including the inalienable dignity and value of every human person prior to any law or social consensus."[59] As a consequence, he added, there existed elements of "fundamental justice" that included not only "paramount respect of human rights," but also "respect for the principle of legality (*nullum crimen sine lege*), the presumption of innocence, and the right to due process."[60] The archbishop also urged that

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Jurisdiction Derived from Internet-Based Contacts, 71 MO. L. REV. 177, 182–83 (2006)).

53. *Id.* at 791.

54. *Id.* at 791–92, 798.

55. 465 U.S. 783 (1984).

56. *Id.* at 785.

57. *Id.* at 789–90 (citations omitted) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

58. *Vatican to United Nations: Human rights are inviolable*, VATICAN RADIO (Nov. 3, 2016, 9:39 AM), https://www.archivioradiovaticana.va/storico/2016/11/03/vatican_to_united_nations_human_rights_are_inviolable/en-1269697.

59. Archbishop Bernardito Auza, *Statement of the Holy See to the U.N. in New York at the 69th Session of the United Nations General Assembly, Sixth Committee, Agenda Item 83: Rule of Law*, HOLY SEE PRESS OFF. (Oct. 13, 2014), https://bit.ly/3zDs6sp.

60. *Id.*

the members of the U.N. be held accountable:

> The Holy See wishes to reaffirm that every State has the primary duty to protect its own population from grave and sustained violations of human rights . . . . If States are unable to guarantee such protection, the international community must intervene with the juridical means provided in the UN Charter and in other international instruments. The action of the international institutions, provided that it respects the principles undergirding the international order, cannot be interpreted as an unwarranted imposition or a limitation of sovereignty.[61]

IV. THE APPLICABLE STANDARD

The U.S. Supreme Court has effectively discouraged many defamation claims in its zeal to protect free speech under the First Amendment. First, in *New York Times v. Sullivan*,[62] the justices imposed an "actual malice" standard on plaintiffs who are "public officials," requiring plaintiffs to show that the author of the allegedly defamatory statements knew that the published information was false, or was reckless in deciding to publish it.[63] Then, in *Gertz v. Robert Welch, Inc.*,[64] the Court expanded the notion of "public officials" to include even "public figures," evidently applying the traditional notion of "assumption of risk" in such matters.[65] If a person decides to enter a public arena, the thinking goes, he should be prepared to deal with criticism; given that he is engaged in public debate, he (presumably) has the opportunity to defend himself against such attacks. Yet, just what type of conduct propels one into the public spotlight is not clear.[66] In any event, the Supreme Court's *Gertz* decision prohibited states from imposing common law rules of strict liability in defamation actions brought by private individuals, requiring plaintiffs to show at least negligent conduct.[67]

Supreme Court defamation jurisprudence has its share of critics, including one of its sitting justices—Clarence Thomas. In a recent concurring opinion regarding a denial of certiorari in a high-profile defamation case, Thomas registered his discontent with the "actual malice" standard, calling for the Court to reconsider its jurisprudence in this area, which he said had the effect of "displac[ing] vast swaths of state defamation law."[68] Justice Thomas argued that:

> *New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law. Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own "'federal rule[s]'" by balancing the "competing values at stake in defamation suits." We should not continue to reflexively apply this policy-driven approach to the Constitution. Instead, we should

61. *Id.*
62. 376 U.S. 254 (1964).
63. *Id.* at 262.
64. 418 U.S. 323 (1974).
65. *Id.* at 345.
66. Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1419–26 (1975). It is interesting to consider, for example, whether a Catholic priest would be seen as a "public figure" by virtue of his position, his participation on social media, or perhaps even by his preaching.
67. *Gertz*, 418 U.S. at 347–48, 350.
68. McKee v. Cosby, 139 S. Ct. 675, 680 (2019) (Thomas, J., concurring in denial of certiorari).

> carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we.[69]

Until the Court takes up this invitation to revisit its jurisprudence on defamation, the current practice will stand. Thus, private plaintiffs in most defamation actions are required to show that the author of a defamatory falsehood knew, "or in the exercise of reasonable care should have known," that the statement at issue "was false or would create a false impression in some material respect."[70] This negligence standard appears to be in place in at least thirty-six states at present[71]: Alabama,[72] Arizona,[73] Arkansas,[74] California,[75] Delaware,[76] Florida,[77] Georgia,[78] Hawaii,[79] Idaho,[80] Illinois,[81] Iowa,[82] Kansas,[83] Kentucky,[84] Louisiana,[85] Maine,[86] Maryland,[87] Massachusetts,[88] Michigan,[89] Minessota,[90] Missouri,[91] New Hampshire,[92] New Mexico,[93] North Carolina,[94] Ohio,[95]

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69. *Id.* at 676 (internal citations omitted).

70. ROBERT D. SACK, 1 SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 6:2.1 (3rd ed. 1999) (citing cases) (hereinafter SACK vol. 1).

71. *Id.* at § 6:2. Sack's treatise notes that courts in the District of Columbia and Puerto Rico have also adopted the negligence standard.

72. Mead Corp. v. Hicks, 448 So. 2d 308 (Ala. 1983).

73. Peagler v. Phx. Newspapers, Inc., 560 P.2d 1216 (Ariz. 1977).

74. Dodrill v. Ark. Democrat Co., 590 S.W.2d 840 (Ark. 1979).

75. Brown v. Kelly Broad. Co., 771 P.2d 406 (Cal. 1989).

76. Gannett Co. v. Re, 496 A.2d 553 (Del. 1985).

77. Mia. Herald Publ'g Co. v. Ane, 458 So. 2d 239 (Fla. 1984); Firestone v. Time, Inc., 332 So. 2d 68 (Fla. 1976).

78. Triangle Publ'ns v. Chumley, 317 S.E.2d 534 (Ga. 1984).

79. Cahill v. Hawaiian Paradise Park Corp., 543 P.2d 1356 (Haw. 1975).

80. Wiemer v. Rankin, 790 P.2d 347 (Idaho 1990).

81. Troman v. Wood, 340 N.E.2d 292 (Ill. 1975).

82. Jones v. Palmer Commc'ns, Inc., 440 N.W.2d 884 (Iowa 1989).

83. Gobin v. Globe Publ'g Co., 531 P.2d 76 (Kan. 1975). Some authority exists supporting the conclusion that the higher "actual malice" standard applies in Kansas for matters of public concern, regardless of whether the plaintiff is a "public person" or not. *See* Bosley v. Home Box Office, Inc., 59 F. Supp. 2d 1147 (D. Kan. 1999).

84. McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882 (Ky. 1981).

85. Kennedy v. Sheriff of East Baton Rouge, 935 So. 2d 669 (La. 2006).

86. Hudson v. Guy Gannett Broad. Co., 521 A.2d 714 (Me. 1987).

87. Jacron Sales Co. v. Sindorf, 350 A.2d 688 (Md. 1976).

88. Stone v. Essex Cnty. Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975); Brown v. Hearst Corp., 54 F.3d 21, 26 (1st Cir. 1995) ("Massachusetts has imposed a requirement that the newspaper or broadcaster be shown to be negligent or worse.").

89. Rouch v. Enquirer & News of Battle Creek, 398 N.W.2d 245 (Mich. 1986); Glazer v. Lamkin, 506 N.W.2d 570 (Mich. 1993) (discussing the applicable standard in light of an apparently self-contradictory state statute).

90. Britton v. Koep, 470 N.W.2d 518 (Minn. 1991); Jadwin v. Minneapolis Star and Trib. Co., 367 N.W.2d 476 (Minn. 1985).

91. Englezos v. Newspress and Gazette Co., 980 S.W.2d 25, 31 (Mo. Ct. App. 1998) (holding that the relevant standard is "fault," citing cases from other intermediate level state appellate courts).

92. Duchesnaye v. Munro Enters., Inc., 480 A.2d 123 (N.H. 1984); McCusker v. Valley News, 428 A.2d 493 (N.H. 1981).

93. Marchiondo v. Brown, 649 P.2d 462 (N.M. 1982).

94. Walters v. Sanford Herald, Inc., 228 S.E.2d 766 (N.C. Ct. App. 1976).

95. Landsowne v. Beacon J. Publ'g Co., 512 N.E.2d 979, 984 (Ohio 1987) (holding that "the plaintiff must

Oklahoma,[96] Oregon,[97] Pennsylvania,[98] Rhode Island,[99] Tennessee,[100] Texas,[101] Utah,[102] Vermont,[103] Virginia,[104] Washington,[105] West Virginia,[106] and Wisconsin.[107] Courts in Connecticut[108] and Montana[109] require a degree of fault less than actual malice for a private plaintiff to recover, but they are not clear what degree of fault that is.[110] Two other states—Nebraska[111] and Nevada[112]—appear to have adopted the higher "actual malice" standard, at least with respect to matters of "public interest or concern."[113] Other states have standards that fall somewhere between negligence and actual malice, including Wyoming[114] (requiring a "due care" standard for broadcasting stations for statements broadcast by non-employees) and South Carolina[115] (imposing the common law standard of malice, requiring that a defendant acted with ill will or with conscious indifference toward the plaintiff).

Predicting what standard will be applied in a given jurisdiction is difficult; results in defamation cases are fact-specific and can vary widely depending on the particular court hearing the case, especially when private plaintiffs bring actions against non-media defendants. A review of the case law suggests that whether constitutional concerns even apply to such cases is not at all clear; some state courts have afforded "constitutional protection" to non-media defendants, while others have not.[116] The picture is even murkier

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prove by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication.").

96. Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976).

97. Bank of Or. v. Indep. News, Inc., 693 P.2d 35 (Or. 1985).

98. Hepps v. Phila. Newspapers, 485 A.2d 374 (Pa. 1984), *rev'd on other grounds*, 475 U.S. 767 (1986). Interestingly, Pennsylvania appears to be the only state in the U.S. that offers explicit protection for the right of reputation in its state constitution as one of the "inherent rights of mankind." *See* PA. CONST. art. I.

99. Capuano v. Outlet Co., 579 A.2d 469 (R.I. 1990).

100. Memphis Publ'g Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978); Sullivan v. Baptist Mem'l Hosp., 995 S.W.2d 569 (Tenn. 1999).

101. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976).

102. Cox v. Hatch, 761 P.2d 556 (Utah 1988).

103. Ryan v. Herald Ass'n, Inc., 566 A.2d 1316 (Vt. 1989).

104. Gazette, Inc. v. Harris, 325 S.E.2d 713 (Va. 1985); Heishman, Inc. v. Fox Television Stations, Inc., 217 F. Supp. 2d 690, 694 (E.D. Va. 2002) ("In Virginia, a private plaintiff may recover presumed compensatory damages resulting from defamation actions [with respect to communications] regarding matters of public concern only by establishing that the defendant acted with actual malice.").

105. Taskett v. King Broad. Co., 546 P.2d 81 (Wash. 1976).

106. Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (W. Va. 1984); Havalunch, Inc. v. Mazza, 294 S.E.2d 70 (W. Va. 1981).

107. Denny v. Mertz, 318 N.W.2d 141 (Wis. 1982).

108. Miles v. Perry, 529 A.2d 199 (Conn. App. Ct. 1987).

109. Madison v. Yunker, 589 P.2d 126 (Mont. 1978).

110. SACK vol. 1, *supra* note 70, at § 6:2.

111. Hoch v. Prokop, 507 N.W.2d 626 (Neb. 1993).

112. Nev. Ind. Broad. Corp. v. Allen, 664 P.2d 337 (Nev. 1983).

113. The New Jersey Supreme Court stated in a 1995 case that, at least at that time, the states mentioned were two of those that had in place an "actual malice" standard for public officials in matters of public concern, which "would not be adopted when a private person is involved." Turf Lawnmower Repair, Inc. v. Bergen Rec. Corp., 655 A.2d 417, 424 n.1 (N.J. 1995).

114. Adams v. Frontier Broad. Co., 555 P.2d 556 (Wyo. 1976).

115. Tharp v. Media Gen., Inc., 987 F. Supp. 2d 673 (D.S.C. 2013).

116. SACK vol. 1, *supra* note 70, at §§ 6.5.1, 6.5.2 (listing cases from states in which *Gertz* was applied to non-media defendants (eighteen states) as well as cases in which *Gertz* was not so applied (eight states)).

when one considers how the new media of blogs and social media sites will affect jurisprudence in this area.

Also unresolved is what standard will be applied to defamation cases that do not deal with matters of "public concern."[117] Much depends on that fundamental question. If the alleged defamatory statement touches a matter of public concern, the defendants will likely be afforded considerably more protection. If the matter is merely of private concern, however, plaintiffs are more likely to prevail. An analysis of fifty-seven reported defamation cases decided shortly after and citing the Supreme Court's 1985 *Dun & Bradstreet* decision showed that in just under two-thirds of the cases a public interest was found; the remaining one-third dealt with matters of private interest.[118] In the cases involving a public interest, the plaintiff prevailed only 17% of the time.[119] In the private interest cases, on the other hand, the plaintiff prevailed 64% of the time.[120] Matters of public concern were found in areas touching political campaigns, the operations of public financial institutions, the conduct of public officials, public health and safety, reports of criminal conduct, pornography, and athletics.[121] No public concern was found in matters relating to customer complaints against certain businesses, allegations of employee misconduct, employment recommendations, disputes between professionals or business organizations, paternity disputes, tenure at a public university, and commercial advertising.[122]

V. PROCEDURAL CONSIDERATIONS

Beyond these constitutional considerations are significant statutory issues, generally manifesting themselves at the level of procedure. For example, a fundamental principle of civil procedure in U.S. courts, whether at the state or federal level, is that the plaintiff must "state a claim upon which relief may be granted."[123] Failure to do so leaves the claim open to an attack by the defendant by means of a motion to dismiss.[124] These motions tend to be granted more often in defamation litigation than in other types of cases given the many practical and legal obstacles facing plaintiffs alleging libel or slander in the U.S.[125] As the U.S. Supreme Court stated in *Ashcroft v. Iqbal*,[126] plaintiffs must state in their complaints "more than the mere possibility" that a defendant has acted unlawfully.[127] While pleadings of facts are generally accepted as true at the opening stages of a lawsuit, pleadings of legal conclusions are not, and the "doors of discovery" will not be opened to plaintiffs "armed

117. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (holding that the "actual malice" standard did not apply to determinations of damage awards not involving matters of "public concern.").

118. Robert E. Drechsel, *Defining Public Concern in Defamation Cases Since* Dun & Bradstreet v. Greenmoss Builders, 43 FED. COMM. L.J. 1, 8 (1990).

119. *Id.*

120. *Id.*

121. *Id.* at 13.

122. *Id.* at 13–14.

123. *See, e.g.*, FED. R. CIV. P. 12(b)(6).

124. *Id.*

125. ROBERT D. SACK, 2 SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 16:1 (3rd ed. 1999) (hereinafter SACK vol. 2).

126. 556 U.S. 662 (2009).

127. *Id.* at 679.

with nothing more than conclusions."[128] In practice, this means that many defamation cases can be rejected at the outset of the litigation, given that plaintiffs may not be able to allege specific facts showing negligence, let alone actual malice.

Beyond that, "anti-SLAPP" statutes may not only prevent certain defamation lawsuits from going forward but also punish the plaintiffs. SLAPP is an acronym for "Strategic Litigation Against Public Participation," and can be described as a legislative response to the weaponization of lawsuits by the powerful to silence protest or dissent.[129] Several states have created anti-SLAPP statutes that to some degree seek to punish claimants who initiate lawsuits that arguably infringe the free speech rights of others. A few of these laws are broad in scope, including those in populous states such as California,[130] Texas,[131] Illinois,[132] and New York.[133] Over half of the remaining forty-six states (as well as the District of Columbia)[134] have some form of anti-SLAPP legislation, with varying degrees of scope and strength, including Arizona,[135] Arkansas,[136] Connecticut,[137] Delaware,[138] Florida,[139] Georgia,[140] Hawaii,[141] Indiana,[142] Kansas,[143] Louisiana,[144] Maine,[145] Maryland,[146] Massachusetts,[147] Minnesota,[148] Missouri,[149] Nebraska,[150] Nevada,[151] New Mexico,[152] Oklahoma,[153] Oregon,[154] Pennsylvania,[155] Rhode Island,[156] Tennessee,[157] Utah,[158] Vermont,[159] Virginia,[160] and

128. *Id.* at 678–79.
129. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 8 (1996).
130. CAL. CIV. PROC. CODE § 425.16.
131. TEX. CIV. PRAC. & REM. CODE §§ 27.001–27.011.
132. 735 ILL. COMP. STAT. 110/1 *et seq.*
133. N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a.
134. D.C. CODE § 16-5501.
135. ARIZ. REV. STAT. §§ 12-751, 12-752.
136. ARK. CODE ANN. § 16-63-501 *et seq.*
137. CONN. GEN. STAT. § 52-196(a).
138. DEL. CODE ANN. tit. 10, §§ 8136–8138.
139. FLA. STAT. §§ 720.304, 768.295.
140. GA. CODE ANN. § 9-11-11.1.
141. HAW. REV. STAT. §§ 634F-1–634F-4.
142. IND. CODE ANN. § 34-7-7-1 *et seq.*
143. KAN. STAT. ANN. § 60-5320.
144. LA. CODE CIV. PROC. ANN. art. 971.
145. ME. STAT. tit. 14, § 556.
146. MD. CODE ANN., CTS. & JUD. PROC. § 5-807.
147. MASS. GEN. LAWS ch. 231, § 59H.
148. MINN. STAT. §§ 554.01–554.05.
149. MO. REV. STAT. § 537.528.
150. NEB. REV. STAT. §§ 25-21,241 *et seq.*
151. NEV. REV. STAT. §§ 41.635–41.670.
152. N.M. STAT. ANN. §§ 38-2-9.1, 38-2-9.2.
153. OKLA. STAT. tit. 12, §§ 1430–1440, 1443.1.
154. OR. REV. STAT. §§ 31.150, 31.152, 31.155.
155. 27 PA. CONS. STAT. §§ 7707, 8301–8305.
156. 9 R.I. GEN. LAWS §§ 9-33-1–9-33-4.
157. TENN. CODE ANN. §§ 20-17-104–20-17-110.
158. UTAH CODE ANN. §§ 78B-6-1401 *et seq.*
159. VT. STAT. ANN. tit. 12, § 1041.
160. VA. CODE ANN. § 801-223.2.

Washington.[161] Two additional states—Colorado[162] and West Virginia[163]—have caselaw supporting positions similar to most anti-SLAPP laws.

While the original intent of these statutes may have been to punish large and powerful corporate interests from using litigation as a weapon against the powerless, they have had the effect of establishing yet another hurdle to individuals claiming defamation. In one California case, for example, a church published a report on the alleged sexual misconduct of two of its employees.[164] When the two youth ministers sued the church for defamation, the church sought protection under the state's anti-SLAPP statute.[165] The state appellate court decided that the church had a free speech right to publish its report, given that the subject matter fell within the category of a "public issue or an issue of public interest" for purposes of the anti-SLAPP statute.[166] Additionally, some state anti-SLAPP statutes provide that a plaintiff who has initiated a SLAPP lawsuit must pay the defendant's legal fees.[167] As a result, plaintiffs alleging that they have been defamed can face very different prospects for success in litigation, depending on the anti-SLAPP rules in their jurisdiction.

Applying these principles to the case of a hypothetical priest accused of sexual misconduct who seeks redress in a civil forum, it is possible that an anti-SLAPP statute will militate against any defamation action he may wish to pursue. An immediate and significant practical obstacle might be finding a civil attorney willing to file such an action, not only because personal injury attorneys in the United States generally work only on a contingency basis—i.e., collecting their fees from a percentage of any eventual recovery for a personal injury such as defamation—but also because of the possibility of the imposition of a judgment ordering the unsuccessful plaintiff to pay the often-significant legal fees of defense counsel. In response to any tort claim filed by a priest, the diocese might seek to rely on any applicable anti-SLAPP protection. Whether this would be perceived as violating the bishop's duty under canon 384 of the 1983 Code of Canon Law (generally requiring the bishop to have a "special solicitude" for the priests under his charge and to "protect their rights") is an open question, and one which a civil court would certainly be incompetent to judge.[168]

In any event, such lawsuits could be portrayed unfavorably in the media. A 2004 article in the *Los Angeles Times*, for example, stated that a spate of lawsuits filed by priests against their accusers at the time reflected "a decades-old legal strategy that has been used against activists and ordinary people who have spoken against developers, big property owners and other special interests."[169] The article highlighted one such case filed by Msgr.

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161. WASH. REV. CODE § 4.24.510.

162. *See* Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984).

163. *See* Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993).

164. *See* Terry v. Davis Cmty. Church, 131 Cal. App. 4th 1534, 1538–39 (2005).

165. *Id.*

166. *Id.* at 1545–46 (quoting CAL. CIV. PROC. CODE § 425.16(e)).

167. *See, e.g.*, LA. CODE CIV. PROC. ANN. art. 971(B).

168. 1983 CODE c.384.

169. Jean Guccione, *Some Priests are Suing Their Accusers*, L.A. TIMES (Mar. 5, 2004), https://www.latimes.com/archives/la-xpm-2004-mar-05-me-priests5-story.html. *See also* Sam Dillon, *Fighting Back, Accused Priests Charge Slander*, N.Y. TIMES (Aug. 25, 2002), https://www.nytimes.com/2002/08/25/us/fighting-back-accused-priests-charge-slander.html (quoting a letter

Joseph Alzugaray in Los Angeles County Superior Court against his accuser, and noted that the priest had taken the "rare legal step" of suing the organization "Survivors Network for those Abused by Priests" (SNAP), which had published his name on the group's website as being a sexual abuser, even though he had been cleared of the accusation by the diocese of Santa Rosa.[170] Lawyers for SNAP filed a motion to strike the lawsuit pursuant to California's anti-SLAPP law, which the court eventually granted, also awarding legal fees to defense counsel.[171] A different result was reached in a 2016 case from Missouri involving a diocesan priest, Fr. Joseph Jiang, who, after being cleared of a false accusation of sexual abuse, sued, among other defendants, the same SNAP group that Msgr. Alzugaray had sued.[172] Jiang eventually won, and SNAP was forced to pay his attorneys' fees and issue an apology.[173]

VI. STATUTES OF LIMITATIONS

Defamation plaintiffs must also contend with the applicable statutes of limitations. While these may vary among the different states, they generally run short, with a range from six months (in Tennessee)[174] to three years (in Massachusetts, New Hampshire, New Mexico, Vermont, and Wisconsin).[175] Just under half the states (and the District of Columbia) have only a one-year limit for defamation actions,[176] and two states have a one-year limit for actions involving slander and a three-year limit for those involving libel.[177]

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from SNAP criticizing a defamation lawsuit filed by a priest as "un-Christian, vengeful-style litigation that may scare others who have been abused and are hurting into remaining silent.").

170. Guccione, *supra* note 169; Martin Espinoza, *Monsignor Alzugaray consistently denied he abused girl 40 years ago*, PRESS DEMOCRAT (Apr. 24, 2010), https://www.pressdemocrat.com/article/news/monsignor-alzugaray-consistently-denied-he-abused-girl-40-years-ago/?view=AMP.

171. *See* Case Access, *Alzugaray v. Survivors Network for Those Abused by Priests*, L.A. CNTY. SUPERIOR CT., https://www.lacourt.org/CaseSummary/UI/casesummary.aspx?caseNumber=BC311107 (last visited Nov. 11, 2022); Msgr. Alzugaray retired in 2011 as a priest in good standing from the diocese of Santa Rosa and died three years later. Yet, as of May 2022, his name still appears on the internet listing of the Archdiocese of Los Angeles, where he was first incardinated, as having been "credibly accused" of sexual abuse. *See Consolidated List of Persons Named in the Report to the People of God with Current Status Through March 30, 2021*, ARCHDIOCESE OF L.A., http://1811.la-archdiocese.org/wordpress/wp-content/uploads/Consolidated_List_to_the_Report_to_the_People_of_God.pdf (last visited Nov. 11, 2022).

172. Robert Patrick, *St. Louis priest gets apology from anti-abuse group; suit against police is dismissed*, ST. LOUIS POST-DISPATCH (Nov. 27, 2017), https://www.stltoday.com/news/local/crime-and-courts/st-louis-priest-gets-apology-from-anti-abuse-group-suit-against-police-is-dismissed/article_bec0cc90-6d17-50a8-9610-932dd20fda59.html.

173. *Id.*

174. TENN. CODE ANN. §§ 28-3-103, 28-3-104(a)(1)(A) (providing a six-month statute of limitation for claims of slander and one year for libel).

175. MASS. GEN. LAWS ch. 260, § 4; N.H. REV. STAT. ANN. § 508:4(II); N.M. STAT. ANN. § 37-1-8; VT. STAT. ANN. tit. 12, § 512(3); WIS. STAT. § 893.57.

176. *See* ARIZ. REV. STAT. § 12-541(1); CAL. CIV. PROC. CODE § 340(c); COLO. REV. STAT. § 13-80-103(1)(a); D.C. CODE § 12-301(4); GA. CODE ANN. § 9-3-33; 735 ILL. COMP. STAT. 5/13-201; KAN. STAT. ANN. § 60-514(a); KY. REV. STAT. ANN. § 413.140 (1)(d); LA. CIV. CODE ANN. art. 3492; MD. CODE ANN., CTS. & JUD. PROC. § 5-105; MICH. COMP. LAWS § 600.5805(11); MISS. CODE ANN. § 15-1-35; NEB. REV. STAT. § 25-208; N.J. STAT. ANN. § 2A:14-3; N.Y. C.P.L.R. LAW § 215(3) (McKinney); N.C. GEN. STAT. § 1-54(3); OHIO REV. CODE ANN. § 2305.11(A); OKLA. STAT. tit. 12, § 95(4); OR. REV. STAT. § 12.120(2); 42 PA. CONS. STAT. § 5523(1); TEX. CIV. PRAC. & REM. CODE § 16.002(a); UTAH CODE ANN. § 78b-2-302(4); VA. CODE ANN. § 8.01-247.1; W. VA. CODE § 55-2-12(c); *and* WYO. STAT. ANN. § 1-3-105(a)(v)(A).

177. ARK. CODE ANN. §§ 16-56-104(3), 16-56-105(5); 9 R.I. GEN. LAWS § 9-1-14(a), (b).

The remaining eighteen states have a two-year limit.[178] While not applied as severely as statutes of repose (the civil equivalent of a canonical period of prescription),[179] the running of which can actually extinguish a claim, a statute of limitation that is brief provides a potential defamation claimant with a short window in which to make his claim. This is particularly true when the single-publication rule applies, meaning that the period in which to make a claim starts to run from the date the objectionable material is first published, not on the date an individual reader happens upon it (e.g., on an internet website).[180] A special rule applies in Indiana, where courts have interpreted the two-year statute of limitations for defamation claims as beginning only when the damages caused by the statement are "susceptible of ascertainment."[181]

Applied in the particular instance involving a priest, civil statutes of limitation might pose a particularly tricky problem: given the short statute of limitations under civil law, a defamation claim may be time-barred if not filed before a priest's case has been fully dealt with under canon law, a process that can easily take over a year (or more) to resolve. It is not uncommon in the world of civil litigation for plaintiffs to face similar situations in which the imminent expiration of a statute of limitation threatens to extinguish a cause of action. For example, an employee might be contemplating a lawsuit for wrongful termination against his former employer but cannot do so until a governmental regulatory agency finally rules in a related matter.[182] If the statute of limitation for a wrongful termination claim is shorter than the period it takes for the agency to reach its decision, the lawyer for the plaintiff may ask the defendant to agree to an informal tolling of the statute. If this fails, the plaintiff may file his lawsuit and immediately petition the court for a stay of the action pending the outcome of the related but separate litigation. Such techniques are familiar to litigators wishing to preserve the legitimate claims of their clients under civil law. It remains to be seen how employing this technique would play out in the context of a priest suing for defamation.

VII. OTHER ACTIONS

In the litigious, post-Dallas Charter environment of the Catholic Church in the United States, settlements of lawsuits are very often reached between a diocese, its liability insurance company, and the legal representatives of the plaintiffs without the knowledge, much less the approval, of the priest whose alleged conduct is a central element of the dispute.[183] Similarly, in federal bankruptcy proceedings for Catholic dioceses, the

178. *See* ALA. CODE § 6-2-38(k); ALASKA STAT. § 09.10.070(a); CONN. GEN. STAT. § 52-597; DEL. CODE ANN. tit. 10, § 8119; FLA. STAT. § 95.11(4)(g); HAW. REV. STAT. § 657-4; IDAHO CODE § 5-219(5); IND. CODE ANN. § 34-11-2-4(a)(1); IOWA CODE § 614.1(2); ME. STAT. tit. 14, § 753; MINN. STAT. § 541.07(1); MO. REV. STAT. § 516.140; MONT. CODE ANN. § 27-2-204(3); NEV. REV. STAT. § 11.190(4)(c); N.D. CENT. CODE § 28-01-18(1); S.C. CODE ANN. § 15-3-550(1); S.D. CODIFIED LAWS § 15-2-15(1); *and* WASH. REV. CODE § 4.16.100.

179. *See* Statute of Repose, LEGAL INFO. INST., https://www.law.cornell.edu/wex/statute_of_repose (last visited Oct. 5, 2022).

180. Adam Jacob Wolkoff, *A Privilege to Speak Without Fear: Defamation Claims in Higher Education*, 46 J. COLL. & UNIV. L. 121, 136 (2021).

181. Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 842–43 (Ind. 1992).

182. *See, e.g.*, 29 C.F.R. § 1601.28 (providing that employees suing under Title VII of the Civil Rights Act of 1964 must receive notice of a right to sue).

183. Shaneyfelt & Maher, *supra* note 1. *See generally* Brandon Vaidyanathan et al., *Well-being, Trust, and*

creditors, the federal bankruptcy judge, and the bankrupt diocese may arrive at an agreement that adversely affects the interests of an individual priest. For example, if a priest has been the subject of an accusation and, as a condition of the settlement of the bankruptcy, the alleged victim stands to receive a payment from the bankruptcy estate, the priest may very well wish to object to the arrangement, claiming that it prejudices his interests. Yet in neither of the two situations described above is an individual priest necessarily granted a hearing, given that the priest lacks standing to object to the agreement.[184] There is no easy solution for a priest wishing to defend his right to reputation in this context. Whether and to what extent the priest's concerns will be entertained by the judge overseeing the dispute will depend to a large degree on the facts at issue, the expertise and ethics of the parties involved, and whether the priest has the assistance of knowledgeable civil legal counsel.

Assuming that a priest's defamation action fails in civil court, there are other claims that might be pursued, though none of them appears to offer a great likelihood of prevailing on the merits. One possibility is to allege that a defamer has tortiously interfered with the priest's employment,[185] or in some other way has intentionally caused him economic harm by means of a false statement (sometimes referred to as "slander of title"[186] or "injurious falsehood"[187]). These claims focus on the economic injuries sustained rather than on reputational injuries, and in the unique context of priestly ministry this type of action might not be understood, much less well-received, in a U.S. court.

Another tort that might be alleged in defense of a priest's reputation is the intentional infliction of emotional distress. Though often pled along with a claim for libel or slander, standing alone the tort presents a relatively high bar for pleading—the conduct that is being objected to must, in the words of the definitive treatise on torts under American law, "go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally . . . the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"[188] Whether this standard has been met by the plaintiff will depend greatly on the particular facts at issue and the law of the jurisdiction in which the case is heard.

If a defamation case involving the intentional infliction of emotional distress is difficult for a plaintiff to win, then succeeding with an allegation of the lesser tort of *negligent* infliction of emotional distress is an even more difficult task, given that in most jurisdictions this tort requires a perceived physical harm to someone's body—not simply one's reputation.[189] Similarly, an action alleging that a government actor has tortiously

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Policy in a Time of Crisis: Highlights from the National Study of Catholic Priests, THE CATHOLIC PROJECT (Oct. 2022), https://catholicproject.catholic.edu/wp-content/uploads/2022/10/Catholic-Project-Final.pdf

184. *See, e.g.*, *In re* Roman Catholic Church of the Archdiocese of Santa Fe, No. 18-13027-t11, 2021 Bankr. LEXIS 270, at *6-8 (Bankr. D.N.M. Feb. 4, 2021).

185. SACK vol. 2, *supra* note 125, at § 13:4. *See also* Frank J. Cavico, *Tortious Interference with Contract in the At-Will Employment Context*, 79 Detroit Mercy L. Rev. 503 (2002).

186. SACK vol. 2, *supra* note 125, at § 13:1.2.

187. *Id.* at § 13:1.4.

188. RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (AM. L. INST. 1975).

189. *See* Nicholas Carroll, *Emotional Distress Damages in Defamation Cases*, AM. BAR ASS'N (Apr. 30 2019), https://www.americanbar.org/groups/litigation/committees/expert-witnesses/articles/2019/spring2019-

deprived a citizen of his constitutional rights requires something more than mere reputational injury.[190] Section 1983, Title 42 of the U.S. Code provides generally that U.S. citizens who are deprived of their civil rights by someone acting under color of state law may bring an action against that government official.[191] However, courts have not viewed being defamed by a government official acting within the course of his duties as a wrong that can be righted by a Section 1983 claim unless, along with that defamation, there is some other kind of injury.[192] This might apply in the fairly common situation when a priest is charged with a crime but, after a long delay, the prosecutor finally decides not to bring the case to trial. The damage done to the priest's reputation is obvious; his method of recovery is not.

VIII. RECOVERING DAMAGES

On May 25, 1987, after being acquitted by a New York jury of charges related to larceny and fraud, Catholic businessman Ray Donovan famously asked the media: "Which office do I go to to get my reputation back?"[193] The question is a stark reminder of the costs to one's reputation and how difficult it is to make adequate reparation for its loss. The traditional answer to Mr. Donovan's inquiry has involved, at least in the United States, a personal injury lawsuit. This field of tort law, though often denigrated as the domain of money-grubbing, "ambulance chasing" lawyers seeking to capitalize on other's misery, serves an important function in today's society. Above all else, lawsuits offer a non-violent way to resolve conflicts. The vengeful instincts running through the veins of men still exist. As a result, there are real risks to foreclosing such peaceful, if not always bloodless, means of redressing wrongs. People who feel both wronged and unheard will resort to what has euphemistically been called "self-help." Such methods are typically relied upon by the most desperate and the most angry in any society, and frequently involve violence to themselves or others.[194]

How a society sees reputation will determine to a great degree what remedies it affords its loss.[195] If reputation is seen as a type of *property right*, monetary damages are an obvious remedy, measured by and dependent upon market forces.[196] If reputation reflects a person's sense of *honor*, however—and assuming that honor is a good that the society values—it is more likely that adequate compensation for its loss will be commensurate with the social status enjoyed by the defamed person, which may involve

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190. Paul v. Davis, 424 U.S. 693 (1976).

191. 42 U.S.C. § 1983. The federal corollary to this rule, allowing similar actions against those operating "under color" of federal law (i.e., with apparent authority), is named after the U.S. Supreme Court case *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This fact-pattern is unlikely to arise in cases relevant to this study, and so will not be discussed.

192. *See Paul*, 424 U.S. at 701 (articulating what became known as the "stigma plus" standard for such claims).

193. Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES, May 26, 1987, at A1.

194. Richards, *supra* note 27, at 176–216 (documenting cases in which those unable to defend their reputations in a legal forum resorted to "self-help" remedies including suicide or vigilante justice).

195. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).

196. *Id.* at 693–99.

sums of money.[197] Finally, if a society sees one's good name as reflective of a person's fundamental *human dignity*, compensation is likely to include some element whereby the offended person is given the opportunity to rejoin civil society—whether that includes a monetary award is an open question.[198]

At common law, no proof of damages was needed; the offense to one's honor or reputation was enough.[199] That standard changed to require that "actual" or "special" damages needed to be pled in order to prevail at trial with the exception of those cases involving slander per se.[200] Another development was the use of "punitive" damages, the imposition of which, often by juries sympathetic to a plaintiff's claim, served to punish the defaming party, to "send him a message."[201]

After the U.S. Supreme Court's *Gertz* ruling, damage awards in private-figure, public-issue defamation cases tended to shrink, as post-*Gertz* plaintiffs are required to prove damages limited to no more than compensation for the actual injury.[202] These awards were scrutinized lest they served as punitive awards in disguise, as "gratuitous awards of money damages far in excess of any actual injury."[203] After *Gertz*, however, the question remains whether states can allow private-figure plaintiffs in cases not involving the media or an issue of public interest to recover presumed damages, i.e., non-specific compensation for harms directly resulting from defamatory conduct.[204] Punitive awards remain as a less-than-theoretical possibility, though appellate courts are wary of excessive verdicts, especially after the U.S. Supreme Court's 1996 decision in *BMW v. Gore*.[205]

Another question is whether anything other than money can remedy the harm done to reputation, at least as far as the civil courts are concerned. Such remedies might include retraction, the right of reply, publication of court decisions, declaratory judgments, and court-ordered apologies.[206] Long standard in ecclesiastical circles, such novel remedies have not yet been extensively considered by courts in the United States despite the promise of educating citizens about the norms of acceptable conduct and shaming those whose speech violates those norms.[207]

How does this apply to our hypothetical case involving a defamed priest? Again, assuming that he has exhausted his available canonical remedies and prevailed at a civil trial, the priest would theoretically be limited in his damage recovery to actual damages (if the matter were held to be in the public interest) and perhaps presumed damages (if the

197. *Id.* at 699–707.
198. *Id.* at 707–19.
199. RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 1:8 (2d ed.).
200. SACK vol. 1, *supra* note 70, at §§ 10:3.2, 10:5.1.
201. *Id.* at § 10:3.5.
202. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974)
203. *Id.*
204. SACK vol. 1, *supra* note 70, at § 10:3.3.
205. 517 U.S. 559 (1996) (overturning a $2 million verdict awarded to the purchaser of an automobile who had complained he had been defrauded because his car dealer had retouched the paint job on his new car prior to the sale without his knowledge or consent).
206. *See, e.g.*, Wannes Vandenbussche, *Rethinking Non-Pecuniary Remedies for Defamation: The Case for Court-Ordered Apologies*, 9 J. OF INT'L MEDIA & ENT. L. 109 (2018).
207. *Id.*

matter were to be considered merely private). Punitive damages would also remain a possibility. All of this assumes, of course, that the harm caused to his reputation could be remedied by simple money damages.

IX. CONCLUSION

Numerous challenges for defending a cleric's right to his reputation currently exist. In the age of internet and social media, in the wake of the clerical sexual abuse scandals, and in view of the pervasive antinomian atmosphere of our cultural and legal institutions, defending the reputation of an accused priest may appear to be something of a quixotic quest. The existence of the significant obstacles under applicable civil law outlined in this article do not make the task any easier. Tempting as it might be for individual priests to avail themselves of the civil forum in order to vindicate their right to reputation, this study has shown that such a path presents its own perils. In light of the expansive notion of free speech in American law and culture, heightened pleading standards and significant statutory barriers serve as substantial impediments to defamation plaintiffs in general, let alone politically unpopular ones such as Catholic priests accused of sexual misconduct. Nevertheless, civil courts do not have the last word on such matters; another Tribunal awaits from which there is no appeal.[208]

208. *Matthew* 25:31–46.