THE UNUSUAL SOVEREIGN STATE: THE FOREIGN SOVEREIGN IMMUNITIES ACT AND LITIGATION AGAINST THE HOLY SEE FOR ITS ROLE IN THE GLOBAL PRIEST SEXUAL ABUSE SCANDAL

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INTRODUCTION

The Holy See is the word's smallest nation-state, inhabited by a little over eight hundred people, and landlocked in the center of Rome, Italy.[1] This urban nation-state is also the headquarters of the Roman Catholic Church, the faith of over one billion people worldwide.[2] In 1929, the Holy See signed the Lateran Accords[3] and became an independent nation-state, gaining full sovereignty from Italy.[4] Gradually, the Holy See was welcomed into the family of nations. With the emergence of the Second World War, informal relations between the United States and the Holy See surfaced and continued into the early 1980s.[5] In 1984,

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1 THOMAS J. REESE, INSIDE THE VATICAN: THE POLITICS AND ORGANIZATION OF THE CATHOLIC CHURCH 16 (1996); CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: HOLY SEE (VATICAN CITY), https://www.cia.gov/library/publications/the-world-factbook/geos/vt.html; The Holy See is also referred to as the "State of the Vatican City," the "Vatican City," or the "Vatican." *Id.*

2 CENT. INTELLIGENCE AGENCY, *supra* note 1.

3 Beginning in 1918, the Holy See sought to negotiate concordats with as many nations as possible. This culminated in the Lateran Accords of 1929. The Accord was between Italy and the Holy See and solidified the Holy See's status as an independent sovereign state. Stewart A. Stehlin, *The Emergence of a New Vatican Diplomacy During the Great War and Its Aftermath, 1914-1929*, *in* PAPAL DIPLOMACY IN THE MODERN AGE 75, 82-83 (Peter C. Kent & John F. Pollard eds., 1994). "[T]he agreement confirmed by international treaty the Vatican as an independent state, sovereign in its own right, free to carry out its policies and speak to the world, to act in international affairs without the fear of a caesaro-papistic situation developing because the spiritual leader of a multinational religion was himself a citizen of one of Europe's nation-states." *Id.*

4 Americans United for Separation of Church & State v. Ronald W. Reagan, 786 F.2d 194, 197 (3d Cir. 1986).

5 Gerard P. Fogarty, S.J., *The United States and the Vatican, 1939-1984*, *in* PAPAL DIPLOMACY IN THE MODERN AGE, *supra* note 3, at 221, 230; Peter C. Kent & John F. Pollard, *A Diplomacy Unlike Any Other: Papal Diplomacy in the Nineteenth and Twentieth Centuries*, *in* PAPAL

U.S. President Ronald Regan nominated William A. Wilson to be U.S. Ambassador to the Vatican, thereby establishing formal diplomatic relations with the Holy See.[6] The United States has maintained this diplomatic relationship with the Vatican ever since.[7] The nature of the Holy See as a sovereign nation and as the headquarters of one of the world's largest religions, makes the Holy See, "a very unusual sovereign state-quite possibly unique in the entire world."[8]

Recently, in the United States, the tension between the foreign sovereign immunity of the Holy See and its role as the headquarters of the Roman Catholic Church converged in the case *Joe V. Doe v. Holy See* (*Doe v. Holy See I*)[9] in which the U.S. District Court of Oregon, for the first time, allowed the Holy See to be sued in the U.S. for its alleged role in priest sexual misconduct.[10] The plaintiff in *Doe*, a victim of priest sexual abuse, filed an action against the Holy See and other defendants[11] alleging *respondeat superior*,[12] negligence, and fraud for the Vatican's role in the abuse. According to the plaintiff, he was sexually abused by Father Andrew Ronan at St. Albert's Church in Portland, Oregon.[13] The plaintiff alleged that the Holy See placed Father Ronan at St. Albert's Church with the knowledge that Ronan had admitted to sexually abusing minors on several previous occasions—once while employed at Our La-

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DIPLOMACY IN THE MODERN AGE, *supra* note 3, at 11, 16-17; Elisa A. Carrillo, *Italy, the Holy See, and the United States, 1939-1945, in* PAPAL DIPLOMACY IN THE MODERN AGE, *supra* note 3, at 137, 149.

6 Fogarty, *supra* note 5, at 239. Kent & Pollard, *supra* note 5, at 16-17. U.S. president Franklin D. Roosevelt re-established diplomatic relations with the Holy See by appointing a Personal Presidential Representative to the Pope. Carrillo, *supra* note 5, at 137. In the 1980s, there was pressure on the U.S. to re-establish formal diplomatic relations with the Holy See because the U.S. was virtually the only Western nation who did not have official diplomatic relations with the Holy See. Fogarty, *supra* note 5, at 237-38.

7 *See, e.g.*, CATHOLIC NEWS SERVICE, *Senate Confirms Mary Ann Glendon as U.S. Ambassador to Vatican*, Dec. 21, 2007, http://www.catholicnews.com/data/stories/cns/0707294.htm. At the end of 2007, Harvard Law Professor Mary Ann Glendon became U.S. Ambassador to the Vatican. *Id.*

8 Doe v. Holy See, 434 F. Supp. 2d 925, 938 (D. Or. 2006). Some scholars argue that since nationhood, the Holy See has defined its power in a unique way when compared to "traditional" nation-states. "The institutional objectives of the Holy See are spiritual in nature as opposed to questions of politics and economics which move secular states . . . Like secular states, it seeks power, but power in the spiritual and cultural domain." Kent & Pollard, *supra* note 5, at 14-15.

9 434 F. Supp.2d 925, 938 (D. Or. 2006).

10 *Id.*

11 The Portland archdiocese and the Order of Friar Servants. *Id.* at 931.

12 Pursuant to the doctrine of *respondeat superior*, "an employer is *vicariously* liable for any tortious acts committed by his employee *within the scope of employment*." MARC A. FRANKLIN, GILBERT LAW SUMMARIES: TORTS 125 (23d ed. 2002).

13 *Doe*, 434 F. Supp.2d at 931.

dy of Benburd in Ireland and subsequently while employed at St. Philip's High School in Chicago.[14]

On appeal, the Ninth Circuit, in *John V. Doe v. Holy See* (*Doe v. Holy See II*)[15] affirmed the district court decision in part and reversed in part.[16] The Ninth Circuit affirmed the district court decision that the Holy See was not immune from suit in U.S. courts, specifically from plaintiff's *respondeat superior* claim.[17] The Ninth Circuit reversed the district court decision in part, and said that the plaintiff's vicarious liability and negligence claims could not go forward against the Holy See.[18]

In a similar case, *O'Bryan et. al. v. Holy See* (*O'Bryan I),*[19] three plaintiffs, on behalf of themselves and "other similarly situated victims of childhood sexual abuse,"[20] filed a punitive class action suit against the Holy See for its role in the alleged sexual abuse of minors by Roman Catholic priests in Kentucky between 1920 and 1970.[21] In *O'Bryan*, the plaintiffs claimed that the Holy See implemented a policy of secrecy that prevented bishops and priests from reporting sexual abuse to the proper public authorities.[22] In *O'Bryan et. al. v. Holy See* (*O'Bryan II)*[23] the U.S. District Court for the Western District of Kentucky allowed the suit to move forward against the Holy See for the plaintiffs claims of negligence, breach of fiduciary duty, emotional distress, and violation of customary international human rights law.[24] The district court decision was

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[14] *Id.* at 931-32. The plaintiff's alleged sexual abuse occurred in 1965. *Id.* A minor accused Ronan of sexual abuse between 1955 and 1956 when he was employed at Our Lady of Benburb in Ireland. Ronan admitted to the sexual abuse. Ronan was immediately transferred to an all-boys school, St. Philip's High School, in Chicago where he was again accused of sexual abuse of three male students. Ronan also admitted to this abuse. In 1965, Ronan was placed in the plaintiff's church in Portland, Oregon. *Id.*

[15] John V. Doe v. Holy See, No. 06-35587, slip op. 2543 (9th Cir. Mar. 3, 2009).

[16] *Id.* at 2549.

[17] *Id.*

[18] *Id.*

[19] 490 F. Supp.2d 826 (W.D. Ky. 2005).

[20] Complaint at 10, O'Bryan v. Holy See, 490 F. Supp.2d 826 (W.D. Ky. 2005) (No. 3:04 CV 338-H).

[21] O'Bryan v. Holy See, Nos. 07-5078/5163, 2009 U.S. App. LEXIS 2412, at *3 (6th Cir. Feb. 10, 2004). Unlike *Doe v. Holy See*, in *O'Bryan*, the Holy See was the only defendant in the suit and the suit was a class action. In *O'Bryan*, the first class of plaintiffs, James O'Bryan and Donald Poppe, had never brought claims against the Holy See or agents of the Catholic Church in the U.S. *Id*. at *3. The second class of plaintiffs, Michael Turner, had previously brought claims against an agent of the Holy See in the U.S. *Id.*

[22] *Id.* at *5-6 (citing plaintiffs' complaint).

[23] 471 F. Supp.2d 784 (W.D. Ky. 2007).

[24] *Id.* at 786-87, 795. Specifically, in *O'Bryan I*, the plaintiffs alleged that the Holy See was liable for (1) the violation of customary international human rights law, (2) negligence (failure to pro-

appealed to the Sixth Circuit,[25] and in February 2009, the Sixth Circuit, in *O'Bryan III* affirmed the district court decision and held that the Holy See, as a foreign state, was not completely immune from litigation for its role in the priest sexual abuse scandal.[26]

Typically foreign states, such as the Holy See, are immune from jurisdiction in the United States pursuant to the Foreign Sovereign Immunities Act (FSIA). In 1976, Congress adopted the Foreign Sovereign Immunities Act to ensure foreign states' immunity from jurisdiction in the United States.[27] While the FSIA grants foreign states immunity in the United States, it also includes several exceptions that exclude foreign states from declaring sovereign immunity in certain circumstances.[28] One exception is the noncommercial tortious acts or omissions exception.[29] In *Doe v. Holy See* and *O'Bryan v. Holy See*, the courts said that the Holy See was not immune from litigation in the U.S. because the tortious act exception of the FSIA applied.[30]

This comment argues that the decision in *Doe v. Holy See* and subsequent decisions[31] increase the possibility that the Holy See will face lawsuits, both within the United States and abroad, for its responsibility in the worldwide priest sexual abuse scandal that has recently affected the Roman Catholic Church. This comment argues that the Oregon District Court and Ninth Circuit decisions in *Doe v. Holy See* and the Western District of Kentucky and Sixth Circuit decisions *O'Bryan* have expanded the scope of the tortious exception under the FSIA.

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vide safe care, failure to report, and failure to warn), (3) breach of fiduciary duty (failure to warn and to notify claim), (4) the tort of infliction of emotional distress, (5) *respondeat superior*, and (6) deceit and misrepresentation. *Id.* at 786-87. The Holy See filed a motion to dismiss, and in *O'Bryan II*, the U.S. District Court for the Western District of Kentucky sustained the Holy See's motion to dismiss, but only for the plaintiff's negligence claim of failure to provide safe care and the claim of deceit and misrepresentation. *Id.* at 795. The district court allowed the remaining claims to continue. *Id.*

[25] O'Bryan, 2009 U.S. App. LEXIS 2412, at * 1.

[26] *Id.* at *1-2.

[27] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604 (2006). The tortious exception says that a foreign state shall not be immune from the jurisdiction of U.S. courts in any case "in which money damages are sought against a foreign state for personal injury . . . occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment." *Id.* § 1605(a)(5).

[28] *Id.* § 1605.

[29] *Id.* § 1605(a)(5).

[30] Doe v. Holy See, 434 F. Supp.2d 925, 931 (D. Or. 2006); O'Bryan v. Holy See, Nos. 07-5078/5163, 2009 U.S. App. LEXIS 2412, at *1-2 (6th Cir. Feb. 10, 2009).

[31] *See, e.g.*, O'Bryan v. Holy See, 471 F. Supp.2d 784 (W.D. Ky. 2007).

Consequently, this expanded interpretation increases the possibility that the Vatican will be sued both within the United States and abroad for its role in the priest sex abuse scandal.

This comment analyzes the "tortious exception" of the FSIA as it relates to the priest sex abuse scandal in the United States. Part I describes the emergence of the global priest sexual abuse scandal that has affected the Roman Catholic Church. Part II traces the global development of the concept of sovereign immunity from the absolute to the restrictive theory. Part III focuses on the tortious exception of the FSIA and how it has been applied to cases against the Holy See in the priest sexual abuse scandal in the United States. Part IV looks at the balance between foreign policy considerations and a victim's right to justice.

I. A GLOBAL COVER-UP?

The Oregon District Court and Ninth Circuit decisions in *Doe v. Holy See* and the Western District of Kentucky and Sixth Circuit decision in *O'Bryan* arose in the shadows of an international priest sexual abuse scandal that plagued the Roman Catholic Church for several decades.[32] Many men and women in the United States and abroad stepped forward alleging that they were abused as minors by their local priests.[33] Subsequently, details emerged of a vast "cover-up" to hide the secret of priest sexual abuse in the Roman Catholic Church.[34] There was both a domestic and global component to the priest sexual abuse scandal.

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[32] Records obtained by The Boston Globe in 2002 include a file which "shows that the church's practice of tolerating sexually abusive priests dates at least to the 1950s." Michael Rezendes & Matt Carroll, *Files: Church Struck Deals with Accusers*, BOSTON GLOBE, Dec. 20, 2002, http://www.boston.com/globe/spotlight/abuse/print3/122002_files.htm.

[33] *See Church Settles Sex Abuse Cases with Labrador Innu*, CBC NEWS, Apr. 6, 2006, http://www.cbc.ca/canada/newfoundland-labrador/story/2006/04/06/nf-innu-church-20060406.html.

[34] Anthony Barnett, *Vatican Told Bishops to Cover Up Sex Abuse*, THE OBSERVER, Aug. 17, 2003, http://www.guardian.co.uk/world/2003/aug/17/religion.childprotection (a document, circulated to bishops in archdioceses across the globe, called "Crimine Solicitationies" in Latin or "Instruction on Proceeding in Cases of Solicitation" in English urged bishops to deal with sexual abuse issues in a secret way or risk excommunication from the Church); Terry Carter, *Collaring the Clergy*, A.B.A. J., June 2007, 38, 39 (calling the *Doe. v. Holy See* lawsuit "the first hurdle in claiming a high reaching conspiracy to cover up abuses by priests").

A. DOMESTIC COMPONENT

On the domestic level, in the United States,[35] Canada,[36] Australia,[37] and in a host of other countries,[38] adult men and women came forward with claims that they were abused by their local parish priests as minors. Several of these survivors claimed that as children they had reported allegations of sexual abuse to Church cardinals and bishops, but that nothing was done.[39] Some Church documents support these allegations.[40] In Boston, for example, victims of sexual abuse alleged that Cardinal Bernard Law and others were aware that two priests, Reverends Paul Shanley and John Geoghan were molesting young boys.[41] Victims said that the cardinals and bishops seemed "uninterested" in their complaints.[42] One Los Angeles survivor, Rita Milla, said, "my church acted like it didn't know what was happening" and another survivor Carlos Perez-Carillo said, "we were told we lied . . . we walked in darkness for many years."[43]

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[35] *See* Ian Fisher & Laurie Goodstein, *After Mass, Pope Meets Privately with Abuse Victims*, N.Y. TIMES, Apr. 18, 2008, http://www.nytimes.com/2008/04/18/us/nationalspecial2/17cnd-pope.html ("The scandal has affected nearly every diocese in America"); Reuters, *Oregon: Archdiocese To Pay $75 Million in Abuse Cases*, N.Y. TIMES, Dec. 20, 2006, http://www.nytimes.com/2006/12/20/us/20brfs-abuse.html; Lawrence Morahan, *Vatican Lawsuit Liability Could Reach $1Billion in US*, CNSNEWS.COM, May 22, 2002, http://www.cnsnews.com/public/Content/Article.aspx?rsrcid=5055.

[36] *See* James Brooke, *Indian Lawsuits on School Abuse May Bankrupt Canada Churches*, N.Y. TIMES, Nov. 2, 2000, http://www.nytimes.com/2000/11/02/world/indian-lawsuits-on-school-abuse-may-bankrupt-canada-churches.html?scp=1&sp=%22Indian%20lawsuits%20on%20School%20Abuse%22&st=cse.

[37] *See* Philip Pullella, *Pope Apologises for Church Sex Abuse*, Reuters UK, July 19, 2008, http://uk.reuters.com/article/email/idUKSYD1805020080719 ("The Catholic Church in Australia has paid millions of dollars in compensation" to abuse victims).

[38] *See* Brian Lavery, *Ireland Shaken by Sex Abuse Report*, INT'L HERALD TRIB., Nov. 13, 2005, http://www.iht.com/articles/2005/11/13/news/ireland.php; James C. McKinley, Jr., *Accused Priest Flees from Law in U.S. and Mexico*, N.Y. TIMES, Oct. 21, 2006, http://www.nytimes.com/2006/10/21/world/americas/21mexico.html?pagewanted=1.

[39] Walter V. Robinson & Thomas Farragher, *Shanley's Record Long Ignored*, BOSTON GLOBE, April 9, 2002, http://www.boston.com/globe/spotlight/abuse/print/040902_shanley_record.htm; Michael Rezendes, *Abuse Allegations Known, Files Show*, BOSTON GLOBE, June 5, 2002, http://www.boston.com/globe/spotlight/abuse/print2/060502_documents.htm.

[40] Rezendes, *supra* note 39; Pullella, *supra* note 37.

[41] Robinson & Farragher, *supra* note 39.

[42] *Id.*

[43] Laurie Goodstein, *Payout is Bittersweet for Victims of Abuse*, N.Y. TIMES, July 17, 2007, http://www.nytimes.com/2007/07/17/us/17abuse.html.

Many alleged victims of priest sexual abuse have also claimed that Church officials urged them to keep quiet about their allegations of abuse.[44] Some victims say that they were "coaxed" into making secret settlements with their local archdioceses.[45] These secret settlements could be mutually beneficial to the Church and the victims. For example, settlements often garnered larger payouts for the victims because the name of the accused priest and the conditions of the settlement were kept secret, thus protecting both the victim's identity and the Church from scandal.[46] Most alleged victims of sexual abuse, however, kept quiet without making secret settlements and went on living with the secret of their abuse.

Church records have also shown that priests were shifted to new parishes following accusations and admissions of sexual misconduct[47] or in some cases promoted to higher positions within the church.[48] Typically, parishioners were not warned of the priest's alleged, and sometimes admitted, sexual misconduct when priests were transferred to new parishes.[49] Occasionally, following the priest's transfer to the new parish, the cycle of abuse would continue.[50] The Church defended its actions and claimed that they had assurances that the reassignments were "appropriate and safe."[51] Church officials also said that they acted the way they did to "not only protect children and their families but, at the same time, to try and protect the church, try and protect the priesthood."[52] Church officials said that, at the time, they believed a policy of secrecy was the best way to deal with the crisis.[53] But those who were affected by the Church's policy said that the Church moved too slowly and that they should have known that placing accused and sometimes admitted

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[44] Michael Rezendes et al., *Sidebar: A Revered Guest; A Family Left in Shreds; Church Allowed Abuse by Priest for Years Aware of Geoghan Record, Archdiocese Still Shuttled Him from Parish to Parish*, BOSTON GLOBE, Jan. 6, 2002, at A1;Walter V. Robinson & Stephen Kurkjian, *Crisis in the Church/Priest Responds/A Plot to Mislead; Records Show a Trail of Secrecy, Deception*, BOSTON GLOBE, Dec. 4, 2002, at A27.

[45] Robinson & Kurkjian, *supra* note 44.

[46] *Id.*

[47] *See* Rezendes & Carroll, *supra* note 32; Robinson & Kurkjian, *supra* note 44; Rezendes, *supra* note 39.

[48] Michael Rezendes & Sacha Pfeiffer, *Cardinal Promoted Alleged Sex Abuser*, BOSTON GLOBE, May 18, 2002, http://www.boston.com/globe/spotlight/abuse/print2/051802_quincy_priest.htm.

[49] *Id.*

[50] *See* Robinson & Farragher, *supra* note 39.

[51] Rezendes et al., *supra* note 44.

[52] Rezendes, *supra* note 39.

[53] *Id.*

child molesters in parishes as priests was a dangerous and unacceptable policy.[54]

B. INTERNATIONAL COMPONENT

The priest sexual abuse scandal had an international component as well. The Holy See is a nation state and also the head of an international religion, the Roman Catholic Church. It seemed that almost no Catholic archdiocese was immune from accusations of priest sexual misconduct. The scandal touched archdioceses across the globe, from Ireland to the United States, to Mexico,[55] and Malawi.[56] Though domestic in impact, the scandal was global in scope.

In 1962, in the apex of the priest sexual abuse problem, the Holy See crafted a secret policy to deal with the sexual abuse of minors by members of the clergy. The policy was disseminated to "patriarchs, bishops, and other diocesan ordinaries" around the world in a confidential document entitled "Instruction on the Manner of Proceedings in Cases of Solicitation" (The 1962 Policy).[57] The 1962 Policy ordered bishops to cover-up cases of sexual abuse and forbade bishops from speaking out. For example, the 1962 Policy directed officials to deal with accusations of sexual abuse "in a most secretive way," and once the issue was dealt with to "be restrained by a perpetual silence."[58] The documents even or-

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[54] Rezendes et al., *supra* note 44.

[55] John L. Allen Jr., *Vatican Restricts Ministry of Legionaries Priest Founder*, NAT'L CATH. REP., May 18, 2006, http://www.nationalcatholicreporter.org/update/bn051806.htm.

[56] *Id.* John L. Allen Jr. & Pamela Shaeffer, Reports of Abuse: AIDS Exacerbates Sexual Exploitation of Nuns, Reports Allege, NAT'L CATH. REP., May 16, 2001, http://www.natcath.com/NCR_Online/archives/031601/031601a.htm.

[57] SUPREME AND HOLY CONGREGATION OF THE HOLY OFFICE, FOR ALL PATRIARCHS, ARCHBISHOPS AND OTHER DIOCESAN ORDINARIES "EVEN OF THE ORIENTAL RITE": INSTRUCTION ON THE MANNER OF PROCEEDING IN CASES OF SOLICITATION (1962), *available at* http://www.npr.org/templates/story/story.php?storyId=98542613#document [hereinafter THE 1962 POLICY]. In Catholicism, pursuant to canon law, "solicitation" is the crime of using the Sacrament of Penance to draw someone into lust or adultery. *Solicitation*, CATHOLIC ANSWERS, THE ORIGINAL CATHOLIC ENCYCLOPEDIA, http://oce.catholic.com/index.php?title=Solicitation. Specifically, Canon Law 1387, says: "A priest who in the act, on the occasion, or under the pretext of confession solicits a penitent to sin against the sixth commandment of the Decalogue is to be punished, according to the gravity of the delict, by suspension, prohibitions, and privations; in graver cases he is to be dismissed from the clerical state." 1983 CODE c.1387, *available at* http://www.vatican.va/archive/ENG1104/__P54.HTM.

[58] THE 1962 POLICY, *supra* note 58, para. 11.

dered that the accusers and witnesses be sworn to secrecy.[59] The consequence of speaking out was excommunication.[60] The Church has claimed, however, that the Church documents revealing the sexual abuse policy were not part of an organized cover-up.[61]

The plaintiffs in *O'Bryan* relied on the contents of the 1962 Policy in establishing their claims against the Holy See.[62] The 1962 Policy seems to show that senior officials at the Holy See were aware of the depth and scope of the sexual abuse scandal. Specifically, the 1962 Policy says that:

> Any denunciation once accepted, the Ordinary is bound most gravely to communicate this as soon as possible to the promoter of justice . . . Within ten days he must submit the matter to the Holy Office.[63]

It appears from the 1962 Policy that it was church practice for officials to notify the Holy Office in the Holy See when any instance of sexual abuse occurred. From the contents of the document, it also seems that officials would have been aware of the accused abuser's past behavior. Specifically, officials were instructed to investigate the history of accused priest and determine the consistency of their behavior.[64] All of this information was to be kept secret and nothing in the document instructs officials to notify parishioners or authorities of the priest's behavior.

The penalties for priests who were found to have sexually abused parishioners were quite weak. There was a high burden for removing a priest from his position as a member of the clergy. The 1962 Policy says that this penalty "is only . . . imposed when, having weighed everything, it evidently appears that the accused . . . exists to such a degree of foolhardiness and habit, so that there is no hope, humanly speaking, or almost no hope, of his amendment that is evident any more [(sic)]."[65] Furthermore, there was nothing in the 1962 Policy that discouraged officials from transferring a "delinquent" priest to another parish; [66] rather it

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[59] *Id.* para. 13. ("The oath of keeping secret must be given in these cases also by the accuser or those denouncing [the priest] and the witnesses.").

[60] Barnett, *supra* note 34; THE 1962 POLICY, *supra* note 57 para. 11 ("Under the penalty of excommunication . . .").

[61] Barnett, *supra* note 34.

[62] O'Bryan v. Holy See, Nos. 07-5078/5163, 2009 U.S. App. LEXIS 2412, at *5-6 (6th Cir. Feb. 10, 2009) (citing plaintiffs' brief).

[63] THE 1962 POLICY, *supra* note 57, para. 27.

[64] *Id.*

[65] *Id.* para. 63.

[66] *Id.* para. 4.

seemed to encourage this prescription. Specifically, the 1962 Policy says:

> As often as . . . it seems necessary for the amendment of the delinquent, for the removal of the near occasion [of soliciting in the future], or for the prevention of scandal or reparation for it, there should be added a prescription for a prohibition of remaining in a certain place.[67]

Thus, it was Church policy to move priests guilty of sexual abuse from the parish where the abuse occurred to another parish. This was done to avoid scandal and in complete secrecy. The instructions outlined in the 1962 Policy were reflected in Church practice. Priests who were accused of sexual abuse were often moved to new parishes[68] and were sometimes moved across national borders to evade embarrassment, accusations, and sometimes criminal charges.[69]

In addition to its domestic component, the priest sexual abuse scandal had an international facet as well. The nature of the Holy See as the headquarters of an international religion made its policy prescriptions for priest sexual abuse global in reach. The policies that the Holy See outlined in 1962 were distributed to its dioceses and churches around the world, and likely implemented in each place where abuse occurred. Furthermore, this international component of the priest sexual abuse scandal is important because the policies created and enforced by the Holy See are the subject of many of the lawsuits currently pending against it.

C. BATTLE IN THE COURTS

In the U.S., frustrated by the response from Church officials, a growing number of victims of priest sexual abuse turned to the courts.[70] For many survivors, either the death of their abuser or the statute of limitations barred them from pursing criminal charges. Many survivors chose to file civil lawsuits against their abusers, their archdioceses, their

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[67] *Id.* para. 64(d).

[68] Rezendes, *supra* note 39.

[69] *See* McKinley, Jr., *supra* note 38 ("American law enforcement officials and advocates for survivors say that since 1995 at least three other priests [in addition to Father Nicolás Aguilar] accused of molesting children in the United States have fled to Mexico before the authorities could arrest them. In other cases, going back to the 1980's, still more were transferred to Mexico after church officials received complaints about them.").

[70] *See* Goodstein, *supra* note 43.

bishops and cardinals, and (as of late) against the Vatican as well.[71] Until recently, the vast majority of settlements between survivors of priest sexual misconduct and the Church were agreed to in private negotiations, not in courtrooms.[72] The older settlements reflected early Church policy to keep secret instances of priest sexual abuse.[73] Some critics of the Church's early policy called these settlements "hush money," whereas others have contended that these settlements were "appropriate" because they were quick, ensured the victim's privacy, and many times came with assurances that the offending priest would not have any contact with the victim.[74]

In the past two decades, U.S. archdioceses have felt the brunt of lawsuits and settlements.[75] Survivors, both those that settled and those who were successful in the courts, were awarded large monetary payouts.[76] For example, in July 2007, in the largest settlement to date, the Archdiocese of Los Angeles agreed to pay $660 million to settle more than 500 complaints of sexual abuse.[77] As a result of such settlements, in both the United States and abroad, many archdioceses have succumbed to bankruptcy[78] and some have been forced to close their schools and parishes.[79] In the U.S., "the scandal revealed more than

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[71] Steven Church, *Vatican Can be Sued over Bishops' Conduct, Judge Says (Update 2)*, BLOOMBERG, Jan. 11, 2007, http://www.bloomberg.com/apps/news?pid=20670001&refer=europe&sid=aIURv2Gv44p4.

[72] Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases*, BOSTON GLOBE, Jan. 31, 2002, http://boston.com/globe/spotlight/abuse/stories/013102_priests.htm.

[73] *Id.*

[74] *Id.*

[75] Dioceses operate semi-independently from the Vatican. Church, *supra* note 71.

[76] Editorial, *A Settlement in Los Angeles*, N.Y. TIMES, July 17, 2007, http://www.nytimes.com/2007/07/17/opinion/17tue1.html ("The Catholic Church in the United States has paid more than $2 billion to survivors and their families—so far.").

[77] *Id.*; Goodstein, *supra* note 43. In September 2007, the Dioceses of San Diego and San Bernardino agreed to pay a $198.1 million join settlement with 144 people who claimed they were sexually abused. Susan Hines-Brigger, *Southern California Diocese Reach Sex-abuse Settlement*, ST. ANTHONY MESSENGER, Nov. 2007, at 8.

[78] William McCall, *Portland Archdiocese Seeks Disclosure of Name in Sex Abuse Suit*, ASSOCIATED PRESS, Oct. 25, 2007, http://www.kellyclarkattorney.com/news/portland-archdiocese-seeks-disclosure-of-name-in-sex-abuse-suit/ (Portland Archdioceses declared bankruptcy in 2004.); Brooke, *supra* note 36 (discussing how Canadian dioceses face bankruptcy in the face of sexual abuse accusations).

[79] Abby Goodnough, *Victims in Boston Criticize Pope's Comments*, N.Y. TIMES, Apr. 15, 2008, http://www.nytimes.com/2008/04/15/us/15cnd-reax.html. According to the National Catholic Education Association, since 2000, more that 1,260 Catholic schools have closed. Fernanda Santos, *Catholic Schools Face Changing Fortunes*, N.Y. TIMES, Apr. 13, 2008, at CT1. Although the reason most often cited is declining enrollment, it is fair to say that the burgeoning costs of settling priest sexual abuse cases contributes to the budget deficits faced by archdioceses

13,000 victims, and left behind five bankrupt dioceses," while costing the church $2 billion in settlements.[80]

II. THE ORIGINS OF THE THEORY OF FOREIGN SOVEREIGN IMMUNITY AND THE ADOPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT IN THE UNITED STATES

The judiciability of claims against the Holy See is relevant because survivors of alleged priest sexual abuse have increasingly turned to the courts for relief. Given the unique nature of the Holy See, as a nation-state and the headquarters of a global religion, questions of how to deal with an international priest sexual abuse scandal lead to a discussion of sovereignty. The discussion of sovereignty in the context of the global priest sexual abuse scandal should be couched in the debate over an international principle of foreign sovereign immunity. This principle is centuries old and has transformed over time from an absolute to a restrictive theory, expanding as the world has become increasingly interconnected and globalized.

A. THE DEVELOPMENT OF A THEORY OF SOVEREIGN IMMUNITY

The principle of nation-state sovereignty is rooted in history and it is the underlying principle behind the theory of foreign sovereign immunity. The 1648 Treaty of Westphalia[81] is commonly marked as the contemporary origin of the principle of nation-state sovereignty.[82] The Westphalian norms of sovereignty applied first to monarchs then later to sovereign states, but not to individuals.[83] Rulers accepted the idea that

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and their inability to keep schools open. Laurie Goodstein, *Uncertain Church Awaits Pope in U.S.*, N.Y. TIMES, Apr. 14, 2008, http://www.nytimes.com/2008/04/14/us/14church.html?ref=nationalspecial2.

[80] Goodstein, *supra* note 79.

[81] Treaty of Westphalia, Oct. 24, 1648, http://avalon.law.yale.edu/17th_century/westphal.asp (last visited Apr. 7, 2009).

[82] CHRIS BROWN, SOVEREIGNTY, RIGHTS AND JUSTICE: INTERNATIONAL POLITICAL THEORY TODAY 22 (2002). This view is common in Western international relations and international law literature. *Id.*

[83] *Id.* at 35.

there were no internal equals and no external superiors.[84] It included the notion of equality of states, absolute power, and the central norm of non-intervention.[85]

During the nineteenth century, similar principles were applied to international law.[86] Sovereignty in international law encompassed the notion that states had "complete and exclusive territorial jurisdiction, absolute independence, and legal equality within the family of nations."[87] In the United States, the early common law concept of foreign sovereign immunity, called the absolute immunity theory, evolved from these principles of international law and the norms of Westphalian sovereignty.[88]

The absolute theory of sovereign immunity was premised on the notion that a sovereign nation cannot, without its consent, be made a respondent in the courts of another sovereign.[89] The United States applied the common law doctrine of absolute sovereign immunity throughout the nineteenth and early twentieth century.[90] The absolute doctrine dictated that foreign states would receive immunity in the United States for both their governmental and commercial activities.[91]

The principle of absolute sovereign immunity was reflected in the influential 1812 Supreme Court decision, *The Schooner Exchange v. McFaddon*,[92] where Chief Justice John Marshall said the U.S. lacked jurisdiction over sovereign states.[93] Chief Justice Marshall's opinion in

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[84] *Id.* The Peace of Augsburg of 1555 expanded Westphalian sovereignty to include the principle that the ruler "was entitled to enforce religious uniformity within his realm." *Id.* at 26.

[85] *Id.* at 35. The concept of Westphalian sovereignty also includes the notion that states have a right to self defense. *Id.* at 33.

[86] THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 5 (1970).

[87] *Id.*

[88] GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 219 (4th ed. 2007); GIUTTARI, *supra* note 86, at 28; *see generally* BROWN, *supra* note 82.

[89] Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T. ST. BULL. 984, 984 (1952).

[90] BORN & RUTLEDGE, *supra* note 88, at 220; GIUTTARI, *supra* note 86, at 27.

[91] BORN & RUTLEDGE, *supra* note 88, at 220; GIUTTARI, *supra* note 86, at 8-9.

[92] The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).

[93] *Id.* at 135-36; *see also* GIUTTARI, *supra* note 86, at 8; BORN & RUTLEDGE, *supra* note 88, at 219; JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 416-18 (2d ed. 2006). At dispute in *The Exchange* was a vessel owned by two U.S. citizens that was captured by the French Navy and converted into a warship. *Id.* at 416. What was at issue was whether a U.S. citizen could file a libel action against a sovereign nation in U.S. courts. *The Schooner Exchange*, 11 U.S. at 120. In resolving this issue, Chief Justice Marshall admitted he was "exploring an unbeaten path." *Id.* at 136. Chief Justice Marshall relied on a strict interpretation of the international principle of sovereignty and upheld France's claim of sovereign immunity. *Id.* at 146-47.

The Exchange reflected a modern application of Hugo Grotius[94] and Emeric de Vattel's[95] legal theories of sovereign equality.[96] Marshall's opinion in *The Exchange* is considered the landmark decision establishing the validity of a principle of foreign sovereign immunity in the U.S. and in international law.[97]

For the next century, U.S. courts relied on Marshall's strict interpretation of sovereignty and international law. Generally, courts did not consider the views of the U.S. State Department regarding whether immunity should be granted.[98] Gradually, however, the Supreme Court began to consider the views of the State Department.[99] Following Supreme Court decisions in *Ex parte Republic of Peru*[100] and *Republic of Mexico et. al. v. Hoffman*,[101] the Court treated the State Department's suggestions of immunity as binding.[102] The Supreme Court made it clear that it would neither go against State Department recommendations nor act when the State Department had not spoken.[103] This was an attempt by the Supreme Court to neither "embarrass the executive branch in its conduct of foreign affairs,"[104] nor "interfere with the proper conduct of foreign relations."[105]

Over time, the principle of foreign sovereign immunity evolved from an absolute to a restrictive theory. The traditional notions of sovereignty were challenged with an increasingly globalized world, which in-

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[94] Hugo Grotius or Hugo de Groot, is commonly called the "father of international law." BROWN, *supra* note 82, at 30. "For Grotius, natural law is a morality based on coexistence between self-regarding individuals. Noninterference in each other's affairs is the basic tenet here and this is transferred to international relations in *The Laws of War and Peace*, one of the founding texts of the Westphalia System." *Id.* at 31 (citation omitted).

[95] In *Law of Nations*, Vattel emphasizes the equality of states. *Id.* at 32 ("The legal principle of sovereign immunity, still enshrined in bodies such as the UN, is established by analogy with the natural equality of persons ('a dwarf is as much a man as a giant is') and reflects diplomatic practice and protocol whereby ruling princes are accorded respect and address each other as fraternal equals, irrespective of the size of their domains.").

[96] For more on the legal theories of Grotius and Vattel *see generally* BROWN, *supra* note 82.

[97] GIUTTARI, *supra* note 86, at 28.

[98] BORN & RUTLEDGE, *supra* note 88, at 220; DUNOFF, RATNER & WIPPMAN, *supra* note 93, at 418.

[99] *Ex parte* Peru, 318 U.S. 578, 587 (1943); Mexico v. Hoffman, 324 U.S. 30, 35 (1944).

[100] 318 U.S. 578 (1943).

[101] 324 U.S. 30 (1945).

[102] BORN & RUTLEDGE, *supra* note 88, at 221. In both cases, the Supreme Court decided whether or not to grant sovereign immunity based on whether or not the State Department had issued a certificate of immunity on behalf of the foreign state. *Id.*

[103] *Hoffman*, 324 U.S. at 35.

[104] *Id.*

[105] *Ex parte Peru*, 318 U.S. at 589.

cluded an "expanding," "speeding up," and "deepening" of "transcontinental flows and patterns of social interaction."[106] This was nied, at the beginning of World War I, by an increase in the nationalization of various industries.[107] In response, many national courts reexamined the traditional notion of sovereign immunity and adopted a more restrictive view, called the restrictive theory of sovereign immunity.[108] The restrictive theory was premised on two principles (1) the acts of a sovereign that are public or sovereign in nature (*acta jure imperii*) and (2) the acts of a sovereign that are private or commercial in nature (*acta jure gestionis*).[109] The absolute theory of sovereign immunity said that states were immune from both *acta jure imperii* and *acta jure gestionis*. The restrictive theory said that a sovereign was immune only for its acts public in nature (*acta jure imperii*), not those acts which were private in nature (*acta jure gestionis*).[110]

In 1952, the State Department adopted the restrictive view of sovereign immunity with the release of a letter by Jack Tate, the State Department's Legal Advisor (Tate Letter).[111] Global pressures to adopt the restrictive theory of sovereign immunity greatly impacted the State Department's shift in policy toward sovereign immunity.[112] The State De-

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[106] Globalization expert, David Held, defines globalization in its simplest terms as "a shift or transformation in the scale of human organization that links distant communities and expands the reach of power relations across the world's regions. This shift can be mapped by examining the expanding scale, growing magnitude, speeding up and deepening impact of transcontinental flows and patterns of social interaction." DAVID HELD, GLOBAL COVENANT: THE SOCIAL DEMOCRATIC ALTERNATIVE TO THE WASHINGTON CONSENSUS 1 (2004). Following the atrocities and immense human suffering of the Second World War, traditional concepts of sovereignty were challenged and the concept expanded to include notions of democracy and human rights. *Id.* at xi.

[107] GIUTTARI, *supra* note 86, at 3. In the years following the First World War, governments took on a larger role in economic development and industrial rehabilitation. *Id.* Consequently, government's played a greater role in sectors of the economy which had been traditionally private in nature. *Id.*

[108] Tate, *supra* note 89, at 984; GIUTTARI, *supra* note 86, at 4.

[109] Tate, *supra* note 89, at 984; GIUTTARI, *supra* note 86, at 4.

[110] Tate, *supra* note 89, at 984.

[111] The letter is commonly referred to as the "Tate Letter." Tate, *supra* note 89, at 984; BORN & RUTLEDGE, *supra* note 88, at 221.

[112] *See* Tate, *supra* note 89, at 985. At the beginning of the Twentieth Century, Italy and Belgium were among the first to adopt the restrictive theory of sovereign immunity, followed in the 1920s by Egypt, Switzerland, France, Austria, Greece, Romania, Peru, and Demark. GIUTTARI, *supra* note 86, at 4; Tate, *supra* note 89, at 984. *See also* William A. Dobrovir, *A Gloss on the Tate Letter's Restrictive Theory of Sovereign Immunity*, 54 VA. L. REV. 1, 2 (1968) ("The *Tate Letter* represented an attempt to give businessmen and merchants dealing with foreign governments some assurance that the [State] Department would not interpose a suggestion of immunity in suits arising from commercial transactions.").

partment practice of making suggestions of immunity under the new theory proved cumbersome[113] because it had to determine not only whether to grant immunity, but also whether foreign state action was inherently "sovereign" or "commercial."[114] This, in effect, caused the State Department to have to perform a judicial function.[115] The State Department felt pressure from foreign nations to grant immunity in situations where immunity should not have been granted.[116] No clear standard for granting immunity developed and when the courts were left to decide whether to grant immunity, for example when the State Department did not intervene, the courts did not have a uniform rule to apply.[117] These drawbacks and the need for a uniform procedure for granting sovereign immunity caused Congress to consider reform and this resulted in the Foreign Sovereign Immunities Act of 1976.[118]

B. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976: THE CODIFICATION OF THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY IN THE UNITED STATES

The codification of the restrictive theory of sovereign immunity occurred in the United States with the adoption of the Foreign Sovereign Immunities Act of 1976 (FSIA).[119] The FSIA transferred the determination of sovereign immunity from the executive branch via the State Department to the judiciary.[120] FSIA became the sole basis for obtaining jurisdiction over a foreign state in U.S. Courts.[121]

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[113] BORN & RUTLEDGE, *supra* note 88, at 221-22.

[114] *Id.*

[115] *Id.*

[116] DUNOFF, RATNER & WIPPMAN, *supra* note 93, at 421.

[117] *Id.*

[118] BORN & RUTLEDGE, *supra* note 88, at 221-22.

[119] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (2006).

[120] *Id.* § 1602; BORN & RUTLEDGE, *supra* note 88, at 222. Specifically, § 1602 reads, "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602.

[121] Argentine Rep. v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

1. FOREIGN STATES, THEIR POLITICAL SUBDIVISIONS, AND THEIR AGENCIES OR INSTRUMENTALITIES

According to the FSIA, a foreign state is immune from jurisdiction in U.S. courts.[122] The Act defines a "foreign state" as a "political subdivision of a foreign state or an agency or instrumentality of a foreign state."[123] A "foreign state proper" is a nation recognized diplomatically as an independent state, for example a nation such as Switzerland or the Holy See.[124] A "political subdivisions" of a foreign state includes entities such as states, cantons, or provinces.[125] An agency or instrumentality of a foreign state is, for example, a foreign corporation "incorporated in and at least fifty percent owned by the foreign state."[126]

2. EXCEPTIONS TO FOREIGN STATE IMMUNITY

While the Act did codify the principle of restrictive immunity, it rejected the notion that a sovereign would be immune for all of its activities, both public and private. This was reflected in section 1605 of the Act which listed the general exceptions to the jurisdictional immunity of foreign states and limited immunity to a sovereign's public acts.[127] The Act listed seven exceptions to foreign state immunity.[128] Some of these exceptions include the waiver exception, the commercial activity excep-

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[122] 28 U.S.C. § 1604. Specifically, the Act says: "[A] *foreign state* shall be immune from the jurisdiction of the courts of the United States and of the States, except as provide in sections 1605 to 1607 of this chapter." *Id.* (emphasis added).

[123] *Id.* § 1603(a).

[124] BORN & RUTLEDGE, *supra* note 88, at 239.

[125] *Id.* at 240. More specifically, political subdivisions are: "[A]ll governmental units beneath the central government, including local governments." *Id.* (quoting H.R. REP. NO. 94-1487, at 15 (1976)).

[126] Andrew Loewenstein, *The Foreign Sovereign Immunities Act and Corporate Subsidies of Agencies or Instrumentalities of Foreign States*, 19 BERKELEY J. INT'L L. 350, 358 (2001). The FSIA definition of "agency or instrumentality of a foreign state" has three components. It must be an entity (1) with a separate legal person, corporate or otherwise, and (2) is "an organ" of a foreign state or its political subdivision, or a "majority of whose shares or other ownership interest" is owned by a foreign state or its political subdivision, and (3) which is neither a citizen of the U.S. nor created under the law of any third country. 28 U.S.C. § 1603(b)(1)-(3). In *Dole Food Co. v. Patrickson*, the Supreme Court held that "only direct subsidiaries of a foreign state, a foreign state organ, or a foreign state's political subdivision qualify as 'agencies or instrumentalities.'" BORN & RUTLEDGE, *supra* note 88, at 241 (quoting Dole Food Co. v. Patrickson, 538 U.S. 468 (2003)).

[127] 28 U.S.C. § 1605.

[128] *Id.*

tion, the tortious conduct exception, and the terrorist activity exception.[129] This comment will focus on the tortious conduct exception.

3. THE TORTIOUS CONDUCT EXCEPTION

One exception to foreign sovereign immunity in the United States is the tortious conduct exception.[130] The tortious conduct exception provides foreign state immunity when "money damages are sought . . . for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his or her employment."[131] There are also two exceptions to the tortious conduct exception. The tortious conduct exception does not apply either when (1) the claim is based upon the performance or failure to perform a discretionary function, nor does it apply when (2) the claim arises out of "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[132]

III. THE TORTIOUS ACTIVITY EXCEPTION AND ITS APPLICATION TO THE PRIEST SEXUAL ABUSE SCANDAL IN THE ROMAN CATHOLIC CHURCH

In *Doe v. Holy See* and *O'Bryan*, action against the Holy See in U.S. courts was not barred under the Foreign Sovereign Immunity Act because the courts found that such conduct fell under the noncommercial tortious activity exception of the FSIA. Two primary questions governed the issue of Holy See liability in U.S. courts (1) whether the Holy See

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[129] *Id.*

[130] 28 U.S.C. § 1605(a)(5) reads: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

[131] *Id.*

[132] *Id.* § 1605(a)(5)(A)-(B).

was a foreign nation guaranteed certain safeguards under the FSIA or whether it was the head of a religious institution; and (2) if the Holy See was a foreign nation, whether it still had immunity in the U.S. under the tortious activity exception of the FSIA.

A. THE HOLY SEE AS A FOREIGN STATE UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

Pursuant to the FSIA, for an entity to have immunity from jurisdiction in U.S. courts, it must be a foreign state.[133] Courts in the U.S. recognize a government as a foreign state if the executive branch has diplomatically recognized the foreign entity as a nation-state.[134] In *Doe v. Holy See*, the sovereign status of the Holy See was not in dispute[135] because the executive branch diplomatically recognized the Holy See as a foreign nation in 1984, with President Regan's nomination of William A. Wilson to U.S. Ambassador to the Holy See.[136] Soon after the U.S. executive branch diplomatically recognized the Holy See, there was controversy over whether a formal diplomatic relationship with the Holy See violated the separation of church and state. In *Americans United for Separation of Church & State v. Ronald W. Reagan*, the U.S. Court of Appeals for the Third Circuit held that President Ronald Reagan's decision to appoint an Ambassador to the Holy See, and maintain diplomatic relations with the Vatican, was his exclusive power as the president under Article II, § 2 of the United States Constitution and a judicially "unreviewable" political decision.[137]

In *O'Bryan*, the plaintiffs challenged the premise that the Holy See was a foreign state in its role as the head of the Roman Catholic Church. The plaintiffs did this because, if the court agreed with the plaintiffs that the Holy See was not a foreign state, then the FSIA and its protections would not apply to the Holy See in this case. The plaintiffs made two arguments regarding the classification of the Holy See as a foreign state. First, the plaintiffs argued that the Holy See should not be recognized as a foreign state in this lawsuit because the U.S. had not diplomatically recognized the Holy See as a foreign state when the alleged

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[133] *Id.* § 1604.

[134] BORN & RUTLEDGE, *supra* note 88, at 239.

[135] Doe v. Holy See, 434 F. Supp. 2d 925, 933 (D. Or. 2006).

[136] Fogarty, *supra* note 5, at 239.

[137] Ams. United for the Separation of Church & State v. Reagan, 786 F.2d 194, 202 (3d Cir. 1986).

sexual abuse occurred.[138] The alleged abuse occurred between 1920 and 1970, and the U.S. did not diplomatically recognize the Holy See until 1984. The Western District of Kentucky, in *O'Bryan I*, and the Sixth Circuit, in *O'Bryan III*, rejected this argument.[139] The Sixth Circuit said that plaintiffs' arguments failed for two reasons (1) the executive branch decision to diplomatically recognize the Holy See applied retroactively,[140] and (2) by diplomatically recognizing the Holy See, the U.S. intended to grant the Holy See immunity from *present* suits, even for its prior conduct.[141]

In *O'Bryan*, the plaintiffs did not dispute that the *State of the Vatican* was a foreign state under the meaning of the FSIA, but they did argue that the Holy See "as the head of the Roman Catholic Church"[142] was not a foreign state for the purposes of the FSIA.[143] On this issue, the U.S. filed an amicus brief supporting the Holy See.[144] The United States made clear that under the Constitution, the executive branch has the exclusive power to diplomatically recognize a foreign state.[145] In its brief, the U.S. said that the Holy See could be sued in U.S. courts only as a foreign state and not as the head of the Roman Catholic Church.[146] The brief said that classifying the Holy See as the head of an international religious organization rather than as a foreign state would "deprive [it] of the many procedural protections afforded by the FSIA to foreign sovereigns."[147] Additionally, the U.S. said that the Holy See could "be sued in a U.S. court under the terms specified by the FSIA, or not at all."[148]

The Sixth Circuit rejected the plaintiffs' argument that the Holy See was not a foreign state as the head of the Roman Catholic Church.[149]

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[138] O'Bryan v. Holy See, Nos. 07-5078, 07-5163, 2009 U.S. App. LEXIS 2412, at *13-14 n.3 (6th Cir. Feb. 10, 2004).

[139] *Id.*; O'Bryan v. Holy See, 490 F. Supp.2d 826, 830 (W.D. Ky. 2005).

[140] *O'Bryan*, 2009 U.S. App. LEXIS 2412, at *13-14 n. 3.

[141] *Id.* The Sixth Circuit emphasized the importance of "current political realities" and "gesture[s] of comity." *Id.* The decision to diplomatically recognize the Holy See as a foreign state was a political decision made by the executive branch. *See Id.* The court implied that it was not its place to preclude immunity of a foreign state, even if the conduct in question occurred before the U.S. had diplomatically recognized the state. *See Id.*

[142] *Id.* at *13.

[143] *Id.* at *15.

[144] Final Brief for the United States as Intervenor and Amicus Curiae Supporting the Defendant, O'Bryan v. Holy See, Nos. 07-5078/5163, 2009 U.S. App. LEXIS 2412 (6th Cir. Feb. 10, 2009).

[145] *Id.* at 14.

[146] Peter Smith, *U.S. Partially Backs Vatican in Abuse Suit*, COURIER J., Oct. 16, 2007, at 1A.

[147] Final Brief for the United States as Intervenor and Amicus Curiae, *supra* note 144, at 14.

[148] *Id.* at 23.

[149] *O'Bryan*, 2009 U.S. App. LEXIS 2412 at *15-16.

The court called the plaintiffs' argument "obscure" and because they were unsure of what the plaintiffs were arguing, the court interpreted the plaintiffs' argument in two ways. First, the court thought that plaintiffs were arguing that the Holy See was two separate entities, a sovereign nation and a religious organization—one a foreign state and the other not.[150] If this was the plaintiffs' argument, the court said, it failed because the plaintiffs "cite no authority" to show that the Holy See can be sued as two separate entities, as a foreign state and a religious organization.[151] Second, the court thought that the plaintiffs were arguing that the Holy See, as a foreign state, was "acting in a non-sovereign way" because of its involvement in the priest sexual abuse cover-up.[152] The court said that this argument also failed.[153] The court said that the plaintiffs should use one of the FSIA exceptions if it believed that the Holy See acted in a "non-sovereign way" (in a private capacity).[154]

It is not surprising that in a novel lawsuit involving the Holy See, the plaintiffs would try to reshape the classification of the Holy See as a foreign state under the FSIA. The unique nature of the Holy See, as a nation state and the headquarters of an international religion, raise interesting questions about sovereignty and push the limits of sovereign immunity. It is also not surprising that the courts have thus far upheld the classification of the Holy See as a foreign state. The classification of the Holy See as a foreign state is a sensitive diplomatic and political decision the courts are unlikely to disrupt, especially because it involves one of the world's largest religions.

B. THE NONCOMMERCIAL TORTIOUS CONDUCT EXCEPTION & THE PRIEST SEXUAL ABUSE SCANDAL IN THE ROMAN CATHOLIC CHURCH

Foreign policy concerns aside, for a lawsuit against a foreign nation to successfully move forward in U.S. courts, the conduct must also fall under one of the exceptions listed in the FSIA. In the case of the Holy See, the noncommercial tortious conduct exception has successfully been applied in relation to its role in the priest sexual abuse scandal. The noncommercial tortious conduct exception has four parts (1) the act itself must be tortious conduct, (2) the tortious conduct must have occurred in

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[150] *Id.* at *15.
[151] *Id.* at *16.
[152] *Id.*
[153] *Id.* at *17.
[154] *Id.* at *19.

the United States, (3) by an act or omission of any official or employee of that foreign state while acting within the scope of employment, and (4) must not have been a claim based on a discretionary function of the foreign state. Each of these requirements will be discussed in turn as they relate to the case against the Holy See in the priest sexual abuse scandal.

1. SEXUAL ABUSE IN THE CATHOLIC CHURCH AS TORTIOUS CONDUCT

In *Doe v. Holy See*, the plaintiffs attempted to invoke two exceptions to the FSIA, the commercial activity and the tortious conduct exceptions.[155] As the district court noted, this was the first time a plaintiff, suing the Holy See for the priest abuse scandal, relied partially on the commercial activity exception of FSIA.[156] The district court allowed the suit to move forward, but only under the tortious conduct exception.[157] This decision marked the first time a U.S. court allowed a lawsuit to move forward against the Holy See for its role in the alleged priest sexual misconduct.

In two other lawsuits, one before and one since the decision in *Doe v. Holy See,* plaintiffs have tried to sue the Holy See under the tortious exception of the FSIA for alleged sexual abuse by Catholic priests.[158] In *English v. Thorne*,[159] the District Court for the Southern District of Mississippi rejected jurisdiction over the Holy See under the discretionary function exception of the tortious conduct exception of the FSIA.[160] However, following the precedent set in *Doe v. Holy See*, the District Court for the Western District of Kentucky, in *O'Bryan II*, held that the plaintiffs could move forward with their lawsuit alleging acts and omissions by the Holy See regarding alleged priest misconduct under the tortious conduct exception of FSIA.[161]

In *Doe v. Holy See*, *Thorne*, and *O'Bryan*, the plaintiffs used the tortious conduct exception of the FSIA in an attempt to overcome the Holy See's foreign sovereign immunity in U.S. courts. For the tortious

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[155] Doe v. Holy See, 434 F. Supp.2d 925, 957 (D. Or. 2006).
[156] *Id.* at 937.
[157] *Id.* at 957.
[158] *Id.* at 937.
[159] 676 F. Supp. 761 (S.D. Miss. 1987) (a case decided *before* the 2006 decision in *Doe v. Holy See*).
[160] *Id.* at 763-64.
[161] O'Bryan v. Holy See, 471 F. Supp.2d 784, 792 (W.D. Ky. 2007).

conduct exception to apply, the plaintiffs must seek money damages for tortious conduct, specifically for personal injury or death, or damage to or loss of property.[162] According to the FSIA's legislative history, the noncommercial tortious conduct exception in section 1605(a)(5) was "directed primarily at the problem of traffic accidents but is cast in general terms as apply to all tort actions for money damages, not otherwise encompassed by section 1605(1)(2) relating to commercial activities."[163] The scope of the noncommercial tortious conduct exception has been interpreted broadly,[164] as is clear from the cases brought under this exception regarding alleged priest sexual misconduct.

In the three cases against the Holy See, the plaintiffs accused the Holy See of engaging in tortious conduct, specifically as it related to the alleged sexual misconduct of priests employed by the Catholic Church.[165] In applying FSIA, a court must choose a body of substantive law.[166] The state law of the place where the tortious conduct occurred usually applies. For example, in *Doe v. Holy See,* the District Court of Oregon and the Ninth Circuit applied Oregon state law to interpret the meaning of *respondeat superior*, the situs requirement, and discretionary function under the tortious exception. In *O'Bryan*, the Western District of Kentucky and the Sixth Circuit applied Kentucky law.

Thus, the remainder of the tortious exception analysis is dictated by the substantive law chosen by the court.

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[162] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(5) (2006).

[163] RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING 319 (4th ed. 2003).

[164] *See* BORN & RUTLEDGE, *supra* note 88, at 294.

[165] In *English*, the plaintiffs accused the Holy See of negligently employing, retaining, and reassigning Father Vance Zebulon Thomas, a priest accused of sexual misconduct; and alleged that the Holy See breached its fiduciary and professional duties and responsibilities towards the plaintiffs. *English*, 676 F. Supp. at 762. As mentioned earlier, in *Doe*, the plaintiffs filed action against the Holy See and alleged *respondeat superior*, negligence, and fraud for the Vatican's role in the alleged sexual abuse of the plaintiffs by Father Andrew Ronan. Doe v. Holy See, 434 F. Supp.2d 925, 931 (D. Or. 2006). Likewise, in *O'Bryan*, the plaintiffs filed suit against the Holy See under the doctrines of "*respondeat superior* for acts of bishops and priests, violations of customary international law of human rights, negligence, breach of fiduciary duty, infliction of emotional distress, deceit, and misrepresentation" stemming from alleged sexual abuse by priests in the Louisville Archdioceses. *O'Bryan*, 471 F. Supp.2d at 792.

[166] BORN & RUTLEDGE, *supra* note 88, at 307. Under FSIA, a foreign state is "liable in the same manner as to the same extent as a private individual under the like circumstances." Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1606 (2006).

2. THE SITUS REQUIREMENT

The situs requirement of the tortious exception of the FSIA refers to *where* the tortious act or omission took place. Section 1605(a)(5) of the FSIA requires that the tortious act occurred in the United States.[167] Courts have had varying interpretations of what the narrowly drafted "occurring in the United States" should mean.[168] Courts have generally interpreted the FSIA situs requirement in four different ways[169] (1) That only the injury itself must have occurred within the United States;[170] (2) That *all* tortious conduct and injury must have occurred within the United States;[171] (3) That all elements of the tort and the injury of "one entire tort" must have occurred within the United States;[172] or (4) That the center of gravity of the tort and injury must have occurred within the United States.[173]

In the case of the priest sexual abuse scandal, the location of the tort is an interesting question for courts to handle because it requires the court to determine in what sense the Holy See committed a tort: was it the actual abuse of the minors, was it the decisions made by bishops in the U.S., or was it a result of lack of oversight by top officials in the Holy See? The court decisions dealing with this question under the scope of the priest sexual abuse scandal have had varying interpretations.

The third approach was adopted by the District Court of Oregon in *Doe v. Holy See I*.[174] The district court said that plaintiff's claim for negligence[175] was based on acts and injuries that occurred entirely in the United States, mainly (1) the Holy See placed Father Ronan in St. Albert's parish in Portland despite their knowledge of his "dangerous pro-

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[167] 28 U.S.C. § 1605(a)(5).

[168] BORN & RUTLEDGE, *supra* note 88, at 298-99.

[169] *Id.* at 299.

[170] *Id.* The Restatement (Third) Foreign Relations Law took this approach. The Restatement interpreted § 1605(a)(5) of the FSIA to mean that "courts in the United States have jurisdiction over tort claims against a foreign state only if the injury took place in the United State, regardless of where the act or omission causing the injury took place." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 454 cmt. e (1987); *see also* BORN & RUTLEDGE, *supra* note 88, at 299.

[171] BORN & RUTLEDGE, *supra* note 88, at 299.

[172] *Id.*

[173] *Id.*

[174] Doe v. Holy See, 434 F. Supp.2d 925, 931 (D. Or. 2006).

[175] In *Doe v. Holy See I*, the plaintiffs alleged that the Holy See, "failed to provide reasonable supervision [of Father Ronan, the priest accused of sexual misconduct], failed to use reasonable care in investigating Ronan, and failed to provide adequate warning to Portland parishioners." *Id.* at 950.

pensities" and (2) the plaintiff's injuries occurred entirely in the United States.[176] In *Doe v. Holy See I*, the Holy See advocated the second approach, arguing that the tortious exception did not apply because the entire tort did not occur in the United States.[177] Although the injury did occur in the United States—the alleged sexual abuse of the plaintiff—the alleged acts or omissions of the foreign sovereign by top officials in Rome, did not.[178] The court did not adopt this approach.

Whereas the district court in *Doe v. Holy See I* adopted the third approach, the District Court for the Western District of Kentucky, in *O'Bryan II*, adopted the second interpretation of the FSIA situs requirement. Following this strict interpretation of the situs requirement,[179] the district court found that the tortious exception did not apply to the Holy See for acts that occurred abroad. While actions by employees of the Holy See may be challenged, the actions of the Holy See itself could not be challenged because they occurred at the Vatican, outside of the United States.[180] In *O'Bryan III*, the Sixth Circuit affirmed the district court decision by concluding that the "entire tort" must occur in the U.S. for the tortious act exception to apply.[181] The plaintiffs in *O'Bryan* did advanced claims of liability based on actions by Holy See employees that occurred in the U.S. For example, the plaintiffs alleged that bishops or archbishops in the U.S. had knowledge of alleged sexual misconduct and that they did nothing about it.[182] Therefore, in *O'Bryan*, the plaintiffs' claims that occurred in the U.S. survived, but those that did not occur in the U.S. did not survive.

In litigation against the Holy See for its role in the priest sexual abuse scandal, courts application and interpretation of the situs requirement will vary.

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[176] *Id.* at 953.

[177] *Id.* at 951.

[178] *Id.*

[179] *See In re* Sedoco, Inc., 543 F. Supp. 561 (S.D. Tex. 1982) (first establishing the strict interpretation of the situs requirement).

[180] O'Bryan v. Holy See, 471 F. Supp.2d 784, 790, 792 (W.D. Ky. 2007); Church, *supra* note 72.

[181] O'Bryan v. Holy See, Nos. 07-5078/5163, 2009 U.S. App. LEXIS 2412, at *41-43 (6th Cir. Sept. 17, 2007).

[182] *Id.* at *54.

3. OFFICIAL OR EMPLOYEE OF A FOREIGN STATE AND THE SCOPE OF EMPLOYMENT

Another central question in the priest sexual abuse litigation against the Holy See was whether (1) the bishops and clergy of the Roman Catholic Church were officials or employees of the Holy See and (2) whether they were acting within their scope of employment when the tortious act occurred.[183] These questions are dictated by the substantive law chosen by the court.[184]

The courts are in agreement regarding the first issue—whether the bishops and clergy were officials or employees of the Holy See. In *Doe v. Holy See I*, the District Court of Oregon, applying Oregon state law, found that the priest accused of sexual misconduct, Father Ronan, was an employee of the Holy See.[185] The Ninth Circuit, in *Doe v. Holy See II*, agreed.[186] In *O'Bryan II*, the District Court for the Western District of Kentucky, following Kentucky state law, said that it could not conclude whether or not the United States-based archbishops, bishops, and other clergy of the Catholic Church were employees of the Holy See because the Holy See declined to provide evidence that these agents were not employees of the Holy See.[187] In *O'Bryan III*, the Sixth Circuit relied upon Kentucky law to determine that the bishops, archbishops, and Holy See personnel were employees of the Holy See.[188]

The courts are also in agreement regarding the second issue—whether the actions of the Holy See's employees or officials fell within their scope of employment. In *Doe v. Holy See I*, the District Court of Oregon found that the Holy See was liable as employer under Oregon state law's broad application of *respondeat superior*.[189] The district court said that Father Ronan acted within his scope of employment because the abuse occurred in Ronan's capacity as a youth director who was hired to

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[183] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(5) (2006).

[184] BORN & RUTLEDGE, *supra* note 88, at 307. According to FSIA, the foreign sovereign shall be "liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In *Doe v. Holy See*, the District Court of Oregon applied Oregon state law to the question of whether the priest accused of sexual misconduct was an employee of the Holy See pursuant to the tortious exception of the FSIA. Doe v. Holy See, 434 F. Supp.2d 925, 948 (D. Or. 2006). Likewise, in *O'Bryan* the District Court for the Western District of Kentucky applied Kentucky state law. *O'Bryan*, 471 F. Supp.2d 784, 790.

[185] *Doe*, 434 F. Supp.2d at 949.

[186] John V. Doe v. Holy See, No. 06-35587, slip op. 2543, at 2571 (9th Cir. Mar. 3, 2009).

[187] *O'Bryan*, 471 F. Supp.2d at 791.

[188] O'Bryan v. Holy See, 2009 U.S. App. LEXIS 2412, at *55 (6th Cir. Feb. 10, 2009).

[189] *Doe*, 434 F. Supp.2d at 950.

provide spiritual services, guidance, and counseling and thereby gain young people's trust.[190] In *Doe v. Holy See II*, the Ninth Circuit agreed that Father Ronan's conduct fell within the scope of his employment.[191]

In *O'Bryan II*, the District Court of Kentucky said that it was unable to rule on whether the bishops, archbishops, and clergy were employees of the Holy See. Yet, the district court continued its analysis, using Kentucky state law, and determined that if plaintiffs' allegations were true, the bishops, archbishops, and clergy were acting within the scope of their employment if they followed a Holy See policy to cover-up the scandal.[192] In *O'Bryan III*, the Sixth Circuit concluded that when the priests engaged in sexual misconduct, they were not acting within the scope of their employment.[193] This conclusion was based on a Kentucky Supreme Court case that said "a priest's adulterous conduct" was not within the scope of his employment."[194] As a result, according to the Sixth Circuit, the tortious act exception to the FSIA would not apply to the Holy See for the sexual misconduct by its clergy.[195]

The plaintiffs, however, did not base their claims only on the actions of the clergy accused of sexual misconduct, they also based their claims of liability on the behavior of those who supervised the clergy—the bishops, archbishops, and Holy See personnel in the U.S.[196] The court concluded that the actions of those who supervised the clergy—the bishops, archbishops, and Holy See personnel—were within the scope of their employment.[197] Taking the plaintiffs' allegations as true, the court said that their actions were within their scope of employment because those who supervised the clergy "had knowledge of the alleged sexual abuse of priests and . . . they failed to act on that knowledge."[198] Therefore, the Sixth Circuit found that the scope of employment element of the tortious exception was satisfied in *O'Bryan III*.

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[190] *Id.* at 949-50.
[191] *Doe*, No. 06-35587, slip op. at 2575.
[192] *O'Bryan*, 471 F. Supp.2d at 792.
[193] *O'Bryan*, 2009 U.S. App. 2412, at *52.
[194] *Id.* at *47 (citing Osborne v. Payne, 31 S.W.3d 911, 915 (Ky. 2000)).
[195] *O'Bryan*, 2009 U.S. App. 2412, at *52.
[196] *Id.* at *54.
[197] *Id.*
[198] *Id.*

4. THE EXCEPTION TO THE EXCEPTION: THE DISCRETIONARY FUNCTION EXCEPTION

The FSIA discretionary function exception is the final element of the tortious exception and is a central component of the priest sexual abuse litigation against the Holy See. The Holy See has relied upon the discretionary function exception to exempt itself from FSIA. According to the noncommercial torts exception, if the court finds that the foreign sovereign has committed a noncommercial tort that fulfills all of the elements of § 1605(a)(5) of the FSIA, the sovereign will not be immune in U.S. courts. However, pursuant to the discretionary function exception, if the court then finds that this tort was based on the act or omission of a discretionary function, the foreign sovereign will again have immunity in U.S. courts.[199]

The discretionary function exception to the noncommercial torts exception of FSIA is modeled off the discretionary function exclusion of the Federal Tort Claims Act (FTCA).[200] The lower courts have relied on precedent from FTCA cases to determine the meaning of discretionary function in FSIA.[201] Discretionary function includes, for example, the "initiation of programs and activities"[202] by executives or administrators "grounded in social, economic, and political policy."[203] In reference to discretionary function under the FTCA, the Supreme Court in *Dalehite v. United States*, said "where there is room for policy judgment and decision there is discretion."[204]

There is disagreement in the lower courts regarding when FSIA discretionary function exception should apply. The District Court of Oregon in *Doe v. Holy See I* and the District Court for Western Kentucky in *O'Bryan II* followed a narrow view of the discretionary function exception and held that the Holy See's actions were not discretionary in nature. However, the District Court for the Southern District of Mississippi in *English v. Thorne* and the Ninth Circuit in *Doe v. Holy See II* followed the broader view of discretion and held that the Holy See's actions were an instrument of their discretionary function as a sovereign nation and thus immune from U.S. courts.

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[199] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(5)(A) (2006).

[200] BORN & RUTLEDGE, *supra* note 88, at 300.

[201] The FSIA legislative history mentions the FTCA discretionary function exception. *Id.*

[202] Dalehite v. U.S., 346 U.S. 15, 35-36 (1953).

[203] U.S. v. Varig Airlines, 467 U.S. 797, 814 (1984).

[204] *Dalehite*, 346 U.S. at 35-36.

The district courts in both *Doe v. Holy See I* and *O'Bryan II*, adopted the narrow view of discretionary function, which strictly characterizes sovereign actions as discretionary in nature.[205] In *Doe v. Holy See I*, the District Court of Oregon held that the discretionary function exception did not apply to the Holy See's alleged conduct because the policy of the Holy See was not the type of judgment the exception was meant to shield.[206] The district court characterized the policy of the Holy See as failing to "failing to warn "parishioners of the known danger, [and to] . . . place . . . a priest it knew to be a child-molester in a position in which, for the third time, he would have private access to minors."[207] According to the district court, if the Holy See demonstrated that its failure to warn was "a policy-based decision" that represented "a balancing of competing interests," its actions may have fallen under the discretionary function exception.[208]

In *O'Bryan II*, the District Court for the Western District of Kentucky held that the discretionary function exception applied to one of the three claims alleged against the Holy See. The district court characterized the first claim, that the defendants "failed to provide safe care for children entrusted in their care," as a negligent hiring claim.[209] The district court held that the negligent hiring claim was protected by the dis-

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[205] In determining whether the discretionary function exception applied, the district courts in *Doe* and *O'Bryan* applied a two prong test first established in *Berkovitz v. United States.* Doe v. Holy See, 434 F. Supp.2d 925, 953-954 (D. Or. 2006) (citing Berkovitz v. United States, 486 U.S. 531, 536 (1988)); O'Bryan v. Holy See, 471 F. Supp.2d 784, 793 (W.D. Ky. 2007) (citing United States v. Gaubert, 499 U.S. 315, 322, (1991), quoting *Berkovitz*, 486 U.S at 536.) Under the *Berkovitz* two prong test, for the discretionary conduct exception to apply, the conduct must have been (1) discretionary or "involve[d] an element of judgment or choice" and (2) been the type of judgment that the discretionary function exception was designed to shield. *Doe*, 434 F. Supp. 2d at 953.

[206] *Doe*, 434 F. Supp.2d at 955. In *Doe*, the discretionary function exception depended upon the second prong because the first prong was "straightforward;" the plaintiffs did not allege that the Holy See's conduct "followed a specific mandatory rule or canon." *Id.* at 954. Thus, pursuant to the second prong of the discretionary function test, the district court had to determine whether the Holy See's alleged conduct was the type that the discretionary function was designed to shield. The district court relied on the Ninth Circuit decision, *Whisant v. United States*, which said that "the question of *how* the government is alleged to have been negligent is critical." *Id.* (quoting Whisant v. United States, 400 F.3d 1177, 1185 (9th Cir. 2005)) (emphasis in original).

[207] *Doe*, 434 F. Supp.2d at 955. The Holy See in *Doe* made the general characterization that the claim of negligence against it was one of "negligent hiring or supervision" and thus the type of discretionary function the exception is designed to shield. *Id.* at 954. The Court rejected this characterization. *Id.*

[208] *Id.* at 956.

[209] *O'Bryan*, 471 F. Supp.2d at 793.

cretionary function exception of the FSIA, and that the negligent hiring claim against the Holy See could not move forward.

The district court, in *O'Bryan II*, held that the remaining two claims alleged against the Holy See were not protected by the discretionary function exception of FSIA (1) the failure to warn and (2) the failure to report claims of child abuse.[210] The failure to warn and the failure to report claims were not protected by the discretionary function exception because the bishops, archbishops, and other clergy were acting according to a prescribed policy and thus the failure to warn and the failure to report "did not involve an element of judgment or choice."[211] In *O'Bryan II*, the district court, following a narrow view of discretionary function, held that the claim that the Holy See failed to provide safe care was protected by the discretionary function exception of the FSIA but that the claims that the Holy See failed to warn and failed to report were not protected.

The second approach, a broad view of discretionary function, is more lenient in its characterization of actions by foreign nations as discretionary. For example, some lower courts have "regard[ed] all conduct 'in furtherance' of an important national policy as discretionary."[212] In *English v. Thorne*, the District Court for the Southern District of Mississippi took a broad view of the Holy See's discretionary function.[213] In *Thorne*, the District Court characterized the negligent hiring and employment practices of the Vatican—hiring, retaining, and reassigning Father Thorne—as the "policies and/or procedures" which were "clearly discretionary functions."[214] The district court in *English v. Thorne* focused on the policy-making aspect of the Holy See's action, rather than focus on the Holy See's failure to act, which was emphasized in *Doe v. Holy See I* and *O'Bryan II*, and held that the Holy See was protected by the discretionary function exception of FSIA.[215]

In *Doe v. Holy See II*, the Ninth Circuit concluded that the plaintiff's claims of negligent retention, supervision, and failure to warn failed

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[210] *Id.*

[211] *Id.* at 793-94.

[212] BORN & RUTLEDGE, *supra* note 88, at 300.

[213] As discussed above, *English v. Thorne*, 676 F. Supp. 761 (S.D. Miss. 1987), was one of the first cases in which the Holy See was included as a defendant and sued in U.S. courts for its role in the priest sexual abuse scandal. *See supra* Part B.1.

[214] *English*, 676 F. Supp. 763-764.

[215] Doe v. Holy See, 434 F. Supp. 2d 925, 954 (D. Or. 2006).

because they did not overcome the discretionary function exception.[216] The court used analysis from the Supreme Court case *United States v. Gaubert,*[217] which says that a foreign state will be protected by the discretionary function exception if two elements are satisfied. The action must be (1) "'discretionary in nature' or 'involve[s] an element of judgment or choice'" and (2) "the judgment is the kind that the discretionary function exception was designed to shield."[218] The court said that the first *Gaubert* element was not satisfied because the plaintiff failed to show that the Holy See had a "specific and mandatory" policy regarding priest sexual misconduct and thereby had not pled "any actions that fall facially outside of the discretionary function exception."[219] The court said that the second *Gaubert* element failed because the hiring, supervision, and training of employees was the type of discretionary functions the exception was meant to protect.[220]

The decisions in *Thorne* and *Doe v. Holy See II* may represent pushback by the courts to allow a lawsuit against a nation state to go forward. There are tremendous policy implications of litigating a global priest sexual abuse scandal on the domestic level. It opens the gates to further litigation, for one. It also puts the U.S. in the difficult position of allowing litigation to go forward against, not only a sovereign nation, but also the head of one of the world's largest religions.

To conclude, twice in U.S. courts, pursuant to the tortious conduct exception of the FSIA, action against the Holy See for its role in the priest sexual abuse scandal was not barred. In each case, U.S. courts considered the Holy See a foreign nation, guaranteed certain safeguards under FSIA, but under certain claims, the courts held the Holy See does not have immunity under the tortious activity exception of the FSIA, due to the discretionary function exception of FSIA.

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[216] John V. Doe v. Holy See, No. 06-35587, slip op. 2543, 2575 (9th Cir. Mar. 3, 2009). "The district court thus erred in exercising jurisdiction over these claims." *Id.*

[217] 499 U.S. 315 (1991).

[218] *Doe*, No. 06-35587, slip op. at 2575.

[219] *Id.* at 2575 -76.

[220] *Id.* at 2577.

IV. IMPLICATIONS OF LITIGATING THE GLOBAL PRIEST SEXUAL ABUSE SCANDAL IN U.S. COURTS

Why does it matter that victims of priest sexual abuse are using a statute, constructed originally to deal with traffic accidents involving diplomats, to sue the Holy See?

It is too soon to tell what the implications of *Doe v. Holy See* and *O'Bryan v. Holy See* will be in U.S. courts or even if either lawsuit will be found in the plaintiffs' favor. However both cases reinvigorate the debate surrounding an international norm of foreign sovereign immunity. The decisions in *Doe v. Holy See* and *O'Bryan v. Holy See* will likely have both domestic and international implications on the global priest sexual abuse scandal.

There has been a move, on the part of survivors of priest sexual abuse, to name the Holy See liable in lawsuits in addition to naming local dioceses and churches. It is likely that more victims of sexual abuse will attempt to sue the Holy See in U.S. courts and perhaps in foreign courts in the future following the precedent set by the District Court of Oregon and the Ninth Circuit in *Doe v. Holy See* and the District Court for the Western District of Kentucky and the Sixth Circuit in *O'Brya*n v. Holy See.[221] There are many reasons why victims of sexual abuse will seek to name the Holy See in a lawsuit for damages.

One reason is financial. As discussed above, dioceses throughout the United States are filing for bankruptcy, exacerbated by the financial burdens of large monetary payouts agreed to in sexual abuse settlements; 194 dioceses have been impacted by such settlements.[222] William F. Murphy, lawyer for the plaintiffs in *O'Bryan v. Holy See*, said, "[i]t's unfair to hold the parishioners of Catholic parishes financially responsible for what their bishops did at the behest of their superiors in the Vatican."[223] A sense of fairness and the risk of lower settlements may push victims of priest sexual abuse to seek financial compensation from the Holy See.

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[221] Church, *supra* note 71.

[222] *Id.*

[223] *Id.*

However, three issues should be considered (1) can the Vatican afford to pay large settlements to victims of priest sexual misconduct, (2) will the Vatican actually comply with court orders to compensate victims of sexual abuse, and (3) will the U.S., as a matter of foreign policy, actually enforce such decisions? Both *Doe v. Holy See* and *O'Bryan v. Holy See* are still on appeal and moving through the U.S. court system, thus one can only speculate what the Holy See will do if it is ordered to pay financial compensation to victims of priest sexual abuse.

The first issue to consider is whether the Holy See can afford to pay large settlements. In 1994, it was estimated that the Holy See had net assets of $460 million plus an additional $500 million to $1billion if the net assets of the Vatican City and the Vatican bank were included.[224] It was also estimated in 1994 that "thirty-two American colleges and universities had endowments larger than the net assets of the Holy See."[225] As mentioned above, in the largest settlement to date, the Archdiocese of Los Angeles agreed to pay $660 million to settle more than 500 complaints of sexual abuse.[226] Multiply those large settlements by the hundreds of diocese where victims have alleged and will allege priest sexual abuse, and the Holy See is facing a daunting financial burden and possible bankruptcy if U.S. courts and other foreign courts find it liable.

This scenario, however, is unlikely because the Holy See would actually have to comply with foreign court orders to pay compensation and the U.S. would have to enforce such a decision if the Holy See refused to voluntarily comply; the second and third issues to consider. Although the U.S. State Department and the Department of Justice said in an amicus brief to the Sixth Circuit that the Holy See could be not be sued as a religious institution and only as a foreign nation, it is unlikely that the U.S. will likewise enforce a decision to financially compensate victims of priest sexual abuse. The unique nature of the Holy See as both a foreign sovereign nation and as the headquarters of a global religion, make it a sensitive entity in foreign policy. In a country with a Roman Catholic population of about 25 percent, it would be surprising if the U.S. government put political pressure on the Holy See, the head of the Roman Catholic Church and a foreign sovereign, to fulfill court orders to compensate victims of priest sexual misconduct.

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[224] REESE, *supra* note 1, at 229.

[225] *Id.*

[226] Editorial, *supra* note 76; Goodstein, *supra* note 43.

While the United States government is unlikely to hold the Holy See accountable for its role in the priest sexual abuse scandal, it is likely that the American members of the Roman Catholic Church will. Accountability is the second reason why survivors of priest sexual abuse are likely to decide to include the Holy See in a lawsuit alleging misconduct. In a 2005 ABC News/Washington Post poll, an estimated 71 percent of American Catholics said they believed that sexual abuse by priests should be the Pope's highest priority.[227] Thus, suing the Holy See for its role in the priest sexual abuse scandal will highlight the role the Vatican had in perpetuating the abuse and will place the Holy See in an embarrassing position that may motivate it to start answering parishioner's tough questions.

Survivors of priest sexual abuse may include the Holy See in a lawsuit because they hope that such action will lead to reforms within the church and apologies for past actions. Inevitably, it is the hope of survivors of sexual abuse that through the legal system via large financial burdens and public embarrassment and pressure, perhaps the Roman Catholic Church will reform the way it deals with sexual misconduct. In fact, the impact of some of these lawsuits has been positive. Many Catholic Bishops have issued public apologies for the past actions of the church and promised reforms.[228] Following one of the largest priest sexual abuse settlements in the U.S. in the Dioceses of San Diego and San Bernardino, San Diego Bishop Robert H. Brom said, "[r]eality requires admission. It happened. Regrettably, to our embarrassment, it happened. And we're learning more about the consequences of sexual abuse and how horrible they are."[229]

Thus, it would not be surprising if the rulings in *Doe* and *O'Bryan* "prompt a fresh wave of suits from victims of priest abuse" in both the United States and abroad.[230] Nor would it be surprising if the Holy See refused to compensate victims of the priest sexual abuse scandal if a U.S. or other foreign court ordered them to do so. It is not a compelling U.S. foreign policy interest to enforce such a decision, both because the Holy See is a sovereign foreign nation and because it is the head of the Roman Catholic Religion. However, the Holy See will likely face pressure from within the Catholic Church, by parishioners and local

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[227] John Cohen, *Poll: American Catholics Support New Pope*, ABC NEWS, Apr. 25, 2005, http://abcnews.go.com/International/Pope/story?id=700062.

[228] Church, *supra* note 71.

[229] Hines-Brigger, *supra* note 77, at 8.

[230] Church, *supra* note 71.

archdiocese, to deal with the priest sexual abuse scandal; lawsuits like *Doe* and *O'Bryan* will likely help in this endeavor.

CONCLUSION

In an international priest sexual abuse scandal that has implicated a sovereign nation state as the main culprit in a vast global cover-up, there exists a delicate balancing act between a victim's right to justice and a nation's right to sovereignty. On the one hand allowing a diplomatically recognized foreign state to be sued in U.S. courts for widespread and systematic priest sexual abuse violates intimate foreign policy objectives of the Executive Branch of the United States, mainly respect for sovereignty and immunity in foreign courts. On the other hand, to deny victims of sexual abuse proper retribution goes against one of the main tenants of our judicial system—accountability and justice. In an era of human rights and a narrowing sense of sovereignty, perhaps the balancing of state sovereignty and individual rights in the priest sexual abuse case fits neatly into the chronology of sovereignty, rights, and justice.