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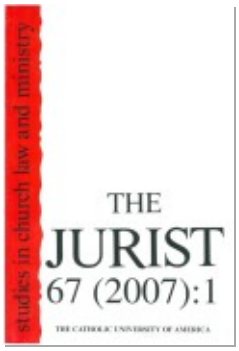

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AN OVERVIEW ON THE PARISH AND THE CIVIL LAW

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In the United States, Catholics have a special affinity for their parishes. Parishes are more than physical structures. They take on a life of their own and, like all living things, grow and change over time. Despite the many changes in civil and church society, parishes are still objects of affection. The parish is where Catholics are baptized, receive the sacraments of initiation, and get married. More than a center of weekly worship, the parish is also the center of general, religious, and adult education; sports activities; and socializing. It is the last place that Catholics will "attend" while the community prays for the repose of their souls. In some historic Catholic centers, the parish is more important than the school district. Even today, the name of the parish often denotes the name of the neighborhood. It is no wonder, then, that Catholics are more than a little concerned about recent civil litigation in the United States that seems to threaten the very existence of the spiritual communities and their physical structures known as parishes.

The purpose of this paper is to address the civil law aspects of parishes in the context of ongoing civil litigation affecting the lives of parishes and dioceses. This paper will address the question, what are the civil law attributes of the parish? To begin at the end, the answer is, whatever civil structure has been chosen for the parish will dictate its civil attributes. Although this sounds circular, it is accurate and precise. If the parish is a civil corporation, it has the attributes of such a corporation under the corporation statutes of that particular jurisdiction, as amplified in the articles of incorporation and bylaws. If the parish is organized as a civil law trust, it has the attributes of a trust under the law of that state as well as any other attributes provided for it in the trust agreement. If the parish is considered an "unincorporated association," one follows the law of that state

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to determine who the members of the association are, and how power is allocated and governance is exercised. And if the parish is part of a statutory or common law corporation sole diocese, well, that brings us a little further into the story and is a symptom of the instant difficulty.

In this paper, after laying some initial *background*, I will address the question of structure in more detail. Thereafter, I will evaluate the *structural question* in various *factual situations* that have occurred in cases affecting dioceses. Then, I will look more closely at the questions created by the several *bankruptcy cases* involving Catholic dioceses in 2005. This will include a brief examination of the constitutional and corporate issues. Because the solution proposed for many of the difficulties facing dioceses is *restructuring*, I will take a more studied look at the legal and practical issues that could confound such deliberations. There is also an appendix listing some of the common legal issues confronting church administrators; and the list is a good starting point for practical discussions about what the Church will look like in the years to come. I will end with some general *observations* about the nature of this undertaking.

I. *Background*[1]

Through the colonial period and thereafter, American Catholics labored under many legal disabilities. A 1647 Massachusetts law banned members of the Society of Jesus from the Commonwealth. The first offense was punishable by deportation; the second, by death.[2] Similarly, an amendment proposed to 1777 New York state constitution permitted the holding of private property "[e]xcept the professors of the religion of the Church of Rome, who ought not to hold lands in, or be admitted to a participation of the civil rights enjoyed by the members of this State until such time as [they] . . . solemnly swear" that they renounce the authority of the Pope and the doctrines of the Church including the absolution of sins.[3] Fortunately, that provision did not survive into the final version of the state constitution. However, in other colonies, later states, the Church went through various periods when its ability to hold property

[1] Most of the historical material is taken from Rev. Patrick J. Dignan's important work on Catholic Church Property. *A History of the Legal Incorporation of Catholic Church Property in the United States [1784–1932]* (P.J. Kenedy 1935) (hereafter Dignan at p. xxx). The work is published with a nihil obstat and an imprimatur.

[2] Dignan, 17. "In 1659, the celebration of Christmas was abolished in Massachusetts as savoring of 'popery."

[3] Dignan, 26. The amendment was proposed by John Jay who served the Washington administration as ambassador to England and later as the first chief justice. It also included text to the effect that the Church had no power to tell its adherents not to take the oath.

was under severe restrictions. Even in Maryland, founded by the Catholic Calverts, the Church was occasionally outlawed and therefore forbidden to own property, followed by years when it was "restored."[4] The solution adopted by the institutional Church was to place land in the hands of a reliable lay trustee who would hold the property in fee simple with the expectation that the property in fact belonged to the Church.[5]

It is not surprising, therefore, that the models through which churches held property in America were built around a Protestant polity.[6] Those corporate forms that did exist provided for governance entirely by lay people. No clergy were permitted to serve on any church board.[7] These entities were controlled like private non-religious agencies. They were subject not to church law, but only to the common law of the state. And there were no distinctions made among faith groups, as equality was nominally part of the American experience. Rather, one form of corporate ownership was expected to be applied by all faith groups, regardless of polity.

These disabilities did not affect the growth of the Church. Catholics continued to emigrate from the Old World to the New with the expectation that they would find freedom and opportunities denied to them in their countries of origin. They continued to move westward with other settlers. To provide for their own worship, the Catholic laity acquired land and, by their own hard labor, built the churches themselves in which they hoped they would be able to worship. Before dioceses were organized in the United States, lay Catholic settlers asked for the assignment of priests from bishops further East. If none were forthcoming, they bargained with itinerant Catholic clergy.[8] These bands of independent settlers from time to time resisted the impositions of bishops, especially as dioceses were formed with the expectation that these independent settlement churches would constitute the new parishes and be subject to the ecclesiastical authority of bishops.[9] Catholic settlers, like other Ameri-

[4] Dignan, 34–36.
[5] Ibid., 36; 38.
[6] Ibid., 66.
[7] Ibid., 49–50.
[8] Ibid., 71.
[9] *St. Andrew's Church of Tecumseh v. Shaughnessy*, 63 Neb. 792, 89 N.W. 261 (Neb. 1902); *Wardens of St. Louis Church v. Blanc*, 8 Rob. 51, 1844 WL 1490 (La. 1844) (resistance to appointment of pastor by trustees). See also *Krauczunas v. Hoban*, 221 Pa. 213 (1908). Dignan discusses this series of Pennsylvania cases in which the bishop attempted to control property in conformity with Church law as against lay trustees. The Pennsylvania Supreme Court rejected the bishop's attempt to assert canon law over the "controlling" requirements of the civil law on property (227–232).

cans, were influenced by European rationalist thought which held that the conventions of society around matters of political and even ecclesiastical power were restraints on the minds of man. Part of the American experience, it was said, was to resist such restrictions.[10]

It would come as no surprise, then, to understand that this whole growing American experience with ecclesiastical government and the administration of temporal goods was contrary to the views espoused by the Catholic Church. In the Catholic tradition, rights of governance descend.[11] The parish has rights, not as a collective of its individual members,[12] but because the community is part of the universal Church. In our tradition, parishioners do not govern. Parishioners render assistance to the ecclesiastical agents who exercise governance of the parish and the larger Church.[13] The members of the congregation, therefore, could not be members of the ecclesiastical corporation where they would be in position to govern. They could not be the trustees to the exclusion of the pastor. Rather the pastor, not lay trustees, must be in the position of governance. The parish, not the congregation, is the body corporate.[14]

Hence, the contrast between the dominant American culture and the Church's ecclesiastical culture could not be more stark. This was reflected throughout the history of the Church in the United States in the administration of temporal goods and in controversies on other questions. A review of those controversies is beyond the scope of this paper. Suffice it to say that lay Catholics have long had an independent streak. At the turn of the twentieth century, a fictional Irish-American bartender and political commentator, Mr. Dooley, was asked whether he was a

[10] Dignan, 72.

[11] Ibid., 51.

[12] Michael McConnell, et al, *Religion and the Constitution*, 360 (Aspen 2002). Indeed, discussions I have had with Protestant constitutional law colleagues have revealed deep divisions over whether ecclesiastical institutions themselves have rights that are separate and apart from those of the members. My Protestant colleagues often take the view that institutional rights are simply the aggregation of individual rights. I, on the other hand, have taken the view that the institution has rights separate and apart from those of individual members. This difference in theology is played out in the way that U.S. constitutional law has dealt with institutional free exercise questions over the last century.

[13] One might compare canon 532 of the 1983 code (the pastor represents the parish in all its juridic business and administers its temporal goods) with canon 228, §2 (laity assist the pastors of the Church as experts and advisors).

[14] Dignan, 51. See Mark Sargent, "The Diocese After Chapter 11," 29 Seton Hall J. Legis. 427, 428–29 (2005).

Roman Catholic. "No, thank God, " he replied. "I am a Chicago Catholic."[15] That attitude is not altogether foreign today.

II. *Structure*

To recap my initial observation, the parish has a civil status—and therefore, rights, duties, and liabilities—fixed by its civil corporate charter or other civil form, or the lack thereof. To look a little bit ahead, that means that a parish's canonical structures and rights must be expressed in civil documents themselves to be better assured, in this legal culture, that they will be adequately protected. From a short survey of colleagues, the dioceses and their parishes tend to have five or six structures. These structures often have as much to do with history and expectations dating to the time when the diocese was organized in that region and whether the state law reflected a tolerant attitude towards religious (especially Catholic) structures as with current needs.[16] Professor William Bassett's treatise on religious organizations lists the following as example structures: religious corporation (special purpose corporation), nonprofit corporation, religious trust, unincorporated association, and corporation sole.[17] Catholic parishes and dioceses exhibit those structures.

In some states, for example, New York, parishes are civil religious corporations pursuant to the operation of state law. Under New York law, the bishop, pastor, chancellor, and two lay members are the corporate trustees of a Catholic parish corporation.[18] In many instances the corporations operate collegially in the administration of church property. The rights and responsibilities of the parish corporation are found in the state statutes which provide for different denominations, section by section,

[15] Raymond Cour, "Catholics and Church-State Relations in America," *Roman Catholicism and the American Way of Life*, 99 (McAvoy ed. 1960). Other words of Mr. Dooley may be found in http://www.gutenberg.org/dirs/etext03/omdoo10.txt .

[16] For example, some states were hesitant even to allow a corporation sole as that might have been perceived as a preference for Catholics. More likely as was seen in the corporate laws of some states, there were attempts to democratize the Church by forcing its structures to conform to the Protestant model of exclusively lay governance. Phillip Hamburger, "Illiberal Liberalism: Liberal Theology, Anti-Catholicism, and Church Property," 12 J. Contemp. Legal Issues 693, 710 et seq. (2002).

[17] I William Bassett, *Religious Organizations and the Law*, Chapter 3 (Thompson-West 2005 edition); *see* Patty Gerstenblith, "Associational Structures of Religious Organizations," 1995 BYU L. Rev. 439. Professor Gerstenblith and others also describe at length the structural choices made by religious entities in James Serritella, et al eds., *Religious Organizations in the United States*, 223 (Carolina Academic Press, 2006).

[18] N.Y. Religious Corp. Law, Chap 51, art. 5, §§90–92 found at http://caselaw.lp.findlaw.com/nycodes/c103/a9.html

through the corporation code.[19] In other states, parishes are considered trusts. There, the parish itself is held to be a trust, under the administration of a trustee (pastor or bishop depending on the nature of the entity) who exercises a fiduciary responsibility for the temporal goods. Under Texas law, dioceses are found to be common-law trusts, and in some places, parishes are administered on that basis.[20] In New Hampshire, a recent ruling by a state chancery court confirms that some parishes are statutory trusts under operation of state trust law.[21] In some places, parishes themselves are considered to be unincorporated associations within the overall structure of the diocese. At times, these associations are said to exist as a way of describing the parish as a canonical entity that has separate autonomy under the Church's canon law within the diocesan corporation sole.[22] In other places, where the common-law corporation sole form has been recognized for dioceses, some take the position that parishes themselves are common-law corporations sole.[23] More will be said about this form below. In the last five years, some dioceses have begun to organize parishes under the statutory corporation sole provisions of the state. In those new structures, the office of the pastor becomes the corporation sole.[24]

[19] N.Y. Religious Corp. Law Chapter 51, articles 1–21 (§§1–455), found at http://caselaw.lp.findlaw.com/nycodes/c103/a1.html ; see also Jill Manny, "Governance Issues for Non-Profit Religious Organizations," 40 Cath. Lawyer 1, 11 (2000).

[20] The Texas Supreme Court in *San Antonio v. Odin*, 15 Tex 539 (1885) upheld the legislative grant of the Alamo to the Church, on the theory that the Church had the capacity to be a legal trustee of the property. Following that precedent, it held in *Gabert v. Olcott*, 23 S.W. 985 (Tex. 1893) that property acquired by a bishop and his successors in office is held in fee simple trust for the benefit of the Church.

[21] *Berthiaume v. McCormack*, 891 A.2d 539, 548–50 (N.H. 2006).

[22] The district judge hearing the appeal of the Diocese of Spokane from its adverse decision in bankruptcy on the separate capacity of the parishes found that the parishes were unincorporated associations under Washington law. *Tort Litigants Committee v. Catholic Diocese of Spokane*, No. 05–CV-274–JLQ, 2006 WL 1867955 (E.D.Wash. June 30, 2006). A transcript of the proceedings of June 15, 2006, which contains the oral ruling of the judge is found at http://www.dioceseofspokane.org/chapter11/June/Hearing%20Transcript%206–15–06%20(00425724).PDF See also Diocese of Spokane's Memorandum in Opposition to Tort Litigant Committee's Motion for Partial Summary Judgment, 21–24 (May 27, 2005), found at http://www.dioceseofspokane.org/chapter11/new_pdf/FILED%20Memo%20in%20Oppo sition%20to%20SJ.PDF .

[23] Most states have abolished the common law forms of ownership. Florida, for example however, preserves the common law corporation sole form; and parishes there are held as common law corporations sole. See *Reid v. Barry*, 93 Fla. 849, 112 So. 846 (1927).

[24] The Diocese of Stockton, for example, has followed this model. See Sister Mary Judith O'Brien, RSM, "Instructions for Parochial Temporal Administration," 41 Cath. Lawyer 113 (2001) (discussing canonical issues in parish administration).

Clearly the most common form by which Catholic dioceses are organized in the United States is the corporation sole. This form was based on English law which provided for the incorporation of the bishops of the Church of England by operation of the laws passed by Parliament.[25] In the United States, the first statutory corporation sole was created by the Maryland legislature in 1833.[26] It was considered an improvement after sixty years of abuses in the administration of church property in various forms, or really none at all. It ended fee simple ownership of real property by bishops (which had been gaining ground since the First Provincial Council of Baltimore as a solution to lay trusteeism) and provided a civil legal way in which episcopal supervision of church property was secured.[27] In the Third Provincial Council of Baltimore in 1837, the Catholic bishops of the United States decreed that dioceses should use the devices provided in civil law to protect the intentions of donors giving real and other property to the Church. Likewise, the council instructed that such property should not be titled in the bishop's name personally.[28] In the decades following these developments in Maryland, the corporation sole eventually became the dominant form of property holding entity by the Church in the United States. Perhaps foreshadowing future developments, the inclusion of parishes as a part of the corporation sole ended in the Archdiocese of Baltimore in 1963 as a consequence of the numerous liability claims filed in the aftermath of a deadly fire at the St. Rose of Lima Oyster Roast in 1956.[29]

Despite the efforts of bishops to insist on the use of the civil law to protect church property, it is still sometimes claimed that dioceses, and more commonly parishes, are really unincorporated associations under the law of a particular state.[30] This conclusion should not be too hastily asserted,

[25] I Bassett, *Religious Organizations*, *supra* note 17 at §3–94 (p. 3–170); James O'Hara, "The Modern Corporation Sole," 93 Dickinson L Rev 23 (1988) found at http://www.jeffotto.com/sw/modern_corp_sole.htm

[26] Dignan, 158; Thomas Spaulding, *The Premier See*, 116–117 (Johns Hopkins Press 1989).

[27] Dignan, 158.

[28] Ibid., 159. Likewise the Code of Canon Law stresses the use of civil law to protect the integrity and autonomy of Church structures. See, for example, c. 1274, §5).

[29] Spaulding, *The Premier See*, 430–431. Each parish was separately incorporated and the Archdiocesan corporation sole still exists to hold the property of the Archdiocese. The story of the tragic fire at the St Rose of Lima Oyster Roast is found at http://www.stroseparish.org/history.htm#History%20of%20Fires%20and%20Tragedies .

[30] A recent example of this is the concession by the Tort Litigants Committee and assertion by the Diocese of Spokane in the bankruptcy proceeding that the parishes are unincorporated associations under Washington law. Although the Bankruptcy Court ruled

for it could create certain difficulties in the administration of temporal goods. For example, at common law, unincorporated associations lack the capacity to hold title to real property and the capacity to be sued.[31] At common law, they are considered the aggregate of their individual members, which means that title to real property must be held in the name of a member or small group of members (often trustees) on behalf of the association, and that liabilities could be passed through to the individual members who risked the execution of judgments against their own property to satisfy claims against the association.[32] Modern state statutes have reformed these practices and provide that associations formed pursuant to these statutes have both the capacity to be sued and hold property. In other words they have an existence apart from their members. There is often a requirement that the associations acquire liability insurance against certain risks.[33]

At the same time, absent a constitutional requirement or a state statute that provides an exception for associations formed by religious organizations to conform to the practices of the religion,[34] an association will be expected to conform to the state law in all respects. Thus, in Catholic polity, one must determine how an unincorporated association could be formed. Associations are formed by "two or more members." Members,

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the parishes had no cognizable legal form, the District Court on appeal reversed finding the parishes stated a case that they were unincorporated associations under Washington law. See note 22 *supra*. See note 42 *infra* and text accompanying notes 84ff.

[31] National Association of Commissioners on Uniform State Laws, "Uniform Unincorporated Nonprofit Association Act," Prefatory Note, found at http://www.law.upenn.edu/bll/ulc/unincorx/unincorx.htm

[32] I Bassett, *Religious Organizations*, *supra* note 17, at §3:32 (p. 3–77); see also Mark Chopko, "Derivative Liability," in Serritella, *Religious Organizations*, *supra* note 17, at 600.

[33] An evolution in the law of associations is found in the discussion of the Texas Supreme Court in *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 172 (Tex. 1992). There, the Texas Court recognized that modern associations have acquired the attributes of civil structures including property, bank accounts, and insurance and thus the law of Texas should recognize these developments. The result in that case was that a church member who was barred from suing the Association (her local unincorporated church) under the doctrine of imputed negligence was enabled to do so. In the process of the litigation, however, the Church, which had resisted incorporation along with other interactions with the state on account of its religious doctrine, incorporated to spare itself future potential liabilities to the members. Chopko, "Derivative Liability," 620 (*supra* note 32).

[34] For example, Minnesota law accommodates religious entities. E.g., Minn. Stat. Ann. Section 315.37 (West 1992).

in turn, are defined as those individuals with the power to make policy.[35] Thus for Catholic entities, the question about who forms, controls, merges, or ends an association has special significance. The other formalities are simple compared to these initial questions.

Regardless of the particular structure chosen, the dilemma has always been how to administer parish property, without risking the diversion of assets, which is a consequence of too much or too little control. In choosing civil forms, and providing for the civil legal operation of the parish, those civil legal choices must also conform to the canon law. It is to the evaluation of those structures in the face of certain facts and circumstances that the paper turns next.

III. *Structure in Context*

Bankruptcy

The bankruptcies of three dioceses in the United States, Tucson, Portland in Oregon, and Spokane, in 2004 put into sharp relief the question of the civil structure of the parish. Each diocese showed far fewer assets than claimed demands in the abuse litigation that triggered the filing. The bulk of the property in the region of each diocese is held and administered by the parishes. In the three dioceses in question, however, parishes were part of the diocesan corporation sole as they had been (with a few limited exceptions) since the time of the formation of the diocesan corporations.[36] Because the dioceses had sought protection through the provision of the federal bankruptcy code dealing with voluntary corporate reorganizations,[37] and because as charities they could not be involuntarily liquidated at the behest of creditors by operation of law,[38] each diocese claimed that its purpose in seeking the protection of the bankruptcy laws was to provide for relief from and orderly resolution of the extraordinary demands made by litigants. Through the bankruptcy process, a

[35] See Uniform Act, *supra* note 29 at §1(1): "'Member' means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association."

[36] Jonathan Lipson, "When Churches Fail: The Diocesan Debtor Dilemmas," 79 So. Cal. L. Rev. 363, 384 (2006). In 2006, the Diocese of Davenport, Iowa filed for bankruptcy protection. In contrast to the other three, the Davenport Diocese and its parishes are each organized as separate corporations. See note 41 *infra*.

[37] The provision is referred to as chapter 11, which is the applicable chapter of the Bankruptcy Code.

[38] 11 U.S.C. §1112(c); see also John Jarboe, "Bankruptcy—The Last Resort," 37 Cath. Lawyer 153 (1996).

diocese could find a safe way in which to reorganize its civil structure in a way that would be better suited to the stark realities of twenty first century liability but still consonant with the Church's canon law.[39] Indeed, in the plan of reorganization filed with the petition for bankruptcy by the Diocese of Tucson, the reorganization of the parishes as separate corporations was expressly described.[40]

In the situations of Portland and Spokane, because of the fact that the parishes hold and administer most of the assets in the region of the dioceses, the dioceses have been litigating over the status of the parishes since the beginning of the process. Rather quickly in these bankruptcies, the claimants filed adversary actions seeking to declare that all parish property in effect "belonged" to the diocesan debtor and thus was subject to execution to satisfy the dioceses' debts.[41] In separate rulings in August[42] and

[39] David Skeel, "Avoiding Moral Bankruptcy," 44 B.C. L. Rev. 1181, 1185 (2003) (noting the requirement of a corporate reorganization).

[40] Today the parishes are being formed as corporations sole. Lipson, "When Churches Fail," 377 (note 36 *supra*).

[41] Tort Claimants Committee v. Roman Catholic Archbishop of Portland in Oregon, et al. Adv Proc. No. 04–03292–elp (Bankr. D. Or. 2004); Tort Litigants Committee v. The Catholic Diocese of Spokane, et al. Adv Proc. No. 05–80038–PCW (Bankr. E.D. Wa. Feb. 4, 2005). Selected documents from Portland's bankruptcy may be found at http://www.archdpdx.org/bankruptcy/ . The pleadings from the chapter 11 proceeding and litigation over the parish properties in Spokane are found at www.dioceseofspokane.org . As noted in the text, the bulk of the assets claimed by the tort litigants in both bankruptcies are in the hands of the parishes: In Spokane, the diocese listed $11 million in its assets against more than $80 million in claims. Coincidentally, the parishes' value has been estimated at more than $80 million. See "Federal Judge Rules Spokane Parishes can't be Sold to Pay Abuse Victims," June 15, 2006 found at http://www.oregonlive.com/news/oregonian/index.ssf?/base/news/1165897510270500.xml&coll=7.

For completeness, in 2006, the Diocese of Davenport, Iowa filed for bankruptcy protection and at this writing is at the beginning of its process. *In Re Diocese of Davenport*, No. 06–02229–lmj11 (October 10, 2006). No adversary actions have been filed at this writing. Information and selected filings from the bankruptcy case are found at http://www.davenportdiocese.org/page4.html. In December 2006, mediators announced a tentative settlement of many of the issues in Portland's bankruptcy. "Archdiocese settles more sex cases," Dec. 12, 2006 found at www.oregonlive.com/news/oregonian/index.ssf?/base/news/1165897510270500.xml&coll=7

[42] *Committee of Tort Litigants v. Catholic Diocese of Spokane (In Re Catholic Bishop)*, 329 B.R. 304 (Bankr. E.D. Wash. 2005) (hereafter Spokane decision). This decision was reversed on June 30, 2006 by the US District Judge hearing the appeal from the bankruptcy ruling. *Tort Litigants Committee v. Catholic Diocese of Spokane*, No. 05–CV-274–JLQ, 2006 WL 1867955 (E.D.Wash. June 30, 2006). The June 2006 ruling does not depend on canon law or constitutional law but rather on the trust law of Washington State. The concept accepted by the District Judge was that the parishes were funded and developed by the work of individual Catholic communities, under a regime in which the local bishop always understood that even though he held title in his name it was actually a trust

December, 2005,[43] the bankruptcy courts rejected the arguments of both dioceses and held that the parishes belonged to the diocesan corporation sole. The courts in both instances rejected arguments that the statute providing for the creation of the corporation sole expressly incorporated consideration of the Church's canon law.[44] The courts also found that there was no "objective" evidence of the separate civil nature of parishes. Finally, the bankruptcy courts rejected arguments that the state law imposed various trust obligations on the bishops to hold the real property of the parishes as property of separate entities. Because the courts ruled that parishes lacked civil structure, any trust obligations, the courts decided, were to hold property not for the benefit of the parishes, but for the benefit of the dioceses.[45] It should also be noted that at least in Spokane the claimants targeted the property of all separate corporations, including schools and cemeteries, which they claimed legally belonged to the dioceses.[46] Thus, the Spokane claimants also asserted that even separately incorporated property was not beyond their reach as creditors of the diocese.

The long term administration of the parishes and their legitimate autonomy under church law was irrelevant to the bankruptcy judges. And the context of bankruptcy made the claimants' arguments more appealing. As will be discussed later, the bankruptcy courts are considered courts of equity with broad powers to acquire assets to satisfy debts.

Liability

At the same time, there are persistent questions whether parishes, even parishes that are part of the corporation sole, can be liable in tort.

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for individual parishes (there is no mention of parishioners as beneficiaries). See text accompanying notes 84 ff. *infra*.

[43] *Tort Claimants Committee v. Roman Catholic Archbishop (In re Roman Catholic Archbishop of Portland in Oregon)(Portland Property Decision)*, 335 B. R. 842 (Bankr. D. Ore. 2005) (hereafter Portland decision).

[44] The manner in which such corporation laws contemplate use of the canon law in the administration of religious property is explored in Melanie DiPietro, "The Relevance of Canon Law in a Bankruptcy Proceeding," 29 Seton Hall Legis. J. 399 (2005).

[45] E.g., Spokane Decision, 328. In a separate ruling, the bankruptcy court excluded all contrary evidence to its conclusions as irrelevant. By contrast, the District Court on appeal considered the record as a whole, finding the treatment of the evidence by the bankruptcy court to be erroneous. Reviewing all the proffered evidence, he found that the parishes could be unincorporated associations under Washington state law, capable of being the beneficiaries of a constructive or "resulting trust." See discussion *infra* at note 84 ff.

[46] For example, Catholic Charities and Cemeteries were implicated in the cases. The case law has been clear that parish liability (where the parishes are separately organized) is not identical to diocesan liability. See, e.g., *Plate v. St Mary's Help of Christians*

Whether parishes have the capacity to be sued is answered only in part by their corporate structure. In my view, even for parishes that are separately incorporated, what matters more is the nature of the dispute and the substance of the claim. As I have described more fully elsewhere,[47] different religious polities assign different responsibilities to different places in a church's ecclesiastical organization. The administration of real property might be vested in parish churches, while the supervision of clergy could be assigned to regional judicatories. Thus, a slip and fall claim might clearly be within the purview of the parish which has direct oversight of that property. On the other hand, a negligent supervision claim about the misconduct of the parish priest could not be stated against the parish as the parish is not the priest's supervisor.[48] Where the structure does not adequately provide for separation between activities that legally belong to the parish and those that legally belong to the diocese, claimants will continue to sue both and hope that the defendants sort out their responsibilities. Liability, after all, follows responsibility.[49] The issue gets tricky, however, in instances involving the alleged negligence of *parish* employees or volunteers of which the *diocese* is completely unaware.

On the other hand, the case law in the United States has shown that the absence of structure for parishes within a corporation sole provides some measure of insulation for those parishes against any claims. In a case involving an anti-discrimination charge arising at a parish school, for example, it was held that the parish, as a department or activity of the corporation sole, lacked the capacity to be sued on account of the anti-discrimination claim.[50] Rather, the claim properly would lie against the diocese. Similarly, in a case involving a workers compensation issue, a state supreme court has held that the responsibility for a worker, injured on parish property that was part of the diocesan corporation sole, rested with the diocese even though the diocese did not even know the worker had been hired.[51] The corporation sole was formed to hold, administer, and maintain property. The court reasoned that, having chosen this form

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Church, 520 N.W.2d 17 (Mn App 1994) (evaluating and rejecting claim of diocesan liability for property accident occurring in parish cemetery).

47 Mark Chopko, "Stating Claims against Religious Institutions," 44 B.C. L. Rev. 1089 (2003).

48 Ibid., 1103–1106 (citing cases).

49 Ibid., 1094, 1097.

50 *EEOC v. St Francis Xavier School*, 77 F. Supp.2d 71 (D.D.C. 1999).

51 *California Industrial Accident Comm'n v. Roman Catholic Archbishop*, 230 P. 1 (Cal. 1924).

of corporate ownership to achieve certain benefits through the uniform administration of property, it could not disclaim the burdens including the responsibility for those injured on the real property.[52]

Still, there has been a tendency in some liability complaints to sweep together ecclesiastical entities that are related to each other only on account of their common fealty to a religion or a movement. Plaintiffs occasionally sue everyone and everything that could conceivably, "on information and belief," have something to do with the claimed wrong—from the pope to the parochial vicar to lay volunteers, from the Vatican to the parish school hall, and everyone and anything in between. One or more of these individuals or entities might be responsible. Others might be willing to contribute insurance funds to extricate themselves from potentially years of litigation, making the payoff larger. Elsewhere I refer to this as the "nameplate" problem.[53] The essence of the claim is that all of these agencies have the same name in their title, for example, Catholic or Lutheran or Boy Scouts, and therefore they all *must* have colluded to create the problem which has been experienced by the plaintiff. One California court, a generation ago, found that the United Methodist Church was an unincorporated association, "United" on account of its ecclesiastical documents.[54] Thus, the entire denomination was potentially at risk because of the bankruptcy of certain retirement homes that were owned by regional church agencies. Although the case eventually was settled, it stands as a warning beacon to pay attention to questions of structure and relationship. In every case following, no court has adopted this breathtaking rationale but rather has respected the polity of the churches involved, and not imposed a structure on a church that is contrary to the one that it has chosen.[55] The result in the Methodist case, in my view, is patently unconstitutional.[56]

[52] Ibid., 8.

[53] Mark Chopko, "Continuing the Lord's Work and Healing His People: A Reply to Lupu & Tuttle," 2004 BYU L. Rev. 1897, 1907–08.

[54] *Barr v. United Methodist Church*, 153 Cal. Rptr. 322 (Cal. App.), *cert denied sub nom., General Conference on Finance & Admin. v. Superior Court*, 444 U.S. 973 (1979).

[55] Chopko, "Derivative Liability," 623–625 (note 32 *supra*) (collecting cases).

[56] Ibid. See also Chopko, "Continuing the Lord's Work," 1097 (note 53 *supra*). Others might call this kind of case an example of enterprise liability in which the entire set of related entities could be held responsible if it could be shown that "(1) there is such a high degree of control that the various entities have effectively lost their separate existence and (2) the abuse of that control in a way deemed unjust or inequitable." Stephen Bainbridge and Aaron Cole, "The Bishop's Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal," UCLA Law School Research Paper 06–23, p. 20 (2006), found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901663 ; see also ibid., 17.

Bequests

Whether parishes have the capacity to receive gifts was a question asked in the context of the bankruptcies.[57] That same question occurs every day in dioceses across the United States. There is a tendency—correct I think—sometimes to think of our Church as a diocesan church. Surely the Catholic Church, regardless of the civil structures of dioceses and parishes, is not a collection of independent parish churches. Yet parishioners leave gifts to parishes every day and, again regardless of the civil structures, those restricted gifts must be respected by church administrators.

At the same time, among those administrators, there is a tendency to think of the Church in egalitarian terms. In one instance, a bequest to a single parish in a poor region of a diocese created the effect that this one parish had great wealth at the expense of its neighbors. That one parish should be so wealthy in its temporal goods in the midst of its poor neighbors is sometimes too much to bear. In the particular case, the administration of the bequest was not even in the hands of ecclesiastical administrators such as the pastor, but in the hands of a parish society of uncertain civil status. Eventually, the courts were called on to determine to what extent the donation to the parish should take precedence over applying the bequest to a broader range of potential beneficiaries.[58] The matter was happily settled but not before raising some of the practical difficulties that one must confront in examining questions of structure and organization. In a diocese organized as a corporation sole, the temp-

[57] That parishes may receive gifts and have these gifts be respected as "belonging" to the parishes and accounted for accordingly does not by itself create a structure not otherwise provided for by a diocese or by operation of the civil law. The Bankruptcy Court noted in the Spokane decision that a gift to a scout camp on federal land does not change the landowner from the federal government to the Scouts. Spokane decision, 331. But even in the absence of an express separate structure, such restrictions should be strong enough in practice to protect the gift against being treated as an unrestricted asset of a corporation sole diocese. Indeed that was the view of the District Judge reversing the decision of the Spokane Bankruptcy Judge on Washington trust law. *Tort Litigants Committee v. Catholic Diocese of Spokane*, No. 05–CV-274–JLQ, 2006 WL 1867955 (E.D.Wash. June 30, 2006).

[58] One can sometimes forget that churches are public charities and, as such, are subject to the regulation of the state attorney general's office in some fashion. Catharine Wells, "Churches, Charities, and Corrective Justice," 44 B.C. L. Rev. 1201 (2003). Religious organizations are often exempt from some kinds of scrutiny to which nonreligious charities are subjected. Marion Fremont-Smith, *Governing Non Profit Organizations: Federal and State Law and Regulation* (2004).

tation would be strong to step in and provide a benefit for more parishes.[59] On the other hand, where the parish is organized as a separate corporation, what would prevent the parish from ignoring the views of the diocese?

Landmarking

In the same way, dioceses and parishes confront local land use authorities and state and federal historic preservation offices often as allies but sometimes not. This is another area where the civil structure of the parish may or may not help to resolve questions of land-use controls and historic preservation. In a structure where parishes are separate civil entities, who could decide whether particular property in a parish should be landmarked as historically significant? The pastor or the bishop? The parish or the diocese? The civil law usually only provides that the "landowner" can register or, conversely, can object to involuntary registration. In some places, the device of historic preservation has been attempted as a way to block the sale of church properties in parishes that have been slated for closure. Again, where dioceses are organized as corporations sole, there would be a temptation to preclude any (legal) voice for the parish. However, even in that situation, the parish has to have a role and that role would have to be considered in diocesan policy. And if the parishes are separate civil entities, would the diocese have a (legal) voice? This species of land use question also involves consideration of certain beneficial interests in broadly defined "enjoyment" and the public interest in the administration of certain parish properties.

Parish Consolidation and Liquidation

The case law in the United States is generally deferential to the rights of bishops in parish consolidation and liquidation cases.[60] Recent events have confirmed the importance of the primacy of the canon law as part of

[59] This temptation should always be resisted in matters of the administration of temporal goods. Clearly the beneficiary is obliged to use the bequest according to its terms, or was obliged under the canon law to refuse it. As I understand the hypothetical, the benefitted parish already had exhausted the possible objects of the benefice; and others started to look for ways to extend the gift without violating the terms of the gift. A *cy pres* proceeding would be one way to examine those questions but should be done in a such a way as to respect the autonomy of both the diocese and the parish.

[60] *St. Matthew's Slovak Roman Catholic Congregation v. Wuerl*, 106 Fed. Appx. 761 (3d Cir. 2004); *Fortin v. Roman Catholic Bishop*, 416 Mass. 781 (1994); *Parent v. Roman Catholic Bishop of Portland*, 436 A.2d 888 (Me. 1981); *Marich v. Kragulac*, 415 N.E.2d 91 (Ind. Ct. App. 1981); *Gallich v. Catholic Bishop of Chicago*, 394 N.E.2d 572 (Ill. App. 1979).

the decision-making process. Most of the legal treatment of these questions has found that there are constitutional barriers which bar the litigation of these kinds of cases at the behest of the former parishioners.[61] Such questions, the courts have held, implicate ecclesiastical decision-making about the needs of the faith community.[62] To allow such questions to be adjudicated in the civil courts is to give the civil courts the possible power to dictate ecclesiastical choices. It has long been the rule in the United States that those questions are beyond the jurisdiction of the civil courts.[63]

The Church's decision-making process must be rooted in the canon law and reflect the real needs of the parish in the diocese. In instances where further scrutiny can be contemplated, whether in the press, or through an attempt to assert jurisdiction in a civil court, or in the proper congregation of the Church in Rome, the decision-making process employed by the diocese should reflect a consideration of the factors involved whether it is demographics or finances or more, real consultation, and an overall master plan about where the diocesan and parish churches should go in the coming years to serve best the religious needs of the people and provide for their spiritual welfare. That process will create a barrier to the re-examination of religious decision-making in the civil courts. A question which could deserve further attention in the future is the consequence of the apparent decisions of the Holy See that the physical assets of the parish should follow the people to their new parishes.[64] As noted above, the courts unanimously hold that former parishioners do not have beneficial (that is to say, enforceable legal) interests. Thus, o avoid a misunderstanding about the nature of the church's actions, a

[61] For example, see St. Matthew's Slovak Church, *supra* (and cases cited therein); *Morris v. Scribner*, 69 N.Y. 2d 418 (1987); *Filletto v. St. Mary of the Assumption Church*, 61 Misc.2d 278, 282 (NY Sup Ct Broome Co. 1969). The rule applies in other hierarchical communions. For example, see *Upstate N.Y. Synod of the Evangelical Lutheran Church in Am. v. Christ Evangelical Lutheran Church of Buffalo*, 185 A.D.2d 693, 694 (4th Dep't 1992).

[62] For example, see cases cited in notes 60 & 61 *supra*.

[63] *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872) ("It is not to be supposed that the judges in the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.") The court announced a broad rule of deference to the decisions of the church authorities in ecclesiastical matters. Ibid., 731, 733.

[64] Michael Paulsen, "Vatican Stops Archdiocese in Taking Parish Property," Boston Globe (Aug 11, 2005) found at http://www.bishop-accountability.org/news2005_07_12/2005_08_11_Paulson_VaticanStops.htm .

decision that assets follow the people must be clearly explained in structural, rather than congregational, terms.[65]

IV. *A Closer Look at Bankruptcy*

Parishes are separate juridic persons from dioceses under the canon law.[66] In the territory of the dioceses, most of the pastoral activity occurs in parishes. And—not surprisingly—the bulk of the assets is held and administered by parishes, separate from the assets of the diocese, regardless of how the diocese is civilly organized. At the same time, parishes and dioceses are illiquid, in that most of their "net worth" is normally in the physical property and not in cash accounts. The bankruptcy cases brought scrutiny to certain of the operating assumptions used by dioceses and parishes over the years: Most dioceses are organized as corporations sole; parishes often (but not always) lack their own express civil identity within the structure which in turn relies on administration and decision-making according to the principles of the Code of Canon Law. In other words, parishes have their own legitimate autonomy that is respected by the bishop, and administer their own temporal goods on a daily basis apart from those of other parishes and of the diocese. That is a maxim that has been repeated many times in the last several years.

However, when the tort claimants understood that most of the illiquid (and liquid) property is not in the hands of the diocese, but rather in the hands of the parishes, the parish property quickly became the battleground in the bankruptcy cases.[67] The message in the media was that the diocesan bankruptcy reorganizations were nothing more than strategems

[65] Some have speculated about the apparent lack of consistency between ecclesiastical decisions about parish property made in Boston on the one hand and Spokane on the other. In my view, they were different questions; and the answers were entirely consistent with each other because they were rooted in the canon law. For example, Boston sought reor-ganization under a broad plan and with broad consultation to provide for future parish needs by parish closings and consolidations. It was not saying the parishes had no rights under the law of the Church but rather that those rights had been respected in the process. Spokane's actions likewise respect the rights of the parishes, which participate as litigants in the bankruptcy proceeding. But because the nature of the undertakings is so different, the processes followed are different. Nonetheless, at the same time, I will come back to the express consideration of the common good of the Church in the United States as a key factor in consistent planning to deal with these questions.

[66] Canon 515, §3.

[67] John Stucke, "Fate of diocese could rest on property ruling," Spokane Spokesman-Review, B1 (June 28, 2005). See information collected about assets and liabilities in Spokane at note 41, *supra*.

to cheat victims and other creditors out of their justified damages.[68] The drama was played out, as noted above, in a court of equity that exists primarily to match debts and assets and to pay creditors as fully as possible. That court has broad consolidation powers, and its decisions have placed, in the cases involving U.S. dioceses, a great deal of stress, to say the least, on structural questions.

The downside risks of filing for the protection of a bankruptcy court are clear. Dioceses may experience a loss of governance independence to outsiders. The courts themselves are ill-equipped to understand and deal with canonical argument, resulting in a disregard of the canonical protections that church administrators previously took for granted. The declaration of the bankruptcy courts may also negatively impact what is happening in neighboring dioceses because of the legal questions that are resolved, the financial and other questions that are implicated, and the outpouring of claims and creditors that may also fall on neighboring dioceses. At the same time, however, dioceses are facing challenges that they have never historically faced; finances are dwindling in many places in the face of hundreds of claims; and insurers have abandoned their obligations of defense and compensation. Desperate times often call for desperate measures.[69]

The dioceses of Portland and Spokane have taken the position that the parishes have proper canonical autonomy that is in fact protected under the substantive laws of their respective states and by the Constitution. Even though they are part of the diocesan corporation sole, the parishes are subject always to the Church's canon law and the day-to-day administration of parishes is properly in the hands of pastors, not bishops. Failing that, the dioceses argued that the courts were constitutionally barred from effectively reorganizing the dioceses to please their creditors. Overruling a constitutionally protected choice as to organizational form,

[68] Marci Hamilton, "Did the Portland Catholic Archdiocese Declare Bankruptcy to Avoid or Delay Clergy Abuse Suits?" http://writ.news.findlaw.com/hamilton/20040713.html (July 13, 2004).

[69] Although there may be lessons to be learned in the successful resolution of the Tucson bankruptcy, a particular critique of these various approaches is beyond the scope of this paper. See Arthur Rotstein, "Tucson Diocese Bankruptcy Effectively over a Year Later," http://www.bishop-accountability.org/news2005_07_12/2005_09_18_Rotstein_TucsonDiocese.htm . In addition at this writing it is too early to tell whether the Davenport diocese, which is organized as a corporation and where each parish is also separately incorporated, will be subjected to the same kind of litigation over the parish properties as has occurred in Spokane and Portland.

it was argued, would be tantamount to disregarding the Church's centuries-old polity.[70] The dioceses made rather sophisticated arguments under state corporation, trust, property, and constitutional law. At this writing, the only decisions of record are those by the two bankruptcy courts in Spokane and Portland which rejected these arguments completely and the decision of the district judge in Spokane who reversed, relying on one aspect of Washington's trust law.

To illustrate how courts might react to some of the organizational and operational decisions made by dioceses a century ago, I look more closely at the rulings of the bankruptcy courts. Not surprisingly, given the similar approaches in both cases, the two bankruptcy courts decided them around similar themes. One theme in the courts' decisions is that the dioceses made choices which had consequences that the courts would honor, both as to the corporate form and as to the bankruptcy forum. Enforcing the consequences of those choices did not violate the First Amendment or in any way interfere with the Church's right to make those choices in the first place, the courts concluded. "[The Diocese] has choices about how to organize itself under civil law in a way that recognizes and implements its internal organization with relation to the secular world."[71] This rationale mirrored that adopted in earlier decisions involving the corporation sole form.[72] In the same way, by applying the general rules of bankruptcy law to these proceedings, the courts emphasized that implementing the consequences of these choices would bring consistency to the treatment of these debtors vis-à-vis other debtors with regard to their creditors.[73] After all it was the dioceses that choose the bankruptcy forum: "It is not a burden on a religious organization that voluntarily seeks the protection of the bankruptcy laws to require it to treat its creditors in the same manner as any other debtor."[74] Application of any other body of law would disregard those choices and would, in view of the bankruptcy courts, be unfair.[75]

[70] For example, see Spokane Memorandum in Opposition to Tort Litigants Committee's Motion for Summary Judgment (on parish property issues), 30 (May 27, 2005) at http://www.dioceseofspokane.org/chapter11/new_pdf/FILED%20Memo%20in%20Opposition%20to%20SJ.PDF .

[71] Portland decision, 853.

[72] See *Industrial Accident Comm'n*, 8 (note 51 *supra*).

[73] Spokane decision, 319–320 (discussing the inconsistency of approach of the diocese in other litigation); Portland decision, 866–867 (same).

[74] Spokane Decision, 325.

[75] "Fair and equitable treatment of all creditors requires application of civil law not only to determine their rights to recover from assets of the debtor, but to first define the interest of the debtor in those assets." (Ibid.).

The dioceses made similar arguments that the state corporation laws, which allowed for the incorporation of the dioceses, in effect incorporated by reference and contemplated use of the Church's canon law. The corporation sole statutes in both states permit the incorporation of a church office by the person of the office holder if in accord with the rules of the religious denomination. Unlike the incorporation laws of other states which are sect specific, the corporation sole statutes in Washington and Oregon are more generic. In order to determine what ecclesiastical office is incorporated, including its powers and limitations, one must resort to the internal law of the religious denomination. It was that argument which the courts rejected. To be sure, this was a novel argument as all would be in cases of first impression, but one built on a firm foundation.[76] It is, after all, not the person of the bishop but the office of the bishop which is incorporated. Without reference to the internal law of the Church, how could one test the validity of any corporate act? How could a bank, for example, know whether a bishop had the power to request a loan or sell property without being able to resort to church law? Nonetheless, the courts concluded that the fact "that an officer or director of a corporation sole may rely on religious authorities or personnel in discharging his duties does not require application of canon law to all of the corporation's relationships or interaction with the secular world, including its need to follow the formalities of state property or trust law with regard to the property it holds."[77] That there was no evidence of a separate corporate existence or trust status for the parishes in the deeds, title records, organizational documents, or other civil legal records bearing external evidence was fatal to the dioceses' arguments.[78]

Both courts were concerned about the apparent lack of accountability to the civil courts and to creditors. In oral argument in the Spokane case, for example, the bankruptcy judge asked diocesan counsel a

[76] See DiPietro, "Relevance of Canon Law,"404–405 (note 44 *supra*).

[77] Portland decision, 856. Likewise the courts excluded evidence about the contribution patterns that built the parishes and the autonomy under which the daily administration of the parishes occurred. The bishops had considered the parishes "trusts" pursuant to their canonical obligations of supervision.

[78] Indeed, the Portland Court noted that several parishes in the Portland Archdiocese had been separately incorporated for a number of years and had been de-incorporated and folded into the corporation sole fairly recently. The court also noted that the canon law did not preclude some other arrangement, such as a separate corporation or express trust that could be documented in accord with the civil law. 335 BR at 861–2. The court cited the archdiocese's own canonical experts against it, noting that canon law experts have long stressed the importance of conforming the civil structures to the canon law. Ibid., 866; see also ibid., 857 & n. 15.

hypothetical—"what if a church had a canonical rule that it would not pay the debts of nonmembers?"[79] In other words, if the argument is that the courts must defer to the application of the Church's canon law in the evaluation of title with consequences for the payment of creditors, how far does that argument go? As answered by one decision,

> corporation sole law allows corporations sole to operate in accordance with church law. Thus, it allows the corporation to structure its organization under the civil law in a way that recognizes and effectuates canon law. It does not, however, require that civil courts rely on canon law to determine rights in property held by the corporation sole. In other words, although the corporation sole is authorized by state law to organize its affairs pursuant to canon law, it is the corporation's organization and structure as implemented under civil law that governs the corporation's relationship with the secular world.[80]

The arguments of the dioceses were designed to avoid a direct clash between the civil law and the canon law.[81] Indeed, both argued that what they proposed was entirely compatible with the civil law. The laws of the various states contemplated reference to the internal law of the religious denomination to decide certain questions of power, authority, limitations, and governance. While the civil law of the states did not preclude different choices by the dioceses with regard to the creation of civil structures, there was no perceived need in either diocese to have put in place a different civil structure, given their understanding that the operation of the state corporation code did not bar the trust obligations imposed on the diocesan bishops under the canon law. In effect, this was the flip side of the theme the courts adopted around "choice." The dioceses had a choice to organize in a variety of ways and chose this one—more than a century ago—as consistent with their self understanding of what civil law per-

[79] Author's Notes of Oral Argument.

[80] Portland decision, 857–858.

[81] Indeed in the Pennsylvania cases from the early twentieth century, the state Supreme Court clearly rejected the proposition that religious obligations under the canon law trump the state's property laws, upholding the rights of lay trustees to title to a Catholic parish church. *Krauczunas v. Hoban, supra.* Professor Carmella laments that the loss of the sense of the sacred on religious questions, even in the Supreme Court's Church-State jurisprudence, means that the distinctively religious nature of the dioceses would be deemed irrelevant, and the dioceses would be treated precisely as any other nonprofit debtor. Angela Carmella, "Constitutional Arguments in Church Bankruptcies: Why Judicial Discourse about Religion Matters," 29 Seton Hall Legis. J. 435, 468 (2005).

mitted and religious law required.[82] To make the point more clearly, if these opinions are an accurate recitation of the law of the land as it is and always has been, it seems to me that the "choice" of the corporation sole model, with the potentially destructive effect on parishes in disregard of the polity of the Church, is a choice the dioceses could *not* have made. To have done so would have been contrary to the canon law, something no administrator of the temporal goods of the Church can do without risking penalty under church law.[83]

In a June 30, 2006 ruling, a federal District Court reversed the Spokane bankruptcy decision and expounded the undisputed evidence about the consistent manner in which the parish property has been treated by the diocese and the parishes themselves. To buttress the conclusion that the parish real properties were part of the corporation sole, the Spokane bankruptcy judge had excluded virtually all the evidence proffered by the diocese and the parishes on the consistent canonical administration of the parish properties. On appeal, the district judge considered the record as a whole and construed the inferences in the evidence in favor of the "non-moving parties," the diocese and the parishes.[84] That evidence as noted above showed that the Bishops of Spokane had treated the parishes as "trusts" pursuant to their canonical obligations of supervision (not control or administration).[85] He recognized the parishes' evidence as establishing

[82] For example, see Diocese of Spokane, Memorandum in Support of Cross-Motion for Summary Judgment, 7–8, 22–25 (May 27, 2005) at http://www.dioceseofspokane.org/chapter11/new_pdf/FILED%20Memo%20in%20Support%20of%20Cross%20Motion%20(00324626).PDF

[83] Thus, both dioceses made the case that the pattern of administration of the property, the handling of donations, and other evidence buttressed the conclusion that the parishes were treated and should be treated as trusts separate from the dioceses.

[84] *Tort Litigants Committee v. Catholic Diocese of Spokane*, No. 05–CV-274–JLQ, 2006 WL 1867955 (E.D.Wash. June 30, 2006) (slip op. hereafter Dist.Ct.), at *3, *10 (references to Westlaw pagination). The decisions of both bankruptcy courts were rendered as "summary judgment" for the tort litigants. Such a decision means that the court finds there are no disputes about the material facts and the court is essentially applying the law to a set of facts that are not contested. Under the rules of procedure an appeal of such a decision is tested by the reviewing court de novo in which the court gives the non-moving party (that is, the party opposing summary judgment) the benefit of the doubt and construes the evidence in its favor. The reversal therefore is not a view of the merits in fact, but only what the result *could be* if the assumptions about what the evidence would show at trial were shown to be true.

[85] Dist.Ct. at *10. One news article noted that, in oral argument, the judge read a 1935 letter from the then Bishop of Spokane stating his obligations to hold a parish as a trust, regardless of the civil form. John Stucke, "Parish Assets Protected," Spokesman-Review

that they had sufficient legal capacity as "unincorporated associations" to be the beneficiaries of "resulting trusts."[86] Whether that conclusion was warranted would require proof in each individual case involving the circumstances of the acquisition and improvement of each parish property.[87] He further noted that, although the diocese held legal title, it always held title (not in a canonical but a civil sense)[88] "for the benefit of the individual parish."[89] Perhaps this portends well for the future.

Although the dioceses argued their cases in ways to avoid a direct constitutional clash, as noted immediately above, there certainly are constitutional issues in these cases. The Constitution provides broad protections for a religious organization to describe and organize itself according to religious principles.[90] The Supreme Court's rule requires that a civil court defer to the decision of the Church on questions of governance and not entertain jurisdiction to resolve the case itself.[91] Notwithstanding that

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(June 16, 2006) found at http://www.spokesmanreview.com/sections/diocese/?ID=135890. It is quoted at length in the opinion. Dist.Ct. at *6.

[86] Dist.Ct. at *10. A "resulting trust" is a form of constructive trust imposed on a property to avoid manifest injustice if it were not imposed. http://www.thelawencyclopedia.com/term/resulting_trust?gclid=CPTuhLC-2oUCFRFuFQodGE3-kw. In a situation where one party by agreement holds title to property for another's benefit, applying the formal civil title to resolve the question creates an injustice for the intended beneficiary. The court noted that this was the secondary argument of the parishes, the primary being that they owned the property. Dist.Ct. at *11.

[87] Nonetheless the judge found the evidence so far adduced was "clear and convincing" that a resulting trust could be inferred. Dist.Ct. at *12.

[88] The court "[found] it may consider Canon Law in making a determination of the parties' intent when purchasing real property, constructing churches and making improvements. . . ." Dist.Ct. at *13. But the court disclaimed reliance on the canon law, finding that the pattern of actual behavior in financing and donations provided better evidence of the parties' true intentions. Ibid.

[89] He did not rule the diocese or the parishes were entitled to summary judgment, but that the bankruptcy judge erred in reaching a conclusion of law when it ruled that parishes lack a legal interest in their property. He thus remanded the case for further proceedings in the bankruptcy court with a long discourse in oral argument (transcript referenced *supra* note 22) about the real benefits to all the parties settling the bankruptcy case, sooner rather than later.

[90] *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 96, 116 (1952).

[91] *Serbian Eastern Orthodox Church v. Milivojevich*, 426 U.S. 696 (1976). In particular, the court noted as an error that the lower courts had taken expert testimony about the meaning and application of the church's internal laws to the dispute. That inquiry, the seven justice majority said, violated the Constitution. Ibid., 718–720. That same form of action could likely preclude the disputes over a bishop's canonical responsibilities that plague US misconduct cases.

rule, the Supreme Court and other courts have also attempted to resolve property disputes by means of "neutral principles."[92]

Under relevant Supreme Court doctrine, when courts apply "neutral principles" review, they should look at more than the title and other civil documents. Those courts should also study the relevant church documents and organizational materials that would govern the actual daily administration and operation of the properties.[93] The Supreme Court in that case encouraged religious organizations to resolve ambiguities in their title records to be certain that, if a dispute arose in the future, that dispute would be resolved consistent with the expectations of the religious body.[94] At the same time, commentators note that "neutral principles" review does not allow for a court to resolve a religious property question in any way that is inconsistent with the polity of that church.[95]

Even examining the situation neutrally, the dioceses had argued, all of the evidence pointed to the existence of a trust relationship between the diocese and the parishes. The District Court in Spokane recognized that the evidence presented in the case so far tends to show the parishes have the capacity to be the beneficiaries of a trust. As noted above, however, the bankruptcy courts rejected those arguments, concluding that the parishes were legally a part of the diocesan corporations sole.

Both courts showed their over sensitivity to the possibility of utilizing canon law, perhaps because of the fairness issue discussed above, but also perhaps out of concern that to apply that body of law could actually create the constitutional issue the courts zealously tried to avoid.[96] In my

[92] *Jones v. Wolf*, 443 U.S. 595 (1979).

[93] Ibid., 604.

[94] Ibid., 603–604.

[95] W. Cole Durham, "Legal Structuring of Religious Institutions," in Serritella, *Religious Organizations*, 221 (note 17 *supra*). In point of fact, the Bishops' Conference had filed an amicus curiae brief in *Jones v. Wolf* protesting the possibility of "neutral principles" review, saying that it ran the risk of artificially divorcing property questions from governance. In this way it risked decisions that were contrary to the ecclesiology of the religious body. See H. Reese Hansen, "Religious Organizations and the Law of Trusts," in Serritella, *Religious Organizations*, 301–303 (note 17 *supra*) (criticizing wooden application of "neutral principles").

[96] Of course, an answer to this concern is illustrated by the US Supreme Court's decision in *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). There the court reviewed a case challenging a testamentary trust that ultimately relied on the canon law to determine whether a potential beneficiary was eligible for a chaplaincy that in turn would provide him with income from the trust. The qualifications for a chaplain were matters of religious law beyond the ken of the secular courts. But the relevance is that the court

view, there is a big "distinction between establishing a religion and taking cognizance of the fundamental discipline of the church as established by its founders. To fail to respect that discipline could lead to the diversion of assets dedicated over the centuries to cherished beliefs."[97] As noted elsewhere, "[t]o force upon [the Church] an unaccustomed economy would introduce confusion and embarrassment; whereas to refuse them corporate capacity, except on the condition of renouncing their customs, would be an illiberal treatment by the state."[98] The alteration of the polity of a church through the operation of these bankruptcy decisions does indeed infringe the religious freedom of the institution, to say nothing of the potential burden on the faith community should every stick of property now be subject to execution at the behest of the dioceses' creditors.[99]

V. *Restructuring*?

In light of these developments, in every corner of the United States, experts study the question of reorganizing and restructuring the dioceses and parishes of the Church. Such study was long overdue in my view.[100] The structures that were put in place in the eighteenth and nineteenth centuries have shown that they are not entirely adaptable to the realities and stresses we experience in the twenty first. In saying this, however, there is not a straightforward or easy answer. Each diocese will have to evaluate the risk versus the possible benefits that would accompany any particular reorganization. Among other things, dioceses should be deciding whether an adequate civil format is available and achievable. Will the diocese be able to capitalize the various entities that it creates? How

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was construing a civil trust involving a potential beneficiary and ultimately upholding the person's disqualification because of church law. Compare Spokane decision, 325 ("This argument . . . is in essence a request to impose internal ecclesiastical rules upon third parties who deal with the debtor in secular transactions.") Interpretation of church law would create the constitutional problem; application of that law when contemplated in the civil documents would not.

[97] *Struemph v. McAuliffe*, 661 S.W.2d 559, 566 (Mo. App. 1983), *cert. denied*, 467 U.S. 1216 (1984). In this case parishioners attempted to prevent a bishop from making changes to the interior of a church to conform the liturgical space to the current norms of the Church. The lower court had ruled for the parishioners interpreting canon law and finding an implicit trust. The appellate court ruled for the diocese on constitutional grounds.

[98] *Id.*, *quoting Klix v. Polish Roman Catholic Parish*, 118 S.W. 1171, 1176 (Mo. App. 1909).

[99] The Portland decision kept the question of the possible burden on the faith community open for further proceedings. See Portland decision, 863–864.

[100] Others have called for such careful study. See O'Brien, "Instructions," *supra* note 24, 41 Cath. Lawyer at 334.

much self-sufficiency will be allowed the new structures? Can the new constellation of structures be properly administered by the personnel in place and who will be providing for their training and seeing to it that they act in accord with laws of the Church? To return to the administrative question posed earlier, how much control will prove to be too much, in effect defeating the purpose of setting up new structures,[101] and how much will be too little, opening the door to the possibility that some of our institutions may seek to separate themselves from the denomination?

There are certain issues that must be evaluated to address the legal formalities needed for this kind of wholesale change. For example, dioceses and parishes may create both civil articles of incorporation or association or a trust agreement and canonical statutes. Bylaws and other operational directives will also guide church administrators after this process. Given the rulings of the bankruptcy courts, essential pieces of this exercise will be to examine whether the title records for the real properties clearly indicate which entity exercises the indicia of ownership. If there is ambiguity, this evaluation should identify the sources of the ambiguity and ways in which it can be addressed and rectified. Other denominations have inserted "trust clauses" into the governing and title documents of related church agencies to provide that if there is a situation in which the property might be taken by another, the property reverts to the denomination or some other church agency. Because these devices are under legal attack in various denominations,[102] the existence of the connection to the communion that is the Church must be clear and unambiguous.[103]

[101] See Bainbridge & Cole, "The Bishop's Alter Ego," (note 56 *supra*).

[102] Edward Plowman, "'Momentous' ruling may give local churches trump card in dealing with liberal hierarchies: their property," World Magazine at http://www.worldmag.com/articles/10989.

[103] For example, *From the Heart Ministries, Inc. v. AME Zion Church*, 370 Md. 152, 803 A.2d 548 (2002) (noting that the law of Maryland requires that trusts be properly stated); *Primate and Synod, Russian Orthodox Church Outside Russia*, 636 N.E.2d 211 (Mass. 1994) (awarding property to local church based on deeds and bylaws, not on the plain hierarchy of the church). In *Berry v. Society of St. Pius X*, a priest sought possession of a corporation sole parish against the larger religious body. His predecessor had purported to amend the articles of incorporation to allow him to designate Father Berry as his successor. The California courts did not permit him to succeed to the corporation sole, because the purported amendment on succession in office lacked the requisite prior approval by the religious body (as required in the California corporation sole statute). 81 Cal.Rptr.2d 574, 577, 583–86 (Cal. App.1999). These cases counsel that care should be taken in drafting articles and bylaws especially when there is no statutory saving provision as in this case.

Failing to address these issues adequately could lead to a court disregarding the structure. In a liability situation, multiple church agencies will be sued and there will be some effort to reach the assets of related church entities to pay the debts created by another. The common law provides that corporations are entitled to a presumption that they are separate and legitimate except when it can be proved that they are operated as the alter ego of some other.[104] The court will look, among several factors, at the degree of capitalization to determine whether the funding levels are proper. The court will examine whether it is micro managed by the parent or some other related corporation such that one is a mere pawn of the other. A major factor in evaluating the independence of corporations is whether the corporations observe the legal formalities required by the civil law. If dioceses do not follow the requirements of the civil law in the organization and operation of newly separate agencies, they might be imploded in a liability crisis.[105]

These formalities cannot be ignored simply because they are inconvenient or expensive. If there are co-mingled assets, liabilities, and governance in newly separated entities, continuing to treat them all as other expressions of the diocese, the civil courts will treat them in precisely the same way.[106] Most importantly, if dioceses and parishes depend on the

[104] Manny, 14–18 (note 19 *supra*); Joy Conti Flowers, "Liability Issues for Related Church Entities," Acts of the Colloquium Public Ecclesiastical Juridic Persons and their Civilly Incorporated Apostolates, 157 (Pontifical Angelicum University 1998).

[105] Bainbridge & Cole (note 56 *supra*) conclude, after reviewing the various factors that courts use to look beyond corporate structure, that the likelihood of a court disregarding the separate structures of Catholic entities in a diocese is remote if the canon law is properly followed. Ibid., 13, 23, and 27. A recent case in which the court held it would not disregard the separate structures is *Taeger v. Catholic Family and Community Services*, 955 P.2d 721 (Ariz. App. 1999), where the bishop was on the board, real estate was in the name of the diocesan corporation, and financial statements listed the assets as assets of the diocese. The court held the plaintiffs could not prove the charitable corporation was a "mere instrumentality" of the diocese or bishop. Ibid., 734. Bainbridge & Cole conclude the control was consistent with canon law and respected the autonomy of the charitable agency. (27, note 56 *supra*). Likewise the court distinguished between ecclesiastical control and civil control, finding the former insufficient to cause the agency to be the alter ego of the diocese. 955 P.2d at 735. This conclusion is consistent with the way other courts have approached such liability issues. Chopko, "Stating Claims," 1105 (note 47 *supra*). On the other hand as the discussion above also illustrates, the civil law in the end will be what the civil courts follow. Thus if church agencies intend the application of church law, the civil documents should so state.

[106] In the most curious example of a court rejecting liability premised on Roman Catholic agencies being alter egos of each other (starting with the pope and the Holy See), see *Roman Catholic Archbishop v. Superior Court*, 93 Cal. Rptr. 338 (Cal. App. 1971).

canon law as part of their defense in property and liability litigation, it must be followed rigorously.

In some measure this means that dioceses must work for consistent application of the civil and canon law in their own territories. In the end, dioceses may decide that there is no uniform structure that can be achieved for all the parishes in the diocese, because of differences in size, geography, or finances. But the diocese must be able to explain to the parishes and the people the choices that will be made, and be prepared to defend them in court where every little inconsistency will be attempted (in my view unfairly) to be exploited. But dioceses must also work together in provinces and states—in other words where the applicable civil laws are the same—not for identical structures but for **not inconsistent** structures and approaches to issues they will each confront in their civil affairs. Dioceses in the United States should also be using the framework of the episcopal conference as a vehicle in which some of the common civil, canonical, and constitutional issues can be explored collaboratively. If they cannot follow through on these commitments, they may be creating bigger issues for the next generation of church administrators in their own dioceses and beyond.

Attached to this paper is a list of what I call "principal legal issues" that should be evaluated as one is studying restructuring diocesan operations. This list is not intended to be exhaustive but rather illustrative of the kinds of problems that should be thought about in deciding how church entities should be structured. Some of these issues are set forth in the margin.[107] Failing to undertake this kind of searching analysis could undo even the best efforts to preserve temporal goods in accord with the canon law.

Not to muddy the waters further, but, without careful planning, it is foreseeable that dioceses and parishes may have much about which to dispute. For example, if a school and a church are operated on the same property, the records should be clear as to which entity is the owner of what and, in the end, which entity is responsible for the operation and ad-

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The case involved the failed sale of a St Bernard dog from a Swiss monastery to a California citizen who sued a variety of defendants on an alter ego theory. He won in the Superior Court and reversal came in the above cited case on mandamus.

[107] Some of these matters involve liability and insurance, the management of bank accounts, the administration of contracts and leases, operation of real property, taxation and tax exemption matters, labor and employment issues, child protection issues, record-keeping, and relations with the municipal government. See Appendix to this paper.

ministration of the school. Some dioceses, notwithstanding the separate canonical existence of the parishes, operate the schools as a form of school system by way of centralized operations and hiring.

In some ways, that kind of dispute is easy compared to the kind of dispute that could occur over operational matters. For example, suppose a parish wants to modify a standard contract or diocesan policy. Suppose a diocese is concerned about the possibility of financial self-dealing on a parish council. Suppose pastors dispute with diocesan officials over the extent and administration of benefits or employment issues. The issue of who is responsible for what is only part of the equation. The other part is building in a dispute resolution mechanism consistent with the expectation of the parties that together they are all responsible for the common good of the Church in that place.

VI. *Final Observations*

It should be obvious by now there is no single answer to the structural questions facing the Church in the United States at this point in its history. Nor is there an easy answer to some of the practical questions that must be unraveled. In making decisions, we must be clear, faithful to the civil and the canon law, and in communion with each other. Unfortunately, given the times, we must also be precise about what we are undertaking and why. As one English jurist said:

> It is not enough to attain a degree of precision which a person reading in good faith can understand, but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand.[108]

In observations he made in 1829 and published ten years later, Bishop John England of Charleston criticized some of the administrative choices being made in the United States for the operation of Catholic entities. In his view, Catholic entities were among those institutions most negligently managed.[109] Church administrators were guilty of not taking advantage of the various bylaws and legal elements to provide discipline for corporate activities and confine the work of trustees to their proper spheres. Bishop England said that we are "better protected by law than by expedients."[110] He noted as Americans we Catholics have the right to

[108] *In re Castioni*, [1891] 1 Q.B. 149, 167 (Stephen, J.) at http://uniset.ca/other/cs4/castioni.html .

[109] Letter quoted in Dignan,144.

[110] Dignan, 161.

self governance just like any other organization in the society. Those choices about self governance, he said, would be entitled to respect by the civil courts:

> I do not know any system more favorable to the security of religious rights and of Church property than that of American law. I have consulted eminent jurists on the subject, I have closely studied it, and have acted according to its provisions in various circumstances, favorable and unfavorable, during several years, and in many of the details and as a whole, I prefer it to the law of almost every Catholic country with which I am acquainted. . . . . The state recognizes in each [voluntary] society . . . the right to make for itself a constitution or form of government, and by-laws for the management of its own concerns; and when they are regularly made, it recognizes their force within that body. . . .
>
> Upon these principles there is no difficulty for a body of Catholics to assemble, to form themselves into an association, to recognize the power of their Pope, of their bishop, of their priests, and the several rights of each individual or body according to the doctrine and discipline of their church; they can, without departing from that doctrine or discipline, regulate the manner in which the property is to be held, and how it is to be managed, and can establish rules to restrict and to direct its managers. . . .
>
> By this process of American law, no person is obliged to belong to any religious society except he shall desire it himself, and he cannot obtrude himself upon any religious society which is not willing to receive him, or whose constitution he violates; and the legal tribunals of the states must, should questions of litigation arise, govern their decisions by the constitution and bylaws of the Society itself, provided these laws are not incompatible with the laws of the particular state or of the United States.[111]

According to Bishop England, if the Church failed to make adequate rules to direct internal governance, the fault was not the civil law but the Church's administrators.[112] With the proper tools, the administration of the Church would be more consistent with the canon law and adequately protected by the civil law. How prescient he was for this discussion. Moreover, he accurately predicted the principle announced 40 years later, when

[111] Ibid., 142–143.
[112] Ibid., 143.

the Supreme Court declared in 1872, that those who unite themselves together in a faith community consent to the rules and protocols of that faith community. Having so consented to the doctrine and discipline of the religious community, "it would be a vain consent, and lead to the total subversion of those religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed."[113]

Americans have the right to organize religious communities consistent with the available civil law choices in a particular state and their own religious self understanding. In order to move beyond the present point, those involved in this transaction must be actively cooperating with each other over a common set of principles. It requires more than simple consultation. In the end, it requires assent—that the current mode of operation has created a set of potential and real difficulties that must be addressed, even if, in the end, the answer that is given is "this is the best we can do for now." It requires resort to a perspective beyond the parochial or even diocesan good. It requires asking what the common good of the Church in the United States requires at this time. A hodgepodge of answers, inconsistent with each other and at odds with the civil and canon law approaches taken by neighbors will do no one any good.

We can do better. We must get it right.

Appendix: Principal Legal Issues for Pastors and Administrators[114]

1. Canonical issues—clarify canonical structures and the rights and responsibilities of the various parties: diocesan bishop, pastor, diocese, parish, and parishioners.
2. Liability—mostly property related, mostly slip and fall cases or car crash cases involving employees or volunteers
3. Contract issues—who has authority to engage and for what purposes? Who drafts, who reviews, who decides, who tracks compliance etc?
4. Insurance issues—how much? What types? Who's insured? Who obtains?

[113] *Watson v. Jones*, *supra*, 80 U.S. at 729.

[114] This list is illustrative only and does not deal with the even more complex issue of the administration of schools. It is a "conversation starter."

5. Financial administration issues—Accounting regularity & financial transparency to the members / avoiding financial irregularities. Honoring donor restrictions.
6. "Innovative" fund raising schemes—UBIT, the rich person's exception to the rules on common sense ("don't worry, rich donors love this kind of activity by churches"), etc.
7. Structures—how are we organized and operated? Do we respect those limits and act within our authority? (staying within the administrative authority proper to that entity (school board runs the school, not the church, etc.)) Does an administrator or board sometimes act with "apparent authority" to do actions technically outside their legal competence? How much control do we exercise versus some other entity within the church?
8. "Trust clause"—denominational affiliation issues: local vs regional vs national jurisdiction over certain matters, how close and how enforceable an affiliation?
9. Land use issues—zoning and restrictions, easements, oversight, RLUIPA, etc.
10. Compliance with local, state, and federal tax rules—reporting, qualification for exemption, property and sales tax issues, PILOTS/SILOTS, etc. Compliance with the federal tax exemption (political activity, lobbying activity, financial transactions)
11. Misconduct issues—setting and enforcing policy; background checks on clergy, employees, and volunteers; training and re-educating personnel on child protection issues, reporting abuse; dealing with the criminal and civil justice system; setting and enforcing church discipline; crisis communications policies
12. Dealing with foreign born members (immigration and enculturation issues, undocumented persons (complicates the volunteer issues)) and ministers and church workers
13. Copyright issues (copying and using ministry and music materials)
14. Labor and employment issues/ workplace issues—hiring, firing, compensating, not discriminating (especially note the dif-

ferences between state/local rules on religious employers with the Title VII exemption), religious identity, "employee/spousal" benefits issues, workers comp (also an insurance issue)

15. Church-state interactions—public funding (qualification for various programs run by the Church, conditions on grant funds that could eviscerate various exemptions, etc)

16. Records and record keeping—what to keep and why? Who maintains for how long? At what level of confidentiality?