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Hidden in the Shadows: The Perilous Use of ADR by the Catholic Church

Michelle Rosenblatt¹

“Jesus extended this care in a tender and urgent way to children, rebuking his disciples for keeping them away from him: ‘Let the children come to me’ (Matthew 19:14). And he uttered the grave warning about anyone who would lead the little ones astray, saying that it would be better for such a person ‘to have a great millstone hung around his neck and to be drowned in the depths of the sea’ (Matthew 18:6).”²

I. INTRODUCTION

In the last several years, alternative dispute resolution (“ADR”) has risen to the forefront of the legal field. This is because methods such as mediation and arbitration offer several advantages over traditional methods, such as litigation, which can be costly and time consuming.³ Furthermore, mediation and arbitration can be effective in many different contexts, especially those in which confidentiality and privacy are of importance.⁴

This article begins with a history of sexual abuse cases in the Catholic Church by exploring the church autonomy doctrine,⁵ allegations and investigations, and the Church’s stance on abuse cases.⁶ The discussion then turns to the current state of events and reform measures the Church is taking to deter further criticism.⁷ The main body of the article examines the parties and interests in-

1. J.D. Candidate, Pepperdine University School of Law. The views expressed are solely those of the author and do not reflect those of any entities, organizations or institutions with whom the author is affiliated.

2. United States Conference of Catholic Bishops, *Charter for the Protection of Children and Young People, Revised Edition*, Oct. 8, 2003, Preamble, available at <http://www.usccb.org/ocyp/charter.htm>.

3. KIMBERLEE K. KOVACH, *MEDIATION IN A NUTSHELL*, 35 (West, 2003); see also Sarah E. Rudolph, *Blackstone's Vision of Alternative Dispute Resolution*, 22 MEM. ST. U. L. REV. 279, 282-85 (1992).

4. See KOVACH, *supra* note 3, at 34-35; see Rudolph, *supra* note 3 at 282-85.

5. The church autonomy doctrine makes reference to the Church’s historical view of deciding spiritual matters within its own walls, which the United States Supreme Court supports. For a more in-depth discussion, see *infra*, notes 10-18 and accompanying text.

6. See *infra* notes 19-41 and accompanying text.

7. See *infra* notes 42-66 and accompanying text.

volved in the dispute, factors for a successful mediation and the Church's current use of ADR.⁸ Finally, the article concludes that ADR, despite its unique advantages in satisfying some of the parties' interests, fails to meet many of the factors necessary for a truly successful resolution.⁹

A. A History of Asylum and Sexual Abuse Cases in the Catholic Church

1. Asylum

In 1871, the United States Supreme Court placed limitations on the jurisdiction civil courts could claim over church disputes.¹⁰ However, it is evident that the Court intended to limit the autonomy of the Church.¹¹ For example, the Court enumerated the matters over which the civil courts exercised no jurisdiction.¹² Specifically, civil courts were to have no jurisdiction over disputes the Court considered strictly and purely ecclesiastical in character, such as matters "which concerns [sic] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" ¹³

Similarly, the Catholic Church has asserted its independent jurisdiction throughout history.¹⁴ Specifically, the Church has long followed a policy of providing asylum to those accused of a crime.¹⁵ The basic process of asylum is as follows: the Church evaluates the case of the accused, and, if it finds the crime accidental, offers protection from the civil authorities within its walls.¹⁶ However, even under this evaluation, often the Church has overstepped its stated purpose and offered protection to those who were of questionable innocence.¹⁷ This can be attributed to the difficulty in determining moral and legal distinctions among the offenders.¹⁸ While asylum appears to be beneficial in theory,

8. See *infra* notes 67-129 and accompanying text.

9. See *infra* notes 130-164 and accompanying text.

10. *Watson v. Jones*, 80 U.S. 679, 733 (1871).

11. *Id.* In *Watson*, Justice Miller stated that any trial undertaken by the General Assembly of the Presbyterian Church would have no validity in a civil court or anywhere else because the General Assembly has no jurisdiction over the case. *Id.*

12. *Id.*

13. *Id.* (emphasis added).

14. Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 323 (2003).

15. *Id.* at 323-24.

16. *Id.*

17. *Id.* This was especially true in ancient Grecian society where even those criminals who had committed the worst crimes were protected. *Id.* at 324. However, the Romans were less predisposed to sanctuary, only offering temporary protection until formal adjudication by civil authorities could proceed and civil sanction applied. *Id.*

18. *Id.* at 324.

the protection afforded by the Church within its walls has become of more concern in recent years, especially with regard to its own clergy members.

2. Sexual Abuse Cases

Although quiet allegations of priests sexually abusing children have surfaced throughout history, the voices have grown more outspoken in the past few decades. The trend became noticeable when a plethora of victims began to break their silence in the 1980s.¹⁹ The largest number of allegations, however, came in the winter of 2002.²⁰ Almost daily, newspapers, television, and radio reported allegations of sexual abuse by priests and other clergy members. As a result, the government and the public have become increasingly less tolerant of the protection the Church has historically afforded its clergy.²¹

Recent investigations of church documents demonstrate that some priests bartered drugs for sex, fathered children, and physically assaulted young boys from their parishes.²² In addition, some Church officials have faced charges of destroying personal and personnel files.²³ In spite of the mounting pressure, the Vatican, which acts as the utmost authority for the Church, continues to claim it is the ultimate victim, suffering from a smear campaign by the American media.²⁴ The public watches with a weary eye, however, as the investigation mounts.²⁵

In most cases, Church officials were notified of the abusive behavior, but did little about it.²⁶ As the U.S. Conference of Bishops admitted, “[i]n the past, secrecy has created an atmosphere that has inhibited the healing process and, in some cases, enabled sexually abusive behavior to be repeated.”²⁷ Moreover, one

19. Lisa M. Smith, *Lifting the Veil of Secrecy: Mandatory Child Abuse Reporting Statute May Encourage the Catholic Church to Report Priests Who Molest Children*, 18 LAW & PSYCHOL. REV. 409, 409-13 (1994).

20. See Logan, *supra* note 14, at 321.

21. *Id.* at 321-22.

22. *Predator Priests*, BOSTON GLOBE, Jan. 7, 2003, available at <http://www.boston.com/globe/spotlight/abuse/predators/>.

23. Kevin Cullen, *Bishop Denies Saying Predecessor Destroyed Abuse Data*, BOSTON GLOBE, Sept. 30, 2003, at B3, available at 2003 WL 3421011.

24. Michael Paulson, *Jesuit Journal Raps U.S. Media's Church Coverage*, BOSTON GLOBE, Mar. 31, 2002, at A1, available at 2002 WL 4130238.

25. See Smith, *supra* note 19, at 409.

26. *Predator Priests*, *supra*, note 22; see also Thomas Farragher, *Police Warned Archdiocese About Priest's Activities*, BOSTON GLOBE, Feb. 5, 2003, at B4, available at 2003 WL 3378610.

27. United States Conference of Bishops, *supra* note 2, Preamble.

bishop related: "Very definitely it was covered up in the past."²⁸ From statements such as these, it is evident that the Church has acted to protect itself rather than ending the abuse and facilitating prosecution of the offenders.²⁹ One recent survey has estimated that roughly two-thirds of Church officials in the largest U.S. Catholic dioceses have sheltered priests accused of sexual abuse.³⁰ This is no surprise considering that "institutions within the Church were designed to protect priests and to deal with allegations in their own way."³¹ For example, in 1985, the Church's own Internal Oversight Board warned of widespread clergy sexual abuse and mounting settlement costs, but the Church failed to make any changes or notify civil authorities of its findings.³²

In fact, many Church officials used their influence to "fix" matters or keep them quiet.³³ In past decades, it was customary for a bishop to meet an aggrieved family, comfort them, and perhaps offer an assurance that the offending priest would receive help or alternatively offer the family a settlement of a few thousand dollars.³⁴ In other cases, Church officials ignored or attempted to discredit victims by defaming them.³⁵ Yet another of the Church's remedies was to recommend psychological evaluations.³⁶ The accused priests, however, were often allowed to return to the same or a different parish.³⁷ All of these "remedies" allowed the accused priests an opportunity to offend once again.³⁸ Thus, it is not surprising that a significant number of priests have abused repeatedly during one or several parish assignments.³⁹

28. Schuyler Kropf, *Church Now Deals Openly with Abuse Cases*, POST AND COURIER (Charleston, S.C.), Jan. 8, 1994, at 2B. For further substantiation that records have been purged, see Aric Press et al., *Priests and Abuse*, NEWSWEEK, Aug. 16, 1993, at 42. Two of the most egregious examples of the Church's protection of offenders are Father John Geoghan, who sexually preyed on children from 1962 to 1995, moving from one parish to another until he was finally defrocked in 1998, and Father Paul Shanley, who was shielded from civil authorities for almost thirty-five years by being repeatedly relocated to new parishes, where he continued his offending. See Logan, *supra* note 14, at 330-34.

29. See Logan, *supra* note 14, at 321.

30. Brooks Egerton & Reese Dunklin, *Catholic Bishops and Sex Abuse*, DALLAS MORNING NEWS, available at <http://www.dallasnews.com> (documenting a three-month investigation into records of the country's 178 Roman Catholic dioceses).

31. Smith, *supra* note 19, at 410 (citing Aric Press et al., *Priests and Abuse*, NEWSWEEK, Aug. 16, 1993, at 42-43).

32. THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 112 (2002).

33. Farragher, *supra* note 26, at B4.

34. Michael Powell & Lois Romano, *Roman Catholic Church Shifts Legal Strategy: Aggressive Litigation Replaces Quiet Settlements*, WASH. POST, May 13, 2002, at A1.

35. Smith, *supra* note 19, at 409.

36. *Id.*

37. *Predator Priests*, *supra* note 22; Farragher, *supra* note 26, at B4.

38. *Id.*

39. *Predator Priests*, *supra* note 22.

There are several possible, though not necessarily plausible, explanations for the Church's secrecy. The Church claimed it would not be able recover settlement monies if details of the abuse were ever divulged.⁴⁰ The Church also might seek to avoid association with the abusers, whose acts reflect poorly on the Church. Most egregious, however, is the Church's own explanation that it must keep abusing priests in rotation because of personnel shortages.⁴¹

B. Current News and State of Events

In January 2002, the Boston Archdiocese⁴² appeared on the national radar when allegations of a single predatory priest were published.⁴³ Under the mounting public pressure following the allegations, Cardinal Bernard Law resigned his position as Archbishop in December 2002.⁴⁴

Before Law's resignation, however, the U.S. Conference of Catholic Bishops addressed the issue of sexual abuse in its June 2002 meeting.⁴⁵ Afterwards, it released its "Charter for the Protection of Children and Young People."⁴⁶ The Charter proposed several measures, including:

40. The Investigative Staff of the Boston Globe, *supra* note 32, at 112.

41. Logan, *supra* note 14, at 321. The Church claims that it lacks sufficient qualified clergy to wholly remove offending priests.

42. The Boston Archdiocese, with registration of at least two million members and 357 parishes, is the fourth largest in the nation. See Andrew Mollison & John Blake, *Audit Says 90% of Bishops Obey Anti-Abuse Rules*, ATLANTA J. CONST., Jan. 7, 2004, at A3, available at 2004 WL55878902; Editorial, *When Churches Close*, BOSTON GLOBE, Dec. 29, 2003, at A10, available at 2003 WL 66484806; *U.S. Church in Sex Abuse Bill Shock*, PEOPLE (UK), Dec. 14, 2003, at 2, available at 2003 WL 66953516.

43. Associated Press, *Audit Says Dioceses Adopting Reforms*, TIMES UNION, Jan. 7, 2004, at A3, available at 2004 WL 59354376. The priest referred to is former priest John J. Geoghan. See Larry B. Stammer & Richard Winton, *The Nation; 90% of Dioceses Meet New Rules; Catholic Church's Watchdog Office Will Issue Report on Changes Made to Prevent Sexual Abuse by Priests. Critics Question its Validity*, L.A. TIMES, Jan. 6, 2004, at A1, available at 2004 WL55884319. He was transferred from parish to parish during a time that the Church had knowledge of allegations against him. *Id.* He was finally convicted and was killed in prison by another inmate in 2003. *Id.*

44. Gillian Flaccus, *California Abuse Cases Flood in: Molestation Suits Pile up as Filing Deadline Nears*, CENTRE DAILY TIMES, Dec. 30, 2003, at 4, available at 2003 WL 64499526. Following Law's resignation, Pope John Paul II named Bishop Sean Patrick O'Malley of the Palm Beach diocese to replace him. See *2003 Florida Stories that Also Received Votes*, THE BRADENTON HERALD, Dec. 28, 2003, at 7, available at 2003 WL 65534630.

45. Logan, *supra* note 14, at 336 (citing Laurie Goodstein, *A Time to Bend: U.S. Bishops, Sure of Their Ground in the Past, Let Public Opinion Guide Them This Time*, N.Y. TIMES, June 16, 2002, at A1; Laurie Goodstein & Sam Dillon, *Bishops Proceed Cautiously in Carrying out Abuse Policy*, N.Y. TIMES, Aug. 18, 2002, at A1).

46. *Id.*

[I]mplementation of a 'zero tolerance' approach, requiring the removal of any priest for whom there is a 'credible accusation' of child sexual abuse; rescission of the Canon statute of limitations for sexual abuse claims; mandatory reporting of all abuse accusations to civil authorities; and the creation of a national oversight board, complemented by local review boards at the diocese level, to monitor compliance with the policies.⁴⁷

The Vatican responded to the Charter by dismissing the measures, stating it was against Canon law and tradition, which the Vatican felt offered its own measures of due process and fairness.⁴⁸ The Vatican also took issue with reporting any sexual abuse claims to the civil authorities.⁴⁹

Consequently, in November 2002, the U.S. Conference of Bishops revised its policies and released its "Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons."⁵⁰ Under the Norms, any claim of abuse is referred to an *internal* board.⁵¹ Only if the board decides there is "sufficient evidence" of abuse will it give notice to the Vatican-based Congregation for the Doctrine of the Faith.⁵² The Congregation ultimately decides whether the Church will retain jurisdiction or turn it over to the civil courts.⁵³

A few months later, in June 2003, the U.S. Conference released its "Charter for the Protection of Children and Young People, Revised Edition."⁵⁴ The Revised Charter states:

[T]he bishops will work with parents, civil authorities, educators, and various organizations in the community to make and maintain the safest environment for minors. In the same way, the bishops have pledged to evaluate the

47. *Id.*

48. Logan, *supra* note 14, at 336 (citing Frank Bruni, *Vatican Demands U.S. Bishops Revise Sex-Abuse Policy*, N.Y. TIMES, Oct. 19, 2002, at A1; Frank Bruni & Laurie Goodstein, *Rome Withholding Full Endorsement of U.S. Abuse Plan*, N.Y. TIMES, Oct. 18, 2002, at A1.).

49. *Id.*

50. United States Conference of Catholic Bishops, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, Dec. 8, 2002, available at <http://www.usccb.org/bishops/norms.htm>.

51. *Id.*

52. *Id.* Founded in 1542 by Pope Paul III, it is the oldest of the Curia's nine congregations. *Id.* Its work is divided into four distinct sections: the doctrinal office, the disciplinary office, the matrimonial office and that for priests. *Id.* For further information, see *Congregation for the Doctrine of the Faith*, available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_pro_14071997_en.html (Last Visited Oct. 3, 2004).

53. United States Conference of Catholic Bishops, *supra* note 42. The Vatican can choose to deal with the matter under its own jurisdiction or refer it back to a U.S.-based tribunal consisting of Church clergy. *Id.*

54. United States Conference of Catholic Bishops, *supra* note 2.

background of seminary applicants as well as all church personnel who have responsibility for the care and supervision of children and young people.⁵⁵

Following the U.S. Conference of Bishops' publicly released statements in 2003, the archdioceses in Boston and many other large metropolitan areas⁵⁶ have been in the news for their proposed and actual use of ADR methods to resolve the civil aspect of abuse suits against them. The results appear to be positive on the surface. For instance, in 2003, the Archdiocese of Boston settled with 552 victims of clergy sexual abuse for \$85 million following months of mediation.⁵⁷ Each plaintiff received between \$80,000 and \$300,000, with the specific damage amount determined by an arbitrator based on the type of abuse, duration of the abuse, and the effect the abuse had on the victim.⁵⁸ As a result of the mediation terms, the Boston Archdiocese may defrock or otherwise discipline some of the accused priests, according to lawyers for abuse victims.⁵⁹ Once defrocked, however, "if there has been no conviction for a crime, [the priests] can walk away from [the Church] without any kind of supervision."⁶⁰

Furthermore, in January 2004, Boston church leaders and 200 clinicians attended a conference to address the long-term effects of clergy sexual abuse.⁶¹ More compelling, however, an audit performed in the same month⁶² showed that the Boston Archdiocese was in full compliance with the guidelines set by the

55. *Id.*

56. The Church officials in Milwaukee, Denver, Seattle, and Los Angeles have all been in the news recently.

57. Ralph Ranalli, *Lawyers Say Archdiocese Could Defrock Some Priests*, BOSTON GLOBE, Jan. 6, 2003, at B8, available at 2003 WL 59765176; see also Denise Lavoie, *Boston Archdiocese Settles 552 Priest Abuse Cases for \$85 Million*, CHI. SUN-TIMES, Sept. 10, 2003, at 1, available at 2003 WL 9571987. The Archdiocese notified the Plaintiffs of their respective payouts in December 2003, almost three months after the arbitrator began hearing testimony regarding the abuse of the Plaintiffs. The Associated Press, *Church Abuse Settlement Divided Up*, NEWSDAY, Dec. 21, 2004, at A06, available at 2003 WL 69082809.

58. NEW YORK TIMES NEWS SERVICE, *Boston Archdiocese Abuse Payouts Revealed*, CHI. TRIB., Dec. 21, 2003, at 17, available at 2003 WL 70653415.

59. Ranalli, *supra* note 49.

60. Editorial, *Editorial...and Tracking Priests*, Jan. 10, 2004, BOSTON HERALD, at 22 (quoting Rev. Christopher Coyne, a spokesman for the Boston Archdiocese). This is of great concern because as of January 2004, hundreds of priests had been removed from their ministerial duties with the Church. See Editorial, *A Good Start*, Jan. 9, 2004, BALTIMORE SUN, at 12A, available at 2004 WL 56109364.

61. Robin Washington, *Hub Church Leaders, Therapists Huddle on Effects of Abuse*, BOSTON HERALD, Jan. 15, 2004, at 28.

62. The audit was conducted by 54 investigators, several of whom were former FBI agents, at a cost of \$1.8 million to the Church. The audit was conducted from June 23, 2003 to October 31, 2003. Stammer & Winton, *supra* note 43.

U.S. Conference of Bishops.⁶³ The Boston Archdiocese also received praise for creating a support group for the victims' parents and training church employees and young people against abuse.⁶⁴

The progress exhibited by the Boston Archdiocese, however, has not come without disadvantages. Several properties held by the Boston Archdiocese have been sold or are planned to be sold, including the archbishop's mansion and its surrounding twenty-eight acres (at an estimated value of \$14 to \$100 million).⁶⁵ In January 2004, the Archdiocese announced its plan to close a substantial number of Boston area churches due to dwindling Mass attendance, a shortage of priests and a dire financial situation caused by the sex abuse scandal.⁶⁶ In addition, although the results of the Boston mediation may appear just, this article critiques the relative bargaining power of the parties and examines the unconscionability of the Boston Archdiocese's 2003 mediation terms.

II. THE INTERESTED PARTIES

A. *The Victim*

In any type of sexual abuse proceeding, the victim should be most important. The harm suffered by the victim is great and often psychologically and emotionally incapacitating.⁶⁷ Even the U.S. Conference of Bishops admits "[t]he damage caused by sexual abuse of minors is devastating and long-lasting."⁶⁸ When clergy misuse their position as a father figure or counselor to sexually exploit the victim, the victim suffers the same kind of "shame, guilt and anxiety experienced by incest victims."⁶⁹

Victims abused by clergy are commonly compared to victims abused by a non-Church counselor. The latter often suffer "diminished self esteem, increased feelings of personal ambivalence, increased sexual difficulties, anger at being exploited, a feeling of being used as a sex object, and an inability to trust

63. Editorial, *supra* note 52, at 22.

64. Editorial, *Keeping the Faith*, Jan. 9, 2004, BOSTON GLOBE, at A14, available at 2004 WL 59765742.

65. Denise Lavoie, *Boston Church Mortgaged to Pay Legal Bills; the Boston Archdiocese is Refinancing and Selling Property to Help Pay the \$85 Million in Abuse Settlement Claims*, MIAMI HERALD, Dec. 19, 2003, at 47, available at 2003 WL 71418656.

66. John Zaremba, *Parishioners Want Say in Church Closings; Archdiocese Expected to Announce Dozens of Shutdowns in April*, THE PATRIOT LEDGER, Jan. 12, 2004, at 2, available at 2004 WL 62223057.

67. Eduardo Cruz, Comment, *When the Shepard Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions*, 19 FLA. ST. U.L. REV. 499, 507-08 (1991).

68. United States Conference of Catholic Bishops, *supra* note 2, Preamble.

69. Cruz, *supra* note 67, at 507.

other therapists.”⁷⁰ The most severe cases can involve hospitalization and suicide attempts.⁷¹

Victims abused by religious counselors are likely to react even more severely.⁷² Drug abuse, depression, suicide and attacks on the attacker have been cited in such cases.⁷³ The damage may affect the victim’s belief in God or his own self-worth. Consequently, “the violation of trust may spur a spiritual crisis in which the victim leaves the church, suffering the ‘loss of pastor, faith and the community of faith.’”⁷⁴ Many victims blame God for violating their sacred trust.⁷⁵ Additionally, the abuse can have a lifelong effect; with some victims citing distress any time they see a priest.⁷⁶

A victim may choose to remain silent or quietly address the abuse for several reasons. Victims and their families may be reluctant to suffer public exposure or damage the reputation of the Church.⁷⁷ Other victims fail to speak out because they fear divine retribution, or give into church representatives who pressure them not to pursue the matter publicly.⁷⁸ Lastly, the prevalent lack of pursuit by civil authorities, the courts and the media only cements the victims’ feelings of helplessness.⁷⁹

Therefore, victims may prefer to resolve their claims using mediation for several reasons. First, mediation is a less costly and less time-consuming alternative to litigation.⁸⁰ Second, mediation can provide more than just a monetary settlement. It can help victims gain the recognition essential for healing, obtain therapy, avoid intrusive background investigations and prevent reliving the trauma in a public trial.⁸¹ More importantly, however, mediation is a flexible

70. *Id.*

71. *Id.* at 507-08.

72. *Id.*

73. *Abuse in the Catholic Church: The Victims*, BOSTON GLOBE, available at <http://www.boston.com/globe/spotlight/abuse/victims> (last visited Oct. 1, 2004).

74. Cruz, *supra* note 67, at 508 (quoting Mary Pellauer, *Sex, Power, and the Family of God: Clergy and Sexual Abuse in Counseling*, CHRISTIANITY AND CRISIS 47, 48 (1987)).

75. *Id.*

76. Robin Washington, *supra* note 61 (citing psychiatry professor Terence Keane and victim Jean Creatty, respectively).

77. Logan, *supra* note 14, at 333.

78. *Id.* at 333-34.

79. *Id.* at 334, fn. 88-89.

80. PETER LOVENHEIM, HOW TO MEDIATE YOUR DISPUTE: FINDING A SOLUTION QUICKLY AND CHEAPLY OUTSIDE THE COURTROOM §§ 2.8-2.9 (1996).

81. Jane Lampman, *Mediating Church Scandals: The Process Can Benefit Both Parties, But Will It Perpetuate Secrecy?*, CHRISTIAN SCI. MONITOR, Jan. 16, 2003, at 02, available at 2003 WL 5250495.

process, and the victim can raise emotional issues that would not be addressed in a more traditional realm, such as litigation.⁸²

B. The Individual Offender/The Clergy Member

A 1993 study showed that almost two percent of U.S. priests are pedophiles, and an additional four percent can be classified as ephebophiles (persons who sexually fixate on adolescents).⁸³ The study hypothesized that approximately half of the afflicted priests had actually acted on their tendency.⁸⁴ However, a more recent survey conducted by the *New York Times* shows this to be a significant underestimate of the actual number of offending priests.⁸⁵ Moreover, although it is commonly believed most victims were teenagers at the time of abuse, forty-three percent of priests have been accused of molesting children twelve and younger.⁸⁶ The *New York Times* survey also projected that the rates will continue to rise as more victims come forward.⁸⁷

C. The Catholic Church

The Church's position is that its first obligation is healing and reconciling the victim.⁸⁸ The Church states that using ADR methods can help avoid costly court battles, assist it in responding more equitably to many victims, and shape a pastoral response to the crisis. However, this directly conflicts with the Church's policy of repentance and lifelong employment for priests.⁸⁹ "[O]nce a man is ordained, he is forever a priest."⁹⁰

82. See LOVENHEIM, *supra* note 80, at § 1.8; for a discussion of drawbacks, see *infra* Part V.

83. Smith, *supra* note 19, at 410 (citing Charles M. Sennott, *Sins of the Fathers: Sex Scandals Involving Catholic Priests*, PLAYBOY, July 1993, at 74, 145-146).

84. *Id.*

85. Logan, *supra* note 14 (citing Laurie Goodstein, *Decades of Damage: Trial of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, §1, at 1).

86. *Id.* at 331.

87. *Id.* at 331-332.

88. U.S. Conference of Catholic Bishops, Office of Child and Youth Protection, *Executive Summary, Compliance Audits, Analysis of the Findings, and Recommendations: Report on the Implementation of the Charter for the Protection of Children and Young People*, Dec. 2003, available at <http://www.usccb.org/ocyp/audit2003/sectionone.htm#1>.

89. David France, *Day of Atonement: The U.S. Bishops Met, Prayed, Argued—and Finally Voted*, Newsweek, June 24, 2002, at 80, available at 2002 WL 7294497.

90. *Id.*

III. FACTORS FOR A "GOOD FIT"⁹¹

Because the peaceful resolution of disputes is a cornerstone of most major faiths, religious organizations have long used mediation to resolve conflicts that threatened their sense of community or their goals.⁹² Facilitative mediation, in particular, is beneficial in highly emotional disputes, such as those involving sexual abuse.⁹³ This particular type of mediation focuses on resolving the dispute, but more importantly, on moving the parties forward.⁹⁴ For example, a proper use of mediation in abuse cases can result in a settlement agreement including an apology or some explanation for why the abuser abused the victim.⁹⁵

Essentially, there are six factors that determine whether mediation will result in a win-win situation.⁹⁶ They consist of the following: 1) the importance of a future relationship between the parties; 2) high stakes for creating a mutually satisfactory solution; 3) mutually dependent party interests; 4) assertive problem-solving by the parties; 5) cooperation in joint problem solving; and 6) the lack of a power struggle.⁹⁷ Not all factors need be present to effect a successful mediation, but the more factors present, the more effective the mediation.⁹⁸

In abuse cases, particularly those involving the Church, several of the criteria fostering a winning solution cannot be met. First, the parties are not likely to seek to continue the relationship, whether by choice or by circumstance. Unlike a husband and wife or a parent and child who, although upset, may want to repair their relationship, the victim and the offending priest usually do not have an investment in continuing the damaged relationship. While the victim may want or need to reconcile his or her relationship with the Church or his or her beliefs, there are other clergy to whom the victim can turn. One rare exception would be a victim who lives in a small town with only one Church or clergy member to whom to turn. In the majority of abuse cases, however, it is unlikely, if not impossible, for the victim to continue the relationship. Thus, therapy is likely of more benefit to the victim than trying to reconcile the relationship with the abuser.

91. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 107 (3d ed. 2003).

92. KOVACH, *supra* note 3, at 293-95.

93. Carol Weigler & Jerod Weigler, *Facilitative Mediation*, 63 OR. ST. B. BULL. 27, 29 (2003).

94. *Id.* at 28.

95. See e.g. LOVENHEIM, *supra* note 80, at § 2.4 (describing how mediation can help when the law cannot provide the remedy sought).

96. MOORE, *supra* note 91, at 107.

97. *Id.*

98. *Id.*

The second criterion of creating a mutually satisfactory solution is more easily met. The victim may want to preserve his or her relationship with the Church, although not necessarily with the abusive priest. Additionally, the Church wants to preserve its reputation in the community. Thus, the parties have high stakes or a large investment in creating a mutually satisfactory solution.

The third criterion of an effective mediation is that parties have mutually dependent interests. In other words, both parties must have an interest in ending the dispute. If only one party is willing to concede, then mediation will be one-sided and likely unsuccessful. The Church abuse cases meet this criterion, as both the Church and the victim want resolution. Another mutually dependent interest may be the desire for privacy. Often, both the Church and the victim seek to avoid public disclosure.⁹⁹ Therefore, the parties seem to meet this third factor quite easily, at least as it relates to privacy and resolution.

The fourth, fifth and sixth criteria are interrelated: the parties must be able to assertively solve problems, cooperate in joint problem solving freely, and cannot be engaged in a power struggle. These factors can be problematic in abuse cases because the victim's ability to challenge the Church may be impaired. As discussed earlier, victims may suffer a loss of self-esteem or fear punishment by God or their congregation.¹⁰⁰ Accordingly, it hardly seems that a party who fears its opponent can engage in equivocal problem solving (the fourth and fifth factors).

In addition, abuse victims may have difficulty confronting their abuser. This is intertwined with the sixth and final factor: lack of a power struggle. Mediation may not be appropriate in disputes where the parties differ in level of reverence, sophistication, or education.¹⁰¹ This is because such an imbalance can present the opportunity for one party to take advantage of the other.¹⁰² In disputes involving an abuser and victim, the abuser has already seized the ultimate power in the relationship.¹⁰³ Although the parties are not involved in a power struggle per se following the abuse, the power struggle has already been waged and won by the abuser. Consequently, it is difficult to satisfy the fourth, fifth and sixth criterion in clergy abuse cases.

99. See *supra* note 67 and accompanying text.

100. Cruz, *supra* note 67, at 507-09.

101. See e.g. KOVACH, *supra* note 3, at 108.

102. *Id.* at 109.

103. See *infra* Part V, Section B.

IV. THE CHURCH'S CURRENT USE OF ADR

A. Mediation, Including Class Mediation

Because of the constitutional concerns regarding the separation of church and state, the Church has taken the position that the most appropriate way to deal with cases of clergy abuse is through independent Church mediation.¹⁰⁴ Others claim mediation is a consequence of the Church's tenets of conciliation and forgiveness.¹⁰⁵ Whatever the underlying reason, the Church has strongly pressed for mediation instead of litigation. For example, when a woman lodged a complaint against a priest, Church officials "specifically promised her that mediation would obviate or render moot any need for her to resort to litigation."¹⁰⁶ The question this statement presents is whether mediation truly gives the victim a fair route to justice.

Although the Church frequently has used its own internal mediation to address complaints of abusive priests, this method has been highly ineffective.¹⁰⁷ As alluded to earlier in this article,¹⁰⁸ the Church has a long history of claiming to act on an allegation, but then "'mediate[s]' the problem by sending the offender for 'treatment' or 'reform' where he gardens and meditates, then is returned in the same capacity, albeit in a different location, preferably one far away from the one in which he was accused."¹⁰⁹

If a mediation involving the victim actually occurs, the Church exerts complete control over the mediations. For example, the Archdiocese of Milwaukee's mediation offer to victims of sexual abuse required two very specific conditions. First, victims had to agree not to have a lawyer present at the mediation. Second, victims had to drop any lawsuits before the mediation would ensue.¹¹⁰ As a result, one victims' organization claimed the Archdiocese was not negotiating ethically.¹¹¹ The organization argued that state court decisions were to blame

104. Juliet William, *Catholics Move Beyond Weakland Scandal; But There is Some Concern that the Milwaukee Archdiocese is Taking Too Long to Resolve Claims of Sex Abuse by Priests*, WIS. ST. J., May 26, 2003, at B1 (quoting Archbishop Timothy Dolan), available at 2003 WL 6346327; see also Tom Heinen, *Dolan Setting Up \$4 M Victims' Fund*, MILWAUKEE J. SENTINEL, Nov. 7, 2003, at 1A, available at 2003 WL 58669700.

105. KOVACH, *supra* note 3, at 295.

106. *Martin v. Howard*, 784 A.2d 291, 301 (R.I. 2001).

107. See Smith, *supra* note 19, at 409-13.

108. See *supra* Part I, Section A, Subsection 2.

109. Smith, *supra* note 19, at 409-13.

110. Rachel Zoll, *Despite Promises, Bishops Still Fighting Lawsuits*, MILWAUKEE J. SENTINEL, May 25, 2003, at 13A, available at 2003 WL 3327466.

111. *Id.*

because they prevented victims from suing the church for failing to curb abusive priests.¹¹²

It is no surprise that the Milwaukee Archdiocese responded by placing the emphasis elsewhere. It stated that at least five victims agreed to the proposed terms and the mediation would attempt “to achieve a holistic sense of healing by focusing on spiritual/pastoral, emotional/psychological and restorative justice issues.”¹¹³ However, as its offer came under criticism, the Archdiocese of Milwaukee decided to institute changes, including “less church control over mediations, more freedom for victims to choose outside mediators and a more formal method of determining how much to pay when monetary restitution is needed.”¹¹⁴ The Archdiocese intended to separate the connection or perception that the mediation was tied directly to the Church.¹¹⁵

The Catholic Church has also employed class mediations, as shown by the Boston abuse cases. As of September 2003, 80-85% of the 552 victims agreed to a class mediation/arbitration for the damages portion of their claims.¹¹⁶ Under the system, victims presented their cases to an arbitrator who determined the amount of damages they recovered.¹¹⁷ The process was condemned by many because the Boston Archdiocese denied any liability as to wrongdoing, although it did apologize to the victims.¹¹⁸

Whether mediation is individual or class-based, it is most effective when the parties can work together on an acceptable solution.¹¹⁹ In order to craft a mutually acceptable solution, however, the parties must be capable of direct communication.¹²⁰ If the parties are capable of standing their own ground, then a neutral mediator can guide the process between them. Without representation or with unequal representation by counsel, power imbalances may occur.¹²¹ Critics claim using mediation at the front end of a dispute, rather than for the damages portion, only helps to hide the information and perpetrators.¹²²

112. *Id.*

113. *Id.*

114. Tom Heinen, *Changes Seen in Sexual Abuse Mediation*, MILWAUKEE J. SENTINEL, Nov. 6, 2003, at 1B, available at 2003 WL 3040927.

115. *Id.* (quoting Archdiocesan spokesman Jerry Topczewski).

116. Tom Mashberg, *Mediations Imminent in Church Abuse Settlement*, BOSTON HERALD, Oct. 21, 2003, at 008, available at 2003 WL 3040927.

117. *Id.*

118. Joseph Gallagher, *Plaintiffs Victimized by Terms of Church's Sex Abuse Settlement*, BOSTON HERALD, Jan. 4 2004, at 020, available at 2004 WL 57709304.

119. Weigler & Weigler, *supra* note 93, at 27-29.

120. *Id.* The creativity and relevance of solutions has been cited as the most satisfying aspect of the resolution for participants. *Id.*

121. KOVACH, *supra* note 3, at 109.

122. Lampman, *supra* note 81, at 02.

B. Arbitration

The Church has also offered binding and non-binding arbitration as a procedure for resolving abuse cases.¹²³ Use of this method is not as prevalent because the Church does not want its officials forced into a decision or “exposed to a program that can arbitrarily overturn [their] decision and cause them to lose face in a public way.”¹²⁴ While the Church views arbitration as a necessity, it is a clearly second to mediation for settling or resolving a case.¹²⁵ As one mediator for the Seattle Archdiocese has written, “It is far better to encourage a settlement and negotiate [a dispute] in good faith, as you can do through mediation. So, while I have the procedural authority to require an arbitration, I rarely do it.”¹²⁶

C. The Due Process Program

The Seattle Archdiocese has adopted a “Due Process Program,”¹²⁷ which processes and resolves claims of clergy misconduct.¹²⁸ As the program’s founding attorney/mediator states, “[i]n this kind of case, I act not as a mediator but as a compassionate claims manager.”¹²⁹ In the Due Process Program, a panel of attorney mediators is available for those claiming to be abused or harmed by any priest or clergy member.

V. POTENTIAL DISADVANTAGES OF MEDIATION AS EMPLOYED BY THE CHURCH

A. Privacy

In sexual abuse cases, privacy is usually a key issue for both the victim and the offender. The victim chooses not to broadcast that he or she is a victim, while the offender obviously wants to remain anonymous. Moreover, any information discovered by either side and filed with or brought into court becomes a matter of public record. In the current environment, the media is quick to publicize the “juiciest” details they discover, as this type of material tends to

123. Jessie C. Dye, et. al., *Intra-Church Dispute Resolution*, 38 CATH. LAW. 133, 137-38 (1998). Ms. Dye is an attorney and mediator in Seattle, Washington. *Id.* Ms. Dye established the Due Process Program at the Archdiocese of Seattle in 1985. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* (quoting Jessie C. Dye).

127. *Id.* at 138.

128. Dye, et al., *supra* note 123, at 138.

129. *Id.* at 137 (quoting Jessie C. Dye).

bring in higher ratings. Sex scandals always sell, and if stories incriminating the sanctified Church are involved, the story will sell all the more. Thus, privacy appears to be a common goal of both the victim and the Church.

Currently, mediations and all that occurs within mediations remain confidential.¹³⁰ Because mediation is a private process, however, problems can arise. While mediation protects sexual abuse victims, it can have the parallel, yet detrimental, effect of shielding the offender. In sexual abuse cases, the Church benefits from this confidential process while the public suffers. Mediators are prohibited from disclosing any information regarding the mediation, other than the fact that the parties were present.¹³¹ This results in a lack of knowledge to the public, thereby placing it in a position where it is unaware of a potential danger for which it cannot prepare nor protect itself. Unfortunately, the Church has been unwilling to forego confidentiality for fear that its internal documents might go unsealed or that further scandal will ensue.

Another worry related to the absolute confidentiality of mediation is that one or both parties may make misrepresentations.¹³² Because nothing about mediation is publicized, a party may take advantage of the situation and make deceptive or fraudulent statements. This is of concern because the other party may rely on such statements, and without evidence of what actually took place, it is practically impossible to prove breach of contract or fraud.¹³³ Another issue stemming from the confidential nature of mediations is the difficulty of monitoring mediator conduct. Consequently, parties asserting mediator misdeed or malpractice would have difficulty seeking legal recourse without evidence of what transpired during the mediations.¹³⁴

Privacy appears to be a common goal of the parties, but more harm than good seems to come from the Church's use of the privacy shield. I am not sure there is any good way to resolve this conflict other than to record mediations in some format or make mediations part of the public record. This proposal, however, destroys the very tenet that the parties seek through their use of mediation.

B. Imbalance of Power

The imbalance of power causes the most concern in abuse cases because the abuse has arisen from, and is cemented in, an imbalance of power. The abuser has a certain influence over the victim, which is apparent from the abuse itself. Accordingly, abuse cases can be difficult to deal with in mediation. Thus, the

130. KOVACH, *supra* note 3, at 178-79.

131. *Id.* at 178.

132. *Id.* at 179.

133. *Id.*

134. *See id.* at 180.

question is whether mediation can be an effective and just resolution in abuse cases.

The answer depends upon the present level of coercion or intimidation in the relationship between the abuser and the victim.¹³⁵ With spousal abuse, for example, the abusee may have been able to separate from and/or divorce the abuser and heal himself or herself enough to become a separate entity. However, when clergy enter the picture, the relationship becomes less separable and more intertwined due to the clergy's perceived pre-eminence. The mere position of the priest or clergy member is already an elevated one because many parishioners regard clergy as a direct route to God. Thus, an imbalance of power is inherent in clergy abuse cases. Children and fervent believers, of course, are the most susceptible. While the Church may attempt to refute this and raise the defense of consent with adults, children are presumed unable to consent.¹³⁶

In addition, the courts have recognized that an abuser's power over the victim can make consent legally impossible in any counseling setting.¹³⁷ As further support, a former priest confessed that "abusive clergy pick out the most vulnerable—children from low income families, children being raised by single mothers, and children who are in the midst of a family crisis."¹³⁸ Thus, the victims are prone to being dominated by the Church or its members.

These examples are simply meant to show that clergy are placed in a position of trust and wisdom that serves to exemplify their eminent status. This results in a power imbalance, with parishioners looking to clergy for advice and counsel. Once a relationship such as this exists, it will be very difficult, if not impossible, for the parishioner to take a stand against the clergy member or the Church. This can lead to the risk that the victim and the victim's family may accept an inappropriate agreement in order to appear cooperative or to abide by the Church's decree. Such cooperativeness is compounded in a setting that the Church has arranged. In the majority of mediations, the Church has chosen (or even worse, controls) the mediator and does not allow victims to have an advisor or attorney present at the mediation.¹³⁹

135. Kathleen O'Connell Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 *MEDIATION Q.* 303, 313 (1990).

136. James T. O'Reilly & JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 *ST. THOMAS L. REV.* 31, 61 (1994).

137. *Id.* (citing *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), cert. denied, 114 S. Ct. 2153).

138. Brittany Reid, Comment, "*If Gold Rust*": *The Clergy Child Abuse Scandal Demonstrates the Need for Limits to the Church Autonomy Doctrine*, 72 *MISS. L.J.* 865, 883 (2002).

139. See e.g., *supra* notes 104-05 and accompanying text.

To discover means of mediating abuse cases and resolving the obvious power imbalance, we may look to the small niche involving mediation of domestic violence disputes. Because “mediation by definition is adaptable to meet the individual needs of the negotiating parties,” the mediator can customize the process to serve the best interests of the parties.¹⁴⁰ Using shuttle mediation or telephone conferences to keep the parties separated are feasible remedies.¹⁴¹ Another alternative is to help the parties set ground rules and consequences for breaking those rules, such as terminating the mediation.¹⁴² Other suggestions include positioning the victim by the door to expedite escape or allowing the victim to be accompanied by a friend.¹⁴³ Using techniques such as these, the mediator can adapt the process to protect and empower the victim.¹⁴⁴ Domestic violence mediators are often specially trained to balance any power differentials between the parties.¹⁴⁵ Thus, if mediation is to be effective, the mediator must strive to place the parties on equal footing. However, since the victim has succumbed at least once before, this might be an uphill battle. In fact, many experts have asserted that mediation is completely inappropriate in abuse cases.¹⁴⁶

C. Lack of Procedural Safeguards and Comprehensive Standards

One of the most concerning issues is the lack of procedural safeguards mediation offers. Because mediation is private and the process is flexible, there are no procedural safeguards. Thus, if the mediation is to fail and the parties choose to go to court, the information revealed in the mediation may assist the opposing party in its defense.¹⁴⁷ Furthermore, it has been noted that forcing parties to mediate with each other can be detrimental, especially when counsel does not represent the parties.¹⁴⁸

Another hurdle is that no universal licensing or regulation of mediation or mediators exists. This can lead to an uncertainty of process. At the extreme, a poorly mediated process can be disastrous, polarizing the parties and ruining any good faith or trust they placed in mediation.

A potential solution seems fairly easy to achieve in this area. It falls to practicing mediators to draft and approve a universal licensing or regulation of mediation. The solution seems to be to create guidelines (at the least) or com-

140. Holly Joyce, Comment, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIM. LAW. 447, 456-57 (1997).

141. *Id.* at 457.

142. *Id.*

143. KOVACH, *supra* note 3, at 278.

144. Joyce, *supra* note 140, at 457.

145. *Id.* at 458.

146. KOVACH, *supra* note 3, at 277.

147. LOVENHEIM, *supra* note 80, at § 1.10.

148. KOVACH, *supra* note 3, at 108.

prehensive standards (preferably) for dealing with disputes that are as sensitive and potentially damaging as abuse disputes.

D. Neutrality

There are several competencies, training and standards of ethics regarding the role of the mediator.¹⁴⁹ The mediator should promote understanding between the parties, focus them on exploring their interests rather than maintaining a position, shift the interaction to a collaborative one and help the parties creatively seek a resolution tailored specifically for their situation.¹⁵⁰ Because the resolution depends in part on the mediator's impartiality, it is vital that the mediator be truly unbiased.

Neutrality is of utmost importance in reaching a fair agreement, and, subsequently, in the parties' perception of the mediation process.¹⁵¹ Any past or potential relationship the mediator may have with the parties can taint his or her neutrality.¹⁵² For instance, in the informal setting of mediation, prejudicial attitudes are more prone to arise.¹⁵³ The mere perception of bias may arise from prior dealings between one party and the mediator.¹⁵⁴ Most damaging are the intensity, frequency, and duration of any prior relationships.¹⁵⁵ As any of these factors increases, the mediator's perceived neutrality is irreparably impaired.¹⁵⁶ Moreover, if one party is a "repeat" player, the mediator may also be prone (even subconsciously) to bias as a result of knowing he or she can secure future business by favoring the repeat player.¹⁵⁷ Because the Church has faced so many suits recently, it has required the repeated use of mediators. More disturbing, however, is that the Church unilaterally chooses its mediator and will not participate unless its chosen mediator is used. Thus, it is hard to fathom that the victims are confident of the mediator's neutrality.

149. Weigler & Weigler, *supra* note 93, at 27.

150. *Id.* at 28.

151. *Id.* at 178.

152. KOVACH, *supra* note 3, at 105. This "repeat player" problem is particularly relevant to mediations involving insurance companies. *Id.* Because of the number of cases that may be brought to mediation involving one company, the insurance company may be able to exert influence over the mediator and affect his or her neutrality. *Id.* This influence may be subtle or more direct by acknowledging the potential of future business for the supposed neutral mediator. *Id.*

153. *Id.* at 108.

154. *Id.* at 156.

155. *Id.* at 156-57.

156. *Id.* at 157.

157. *Id.* at 158.

E. Binding Mediation and the Need for Precedent

It is important to note that mediation is not always beneficial for matters of public policy.¹⁵⁸ Victims often want to establish precedent, and most mediations do not offer the possibility of doing so.¹⁵⁹ In fact, some parties may use mediation as a way to avoid precedent.¹⁶⁰ Mediation agreements do not offer a position on or explain why one party is right and one wrong.¹⁶¹ Therefore, a dispute resolved in mediation has no effect on the parties to any other dispute, even if the disputes are similar.¹⁶² While binding mediation is an option, it might be devastating to the victim, especially if a mediator chosen by or employed under the auspices of the Church renders a favorable decision for the Church.

This problem is similar to the privacy problem in that the solution to prevent such a scenario seems to be to open mediation to the world. For example, the mediation process could be open to the public, as are most trials. Again, however, this remedy defeats one of the very purposes of mediation (that of privacy).

F. It is Too Early in the Process

In order to reach a fair settlement, both parties must possess enough information to be able to gauge what their positions are.¹⁶³ However, if pushed to mediate too soon, one or both parties may not have all of the facts, and thus, may be placed at a significant disadvantage.¹⁶⁴

One feasible solution is that mediation could wait until a suit has been filed. The disadvantage again, however, goes to privacy and the protection afforded by mediation.

VI. CONCLUSION

The Church's long-standing policy of asylum is of concern when resolving disputes privately comes into play. Only recently has evidence of the Church's secrecy come to light, which in turn, makes suspect its methods of resolving disputes internally and privately. The examples of private mediation by the Archdioceses of Boston and Milwaukee demonstrate that the Church has not

158. Dye et al., *supra* note 117, at 137-38.

159. KOVACH, *supra* note 3, at 110. Binding mediation is binding on the courts. *Id.* When the parties come to an agreement in binding mediation, the courts may not overrule that decision. *Id.*

160. *Id.*

161. LOVENHEIM, *supra* note 80, at § 2.11.

162. *Id.*

163. *Id.* at § 4.4.

164. *Id.*

changed its policy, although it claims the contrary. Thus, not only do the victims continue to suffer, but the public is harmed as well. Nevertheless, while a cure-all solution seems difficult to achieve, with continued discussion and work by those affected, a better remedy seems attainable.

