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Raymond C. O'Brien

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Clergy, Sex and the American Way

Rev. Raymond C. O'Brien*

* Roman Catholic priest of the Archdiocese of Washington; Professor of Law, The Catholic University of America, Columbus School of Law; Visiting Professor of Law, Georgetown University Law Center.

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I. INTRODUCTION

The sexual abuse of minors by Roman Catholic clergy affected not only the largest institutional church in America, but through association, all clergy and the institutions they represent. Because the abuse was so widespread, so horrendous, and so clandestine, it affected the long-standing constitutional church-state harmony evidenced in the myriad of legislative, judicial, and public policy pronouncements so replete in the fabric of this country's democracy.¹ Resolution of the sexual abuse scandal has repercussions upon religion's secular relationship with America and these repercussions will last longer than the resolution.

The chronology of the crisis within the American Catholic Church, what happened to the victims and the priests and the response of the bishops and the laity, is the subject of this Article. This chronology prompts repeated references to the media, books, magazines, and newspapers, a significant factor in the development of the scandal. Indeed, how the crisis was identified by the American media, then addressed by the American civil and criminal courts, and characterized by American legislatures is the underlying focus of this Article. But the specific question that this Article addresses is whether the *Charter for the Protection of Children & Young People*² and the *Revised Norms*³ adopted by the American bishops and approved by the Vatican for a probationary period will restore the mutually supportive relationship between church and state in America. To provide such a restoration, the *Charter* must address the legal issues raised by the scandal in a fashion that establishes accountability by the American bishops.

Heretofore, the church-state relationship was unique among the nations of the world, mutually supportive and a model for religiously pluralistic societies. This is the American way. The relationship was built upon trust and mutually recognizable goals of non-establishment, free exercise, ascendant achievement, full participation, and respect for the rule of law. Church and state cooperated; there was an absence of rancor brought on by isolationism and mutual condemnation. Nonetheless, when so many of America's Roman Catholic bishops, often upon the advice of attorneys, and with the best of intentions of supporting errant priests and honoring theological bonds, authorized confidential agreements and repeated reassignment of known offenders, trust was broken. It appeared as if the Church had isolated itself from the state's concern for children, an isolation

1. For a partial chronology of the sexual abuse by Roman Catholic clergy, see *Chronology of Church Abuse Crisis*, AP ONLINE, Dec. 13, 2002, available at 2002 WL 103844192.

2. U.S. CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN & YOUNG PEOPLE (2002), http://www.usccb.org/bishops/charter_final.pdf [hereinafter CHARTER].

3. U.S. CONFERENCE OF CATHOLIC BISHOPS, ESSENTIAL NORMS FOR DIOCESAN/EPARCHIAL POLICIES DEALING WITH ALLEGATIONS OF SEXUAL ABUSE OF MINORS BY PRIESTS OR DEACONS (2002), <http://www.usccb.org/comm/compare.htm> [hereinafter REVISED NORMS].

which appeared arrogant and even sinister. Concomitantly, civil authorities restricted free exercise and asserted civil and criminal rules of law to hold the bishops accountable. At the same time, there was an unprecedented challenge from Catholic laity, women and men in the Church pews, demanding accountability from their bishops and signaling a dissatisfaction that reaches deeply into the Church's structure, mission, and message.

This Article concludes that the *Charter* and the *Revised Norms* must initiate a process of contrition and accountability on the part of the American bishops. Looking to what happened, the Church documents demonstrated a plan of accountability, responding to the following elements of the crisis: bishops' isolation from victims, confidential agreements, continuing to place children at risk, failure in themselves and their advisors to admit that errant priests were not ill but bad and must be punished, and personnel decisions protected by the First Amendment but contributing to abuse. And then, focusing on the future, the documents must demonstrate a renewed level of openness and respect for the rule of law in America. Perceiving that the bishops have no respect for the law, civil authorities have taken the initiative in revoking some of the Church's privileges; the review of priest personnel policies in the diocese of Manchester, New Hampshire by the state's attorney general would be an example. The Church documents must signal a willingness to return to a respect for the interaction between American public policy and the goals of any religious institution.

The *Charter's* incorporation of a broad definition of sexual abuse, as well as the increased lay participation on the diocesan and national review boards and the Office for Child and Youth Protection, offer promise, as with any nascent effort, the bishops are responsible for cooperation with the goal of accountability through lay participation. The documents must initiate complete cooperation with civil and criminal authorities to exhibit accountability; having surrendered religious deference, the bishops may not now claim distinctions based on status. The *Charter's* procedure for assessing allegations of sexual abuse of minors is simple, but there are many facets yet to be explained and eventually implemented. Specific elements are identified in this Article, but upon the bishops rests the responsibility for implementation. The use of canon law, the law of the Church, is not and cannot be an obstacle for full and complete observance of constitutional and civil laws; such as due process, privacy, equal protection and free exercise of religion. Instead, it is incumbent upon the bishops to accommodate American law into the enforcement of the goals of the *Charter* and *Revised Norms*. If canon law becomes a symbol or a tool of isolationism, secrecy, or clericalism, then the repair of the American church-state model will be unattainable. Trust between the Church and the state was a casualty of the scandal, and secrecy must be replaced with the cooperation that had been a hallmark of the Church in America. And lest it be forgotten, in America the media—most notably the *Boston Globe* in this particular instance—is a force to be acknowledged. It is a unique facet of modern public life in America that nothing is secret, be it occurring in the Oval Office or the Archdiocesan Chancery.

Part I of the Article discusses the two hundred year history of the Roman Catholic Church in America. Internationally the Church has over a billion members, but the American Church has distinctive characteristics that have allowed it to prosper and serve as a model for other nations. Growth, involvement, wealth, and a nexus between being American and being Catholic evidenced by cooperation with civil authorities are among the characteristics. The *Charter* is now a marker in that history. Part II examines what happened to bring about the crisis of the sexual abuse of minors by clergy. In spite of the horrific acts committed against victims by priests, the public focus was always on the bishops and their role in the scandal, specifically the failure of internal policing, of accountability, and of consistency between the message of the Church and the persons in authority. Part III analyzes the bishops' response to the scandal, the adoption of the *Charter* and the *Revised Norms* that implements the *Charter's* goals. The bishops' response seeks to accommodate secular legal standards with the canon law of the Church regarding treatment due the clergy. But the overriding objective is the accommodation of openness, accountability and assurance that the offense will not be countenanced again, and furthermore, that the Church renews its partnership in the church-state dialogue. If canon law procedures are viewed as, or actually become, an effort to return to clericalism, clerics supervising clerics with even the perception of secrecy, the goals of the *Charter* will fail and the Church will face stricter state scrutiny. But canon law may be accommodated within secular standards of definitions, preliminary investigations, reporting, standards of proof, statutes of limitations, and judgment. Analysis is provided in this article. One suggested model derives from lessons learned from the procedures developed in an effort to combat domestic violence in the United States. Finally, Part IV examines the laity's response to the crisis. The Second Vatican Council, occurring from 1962-1965, invigorated the role of the laity so that millions of men and women serve in parish, diocesan, and archdiocesan activities in addition to contributing funds and receiving the sacraments. In response to the crisis, some of these men and women have formed organizations and want to be a part of any solution, concluding that their participation should extend to every level of the organization. Such lay efforts are a challenge to some bishops and others in authority, not just in reference to addressing the abuse crisis, but also extending into doctrinal issues.

II. THE AMERICAN WAY

America is unique among the nations of the world. It is an open society as is evidenced by the media blitz accompanying the revelations of sexual abuse by American priests. News stories concerning sexual abuse, initiated

by the *Boston Globe*,⁴ quickly became headlines in most major cities and the preamble of articles in such media stalwarts as *Vanity Fair*⁵ and *The New Yorker*.⁶ Nevertheless, the stories also responded to another facet that makes America unique in spite of what television, movies, and our music may portray: America takes sexual abuse of minors very seriously. Federal and state governments have coordinated efforts to prosecute child neglect, abandonment, and abuse, with increasing attention paid to child sexual abuse. Registration of convicted child sex offenders under Megan's law, so as to alert the public of the presence of offenders, is only one example of those coordinated efforts.⁷ Additionally, there has been increasing vigilance in the prosecution and prevention of abuse in intimate relations between adults under the aegis of domestic violence legislation. Thus, sexual abuse of minors by clergy in America occurs within the panoply of these aspects of American society, and whatever is decided as the proper remedy for errant priests must take into account the evolving body of secular law directed towards the protection of children and adults in abusive situations. Precisely put, any fair response to the sexual abuse of minors in America by clergy, must take into consideration the fact that America's sophisticated prosecution of sexual abuse is unique among nations and provides a backdrop for the crisis involving sexual abuse by American priests.

A. Church and State

There is a lengthy history of cooperation and consideration between the Roman Catholic Church in America and secular authorities. From the consecration of its first bishop, John Carroll, on August 15, 1789, the same year George Washington was inaugurated the first president of the United States, the Church made a fervent effort to balance its allegiance to Rome with uniquely American ideals of pluralism, independence, initiative, and integration.⁸ Unlike European branches of the Church that pursued and supported hegemony, American Catholics originated as an oppressed minority and evolved into an integrated presence. Characterizing the American dream, economically-driven immigrants from places such as Ireland, Italy, and Germany, primarily settled in urban areas and formed a

4. James L. Franklin, *Sex Abuse By Clergy Called Crisis For Churches*, BOSTON GLOBE, July 17, 1991, at 11.

5. See, e.g., Leslie Bennetts, *Unholy Alliances*, VANITY FAIR, Dec. 1991, at 224.

6. See, e.g., Thomas Keneally, *Cold Sanctuary: How the Church Lost Its Mission*, THE NEW YORKER, June 24, 2002, at 58.

7. States have been increasingly vigilant in requiring that convicted sex offenders register within the state and the courts have found such registration to be constitutional. See, e.g., Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 (2003) (concluding that the Due Process Clause did not entitle offenders to a separate hearing to determine if they were currently dangerous before being included on the sex offender registry); Smith v. Doe, 538 U.S. 84 (2003) (holding that Ex Post Facto Clause was not violated by Alaska's Sex Offender Registration Act's retroactive application); A. A. v. New Jersey, 341 F.3d 206 (3d Cir. 2003) (finding that a state law making the home addresses of convicted sex offenders available to the public via the Internet to be constitutional).

8. See generally JAY P. DOLAN, THE AMERICAN CATHOLIC EXPERIENCE 101-24 (1985).

church that spearheaded a social revolution characterized by cross-cultural adaptation. Even with the concomitant construction by the Catholic Church of private schools, national churches, hospitals, social clubs, and neighborhoods,⁹ the First Amendment's prohibition against establishment of religion prevented dominance by any religion and necessitated social interaction in the political and mercantile arenas.¹⁰ Recognizing that they could not isolate themselves and prosper, Catholics participated in established political parties, joined multi-cultural labor unions and bought and sold in the public marketplace. By sheer weight of numbers many organizations became dominated by Catholics, but there was an absence of a need to remain isolated and confrontational, as was often the case in Europe. This pluralistic interaction, which continues today in arenas such as the courts and legislatures,¹¹ is now decidedly different in tone.

Certainly there has been, and presumably there always will be, bias against the institutional Roman Catholic Church.¹² There has been consistent conflict with its social agenda and constant innuendo about the Church being controlled by the Pope in Rome, set upon a mission of social dominance. The innuendo became more muted with the election of John F. Kennedy in 1960 and the first Roman Catholic president's careful separation of church and state.¹³ But by the 1960s, the Church was a player in American politics, a dynamic builder, an organizer of labor, and a partner in what everyone liked best about America: opportunity. Many Catholic men were barbers and firemen. Catholic women were housewives, but women within religious orders were also CEOs of vast medical, educational, and charitable enterprises long before married women occupied such positions of

9. By 1900 the American Church was served by 12,000 priests and 50,000 nuns; staffing more than 12,000 parishes and missions and 3300 schools. CHARLES R. MORRIS, *AMERICAN CATHOLIC* 114 (1997).

10. See generally JAMES HENNESEY, S.J., *AMERICAN CATHOLICS 184-203* (Oxford Univ. Press, Inc.) (1981).

11. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (permitting a state school voucher program that provided state funds to parents choosing to send their children to private, often religious, schools). Charles M. Whelan, S.J., argues that this interaction within the confines of the First Amendment is what is now needed most of all. See Charles M. Whelan, S.J., *Church, Government and Media*, *AMERICA*, May 27, 2002, at 21.

12. See, e.g., JAMES CARROLL, *THE NEW ANTI-CATHOLICISM* (2003); John T. McGreevy, *The Fog of Scandal: The Sexual-Abuse Crisis in Historical Perspective*, *COMMONWEAL*, May 23, 2003, at 14 (suggesting that a quiet anti-Catholicism within the culture-forming sectors of American society contributed to the crisis).

13. See generally DOLAN, *supra* note 8, at 421-22. Fears that the Vatican controls American public policy are often generated by statements emanating from the Vatican concerning public policy. For example, the Vatican's Congregation for the Doctrine of the Faith issued a statement that Catholic politicians have a duty to oppose the enactment of legislation recognizing homosexual unions. *Vatican Tells Catholic Politicians to Oppose Same-Sex Marriage*, 29 *FAM. L. REP.* 1443 (2003). For an excellent analysis of the interaction between Catholicism and American secular culture, see generally JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY, FROM SLAVERY TO ABORTION* (2003).

authority. Catholics went to war and fought against the country from which their parents or grandparents emigrated; they raised lots of children who dutifully mined the coal and built the railroads, all the while saving money and educating their children so they could “do better.” Thus, the uniqueness of the American Catholic Church was its acceptance of plurality and its zest for America’s opportunity. As a result, the Church eventually earned its place at the table.

Charles R. Morris, in his classic description of the nascent Church, wrote that “[i]ts members shared an outlook on the world that was definably ‘American Catholic’—disciplined, rule-bound, loyal to church and country, unrebelling, but upwardly mobile and achievement oriented.”¹⁴ These characteristics defined a church that would grow to be America’s largest religious denomination by the end of the second millennium. Unique characteristics even found international recognition in a document of the Second Vatican Council,¹⁵ meeting in Rome during 1962-1965, titled: *Declaration on Religious Freedom (Dignitatis Humanae)*.¹⁶ The document provided that, “The right of the human person to religious freedom must be given such recognition in the constitutional order of society as will make it a civil right.”¹⁷ The American model of church and state coexistence, with plurality and interaction, was a departure from past history but now became part of the canon of the universal church. In stark contrast, a mere one-hundred years earlier, Pope Pius IX declared in *Syllabus of Errors* that the Catholic religion was to be the sole religion of the state to the exclusion of all others.¹⁸

The legal consequence of the sexual abuse scandal has had an adverse impact on the relationship between church and state; this is the underlying agenda. The Church, together with other charities, has benefited from an array of legislative, judicial, and public policy protections. Examples of these protections include deference given to the Church through exemption from taxation, doctrines such as charitable immunity from civil suit,¹⁹ limits on monetary awards in civil suits, privilege against reporting or disclosing

14. MORRIS, *supra* note 9, at 133.

15. The Second Vatican Council was called by Pope John XXIII in 1962 and ended in 1965 under the pontificate of Pope Paul VI. Twenty-nine hundred bishops and priests attended from throughout the world, hence its description as ecumenical. See generally VATICAN II REVISITED (Alberic Stacpoole, ed., 1986).

16. VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 799-812 (Austin Flannery, O.P. ed., 1975).

17. *Id.* at 800.

18. PAUL JOHNSON, A HISTORY OF CHRISTIANITY 392-93 (1976).

19. See generally Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219 (2000) [hereinafter *Tort Liability*]; Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1 (1996); James T. O’Reilly & JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31 (1994); Mark E. Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADVOC. 289 (1993); JEFFREY R. ANDERSON, *Visiting the Sins of the Fathers Upon the Church*, in TORT LIABILITY FOR CHARITABLE, RELIGIOUS AND NON-PROFIT INSTITUTIONS 11-20 (1992).

certain communications in criminal prosecution, and other more subtle acts of deference provided by legislators and bureaucracy. Because the Church's interaction with America is so important in the perspective of the universal-international-church, the consequences of any response to the sexual abuse scandal by American Church leadership will have international effects in the way religious denominations address the issue in other countries. And nationally, the more deference erodes in America, the more difficult it will be for religious institutions to have a place at the table and the more difficult it will be for the Church to have a prophetic voice in America's affairs.²⁰

The Church takes pride in its ability to voice concern over topics such as welfare reform, world peace, hunger, homelessness, and AIDS.²¹ This voice, although often ignored or repudiated, was nonetheless expected and even appreciated. It was a part of the American way of free exercise, free expression and commonality of purpose. There are reasons to think that the uniqueness of the American Church results from its wealth: "None of the so-called Catholic countries of Europe and Latin America can match the activism, wealth, and dynamism of the American Church."²² But the uniqueness results not from wealth alone, rather from the legal and public policy status of the Church, as a "player," an advocate, a doer. This status is what is at stake. Commentators on the crisis saw the decisive action of the bishops at their summer 2002 meeting in Dallas, Texas, adopting the new *Charter*, as the "beginning of accountability" to "the people in the pews"²³ and to those outside the Church who provide the legal and public policy status. If the *Charter* was bold in its proclamation of zero tolerance it was born of a necessity to recommit to the public policy of America, to restore the status lost. If that status is diminished because the Church fails to make itself accountable and implement a policy that conforms with civil law, then federal and state legislatures will apply their own strictures, resulting in a

20. See, e.g., David Yamane, *The Bishops & Politics: Has the Scandal Stilled the Church's Voice? Don't Believe It*, COMMONWEAL, May 23, 2003, at 17-20. Additional authors have written on the scandal and the consequences for the Church. See, e.g., JIM NAUGHTON, CATHOLICS IN CRISIS (2003); MICHAEL H. CROSBY, THE DYSFUNCTIONAL CHURCH (2003); JAMES CARROLL, TOWARD A NEW CATHOLIC CHURCH (2003); PHILIP JENKINS, THE NEW ANTI-CATHOLICISM (2003); CARL E. OLSON, WILL CATHOLICS BE LEFT BEHIND? (2003); GARRY WILLS, PAPAL SIN (2003); EUGENE KENNEDY, TOMORROW'S CATHOLICS/YESTERDAY'S CHURCH (2003); PETER STEINFELS, A PEOPLE ADRIFT: THE CRISIS OF THE ROMAN CATHOLIC CHURCH IN AMERICA (2003); DAVID GIBSON, THE COMING CATHOLIC CHURCH: HOW THE FAITHFUL ARE SHAPING A NEW AMERICAN CATHOLICISM (2003).

21. See generally NAT'L CONFERENCE OF CATHOLIC BISHOPS, U.S. CATHOLIC CONFERENCE, PASTORAL LETTERS OF THE U.S. CATHOLIC BISHOPS, Vol. V (1983-1988) (Hugh J. Nolan ed. 1989); NAT'L CONFERENCE OF CATHOLIC BISHOPS, U.S. CATHOLIC CONFERENCE, PASTORAL LETTERS AND STATEMENTS OF THE U.S. CATHOLIC BISHOPS, Vol. VI (1989-1997) (Patrick W. Carey ed. 1998).

22. MORRIS, *supra* note 9, at 411.

23. E.J. Dionne, Jr., *Rebuked by Rome*, WASH. POST, Oct. 22, 2002, at A27; see also Alan Cooperman, *In Search of Clarity, and Fairness*, WASH. POST, Oct. 21, 2002, at A2.

lessening of the Church's prophetic mandate, a diminished church-state partnership.

B. Adoption of the Charter

When the American bishops adopted the *Charter for the Protection of Children & Young People* at their meeting in Dallas, Texas, they were responding to the American model of accountability, repentance, and restitution.²⁴ The *Charter* expressed the resolve that abuse of children by clergy was not a Church problem to be settled privately, but an American problem that demanded public accountability by the Church. When the Vatican subsequently expressed concern over the *Charter's* lack of due process for the accused and failure to provide universal canonical procedures, one commentator suggested that the Vatican's real concern was that "[t]he American bishops were responding to the child sexual abuse crisis in an almost secular, political fashion: aggressively rewriting rules, publicly confessing fault and acknowledging that they might need outsiders to keep them honest."²⁵ Upon reading this, the impression from outsiders was that the Vatican did not understand that the scandal's nucleus was the failure of the Church's leadership to be accountable, and the fact that the bishops were responding to public clamor was a sign of strength, not weakness. Even subsequent to Vatican approval of the *Revised Norms*, whether the Vatican understands the accountability problem continues to be a topic of discussion.²⁶ At a minimum, the dialogue between American bishops and Vatican officials demonstrates the continuing evolution of the quest for balance in the American Church between allegiance to Rome and allegiance to American pluralism.

That the bishops would include secular reactions to the crisis is not unusual; it is borne of church-state interaction common in American pluralism. For example, the bishops employ many attorneys, media consultants, news conferences, web pages, and a panoply of secular interaction befitting a corporate CEO. The task of the American bishops today is reminiscent of the bishops of yesterday; they must balance the unique dynamism of church and state, from which comes the rationale for zero tolerance of any sexual abuse of minors and the particulars that fashion its adoption. The requirements of being Roman Catholic must be

24. At the Dallas meeting, the bishops heard impact statements from victims of clergy sexual abuse. U.S. Conference of Catholic Bishops, *Restoring Trust: Response to Clergy Sexual Abuse*, at <http://www.usccb.org/comm/restoretrust.htm>. (last visited Sept. 28, 2003).

25. Frank Bruni, *The Vatican Is Rejecting an Erosion of Authority*, N.Y. TIMES, Oct. 20, 2002, at A1 [hereinafter *Erosion of Authority*]. For the text of the letter from the Vatican expressing concern over the policy adopted by the bishops in Dallas, see Letter from Cardinal Giovanni Battista Re, Prefect of the Vatican Congregation for Bishops, to the Most Rev. Wilton Gregory (Oct. 14, 2002) (on file with author).

26. See, e.g., Frank Bruni, *Vatican Decision Could Be Shift or Isolated Case*, N.Y. TIMES, Dec. 15, 2002, at A44 (providing comments from Vatican observers); Laurie Goodstein, *Scandals in the Church: News Analysis: Rebels in the Church*, N.Y. TIMES, Dec. 14, 2002, at A1 (commenting on the after effect of Cardinal Law's resignation).

accommodated within a pluralistic society. History tells us that it is an acceptable option to utilize American procedures such as constitutional prohibition of the establishment of religion.

The bishops may draw upon an extensive array of American laws and opinions that include various definitions of sexual abuse, statutes of limitations, due process procedures, and the extensive powers of lay review boards governing many aspects of the American economy. For example, the definition of child sexual abuse has evolved as states have sought to provide for a child's need for a safe and secure home. Internet pornography and media-induced sexual situations prompt expansion of definitions of sexual abuse from physical contact to interaction with children. So too, state and federal efforts to protect victims from domestic violence have evolved from civil suits in tort and criminal charges of assault and battery, to civil ex parte²⁷ protective orders enforceable interstate; the orders complement criminal statutes and civil liability. But, as with the definition of sexual abuse, the ex parte protective orders have generated due process safeguards including statutes of limitation and standards of proof that are also applicable to issues arising out of the sexual abuse of minors by clergy.

The current scandal involving sexual abuse of minors had its beginning in January 2002 with reports in the *Boston Globe* about a former priest, John T. Geoghan.²⁸ Repeated abuse by priests and church employees and the retention and reassignment of them by bishops and church superiors have occurred and been reported before.²⁹ But this crisis seems different. For one thing, the *Boston Globe* published nearly three hundred stories in a very short period of time about clergy sexual abuse.³⁰ Among other distinguishing characteristics, this particular scandal was dominated by the "growing and widespread persuasion that the scandal has occurred not simply because of the moral weakness that touches us all, including bishops, but because there is some underlying systemic cause."³¹ Furthermore, the Church hierarchy failed to address the crisis in a manner that responded to the horror visited upon the victims, a horror dramatized in the media and in meetings with bishops and alleged perpetrators. The American bishops were viewed as duplicitous and contradictory in their expectations of others

27. *Ex parte* refers to the fact that only one of the parties is petitioning for relief. BLACK'S LAW DICTIONARY 661 (4th ed. 1951).

28. Michael Rezendes, *A Revered Guest; A Family Left in Shreds; Church Allowed Abuse for Years by Priest for Years Aware of Geoghan Record; Archdiocese Still Shuttled Him From Parish to Parish*, BOSTON GLOBE, Jan. 6, 2002, at A1.

29. See, e.g., Raymond C. O'Brien, *Pedophilia: The Legal Predicament of Clergy*, 4 J. CONTEMP. HEALTH L. & POL'Y 91, 92 n.4 (1988).

30. Ben Bradlee Jr., *Foreword* to INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (2002) [hereinafter BETRAYAL].

31. John W. O'Malley, S.J., *The Scandal: A Historian's Perspective*, AMERICA, May 27, 2002, at 14-15.

regarding sexual morality and their expectations of themselves and other clerics.

The *Charter*, subsequently adopted by the American bishops, sought to address these unique elements of the sexual abuse scandal that heightened the public's sense that the Catholic Church had lost its way. Somehow, the Church had become a secret society, and the openness of the past was replaced with confidentiality, often protected by claims of First Amendment elitism. The *Charter* was an attempt to restore moral authority, deference, and mutual trust between American secular society and the institutional church. All three remain jeopardized by the sexual abuse scandal, and the media frenzy frames this fact.³²

The absence of deference found focus when, shortly before Christmas 2002, Cardinal Bernard Law submitted his resignation as archbishop of Boston to Pope John Paul II at the Vatican, and it was accepted immediately.³³ In a written statement, the former archbishop wrote, “[t]o all those who have suffered from my shortcomings and mistakes, I both apologize and from them beg forgiveness.”³⁴ The resignation was precipitated in part by a letter signed by fifty-eight archdiocesan priests urging him to resign,³⁵ a vote by a previously supportive lay organization, Voice of the Faithful, asking him to resign; a subpoena issued by the state's attorney general; millions of dollars in judgments; hundreds of pending law suits; and thousands of pages of Church files still to be revealed.³⁶ If the resignation signified anything, it was that in America accountability will come about externally if accountability is not an internal governing principle. This has been demonstrated in the impeachment of presidents, the indictment of corporate executives, and now the resignation of the Roman Catholic cardinal-archbishop of Boston.

Amazingly, the essence of the crisis was not the repeated acts of sexual abuse by clergy, but the repeated failure of the bishops to act decisively to recognize credible accusations, make offenders accountable, and prevent further abuse. The *Charter* was an admission of these failures and a promise to make amends through the institution of lay review boards in each diocese,

32. A statement by Kevin Burke, the Essex County District Attorney, is particularly illustrative: [W]ith assimilation, the average Catholic's need of the church is not social or political, it's moral and spiritual. And this behavior of the church is so at odds with being moral and spiritual. The church's leaders should be worried about a lot of things, but they should be most afraid of the lack of deference now shown them. They should not think that once this scandal fades, people will come running back to them. I know I won't.

Kevin Cullen, *Crisis In The Church; Scandal Erodes Traditional Deference To Church*, BOSTON GLOBE, May 12, 2002, at A1 (quoting Kevin Burke).

33. Victor L. Simpson, *Cardinal Law Resigns Over Abuse Scandal*, AP ONLINE, Dec. 13, 2002, available at 2002 WL 103844217.

34. *Id.*

35. Frank Bruni, *Pope to See Cardinal Law; Prelate's Future is a Topic*, N.Y. TIMES, Dec. 13, 2002, at A28; Daniel J. Wakin, *Scandals in the Church: Brooklyn Diocese; Priests Feeling Emboldened After Boston Clergy's Success*, N.Y. TIMES, Dec. 14, 2002, at A22.

36. See generally Jay Lindsay, *Once Hailed, Law Steps Down in Disgrace*, AP ONLINE, Dec. 13, 2002, available at 2002 WL 103844203.

the National Review Board, and the Office of Child and Youth Protection.³⁷ These official elements signal a bureaucratic openness to clerical-lay cooperation never before present in the supervision of clergy. This is an amazing departure from past procedures. The radical departure by the bishops from policies that generated confidentiality, treatment, and reassignment of errant clergy, and, consequently, millions of dollars of claims against the Church, resulted from a set of circumstances unthinkable to all but a few. The events leading up to the turn-about are important to document.

III. WHAT HAPPENED

Robert Scheer, a syndicated columnist for the *Los Angeles Times* appropriately captured the national mood of the crisis affecting the Church. He wrote, “[n]ever did I expect to feel sorrow and pity for the Catholic Church, yet I confess that I do.”³⁸ This confession suggests the depth of the scandal and its uniqueness. From his perspective as a member of the media, he has been privy to “the almost instantaneous diffusion of news and information about the scandal”, and he has witnessed the public scrutiny in its “aggressiveness, its immediacy and its graphic details.”³⁹ Furthermore, the information surrounding the scandal is not relegated to the status of innuendo. Instead, “boxes and boxes of files, [that are] now in the offices of public officials across the nation,” are open to public scrutiny.⁴⁰ This availability of information is augmented by the assurance that as more priests go to trial for criminal offenses, and as more priests and bishops are subpoenaed before grand juries, sued civilly, or seek defense in defamation suits, more public records will be created from formerly confidential files.⁴¹

Revelations concerning victims, priests, and bishops resulted in two meetings of the bishops—in Dallas, Texas and Washington, D.C.—which left in place a policy that is still being implemented. The media attention created

37. CHARTER, *supra* note 2, art. 9.

38. Robert Scheer, *Flicking Fallen Angels Off the Head of a Pin*, L.A. TIMES, June 18, 2002, at B13. The sentiment of pity is matched by Schadenfreude: “I must admit I have rather enjoyed watching the bishops and cardinals of the Holy Roman Catholic Church squirm under the glare of public scrutiny lately,” writes a psychiatrist-commentator for a Catholic periodical. William Haughton, *Crossing the Line*, COMMONWEAL, June 1, 2002, at 31.

39. O'Malley, *supra* note 31, at 21.

40. *Id.*

41. See, e.g., OFFICE OF THE ATT'Y GEN. OF MASS., THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON 11-14 (2003) (documenting the results of a sixteen month investigation, to include previously confidential files, revealing that 250 priests and other Boston archdiocesan workers are alleged to have sexually abused at least 789 children since 1940); SUFFOLK COUNTY [LONG ISLAND, NEW YORK] SUPREME COURT, SPECIAL GRAND JURY REPORT 171-73 (2003) [hereinafter SUFFOLK COUNTY GRAND JURY REPORT] (investigating the Diocese of Rockville Center, New York, and documenting abuse by specific priests and failure of diocesan officials to take responsibility for their actions).

a tangle of separate but interwoven issues, all clamoring for attention, but all suffused with the questions: What happened? How could children be so brutally victimized? How could priests so talented and so well-liked commit such heinous acts?⁴² And why was nothing done by those who knew about this, such as those responsible for leadership, namely the bishops and religious superiors? Why were there no arrests or indictments? And now, what can all those horrified by the scandal do? Each of these questions is a separate element of the scandal, but each is interwoven into what will come next in assigning accountability in the American legislative and judicial process. Thus, to determine what happened, we examine individually the victims, the priests, and the bishops.

A. *The Victims*

Sexual abuse of children is not a recent phenomenon. Often it is a complement to the most common form of abuse reported, physical and emotional abuse and neglect. But defining child abuse in the separate context of sexual molestation is a recent legal phenomenon,⁴³ which has gained universal application with the adoption of the federal Child Abuse Prevention and Treatment Act of 1974.⁴⁴ The federal legislation required the states to define abuse and neglect, such as physical or mental injury, *sexual abuse* or exploitation, or negligent treatment in a distinctive manner.⁴⁵ This federal statutory mandate resulted in state statutes that grappled with defining sexual abuse of children,⁴⁶ as well as better reporting and differentiation of allegations of physical abuse and neglect. The importance of distinctly defined parameters resulted in part from concern over constitutional safeguards, such as due process, equal protection and privacy rights.⁴⁷ If activities could be adequately defined, there could be criminal prosecution, and in the case of parents or guardians, civil termination of parental rights.⁴⁸ Most often, abuse or neglect occurred in the context of

42. The characteristics of a person who commits crimes of sex abuse upon a child demonstrate that the abuser is often young, trusted by the child, non-violent, intelligent, and defies any stereotype; the abuser also is very likely to have been abused when a minor. See O'Brien, *supra* note 29, at 112-17.

43. See D. Kelly Weisberg, *The "Discovery" of Sexual Abuse: Experts' Role in Legal Policy Formulation*, 18 U.C. DAVIS L. REV. 1,1 (1984).

44. Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-02, 5104-07 (1995 & Supp. 2003).

45. *Id.*

46. See generally John D. v. Dep't of Soc. Servs., 744 N.E.2d 659 (Mass. App. Ct. 2001) (discussing whether verbal sexual contact constitutes abuse); *In Re T.G.*, 578 N.W.2d 921 (S.D. 1998) (discussing failure to protect from sexual abuse); Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479 (1997); Carol S. Larson et al., *Sexual Abuse of Children: Recommendations and Analysis*, THE FUTURE OF CHILDREN, Summer/Fall 1994, at 4, 8-11; David Finkelhor, *Current Information of the Scope and Nature of Child Sexual Abuse*, THE FUTURE OF CHILDREN, Summer/Fall 1994, at 31; Am. Acad. of Pediatrics, *Guidelines for the Evaluation of Sexual Abuse of Children*, 87 PEDIATRICS 254 (1991).

47. See *In re Gault*, 387 U.S. 1 (1967) (establishing constitutional parameters due children).

48. See Larson, *supra* note 46, at 14-15.

interaction between a child and a parent.⁴⁹ For example, if a parent spans his or her child, deprives the child of food or water, or confines the child to a room for lengthy periods of time, is this physical abuse or neglect, or simply appropriate corporal punishment by a parent?⁵⁰ Likewise, if a parent refuses to provide a child with medical treatment and relies instead on a good faith belief in religious spiritual healing, is the child neglected and the parent liable for criminal prosecution if the child is injured or dies?⁵¹ Answers to these questions are affected by defense claims of constitutional privacy and freedom of religion brought on behalf of parents.⁵² States act cautiously in deference to parents and constitutional guarantees.

If it is difficult to adequately define physical abuse and neglect, it is even more so when seeking to quantify sexual abuse of minors as an element of physical abuse and neglect. Because there may be no demonstrable physical evidence of sexual abuse, there are difficulties of proof.⁵³ Often too, there are false accusations made in the context of a custody dispute between parents,⁵⁴ and the child may not be able to describe the abuse sufficiently to merit legal action.⁵⁵ Sometimes many years elapse before a child victim is able or willing to report the allegation,⁵⁶ and there is a failure by the criminal and civil child protection agencies to maintain comprehensive data.⁵⁷ Most often, the abuse takes place in a family setting and is simply not reported because the child does not understand the nature of the activity, fears retribution, or the information is suppressed by another adult family member.⁵⁸ In spite of quantifying difficulties, one study reports that in 1993 there were 330,000 reports of child sexual abuse, and of these 150,000 were substantiated.⁵⁹ Another study estimates that the sexual abuse of children may account for 14% of the total Child Protective Services

49. See *id.* at 11.

50. See, e.g., *In re Morales*, 583 S.E.2d 692 (N.C. Ct. App. 2003) (requiring physical evidence of sexual abuse of a child prior to the introduction of expert testimony that such abuse occurred).

51. See, e.g., *In re D.R.*, 20 P.3d 166 (Okla. Civ. App. 2001).

52. See *id.* (discussing whether the court's decision to remove an epileptic child from her parents was impermissibly based on her parents' religious beliefs).

53. See, e.g., *Adoption of Quentin*, 678 N.E.2d 1325 (Mass. 1997). See generally Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027 (1994); Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. Ill. L. Rev. 691; John E.B. Myers et. al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1 (1989).

54. See, e.g., CAL. FAM. CODE §§ 3027, 3027.1, 3027.5 (West Supp. 2002); *Ex rel. E.A.*, 552 N.W.2d 135 (Iowa 1996).

55. Larson, *supra* note 46, at 7.

56. See generally Sheila Taub, *The Legal Treatment of Recovered Memories of Child Sexual Abuse*, 17 J. LEGAL MED. 183 (1996).

57. Larson, *supra* note 46, at 9.

58. See Finkelhor, *supra* note 46, at 32.

59. See Larson, *supra* note 46.

caseload,⁶⁰ while the National Center on Child Abuse and Neglect states that in 1995 more than one million children were victims of a general classification of substantiated or indicated child abuse and neglect, and 13% of these children involved sexual abuse.⁶¹

Within the panoply of the difficulty of defining sexual abuse, certain statistics about the abuser and the abused are revealed. For example, "one of every seven victims of [child] sexual assault . . . reported to law enforcement agencies [was] under the age of [six]."⁶² Other characteristics of sexual abuse of minors indicate that most sexual abuse is committed by men (90%).⁶³ It is usually committed by a relative or a friend of the child (70% to 90%), and girls (30% to 50%) tend to be victimized by family members more often than boys (10% to 20%).⁶⁴ "The peak age of vulnerability is between seven and thirteen" years-of-age.⁶⁵ Children who are sexually abused often suffer from posttraumatic stress disorder, chronic perceptions of helplessness, danger, guilt, low self-esteem, self-blame, depression, anxiety, anger, and impaired sense of self.⁶⁶ Children may develop avoidance behaviors including amnesia, substance abuse, suicide, indiscriminate sexual behavior, self-mutilation, bingeing and purging, and difficulties in interpersonal relationships.⁶⁷ One researcher states that the most common response of victims is fright.⁶⁸ While these characteristics may signal that sexual abuse of a minor has occurred, often they do not offer substantial evidentiary indices warranting criminal or civil action against a specific individual. The burden of providing the basis for criminal

60. Diana J. English, *The Extent and Consequences of Child Maltreatment*, THE FUTURE OF CHILDREN 39, 44 (1998).

61. NAT'L CTR. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 1995: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (1997), available at www.acf.dhhs.gov/programs/cb/publications/ncands/highligh.htm.

62. Findings from the National Incident-Based Reporting System (NIBRS). This data is based on reports from law enforcement agencies for years 1991 through 1996. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, NCJ 182990, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf>.

63. Larson, *supra* note 46, at 11.

64. *Id.*

65. *Id.* Estimates range between fifty to eighty-three percent that a parent is the abuser. JAMES CHRISTIANSEN, EDUCATIONAL AND PSYCHOLOGICAL PROBLEMS OF ABUSED CHILDREN 22 (1980).

66. John N. Briere & Diana M. Elliott, *Immediate and Long-Term Impacts of Child Sexual Abuse*, THE FUTURE OF CHILDREN: SEXUAL ABUSE OF CHILDREN 55-59 (1994).

67. *Id.* 54, 59-62. *But see* Rands Richards Cooper, *One Boy's Story*, COMMONWEAL, June 1, 2002 at 14, 19. Cooper writes that when he was twelve years-old a priest engaged him in a sexual conversation and his ability to block any physical sexual continuation of that conversation brought him a new sense of power. *Id.* He writes: "A priest's transgression brought me through a door into a room where I saw things and understood. Desire. Deception. Power. Strategy. Sin. The insistence of need, and the deeply mixed nature of all personal transactions." *Id.*

68. K. PLUMMER, PEDOPHILIA: CONSTRUCTING A SOCIOLOGICAL BASELINE, ADULT SEXUAL INTEREST IN CHILDREN: PERSONALITY AND PSYCHOPATHY 221 (Mark Cook & Kevin Howells eds. 1981).

prosecution falls initially upon the state legislators and the manner in which they phrase the criminal statutes.⁶⁹

Statutes defining sexual abuse, as with physical abuse or neglect, are more likely to overcome constitutional objections if they include words requiring observable marks or trauma. Examples of demonstrable violence in some objective form includes welts, cuts, bruises, and wounds. Nonetheless, it is rare that violence occurs as part of any sexual relationship between an adult and a child.⁷⁰ Indeed, a child victim may often engage in affection-seeking behavior from an adult, especially when the child cannot obtain a sufficient level of emotional response from an appropriate adult.⁷¹ The child may desire attention because of a marginal family background or a condition that may signal vulnerability.⁷² If the adult-child relationship progresses, the child may acquiesce to further sexual abuse because of fear to displease, fear of rejection, or unwillingness to give up the rewards of compliance.⁷³ The child's acquiescence may be interpreted as consent by an adult, and even as evidence of an intimacy that goes beyond sexual gratification.⁷⁴ But a minor may not consent to sexual activity under the law.⁷⁵ And in practice, the law often states that the prosecution need not prove that the alleged offender knew the age of the child,⁷⁶ thus claims that the minor looked like an adult would be unavailable to the adult involved in a sexual relationship with a minor.

These characteristics of adults and victims of sexual abuse, perpetrators and victims described by researchers, are dramatized in testimony and exhibits collected by the Suffolk County [Long Island, New York] Supreme Court Grand Jury from May 6, 2002 until February 28, 2003.⁷⁷ The *Suffolk County Grand Jury Report* specifically describes eighteen priests, the manner in which each was involved with a child or children, and the reaction of the children to the sexual abuse.⁷⁸ Most of the media attention centered

69. See Larson, *supra* note 46, at 8-9.

70. See O'Brien, *supra* note 29, at 113-15.

71. *Id.* at 115-16.

72. See *id.*

73. See *id.* at 116.

74. See *id.* at 115 n.100.

75. See, e.g., MODEL PENAL CODE § 2.11(3)(b) (2001); D.C. CODE ANN. § 22-3011(a) (Supp. 2003) (stating that neither mistake of age nor consent is a defense to prosecution). Some courts have allowed a minor victim's consent to be a mitigating factor in sentencing. See, e.g., *State v. Rife*, 789 So. 2d 288 (Fla. 2001).

76. See, e.g., D.C. CODE ANN. § 22-3012 (2001).

77. See SUFFOLK COUNTY GRAND JURY REPORT, *supra* note 41.

78. See *id.* at 5-94. See generally Elissa Gootman, *One Prosecutor is Praised, Another Criticized in Priest Abuse Cases*, N.Y. TIMES, Feb. 15, 2003, at B1; Elissa Gootman, *"Not Again" is Reaction of the Faithful*, N.Y. TIMES, Feb. 12, 2003, at B6; Daniel J. Wakin, *Victims Say Report of L.I. Priest Abuse Breaks New Ground*, N.Y. TIMES, Feb. 12, 2003, at B1; Elissa Gootman, *Vindication, and Sadness, at Release of Jury Report*, N.Y. TIMES, Feb. 11, 2003, at B6.

on the alleged abuse of the Rev. Paul Shanley.⁷⁹ Father Shanley is the Boston priest alleged to have abused multiple boys and then repeatedly moved from one parish to another by archdiocesan superiors, protected by confidential agreements and treatment at rehabilitation facilities.⁸⁰ Father Shanley allegedly “always focused on youth—first suburban kids, then juvenile delinquents, runaways, and hippies.”⁸¹ He established a ministry with access to screwed-up kids no one cared about, such as kids who thought they were gay and were fearful of telling anyone.⁸² “When they thought there was no one else to talk to, he was there.”⁸³ One of Father Shanley’s alleged victims, Greg Ford, was later described by his father as having pierced his ear to produce blood, as maintaining a hollow, sickening look, setting fires, writing violent and bizarre stories, attempting suicide, and committing violent attacks on his family in hopes the police would kill him.⁸⁴ Such conduct is associated with victims of child sex abuse.⁸⁵ It was the lawsuit filed by Greg Ford in February 2002, alleging that he was repeatedly raped by Father Shanley in the 1980s beginning when he was six-years-of-age, which forced the release of the archdiocesan files on the priest and contributed to the subsequent expose by the *Boston Globe*.⁸⁶

Allegations against Father Shanley are not isolated to him nor are the characteristics of the victims. The Rev. John Geoghan, alleged to have raped or fondled at least two hundred children, admits “how he would single out his prey, the needy children of poor, single mothers—struggling women who were thrilled to have a man in their son’s lives, especially a priest.”⁸⁷ He had an “unerring radar for the weak and needy.”⁸⁸ The stalking pattern of Father Geoghan occurs repeatedly in descriptions of other molesters of children. What makes these descriptions and the Church’s scandal unique is its extent, “case after case popping up in a dismaying number of dioceses in different parts of the country . . . a shockingly large number . . . in dioceses along the East Coast, the most densely Catholic section of the United States.”⁸⁹ Prior to the recent sexual abuse scandal, there had been periodic sensationalist cases of priests in various parts of the country committing

79. See, e.g., Maureen Orth, *Unholy Communion*, VANITY FAIR, Aug. 2002, at 144.

80. See *id.*

81. *Id.* at 181.

82. *Id.* at 182.

83. *Id.* Dr. Eileen Treacy, a psychologist, provided testimony to the Suffolk County Grand Jury that the first phase of abuse is when an offender establishes himself or herself in a trusted relationship with a child. See SUFFOLK COUNTY GRAND JURY REPORT, *supra* note 41, at 95-96.

84. Orth, *supra* note 79, at 184.

85. Briere & Elliot, *supra* note 66, at 59-62.

86. BETRAYAL, *supra* note 30, at 66-67. Among rape victims less than twelve years-of-age, 90% of the children knew the offender. See LAWRENCE A. GREENFELD, U.S. DEP’T OF JUSTICE, NCJ-163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf>.

87. BETRAYAL, *supra* note 30, at 6.

88. *Id.* at 35.

89. O’Malley, *supra* note 31, at 15.

atrocities upon children,⁹⁰ and occasionally there were stories of ministers and representatives of other religions.⁹¹ But when the *Boston Globe* discovered that the cardinal-archbishop of Boston had assigned a priest to serve in a parish while being aware of credible accusations that the priest had molested two boys, the newspaper initiated an inquiry that sparked similar investigations across the nation.⁹² Victims came forward and in Boston, within the first four months of the investigation and the newspaper's subsequent revelations, five hundred people retained lawyers to represent them alleging they were molested by clergy when they were minors.⁹³ The allegations of these alleged victims and many more resulted in the civil, criminal, and ongoing controversy in which the Church and state remain embroiled. In depositions, Cardinal Bernard Law, then archbishop of Boston, defended the reassignments on the basis of medical opinions that said the alleged pedophile priest was no longer a danger to anyone.⁹⁴

Amidst the sensationalism of the facts surrounding each case it seems clear that when one listens to the victims, victims' advocates, or groups established to support victims, the overriding concern is for accountability.⁹⁵ One quote from the district attorney in Essex County, Massachusetts, made in connection with a visit to a priest to discuss a case of abuse, captures the mood of victims and those concerned about them: "And so I'm sitting there, not only stunned at the level, the position in life, that they held themselves at, but how we in the Church allowed them to do this, that no one was saying, 'Hey, this is wrong.'"⁹⁶

90. See O'Brien, *supra* note 29, at 91.

91. See, e.g., *Canada Caps Abuse Claims Against Anglicans*, N.Y. TIMES, Nov. 21, 2002, at A13 (detailing sex abuse among Anglicans); Kevin Eckstrom, *Presbyterian Church Mulls New Rules in Sex Abuse Cases*, WASH. POST, Oct. 5, 2002, at B9; Bobby Ross Jr., *Couple Is Shunned for Airing Allegations*, WASH. POST, Sept. 29, 2002, at A20 (detailing sex abuse among Jehovah's Witnesses); *Sex Complaints Detailed Against A Former Minister*, N.Y. TIMES, Dec. 4, 2002, at B7 (detailing sex abuse among Presbyterians).

92. See, e.g., Derrick Z. Jackson, *Cardinal Law Should Resign*, BOSTON GLOBE, Jan. 16, 2002, at A13 (detailing the cardinal-archbishop's knowledge of and refusal to act on sexual abuse and molestation accusations).

93. BETRAYAL, *supra* note 30, at 80.

94. Pam Belluck, *Depositions Show Cardinal Was Notified Early of Abuse*, N.Y. TIMES, Nov. 20, 2002, at A16.

95. See, e.g., Alan Cooperman, *Auditors Reexamine Church Sex Abuse*, WASH. POST, May 17, 2003, at A2 (discussing victim's group's support for an auditing plan aimed at cleaning up the Church).

96. BETRAYAL, *supra* note 30, at 129.

B. The Priests

1. Theological Status

Within the Roman Catholic Church, a man enters priesthood through the sacrament of ordination by a bishop.⁹⁷ “[T]he sacramental act . . . goes beyond a simple election, designation, delegation, or institution by the community, for it confers a gift of the Holy Spirit that permits the exercise of a ‘sacred power’ . . . which can come only from Christ himself through his Church.”⁹⁸ Once ordained, “[a]ll priests . . . are bound together by an intimate sacramental brotherhood, but in a special way they form one priestly body in the diocese to which they are attached under their own bishop.”⁹⁹ And, “[t]hrough the ordained ministry, especially that of bishops and priests, the presence of Christ as head of the Church is made visible in the midst of the community of believers.”¹⁰⁰ These principles concerning the nature of priesthood, the unity of priests, and the hierarchy established within the Church offer an insight into the special status preserved for priests and especially, bishops.¹⁰¹ The priest is depicted as exercising the power of Christ in the midst of the people, the Church.¹⁰² This role is unique and is one vested in power and trust.

Pope John Paul II affirmed the unique status of the priest in personal documents.¹⁰³ Specifically, he has written on the training and formation of priests.¹⁰⁴ The Vatican’s Congregation for the Clergy, something akin to a department, reiterates the special status of the priest in evangelization,¹⁰⁵ and the Congregation for Catholic Education offers special guidelines for priestly formation.¹⁰⁶ Likewise, in the United States, the National

97. See generally JOSEPH MARTOS, *DOORS TO THE SACRED* 392-455 (1991).

98. U.S. CATHOLIC CONFERENCE, *CATECHISM OF THE CATHOLIC CHURCH* 384 (1994).

99. *Id.* at 392.

100. *Id.* at 387. Following the clergy sexual abuse crisis in Canada, the Canadian bishops formulated a policy for the selection and formation of candidates to the priesthood. See CAN. CONFERENCE OF CATHOLIC BISHOPS, *FROM PAIN TO HOPE* 33-36, 53-57, 79-80 (1992). This policy suggests “[t]he fact that priests were placed on a pedestal was actually a kind of trap. This contributed to their becoming more and more isolated from the people they served and not developing healthy relationships built on simple friendship—something essential to a balanced humanity.” *Id.* at 37-38.

101. See *CATECHISM OF THE CATHOLIC CHURCH*, *supra* note 98, at 384-92.

102. See *id.*

103. See, e.g., JOHN PAUL II, *I WILL GIVE YOU SHEPHERDS: ON THE FORMATION OF PRIESTS IN THE CIRCUMSTANCES OF THE PRESENT DAY* (1992), available at www.cin.org/jp2ency/pastdabo.html.

104. *Id.*

105. See CONGREGATION FOR THE CLERGY, *THE PRIEST AND THE THIRD CHRISTIAN MILLENNIUM: TEACHER OF THE WORD, MINISTER OF THE SACRAMENTS, AND LEADER OF THE COMMUNITY* (1999).

106. See generally CONGREGATION FOR CATHOLIC EDUCATION, *THE BASIC PLAN FOR PRIESTLY FORMATION* (1970). See also CONGREGATION FOR CATHOLIC EDUCATION, *GUIDELINES FOR THE STUDY AND TEACHING OF THE CHURCH’S SOCIAL DOCTRINE IN THE FORMATION OF PRIESTS* (1988); SYNOD OF BISHOPS, *LINEAMENTA THE FORMATION OF PRIESTS IN THE CIRCUMSTANCES OF THE PRESENT DAY* (1989).

Conference of Catholic Bishops has published many statements on the ordained priesthood.¹⁰⁷ Additionally, individual priests have written or edited books on the formation of priests and development of programs to sustain them in ministry, each ratifying the unique nature of priesthood,¹⁰⁸ how the status is replete with vested power and inviting the trust of parishioners.

Vatican II, an ecumenical council of bishops originating internationally and meeting in the early 1960s, brought bishops from every continent to Rome and a series of declarations were adopted to govern the universal church. One decree specifically focused on the priesthood generally, the *Decree On The Ministry And Life Of Priests*,¹⁰⁹ and one on formation of priests, *Decree on Priestly Training*.¹¹⁰ Another declaration concerned the bishop's pastoral office in the Church.¹¹¹ Because these documents represent the international understanding of the Church, they offer an important insight into the unique relation of the priest and bishop to one another, and to the congregations in the parish Churches. Indeed, all the documents of the Second Vatican Council ratify the priests' responsibilities concomitant with the unique status of the priest. For example:

As ministers of sacred realities, especially in the Sacrifice of the Mass, priests represent the person of Christ in a special way. He gave Himself as a victim to make men holy. Hence priests are invited to imitate the realities they deal with. Since they celebrate the mystery of the Lord's death, they should see to it that every part of their being is dead to evil habits and desires.¹¹²

The documents also recognize the possibility of priestly error. For example,

This presence of Christ in the minister is not to be understood as if the latter were preserved from all human weaknesses, the spirit of

107. See, e.g., NAT'L CONFERENCE OF CATHOLIC BISHOPS, *THE PRIEST AND STRESS* (1982); NAT'L CONFERENCE OF CATHOLIC BISHOPS, *THE MINISTERIAL PRIESTHOOD: JUSTICE IN THE WORLD* (1972); NAT'L CONFERENCE OF CATHOLIC BISHOPS, *STUDY ON PRIESTLY LIFE AND MINISTRY* (1971); NAT'L CONFERENCE OF CATHOLIC BISHOPS, *THE PROGRAM OF PRIESTLY FORMATION* (1971).

108. See generally *THE CATHOLIC PRIEST IN THE UNITED STATES: HISTORICAL INVESTIGATIONS* (John Tracy Ellis ed., 1971); EUGENE C. KENNEDY & VICTOR J. HECKLER, *THE CATHOLIC PRIEST IN THE UNITED STATES: PSYCHOLOGICAL INVESTIGATIONS* (1971); *THE PRIEST AND SACRED SCRIPTURE* (Eugene H. Maly ed., 1972); THOMAS MCGOVERN, *PRIESTLY CELIBACY TODAY* (1998) (stating a description of the positive underpinnings of celibacy); *SPIRITUAL RENEWAL OF THE AMERICAN PRIESTHOOD* (Ernest E. Larkin et al. eds., 1972).

109. POPE PAUL VI, *DECREE ON THE MINISTRY AND LIFE OF PRIESTS* (1965).

110. POPE PAUL VI, *DECREE ON PRIESTLY TRAINING* (1965).

111. POPE PAUL VI, *DECREE CONCERNING THE PASTORAL OFFICE OF BISHOPS IN THE CHURCH* (1965).

112. VATICAN COUNCIL II 887-88 (Austin Flannery, O.P. ed., 1975) (quoting from the *DECREE ON THE MINISTRY AND LIFE OF PRIESTS*).

domination, error, even sin . . . [I]n many other acts the minister leaves human traces that are not always signs of fidelity to the Gospel and consequently can harm the apostolic fruitfulness of the Church.¹¹³

But even though the documents may recognize the possibility of error, clergy formation confirms the necessity of celibacy as a demand so that priests "can more easily devote themselves to God alone, with undivided heart."¹¹⁴ Canon law codifies this perception:

Canon 277 § 1. Clerics are obliged to observe perfect and perpetual continence for the sake of the Kingdom of heaven, and are therefore bound to celibacy. Celibacy is a special gift of God by which sacred ministers can more easily remain close to Christ with an undivided heart, and are able to dedicate themselves more freely to the service of God and their neighbor.¹¹⁵

In an effort to promote holiness and the ability to retain celibacy, the bishop has a special role. "[The bishops] should be solicitous for the spiritual, intellectual, and material welfare of the priests, so that [they] can live holy and pious lives and fulfill their ministry faithfully and fruitfully."¹¹⁶ And if error is detected: "With active mercy bishops should pursue priests who are involved in any danger or who have failed in certain respects."¹¹⁷ In retrospect, the sending of priests to treatment centers upon receipt of allegations of abuse, the maintenance of confidentiality through legal agreements with victims, and the eventual reassignment of the priest to a "fresh start" after purported rehabilitation was grievously wrong. However, at the time and in consideration of the theological issues involved, it seemingly could have been done with the best of intentions.

2. Sacramental Brotherhood

Any review of the conduct of priests in the United States, whether involving sexual misconduct or not, must be placed within the context of these decrees and documents of the Church. The documents reveal a position of trust and status occupied by the priest; he represents the person of Christ. They also reveal the camaraderie existent among priests; each priest enjoys an intimate sacramental brotherhood. Canon law encourages clerics

113. *Id.*

114. *Id.* at 892.

115. 1983 CODE c.277, § 1.

116. POPE PAUL VI, DECREE CONCERNING THE PASTORAL OFFICE OF BISHOPS IN THE CHURCH (1965).

117. *Id.* The Rev. Gianfranco Ghirlanda, S.J., a leading consultant on Church law to several Vatican agencies, stated: "Even if a priest is guilty, the bishop remains the pastor of that priest . . . [T]he first thing a bishop should do is try to [spiritually] recover him." *Vatican Reservations Emerging Over U.S. Direction on Sex Abuse*, AMERICA, June 3-10, 2002, at 4.

to share a common life,¹¹⁸ to have provision made for their incapacity, old age or infirmity,¹¹⁹ and remuneration consistent with their condition.¹²⁰ And finally, the documents stress the sacramental relationship with the bishop and with other priests. The documents structure the role of bishops and religious superiors, defining their responsibility to attend upon and support priests. While providing no excuse—though perhaps a reason—the decrees and documents provide a context from which to address the question most often asked: “How is it possible that bishops who, angry rhetoric aside, are known to be conscientious, intelligent churchmen made the horrendous mistakes some repeatedly made in dealing with wayward priests?”¹²¹ One answer might be that there is a human impulse to support your own. Reverend Andrew Greeley opining on the protection offered priests by bishops, observed that it “has much to do with the propensity of men to stand behind their own kind, especially when they perceive them to be under attack.”¹²²

Likewise, the documents of the Church certainly imply a responsibility for and support of errant priests. This support often took the form of treatment at centers patterned on those providing rehabilitation from alcohol or drug dependency.¹²³ The treatment was provided by known medical experts; it involved distinguished lay medical staff and incorporated expensive and current medical and psychological profiles.¹²⁴ The bishops also operated under the belief common not too long ago in American jurisprudence that sexual abuse was a sickness and could be treated; it was not viewed as a crime warranting punishment.¹²⁵ This treatment, privatized by confidential agreements drafted by diocesan attorneys and recommended to the bishops, enabled the pattern of support, reassignment, and, often, renewal of sexual abuse activity for errant priests.

118. 1983 CODE, c.280.

119. 1983 CODE, c.281, § 2.

120. 1983 CODE, c.281, § 1.

121. Russell Shaw, *Clericalism and the Sex Abuse Scandal*, AMERICA, June 3-10, 2002, at 15. Russell Shaw is the former secretary for public affairs at the United States Conference of Catholic Bishops.

122. Andrew Greeley, *Why?*, AMERICA, May 27, 2002, at 12. Authors continue to suggest reasons why bishops protected priests in the context of sexual abuse of children. See, e.g., John T. McGreevy, *The Fog of Scandal: The Sexual-Abuse Crisis in Historical Perspective*, COMMONWEAL, May 23, 2003, at 14.

123. For an insightful description of the manner in which priests were provided medical evaluation and treatment, see Barry Werth, *Father's Helper: How the Church Used Psychiatry To Care For - and Protect - Abusive Priests*, NEW YORKER, June 9, 2003, at 61.

124. *Id.*

125. See generally *id.*

3. Quantifying Errant Priests

The actions of the priests accused of sexual misconduct, pleading guilty to sexual misconduct, or who may have engaged or still be engaging in sexual misconduct are more difficult to categorize. Church authorities resist efforts to release personnel records on clergy, and grand jury investigations are by law secret.¹²⁶ These factors make quantifying a number of priests as involved in the scandal difficult. Nonetheless, we do know that the number of priests engaging in alleged or proven sexual misconduct is significant.¹²⁷ Estimates are that at least fifteen hundred priests have faced public accusations of sexual misconduct with minors since the mid-1980s.¹²⁸ By April 2002, after sexual misconduct allegations in Boston gained constant media attention, a survey by the Associated Press revealed that “176 priests from twenty-eight states and the District of Columbia had resigned or been removed in cases of sexual abuse.”¹²⁹ The Associated Press now reports that the number of priests removed tops 300.¹³⁰ Some archdioceses have reported individual tallies. In Boston, for example, “the archdiocese would give to prosecutors the names of more than ninety priests who have been accused of abuse.”¹³¹ In Philadelphia, by February 2002, the archdiocese said it had credible evidence that “thirty-five priests sexually abused about fifty children dating back to 1950.”¹³² In Albany, New York, the diocese said that nine of its 450 priests had sexually abused minors during the last twenty-five years.¹³³ And in the Archdiocese of Baltimore, officials released a list of 56 priests and members of religious orders accused of molesting children while serving in the archdiocese during the last fifty years, even

126. See, e.g., Laurie Goodstein, *Diocese Resists Releasing Names of Accused Priests*, N.Y. TIMES, Feb. 28, 2003, at A16.

127. In addition to priests, nine Roman Catholic bishops have resigned since 1990 in the context of sexual abuse: Cardinal Bernard F. Law of Boston (2002), Bishop J. Kendrick Williams of Lexington, KY (2002), Auxiliary Bishop James F. McCarthy of New York, NY (2002), Archbishop Rembert G. Weakland of Milwaukee, WI (2002), Bishop Anthony J. O’Connell of Palm Beach, FL (2002), Bishop G. Patrick Ziemann of Santa Rosa, CA (1999), Bishop J. Keith Symons of Palm Springs, CA (1998), Archbishop Robert F. Sanchez of Santa Fe, NM (1993), Archbishop Eugene Marino of Atlanta (1990). *Bishops Who Quit Amid Sexual Scandals*, N.Y. TIMES, Dec. 15, 2002, at A44.

128. BETRAYAL, *supra* note 30, at 8. A New York Times survey of documented cases of sexual abuse by clergy over the last six decades reveals there were 1,200 priests and more than 4,000 victims. Laurie Goodstein & Anthony Zirilli, *Decades of Damage; Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, at A1. It is important to note that advocates for accused priests suggest that as many as one-third of all claims could not be substantiated. Victims groups say that false accusations are rare, but notable cases of false accusations include the late Cardinal Joseph Bernardin of Chicago and Cardinal Roger Mahoney of Los Angeles. See Alan Cooperman, *Bishops Urged to Halt Lawsuits: Abuse Victims Group Complains About Defamation Cases*, WASH. POST, Aug. 31, 2002, at A13 [hereinafter *Bishops Urged to Halt Lawsuits*].

129. BETRAYAL, *supra* note 30, at 100.

130. *Bishops Urged to Halt Lawsuits*, *supra* note 128.

131. BETRAYAL, *supra* note 30, at 98.

132. *Id.* at 112.

133. Laurie Goodstein, *Albany Diocese Settled Abuse Case for Almost \$1 Million*, N.Y. TIMES, June 27, 2002, at B1 [hereinafter *Albany Diocese Settled*].

though charges may not have been brought against them.¹³⁴ “Their names were posted on the archdiocese’s Web site . . . along with the details about which parishes they served.”¹³⁵ One advocacy group located in Boston, Survivors First, has compiled an Internet data base listing at least 573 priests in the United States who have been accused of sexual abuse since 1996, and another 290 incidents are alleged but the priest is unidentified.¹³⁶

The Attorney General of the Commonwealth of Massachusetts initiated an investigation of the sexual abuse of children by clergy within the Archdiocese of Boston and reported that:

Records produced by the Archdiocese reveal that at least 789 victims (or third parties acting on the behalf of victims) have complained directly to the Archdiocese (including complaints filed through the Archdiocese’s attorneys). When information from other sources is considered – such as groups representing survivors of clergy abuse, plaintiff’s attorneys, media reports, and records from civil suits – the number of alleged victims who have disclosed their abuse likely exceeds one thousand. And the number increases even further when considering that an unknown number of victims likely have not, and may never disclose their abuse to others. [Furthermore], analysis of relevant documents, including those produced by the Archdiocese, documents filed in civil suits on behalf of alleged victims of clergy sexual abuse, and media reports, reveal that allegations of sexual abuse of children have been made against at least 237 priests and thirteen other Archdiocese workers. Of these 250 priests and other Archdiocese workers, 202 of them allegedly abused children between 1940 and 1984, with the other forty-eight allegedly abusing children during Cardinal Law’s tenure as Archbishop of Boston.¹³⁷

Even when dioceses release names or numbers, the numbers of priests involved in sexual abuse can be misleading, especially if a percentage of priests is indicated. For example, if the numbers are based on a long period of time, saying that a certain number of priests were the subject of inquiry, that number needs to be compared with the number of priests serving for that entire time and not just the number of priests serving when the report was released. Using this scale, the number of priests against whom there were

134. Caryle Murphy, *Archdiocese Discloses Accused Priests, Expenses*, WASH. POST, Sept. 26, 2002, at A1.

135. *Id.*

136. Richard N. Ostling, *Some Confused on Church Abuse Plan*, AP ONLINE, Nov. 12, 2002, available at 2002 WL 102592222.

137. OFFICE OF THE ATT’Y GEN. OF MASS., *supra* note 41, at 11-13. See generally Fox Butterfield, *789 Children Abused by Priests Since 1940, Massachusetts Says*, N.Y. TIMES, July 24, 2003, at A1.

credible allegations of sexual abuse of minors as a percentage of those who served suggests 1.6% for the Archdiocese of Philadelphia, 1.8% in the Archdiocese of Chicago, and 2% in the Archdiocese of Boston.¹³⁸

Recognizing the extent of the quantifying problem and the necessity of being accountable, the *Charter* adopted by the American bishops directed that the National Review Board “commission a descriptive study, with the full cooperation of our dioceses/eparchies, of the nature and scope of the problem . . . including such data as statistics on perpetrators and victims.”¹³⁹ To date, the collection of the data has not been without difficulty. The National Review Board commissioned “researchers at the John Jay College of Criminal Justice in New York to compile statistics about the number of abusers and victims, the ages and gender of victims, the treatment and discipline of offenders, and how much the dioceses spent to deal with the problem.”¹⁴⁰ At first, some bishops objected, saying that the study could be used by prosecutors and attorneys suing the Church.¹⁴¹ The reluctance of some bishops to cooperate with the study prompted in part the resignation of the board’s chairman, former Governor Frank Keating.¹⁴² But by spring of 2003, the bishops announced there was agreement on a methodology that would keep the identity of the priest offenders confidential and they agreed to complete the lengthy survey designed for the study.¹⁴³ Eventually it is hoped the survey may reveal accurate quantifying data.

4. Qualifying Errant Priests

Sexual abuse of minors by priests was distinctive in that most of the victims were teenage, post-pubescent and male; therefore the conduct involved is more aptly defined as ephebophilia than pedophilia.¹⁴⁴ There are

138. Stephen J. Rossetti, *The Catholic Church and Child Sexual Abuse: Distortions, Complexities and Resolutions*, AMERICA, Apr. 22, 2002, at 8.

139. *Charter*, *supra* note 2, at 11.

140. Laurie Goodstein, *Bishops Reach Accord With Lay Panel on Abuse Survey*, N.Y. TIMES, June 20, 2003, at A16.

141. *Id.*

142. See generally Daniel J. Wakin, *The Basics; Church. Mafia: Why the Link?*, N.Y. TIMES, June 22, 2003, at Sec. 4, p. 2; Alan Cooperman, *Church Sex Abuse Study to Proceed; Holdout Bishops Agree to Cooperate After Researchers Make Changes*, WASH. POST, June 20, 2003, at A2; Laurie Goodstein, *The Lessons of a Year*, N.Y. TIMES, June 18, 2003, at A1; *Keating Quits Sex Abuse Panel Over Mafia Remark*, WASH. POST, June 16, 2003, at A2; Laurie Goodstein, *Chief of Panel on Priest Abuse Will Step Down*, N.Y. TIMES, June 16, 2003, at A1; Alan Cooperman, *Some Bishops Resisting Sex Abuse Survey; New Lay Review Board Seeks Responses to First Comprehensive Study of Priests' Misconduct*, WASH. POST, June 10, 2003, at A3.

143. Laurie Goodstein, *Bishops Reach Accord With Lay Panel on Abuse Survey*, N.Y. TIMES, June 20, 2003, at A16.

144. See BETRAYAL, *supra* note 30, at 167. There are some exceptions, such as the Worcester, Massachusetts priest convicted of raping or molesting 50 to 100 girls. *Nation in Brief*, WASH. POST, Sept. 23, 2002, at A20. A Brooklyn priest was sentenced “to four months in jail for molesting a 12-year-old altar girl.” Andy Newman, *Priest Gets Four Months in Molesting of Altar Girl*, N.Y. TIMES, Mar. 26, 2003, at D6. Bishop James F. McCarthy of New York resigned after admitting allegations that he had affairs with adult women. Daniel J. Wakin, *Past Adviser to Cardinal O'Connor Resigns After Admitting to Affairs*, N.Y. TIMES, June 12, 2002, at B1. A Washington D.C. priest was removed from his parish after allegations he had kissed and fondled minor girls. Caryle

other dissimilarities between the vast majority of priests accused of sexual misconduct and persons in the general population more commonly known as pedophiles.¹⁴⁵ For example, most of the priests involved did not seem irresistibly drawn exclusively to minors nor did most priests indicate they lacked erotic attractions to other adults. But like many pedophiles, the accused priests were popular, gregarious and outgoing. Often the priest was a social guest of the family of the minor, invited by a parent or parents to take sons on trips or visits, and often a pattern would develop between the minor and the priest to include mutual masturbation, oral sex, anal sex, intercourse, nudity, alcohol, pornography, kissing, and fondling.¹⁴⁶

Because the conduct involved resembles ephebophilia (rather than pedophilia), the issue of homosexuality arises. Rightfully, authorities and commentators question whether the priests were homosexuals and therefore the young male teenagers facilitated sexual release.¹⁴⁷ Thus, the argument follows, by eliminating homosexuals from the priesthood the problem of sexual abuse of minors could be solved. Advocates of this position, eliminating homosexuals from seminaries and ministry, point to the Reverend Paul R. Shanley, one of the more notorious of the alleged perpetrators.¹⁴⁸ He frequented homosexual resorts and bars, and defended homosexual relationships, even advocating man-boy love.¹⁴⁹ Furthermore, advocates of elimination argue that the sheer number of sexual encounters between priests and young adolescent males makes a convincing argument that the sexual encounters were substitutes for, or complement to, adult homosexual activity.¹⁵⁰ It is reasonable then to conclude that eliminating men admitting to, or reasonably suspected of, homosexual orientation would eliminate the abusive conduct. It is also arguable that such a move would demonstrate a commitment to reform on the part of the bishops and gain greater public acclaim. Some in the institutional church are convinced by these arguments.¹⁵¹

Murphy, *Pondering His Fall Within the Church*, WASH. POST, Sept. 15, 2002, at C4.

145. O'Brien, *supra* note 29, at 117-28 (giving descriptions of medical evidence concerning pedophiles).

146. The Special Grand Jury Report of the Suffolk County Supreme Court describes the activities of eighteen priests of the Diocese of Rockville Centre, and each corresponds with this type of behavior. See SUFFOLK COUNTY GRAND JURY REPORT, *supra* note 41, at 5-94.

147. See, e.g., BETRAYAL, *supra* note 30, at 169-71; Greeley, *supra* note 122, at 12.

148. BETRAYAL, *supra* note 30, at 67-68; see also Fox Butterfield, *Accusers Detail Abuse at Hands of a Priest*, N.Y. TIMES, July 22, 2003, at A12.

149. Butterfield, *supra* note 148.

150. See generally *Vatican Document Being Prepared on Ordaining Gays*, AMERICA, Nov. 18, 2002, at 6.

151. *Id.* (suggesting that the Vatican will issue directives against admission of homosexuals to the priesthood during 2003).

For example, Vatican spokespersons state unequivocally that homosexuals cannot be ordained,¹⁵² and Cardinal Adam J. Maida of Detroit has stated that the problem is a homosexual problem and must be addressed in that context.¹⁵³ The Reverend Monsignor Andrew R. Baker, a priest serving in the Diocese of Allentown, Pennsylvania, offers justification on removing homosexuals from the priesthood.¹⁵⁴ He writes that the commitment of homosexuals and heterosexuals to celibacy is "significantly different" since the homosexual is not surrendering marriage, only opting for chastity.¹⁵⁵ And furthermore, Baker states that "homosexuality has disordered [the priest's] sexual attraction toward the opposite sex," negating the spousal relationship between Christ and the Church.¹⁵⁶ But others reject these arguments, suggesting that "[t]he issue is not one of sexual orientation but one of relational integration."¹⁵⁷

For example, Bishop Thomas J. Gumbleton, an auxiliary bishop of the Archdiocese of Detroit, suggests that homosexual priests bring unique gifts of compassion and a deeply prophetic courage.¹⁵⁸ There thus can be no blanket exclusion of homosexuals without adverse consequences to the mission of the Church. Certainly moral traits are surfacing in the details of the life of the late Reverend Mychal F. Judge, the Franciscan priest who served as fire chaplain in New York City and was known to be a celibate homosexual.¹⁵⁹ He was killed in the terrorist attack on the World Trade Center while giving the Church's sacramental last rites to a dead fireman.¹⁶⁰

He was one of the first to minister to AIDS patients in the 1980s, at a time when many of them felt abandoned by the church. He walked around with dollar bills to hand out to the homeless. At all hours of night and day, he rushed to fires, stood by the bedsides of dying firefighters, comforted widows.¹⁶¹

152. BETRAYAL, *supra* note 30, at 169 (quoting Joaquin Navarro-Valls, the Spanish psychiatrist and spokesperson for the Vatican on this matter).

153. *Id.* at 170.

154. Andrew R. Baker, *Ordination and Same Sex Attraction*, AMERICA, Sept. 30, 2002, at 8.

155. *Id.* at 9.

156. *Id.*

157. Jon Fuller, *On 'Straightening Out' Catholic Seminaries*, AMERICA, Dec. 16, 2002, at 8 (Jon Fuller is an AIDS physician who teaches at Boston University School of Medicine, Weston Jesuit School of Theology, and Harvard Divinity School); *see also* Edward Vacek, *'Acting More Humanely: Accepting Gays Into the Priesthood'*, AMERICA, Dec. 16, 2002, at 10 (Edward Vacek is a Jesuit priest, department chair and professor of moral theology at Weston Jesuit School of Theology, Cambridge, MA).

158. Thomas J. Gumbleton, *Yes, Gay Men Should Be Ordained*, AMERICA, Sept. 30, 2002, at 13.

159. Daniel J. Wakin, *Killed on 9/11, Fire Chaplain Becomes Larger Than Life*, N.Y. TIMES, Sept. 27, 2002, at A1.

160. *Id.*

161. *Id.* A group of admirers has established a Web site to promote the cause of his canonization and collect reports of miracles. St. Mychal, *available at* <http://www.saintmychal.com>. (last visited Nov. 02, 2003).

There is a movement in New York petitioning for his beatification, the first step in the process of becoming a saint in the institutional church.¹⁶²

The Reverend Andrew Greeley, author and sociologist, points out that most of the cases of sexual abuse by clergy concern men who were ordained long before the alleged increase in homosexual ordinations,¹⁶³ implying that these older men were not part of a "gay subculture" willing and disposed to commit crimes of sexual abuse.¹⁶⁴ Furthermore, since statistics reveal that the vast majority of persons sexually abusing children in the general population are heterosexual males,¹⁶⁵ simply eliminating homosexuals from the priesthood would be a discriminatory procedure without a rational basis.¹⁶⁶ The Reverend Stephen J. Rossetti, a psychologist and president of a treatment facility for priests and other religious persons makes a credible assessment regarding the discriminatory nature of eliminating all homosexual priests from ministry:

The problem is not that the church ordains homosexuals. Rather, it is that the church has ordained regressed or stunted homosexuals. The solution, then, is not to ban all homosexuals from ordained ministry, but rather to screen out regressed homosexuals before ordination. Preparation for ordination should directly assess the seminarian's ability and commitment to live a chaste, celibate life.¹⁶⁷

Rather than blanket elimination of homosexuals, one can conclude that Father Rossetti suggests a better question is this: why are men who have been so well prepared through many years of study, who have lived together in seminaries and rectories, and taught to follow the strict dogmas of the Church, so lax in personal adherence to the Church's moral code?¹⁶⁸ This question is not lost on the general population used to being lectured by the Church on matters of sexual morality. A commentator for the *Los Angeles Times* captures the irony in the Church's posture as a violator of sexual norms when at the same time the Church is the leading advocate of the

162. *Id.*

163. Greeley, *supra* note 122.

164. *See, e.g.*, OFFICE OF THE ATT'Y GEN. OF MASS., *supra* note 41, app. at 2-1 (providing dates of ordination of priests who graduated from the archdiocese of Boston's St. John's seminary from 1946-1999 accused of sexual abuse and confirming the opinion of Father Greeley).

165. Rossetti, *supra* note 138, at 8.

166. *See, e.g.*, *Nation in Brief*, WASH. POST, September 23, 2002, at A20 (describing allegations against a priest who was convicted of rape and admitted to molesting 50 to 100 girls while assigned to a girl's school).

167. Rossetti, *supra* note 138, at 8.

168. *See, e.g.*, Wakin, *supra* note 142 (tracing the historical tendency to compare the Catholic Church to the mafia); Douglas Montero & Dan Mangan, *Playboy Bishop Quits After Egan Gets Lover's Letter*, N.Y. POST, June 12, 2002, at 9 (describing the resignation of James McCarthy, as pastor and bishop, after an adult woman revealed a twenty-year affair and alleged there were additional women involved).

mandatory nature of those norms.¹⁶⁹ He writes: "The preaching of sexual abstinence, the Church's main weapon in the fight against sexually transmitted diseases and teenage pregnancy, obviously didn't work for highly motivated priests who had taken a vow of celibacy."¹⁷⁰ There are many men who maintain the vow or promise of celibacy honorably, but the sexual abuse scandal demonstrates that there are others who do not—heterosexual and homosexual alike.

Accountability following the revelations of sexual abuse will certainly involve issues other than disciplining of errant priests. One focus will be upon why there is such laxity within a church advocating adherence to defined rules.¹⁷¹ This issue implies an integration of unresolved doctrinal issues with the sexual abuse scandal. Peter Steinfels, a *New York Times* columnist and the author of the book, *A People Adrift: The Crisis of the Roman Catholic Church in America*, uses the phrase "a long list of simmering issues" to categorize homosexuality and other doctrinal matters over which the bishops and significant numbers of Catholic laity have been at odds for some decades.¹⁷² The question posed by Peter Steinfels is this: "[O]n too many big questions, as the sex abuse scandal made so painfully clear, collectively [the bishops] stalled and individually they were silent. Will the hierarchy now be jolted out of that stalemate? Or will the bishops be driven even deeper into it?"¹⁷³

5. Accountability

Commentators on the sexual abuse crisis suggest greater accountability within the institution itself.¹⁷⁴ For example: "Clerics and religious denominations must apply strict measures of accountability. If there is a permissive atmosphere to religious dogmas concerning morality and behavior, these dogmas should be clarified."¹⁷⁵ Priests and bishops may have allowed themselves to become complacent with moral codes through the same devices that allowed further sexual abuse to continue: the confidential agreements, months in rehabilitation, and continual reassignment and promotion of offenders. Those against whom allegations were made were treated, reassigned and later, often promoted to pastor of prestigious parishes.¹⁷⁶ This process of acceptance of errant behavior is not

169. Scheer, *supra* note 38, at B13.

170. *Id.* The Rev. Stephen J. Rossetti suggests that one of the elements fueling the furor over the scandal is the pent up anger over disagreement with Church teaching in the areas of human sexuality. See Rossetti, *supra* note 138.

171. See generally PETER STEINFELS, *A PEOPLE ADRIFT: THE CRISIS OF THE ROMAN CATHOLIC CHURCH IN AMERICA* (2003).

172. Peter Steinfels, *Beliefs: A Time for Bishops to Speak Clearly about a Densely Written Document on Sexual Abuse*, N.Y. TIMES, Nov. 9, 2002, at B6.

173. STEINFELS, *supra* note 171, at 357-58.

174. See generally O'Brien, *supra* note 29.

175. *Id.* at 151.

176. The Reverend Paul Shanley was reassigned to St. John the Evangelist Parish in Newton, Massachusetts, a wealthy parish in the suburbs of Boston, where he was promoted to pastor six years

lost on other clerics and bishops alike. Its radical rejection through the *Charter's* policy of zero tolerance for any form of impermissible conduct was a defining moment.¹⁷⁷

The *Charter* adopted by the American bishops in Dallas does provide clear and well-publicized standards of ministerial behavior, zero tolerance, a single act of sexual abuse, an unlimited statute of limitations in practice through governance by the bishops, suspension from ministry, and permanent dismissal from the clerical state.¹⁷⁸ In addition, the creation of lay review boards, cooperation with civil reporting requirements, state supervision of church personnel decisions (e.g., Diocese of Manchester, New Hampshire), and apostolic visits and evaluation of seminaries to focus on the human formation aspects of celibate chastity¹⁷⁹ will contribute to the sense of accountability and an attitudinal shift.

And there is much greater integration of lay persons and American judicial procedures in the accountability process. Among the tasks of the National Review Board and the Office for Child and Youth Protection should be further integration between these distinctively American features of accountability and the *Revised Norms'* inclusion of canon law. At present, accountability appears lessened by the inclusion of the Vatican Congregation for the Doctrine of the Faith, Church tribunals and appeal to the Vatican offices. These give the appearance of returning to a clerical process that harbors secrecy, even though they admittedly respond to the international structure of the Church.¹⁸⁰ Appearances are important and reality more so, and the national offices identified in the *Charter* should process integration, making them accessible to the openness sought by the bishops' initiatives. The bishops have stated that there is no revision from the strict accountability contained in the *Charter*,¹⁸¹ but procedures established in the *Revised Norms* are in need of further clarification if they are to meet the due process concerns of American law.¹⁸² Any past or present depreciation of accountability will have consequences beyond any resolution of the sexual abuse crisis. Charles R. Morris suggests that permissiveness—lack of accountability—is spawned by laxity in vision, thus signaling future ramifications of the Church scandal.¹⁸³ He echoes the theological concerns of Peter Steinfelds when he writes: "The truly serious issues facing the Church . . . are not about numbers, money, or even the rate

later. BETRAYAL, *supra* note 30, at 68.

177. See CHARTER, *supra* note 2.

178. *Id.* at arts. 1-17.

179. *Id.* at arts. 6, 17.

180. See *Bishops Approve Revised Norms and Charter With Zero Tolerance*, AMERICA, Nov. 25, 2002, at 4.

181. *Id.*

182. See *infra*, Sec. IV. C.

183. MORRIS, *supra* note 9, at 294.

of weekly church attendance. The truly hard problems are in the realm of vision, theology, and purpose."¹⁸⁴ Bishops are responsible for the formulation of this vision, theology and purpose, but as the Reverend Andrew Greeley suggests, their credibility is further weakened by the continuing revelations of sexual abuse of children and condonation by the some of the bishops.¹⁸⁵ Father Greeley writes that the bishops "did not seem to understand that at the same time they were trying to inhibit sexual satisfaction in the marital bed, they were facilitating sexual satisfaction for abusive priests."¹⁸⁶ Again, Peter Steinfelds reflects on the confusion in vision:

The Catholic Church's sexual abuse crisis is not solely about sexual abuse. Why did Catholic anger and distrust of the hierarchy flare so quickly A long list of simmering issues—about women's roles, liturgical language and practice, annulments and remarriage, birth control and abortion, religious education, homosexuality, adherence to papal decrees and so on—have left many Catholics of all theological persuasion muttering about a gap between what church leaders say and how the church operates.¹⁸⁷

Today, when the bishops seek to provide moral guidance on issues such as the war against Iraq, hunger, immigration or Third World debt relief, their voices are muffled.¹⁸⁸ To repair this deficit, bishops have begun to reaffirm core doctrines and disciplines,¹⁸⁹ an assertion of theological control. The *Charter* contains a reference to this return to discipline.¹⁹⁰ But if implementation of the accountability of the Church to the past crisis envisioned in the *Charter* is not forthcoming, especially as there will be continuing revelations of abusive clerics in the years ahead, any theological or moral references will continue to be muted. Accountability through all of the elements of the *Charter* and the *Revised Norms* is crucial for constructive prophetic interaction with the American public, both Catholic and non-Catholic. If there is laxity in implementation, even if blamed on the requirements of canon law, the church-state interaction developed so successfully in America will diminish proportionately. And once there is full implementation to account for past wrongs, the clear necessity is leadership.¹⁹¹

184. *Id.*

185. Greeley, *supra* note 122, at 13.

186. *Id.*

187. STEINFELS, *supra* note 171.

188. Alan Cooperman, *Bishops Preparing Iraq Position*, WASH. POST, Nov. 13, 2002, at A9.

189. See CHARTER, *supra* note 2, at art. 6.

190. Article Nine states:

While the priestly commitment to the virtue of chastity and the gift of celibacy is well known, there will be clear and well-publicized diocesan/eparchial standards of ministerial behavior and appropriate boundaries for clergy and for any other church personnel in positions of trust who have regular contact with children and young people.

Id. at art. 9.

191. See, e.g., Paul Elie, *A Church in Search of Followers*, N.Y. TIMES, June 23, 2003, at A21 (arguing that the sexual abuse crisis has exposed a serious crisis in leadership).

Indications are that priests themselves seek a more active role in bringing about accountability, from errant priests and bishops alike. An overlooked facet of the clergy sex abuse scandal is the innocent priest or cleric who finds himself in the midst of a media frenzy linking him to acts of sexual abuse simply because of his status as priest. Many of these stigmatized clerics are responding with discouragement, anger, and by resolutely distancing themselves from the bishops. Then there are priests who have been accused of sexual abuse and removed from active ministry and have retained attorneys and filed defamation suits,¹⁹² appealing to the Vatican for vindication,¹⁹³ and refusing to surrender status provided by Church canon law. Some accused priests have been vindicated.¹⁹⁴ Those priests accused of sexual abuse and those involved in the innuendo of the scandal are responding. The pastor of a large parish in suburban Maryland, stigmatized by simply being a priest in the midst of the scandal, wrote an open letter to his parishioners and admitted that "this has been the darkest and saddest period of my nearly thirty-three years as a priest."¹⁹⁵ But then he writes that attention must be paid to three issues: (1) the victims; (2) accountability, responsibility, and redress from those in positions of authority in the Church; and (3) the fact that there is little evidence that bishops understand the critical need for reform.¹⁹⁶

Another priest, a pastor of a large, prosperous parish in Newton, Massachusetts, suggests the issue is, "the arrogant abuse of power that fuels both the fury people feel and the determination they have for reform."¹⁹⁷ A rector of a large seminary near San Francisco, California, reiterates their concerns and suggests a deficiency in the action taken by the bishops in Dallas because "it made no mention of bishops who knowingly moved offending priests from one assignment to another, creating a situation where the sexual abuse of children and young people was facilitated by their misguided judgments."¹⁹⁸ The criticism recognizes that there is nothing in the *Revised Norms* to the *Charter* to make the bishops accountable for their

192. Courts have allowed damages to persons against whom baseless charges of sexual abuse have been made. See, e.g., *Rogers v. Morin*, 791 So. 2d 815 (Miss. 2001).

193. See Laurie Goodstein, *Call for Revision Means More Priests Are Likely to Fight Zero-Tolerance Dismissals*, N.Y. TIMES, Oct. 20, 2002, at A20; Daniel J. Wakin, *Priest Suspended After Sex Abuse Accusation*, N.Y. TIMES, July 23, 2003, at B5 (stating that "[a]t last 13 priests accused of abuse have been waiting for more than a year for a decision from Cardinal Egan [Archbishop of New York] on whether they can return to ministry").

194. See, e.g., *Accused Priest is Vindicated and Reinstated*, N.Y. TIMES, Feb. 15, 2003, at A15; *Priest Cleared of Abuse Returns to Applause*, N.Y. TIMES, Nov. 25, 2002, at A14.

195. Letter from Rev. Robert D. Duggan, Pastor, St. Rose of Lima Parish, to his parishioners 2 (June 6, 2002) (on file with the author).

196. *Id.*

197. Paul Wilkes, *The Reformer: A Priest's Battle for a More Open Church*, THE NEW YORKER, Sept. 2, 2002, at 2.

198. Gerald D. Coleman, S.S., *No*, COMMONWEAL, Sept. 27, 2002, at 9. This practice is the subject of Article 14 of the CHARTER. CHARTER, *supra* note 2, art. 14.

participation in the scandal; a proposed document on an Episcopal commitment failed to gain approval when it was brought to a vote.¹⁹⁹ But Monsignor Tom Green, a professor of canon law at the Catholic University of America, suggests the possibility of using canon law to make bishops accountable.²⁰⁰ Specifically, Canon 1389:

§ 1. A person who abuses [an] ecclesiastical power or [function] is to be punished according to the gravity of the act or omission, not excluding deprivation of office, unless a law or precept has already established the penalty for this abuse.

§ 2. A person who through culpable negligence illegitimately places or omits an act of ecclesiastical power, ministry, or function with harm to another is to be punished with a just penalty.²⁰¹

Most priests, like the non-clerical persons in parishes to which errant priests were assigned, were most often ignorant of the allegations being made and kept secret within confidential agreements between victims and the diocese. And even if priests suspected that allegations were made, personnel decisions occur at the diocesan level, though there are priest personnel boards who advise the bishops. One priest from a Boston suburban parish, commenting on the isolation he felt from any decision making, said that, “[w]e live in a Balkanized world, isolated in our parishes, and we really had no opportunity to share our concerns openly, without fear of retribution.”²⁰² These priests and others, some signing the letter asking for Cardinal Law’s resignation, indicate a desire for accountability on the part of the clergy, a rejection of the previous secrecy often referred to as clericalism,²⁰³ and establishment of a policy of adequate self-regulation within the Church.

Since the scandal gained national attention priests have been removed by bishops from priestly ministry for allegations of sexual misconduct that took place decades ago,²⁰⁴ names of accused priests have been published,²⁰⁵

199. *Reformist Catholic Groups Lash Out at U.S. Bishops*, REUTERS, Nov. 13, 2002 (on file with author).

200. *Private Memorandum from Monsignor Tom Green*, Professor of Canon Law at the Catholic University of America 1 (Nov. 11-14, 2002) (on file with author).

201. 1983 Code c.1389 §§ 1, 2. The Pope is the judge of bishops. 1983 Code c.1405 § 1(3).

202. See BETRAYAL, *supra* note 30, at 103. Clearly, some priests knew or should have known of abuse being committed by other priests. *Id.* at 24. The Special Grand Jury of the Suffolk County Supreme Court documented the shared culpability: “A general failure of supervision from officials of the [Rockville Center] Diocese, to individual pastors and other priests living in rectories, compounded and perpetrated these violations with devastating consequences for children.” SUFFOLK COUNTY GRAND JURY REPORT, *supra* note 41, at 4.

203. See generally Emil A. Wcela, *Clerical Culture-Both Beauty and Beast*, AMERICA, Sept. 30, 2002, at 23; Shaw, *supra* note 121.

204. See, e.g., *Priest Indicted*, WASH. POST, Sept. 27, 2002, at B2 (citing that a priest was indicted for sodomy, child abuse, and unnatural sex acts occurring in 1978); Barry R. Strong, O.S.F.S., *When the Pastor is Removed*, AMERICA, Aug. 26-Sept. 2, 2002, at 8 (citing allegations of sexual misconduct with a teenager 25 years ago).

priests have been punished for not disclosing the location of priests accused of sexual abuse,²⁰⁶ and priests have been targeted by the media for being homosexuals, accomplices, and pedophiles.²⁰⁷ Additionally, priests have been relegated to the rank of being independent contractors,²⁰⁸ plans have been made to inspect their seminaries with special inquiry as to the question of celibate chastity, their numbers are being depleted by attrition and resignations,²⁰⁹ and they have had to adjust many aspects of their day-to-day conduct within society as a whole. Nevertheless, priests seem unanimous in their desire that the focus should be upon the victims and their families,²¹⁰ that a fair process would be established to resolve questions of culpability and above all, that accountability should be expected and achieved quickly and with resolve on the part of the bishops and the Vatican.

C. The Bishops

Bishops must be asking themselves how this could have happened. Like most important events in history, the clergy sexual abuse scandal did not happen all at once but with decisions over a period of time that eventually culminating with the present scandal. These decisions resulting in the present scandal were revealed by the *Boston Globe* in an article about the Archdiocese of Boston, but many other dioceses were involved in similar situations. In each case there was a bishop, but in Boston it was a cardinal-archbishop of perhaps the most Catholic city in the United States. When the Attorney General of the Commonwealth of Massachusetts published his report on the extent of the sexual abuse of children within the archdiocese eighteen months after the newspaper's revelation, the report was pointed in its condemnation, stating that "there is overwhelming evidence that for many years Cardinal Law and his senior managers had direct, actual knowledge that substantial numbers of children in the Archdiocese had been sexually abused by substantial numbers of its priests."²¹¹ The report continues:

205. See Murphy, *supra* note 134. The cardinal-archbishop of New York has promised to publish the name of any priest permanently removed from ministry for molesting children, but he will not publish the names of suspended priests who are later returned to ministry. Daniel J. Wakin, *Clarifying Stand, Egan Now Vows to Name Priests Ousted for Abuse*, N.Y. TIMES, June 12, 2003, at A1.

206. *Priests Censured for Hiding Location of Ex-Clergyman*, WASH. POST, Sept. 2, 2002, at A24.

207. See, e.g., PETER STEINFELS, *A PEOPLE ADRIFT: THE CRISIS OF THE ROMAN CATHOLIC CHURCH IN AMERICA* 323-25 (2003).

208. Greeley, *supra* note 122.

209. See, e.g., Fox Butterfield, *Boston Archdiocese, Hurting Financially, Warns of Layoffs*, N.Y. TIMES, June 18, 2003, at A22 (reporting that the number of active priests in the Boston archdiocese fell by 10 percent, due mostly to priests removed because of the scandal—Boston now has 505 priests, down from 1,072 two decades ago).

210. See, e.g., Kenneth Lasch, *Zero Tolerance?*, COMMONWEAL, Sept. 27, 2002, at 8; Stephen J. Pope, *Apology or Excuse?*, COMMONWEAL, June 1, 2002, at 9; Greeley, *supra* note 122.

211. OFFICE OF THE ATT'Y GEN. OF MASS., *supra* note 41, at 25.

As Archbishop, and therefore chief executive of the Archdiocese, Cardinal Law bears ultimate responsibility for the tragic treatment of children that occurred during his tenure. His responsibility for this tragedy is not, however, simply that of the person in charge. He had direct knowledge of the scope, duration and severity of the crisis experienced by children in the Archdiocese; he participated directly in crucial decisions concerning the assignment of abusive priests, decisions that typically increased the risk to children; and he knew or should have known that the policies, practices and procedures of the Archdiocese for addressing sexual misconduct were woefully inadequate given the magnitude of the problem.²¹²

Seeking an answer to the question as to how any bishop could be found so culpable, the Reverend Andrew Greeley, priest and sociologist, describes a possible scenario contributing to what happened:

[T]he bishop is under pressure to exercise paternal care of the priest in trouble. The bishop finds himself inclined to the same denials and demonization as other priests: maybe the charges are not true, maybe the so-called victims brought it on themselves, maybe they're just interested in money, maybe the priest deserves another chance. The police have not brought charges; the doctors offer ambiguous advice; the lawyers think they can fend off a suit. The media thus far have left these events alone. The priest vigorously denies that he ever touched the alleged victim. Just one more chance. Many bishops, perhaps most bishops, even the most churlish, feel a compulsion to be kind to the priest in trouble. (There but for the grace of God.) So they beat up on the victims and their families and send the man off to an institution and then, hoping he's cured, send him back to a parish.²¹³

Once judges deprived bishops of the secrecy surrounding diocesan personnel files, subpoenas revealed some of the poor decisions. For example, a letter from Bishop Thomas V. Daily to one of the most notoriously sexually abusive priests, suggested that Rev. John Geoghan “go to Rome on Sabbatical in 1979 to help soothe the ‘traumatic experience’ of a sexual abuse charge.”²¹⁴ Then Bishop Thomas J. O’Brien, Bishop of Phoenix, Arizona, was arrested on June 16, 2003, “on a felony charge of

212. *Id.* at 31.

213. Greeley, *supra* note 122, at 12.

214. Daniel J. Wakin, *Bishop Urged Predator Priest to Go to Rome on Sabbatical*, N.Y. TIMES, Feb. 15, 2003, at B6. Bishop Daily and Bishop William Murphy of Long Island, New York, were sharply criticized by the report of the Attorney General of Massachusetts. See Daniel J. Wakin, *Two Bishops in New York Are Faulted in Abuse Cases*, N.Y. TIMES, June 24, 2003, at B1. Bishop Daily submitted his resignation to the Vatican in August 2003. Christine Haughney, *Brooklyn Bishop Resigns, Citing Age, Not Scandal*, WASH. POST, August 2, 2003, at A4. He announced that the decision was based on reaching retirement age; the resignation was accepted and a successor appointed. *Id.*

leaving the scene of a fatal car accident,” only two weeks after he avoided formal charges on obstruction of justice charges related to sexual abuse of minors.²¹⁵ The bishop had admitted in a written apology that he concealed the abuse of children and agreed to remove himself from any decisions regarding the sexual abuse in the future.²¹⁶ Only after the entire episode comes to light may the bishops and others realize that “[t]he decisions made across the country are manifestations of knavish imbecility.”²¹⁷

1. Financial Costs

Although insurance carriers paid most of the settlement costs made to the victims and their families, the extent of the financial and human costs are gradually being revealed.²¹⁸ Many dioceses are reluctant to publish dollar amounts paid as it may prompt additional allegations to surface, plus there is a fear the amounts will deter current donors from giving to the Church and its programs.²¹⁹ Some philanthropists have called for a nationwide audit detailing how much the sexual abuse scandal has cost the Church,²²⁰ but the bishops have rejected this. The geographical range of the sexual abuse scandal as well as the financial range of settlements may be found among a range of dioceses.²²¹

For example, specific reporting has occurred in Albany, Baltimore, Belleville, Louisville, Phoenix, Manchester, and Boston. The Diocese of Albany reports that 9 of its 450 priests sexually abused minors in the last 25 years and 11 settlements had been paid out for a total of \$2.3 million; all the money was paid by insurance companies.²²² The Diocese of Albany settled its most recent case for \$997,500.²²³ The Archdiocese of Baltimore reported that it and its insurance carriers paid more than \$5.6 million in legal settlements in the last 20 years.²²⁴ The Diocese of Belleville, Illinois, the

215. Alan Cooperman, *Phoenix Bishop Charged in Fatal Hit-and-Run*, WASH. POST, June 17, 2003, at A1; John M. Broder & Nick Madigan, *“Unraveled” by Sex Abuse Crisis in Diocese, Phoenix Bishop Quits*, N.Y. TIMES, June 19, 2003, at A1. The bishop then resigned and was replaced by Bishop Michael J. Sheehan. See Alan Cooperman, *New Phoenix Bishop Takes Over*, WASH. POST, June 21, 2003, at A3.

216. *Sign of the Times: Bishop Apologizes, Avoids Prosecution in Abuse Cases*, AMERICA, June 23-30, 2003, at 4; Alan Cooperman, *Bishop Avoids Charges*, WASH. POST, June 3, 2003, at A1; Charlie LeDuff, *Bishop of Phoenix Admits Transfers of Accused Priests*, N.Y. TIMES, June 3, 2003, at A20.

217. Greeley, *supra* note 122, at 13.

218. See generally Sam Dillon, *Bishops Take No Action on Calls for Audit*, N.Y. TIMES, Nov. 14, 2002, at A30.

219. See *id.*

220. *Id.*

221. *Id.*

222. *Albany Diocese Settled*, *supra* note 133.

223. *Id.*

224. Annie Gowen & Caryle Murphy, *Guilt No Simple Issue in Shooting of Priest; Defense*

Diocese of Bishop Wilton D. Gregory, the president of the United States Conference of Catholic Bishops, "paid \$2.8 million over nine years to cover the costs of sexual abuse by clergymen."²²⁵ And the Diocese of Phoenix has paid "close to \$2 million to settle 12 to 15 lawsuits . . . since . . . 1982."²²⁶ A judge in Louisville, Kentucky, approved a \$25.7 million settlement with 243 people claiming to be have been sexually abused by Louisville Archdiocese's priests and employees.²²⁷ Additionally, after a tumultuous public outcry, the Diocese of Manchester, New Hampshire, settled 176 cases since the abuse crisis broke for a total of \$15.45 million.²²⁸ Finally, a survey in June 2002 reported that 26 other dioceses had released sufficient financial information to suggest that \$106 million was paid in legal settlements.²²⁹

In the fall of 2002, the Archdiocese of Boston was forced to obtain a loan of \$12.5 million from the Knights of Columbus to maintain its daily operations and charitable organizations²³⁰ after it obtained a \$10 million settlement with 86 victims of convicted pedophile John J. Geoghan. But two weeks after the settlement, the Boston Archdiocese was named as a defendant in seventeen new sexual abuse suits involving the former priest²³¹ and for the first time possible bankruptcy of an American archdiocese was a reality.²³² Bankruptcy being a popular notion because the threat of it saved the Archdiocese of Dallas millions of dollars as victims and their attorneys

Contends Baltimore Man Not to Blame Because He Was Sexually Abused, WASH. POST, Dec. 11, 2002, at B3; see also Murphy, *supra* note 134.

225. Dillon, *supra* note 218, at A30.

226. *Nation in Brief*, WASH. POST, Nov. 11, 2002, at A15.

227. *Nation in Brief: Judge Approves Louisville Archdiocese's Abuse Accord*, WASH. POST, Aug. 2, 2003, at A22; Laurie Goodstein, *Archdiocese of Louisville Reaches Abuse Settlement*, N.Y. TIMES, June 11, 2003, at A18.

228. *Diocese to Pay \$6.5 Million to Resolve Abuse Claims*, N.Y. TIMES, May 23, 2003, at A18.

229. Murphy, *supra* note 134, at A1. The following amounts were reported paid to settle claims against the diocese: Providence, \$13.5 million to settle 36 claims; Tucson "paid \$14 million to 10 alleged victims and to six of their parents;" and two California archdioceses together paid \$5.2 to settle an individual case in 2001. Pamela Ferdinand, *Boston Church, 86 Plaintiffs Reach Settlement in Abuse Suit*, WASH. POST, Sept. 20, 2002, at A2. Manchester, New Hampshire paid \$950,000 to settle claims of 16 men who allege abuse by priests dating back to 1957. *Nation in Brief: New Hampshire Diocese Settles Sexual Abuse Suit*, WASH. POST, Oct. 11, 2002, at A27. The dioceses of Santa Fe and Dallas nearly went bankrupt after paying victims and their families. Santa Fe paid settlements estimated to be between \$25 and \$50 million; the families of victims in Dallas accepted \$31 million. Fall River, Massachusetts agreed to pay more than \$7 million to the victims of James Porter. BETRAYAL, *supra* note 30, at 42-43.

230. *Troubled Boston Archdiocese Gets Loan*, N.Y. TIMES, Sept. 28, 2002, at A12. Providence diocese obtained \$14 million in bank loans to settle sexual abuse claims. *\$14 Million Loan for Diocese*, N.Y. TIMES, Dec. 13, 2002, at A28.

231. *Nation in Brief*, WASH. POST, Oct. 4, 2002, at A19.

232. Pam Belluck & Adam Liptak, *For Boston Archdiocese, Bankruptcy Would Have Drawbacks*, N.Y. TIMES, Dec. 3, 2002, at A28. The Diocese of Dallas was near bankruptcy in 1998 as a result of a sexual abuse verdict of \$119 million. The possibility prompted the plaintiffs to accept \$30 million. *Id.*; BETRAYAL, *supra* note 30, at 43 (describing the effect of the Church suggesting bankruptcy). The resignation of Cardinal Law will lessen the possibility of him giving repeated legal testimony and limit jury awards and attorney fees. Alan Cooperman & Michael Powell, *No 'Lighting Rod,' but a Storm: Cardinal Law's Resignation Appears Unlikely to End Problem for Church*, WASH. POST, Dec. 15, 2002, at A3.

were prompted to settle for lesser amounts.²³³ In addition, with the release of thousands of pages of documents, additional plaintiffs will surface. Eventually, due in significant part to the installation of Archbishop Sean Patrick O'Malley to succeed Cardinal O'Connor, the Archdiocese of Boston settled with 550 persons who claimed they were sexually abused by clergy for the sum of \$85 million.²³⁴

The settlement between the Boston Archdiocese and the attorneys representing persons claiming they were sexually abused by clergy was completed within five weeks of the appointment of a new Boston archbishop.²³⁵ Archbishop Sean O'Malley is regarded as a leader, a person who was previously appointed to two other Dioceses with clergy sexual abuse problems, the Dioceses of Fall River, Massachusetts, and Palm Beach, Florida.²³⁶ Some would describe him as a healer bishop, "called on by the pope to rush into troubled dioceses and help extinguish the flames."²³⁷ Throughout the national scandal, a constant theme has been the "absence of leadership in the American Catholic Community . . . [especially] among the bishops; even the best of them have found it difficult to explain the situation, communicate regret, accept responsibility, and inspire confidence."²³⁸

The payments and the continuing civil litigation galvanize the confrontation between the bishops and American society. Donors to the Church have a reason to withhold funding to bishops and to what is perceived as payments in settlement of claims that should never have occurred. It is a way for persons outside of the hierarchical structure of the Church to force a level of accountability when the system seems closed, smug, and protective of clergy to the detriment of sexually abused victims. Surveys suggest that in the Archdiocese of Boston, "most churches are talking about a 25 percent drop-off in collections,"²³⁹ and across the country "[o]ne in every five Catholics surveyed said the scandal had prompted them

233. Belluck & Liptak, *supra* note 232, at A28.

234. Jonathan Finer & Alan Cooperman, *Catholic Church Settles in Boston: Alleged Victims to Share \$85 Million*, WASH. POST, Sept. 10, 2003, at A1.

235. *Id.*

236. Fox Butterfield, *Catholic Church Installs New Boston Archbishop*, N.Y. TIMES, July 31, 2003, at A18; Laurie Goodstein & Fox Butterfield, *Troubleshooter is Named to Lead Boston Catholics*, N.Y. TIMES, July 2, 2003, at A1; Alan Cooperman & Pamela Ferdinand, *Powerful Job of Boston Prelate Falls to Champion of Humility*, WASH. POST, July 2, 2003, at A3.

237. Laurie Goodstein, *Small Band of Healer Bishops for Troubled U.S. Churches*, N.Y. TIMES, June 22, 2003, at A1.

238. David O'Brien, *How to Solve the Church Crisis*, COMMONWEAL, Feb. 10, 2003, at 10; *see also* Editorial, *Learning Curve*, COMMONWEAL, July 18, 2003, at 7 (lamenting the bishops' lack of leadership at their summer meeting in Saint Louis, Mo.); Alan Cooperman, *Catholic Bishops Look for Leadership*, WASH. POST, June 19, 2003, at A7.

239. Pam Belluck, *Cardinal Law Tries New Tack in Handling of Abuse Issues*, N.Y. TIMES, Nov. 13, 2002, at A1. By the spring of 2003, there was a \$9.4 million budget gap in the Boston archdiocese. Fox Butterfield, *Boston Archdiocese, Hurting Financially, Warns of Layoffs*, N.Y. TIMES, June 18, 2003, at A22.

to stop donating to the local diocese.²⁴⁰ Depletion of income affects the social service mission of the Churches, thus adding to the consequences resulting from the sexual abuse scandal. Faced with the economic reality of the crisis, the bishops must explain how this could have happened.

2. Best of Intentions

There are those who maintain that the bishops responded rationally to the repeated allegations of sexual abuse of minors by clergy. The Reverend Stephen J. Rossetti, for example, argues that bishops were not circumventing the states' criminal reporting requirements concerning sexual abuse of minors.²⁴¹ More often than not, the state's reporting requirement was inapplicable because of the statute of limitations, or the Church's officials themselves were not required to report under the statute.²⁴² Thus, Father Rossetti claims, the bishops are being excoriated for not reporting cases of abuse even though state child abuse reporting requirements often did not apply.²⁴³ This is so because the victim was no longer a minor and the statute of limitations barred prosecution because the abuse was not reported within a defined number of years after the minor became an adult.²⁴⁴ The bishops rationally thought that the need to maintain confidentiality with victims and priests outweighed further criminal action.²⁴⁵ Thus, his argument is that since there was no legal obligation to report, the bishops, often upon advice of legal counsel, opted to maintain the privacy rights of the victims and the alleged perpetrators through confidential agreements.²⁴⁶

In hindsight, however, the anger and concomitant withholding of support for the bishops is not over failure to report, but rather, over failure to conduct a more thorough investigation, to hold priests accountable within the Church's system if the accusations were verified, and to bar those found even minimally culpable from any contact with minors in the future.²⁴⁷ In the report of the Attorney General of the Commonwealth of Massachusetts

240. Sam Dillon, *Abuse Scandal is Deterring Catholic Donors, Poll Says*, N.Y. TIMES, Nov. 9, 2002, at A14.

241. Rossetti, *supra* note 138, at 8.

242. *Id.*

243. *Id.*

244. *Id.* Lawmakers, in order to avoid past lapses, proposed new legislation to make everyone accountable. See, e.g., SUFFOLK COUNTY GRAND JURY REPORT, *supra* note 41, at 174-79 (listing specific recommendations for the legislative and executive branches of government); OFFICE OF THE ATT'Y GEN. OF MASS., *supra* note 41, at 22-24 (describing new mandatory reporting law in Massachusetts).

245. See Rossetti, *supra* note 138, at 8.

246. *Id.*

247. BETRAYAL, *supra* note 30, at 153.

The cardinal said canon law had to be considered. We just looked at one another. Whatever we had just told him didn't seem to be registering Canon law was irrelevant to us. Children were being abused. Sexual predators were being protected. Canon law should have nothing to do with it. But they were determined to keep this problem, and their response to it, within their culture.

Id.

on the sexual abuse of children within the Boston Archdiocese, specific findings and conclusions relate both to the archdiocesan failure to conduct a thorough investigation of abuse allegations, and repeatedly placing children at risk by transferring abusive priests to other parishes.²⁴⁸ These failures precipitated the current outrage by the American public.²⁴⁹ And now, when the abuse is described, the failure of some bishops to talk with victims and their families due to advice from attorneys fuels the anger and arguably inhibits negotiating a resolution of claims by alleged victims.²⁵⁰

Patterns of refusal to investigate further were standard in the dioceses.²⁵¹ For example, Cardinal Bernard Law of the Archdiocese of Boston reserved for the central administration of the Archdiocese of Boston the primary responsibility for hearing and investigating all complaints of clergy sexual misconduct.²⁵² But even after the archdiocesan authorities knew that Reverend John Geoghan had molested children, he was reassigned to parish ministry.²⁵³ The same would occur with the Reverend Paul Shanley,²⁵⁴ and there were others in the Boston archdiocese and in other dioceses across the country.²⁵⁵ It was only when prosecutors and civil attorneys alike demanded Church records in order to prevent the reassignment of any priest against whom there were credible accusations that changes in the pattern took place.²⁵⁶ These civil authorities concluded: "They have to be changed. They can't change themselves."²⁵⁷

To their credit, the bishops have included specific procedures in the *Charter* and the *Revised Norms* that respond to this past history of failure to investigate allegations of transfers and reassignment of errant clergy.²⁵⁸ These procedures are designed to preclude the practices of the past and hold both priest and bishop accountable.²⁵⁹ For example, the *Revised Norms* require that a diocesan written policy on abuse be adopted and made

248. See OFFICE OF THE ATT'Y GEN. OF MASS., *supra* note 41, at 57-68.

249. See *id.*; *Boston Archbishop's First Day: Fire Lawyers, Gain Praise*, N.Y. TIMES, Aug. 1, 2003, at A13.

250. Upon being named archbishop of Boston, Archbishop O'Malley replaced the diocesan attorneys with an attorney known for settling such claims. See generally *Boston Archbishop's First Day: Fire Lawyers, Gain Praise*, N.Y. TIMES, Aug. 1, 2003, at A13; Patrick J. Schiltz, *The Future of Sexual Abuse Litigation*, AMERICA, July 7-14, 2003, at 8-9; *Boston Church Leader Hires Lawyer Known for Settlements*, N.Y. TIMES, July 9, 2003, at A18; Pam Belluck, *Diocese is Said to Depose Abuse Therapists*, N.Y. TIMES, Jan. 17, 2003, at A18.

251. See OFFICE OF THE ATT'Y GEN. OF MASS., *supra* note 41, at 57-58.

252. See *id.*

253. See *id.* at 50-53.

254. See Orth, *supra* note 79.

255. *Id.*

256. BETRAYAL, *supra* note 30, at 133.

257. *Id.* at 131.

258. CHARTER, *supra* note 2, at art. 4-7; REVISED NORMS, *supra* note 3, at Norm 2.

259. See CHARTER, *supra* note 2, at art. 4-7; REVISED NORMS, *supra* note 3, at Norm 2.

public,²⁶⁰ the appointment of a victim's assistance coordinator in each diocese,²⁶¹ the creation of a review board consisting mostly of lay persons,²⁶² a working relationship with a canon law official analogous to an attorney general termed the Promoter of Justice.²⁶³ In addition, the *Charter* requires the creation of a National Review Board and an Office of Child and Youth Protection.²⁶⁴ This unprecedented sharing of priest-personnel authority by the bishops with lay persons results in part from the bishops' desire for accountability, so that they may be protected from transfer into their diocese of priests who may victimize parishioners.

In some instances—for example, the dioceses of Manchester, New Hampshire and Phoenix, Arizona—the bishops were forced by local law enforcement officials to relinquish priest-personnel decisions in return for immunity from prosecution.²⁶⁵ Such a departure from what had been the American way of church state cooperation is justified even in the eyes of Reverend John W. O'Malley, S.J., professor of church history at Weston Jesuit School of Theology in Cambridge, Massachusetts. O'Malley writes that, “[E]ven within the framework of priorities, bishops and cardinals seem to have mismanaged resources, acted on poor advice given in closed clerical circles, misspoken themselves and sometimes been less than honest, even with their fellow bishops, when they sent priests with bad histories to work in other dioceses.”²⁶⁶

The bishops relied not only upon the advice of attorneys, but also trained medical staffs.²⁶⁷ Once a priest was assessed to have a problem with sexual abuse, the priest was assigned for psychiatric evaluation at facilities chosen by the diocese.²⁶⁸ “These evaluations typically lasted a week or less . . . [and] often were followed by extended periods of in-patient psychiatric

260. See REVISED NORMS, *supra* note 3, at Norm 2 (stating that a copy of the policy must be filed with the U.S. Conference of Catholic Bishops within three months of the effective date of the Norms and any subsequent revisions filed within three months of their adoption).

261. See REVISED NORMS, *supra* note 3, at Norm 3 (stating that the person appointed is to provide pastoral assistance to persons who allege they were sexually abused by a cleric when a minor).

262. See REVISED NORMS, *supra* note 3, at Norm 4-5 (stating that the board will consist of at least five Catholic adults serving terms of five years; the board will be composed of a majority of laypersons, one priest who is an experienced pastor, and one priest with experience in the treatment of sexual abuse of minors).

263. “A promoter of justice is to be appointed in a diocese for contentious cases that can endanger the public good and for penal cases; the promoter of justice is bound by office to provide for the public good.” 1983 CODE c.1430.

264. CHARTER, *supra* note 2, at art. 9.

265. See, e.g., Ralph Ranalli & Walter V. Robinson, *Indictments Ruled Out in Church Probe; AG Office Says Law, Top Aides Won't Be Charged*, BOSTON GLOBE, July 21, 2003, at A1.

266. O'Malley, *supra* note 31.

267. See OFFICE OF THE ATT'Y GEN. OF MASS., *supra* note 41, at 10.

268. See *id.*

treatment, often lasting six months.²⁶⁹ Often an out-patient monitoring program continued after the patient was discharged.²⁷⁰

Bishops received advice from at least two professional groups. Medical experts told the bishops and religious superiors that assessment and rehabilitation was appropriate, and diocesan attorneys told them that confidential settlement agreements provided a second chance for the perpetrator and the victim alike. Viewed in the context of contrition, forgiveness, and restitution, the reassignment of the priest was rational, rehabilitative, and, as has been demonstrated, a practice condoned by many bishops. At least in the context of medical evaluation, the reassignment could be rationalized as based on a pattern of treatment of child sexual abuse predators that labels them as “sick,” rather than “bad,” and thus candidates for rehabilitation.²⁷¹ Such a pattern was part of past practices in American civil and criminal law as well.²⁷²

Father Rossetti, one of the medical experts upon whom the bishops relied, appears supportive of the treatment of sexually abusive priest priests as “sick” when he states: “In general, the bishops of the United States have done well in dealing with most cases of child sexual abuse by priests over the past decade.”²⁷³ His assessment is based on the premise that defrocking the priest and thus eliminating him from ministry prevents supervision and subjects additional children to abuse by someone no longer available to treatment and control.²⁷⁴ Impliedly, he thus favored “taking the ones who present the least risk and returning them to a limited, supervised ministry that did not involve direct contact with minors.”²⁷⁵

Sexual abuse of minors is no longer evaluated solely as a sickness.²⁷⁶ Today, it is agreed that such an approach focused too heavily upon the rehabilitation of the offending cleric and too little upon the risk to minors.²⁷⁷ Corresponding with past American legal practice, such an approach takes the position that the offender is “sick” and thus by treatment both the offender and society gains.²⁷⁸ Yet, American state and federal legislation as well as court procedures have rejected this therapeutic posture in favor of viewing

269. *Id.* Three of the institutions used by the Boston archdiocese were affiliated with the Roman Catholic Church: St. Luke’s Institute in Maryland, Southdown Institute in Ontario, Canada, and the House of Affirmation in Whitinsville, Massachusetts. *Id.* at 11. A fourth institution, “not affiliated with the Church, was the Institute of Living in Connecticut.” *Id.*

270. *Id.*

271. See Weisberg, *supra* note 43, at 6-10.

272. See generally *id.*

273. Rossetti, *supra* note 138, at 8.

274. *Id.*

275. *Id.*

276. See generally D. Kelly Weisburg, *The “Discovery” of Sexual Abuse: Expert’s Role in Legal Policy Formulation*, 18 U.C. DAVIS L. REV. 1 (1984).

277. See *id.* at 48-50.

278. See *id.*

the child sexual abuse perpetrator as “bad” and better addressed through civil and criminal prosecution.²⁷⁹ The legal approach shifted quite quickly and forcefully in favor of protection of children and neither the bishops nor their advisors adapted.²⁸⁰

But the *Charter* marked a shift in approach. The *Charter* and the *Revised Norms* definitively reject the therapeutic approach and adopt an attitude toward child sexual abuse as something bad.²⁸¹ Rehabilitation of the offender is not completely abandoned, but the possibility of return to ministry in a capacity that would involve official contact with children is completely rejected.²⁸² Thus, the Church is no longer willing to act in a supervisory role over the offending cleric and, impliedly, the inclination toward rehabilitation has been severely curtailed.²⁸³ In fact, the Church will cooperate with state and federal authorities by providing them with notification of the allegations.²⁸⁴ Comments made by several bishops subsequent to the adoption of the *Revised Norms* sustain this conclusion.²⁸⁵ For example, Bishop William E. Lori of the Diocese of Bridgeport, Connecticut, and a member of the mixed commission that helped to draft the *Revised Norms*, stated: “We have not backed off in any way [from the *Charter*] Anyone who abuses a minor will be removed permanently from ministry.”²⁸⁶ This is a major departure from the symbiotic union between priest and bishop postulated by the Second Vatican Council documents and the supporting pronouncements of Church officials.²⁸⁷ It is a departure from exclusive clerical control over clerical personnel and policies; it is a departure from characterizing perpetrators of sexual abuse as sick and needing support and rehabilitation; and it is a departure from focusing on the priest and the Church. The focus is now upon the victim and society.²⁸⁸ In these ways and in other less identifiable ways, the *Charter* is an American response to what is certainly an international problem.²⁸⁹ It is American because of its openness—immediate notification—and its

279. *See id.*

280. *See* BETRAYAL, *supra* note 30, at 184 (“American Catholics struggled to understand what it was about their Church that enabled more than fifteen hundred priests to shuffle problem priests from parish to parish rather than fire them or turn them over to prosecutors.”)

281. *See* CHARTER, *supra* note 2; REVISED NORMS, *supra* note 3.

282. CHARTER, *supra* note 2, at art. 5; REVISED NORMS, *supra* note 3, at Norm 8.

283. CHARTER, *supra* note 2, at art. 5; REVISED NORMS, *supra* note 3, at Norm 8.

284. CHARTER, *supra* note 2, at art. 4; REVISED NORMS, *supra* note 3, at Norm 11.

285. *See, e.g.,* *Bishops Approve Revised Norms*, *supra* note 180, at 5.

286. *Id.*

287. *Compare* VATICAN COUNCIL II, *supra* note 16, with REVISED NORMS, *supra* note 3.

288. CHARTER, *supra* note 2; REVISED NORMS, *supra* note 3.

289. *See, e.g.,* Warren Hoge, *British Cardinal Apologizes for Ignoring Warnings About a Pedophile Priest*, N.Y. TIMES, Nov. 22, 2002, at A10 (discussing a pedophile priest serving in England); *Catholic Order Makes Payments to 70 NZ Men Claiming Abuse*, at http://online.wsj.com/article_email/0,,BT_CO_20021203_008772,00.html (Dec. 3, 2002) (describing clergy sexual abuse in New Zealand). German Roman Catholic bishops admitted mishandling sexual abuse of minors by clergy in the past and issued guidelines providing for cooperation with civil authorities and removal of guilty parties. *News Briefs*, AMERICA, Oct. 14, 2002, at 5.

accountability—immediate suspension, hearing and review. One of the most lasting impacts of the *Charter* may be the effect this purely American venture has upon the universal Roman Catholic Church's response to allegations of clerical sexual abuse throughout the world.

IV. BISHOPS' RESPONSE: THE CHARTER FOR THE PROTECTION OF CHILDREN & YOUNG PEOPLE

When the scandal most dominated the media, the American cardinals traveled to the Vatican to meet with Pope John Paul II and members of the Roman Curia; the meeting took place on April 23-24, 2002.²⁹⁰ The Pope was sympathetic, expressed concern for the victims, and supported measures to exclude priests from ministry if found guilty of sexual abuse of minors.²⁹¹ Nonetheless, the anger in America over the sexual abuse of minors by clergy and the complicity of bishops continued unabated.²⁹² Those bishops that Americans viewed as most duplicitous still had not been made personally accountable.²⁹³ Prelates, such as Boston's Cardinal Bernard Law, were constantly harassed, made to provide public depositions, and confronted with significant loss of revenue, but nothing appeased the anger of Americans resulting from the incessant revelations of the abuse of children and enabling bishops.²⁹⁴ Subsequently in June 2002, at their general meeting in Dallas, Texas, the full body of the United States Conference of Catholic Bishops approved a document drafted by the Ad Hoc Committee on Sexual Abuse.²⁹⁵ The document was titled *Charter for the Protection of Children & Young People*.²⁹⁶ Seeking to provide some measure of accountability, the preamble of the document offers an apology for the sexual abuse scandal: "As bishops, we acknowledge our mistakes and our role in that suffering, and we apologize and take responsibility for too often failing victims and our people in the past."²⁹⁷

The *Charter* evidenced a shift in attitude by the American bishops. First, the *Charter* stresses the duty of the bishops towards victims and families, a reversal of past practice of rehabilitation and reassignment of the priest.²⁹⁸ This reversal of perspective challenges both the documents of the last ecumenical council of the Church and subsequent papal pronouncements

290. Editorial, *Vatican Deliberations*, N.Y. TIMES, Apr. 25, 2002, at A30.

291. *Id.*

292. Don Lattin, *Revolution by Laity: Brewing a Catholics Confront Their Bishops*, S.F. CHRON., May 18, 2002, at A1.

293. *Id.*

294. Kathleen Burge, *Crisis in the Church*, BOSTON GLOBE, May 9, 2002, at A32.

295. Laurie Goodstein & Sam Dillon, *Scandals in the Church: The Bishops' Conference; Bishops Set Policy to Remove Priests in Sex Abuse Cases*, N.Y. TIMES, June 15, 2002, at A1

296. *Id.*; CHARTER, *supra* note 2.

297. *Id.* at pmb1.

298. *Id.* at art. 1.

that had theologically recognized the solidarity of priest and bishop.²⁹⁹ Critics were quick to criticize the shift in perspective, observing that with the *Charter*, “the U.S. norms would transform bishops from spiritual guides into reporting agents and sever this bond of trust [with priests] at a time when a priest may need it most.”³⁰⁰ Furthermore, the shift in perspective was compounded by the surrender of discretion on the part of the bishops in the managing of personnel, mainly priests. Episcopal discretion was replaced by diocesan review boards consisting mostly of lay persons, presenting an image of the Church as being supervised by lay persons rather than by bishops.³⁰¹ Second, critics argued that credible allegations of sexual abuse based solely on a child being used as an object of sexual gratification for the adult offered too nebulous a definition to be enforced fairly. Third, the unlimited statute of limitations countenanced by zero-tolerance exacerbates the nebulous allegations of sexual abuse.³⁰² And fourth, policies enumerated would be a departure from universal church canon law by the United States, which would detract from the universality of that law and thus diminish the Church as a whole.

When the *Charter* was sent to the Vatican for approval, the Vatican deferred and requested a mixed commission of Vatican and American bishops to provide a negotiated revision. The *Revised Norms*, implementing the *Charter*, were drafted as a negotiated settlement between the American bishops and Vatican officials and approved by the American bishops on November 13, 2002, and by the Vatican for two years on December 16, 2002.³⁰³ Facing charges that the bishops capitulated to Vatican demands, the bishops adamantly replied that the *Revised Norms* complement the *Charter* and do not detract from the goal of zero-tolerance it espoused.³⁰⁴ Nonetheless, the *Revised Norms* do make some changes to the *Charter’s* sweeping objectives.³⁰⁵ Taken together, the *Charter* and the *Revised Norms* offer the present response of the bishops to the sexual abuse scandal. There are pluses and minuses when viewed from the perspective of American church-state interaction, and although too little time has passed to offer a final assessment, each of the features, when viewed from American standards, offers a total picture of their worth.

A. *The Definition of Sexual Abuse*

Article 1 of the *Charter* provides that an outreach program be established in each diocese directed towards every person who has been the

299. See VATICAN COUNCIL II, *supra* note 16.

300. *Vatican Quandary: Complicated Decision on Sex Abuse Norms*, AMERICA, Oct. 14, 2002, at 4.

301. See *Erosion of Authority*, *supra* note 25.

302. See CHARTER, *supra* note 2.

303. Frank Bruni, *Vatican Approves Revised Plan on Sexual Abuse by U.S. Priests*, N.Y. TIMES, Dec. 17, 2002, at A28.

304. *Id.*

305. *Id.*

victim of sexual abuse as a minor by anyone acting in the name of the Church, no matter when the abuse occurred.³⁰⁶ This policy implies that the Church is willing to address concerns of alleged victims if the allegations involve priests, deacons, volunteers, employees, and perhaps even bishops themselves, although the documents do not explicitly mention bishops in this context.³⁰⁷ This Article introduces two controversial elements: the definition of sexual abuse and the lack of any time restraints—a statute of limitations—upon when an allegation may be made in relation to an alleged offense.³⁰⁸ Each of these elements has been the focus of American law and each prompted challenges that precipitated modifications of the *Charter*. These modifications are now part of the *Revised Norms*.³⁰⁹

The definition of sexual abuse within the *Charter* is borrowed from a 1992 report of the Canadian Conference of Bishops. The American and Canadian bishops' conferences define sexual abuse as follows: "Sexual abuse [includes] contacts or interactions between a child and an adult when the child is being used as an object of sexual gratification for the adult."³¹⁰ The definition is enhanced with a further explanation that "[a] child is abused whether or not this activity involves explicit force, whether or not it involves genital or physical contact, whether or not it is initiated by the child, and whether or not there is discernible harmful outcome."³¹¹ The dilemma of the definition is that it does not involve physical contact between the child and the adult, but rather the *interaction* between the child and the adult. What interaction between the child and the adult constitutes sexual abuse of a minor? For example, if there is no physical contact between the two parties, is it possible to conclude that sexual abuse has occurred? Similar interpretation dilemmas exist for American secular legislatures and courts as American legislators seek to expand state and federal protection of minors from sexual abuse. The drafters of legislation may err on the part of caution, inclusion, and the use of sexual exploitation terms that are devoid of the necessity of physical contact. If so, the statutes would then face federal and state constitutional challenge. Similar American statutes have survived constitutional attack, but the definitions are aided by context, a high level of proof, and more often than not, a statute of limitations to limit the time in which allegations may be made.³¹² All must work together.

306. CHARTER, *supra* note 2, art. 1.

307. *See id.*

308. *See generally id.*

309. *See* REVISED NORMS, *supra* note 3.

310. Compare CHARTER, *supra* note 2, art. 1, with CANADIAN CONFERENCE OF CATHOLIC BISHOPS AD HOC COMMITTEE, FROM PAIN TO HOPE 20 (June 1992).

311. *Id.* One victim stated that a priest masturbated in front of him. Robert Hanley, *Priest Guilty in Sex Abuse of 11 Year-Old Altar Boy*, N.Y. TIMES, Dec. 12, 2002, at B10.

312. *See generally* *Stogner v. California*, 123 S. Ct. 2446 (2003); HOMER H. CLARK, JR., THE

Seeking to address criticism directed against the *Charter's* definition of sexual abuse, the subsequently adopted *Revised Norms* contains a more lengthy definition, but one that still uses the word *interaction* without qualification. Thus, the *Revised Norms* now defines what will become a credible allegation of sexual abuse as the following:

Sexual abuse of a minor includes sexual molestation or sexual exploitation of a minor and other behavior by which an adult uses a minor as an object of sexual gratification. Sexual abuse has been defined by different civil authorities in various ways, and these norms do not not (sic) adopt any particular definition provided in civil law. Rather, the transgressions in question relate to obligations arising from divine commands regarding human sexual interaction as conveyed to us by the sixth commandment of the Decalogue. Thus, the norm to be considered in assessing an allegation of sexual abuse of a minor is whether conduct or interaction with a minor qualifies as an external, objectively grave violation of the sixth commandment.³¹³

In a footnote, the *Revised Norms* stipulates that "if there is any doubt whether a specific act qualifies as an external, objectively grave violation, the writings of recognized moral theologians should be consulted, and the opinions of recognized experts should be appropriately obtained,"³¹⁴ but ultimately it is the responsibility of the bishop, with the assistance of the review board to determine the gravity of the alleged act.³¹⁵

Thus, the *Revised Norms* continues to allow a credible act of sexual abuse of a minor to include both *physical acts* of molestation and *interactions* that may be devoid of physical contact.³¹⁶ The inclusion of opinions from recognized moral theologians does not provide an objective criteria, and the bishop and review board, now tasked with making the ultimate decision, are still left to wonder what constitutes a fair appraisal of an act of sexual abuse. Thus, the question of due process fairness still exists in spite of the definition revisions to the *Charter*. The fairness of the definition arises in the context of how to determine credible allegations of sexual abuse, when credibility may be analyzed from allegations of (1) physical contact or sexual molestation, and then the more nebulous one of (2) interactions when the child is being used "as an object of sexual gratification" for the adult.³¹⁷ The latter is the subject of the reference in the *Revised Norms* to the "sexual exploitation of a minor and other behavior by which an adult uses a minor as an object of sexual gratification."³¹⁸ This

LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, 353-60 (2d ed. 1987).

313. REVISED NORMS, *supra* note 3, pmb1.

314. *Id.* at n.2.

315. *Id.*

316. *Id.* at pmb1.

317. *Id.*

318. *Id.* at pmb1.

offense does not require physical contact, making proof of the offense difficult to obtain.

To arrive at an assessment of the definition and how review boards may make determinations based on due process standards, the easier of the criteria, physical contact, may be analyzed first and then the more difficult, interactions with the child.

1. Physical Contact

One may allege as a matter of fact, that contact with a child's genitalia or a child's contact with an adult's genitalia may be sexual abuse, particularly when the contact is coupled with a desire for sexual gratification.³¹⁹ The District of Columbia Criminal Code provides examples of physical contact as an element of the definition of sexual act of abuse: (1) "penetration, however slight of the anus or vulva of another by a penis";³²⁰ (2) "contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus";³²¹ (3) "penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desires of any person."³²² The statutory element of physical contact is present in words such as contact and penetration.³²³ Obviously, such physical contact was contemplated by the *Revised Norms'* use of the word "molestation" in its definition of sexual abuse of a minor.

Some state statutes include masturbation in their list of sexual abuse contact, to include:

the real or simulated touching, rubbing, or otherwise stimulating of a person's own clothed or unclothed genitals or pubic area . . . buttocks, breasts, or developing or undeveloped breast area (if the

319. Statutes often address less overt sexual behavior, such as touching or fondling with the intent to arouse sexual desires. See, e.g., COLO. REV. STAT. §§ 189-6-403(2)(c), (d) (2001) (citing erotic fondling or erotic nudity); IND. CODE ANN. §35-42-4-3 (Miche 2002). Physical abuse statutes, as compared to sexual abuse statutes, have also grappled with the definition of abuse and whether or not it is too vague. See, e.g., *People v. Phillips*, 122 Cal. App. 3d 69 (Ct. App. 1981) (describing Munchausen's Syndrome by Proxy and requisite of proof); *People v. Jennings*, 641 P.2d 276 (Colo. 1982) (distinguishing between corporal punishment and child abuse); see also Michael T. Flannery, *First, Do No Harm: The Use of Covert Video Surveillance to Detect Munchausen Syndrome by Proxy—An Unethical Means of "Preventing" Child Abuse*, 32 U. MICH. J.L. REFORM, 105 (1998); Michael T. Flannery, *Munchausen Syndrome by Proxy: Broadening the Scope of Child Abuse*, 28 U. RICH. L. REV. 1175 (1994). Also, issues arise as to fetus gestational abuse. See generally Michael T. Flannery, *Court-Ordered Prenatal Intervention: A Final Means to the End of Gestational Substance Abuse*, 30 J. FAM. L. 519 (1991).

320. See D.C. CODE ANN. § 22-3001 (8)(A) (2002).

321. *Id.* at § 22-3001 (8)(B).

322. *Id.* at § 22-3001 (8)(C).

323. *Id.* at § 22-3001(9).

person is a child), by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person.³²⁴

These state statutes meet the physical contact element through actual or simulated (through clothing) touching. Some statutes are more graphic and define as sexual activity contact involving “sado-masochistic abuse including flagellation, torture, physical restraint, domination or subordination by or upon a person for the purpose of sexual gratification of any person.”³²⁵

Part of the justification of requiring physical contact between the adult and the child is to establish a credible allegation of sexual abuse and to meet the elements of a traditional criminal offense. This supports the underlying notion in criminal law that “there can be no criminal liability for bad thoughts alone.”³²⁶ The bad thoughts are manifested in bad acts and physical contact between the child and the adult brought about the proof of both. Even criminal conspiracy—a combination of multiple bad acts and bad thoughts—requires “bad acts” as proof of the offense.

The *Revised Norms* uses the word “molestation” and the *Charter* uses the word “contacts” and thus both imply that there is a physical activity between the adult and the child allowing for verification of the sexual abuse of the minor.³²⁷ American statutes provide for criminal prosecution and civil cause of action under the same premise.³²⁸ Nonetheless, the *Revised Norms* goes beyond the necessity or scope of physical contact, and provides that “an act [does not] need to involve force, physical contact, or a discernable harmful outcome” to constitute sexual abuse.³²⁹ This invites consideration *interactions*, non-physical forms of sexual abuse of minors, and the accompanying difficulty of proof, a difficulty made more onerous because of the possible unlimited time for making allegations. The experience of some American jurisdictions may prove illustrative to resolve the question of whether such an inclusion of *interactions* provides fair warning to an accused and whether it meets the demands of due process.

2. Interactions

When the *Charter* and the *Revised Norms* use interactions in their definitions of sexual abuse of a minor they approach the limits established upon criminal prosecution for bad thoughts. The problematical portion of the definition is this: *interactions when the child is being used as an object of sexual gratification for the adult*. Thus, what if there is no physical

324. COLO. REV. STAT. 18-6-403(2)(f)(2001).

325. TENN. CODE ANN. § 39-17-1002 (D) (1997 & Supp. 2002).

326. WAYNE R. LAFAVE, CRIMINAL LAW 8 (3d ed. 2000).

327. See REVISED NORMS, *supra* note 3, at pmb1.; CHARTER, *supra* note 2, art. I (citing CANADIAN CONFERENCE OF BISHOPS AD HOC COMMITTEE, FROM PAIN TO HOPE 20 (June 2002)).

328. See D.C. CODE ANN. § 22-3001 (2002); IND. CODE ANN. § 35-42-4-3 (Miche 2002).

329. REVISED NORMS, *supra* note 3, at pmb1.

contact between adult and child, only visual or auditory connections? And also, while the child's subjective intent concerning any mode of sexual gratification cannot be used as a defense by the adult, there is still the quandary of assessing the subjective intent of the adult at the time of the incident. How may any person assess whether the child is being used as an object of sexual gratification by an adult? For example, if an adult male whistles at a sixteen-year-old girl walking her dog in a park is this an interaction sufficient to satisfy the definition of sexual abuse? Thus, this aspect of the *Charter's* and *Revised Norms'* definitions invites due process, privacy, and equal protection concerns in American courts in determining the credibility of allegations of sexual abuse. Specifically, the statute may be so vague as to allow for arbitrary and discriminatory enforcement,³³⁰ particularly in a hostile media climate. To better assess the use of terms not requiring physical contact as an element of the offense, it is worthwhile to review developments in American law regarding definitions of sexual abuse of minors.

There has been an evolution in attitude in American secular legislatures and courts in the last thirty years concerning child sexual abuse.³³¹ As stated previously, the focus had been on the mental illness, or sickness, of the perpetrator and then by the 1980s the focus shifted to the badness of the perpetrator.³³² Psychiatric treatment of sexual offenders became curtailed and replaced with criminal prosecution as the pendulum shifted in American jurisprudence from rehabilitation of the offender to strict and harsh punishment.³³³ This harsher punishment is evidenced in penal statutes such as those requiring that persons convicted of child abuse register in their locality of residence upon release from incarceration,³³⁴ unlimited statutes of

330. "The objection to a vague statute . . . is akin to a claim of denial of equal protection in law enforcement, although it may more appropriately be said to rest upon the notion that the language of the statute is so uncertain that arbitrariness in its enforcement might not be detected." LAFAVE, *supra* note 326, at 101; see Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 RUTGERS L. REV. 1289, 1307 (1999); Lawrence M. Solan, *Law, Language and Lenity*, 40 WM. & MARY L. REV. 57, 129 (1998); see generally Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1 (1997).

331. See discussion, *supra* Parts II A-B.

332. *Id.*

333. See generally *Alaska v. Jackson*, 776 P.2d 320 (Alaska Ct. App. 1999) (mandating incarceration rather than rehabilitation to affirm societal norms); Weisberg, *supra* note 43.

334. See ALA. CODE §§ 13A-11-200, 15-20-21(1), 15-20-25(b) (2002); ALASKA STAT. §§ 12.63.010, 18.65.087 (Michie 2002); ARIZ. REV. STAT. §§ 13-3821 et seq. (2001 & Supp. 2002); ARK. CODE ANN. §§ 12-12-901 et seq. (West 2001); CAL. PENAL CODE §§ 290 et seq. (West 1999 & Supp. 2002); COLO. REV. STAT. § 18-3-412.5 (1999 & Supp. 2002); CONN. GEN. STAT. §§ 54-250 et seq. (2001); DEL. CODE ANN. tit. 11, §§ 4120, 4121, 4336 (2001 & Supp. 2002); D.C. CODE ANN. §§ 22-4001 et seq. (2001); FLA. STAT. ANN. §§943.043(1), 943.0435(1) (West 2001); GA. CODE ANN. § 42-9-44.1 (2001); HAW. REV. STAT. §§ 846E-1 et seq. (2001); IDAHO CODE §§ 18-8301 et seq. (2001 & Supp. 2002); 730 ILL. COMP. STAT. §§ 150/1 et seq. (1997 & Supp. 2002); IND. CODE §§ 5-2-12-1 et seq. (West 2001 & Supp. 2002); IOWA CODE ANN. §§ 692A.1 et seq. (West 2002); KAN. STAT. ANN. §§ 22-4901 et seq. (2001); KY. REV. STAT. ANN. §§17.500 et seq. (West 2001); LA.

limitations on sexual abuse of children, supervision of treatment programs,³³⁵ and termination of parental rights when there is evidence of sexual abuse by a parent upon a child.³³⁶ There is also added momentum towards this harsher approach with the advent of federal statutes mandating that states be continually vigilant in the protection of children.³³⁷ Due in part to federal instigation, but also to the changing nature of technology and opportunities for sexual abuse of minors, states enacted more expansive statutes to criminalize the production and use of child pornography, to include criminalizing possession of pictures and other media representations incorporating children in states of undress or engaging in sexual acts.³³⁸ Some of these activities are making their way into statutes that refer to the sexual exploitation of children.³³⁹ It is arguable that the definition in the *Revised Norms* that uses the word interaction without the necessity of physical contact, seeks to respond to modern American use of the term sexual exploitation of a minor. Sexual exploitation need not incorporate physical contact and may address modern concerns over pornography and internet interactions.³⁴⁰

State sexual exploitation statutes may address situations when pornography is used in the presence of child and an adult with the purpose of sexually stimulating the child. For example, an adult who sits next to a child

REV. STAT. ANN. §§ 15:540 et seq. (West 2001 & Supp. 2002); ME. REV. STAT. ANN. tit. 34-A, §§ 11221 et seq. (West 2001 & Supp. 2002); MD. CODE ANN. CRIM. PROC. §§ 11-701 et seq. (2001 & Supp. 2002); MASS. GEN. LAWS ch. 6, §§ 178C-178P (2002); MICH. COMP. LAWS ANN. §§ 28.721 et seq. (West 2002); MINN. STAT. §§ 243.166, 244.052 (1992 & Supp. 2002); MISS. CODE ANN. §§ 45-33-21 et seq. (2001); MO. REV. STAT. §§ 589.400 et seq. (West 2002); MONT. CODE ANN. §§ 46-23-501 et seq. (2001); NEB. REV. STAT. §§ 29-4001 et seq. (2001); NEV. REV. STAT. §§ 179D.350 et seq. (2001); N.H. REV. STAT. ANN. § 651-B:7 (2001); N.J. STAT. ANN. § 2C:7-6 et seq. (1995 & Supp. 2002); N.M. STAT. ANN. § 29-11A-5.1 (Michie 2000); N.Y. CORRECT. LAW § 168 (McKinney 2001 & Supp. 2002); N.C. GEN. STAT. §§ 14-208.5-208 et seq. (2001); N.D. CENT. CODE § 12.1-32-15 (2001); OHIO REV. CODE ANN. §§ 2950.01 et seq. (West 2001); OKLA. STAT. ANN. tit. 57, §§ 584 et seq. (West 1991 & Supp. 2002); OR. REV. STAT. §§ 181.585 et seq. (2001); 42 PA. CONS. STAT. ANN. §§ 9791 et seq. (West 1998 & Supp. 2002); R.I. GEN. LAWS § 11-37.1-12 (2001); S.C. CODE ANN. §§ 23-3-400 et seq. (2002); S.D. CODIFIED LAWS §§ 22-22-30 et seq. (Michie 2001 & Supp. 2002); TENN. CODE ANN. §§ 40-39-101 et seq. (2001 & Supp. 2002); TEX. CRIM. PROC. CODE ANN. ART. 62.01 et seq. (Vernon 2001); UTAH CODE ANN. § 77-27-21.5 (2001 & Supp. 2002); VT. STAT. ANN. tit. 13, §§ 5401 et seq. (2001); VA. CODE ANN. §§ 19.2-298.1 et seq. (Michie 2002); WASH. REV. CODE ANN. §§ 9A.44.130 et seq., §§ 4.24.550 et seq., § 4.24.5501 (2001 & Supp. 2002); W. VA. CODE §§ 15-12-1 et seq. (2001); WIS. STAT. ANN. §§ 301.45 et seq. (West 2001 & Supp. 2002); WYO. STAT. ANN. §§ 7-19-301 et seq. (Michie 2000); *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995) (analyzing the constitutionality of state registration of sex offenders and community notification laws).

335. See, e.g., CAL. PENAL CODE § 273.1 (West 2002).

336. See, e.g., CAL. FAM. CODE § 7825(a) (West 2002) (allowing for termination of parental rights when the parent is convicted of a felony [e.g. sexual abuse of a minor] and the facts are of such a nature "as to prove the unfitness of the parent or parents to have the future custody and control of the child"); CAL. FAM. CODE § 3027(a) (West 2002) (providing that if allegations of child sexual abuse are made during child custody proceedings the court may take temporary and reasonable steps to protect the child's safety).

337. See, e.g., Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5102, 5104-5107 (1995 & Supp. 2002) (providing minimum standards for state reporting statutes).

338. See, e.g., CAL. PENAL CODE § 311.2 (West 2003).

339. See, e.g., ARK. CODE ANN. §§ 13-3551- 13-3555 (Michie 2003).

340. *Id.*

when viewing pornography but never initiates physical contact with the child, yet all the while is viewing the pornography with the view of its impact on the child is determinative of arousal. Such conduct may come under the aegis of the Pennsylvania criminal code that defines sexual exploitation as the “[a]ctual or simulated sexual activity or nudity arranged for the purpose of sexual stimulation or gratification of any person.”³⁴¹ Other state statutes use sexual exploitation of the child in the context of producing pornography, a visual depiction of conduct that may exclude the requirement of physical contact altogether,³⁴² including sexual stimulation of an adult present while the pornography is being produced. Some states would seem to provide for overlapping, such as New Mexico, where a prohibited sexual act includes any lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation.³⁴³

Commentators have criticized the *Charter's* definition of sex abuse, as focusing on the adult's use of the child as an object of sexual gratification; the *Revised Norms* provide little clarification.³⁴⁴ The criticism is that the definition lacks the necessity of physical contact, relying instead on the subjective feelings of the adult and it is very difficult to assess that subjective gratification.³⁴⁵ The Reverend John P. Beal, an associate professor of canon law at the Catholic University of America, is one of the critics of this element of the definition.³⁴⁶ He writes that “the internal motive can be divined only with great difficulty.”³⁴⁷ In establishing this subjective intent on the part of the adult, the definition shifts the burden to refute to the adult.³⁴⁸ This refutation is usually accompanied “with little cooperation from the diocese [in cases of clerics accused], that the alleged offense did not occur.”³⁴⁹ Thus, in addition to the vague definition, often the accused is left

341. 18 PA. CONS. STAT. ANN. § 6320 (West 2002); *see also* W. VA. CODE ANN. § 49-1-3 (Michie 2001) (defining sexual exploitation as an act whereby: “(1) A parent, custodian, or guardian, whether for financial gain or not, persuades, induces, entices or coerces a child to engage in sexually explicit conduct”).

342. *See, e.g.*, ALA. CODE § 26-14-1(1) (1992 & Supp. 2002) (defining sexual abuse); N.H. REV. STAT. ANN. § 169-C:3 XXVII-(a) (2001) (defining sexual abuse).

343. N.M. Stat. Ann. §30-6A-2a(5) (Michie 1994 & Supp. 2002).

344. John P. Beal, *Hiding in the Thickets of the Law*, AMERICA, Oct. 7, 2002, at 15.

345. *Id.*

346. *Id.*

347. *Id.*; *see also Vatican Quandary: Complicated Decision on Sex Abuse Norms*, *supra* note 300, at 4 (suggesting that canon law experts consider the definition of child sexual abuse as too elastic in the United States).

348. Beal, *supra* note 344, at 15.

349. *Vatican Quandary: Complicated Decision on Sex Abuse Norms*, *supra* note 300, at 4. The *Revised Norms* provide that the diocese provide a competent person to assist persons who claim to have been sexually abused by a priest (Norm 3), but there is no requirement to provide civil or canonical counsel to the accused (Norm 6), although civil authorities are required to provide counsel in a criminal proceeding if the accused cannot afford one and canon law provides that an accused

without the means to pay for legal assistance, a nebulous standard of proof to assess the definition, and without the benefit of being innocent until proven guilty.³⁵⁰ These detriments, coupled with the unlimited statute of limitation to make an allegation, allow for the potential for abuse of due process and generate concern.

Comparison may be made to American jurisprudence. Similar detriments to due process were present in *Santonsky v. Kramer*, a civil termination of parental rights decision.³⁵¹ In this case the Supreme Court of the United States was asked to rule on the standard of proof to be applied when parents, who sometimes are vulnerable to cultural or class bias, could permanently lose custody of their children due to parental unfitness.³⁵² The parents were poor.³⁵³ There were cuts, dirt, broken bones and bruises found on the children, and the parents made little effort to cooperate with state authorities to explain why their children were in such condition.³⁵⁴ There was no mandatory appointment of counsel to represent these poor and barely literate parents, and parental unfitness was a very subjective standard requiring a judicial determination that could easily be biased.³⁵⁵ The Court held that “[g]iven the weight of the private interests at stake, the social cost of even occasional error is sizeable,” and thus, states must apply *at least* a clear and convincing standard of proof before termination of parental rights may be granted consonant with the due process guarantees of the constitution.³⁵⁶ Termination of parental rights is a civil action. In any criminal prosecution for the sexual abuse of a minor, the standard of proof would be the highest—beyond a reasonable doubt—and appointment of a defense counsel would be mandatory if the accused could not provide one for himself or herself.

When viewed in the context of American jurisprudence, the subjectivity of the definition employed in the *Revised Norms* is not the sole issue. Other concerns include the standard of proof necessary to establish the parameters of the offense, additional due process protections such as appointment of counsel when the accused cannot afford one, a reasonable statute of limitations, and even legislation to protect persons vulnerable to denial of due process.³⁵⁷ The elements of the definition are countenanced in existing state and federal statutes, but American jurisprudence provides context,

must always have an advocate. 1983 CODE c.1481 § 2.

350. See Beal, *supra* note 344, at 16.

351. 455 U.S. 745 (1982).

352. *Id.*

353. *Id.* at 752.

354. *Id.* at 751-52..

355. *Id.* at 753.

356. *Id.* at 764.

357. See, e.g., *Popovich v. Cuyahoga County C.P.*, 276 F.3d 808 (6th Cir. 2002) (requiring, under the Americans With Disabilities Act, that state courts provide hearing assistance to a hearing impaired parent so that the parent could effectively participate in a child custody determination, thus guaranteeing due process protection to the parent).

explicit constitutional guarantees, and evidentiary limits which have yet to be fully explored in the procedure adopted by the *Revised Norms*.³⁵⁸

Interactions with a child are not per se prejudicial to the definition. The definition of sexual abuse of minors, including the phrase appearing in the *Charter*, contacts or interactions, is cited by Homer H. Clark, Jr., a professor of law known for his comprehensive treatment of American domestic relations law, as an appropriate definition in American law. He writes that

[s]exual abuse is seldom defined in the statutes, but a suggested definition is contacts or interactions between a child and an adult when the child is being used for the sexual stimulation of the perpetrator or another person when the perpetrator is in a position of power or control over the victim.³⁵⁹

Professor Clark supports the definition's applicability even though often it has been the basis for appeal from conviction in civil courts upon privacy, due process, or equal protection constitutional claims.³⁶⁰ Often the constitutional problems are grounded in questions as to proof. How does a court prove a child was sexually stimulating to the adult, especially since the adult has a privacy interest in his (or her) body which prohibits unlimited discovery of evidence? For example, the Washington Court of Appeals was asked to decide as a matter of law whether a father could be forced to submit to a penile plethysmograph examination to measure his physical sexual arousal in response to auditory and visual stimuli.³⁶¹ The facts that gave rise to the request concerned a father who was involved in a custody dispute from which it was alleged that he exposed his three-year-old daughter to pornography.³⁶² The daughter also stated that the father had touched her genitalia and that he walked around the house naked in front of her.³⁶³ If the daughter had become an object of sexual gratification for the father, then the offense would deny him custody of his daughter in this civil action.³⁶⁴ The legal issue was whether these verbal assertions by the child justified compelling the penile examination to demonstrate his likelihood of arousal at such verbal comments.³⁶⁵ The court held that they did not.³⁶⁶ Due to the

358. See *infra* Sec. IV. C. for a discussion of the procedures.

359. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 354 (2d ed. 1987).

360. *Id.* at 354-55.

361. *Ricketts v. Ricketts*, 43 P.3d 1258 (Wash. Ct. App. 2002). Evidence suggests that canon law provides that "no one can be obliged to engage in invasive psychological testing without the person's free consent." Kevin E. McKenna, *The Dallas Charter and Due Process*, AMERICA, Sept. 16, 2002, at 9.

362. *Ricketts*, 43 P.3d at 1259.

363. *Id.*

364. See *id.*

365. *Id.* at 1260.

lack of evidence of physical contact between the child and the parent the court was not willing to overcome the right to privacy of the father, nor to conclude that the child had been sexually abused by being the object of the father's sexual gratification.³⁶⁷

In addition to privacy protections, if an adult interacts with a child in the context of verbal interaction, the activity has implications for free speech protections. For example, a Massachusetts Appeals Court considered whether "verbal sexual contact" was sufficient to constitute sex abuse.³⁶⁸ The court held that interaction without the necessity of physical contact could be actionable as child sexual abuse because the "focus is not limited to the precise nature of the interaction between parent and child, but additionally takes into account the purpose of that interaction and its potential effect upon the child."³⁶⁹ The court went on to say that when viewed in the context of an adult's concern for the education, physical, and emotional well-being of the child, even verbal sexual contact could result in abusive contact if it appears that the verbal contact with the child went beyond the parameters of what may be considered reasonable in a parent-child relationship.³⁷⁰ The conclusion is that if it may be proven that the parent exceeded the bounds of what is a reasonable verbal discourse between a parent and a child, and that included sexual verbalization, then it could constitute child sexual abuse that went beyond the protection of the First Amendment.

The factual determination of what is a reasonable definition also invites consideration of equal protection guarantees. In the present climate of accusations against clergy and repeated media depictions of sexual abuse of minors, the concern is whether a statute defining the sexual abuse of a minor in terms that are less than precise may invite unequal treatment of clergy.³⁷¹ Without concomitant due process guarantees granted to the accused cleric, the issue arises as to the valid prosecution of any class of persons made vulnerable by bias or disfavor.

When confronted with guarantees of privacy, freedom of expression, due process, and equal protection, it would seem states had few options in criminalizing behavior it considered sexually abusive. This is not the case. American legislation has not been slack in the identification and prosecution of adults attempting sexual physical contacts or interaction with minors.³⁷² Once legislatures abandoned identifying a perpetrator as "sick" and adopted an attitude that they were "bad" there followed greater accountability and

366. *Id.*

367. *Id.*

368. *See* John D. v. Dep't of Soc. Serv., 744 N.E.2d 659 (Mass. App. 2001).

369. *Id.* at 662.

370. *Id.*

371. *See, e.g.,* Papachristou v. Jacksonville, 404 U.S. 156, 170 (1972) (holding that vague laws were a particular threat to the poor and nonconformists); Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that states may have an affirmative obligation to support the disadvantaged in the pursuit of their constitutional rights).

372. *See* COLO. REV. STAT. 18-6-403 (2003).

greater leeway for prosecutors and legislators to prosecute. The balance shifted and state statutes became less definitive and procedures developed that allow for the prosecution to obtain more information from accusers, including children. "The cases have nearly always held that the statutes are sufficiently definite to give persons of ordinary intelligence fair notice of what the legislature is forbidding."³⁷³ For an example of the shift in perspective, a Florida statute that defines child abuse as an act that could reasonably be expected to result in "mental injury" to a child is not unconstitutionally vague—even though it is difficult to know what could cause mental injury to the child.³⁷⁴ Courts may employ another statute defining abused and neglected children to provide the necessary parameters to the definition of what mental injury means. Additionally, states have increasingly allowed expanded testimony opportunities, even allowing the child to testify in both criminal and civil trials.³⁷⁵ For example, state courts provide for the child's testimony through the use of protective arrangements such as closed circuit television, even though these arrangements do not fit the strict objective standards most often expected in civil or criminal procedures.³⁷⁶ Admittedly, because the child may be vindictive in submitting false accusations and because of lengthy statutes of limitations with corresponding limitations on credible evidence, false accusations may well gain credence. But courts and legislatures have decided that the need to prosecute child sexual abuse warrants that the balance be tipped in favor of broader statutory definitions and judicial procedures.

The circumstances surrounding allegations against the late Cardinal Joseph Bernardin when he was falsely accused by Steven Cook of sexual abuse when Mr. Cook was a seminarian, illustrate the consequences of false accusations.³⁷⁷ There was intense media coverage and the cardinal was associated with a range of already proved accusations against clerics.³⁷⁸ Nonetheless, when speaking to the priests of the Archdiocese of Chicago shortly after the accusations, Cardinal Bernardin espoused the attitude favoring expanded protection of children. He said:

373. CLARK, *supra* note 359.

374. See *Dufresne v. State*, 826 So. 2d 272, 274-75 (Fla. 2002).

375. See *Maryland v. Craig*, 497 U.S. 836 (1990) (criminal); *Coy v. Iowa*, 487 U.S. 1012 (1988) (civil). But a trial court should not allow an expert witness to give an opinion that child sexual abuse has occurred absent physical evidence supporting a diagnosis of sexual abuse. *In re Morales*, 583 S.E.2d 692, 695 (N.C. Ct. App. 2003). Without physical evidence the expert's testimony is an impermissible opinion regarding the veracity of the child. *Id.* The expert may only testify that the alleged victim has symptoms consistent with sexual abuse. *Id.*

376. See *Coy v. Iowa*, 487 U.S. 1012 (1988); *Maryland v. Craig*, 497 U.S. 836 (1990). For federal and state statutes, see, for example, 18 U.S.C. § 3509 (2000) (Child Victims and Child Witnesses' Rights); VA. CODE ANN. § 63.2-1521 (Michie 2002). For admissibility of hearsay evidence, see, for example, *Idaho v. Wright*, 497 U.S. 805 (1990).

377. *Panel One: Coverage of the Cardinal Joseph Berardin Case*, available at www.annenbergnwu.edu.

378. *Id.*

We must not let our distress over this false accusation of any other false accusation lessen our concern for true victims. I have said to the media several times during the last week: yes, I want to protect my name, I want to protect the image of the archdiocese. But I do not want to do it in any way that would scare off true victims. They must come forward to us to receive our pastoral care. And we must make sure that no child, no minor will ever be at risk in this archdiocese.³⁷⁹

The problems associated with the nebulous definition of sexual abuse are compounded for the vast majority of clergy confronting allegations of sexual abuse by the lack of resources to maintain an adequate canonical or criminal defense, the ten year statute of limitations (at least) required by the canonical procedures contained in the *Revised Norms*, and the nascent tribunal procedures. There is also, if found guilty, the single penalty at the canonical level, that of forced dismissal from the clerical state.³⁸⁰ This is the most severe penalty and there are neither gradations corresponding with the degree of abuse, nor the number of occasions.³⁸¹ When compared to American procedures, there are valid due process concerns over the definition's inclusion of allegations of interaction, or sexual exploitation, devoid of the more common understanding of sexual abuse as a part of physical contact. There are added deficiencies in the Church's process too, such as the lack of a strict statute of limitations, and the absence of mandatory appointment of civil and canonical counsel.³⁸² Without additional procedural safeguards, justification for the child sexual abuse definition's use of interaction, without predicating it upon physical contact, deserves explanation if it is to meet the level of due process within American jurisprudence.

It is arguable that interaction without physical contact is only justified as an incident of sexual abuse when the interaction occurs as part of the exploitation of a child. The term exploitation could complement non-physical contact and provide a more determinative definition of sexual abuse. An example of this approach is the Colorado code that complements interaction with the sexual exploitation of a child. The statute provides:

379. *Homily to the Priests of the Archdiocese of Chicago, November 19, 1993*, in SELECTED WORKS OF JOSEPH CARDINAL BERNARDIN 581 (Alphonse P. Spilly, C.P.P.S. ed. 2000).

380. 1983 CODE, Book VII c.1400-1500 ("Trials in General").

381. *Id.*

382. Cf. U.S. CONST. amend. VI. Under the Sixth Amendment, an accused is entitled to an attorney appointed by the state only when there are criminal charges pending. *Id.* In civil suits, states sometimes appoint attorneys when the defendant cannot afford one under due process grounds. See, e.g., *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18 (1981) (holding that an attorney was not mandated in a civil termination of parental rights case). But see *Santosky v. Kramer*, 455 U.S. 745 (1982) (appointing an attorney under due process grounds in each case of termination when the parent could not afford one). In spite of the Norms, canon law provides that "[t]he accused in a penal trial must always have an advocate either appointed by the accused or assigned by a judge." 1983 CODE c.1481 § 2.

(3) A person commits sexual exploitation of a child if, for any purpose, he or she knowingly:

(a) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitive material; or

(b) Prepares, arranges for, publishes, including but not limited to publishing through digital or electronic means, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, or distributes, including but not limited to distributing through digital or electronic means, any sexually exploitive material; or . . .

(c) Possesses with the intent to deal in, sell, or distribute, including but not limited to distributing through digital or electronic means, any sexually exploitive material; or

(d) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing a performance.³⁸³

The Colorado statute demonstrates that, taken in context, the phrase "interaction . . . when the child is being used as an object of sexual gratification for the adult,"³⁸⁴ is an offense that may permissibly fall within the definition of sexual abuse of minors because of the commercial context. It is arguable that the statute would be applicable even if profit were not involved or the child did not engage in any activity that could be considered sexual. Thus, there are other state statutes that may permit interaction as an offense without the necessity of a commercial production, the statute being more oriented towards exploitation in the context of the adult's sexual gratification.³⁸⁵ But even if the adult's behavior evidences such exploitation, "credibility is the single most important factor" in any allegation and thus American courts have demanded a standard or proof: clear and convincing evidence in the civil courts,³⁸⁶ and the higher standard of beyond a reasonable doubt if the offense is criminal. In addition, statutes of limitations almost always provide limiting the time for prosecution.

383. COLO. REV. STAT. § 18-6-403 (2003). The statute has survived constitutional challenge based on due process, in *People v. Batchelor*, 800 P.2d 599 (Colo. 1990), equal protection, in *People v. Slusher*, 844 P.2d 1222 (Colo. App. 1992), and the First Amendment in *People v. Enea*, 665 P.2d 1026 (Colo. 1983).

384. REVISED NORMS, *supra* note 3, at pbml.

385. *See, e.g.*, COLO. REV. STAT. § 18-6-403 (2003).

386. *See In re Dawn B.*, 452 N.Y.S.2d 817 (1982), codified in N.Y. CLS FAMILY CT ACT § 1051(e) (2002).

Furthermore, there will be automatic appointment of an attorney in any criminal prosecution when the accused cannot afford one.³⁸⁷ Most states interpret due process guarantees as requiring them to provide for an attorney in civil matters if the matter involves fundamental rights.³⁸⁸

Whether the process contemplated by the American bishops is criminal or civil in character should be evidenced by the penalties exacted. It follows then that once a process is civil or criminal there are defined standards of proof and the possibility of an applicable statute of limitations.³⁸⁹ The *Charter* provides for a policy of zero-tolerance³⁹⁰ and the *Revised Norms* affirms this by stating that,

When even a single act of sexual abuse by a priest or a deacon is admitted or is established after an appropriate process in accord with canon law, the offending priest or deacon will be removed permanently from ecclesiastical ministry, not excluding dismissal from the clerical state, if the case so warrants.³⁹¹

While the zero-tolerance policy may be mitigated by the proposed imposition of a ten-year statute of limitations, the tone of the bishops is that there will be zero-tolerance of a priest's sexual abuse of a minor whenever it is discovered.³⁹² Such censure should demand a standard of proof of sexual abuse at least commensurate with the civil standard of clear and convincing evidence. And because the *Revised Norms* also state that the universal law of the Church considers "sexual abuse of minors a grave delict and punishes the offender with penalties,"³⁹³ the process appears patently criminal; therefore conviction of the accused should be predicated upon proof beyond a reasonable doubt, a presumption of innocence, and mandatory appointment of counsel if the accused cannot afford one.

The definition employed by the bishops must be complemented with additional safeguards if it is to meet constitutional standards in American jurisdictions; a better process would also safeguard the allegations of victims. For example, in the Diocese of Paterson, New Jersey, the bishop restored a suspended priest to active ministry after a diocesan review board consisting of five Catholic lay persons and three clerics voted unanimously that the actions of the priest did not meet the definition of sexual abuse contained in the *Revised Norms*.³⁹⁴ The priest allegedly touched the genitals

387. U.S. CONST. amend. VI.

388. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982).

389. For an example of how civil or criminal status affects the burden of proof, see *Hicks v. Feiock*, 485 U.S. 624 (1988).

390. CHARTER, *supra* note 2, at 8.

391. REVISED NORMS, *supra* note 3, at Norm 8.

392. When removal of a priest would be barred by the ten-year statute of limitations, "the bishop/eparch shall apply to the [Vatican's] Congregation for the Doctrine of the Faith for a dispensation from the [statute], while indicating appropriate pastoral reasons." *Id.* at Norm 8(A).

393. REVISED NORMS, *supra* note 3, at pmb1.

394. Alan Cooperman, *Catholics Question Gray Areas of Abuse*, WASH. POST, Nov. 30, 2002, at A2.

of a minor through the minor's underwear while the minor was in bed.³⁹⁵ The review board admitted the actions of the priest were inappropriate, but did not meet the definition contained in the *Revised Norms*. Leaders of groups representing alleged victims of clergy sexual abuse immediately charged that such decisions will allow clerical abusers to continue to victimize children,³⁹⁶ thereby demonstrating that failures in the definition and the process will jeopardize a fair hearing for alleged victims. The definition, including interaction with a child without physical contact, will be a workable part of the bishops' *Charter* if there are additional safeguards established. This rightfully seems the task of the personnel provided in the *Revised Norms*.

B. The Personnel

Article 2 of the *Charter* establishes a procedural mechanism to initiate and process credible allegations of sexual abuse; the procedure includes personnel to accomplish the mandate of the bishops.³⁹⁷ The *Revised Norms*, adopted by the bishops in November 2002, implements that mechanism at Norms 4-11. Prior to the *Charter's* adoption, many dioceses had established a modicum of personnel to address allegations of sexual abuse of minors. These were independent diocesan commissions or review boards and provided the types of services now mandated by the *Charter*,³⁹⁸ but functioned at the discretion of the individual diocesan bishop.³⁹⁹ After November 2002, the *Revised Norms* specifies that each diocese will have a written policy on the sexual abuse of minors within three months of the effective date of the Norms, and should the diocese modify the policy, the revisions must be submitted within three months.⁴⁰⁰ The written policy and any modification must be sent to the U.S. Conference of Catholic Bishops, where it will be reviewed by the National Review Board.⁴⁰¹

Thus, each diocese will have an assistance coordinator to assist alleged victims⁴⁰² and a local review board where the majority of members will be lay persons not employed by the local church.⁴⁰³ These lay persons are

395. *Id.*

396. *Id.*

397. CHARTER, *supra* note 2, at art. 2.

398. Cardinal Joseph Bernardin established an archdiocesan commission and a set of guidelines for implementation in Chicago in 1993 and distributed them to every American bishop, but they were mostly ignored. See Greeley, *supra* note 122, at 13.

399. For a description of the process by which allegations of sexual abuse were administered within the Boston archdiocese, see OFFICE OF THE ATT'Y GEN. OF MASS., *supra* note 41, at 5-11.

400. REVISED NORMS, *supra* note 3, at Norm 2.

401. *Id.* at Norm 2.

402. *Id.* at Norm 3.

403. *Id.* at Norm 5. The review board will have the initial task of assessing credible allegations of sexual abuse of minors. *Id.* at Norm 4(A). The board will consist of at least five persons, the

pivotal in the operation of the Church's policy to address clergy sexual abuse of minors because they exhibit a commitment to openness as opposed to confidentiality, of lay participation as opposed to clericalism, of accountability for mistakes made, of pastoral assistance to victims, and of standardization as opposed to fragmentation. Overall, it will be the personnel and especially the national offices that will provide the test of the effectiveness of the *Charter's* goals.

1. Diocesan Review Board

Each diocese in the United States will have a diocesan review board consisting of at least five persons, thus allowing for the appointment of more members should the bishop choose to do so. Therefore, even though the Norms specifies that five must be "in full communion with the Church,"⁴⁰⁴ this would not preclude the appointment of non-Catholics to the board if the number of members were to exceed five. Among the members there should be a priest who is an experienced pastor, and another non-clerical member who has "expertise in the treatment of the sexual abuse of minors."⁴⁰⁵ And finally, the Norms states that "[i]t is desirable that the Promoter of Justice participate in the meetings of the review board."⁴⁰⁶ The Promoter of Justice is an addition to the original norms initiated after the bishops' meeting in Dallas, Texas, in June 2002. The Promoter of Justice is a product of the Church's canon law, charged with providing for the public good when there are contentious cases.⁴⁰⁷ One of the major concerns over the original norms was the lack of inclusion of canon law procedures.⁴⁰⁸

The members of the diocesan review board will serve "as a confidential consultative body to the bishop,"⁴⁰⁹ make "assessment of allegations of sexual abuse of minors" and fitness for ministry of Church personnel,⁴¹⁰ review policies for addressing sexual abuse in the local church,⁴¹¹ and offer "advice on all aspects of [sexual abuse] cases, whether retrospectively or prospectively."⁴¹² The *Revised Norms* contains no reference to the appellate review board, a feature of the previously adopted norms. Instead, the appellate procedure was replaced with a process that would now conform to Church canon law. Indeed, the *Revised Norms* requires that the written

majority of whom will be lay persons (not clerics); one of the lay persons is to have "particular expertise in the treatment of the sexual abuse of minors." *Id.* at Norm 5. The term of the board members is five years with the option to renew. *Id.* at Norm 2. For an example of the composition of a board with credentials, visit the website for the Archdiocese of Washington Child Protection Advisory Board at http://www.adw.org/commun/protect_advisory.html.

404. REVISED NORMS, *supra* note 3, at Norm 6.

405. *Id.* at Norm 5.

406. *Id.*

407. 1983 CODE c.1430-37.

408. See John P. Beal, *Hiding in the Thickets of the Law*, AMERICA, Oct. 7, 2002, at 15.

409. REVISED NORMS, *supra* note 3, at Norm 4.

410. *Id.* at Norm 4(A).

411. *Id.* at Norm 4(B).

412. *Id.* at Norm 4(C).

policy adopted by the diocese “comply fully with, and . . . specify in more detail, the steps to be taken in implementing the requirements of canon law.”⁴¹³ There are now specific references in Church canons referencing the preliminary investigations in the penal process,⁴¹⁴ the place of the trial, and the persons to be admitted to the court.⁴¹⁵ Thus, while the members of the review board are mostly lay persons, the procedure outlined in the *Revised Norms* and the abolition of the lay appellate review procedure shift the focus to a more clerical process through the incorporation of more clergy. Church tribunals consisting of priests, Vatican congregations, and Church canon law may contribute to a perception of clericalism and perhaps obfuscation. In practice, the procedure, and particularly the lay review board, must overcome this perception with tightly defined procedures rather than repeated prosecutions.

413. *Id.* at Norm 2.

414. *See* 1983 CODE c.1718-19. “Whenever [a bishop] receives information which at least seems to be true of an offense, he shall cautiously inquire personally or through another suitable person about the facts and circumstances and about imputability unless this investigation appears to be entirely superfluous.” *Id.* at c.1717, § 1. “Care must be taken lest anyone’s good name be endangered by this investigation.” *Id.* at c.1717, § 2. “The one who conducts the investigation has the same power and obligations as an auditor in the process; this person cannot act as a judge in the matter, if a judicial process is set in motion later.” *Id.* at c.1717, § 3.

When sufficient evidence appears to have been collected, the [bishop] shall decide: [1] whether the process for inflicting or declaring a penalty can be set in motion; [2] whether this is expedient in light of can. 1341; [3] whether a judicial process must be used or unless the law forbids it whether he must proceed by a decree without a trial.

Id. at c.1718, § 1. “The [bishop] is to revoke or change the decree mentioned in [c.1718, § 1] when it appears to him from new evidence that a different decision is called for.” *Id.* at c.1718, § 3. “In issuing the decrees mentioned in [c.1718, § 1-2], the [bishop] is to hear two or more judges or other experts in the law, if he prudently sees fit to do so.” *Id.* at c.1718, § 3. “In order to avoid useless trials, before he makes a decision in accord with [c.1718, § 1], the [bishop] is to consider whether it is expedient that either he or the investigator equitably solve the question of damages with the consent of the parties.” *Id.* at c.1718, § 4. “The acts of the investigation, the decrees of the [bishop] by which the investigation was opened and closed, and all that preceded it are to be kept in the secret archive of the curia if they are not necessary for the penal process.” *Id.* at c.1719.

415. *See* 1983 CODE c.1468-70. “To the extent that it is possible, each tribunal is to be in a permanent place which is open during specified hours.” *Id.* at c.1468. “Judges who have been forcibly expelled from their own territory or have been impeded in the exercise of jurisdiction there can exercise jurisdiction and render a sentence outside that territory; however, the diocesan bishop should be informed of this fact by the judge.” *Id.* at c.1469, § 1. “Besides the case mentioned in [c.1469.] § 1, for a just cause and after hearing the parties, judges can travel outside their own territory in order to acquire proofs with the permission of the diocesan bishop of the place they enter and at a site designated by the bishop.” *Id.* at c.1469, § 2. “Unless particular law provides otherwise, while cases are being tried before a tribunal only those person are to be present in court whom the law or the judge decides are necessary to expedite the process.” *Id.* at c.1470, § 1. “With appropriate penalties a judge can demand compliance on the part of all who assist at the trial and who are seriously lacking in the respect and obedience owed the tribunal; the judge can also suspend advocates and procurators from exercising their function before ecclesiastical tribunals.” *Id.* at c.1470, § 2.

2. National Review Board

The *Charter* provides for the establishment of a National Review Board, “including parents, appointed by the Conference [of Catholic bishops] President and reporting directly to him.”⁴¹⁶ The National Review Board will be headquartered at the U. S. Conference of Catholic Bishops’ offices in Washington, D.C., and will have the following responsibilities: (1) “approve the annual report on the implementation of [the] *Charter* in each of [the] dioceses,” (2) recommend changes based on the annual review, (3) commission a comprehensive study of the causes and context of the sexual abuse scandal, and (4) “commission a descriptive study, with the full cooperation of our [dioceses], of the nature and scope of the problem within the Catholic Church in the United States, including such data as statistics on perpetrators and victims.”⁴¹⁷

Gov. Frank Keating of Oklahoma was appointed the first chairman of the national board, composed entirely of lay persons. His first announcement as chairman “publicly excoriated American church leaders for failing to act swiftly and decisively enough against abusive priests.”⁴¹⁸ And following the board’s meeting in November 2002, he announced plans to (1) establish benchmarks by which diocesan programs can create a safe environment for children, (2) establish procedures to provide due process within the diocesan review boards, (3) schedule testimony and surveys to assess the nature and scope of the problem,⁴¹⁹ and (4) issue the first public annual audit of diocesan policies in 2003, naming those not in compliance with the new procedures.⁴²⁰ The national board also has the responsibility of assisting and monitoring the Office for Child and Youth Protection.

Governor Keating resigned as chairman of the review board mid-June, 2003, with another attack on American bishops. Concerned over the reluctance of some bishops to complete a survey ordered by the *Charter* and provided by the review board, Governor Keating “dared to summarize resistant bishops as Mafia-like in withholding a full accounting of the problem.”⁴²¹ Eventually, the bishops resolved their concerns with the survey and the review board promised to release its findings once completed.⁴²² By

416. CHARTER, *supra* note 2, at art. 9.

417. *Id.* The National Review Board intends to audit every American diocese to determine its compliance with the Charter’s policies by the end of 2003. Alan Cooperman, *Auditors Reexamine Church Sex Abuse*, WASH. POST, May 17, 2003, at A2.

418. Frank Bruni, *The Vatican is Rejecting an Erosion of Authority*, N.Y. TIMES, Oct. 20, 2002, at A2; *see also* Sam Dillon, *Accounting of Abuse is Criticized*, N.Y. TIMES, Dec. 8, 2002, at A41 (accusing bishops of being reckless in keeping personnel files).

419. Robert S. Bennett, Esq., announced plans to question bishops so as to determine the scope of the sexual abuse scandal. Pam Belluck, *Catholic Hierarchy Facing Questions From Review Panel*, N.Y. TIMES, Dec. 7, 2002, at A15.

420. *National Review Board Outlines Plans to Combat Sexual Abuse*, AMERICA, Dec. 2, 2002, at 4.

421. *Faith in the Bishops Put to the Fire*, N.Y. TIMES, June 17, 2003, at A26.

422. *Catholic Panel to Release Reports on Priests’ Abuse*, WASH. POST, July 30, 2003, at A4.

July 2003, one year after its inception, the review board published a report on its activities and continuing plans for the future.⁴²³

3. Office for Child and Youth Protection

Operating out of conference headquarters in Washington, D.C., the office will (1) assist dioceses in the implementation of all "safe environment" programs,⁴²⁴ (2) assist in the development of mechanism to audit adherence to policies, and (3) publish an annual report on the progress made implementing the objectives of the *Charter*, to include publishing the names of those dioceses not in compliance.⁴²⁵

The director of the office is appointed by the General Secretary of the U.S. Conference of Catholic Bishops; Kathleen L. McChesney, the third-ranking person at the FBI, was chosen to become the first director.⁴²⁶ Until her appointment, she was responsible for improving relations between federal and local law enforcement agencies after the terrorist attack on September 11, 2001.⁴²⁷ Her role is described as "a watchdog over the bishops."⁴²⁸ Victims of clergy sexual abuse welcomed the appointment because she had investigative experience and is "independent of the bishops."⁴²⁹

The personnel, to include the assistance coordinator, the diocesan review boards, the national board and the office for youth protection consist almost exclusively of lay persons.⁴³⁰ This is purposeful and responds to the necessity of accountability. The inclusion of lay persons seeks to address the concern voiced by so many critics of the past practices of many bishops, which consisted of confidential agreements with victims, attempted rehabilitation and reassignment of the cleric, all conducted within a context of secrecy. This cross-cultural inclusion is also consonant with American

423. The report may be found at www.usccb.org/comm/reviewboard.htm. The United States Conference of Catholic Bishops provides, through its Office of Communications, a list of documents and reports concerning the sexual abuse crisis. See www.nccbuscc.org/comm/restoretrust.htm.

424. CHARTER, *supra* note 2, at art. 12.

[Dioceses] will establish "safe environment" programs. They will cooperate with parents, civil authorities, educators, and community organizations to provide education and training for children, youth, parents, ministers, educators, and others about ways to make and maintain a safe environment for children. [Dioceses] will make clear to clergy and all members of the community the standards of conduct for clergy and other persons in positions of trust with regard to sexual abuse.

Id.

425. *Id.* at art. 8.

426. Alan Cooperman, *Catholic Church is F.B.I. Veteran's New Boss*, WASH. POST, Nov. 8, 2002, at A2.

427. *Id.*

428. *Id.*

429. Laurie Goodstein, *Bishops Pick FBI Official to Police Abuse in Church*, N.Y. TIMES, Nov. 8, 2002, at A18.

430. REVISED NORMS, *supra* note 3, at Norm 5.

principles of review, openness and accountability. But the burden on these persons, almost all of whom are new to clerical governance, is to administer a procedure that can provide accountability within a context of openness, guarantees due process to those accused, a fair hearing to those making allegations, and safety from sexual abuse for children. This is far more difficult than condemning bishops and convicting priests, and it will demand a strict interaction with American notions of constitutional guarantees since the underlying issue is discordance in the church-state relationship.

C. *The Procedure*

The lay review boards and the process by which an allegation against a priest is conducted necessitate a delicate balance between the alleged victim's right to seek redress for child sexual abuse, and the right of the accused to privacy and due process. Church canon law is conscious of this balance, mandating that care be taken so that the good name of the accused is not endangered by the investigation.⁴³¹ Canon law also recognizes the right of every person to protect his or her own privacy.⁴³² And American criminal procedure provides guarantees that every person is innocent until proven guilty, persons should be free from unreasonable searches and seizures, defamation is not protected by free speech, and a fair process is always due.

The two juridical systems overlap when an alleged offense occurs within a state and a Roman Catholic priest's conduct intersects with the right of the public, operating through civil authorities, to prosecute criminal offenses. Church and state have a right to determine guilt or innocence and to provide appropriate penalties. The *Charter* and the *Revised Norms* seek to maintain a balance between the civil and canon law requirements, each is entitled to its own process.⁴³³ The tone of the Church's policy is complementary to the American process of justice and this is consonant with the American model of church-state relations. The procedure outlined in the *Revised Norms* involves the following elements:⁴³⁴

1. Investigation

A preliminary investigation commences with a credible allegation of sexual abuse.⁴³⁵ It will be the task of each diocese to provide an intake person to assess the credibility of each allegation.⁴³⁶ This is a person to whom the secretary at the chancery, the parish priest, or the alleged victim knocking at the door is directed to begin the process. Neither the *Charter* nor the *Revised Norms* provides for such a person, but one is implied

431. 1983 CODE c.1717, § 2.

432. *Id.* at c. 220.

433. See CHARTER, *supra* note 2, at art.5; REVISED NORMS, *supra* note 3, at pmb1.

434. REVISED NORMS, *supra* note 3, at Norm 4.

435. *Id.*

436. See *id.*

logically from the policy since the diocesan review board must be called upon by the bishop.⁴³⁷ Credibility is an issue from the start, but in light of past history and the sensitive nature of each allegation, the intake person should certainly be prompted to consider each allegation as credible and warranting further investigation by the review board.⁴³⁸ This heightened sensitivity is sustained by canon law: "Whenever [a bishop] receives information which at least seems to be true, of an offense, he shall cautiously inquire personally or through another suitable person about the facts and circumstances and imputability unless this investigation appears to be entirely superfluous."⁴³⁹ Allegations will run the gamut from law enforcement notification that a priest or deacon has been arrested, to anonymous e-mails or written notes alleging sexual misconduct towards a minor by diocesan personnel. The intake person must have a process for deciphering these within the dimension of the definition of sexual abuse of minors. And if the allegation is sufficiently credible at that point, then the bishop will confront the *Charter's* and *Revised Norms'* policies that "[the diocese] will advise victims of their right to make a report to public authorities and will support this right."⁴⁴⁰ That is, after an allegation is made to the diocese, the diocese will have an affirmative duty to support disclosure to the public authorities.⁴⁴¹ Such a disclosure policy is in sharp contrast to the confidential agreements and secrecy that was the practice of many Church officials until the *Boston Globe's* reporting revealed that priests were assigned to parishes after the Boston archdiocese had knowledge of sexual abuse of minors.⁴⁴²

Often the Church was able to keep personnel files of priests secret, arguing that this was a religious matter and thus protected by the First Amendment from state entanglement.⁴⁴³ Thus, allegations made against priests were confined to the files kept in diocesan offices and were beyond

437. *Id.*

438. *See id.* at Norm 6.

439. 1983 CODE c.1717, § 1.

440. REVISED NORMS, *supra* note 3, at Norm 11; *see also* CHARTER, *supra* note 2, art. 4.

441. *See* REVISED NORMS, *supra* note 3, at Norm 11.

442. *Compare* REVISED NORMS, *supra* note 3, at Norms 5-11, with Rezendes, *supra* note 28, at A1.

443. Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (1995) (prohibiting judicial review of internal Church governance because of the First Amendment); James T. O'Reilly & JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31, 63 (1994) (discussing how excessive discovery would violate a pastoral privilege implicit in the First Amendment); *see also* Tort Liability, *supra* note 19, at 219 (arguing that First Amendment prohibition on adjudication of legal actions requiring resolution of religious questions in the tort context will be eroded in the coming decades). *See generally* Editorial, *Church, State and Children*, N.Y. TIMES, Mar. 6, 2003, at A30; Calvin Sims, *Los Angeles Archdiocese Tries to Shield Documents*, N.Y. TIMES, Apr. 2, 2003, at A10; Paul Von Zielbauer, *On Appeal, Diocese Can Keep Abuse-Suit Documents Sealed*, N.Y. TIMES, June 26, 2003, at B8; Katherine Zezima, *Archdiocese Appeals Ruling*, N.Y. TIMES, Mar. 22, 2003, at A8.

the scope of discovery tactics used in civil and criminal procedures.⁴⁴⁴ The protection of the First Amendment ended during the summer of 2002, when Justice Robert D. Krause of the Rhode Island Superior Court issued a ruling that required the Diocese of Providence to produce thousands of documents relating to personnel decisions involving priests.⁴⁴⁵ The ruling was hailed as a significant shift in the church-state balance and First Amendment protection previously accorded the Church.⁴⁴⁶ Later that year, in Boston, Suffolk Superior Court Judge Constance M. Sweeney, ordered the Boston archdiocese to produce 11,000 internal Church documents relating to 65 priests accused of sexual abuse of minors over a period of thirty years.⁴⁴⁷ As the *Boston Globe* had pointed out in its investigation: "For every name passed along to prosecutors, a secret Church file of some type existed in virtually every case."⁴⁴⁸ These documents reveal "a more consistent pattern of mishandling abusive priests."⁴⁴⁹ The revelations in the documents expose misconduct by priests and failure by the archdiocese to take action when there was sexual abuse of minors and other sexual misconduct.⁴⁵⁰ Misconduct notations include fathering children with married women, drug abuse, seduction of young women in training to become nuns, and violent behavior.⁴⁵¹ The judicial orders requiring that Church documents be revealed demonstrate that secrecy is no longer an option for the Church. The First Amendment freedom of expression now unveils the Church secrets, rather than hiding them, and "its leaders arrived there by abandoning children and by keeping that abandonment hidden for far too long."⁴⁵²

2. Reporting Requirement

Once a credible allegation is established, the *Charter* incorporates a requirement of cooperation with the civil authorities by providing that "dioceses/eparchies will report an allegation of sexual abuse of a person who is a minor to the public authorities. They will cooperate in their

444. See, e.g., *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 825 A.2d 153 (Conn. App. Ct. 2003).

445. Sam Dillon, *First Amendment No Shield for Church in Abuse Cases*, N.Y. TIMES, July 4, 2002, at A8.

446. *Id.*

447. *Church Ordered to Release Records on Accused Priests*, WASH. POST, Nov. 26, 2002, at A11; Pam Belluck, *From Files of the Boston Archdiocese. A Problem Priest's Dossier*, N.Y. TIMES, Dec. 6, 2002, at A28 (alleging the Rev. James D. Foley of adulteries, paternity of two children, and negligence in regards to his mistress' death); Editorial, *Do What You Say, Cardinal*, L.A. TIMES, Mar. 5, 2003, at B14 (arguing that Cardinal Mahoney of Los Angeles should not use the First Amendment to shield documents).

448. BETRAYAL, *supra* note 30, at 55.

449. Pam Belluck, *Boston Church Papers Released; A Pattern of Negligence is Cited*, N.Y. TIMES, Dec. 4, 2002, at A1.

450. *Id.*

451. *Id.*

452. Kathleen Reagan, *Church & State: Sexual Abuses & the First Amendment*, COMMONWEAL, May 17, 2002, at 11, 12; see also *Jane Doe I v. Malicki*, 771 So. 2d 545 (Fla. Dist. Ct. App. 2000) (holding that civil claims of negligent hiring and supervision, respondeat superior, and breach of implied contract claims against Church were not barred by First Amendment).

investigation in accord with the law of the jurisdiction in question."⁴⁵³ The *Revised Norms* modify this reporting standard somewhat. Thus, the Norms state that "[t]he [diocese] will comply with all applicable civil laws with respect to the reporting of allegations . . . to civil authorities and will cooperate in their investigation."⁴⁵⁴ By stipulating "applicable civil laws" the Norms withdraw from blanket reporting implied in the *Charter*. Some states are quite specific in who must report instances of sexual or physical abuse of a child.⁴⁵⁵ Maryland, for example, requires all persons to report,⁴⁵⁶ but not

453. CHARTER, *supra* note 2, art. 4. The Norms also require that diocese report to civil authorities when the accuser is a minor, and then adds that the diocese will cooperate with public authorities about reporting in cases when the person alleged to have been abused is no longer a minor. See REVISED NORMS, *supra* note 3, at Norm 3. There is an express reservation when any allegation is canonically privileged; this presumptively means privileged communications received in the process of the Sacrament of Reconciliation. See generally Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating That Clergy Report Child Abuse*, 25 LOY. L.A. L. REV. 1 (1991) (suggesting possible conflict between Free Exercise and any state requirement to report allegations).

454. REVISED NORMS, *supra* note 3, at Norm 11.

455. See ALA. CODE § 26-14-3 (1992 & Supp. 2002) (mandatory reporting by specified professionals, not including clergy, and any person called upon to render aid or medical assistance to child abuse victim); ALASKA STAT. § 47.17.020 (Michie 2002) (mandatory reporting by specified professionals not including clergy); ARIZ. REV. STAT. ANN. § 13-3620 (West 2001 & Supp. 2002) (mandatory reporting by specified professionals or any person responsible for care or treatment of children expressly including clergy); ARK. CODE ANN. § 12-12-507 (Michie 1999 & Supp. 2002); (mandatory reporting by specified professionals not including clergy); CAL. PENAL CODE § 11166 (West 2000 & Supp. 2002) (mandatory reporting by specified professionals, including clergy acting in other capacities, but specifically upholding clergy communicant privilege for confidential "penitential communications"); COLO. REV. STAT. ANN. § 19-3-304 (West 1999 & Supp. 2001) (mandatory reporting by specified professionals including Christian Science practitioners and clergy members, but specifically upholding clergy communicant privilege); CONN. GEN. STAT. ANN. § 17a-101 (West 1998 & Supp. 2001) (mandatory reporting by specified professionals, expressly including clergy); DEL. CODE ANN. tit. 16, § 903 (1995 & Supp. 2000) (mandatory reporting by specified professionals, not including clergy, and any person who suspects child abuse); D.C. CODE ANN. § 4-1321.02(d) (2001) (mandatory reporting by specified professionals not including clergy); FLA. STAT. ANN. § 39.201 (West 1998 & Supp. 2002) (mandatory reporting by specified professionals not including clergy, and by any person who suspects child abuse or neglect); GA. CODE ANN. § 19-7-5 (1999 & Supp. 2001) (mandatory reporting by specified professionals, not including clergy, and by any person who has reasonable cause to believe that a child is abused); HAW. REV. STAT. ANN. § 350-1.1 (Michie 1999 & Supp. 2001) (mandatory reporting by specified professionals not including clergy); IDAHO CODE § 16-1619 (Michie 2001) (mandatory reporting by specified professionals, not including clergy, and any person who suspects child abuse); 325 ILL. COMP. STAT. ANN. 5/4 (West 2001) (mandatory reporting by specified professionals including clergy but specifically upholding clergy communicant privilege); IND. CODE ANN. § 31-33-5-1 (West 1999 & Supp. 2001) (mandatory reporting by any person); IOWA CODE ANN. § 232.69 (West 2000 & Supp. 2001) (mandatory reporting by specified professionals not including clergy); KAN. STAT. ANN. § 38-1522 (2000) (mandatory reporting by specified professionals not including clergy); KY. REV. STAT. ANN. § 620.030 (Michie 2001) (mandatory reporting by specified professionals, not including clergy, and mandatory reporting by any person who knows or has reasonable cause to believe a child is abused); LA. REV. STAT. ANN. § 14:403 (West 2003) (mandatory reporting by specified professionals not including clergy); MD. CODE ANN. FAM. LAW § 5-704 (1999 & Supp. 2001) (mandatory reporting by specified professionals not including clergy); MASS. ANN. LAWS ch. 119, § 51a (Law. Co-op. 1993) (mandatory reporting by specified professionals expressly including clergy except where knowledge acquired during confession or other confidential communication); MICH. COMP. LAWS

all states' mandate is so broad and the Church's failure to report may become suffused within the parameters of the First Amendment's Free Exercise Clause if allegations are made within the context of sacramental confession.⁴⁵⁷ For example, an allegation is made during a procedure defined within the Church's theology as confessional, the secrecy of which is complete and violation punishable by the severest penalty.⁴⁵⁸ Under such

ANN § 722.623 (West 2003) (mandatory reporting by specified professionals including clergy); MINN. STAT. ANN. § 626.556 (West 1993 & Supp. 2001) (mandatory reporting by specified professionals including clergy except where reporting violates clergy-communicant privilege); MISS. CODE ANN. § 43-21-353 (2000) (mandatory reporting by specified professionals including ministers and any person who suspects child abuse); MO. REV. STAT. § 210.115 (2003) (mandatory reporting by specified professionals and ministers, with ministers defined by § 352.400 to include clergypersons and priests); MONT. CODE ANN. § 41-3-201 (2001) (mandatory reporting by specified professionals including clergy, Christian Science practitioners and religious healers, but specifically upholding clergy communicant privilege under specified conditions); NEB. REV. STAT. 28-711 (1995) (mandatory reporting by specified professionals and other persons with reasonable cause to suspect child abuse, not including clergy); NEV. REV. STAT. § 202.882 (2001) (mandatory reporting by all persons); N.H. REV. STAT. ANN. § 169-C: 29 (1995) (mandatory reporting by specified professionals including clergy); N.J. STAT. ANN. § 9:6-8.10 (West 1993 & Supp. 2001) (mandatory reporting by any person); N.M. STAT. ANN. § 32A-4-3 (Michie 1999) (mandatory reporting by specified professionals and any person who suspects child abuse, not including clergy); N.Y. SOC. SERV. LAW § 413 (McKinney 2000) (mandatory reporting by specified professionals including Christian Science practitioners); N.C. GEN. STAT. § 7B-301 (1999) (mandatory reporting by any person or institution that suspects child abuse); N.D. CENT. CODE § 50-25.1-03 (1999) (mandatory reporting by specified professionals including clergy unless knowledge acquired "in the capacity of spiritual adviser"); OHIO REV. CODE ANN. § 2151.421 (West 1994 & Supp. 2001) (mandatory reporting by specified professionals including persons "rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion"); 10 OKLA. STAT. § 7103 (West 1998 & Supp. 2001) (mandatory reporting by specified professionals and any person who suspects child abuse); OR. REV. STAT. § 419B.010 (2001) (mandatory reporting by any public or private official unless knowledge obtained by privileged communication with psychiatrist, psychologist, clergy or attorney); 23 PA. CONS. STAT. § 6311 (1991 & Supp. 2001) (mandatory reporting by specified professionals including clergy, Christian Science practitioners and any professional who has contact with children); R.I. GEN. LAWS § 40-11-3 (1997 & Supp. 2001) (mandatory reporting by any person); S.C. CODE ANN. § 20-7-510 (Law. Co-op. 1985 & Supp. 1997) (mandatory reporting by specified professionals including Christian Science practitioners); S.D. CODIFIED LAWS § 26-8a-3 (Michie 1999 & Supp. 2001) (mandatory reporting by specified professionals including religious healing practitioners); TENN. CODE ANN. § 37-1-403 (2001) (mandatory reporting by specified professionals, not including clergy, and any person who has reason to know or renders aid to child abuse victim); TEX. FAM. CODE ANN. § 261.101 (Vernon 1996 & Supp. 2002) (mandatory reporting by specified person expressly including clergy); UTAH CODE ANN. § 62A-4a-403 (2000) (mandatory reporting by any person including clergy unless sole source of information is perpetrator's confession); VT. STAT. ANN. tit. 33, § 4913 (2001 & Supp. 2001) (mandatory reporting by specified professionals not including clergy); VA. CODE ANN. § 63.1-248.3 (Michie 1995 & Supp. 2001) (mandatory reporting by specified professionals including Christian Science practitioners); WASH. REV. CODE § 26.44.030 (1997 & Supp. 2002) (mandatory reporting by specified professionals not including clergy); W. VA. CODE § 49-6a-2 (2001) (mandatory reporting by specified professionals including Christian Science practitioners, religious healers, and members of the clergy); WIS. STAT. § 48.981(2)(a)-(i) (2003) (mandatory reporting by specified professionals and any person who has reasonable cause to believe that a child has been abused, not including clergy); WYO. STAT. ANN. § 14-3-205 (West 2000) (mandatory reporting by any person); 8 P.R. LAWS ANN. § 441(a) (2000) (mandatory reporting by professionals or public officials); 5 V.I. CODE ANN. § 2533 (2002) (mandatory reporting by specified professionals, not including clergy, and any other person with reasonable cause to suspect child abuse).

456. MD. CODE ANN., FAM. LAW § 5-705 (1999 & Supp. 2002).

457. See generally O'Brien & Flannery, *supra* note 453.

458. 1983 CODE c.983 § 1. The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason. *Id.*

circumstances, a priest would not be allowed to report the allegation to anyone, and yet the state statute may require reporting, prompting a clash between the Church's theology and the state's protection of a minor.⁴⁵⁹

Cooperation may be enhanced through consultation with local civil authorities and the diocesan review board so as to establish procedures that ensure openness and candor, but at the same time protect the privacy of the alleged victim, accuser, and potential defendant. Efforts must be made to provide for a legislative privilege to exclude reporting conversations obtained during sacramental confession. The Office for Child and Youth Protection, the bishop or intake person, and the National Review Board must monitor the process of reporting to civil authorities as an element of the annual report to the bishops, so as to comply with the openness required by the *Charter*. This is suggested too by one of the members of the Mixed Commission, when asked to resolve the discrepancy between the *Charter's* full reporting requirement and the more modest requirement contained in the *Revised Norms*.⁴⁶⁰ Bishop William E. Lori of Bridgeport, Connecticut, responded that "[t]he norms represent the minimum The charter represents the full expanse of our commitment."⁴⁶¹

All others who in any way have knowledge of sins from confession are also obliged to observe secrecy. *Id.* §2. A confessor is prohibited completely from using knowledge acquired from confession to the detriment of the penitent even when any danger of revelation is excluded. *Id.* at c.984 § 1. A person who has been placed in authority cannot use in any manner for external governance the knowledge about sins, which he has received in confession at any time. *Id.* at §2.

459. See ALA. CODE § 12-21-166 (1995 & Supp. 2002); ALASKA R. EVID. 506 (West 2003); ARIZ. REV. STAT. ANN. § 12-2233 (West 2003); ARK. CODE ANN. § 5-28-104 (Michie 1997); CAL. EVID. CODE §§ 912, 917, 1030-1034 (West 1995 & Supp. 2002); COLO. REV. STAT. § 13-90-107(c) (2003); CONN. GEN. STAT. ANN. § 52-146b (West 1991 & Supp. 2002); DEL. R. EVID. 505 (West 2002); FLA. STAT. ANN. § 90.505 (West 1999 & Supp. 2003); GA. CODE ANN. § 24-9-22 (Michie 1995 & Supp. 2002); HAW. R. EVID. 506 (West 2002); IDAHO CODE § 9-203(3) (Michie 1998 & Supp. 2002); 735 ILL. COMP. STAT. 5/8-803 (West 1992 & Supp. 2002); IND. CODE ANN. § 34-46-31 (West 1999 & Supp. 2002); IOWA CODE § 622.10 (1999 & Supp. 2002); KAN. STAT. ANN. 60-429 (1994 & Supp. 2001); KY. R. EVID. 505 (Michie 2002); LA. CODE EVID. ANN. art. 511 (West 1995 & Supp. 2002); ME. R. EVID. 505 (West 2002); MD. CODE ANN. CTS. & JUD. PROC § 9-111 (2002); MASS. ANN. LAWS ch. 233, § 20A (West 2000); MICH. COMP. LAWS ANN. § 600.2156 (West 2000); MINN. STAT. § 595.02(1)(c) (2000); MISS. CODE ANN. § 13-1-22 (2001); MO. REV. STAT. § 491.060(4) (1996); MONT. CODE ANN. §§ 26-1-801 to 804 (2001); NEB. REV. STAT. § 27-506 (1995); NEV. REV. STAT. ANN. § 49.255 (2002); N.H. REV. STAT. ANN. § 516.35 (1995 & Supp. 2001); N.J. STAT. ANN. § 2A:84A-23 (West 1994 & Supp. 2002); N.Y. C.P.L.R. § 4505 (McKinney 2001); N.C. GEN. STAT. § 8-53.2 (Lexis 2001); N.D. R. EVID. 505 (2001); OHIO REV. CODE ANN. § 2317.02(c) (West 1994 & Supp. 2002); OKLA. STAT. tit. 12, § 2505 (1993 & Supp. 2003); OR. REV. STAT. § 40.260 (2001); 42 PA. CONS. STAT. ANN. § 5943 (West 2000); R.I. GEN. LAWS § 9-17-23 (1997); S.C. CODE ANN. § 19-11-90 (1997); S.D. CODIFIED LAWS §§ 19-13-16 to 18 (Michie 1995); TENN. CODE ANN. § 24-1-206 (2000); TEX. R. EVID. 505 (West 2003); UTAH CODE ANN. § 78-24-8(3) (1996 & Supp. 2002); VT. STAT. ANN. tit. 12, § 1607 (2002); VA. CODE ANN. § 8.01-400 (Michie 2002); WASH. REV. CODE ANN. § 5.60.060(3) (West 1995 & Supp. 2002); W. VA. CODE § 48-1-301 (2001); WIS. STAT. § 905.06 (2000); WYO. STAT. ANN. § 1-12-101 (Michie 2001).

460. *Bishops Approve Revised Norms, supra* note 180.

461. *Id.*

Failure to report instances of child abuse in any form by a person mandated to report could result in criminal and civil liability.⁴⁶² State prosecutors, barraged with complaints from the public concerning bishops' reassignment of priests considered prosecution for such crimes as child endangerment,⁴⁶³ but were most often barred by statutes of limitations or elements of the crime.⁴⁶⁴ Nonetheless, failure to be able to obtain convictions for past practices will not deter legislatures from making future conduct criminal. One prosecutor, assisted by broad state statutes, proceeded to prosecute one bishop for child endangerment.⁴⁶⁵ In order to avoid possible prosecution the bishop of Manchester, New Hampshire admitted the likelihood of conviction if indictments were issued against the diocese and agreed to scrutiny from public officials over personnel policies if criminal charges were dropped.⁴⁶⁶ State authorities may now monitor the diocese's sexual abuse policy for at least five years, conduct annual audits and review of records and personnel decisions, and the diocese would turn over 10,000 pages of personnel records, and report all sexual abuse allegations to civil authorities (except those obtained in the sacrament of confession).⁴⁶⁷ Such a review by state officials is unprecedented and particularly striking in that only a few months earlier Church personnel records and decisions would have been protected from civil authorities by the First Amendment. In a subsequent news conference, the bishop acknowledged that the scrutiny resulted from the "failures in our system that contributed to the endangerment of children."⁴⁶⁸ The agreement between the diocese and the prosecutors did not bar further criminal or civil investigation of individual priests; it only underscored the vulnerability of bishops who fail to report future credible allegations of sexual abuse.⁴⁶⁹

462. See, e.g., CAL. PENAL CODE § 11166 (1992 & Supp. 2003) (imposing a mandatory reporting requirement on all individuals whose professions bring them into contact with children to report physical abuse, sexual abuse, willful cruelty, unlawful corporal punishment, and neglect).

463. See, e.g., CAL. PENAL CODE § 273(a) (1985 & Supp. 2003) (finding "any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.").

464. See, e.g., OFFICE OF THE ATT'Y GEN. OF MASS., *supra* note 41, at 2-6 (detailing the state's inability to prosecute for (1) accessory after the fact to a felony, (2) conspiracy, and (3) obstruction of justice).

465. Pamela Ferdinand, *N.H. Catholic Diocese Reaches Deal on Abuse; Convictions for Child Endangerment were Likely, Bishops Acknowledges*, WASH. POST, Dec. 11, 2002, at A3.

466. *Id.*

467. *Id.*; Pam Belluck, *Diocese is the First to Settle a Criminal Case Over Abuse*, N.Y. TIMES, Dec. 11, 2002, at A31 [hereinafter *First to Settle*] (stating that the diocese admitted it probably would have been convicted under the state's child-endangerment law).

468. *First to Settle*, *supra* note 467. The Manchester diocese reports that 60 individuals, mostly priests, have been accused of sexual abuse in the last 59 years, and 107 complaints have been settled since 1987 at a total cost of \$7.7 million. *Id.*

469. A Massachusetts grand jury issued subpoenas to five bishops who worked with Cardinal Bernard Law in Boston to answer possible charges concerning conspiracy or being accessory to a crime. Pam Belluck, *State's Top Lawyer Accuses Boston Church of Cover-Up*, N.Y. TIMES, Dec. 13,

Victims' advocacy groups and other concerned individuals and groups will lobby legislators to prosecute for failure to report, to eliminate statutes of limitations, and expand the applicability of existing criminal laws to encompass failure to report.⁴⁷⁰ To date, prosecution has been barred due to statutes of limitation, privileged communications relationships,⁴⁷¹ and certainly the deference given to bishops and the Church. There are also difficulties with proving the bishops willfully endangered a child, were valid accessories after the fact,⁴⁷² or committed overt acts to establish a conspiracy.⁴⁷³ Nonetheless, failure to report credible allegations after the apex of the sexual abuse scandal will occur in a changed legal landscape. No longer will the First Amendment provide a shield; statutes of limitations are being debated and modified,⁴⁷⁴ deference is eroded, and there are criminal statutes available for prosecution,⁴⁷⁵ expanded civil liability possibilities,⁴⁷⁶ and states are willing to extend or eliminate statutes of limitations.⁴⁷⁷

2002, at A28; Laurie Goodstein, *Scandals in the Church: Rebels in the Church*, N.Y. TIMES, Dec. 14, 2002, at A1 (identifying nine states where grand juries are investigating the Church). Other state prosecutors are considering subpoenas for failure to cooperate with civil authorities. *See, e.g.*, John M. Broder, *Bishop and Prosecutor Joust Over Subpoenas on Abuse*, N.Y. TIMES, Dec. 12, 2002, at A34 (Diocese of Phoenix); Rachel Zoll, *Prosecutors Face Obstacles in Charging Church Leaders*, WASH. POST, Aug. 24, 2002, at B9 (describing problems faced by prosecutors in Boston, New Jersey, and Cincinnati).

470. *See, e.g.*, Bipasha Ray, *Abuse Victims to Press for Reforms*, AP ONLINE, Nov. 24, 2003, available at 2002 WL 103439307.

471. *See, e.g.*, CAL. PENAL CODE § 152.3(b) (West 2003) (Child Victim Protection Act shall not be construed to affect privileged relationships as provided by law).

472. In order to constitute becoming an accessory after the fact, American criminal law provides that (1) a completed felony must have been committed; (2) the person alleged to be the accessory must actually know of the felony, mere suspicion is not enough; and (3) assistance must be given to the felon with the intention of hindering the felon's apprehension, conviction or punishment. LAFAVE, *supra* note 326, at 643-44.

473. *See, e.g.*, CAL. PENAL CODE § 184 (West 1999) ("No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement.").

474. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2003) (providing that all clergy and other Church workers make a report to social services whenever they "have reasonable cause to believe that a child [has suffered] physical or emotional injury . . . including sexual abuse")

475. *See, e.g.*, CAL. PENAL CODE § 135 (West 1999) (making it a misdemeanor to destroy evidence); *id.* at § 136.1 (making it a public offense to prevent or dissuade "any witness or victim from attending or testifying at any trial"); *id.* at § 137 (making it illegal to influence or attempt to influence testimony or information); *id.* at § 138 (making it a felony to bribe or attempt to bribe a witness); *id.* at § 152.3 (West 2003) (making it illegal to fail to notify a peace officer when someone observes an offense against a child); *id.* at § 261 (rape defined).

476. *See, e.g.*, *Moses v. Diocese of Colo.*, 863 P.2d 310, 321 (Colo. 1993) ("Civil actions against clergy members and their superiors that involve claims of a breach of fiduciary duty, negligent hiring and supervision, and vicarious liability are actionable if they are supported by competent evidence in the record."); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *see also Doe v. Hartz*, 52 F. Supp. 2d 1027 (N.D. Iowa 1999) (discussing respondeat superior); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 10 F. Supp. 2d 138 (D. Conn. 1998).

477. *See Bishops Criticize New Abuse Law*, N.Y. TIMES, Dec. 9, 2002, at A15; Laurie Goodstein,

3. Standard of Proof

In order to provide for due process, diocesan officials and civil authorities alike must determine first what standard of proof to apply to establish a credible allegation, and second what standard of proof to apply to any disciplinary action proceeding. The *Revised Norms* simply provide that “a preliminary investigation in harmony with canon law will be initiated and conducted promptly and objectively.”⁴⁷⁸ Suspension from the ministry will occur at this time. Then “[w]hen there is sufficient evidence that sexual abuse of a minor has occurred, the Congregation of the Doctrine of the Faith shall be notified.”⁴⁷⁹ This process appears to require two steps, applying two standards of proof, one for removal and another for a finding of guilt or innocence.

American civil law decisions allow for the temporary removal of a child under allegations of abuse with the least amount of proof, preponderance of the evidence.⁴⁸⁰ Under American criminal law, arrest and indictment follow probable cause,⁴⁸¹ and eventual conviction occurs only where there the highest level of proof is met, which is beyond a reasonable doubt.⁴⁸² From a Church perspective, a canon lawyer suggests that further work must be done to establish a standard by which a review board may initially find there is a credible accusation.⁴⁸³ The determination is difficult because in the present context “it can be politically difficult for a bishop to conclude that an accusation against a priest is unfounded.”⁴⁸⁴ Current public attitudes, the radical shift towards lay involvement, and *Charter* policies mandating reporting to civil authorities, suspension of a cleric, and possible loss of reputation and removal from ministry, suggest that the review board cooperate with civil authorities and diocesan personnel to establish a procedure that will balance the risk among the victims, clergy, diocese, and public authorities. That procedure demands a level of proof commensurate with the initiating of the allegation and the eventual hearing, if one is so demanded.

California Dioceses Brace for New Abuse Suits as Law Allows Litigation of Old Cases, N.Y. TIMES, Dec. 6, 2002, at A28; Michael Powell, *Catholic Clout is Eroded by Scandal*, WASH. POST, July 6, 2002, at A1; see also CAL. CIV. PROC. CODE § 340.1 (Deering 2002) (extending the period of time in which a civil action may be brought against a person or an entity if the person or entity should have known and failed to take steps to avoid unlawful sexual conduct by an employee in the future).

478. REVISED NORMS, *supra* note 3, at Norm 6.

479. *Id.*

480. See WALTER WADLINGTON & RAYMOND C. O'BRIEN, FAMILY LAW IN PERSPECTIVE 188 (2001) (discussing the distinction between temporary removal and permanent termination of parental rights).

481. WAYNE R. LAFAVE, CRIMINAL LAW 16-18 (3d ed. 2000).

482. *Id.*

483. See Beal, *supra* note 344, at 16.

484. *Id.* The author suggests that the review board has been more attentive in the past to providing a safe environment for children than protection of the priest about whose guilt there remains a reasonable doubt. *Id.* at 18.

What is missing from the *Revised Norms* is a definitive standard of proof,⁴⁸⁵ and it is plausible that the bifurcated procedure complicates the adoption of one. The state civil procedure utilized in connection with domestic violence, to be discussed *infra*, seems appropriate as a model for the review boards. The domestic violence model allows for the suspension of an accused's rights on a minimal level of proof due to the gravity of the offense, and then provides a higher standard to justify permanent or long-term sanctions.⁴⁸⁶ Therefore, it meets the requirements of protection of minors and an opportunity for the accused to have a hearing at a later date.⁴⁸⁷ This domestic violence model offers the possibility to use the lowest standard of proof for the allegation so to permit suspension from the ministry, which is preponderance of the evidence. Then a higher level of proof is used to establish guilt or innocence, at least clear and convincing or beyond a reasonable doubt. Addressing the appropriate standard of proof will contribute to the appropriateness of the definition of sexual abuse, protection of the civil and canon law rights of the accused, and strengthen the allegations made by victims.

4. Confidential Agreements

Absent from the procedure is any provision allowing for confidential agreements. These agreements, a hallmark of the pre-*Charter* era, were signed by victims, their families, and Church authorities once the Church had reached a point where it was willing to pay a settlement to victims in order to avoid civil or criminal litigation.⁴⁸⁸ The agreements protected against the establishment of any public record and are the opposite of what Article 4 now demands through a reporting of any allegation to public officials.⁴⁸⁹ In the past, secrecy was paramount: "the confidentiality agreements signed by the victims said the Church could get back its settlement payments if details of the abuse were ever divulged."⁴⁹⁰ Under the agreements attorneys representing the alleged victims were able to obtain fees, most often one-third of the agreed upon amount, and victims, parents, priests and the Church were able to avoid scandal and embarrassment and go on with their lives.⁴⁹¹ In hindsight, the secrecy and the abuse the agreements enabled, contributed to the production of more victims and more perpetrators

485. See generally REVISED NORMS, *supra* note 3.

486. See *infra*, Section IV (C)(9).

487. *Id.*

488. BETRAYAL, *supra* note 30, at 47-48.

489. CHARTER, *supra* note 2, at art. 4.

490. BETRAYAL, *supra* note 30, at 47. Initially, the agreements were for small amounts because the Church, like other charities, was protected by doctrines such as charitable immunity, limiting recovery to, for example, \$20,000 in Boston. *Id.* at 48.

491. See *id.* at 48.

because people outside of the immediate scandal were unaware of the possibility of detection of sexual abuse and the prosecution of offenders.⁴⁹²

The agreements also concealed the extent of the tragedy. Eventually, however, it was the agreements that fueled the outrage over the sexual abuse of minors. The *Boston Globe* revealed on January 31, 2002, that the Boston archdiocese had secretly settled seventy sexual abuse claims against seventy priests during the past ten years,⁴⁹³ and this discovery was made as the newspaper investigated allegations that Cardinal Bernard Law had reassigned the Rev. John J. Geoghan to another parish after having been notified that he allegedly molested seven minors. The agreements, the ability to keep the allegations secret from new parishioners, allowed for the reassignments and precipitated the continued abuse among persons who had no knowledge of the predilection.

Responsibility for the agreements is debated. It is arguable that the bishops were acting on the advice of attorneys and behavior therapists with the best of intentions.⁴⁹⁴ Any assessment must be made in the context of the mind set of the times, which argued that the priest could be rehabilitated, that the priest was not bad but sick. The focus of the bishops was inexorably upon the priest's treatment and return to productive ministry.⁴⁹⁵ Such conduct protected the victim's right to live his or her life free from scandal too. This past policy was acknowledged, and now regretted, by Cardinal Roger Mahoney of the Archdiocese of Los Angeles.⁴⁹⁶ At the height of the scandal, he wrote: "*We as bishops need to acknowledge and apologize for decisions made in the past regarding priestly abuse that were not in the best interest of young people and the church.*"⁴⁹⁷

Contrasting with the confidential agreements, it is difficult to overstate the importance of Article 4 [public reporting requirement] and its implications; there is no thought of returning to a system of confidential agreements forbidden by Article 3. Expressly and impliedly, Article 4 imposes on the diocese the duty to report allegations of sexual abuse of minors, to work with public authorities, and advise victims of their rights.⁴⁹⁸ Cooperation with state and federal authorities had been a hallmark of the American church-state paradigm, and Article 4 promises a return to this accountability. The absence of confidential agreements inhibits claims of clericalism⁴⁹⁹ and fosters lessons for other denominations.⁵⁰⁰ Without the

492. *Id.*

493. *Id.* at 98.

494. *See supra*, Sec. III (C)(2).

495. *Id.*

496. Roger M. Mahoney, *My Hopes for Dallas*, AMERICA, May 27, 2002, at 6.

497. *Id.* at 7.

498. CHARTER, *supra* note 2, art. 4.

499. *See, e.g.*, Shaw, *supra* note 121; DONALD COZZENS, SACRED SILENCE 112-23 (Liturgical Press, 2002).

500. Note that the Charter contemplates ecumenical cooperation: "Article 16. Given the extent of the problem of the sexual abuse of minors in our society, we are willing to cooperate with other churches and ecclesial communities, other religious bodies, institutions of learning, and other interested organizations in conducting research in this area." CHARTER, *supra* note 2, at art. 16.

agreements, deterrence will be manifested among members of the clergy, and the aura of suspicion of priests prevalent within parishes will wane. The absence of the agreements and the reporting requirement permit cooperation between church and state, too. Thus, when allegations of sexual abuse were made against Monsignor Charles M. Kavanagh, he was immediately suspended from his duties as pastor of a prominent parish in the Bronx, New York.⁵⁰¹ He was also suspended from any public ministry and removed as chief of fund-raising for the New York archdiocese.⁵⁰² Once notified, the Bronx district attorney found that civil authorities were unable to bring criminal charges against the priest because of the state's statute of limitations.⁵⁰³ But the diocesan review board, the Charter Advisory Board, scheduled a hearing to make a separate decision on whether the priest should be returned to ministry.⁵⁰⁴ The decision of the civil authorities did not hamper the ability of the diocesan review board in making its own determination. This case exhibits the cooperation between the civil and church structures now made possible because of the absence of the confidential agreements.

5. Plea

Once confronted with allegations of sexual abuse, a priest would have the opportunity to voluntarily resign from the ministry or petition for laicization (dismissal from the clerical state). At this point the process under the *Charter* could cease unless the Church wished to laicize the cleric.⁵⁰⁵ The cleric could of course petition for laicization himself based on the facts alleged. Civil authorities would be able to continue any criminal complaints, and those alleging they were victimized would be able to pursue civil suits for damages against the alleged perpetrator and any other defendant, including the Church. Thus, the *Revised Norms* and the procedure they envision, "would usually apply only to priests who claim innocence or who refuse to resign from the priesthood or retire from ministry."⁵⁰⁶ For some accused of allegations of sexual misconduct, resignation from ministry (laicization) may be an option,⁵⁰⁷ but resignation does not bar continued investigation by the civil authorities, as has been noted, nor does it bar the

501. Daniel J. Wakin, *Monsignor in Abuse Case Faces No Criminal Charges*, N.Y. TIMES, Dec. 7, 2002, at B3.

502. *Id.*

503. *Id.*

504. *Id.*

505. CHARTER, *supra* note 2, art. 5.

506. *Bishops Approve Revised Norms and Charter with Zero Tolerance*, *supra* note 180, at 4.

507. See, e.g., David M. Herszenhorn, *Resignations of Three Priests in Connecticut Stun Parishes*, N.Y. TIMES, Dec. 18, 2002, at B1 (explaining that resignations came three weeks after an allegation was made against three priests and the bishop meeting with the alleged victim).

diocese from further review should it wish to dismiss the resigned priest from the clerical state. But the plea made by the accused is an important part of the process, and the accused is entitled to fairness in both its consideration and assertion.

Fairness may be judged by the preliminary procedures outlined in the Revised Norms. First, when the allegation is received it must be handled confidentially, promptly, and objectively.⁵⁰⁸ If the allegation is deemed credible and an investigation ensues, it will be necessary for the diocese to cooperate with the accused to facilitate confidentiality and objectivity since, pending the investigation and outcome, the accused will be suspended from active ministry and thus barred from his parish or diocesan assignment.⁵⁰⁹ Second, the accused "will be encouraged to retain the assistance of civil and canonical counsel."⁵¹⁰ Third, the accused may be offered "an appropriate medical and psychological evaluation at a facility mutually acceptable to the diocese . . . and to the accused."⁵¹¹ Obviously this has the effect of ascertaining the accused's ability to make an informed plea, but it also has implications regarding whether the priest may find a child an object of sexual gratification, as required by the definition of sexual abuse.⁵¹² Such a discovery has implications regarding privileged communications and conflict of interest. That is, privileges surrounding priest-penitent and doctor-patient may surface in connections with allegations concerning priests. And since the diocese has a stake in the outcome of any allegation against one of its priests, its assistance or lack of assistance in the production of counsel, medical treatment or counseling prompts concern over a possible conflict of interest.

The procedures for invoking a plea imply a minimal level of fairness since they must be examined within the context of a broad definition of sexual abuse, the vagueness of what constitutes sufficient evidence, the appointment of civil and canonical counsel if one cannot be afforded by the accused, and the incendiary climate surrounding any allegation of sexual abuse of a child. When compared to the American system, any plea made by an accused to an allegation of sexual abuse of a minor within the context of the *Revised Norms* lacks the due process support to make it free, credible, and fully informed. Within the American criminal justice system an accused is presumed innocent until proven guilty, thus placing the burden on the state to prove the elements of the crime without resorting to self-incrimination.⁵¹³

508. REVISED NORMS, *supra* note 3, at Norm 6.

509. *Id.* The Norm makes no provision for the continued payment of salary and other forms of remuneration during this period of suspension, nor for any suitable employment, but compensation and activity seem warranted until there is a resolution of the allegation.

510. *Id.* Canon law provides that in the development of the penal process, "if the accused does not provide for this, the judge is to name an advocate before the joinder of issues . . . who will remain in this function as long as the accused has not personally appointed an advocate." 1983 CODE c.1723, § 2.

511. REVISED NORMS, *supra* note 3, at Norm 6.

512. *Id.* at Norm 3 ("Sexual abuse of a minor includes . . . behavior by which an adult uses a minor as an object of sexual gratification.").

513. U.S. CONST. amend. V; *Miranda v. Arizona*, 384 U.S. 436 (1966).

There is mandatory appointment of counsel in a criminal proceeding, probably due process appointment of one in a civil proceeding, and established practices in state and federal courts to decipher statutory definitions and credible evidence.⁵¹⁴ Even in the context of civil litigation where a plea is not an element, negligence on the part of a defendant and resulting damages must be proven with a greater degree of certainty, a sufficient standard of proof.⁵¹⁵ Thus, a plea considered by diocesan officials as sufficient to warrant cessation of the process, voluntary removal from ministry, and loss of benefits and reputation should be the product of prudently informed consent. Prudence requires conscious attention to all of the following: conflict of interest between diocese and accused, the due process limitations contained in a procedure involving a nebulous definition, unlimited period of allegations, and no gradation in penalties.

6. Statute of Limitations

Civil law and criminal law often have limitations on the time in which suits may be brought or prosecution commenced. These limitations are classified as statutes of limitation and provide "that no suit shall be maintained on such causes of action unless brought within a specified period after the right accrued In criminal cases, however, a statute of limitation is an act of grace, a surrendering by sovereign of its right to prosecute."⁵¹⁶ These limitations are essential because:

The primary consideration underlying [the limitations] . . . is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared.'⁵¹⁷

514. U.S. CONST., amend. VI. See generally 3 MATTHEW BENDER, CRIMINAL CONSTITUTIONAL LAW §13 (2002).

515. See 4 MATTHEW BENDER, MODERN FEDERAL JURY INSTRUCTIONS-CIVIL § 73 (2003).

516. BLACK'S LAW DICTIONARY 1077 (4th ed. 1951).

517. Feldman v. Granger, 257 A.2d 421, 426 (Md. 1969) (quoting *Developments in the Law-Statutes of Limitation*, 63 HARV. L. REV. 1177 (1950)); see also Doe v. Archdiocese of Wash., 689 A.2d 634, 638 (Md. Ct. Spec. App. 1997) (positing that limitations "strike a balance between protecting the interests of a plaintiff who pursues his claim diligently and allowing repose to a potential defendant"); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995) (arguing that claims after twenty-seven years would be fundamentally wrong); Decker v. Fink, 422 A.2d 389, 391-92 (Md. 1980) (arguing that policy is to provide fairness to defendants); Goldstein v. Potomac Elec. Power Co., 404 A.2d 1064, 1069 (Md. 1979) (explaining that limitations avoid "inconvenience which may stem from delay when it is practicable to assert rights").

Historically, certain events may limit application of the statute and allow for an extended time—a tolling of the statute—for prosecution or suit.⁵¹⁸ For example, some states have lists of persons considered as under a disability and the statute of limitations does not commence until the disability is removed, rather than when the cause of action accrued.⁵¹⁹ Being underage or mentally incompetent would be examples of such disabilities. Similar to disabilities, some states limit the statute of limitations for civil causes of action if a plaintiff “repressed memories” of child sexual abuse and recently recovered them.⁵²⁰ Often these recovered memories are referred to as delayed discovery, recognizing that emotional and psychological trauma associated with child sexual abuse may stem from memories that were suppressed until “discovered” through psychological counseling or therapy. For example, the California Code of Civil Procedure has a statutory provision related to repressed memories. It provides:

In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later.⁵²¹

Nonetheless, the code provision, as enacted, provides that “no action . . . may be commenced on or after the plaintiff’s twenty-sixth birthday.”⁵²² Today, states, angry over revelations of clergy sexual abuse, are revising their statutes. Following the discovery of multiple instances of reassignment of sexually abusive clergy by knowledgeable bishops and superiors, states have relaxed their statutes of limitations so as to allow greater opportunity

518. See, e.g., *Beller v. Tilbrook*, 571 S.E.2d 735, 736 (Ga. 2002) (concealment of herpes); *Goldberg v. Howard County Welfare Bd.*, 272 A.2d 397, 400 (Md. 1971) (governmental rights); *Schaumloefel v. State*, 62 A. 803, 804 (Md. 1906) (misdemeanor punishable by imprisonment in the penitentiary); *Smallwood v. State*, 443 A.2d 1003, 1006 (Md. Ct. Spec. App. 1982) (prosecution for a felony).

519. See, e.g., MD. CODE ANN. CTS. & JUD. PROC. § 5-201 (Deering 2003) (providing that minors and mentally incompetent persons may assert a cause of action against a defendant within three years or longer if applicable, after the removal of the disability). Having repressed memories of sexual abuse is not considered a disability in Maryland. *Doe v. Maskell*, 679 A.2d 1087, 1088 (Md. 1996), *cert. denied*, 519 U.S. 1093 (1997).

520. See *Doe v. Creighton*, 786 N.E.2d 1211, 1214 (Mass. 2003) (“plaintiff must demonstrate reasonable expectation of proving that her suit was timely filed”); *Cole v. Shults-Lewis Child and Family Servs.*, 677 N.E.2d 1069, 1074 (Ind. App. 1997) (statute of limitations not tolled where a child abuse victim had independent recollection of past sexual abuse); Taub, *supra* note 56, at 197 (identifying twenty-four states that toll the statute of limitations for civil actions based on child sexual abuse). *But see Doe v. Archdiocese of Milwaukee*, 565 N.W.2d 94, 107 (Wis. 1997) (holding that only the legislature can extend the statute of limitations for repressed memory).

521. CAL. CODE CIV. PROC. § 340.1(a) (Deering 2003); see also § 340.1(c) (allowing revival of civil suits associated with child sexual abuse on January 1, 2003). *But see Adam Liptak, Court Makes It Harder to Sue In Some Cases of Sexual Abuse*, N.Y. TIMES, May 1, 2003, at A28.

522. *Id.* § 340.1(b)(1).

for civil suits,⁵²³ with only the Ex Post Facto Clause of the United States Constitution inhibiting expansion of the time period for criminal prosecution.⁵²⁴

Against this history of the nature and scope of statutes of limitation, the *Charter* and the *Revised Norms* adopted by the American bishops seek to balance the objectives of due process and reliance, against the seriousness of even one act of sexual abuse of a minor.⁵²⁵ The initial unambiguous statement of “zero tolerance” of any act of sexual abuse whenever committed has since given way to an objective and yet malleable standard of years in conformity with canon law.⁵²⁶ But because the limitation established by canon law may be ignored the Church’s process there is the distinct possibility that allegations may be considered without any statute of limitations.⁵²⁷ This invites scrutiny under due process. A comparison of objectives, ecclesiastical and American civil and criminal, provide analysis.

a. Ecclesiastical Officials

There was criticism of the “zero tolerance” provision in the *Charter*⁵²⁸ from Church canon lawyers when it was announced. One came from the Rev. John P. Beal. His argument against zero tolerance—an absence of any statute of limitations—derives from what he alleges is an already established egregious process that reverses the presumption of innocence to foster a necessity to refute guilt, a burden too heavy to bear.⁵²⁹ Commenting on the absence of a statute within the present process established, he specifically thinks it was exacerbated by the absence of an explicit standard of proof.⁵³⁰ Penalties attach immediately because once a bishop receives an allegation that he (or someone he delegates under the *Charter*) judges to be credible, the priest may be suspended from ministry forced to prove that the allegation

523. Goodstein, *supra* note 477 (stating that California state legislature unanimously passed a statute lifting the statute of limitations on civil sexual abuse lawsuits for one year starting January 1, 2003).

524. U.S. CONST., art. I, § 9, cl. 3 (prohibiting the enactment of ex post facto laws by Congress); art. I, § 10, cl. 1 (prohibiting enactment of ex post facto laws by any state).

525. See generally *Sign of the Times*, *supra* note 216, at 4-5.

526. See Laurie Goodstein, *Call or Revisions Means Priests are Likely to Fight Zero-Tolerance Dismissals*, N.Y. TIMES, Oct. 20, 2002, at 20 (Vatican called into question the ways in which zero-tolerance policy could be brought into conformity with canon law).

527. See, e.g., *id.* (bishops in Dallas committed to dismissing priests charged with credible allegations of abuse, “no matter how old the accusation”).

528. Diocesan “policy will provide that for even a single act of sexual abuse . . . of a minor—past, present, or future—the offending priest or deacon will be permanently removed from ministry.” CHARTER, *supra* note 2, at art. 5.

529. See Beal, *supra* note 344, at 18.

530. *Id.* at 16. The standard of proof for a preliminary investigation is absent; subsequently, “sufficient evidence” prompts notification to the Congregation of the Doctrine of the Faith. REVISED NORMS, *supra* note 3, at Norm 6.

did not occur.⁵³¹ “[I]t can be extremely difficult to rebut effectively an accusation already deemed ‘credible.’”⁵³² And, Father Beal continues, the process is unfair because even at this early stage of the procedure the burden is shifted to the alleged offender and the allegation is given nascent credibility due to a determination made by the bishop, or upon delegation, that there is sufficient evidence to support whatever is meant by “credible.”⁵³³ Thus, if an allegation is made concerning conduct far in the past, it is very difficult to provide an adequate defense when, as one court observed, “accusation has unfortunately become synonymous with guilt, indictment with conviction.”⁵³⁴

The argument against the zero tolerance policy adopted by the *Charter* and nebulously affirmed by the *Revised Norms*,⁵³⁵ thus rests upon procedural deficiencies and an attenuated definition of sexual abuse. Arguing on behalf of the *Revised Norms*, it appears that the adoption in the *Revised Norms* of a canonical statute of limitations providing that an alleged victim may make an allegation of sexual abuse for a period up to ten years after his or her eighteenth birthday⁵³⁶ lessens the zero tolerance policy and heightens due process protection for clerics. Presumptively, the *Revised Norms*, forbidding allegations after the alleged victim reaches the age of twenty-eight, would also bar many plaintiffs from court since “most of the sex abuse cases that have recently come to light in the United States were brought by people over the age of 28.”⁵³⁷ Of course, the canonical statute does not bar civil claims or criminal prosecution that may exceed the Church’s limitation for such reasons as repressed memory or unlimited felony prosecution.⁵³⁸

But the ten-year canonical statute of limitations is not truly a bar to prosecution under the *Revised Norms*. The Norms provide two methods by which the statute of limitations may be mollified. First, “[i]f the case would

531. Beal, *supra* note 344, at 16.

532. *Id.* Credibility is further complicated by the obliteration of any statute of limitations for the punishment of sexual abuse of minors. *Id.* at 18. Concern is also voiced by the Rev. Kevin E. McKenna, president of the Canon Law Society of America. See McKenna, *supra* note 361, at 8-9.

533. Beal, *supra* note 344, at 16.

534. *Smallwood v. State*, 443 A.2d 1003, 1004 n.4 (Md. Ct. Spec. App. 1982).

535. Bishop William E. Lori, of Bridgeport, Connecticut, commented after adoption of the *Revised Norms* by the bishops that, “We have not backed off in any way from what the bishops decided in Dallas [the Charter] Anyone who abuses a minor will be removed permanently from ministry A priest or deacon, for a single act of sexual abuse, will be removed permanently.” *Bishops Approve Revised Norms*, *supra* note 180, at 5.

536. Although 1983 CODE c.1362 § 2 provides a statute of limitations of five years for sexual abuse of minors, in April 1994, Pope John Paul II approved extension of the period to ten years from the alleged victim’s eighteenth birthday. Cooperman, *supra* note 23, at A1. There are now universal norms in place pursuant to an April 30, 2001 motu proprio entitled *Sacramentorum Sanctitatis Tutela*. See generally John Paul II, Apostolic Letter, *Sacramentorum Sanctitatis Tutela*, April 30, 2001. Article 5, section 2 of the substantive norms specifies the ten-year statute of limitations. Offenses committed prior to November 27, 1983 have a five-year statute; offenses committed prior to April 25, 1994 are allowed five years after the victim’s eighteenth birthday; offenses committed after April 25, 1994 have the present statute, ten years after the victim’s eighteenth birthday. Cooperman, *supra* note 23, at A1.

537. *The Bishops and Zero Tolerance*, N.Y. TIMES, Nov. 15, 2002, at A30.

538. See *Sign of the Times*, *supra* note 216, at 4.

otherwise be barred by prescription [i.e., the statute of limitations] because sexual abuse of a minor is a grave offense, the [bishop] shall apply to the Congregation for the Doctrine of the Faith for a derogation from the prescription, while indicating appropriate pastoral reasons.⁵³⁹ Thus, the Vatican Congregation may dispense with the statute of limitations and provide for the penal procedure. And second, even if the statute is not lifted by the Vatican Congregation, the *Revised Norms* provide,

At all times, the diocesan [bishop] has the executive power of governance, through an administrative act, to remove an offending cleric from office, to remove or restrict his faculties, and to limit his exercise of priestly ministry. Because sexual abuse of a minor . . . is a crime in the universal law of the Church . . . and is a crime in all jurisdictions in the United States, for the sake of the common good and observing the provisions of canon law, the [bishop] shall exercise this power of governance to ensure that any priest who has committed even one act of sexual abuse of a minor as described . . . shall not continue in active ministry.⁵⁴⁰

Thus, the zero tolerance policy announced by the *Charter*⁵⁴¹ may still be effectuated in the *Revised Norms*⁵⁴² in spite of the ten-year statute of limitations. But the difference between the two dispensations in the Church's policy is very significant. Specifically, the manner in which the Norms provide for zero tolerance may be accomplished by three methods: (1) through an allegation being made by a complainant before his or her twenty-eighth birthday,⁵⁴³ (2) through a dispensation by a Vatican congregation,⁵⁴⁴ or (3) an act of governance by a bishop.⁵⁴⁵ The latter two are presumptively utilized when prosecution during the ten-year period is unattainable. Furthermore, there is no mention of methods of tolling the statute, such as repressed memory.⁵⁴⁶ All of these mechanisms by which an accused may be suspended from ministry and thus from a position of authority that could endanger minors, involves decisions to be made by canon law, Church tribunals or bishops.⁵⁴⁷ The decisions, therefore, will be

539. REVISED NORMS, *supra* note 3, at Norm 8(A).

540. REVISED NORMS, *supra* note 3, at Norm 9. Experts in canon law caution that a bishop may not permanently suspend a priest by an administrative act and is the exercise of governance by a bishop an alternative to the judicial procedure established by canon law. *Revised Norms Support Key Elements of U.S. Bishops' Policy*, AMERICA, Nov. 18, 2002, at 4-5.

541. See CHARTER, *supra* note 2, at art. 5.

542. REVISED NORMS, *supra* note 3, at Norm 9.

543. See *id.* at Norm 6.

544. *Id.* at Norm 8(A).

545. *Id.* at Norm 9.

546. See REVISED NORMS, *supra* note 3.

547. See REVISED NORMS, *supra* note 3, at Norms 6, 8(A), 9.

made by priests or bishops.⁵⁴⁸ The perception may arise that the statute of limitations and the dispensing mechanisms thus offend the primary concerns of the scandal: clericalism, secrecy and non-accountability of those in authority.⁵⁴⁹ Even with the present ability of civil authorities to commence their own investigations and prosecutions, the perception of clericalism will prolong distrust and prompt civil authorities who have confronted bishops in the past,⁵⁵⁰ to explore further-reaching options.⁵⁵¹

b. State Officials

Emphasizing the public's concern over the secrecy surrounding the confidential agreements and the reassignment of allegedly abusive priests by bishops, the spokesperson for the Suffolk County (Mass.) District Attorney's Office, which has jurisdiction over Boston, summarized anticipated public opinion concerning Church tribunals.⁵⁵² He stated: "We believe the only proper finder of fact is a court of law, and that's where these issues should be decided."⁵⁵³ Of course his remarks provide a challenge to tribunals and Vatican congregations too. Neither the *Charter* nor the *Revised Norms* seek to supplant the right of civil authorities to bring criminal prosecutions or to allow plaintiffs the opportunity to bring civil suits, but since the *Revised Norms* specify the use of canon law, Church tribunals, Vatican congregations, and governance by bishops, the public perception is that the *Revised Norms* offer a retrenchment from the openness sought in the *Charter*. Thus, civil authorities are responding with grand jury investigations,⁵⁵⁴ subpoenas of persons and documents,⁵⁵⁵ and modification

548. *Id.*

549. For criticism of the policy, see for example, *The Bishops and Zero Tolerance*, *supra* note 345 (citing that the problem is that bishops have ultimate authority); *The Bishops and the Law*, WASH. POST, Nov. 10, 2002, at B6 (stating that civil authority must have primacy); Laurie Goodstein, *Bishops Pass Plan to Form Tribunals in Sex Abuse Cases*, N.Y. TIMES, Nov. 14, 2002, at A1 (positing that bishops need to be held accountable); Laurie Goodstein, *Bishops Unveil New Policy on Accusations of Abuse*, N.Y. TIMES, Nov. 5, 2002, at A16 (explaining that bishops were criticized for not protecting children in the past); Laurie Goodstein, *Catholic Bishops Seek to Reclaim Authority*, N.Y. TIMES, Nov. 12, 2002, at A22 (identifying clerical dominance in the new norms); STEINFELS, *supra* note 171 (stating that the norms are opaque, allowing shroud of secrecy to continue).

550. Powell, *supra* note 477, at A1 (citing New Jersey, Massachusetts and Connecticut legislative attempts to extend statutes of limitations or deny charitable tax status to churches).

551. See, e.g., Laurie Goodstein, *California Dioceses Brace for New Abuse Suit as Law Allows Litigation of Old Cases*, N.Y. TIMES, Dec. 6, 2002, at A28 (describing the legislatures' lifting of the civil statute of limitations for one year in California).

552. Alan Cooperman, *Church's Revised Abuse Rules Stir Debate; Canon, Civil Law May Conflict, Experts Say*, WASH. POST, Nov. 10, 2002, at A3.

553. *Id.*; see *The Bishops and the Law*, WASH. POST, Nov. 10, 2002, at B6 (stating that civil authority must have primacy over any religious shield); Laurie Goodstein, *Bishops Pass Plan to Form Tribunals in Sex Abuse Cases*, N.Y. TIMES, Nov. 14, 2002, at A1 (stating that judging accused priests should not be controlled entirely by clerics); Jay Lindsay, *Catholics See Progress in New Policy*, AP ONLINE, Nov. 13, 2003, available at 2002 WL 102592965 (explaining that secrecy in the process will breed mistrust).

554. See, e.g., *Grand Jury to Investigate Priests in Pa.*, WASH. POST, Apr. 25, 2002, at A16; *Scandals in the Church: The Philadelphia Inquiry; Philadelphia to Convene a Grand Jury on Accusations of Abuse*, N.Y. TIMES, Apr. 26, 2002, at A23.

of existing statutes of limitations.⁵⁵⁶ Efforts are currently focused on whether liability may be maintained or brought under civil and criminal statutes because, frankly, the American public has lost trust in the Church.

i. Civil Statutes

“[M]ore than five hundred people [in Boston] retained lawyers in the first four months of 2002 with claims that they were molested by priests when they were growing up.”⁵⁵⁷ The large number of plaintiffs resulted from a legal strategy devised by Michael Garabedian, a plaintiffs’ attorney who represented more than one-hundred alleged victims of the Rev. John Geoghan.⁵⁵⁸ In Massachusetts, as in many other jurisdictions, non-profit institutions are protected by a doctrine of charitable immunity that limits the liability of such institutions to a certain fixed amount, \$20,000 in Massachusetts.⁵⁵⁹ If a plaintiff sues a non-profit institution like the Roman Catholic Church, his or her judgment—and fees to his or her attorney—would be limited to that amount.⁵⁶⁰ Such a small amount often limited suits and prompted quick confidential agreements of settlement.⁵⁶¹ But Mr. Garabedian brought suit against the archbishop himself, Cardinal Bernard Law, for negligence, not the institutional church.⁵⁶² The suit claimed that the Cardinal and his officials knew of the sexual misconduct of the clergy and were therefore responsible for it.⁵⁶³ As such, they were liable for damages far in excess of the limits imposed by state limits on non-profit institutions.⁵⁶⁴ This was a major breakthrough in allowing civil suits against the Church. Subsequently, courts allowed other plaintiffs’ attorneys to subpoena heretofore confidential Church documents—previously protected by the First Amendment—and this provided the basis for civil suits of negligent hiring, negligent supervision, agency, breach of fiduciary duty, and clergy malpractice.⁵⁶⁵

Many if not most of the clergy accused of sexual abuse of minors had

555. See, e.g., Pamela Ferdinand & Alan Cooperman, *As Furor Rises in Boston, Law Goes to Meet with Pope*, WASH. POST, Dec. 13, 2002, at A12.

556. See Laurie Goodstein, *California Dioceses Brace for New Abuse Suits as Law Allows Litigation on Old Cases*, N.Y. TIMES, Dec. 6, 2002, at A28.

557. BETRAYAL, *supra* note 30, at 80.

558. *Id.* at 48.

559. *Id.*

560. *Id.*

561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.* at 49.

565. See Joseph B. Conder, Annotation, *Liability of Church or Religious Society for Sexual Misconduct of Clergy*, 5 A.L.R.5th 530 (2002); Chopko, *supra* note 19.

very few assets.⁵⁶⁶ A civil suit against any of them would bring limited damages.⁵⁶⁷ Furthermore, their alleged sexual abuse of minors was beyond the scope of their ministerial duties and thus would not allow for liability to be assessed against a supervising bishop or superior under agency theories.⁵⁶⁸ “[C]ourts have generally held that deliberate sexual misconduct (rape or sexual battery) is far outside the foreseeable scope of expected duties of the employees, the ministers, or the volunteers.”⁵⁶⁹ Without the involvement of the bishop or religious superiors, the assets of the diocese, to include insurance, would be beyond the scope of any civil claims for damages.⁵⁷⁰ But there would be involvement if the bishop or religious superior had “specific evidence . . . a direct negligence tort . . . may be involved.”⁵⁷¹ Specifically, “[r]eligious bodies that reserve the power to discipline clergy may find that they must answer for the failure of discipline in particular cases.”⁵⁷² When bishops knew of instances of child sexual abuse on the part of clergy subject to their authority, either admitted or for which there was credible evidence, and then assigned the offending cleric to opportunities at which minors would be subject to foreseeable harm, civil liability resulted.⁵⁷³

In spite of opportunities for harm, many plaintiffs were barred from bringing civil suits because of a state statute of limitations limiting their civil claim to a period of time. Massachusetts provides an example of a civil statute involving sexual abuse:

Actions for assault and battery alleging the defendant sexually abused a minor shall be commenced within three years of the acts alleged to have caused an injury or condition or within three years of the time the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by said act, whichever period expires later; provided, however, that the time limit for commencement of an action under this section is tolled for a child until the child reaches eighteen years of age.⁵⁷⁴

The statute makes provision for disability of the victim, being a minor in this case, and the possibility of repressed memory, both extending the length of

566. See Pam Belluck, *Trial Begins for Priest Accused of Molestation*, N.Y. TIMES, Jan. 15, 2002, at A14.

567. *Id.*

568. Chopko, *supra* note 19, at 318.

569. *Id.*

570. *Id.*

571. *Id.* at 319.

572. *Id.* at 349.

573. Edward Walsh, *Prosecutors Examine Legal Culpability of Church Officials; Hiding Sex Abuse Could Bring Charges*, WASH. POST, May 5, 2002, at A16. The bishops may also be liable for canonical delicts. See 1983 CODE c.1389 n.145.

574. MASS. GEN. LAWS ch. 260, § 4(C) (West 2002.).

time in which civil suits may be brought, but nonetheless providing a specific time limit.⁵⁷⁵

The state of California has a statute of limitations very similar to the one in Massachusetts, but California provided a new dimension to civil liability. In late 2002, the California legislature unanimously enacted a statute to provide a one-year window of opportunity for any person to file a civil claim for sexual abuse no matter when the offense may have occurred.⁵⁷⁶ The statute thus revives any claim that would be time barred because of the statute of limitations that provided that no action could be “commenced on or after the plaintiff’s 26th birthday.”⁵⁷⁷ The revision enacted by the legislature stipulates that a claim for damages may be brought in connection with childhood sexual abuse “within one year of January 1, 2003”⁵⁷⁸ unless the claim has been litigated to finality on the merits or a written compromise agreement was entered into by the plaintiff and a defendant.⁵⁷⁹

The state statute targets two sexual abuse claims, those against defendants who intentionally or negligently caused the abuse,⁵⁸⁰ and those involving defendants who, with knowledge, allowed sexual abuse of minors to occur.⁵⁸¹ In practice therefore, both offending priests and bishops would be liable, but bishops seem to be the primary object of the legislation and the most likely defendants of litigation. Under the terms of the statute, the one-year opportunity for claims may be commenced if the defendant

knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment. For purposes of this subdivision, providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard.⁵⁸²

Catholic bishops immediately attacked the statute in a letter read by clergy at Sunday services throughout the state, arguing that the statute would serve as a windfall for plaintiffs’ lawyers, violated due process, and unfairly

575. *Id.*

576. CAL. CODE CIV. PROC. § 340.1(c) (West 2002)

577. *Id.* § 340.1(b)(1).

578. *Id.* § 340.1(c).

579. *Id.* § 340.1(d)(1)-(2).

580. *Id.* § 340.1(a)(1)-(3).

581. *Id.* § 340.1 (b)(2).

582. *Id.* § 340.1(b)(2).

discriminated against the Catholic Church.⁵⁸³ The statute has produced a variety of concerns.⁵⁸⁴ Eventually the concern will become whether the state may reopen the possibility of civil litigation to claimants after the validly enacted statute of limitations, in effect at the time of the offense, has passed.

Even though the statute is unusual, there is some modicum of precedent for ex post facto opening the window of opportunity for civil suit. In *Enright v. Lilly & Co.*, the Court of Appeals of New York was asked to decide whether a cause of action existed involving a drug “produced by approximately 300 manufacturers.”⁵⁸⁵ Between 1947 and 1971 the drug was ingested by millions of women to prevent miscarriages, but the Food and Drug Administration subsequently banned the drug in 1971 when it was discovered that the drug was linked to cancer, malformations of the uterus, and assorted abnormalities.⁵⁸⁶ Subsequently, the New York legislature “revived for one year previously time-barred causes of action based on exposure to [the drug] and four other toxic substances.”⁵⁸⁷ Clamor for restitution and public policy prompted this action by the legislature to provide compensation to those who had ingested the drug long ago.⁵⁸⁸ The issue then before the state court was whether liability could be expanded to provide restitution to third generation plaintiffs—those who never took the drug, but claimed they were eventually harmed by it as demonstrated by physical or emotional injuries.⁵⁸⁹ To provide for fair remuneration, attorneys argued for a market-share liability.⁵⁹⁰

The court refused to recognize a multigenerational cause of action, holding that it “would ‘require the extension of traditional tort concepts beyond manageable bounds.’”⁵⁹¹ The majority opinion thus allowed only those who ingested the drug or were exposed to it in utero to recover, rejecting arguments that extending liability would encourage the development of safer drugs and act as a deterrent to manufacturer misconduct.⁵⁹² But even though the court denied recovery to the plaintiffs, the court did not address the validity of the legislature lifting the statute of limitations to provide for liability for one year. When the court addressed

583. *Bishops Criticize New Abuse Law*, *supra* note 477, at A15; *see* Goodstein, *supra* note 477, at A28.

584. *See, e.g.*, Jean Guccione, *Priest Suits Consolidated Into L.A. Court*, L.A. TIMES, May 29, 2003, at B5 (all of the suits in Southern California will be heard by one judge in Los Angeles); Jean Guccione, *L.A. Judge to Oversee Sex Abuse Civil Suits*, L.A. TIMES, June 18, 2003, at B5 (Los Angeles Superior Court Judge Marvin M. Lager, Jr. will preside); Anna Gorman, *Spreading the Word About Sex-Abuse Victims' Rights*, L.A. TIMES, Jan. 2, 2003, at B3 (discussing efforts to encourage sexual abuse victims to come forward with accusations); Larry B. Stammer, *States Follow California's Lead On Priest Abuse*, L.A. TIMES, Feb. 13, 2003, at A1 (survey of other states debating changes in statutes).

585. 77 N.Y.2d 377, 382 (1991).

586. *Id.*

587. *Id.* at 383.

588. *See id.* at 382-83.

589. *See id.* at 380-81.

590. *Id.* at 383-84.

591. *Id.* (quoting *Albala v. City of New York*, 54 N.Y.2d 269, 271 (1981)).

592. *Id.* at 386.

the statute at all it stated that "the statute merely provides a starting point and a direction."⁵⁹³ But by holding that an "injury to a mother which results in injuries to a later-conceived child does not establish a cause of action in favor of the child against the original tort-feasor"⁵⁹⁴ the court, at a minimum, accepted the premise upon which removal of the statute of limitations is based: that it is possible to reject the claim but allow for the timeliness of the suit.

In addition, the Supreme Court of the United States recently made reference to the state's ability to repeal expired civil statutes of limitations in *Stogner v. California*.⁵⁹⁵ "In 1993, California enacted a new criminal statute of limitations permitting prosecution for sex-related child abuse when the prior limitations period ha[d] expired."⁵⁹⁶ The single condition was that the prosecution must begin within one year of a victim's report to the police.⁵⁹⁷ Defendant was indicted for sex-related child abuse committed between 1955 and 1973 and at the time of the alleged offenses the applicable criminal statute of limitations was three years.⁵⁹⁸ The Court held that the Constitution's Ex Post Facto Clause bars the state's resurrection of otherwise time-barred criminal prosecution.⁵⁹⁹ The decision caused controversy because it prompted the release of persons already convicted under the new statute and caused review of nearly 800 additional cases.⁶⁰⁰

Even though the decision concerned the application of the Constitution's Ex Post Facto Clause to an expired criminal statute of limitations, the Court made reference to the status of civil statutes of limitations and the ability of a state to toll the statute.⁶⁰¹ For instance, the Court's majority cited to *Stewart v. Kahn*, where the Court held that a civil statute of limitations could be tolled for periods during the Civil War when service of process was impossible or the courts were inaccessible.⁶⁰² But in dissent, Justice

593. *Id.* at 385 n.1.

594. *Id.* at 389.

595. 123 S. Ct. 2446, 2447 (2003).

596. *Id.* at 2447.

597. *Id.*

598. *Id.*

599. *Id.* at 2448. "Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient." *Id.* at 2452.

600. See generally John M. Broder, *Victims Angered and Upset by Ruling Freeing Molesters*, N.Y. TIMES, July 13, 2003, at 12; Lance Pugmire, *Diocese Will Pay Record Settlement; Agreement is Reached Even Though Conviction of San Bernadino Priest is Likely to be Vacated*, L. A. TIMES, July 2, 2003, at B1; Steve Berry & Richard Winton, *Last Jailed Priest in County is Released*, L.A. TIMES, July 1, 2003, at B1; Fred Alvarez & Richard Winton, *Priest Abuse Cases Falter*, L.A. TIMES, July 1, 2003, at B1; *Ex-Priests Facing Abuse Charges Are Freed From Los Angeles Jail*, N.Y. TIMES, June 29, 2003, at 23.

601. *Stogner*, 123 S. Ct. at 2454-55.

602. *Id.* at 2454 (citing *Stewart v. Kahn*, 78 U.S. 493, 503-04 (1870)).

Kennedy stated that the Court had previously allowed the repeal of expired statutes of limitation to revive a civil action.⁶⁰³ The clear implication is that the state may modify a statute of limitations so as to allow litigation.

[Statutes of limitations] are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.⁶⁰⁴

Furthermore, the Fourteenth Amendment due process is of no avail. “[I]t cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment.”⁶⁰⁵

The action of the California legislature allowing for civil suit by plaintiffs for one year no matter when the offense was committed is provocative; some think it is an alternative means to the criminal prosecution of time-barred offenses.⁶⁰⁶ Further litigation will clarify the ability of a state to allow otherwise time-barred sexual abuse suits civil suits for reasons that warrant strong public policy considerations.

ii. Criminal Statutes

Criminal offenses, like civil causes of action, often have a statute of limitations that prohibits indictment for the offense after a stated period of time. But unlike civil causes of action, the Ex Post Facto Clause of the United States Constitution⁶⁰⁷ prohibits “potentially vindictive legislation.”⁶⁰⁸ “The Clause protects liberty [interests] by preventing governments from enacting statutes with ‘manifestly *unjust and oppressive*’ retroactive effects.”⁶⁰⁹

The Supreme Court has held that the Ex Post Facto Clause applies to:

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters

603. *Id.* at 2471 (Kennedy, J., dissenting) (citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995)).

604. *Chase Sec. Corp.*, 325 U.S. at 314.

605. *Id.* at 316.

606. See Jean Guccione, *Burden of Proof Now Falls on Victims in Sex Abuse Civil Suits*, L.A. TIMES, June 28, 2003, at A24.

607. “No Bill of Attainder or ex post facto Law shall be passed.” U.S. CONST. art. I, § 9, cl.3.

608. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

609. *Stogner v. California*, 123 S. Ct. 2446, 2449 (2003) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798)).

the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*.⁶¹⁰

So too, the due process clause of the Fifth and Fourteenth Amendments would forbid the courts from creating a retroactive offense.⁶¹¹ Yet, the scope of the protection against *ex post facto* criminal prosecution for the crime of sexual abuse of a child, as compared to the elimination of an established statute of limitations so as to prosecute for an existing crime is likely to be the subject of future litigation. The reason is the distinction to be made between a crime and a procedure. Does the Constitution prohibit *ex post facto* modification of procedures? The California Court of Appeal, providing one example, interpreted the California Penal Code to permit prosecution of certain sex offenders decades after their alleged offenses occurred.⁶¹² And the Supreme Court in *Collins v. Youngblood*, implying that the imposition of a retroactive procedure is not forbidden, held that a statute is unobjectionable if it “does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed.”⁶¹³

Angry over failure to prevent abuse, states are grappling with ways to prosecute child sex offenders regardless of expired statutes of limitations. Michigan prosecutors, for example, used an exception in the old state criminal statute of limitations that allowed charges to be brought if a suspect left the state before the six-year limitations period expired.⁶¹⁴ This allowed criminal sexual assault charges to be brought against a priest who had allegedly sexually abused a minor during the mid-1960s.⁶¹⁵ And there are some states that have no statute of limitations barring prosecution in connection with certain crimes. Since there never has been a statute, prosecution is not time barred no matter when the offense occurred. Maryland, for example, “has no statute prescribing the time in which a

610. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). For an example of a prohibited retroactive procedural statute, see *Thompson v. Missouri*, 171 U.S. 380 (1898) (burden of proof); *Duncan v. Missouri*, 152 U.S. 377 (1894) (change in the number of trial jurors). *But see Collins v. Youngblood*, 497 U.S. 37 (1990) (limiting procedural objections).

611. *See, e.g., Keeler v. Super. Ct.*, 470 P.2d 617, 625 (Cal. 1970); *Marks v. United States*, 430 U.S. 188 (1977) (clause does not apply to judicial decisions).

612. *Stogner v. Super. Ct.*, 114 Cal. Rptr. 2d 37 (Cal. Ct. App. 2001), *cert. granted*, No. 01-1757.

613. *Collins v. Youngblood*, 497 U.S. 37, 52 (1990).

614. *Priests Are Charged in Sex Abuse Cases From Past Decades*, WASH. POST, Aug. 28, 2002, at A3.

615. Dillon, *supra* note 240, at A14. *But see Wakin, supra* note 501 (reporting that a Bronx District Attorney was forced to drop charges because of the statute of limitations).

prosecution for a felony must be commenced,⁶¹⁶ and sexual abuse of a child is a felony in Maryland.⁶¹⁷ Neither the *ex post facto* clause nor due process would bar prosecution. Prosecutors and legislators are being lobbied to repeal all statutes of limitation, both civil and criminal, to incarcerate people who do not report known instances of child abuse, to repeal charitable immunity or monetary liability limits, and to convene grand jury investigations to discover additional criminal violations.⁶¹⁸

For some time to come a criminal statute of limitations will be governed by the following: That "a law enacted after expiration of a previously applicable [statute of] limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution."⁶¹⁹

7. Tribunals

All of the previous elements of the procedure, the investigation, the standards of proof, the possibility of a plea, the statute of limitations and the concurrent jurisdiction with civil authorities, lead to the *Revised Norms'* tribunals and the establishment of guilt or innocence at the canonical level. The word tribunal never appears in either the *Charter* or the *Revised Norms*, yet it is included as a reference in the process by reason of the introduction of canon law following the recommendations of the Mixed Commission. One of the objections to the *Charter* and the original norms was the absence of canonical procedures guaranteed to any cleric subject to disciplinary penalties. The *Revised Norms*, adopted as a result of the negotiations between American bishops and Vatican officials, seek to correct the deficiency by providing that "[i]n every case involving canonical penalties, the processes provided for in canon law must be observed, and the various provisions of canon law must be considered."⁶²⁰ Since Church tribunals are an essential element of the process of deciding guilt or innocence under canon law, they have been introduced. Nonetheless, the presence of a Church tribunal should not hinder or lessen the objective of cooperating with civil authorities. The two may act concurrently. Thus,

[t]he necessary observance of the canonical norms internal to the Church is not intended in any way to hinder the course of any civil action that may be operative [But] the Church reaffirms her right to enact legislation binding on all her members concerning the ecclesiastical dimensions of the [offense of sexual abuse of minors].⁶²¹

616. *Smallwood v. State*, 443 A.2d 1003, 1006 (Md. Ct. Spec. App. 1982).

617. See MD. CODE ANN., CRIM. LAW § 3-602 (2002).

618. *Ray*, *supra* note 470.

619. *Stogner v. California*, 123 S.Ct. 2446, 2461 (2003).

620. REVISED NORMS, *supra* note 3, at Norm 8(A).

621. *Id.* at Norm 11 n.7.

The tribunal process becomes operative once an allegation of the sexual abuse of a minor is received by the bishop or his intake person.⁶²² Then a preliminary investigation will ensue promptly and objectively.⁶²³ This investigation will involve the diocesan review board and the personnel previously discussed. Unless the accused accepts the probability of guilt and resigns from active ministry, the accused cleric would be suspended from ministry⁶²⁴ upon a finding by the review board that “there is sufficient evidence that sexual abuse of a minor has occurred.”⁶²⁵ At this point “the Congregation for the Doctrine of the Faith shall be notified.”⁶²⁶ Unless the Congregation “calls the case to itself because of special circumstances,”⁶²⁷ such as repeated abuse of children, it will direct the bishop to proceed by bringing the accused before a Church tribunal convened in the diocese.⁶²⁸ If the decision of the tribunal is adverse to the cleric, he may appeal to the Vatican.⁶²⁹ But even if the tribunal finds that a cleric is innocent of the allegations, or the Vatican reverses upon appeal, the accused’s bishop may suspend the priest from ministry.⁶³⁰

The introduction of the tribunal to the process has generated comments from clerics and lay observers. First, almost all Church tribunals work to resolve annulment cases, a process that rules on whether or not a marriage ever took place and if not, one or both of the parties may remarry within the Church. Over four hundred priests have been involved in the sexual abuse of minors scandal, and no matter how many of them go before a tribunal, a spokesperson for the bishops admitted that “it could be at least a year until the tribunals were organized and the priests who would act as judges and prosecutors were trained.”⁶³¹ Second, because tribunals have been

622. *Id.* at Norm 6.

623. *Id.*

624. During suspension, the bishop may “remove the accused from the sacred ministry or from any ecclesiastical office or function, impose or prohibit residence in a given place or territory, and prohibit public participation in the Most Holy Eucharist pending the outcome of the process.” REVISED NORMS, *supra* note 3, at Norm 6; *see also* 1983 Code c.1722 (“To preclude scandals, to protect the freedom of witnesses and to safeguard the course of justice, having heard the promoter of justice and having cited the accused, the ordinary at any stage of the process can remove the accused from the sacred ministry.”).

625. REVISED NORMS, *supra* note 3, at Norm 6.

626. *Id.* at Norm 6. For a description of the Congregation for the Doctrine of the Faith, see the Vatican website at www.vatican.va/roman_curia/congregations/cfaith.

627. REVISED NORMS, *supra* note 3, at Norm 8(A).

628. For a description of the process, see Laurie Goodstein, *Revised Policy Sets Tribunals for Priests Accused of Abuse*, N.Y. TIMES, Nov. 2, 2002, at A1 [hereinafter, Goodstein, *Revised Policy*].

629. *Id.*

630. REVISED NORMS, *supra* note 3, at Norm 9 (“At all times, the diocesan [bishop] has the executive power of governance, through an administrative act, to remove an offending cleric from office, to remove or restrict his faculties, and to limit his exercise of priestly ministry.”).

631. Laurie Goodstein, *Bishops Pass Plan to Form Tribunals in Sex Abuse Cases*, N.Y. TIMES, Nov. 14, 2002, at A1.

comprised of clerics, accountability of an alleged offender is suspect.⁶³² According to one person allegedly sexually abused by a priest, “[t]he charter that was designed to make the bishops more accountable is going back into the secrecy of the courts run by the clergy.”⁶³³ Others share this concern, especially the fact that the tribunals operate under canon law and Vatican documents. One journalist commented,

[M]uch of the meaning [of the *Revised Norms*] seems tucked away in references to other documents. For example, there are references to [canon law] and to procedures outlined in such sources as the 1995 “Canonical Delicts Involving Sexual Misconduct and Dismissal from the Clerical State” and the papal document “Sacramentorum Sanctitatis Tutela.”⁶³⁴

Third, if the tribunal is to hold hearings pertaining to a case in the diocese where the priest ministered, the possibility of finding fair and impartial judges may be limited. And finally, the goal of the *Charter* was to move towards openness, lay involvement at every stage of the process, accountability, and a judicial process similar to what occurs in American courts.⁶³⁵ The challenge of the Church tribunal will be to accommodate this goal with the reality of Church canon law.

8. Judgment

If guilt is established by the tribunal, the Vatican congregation, or admitted in a plea by the accused, “the offending priest or deacon will be removed permanently from ecclesiastical ministry, not excluding dismissal from the clerical state, if the case so warrants.”⁶³⁶ The Norms do make an exception for reasons of advanced age or infirmity, but even then, the offending cleric may not wear clerical garb or celebrate the sacraments publicly and must lead a life of penance and prayer.⁶³⁷ The accused priest, having already been suspended and awaiting judgment, “may be requested to seek, and may be urged voluntarily to comply with, an appropriate medical and psychological evaluation at a facility mutually acceptable to the [diocese] and to the accused.”⁶³⁸ But, unlike past practice where the priest was often reassigned to ministry following treatment, the Norms explicitly

632. *Id.* (“Victims of sexual abuse were sharply critical, saying the process of judging accused priests should not be controlled entirely by clerics.”).

633. *Id.*

634. Peter Steinfelds, *Beliefs, A Time for Bishops to Speak Clearly About a Densely Written Document on Sexual Abuse*, N.Y. TIMES, Nov. 9, 2002, at B6.

635. *Id.*

636. REVISED NORMS, *supra* note 3, at Norm 8. This is in conformity with Canon Law. See 1983 Code c.1395 § 2 (“A cleric who . . . has committed an offense against the sixth commandment . . . with a minor below the age of sixteen [now eighteen], is to be punished with just penalties, including dismissal from the clerical state if the case warrants.”).

637. REVISED NORMS, *supra* note 3, at Norm 8(B).

638. *Id.* at Norm 7.

exclude remaining in ministry. "Removal from ministry is required whether or not the cleric is diagnosed by qualified experts as a pedophile or as suffering from a related sexual disorder that requires professional treatment."⁶³⁹

Even should the cleric be found innocent by the diocesan review board or the tribunal established in conformity to canon law, the diocesan bishop may "exercise [his] power of governance to ensure that any priest who has committed even one act of sexual abuse of a minor . . . shall not continue in active ministry."⁶⁴⁰ Even though the bishop may not dismiss from the clerical state, removal from active ministry includes the following options: (1) request the cleric resign from clerical office, such as being a pastor; (2) forcibly remove the cleric from office; (3) faculties such as administering the sacraments may be removed or restricted; (4) forbid public celebration of the Mass; (5) dispense the cleric from wearing priestly garb.⁶⁴¹ The administrative actions must be communicated to the cleric in writing.⁶⁴² While severe, these administrative penalties do not rise to the level of forced laicization and the permanency of the penalty is not discussed.⁶⁴³

Permanent removal from ecclesiastical ministry and laicization, or dismissal from the clerical state, are the most severe penalties available. Newly revised Vatican policies make it easier to laicize a priest when the cleric admits the abuse or the offense is particularly egregious.⁶⁴⁴ There is some mitigation implied for special circumstances, but these circumstances only justify allowing a convicted or admitted perpetrator to remain a cleric: mandatory removal from ministry is still required.⁶⁴⁵ Removal from ministry does not impede civil authorities from initiating or continuing criminal prosecution, nor does it thwart plaintiffs from bringing civil suits against a perpetrator. What removal from ministry does for the diocese is remove the diocesan bishop, officials, and assets from the possibility of civil suit or criminal investigation. Thus, if the diocese knows of the danger and allows that danger to affect persons to whom it owes a reasonable duty of care, the diocese would incur civil and possible criminal liability.⁶⁴⁶ The

639. *Id.* at Norm 8 n.4.

640. *Id.* at Norm 9.

641. *Id.* at Norm 9 n.6

642. *Id.*

643. See REVISED NORMS, *supra* note 3.

644. See Laurie Goodstein, *Pope Reportedly Acts to Speed Removal of Abusive Priests*, N.Y. TIMES, Feb. 27, 2003, at A20.

645. REVISED NORMS, *supra* note 3, at Norm 8B.

If the penalty of dismissal from the clerical state has not been applied (e.g., for reasons of advanced age or infirmity), the offender ought to lead a life of prayer and penance. He will not be permitted to celebrate Mass publicly or to administer the sacraments. He is to be instructed not to wear clerical garb, or to present himself publicly as a priest.

Id.

646. See O'Brien, *supra* note 29, at 129-50 (outlining the criminal and civil law ramifications).

monetary awards and grand jury investigations accompanying the notoriety of the sexual abuse scandal illustrate this.⁶⁴⁷ When faced with prospect of litigation following the reassignment of a priest admitting guilt or found guilty of one instance of sexual abuse, no matter how long ago, the safest approach is mandatory removal of all convicted priests, laicization with no public association as a cleric, and no possibility that a bishop or religious superior could be responsible for their actions.

The harshness of the penalty, especially when it is the product of so fluid a definition of sexual abuse of a minor, an indefinite statute of limitations, and the nebulous and nascent standard for establishing guilt or innocence, invite concern as to fairness. For example, Monsignor Russell L. Dillard was fifty-four years old, the pastor of a vibrant largely African-American parish in Washington D.C., popular, and from the comments of his many parishioners, caring and spiritual.⁶⁴⁸ He had been a priest for twenty-four years when two adult women accused him of fondling them, kissing them, and feeling their legs over a period of three years twenty years ago.⁶⁴⁹ When the allegations were deemed credible enough by the archdiocese, Monsignor Dillard was suspended as pastor and ordered to undergo psychological evaluation.⁶⁵⁰ The ten-person archdiocesan review board found that the "allegations against Dillard were credible and constituted sexual abuse as defined by the bishops in Dallas."⁶⁵¹ He has announced plans to appeal the decision of the review board to the Vatican and, "[f]or now, the archdiocese still gives him his salary of about \$1,000 a month and health benefits," but he plans to get a job.⁶⁵²

The facts surrounding the removal of Monsignor Dillard may be compared to the graphic sexual abuse allegedly and factually perpetrated by men like Rev. Paul R. Shanley, Rev. John J. Geoghan, and Rev. Gilbert Gauthier; incidents of anal intercourse, mutual masturbation, fellatio, all involving multiple victims. Factual comparison suggests concern over whether there should be gradations in the penalty, making the penalty more appropriate to the nature and frequency of the crime. For example, if the offense were kissing or fondling, and the act took place only once, should the penalty be the same as if the offense were far more graphic and occurred often and over a longer period of time?⁶⁵³ The issue is one of proportionality, and both canon law and civil law offer starting points for analysis.

647. See *supra* text accompanying notes 218-40.

648. See Murphy, *supra* note 144, at A1.

649. *Id.*

650. *Id.*

651. *Id.*

652. *Id.*

653. See Gerald D. Coleman, *No*, COMMONWEAL, Sept. 27, 2002, at 9 (arguing that punishment should vary with the crime); Kenneth Lasch, *A Reluctant Yes*, COMMONWEAL, Sept. 27, 2002, at 8 (arguing that one act is sufficient to justify the maximum penalty).

a. *Canon Law*

Monsignor Thomas Green, a professor of canon law at the Catholic University of America in Washington, D.C., asks: "Is every act of [sexual abuse of a minor] of the same magnitude and is the rather sweeping, presumably expiatory penalty of being 'permanently removed from ministry' always warranted?"⁶⁵⁴ He suggests that canon law has a tradition of recognizing gradations of criminality and punishment and uses a Canon as an example: "If cleric has otherwise committed an offense against the sixth commandment of the Decalogue . . . with a minor below the age of sixteen, is the cleric to be punished with just penalties, including dismissal from the clerical state if the case warrants it."⁶⁵⁵ The reference to the possibility of other penalties and to doing what is just, offers comparison to the uniform and mandatory policy of the *Revised Norms* and suggests that one penalty for all is not in the spirit of the canons. Such canonical concerns have due process and Eighth Amendment counterparts in civil law as well.

b. *Civil Law*

The Eighth Amendment of the United States Constitution prohibits the federal government from imposing cruel and unusual punishments for federal crimes.⁶⁵⁶ States have restrictions on penalties within their own constitutions, and the Due Process Clause of the United States Constitution also prohibits the states from inflicting impermissible punishments. In particular, it would limit the amount of punishment that may be prescribed for various offenses,⁶⁵⁷ and force the court to consider mitigating factors before imposing a death sentence.⁶⁵⁸ But a survey of cases reveals that sentences for sex offenses in American jurisdictions are often severe and yet upheld on appeal.⁶⁵⁹ Nonetheless, arguments may be made that the sentence should be proportional to what others would receive in other jurisdictions

654. Unpublished memorandum in the possession of the author.

655. 1983 Code, c.1395 § 2. Penal discretion is also given to judges at Canons 1343-46, and mandatory removal omits the possibility of rehabilitation of the offender. *Id.* at c.1343-46.

656. U.S. CONST. amend. VIII. The Supreme Court has begun to broaden the scope of the amendment to cases involving punitive damages and forfeiture of property. LAFAVE, *supra* note 326, at 186 n.86.

657. *Weems v. United States*, 217 U.S. 349 (1910) (punishment must be proportional to the offense); *Thomas v. State*, 634 A.2d 1 (Md. 1993) (20 years for slapping wife is excessive); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966). *But see Perkins v. State*, 234 F. Supp. 333 (W.D.N.C. 1964) (allowing a sentence from twenty to thirty years for fellatio).

658. *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion); *Sumner v. Shuman*, 483 U.S. 66 (1987).

659. Millman, *Sodomy Statutes and the Eight Amendment*, 21 COLUM. J.L. & SOC. PROBS. 267 (1988); G. MUELLER, *LEGAL REGULATION OF SEXUAL CONDUCT* 65-158 (1961). *But see Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the death penalty is disproportionate to the crime of rape).

and there should be objective factors relating to the gravity of the offense and the harshness of the penalty.⁶⁶⁰ Such proportionality however, seems out of favor with sentencing guidelines current today.

At one time American jurisdictions rendered indeterminate sentences, for example, a term of years, but suspending part of the time for good behavior. Sentencing was designed to promote rehabilitation and the Model Penal Code, published by the American Law Institute in 1962, was a product of rehabilitative goals.⁶⁶¹ But today the objective of federal and state legislatures is often punishment, and mandatory sentences meet the public's desire for retributive goals.⁶⁶² If discretion is provided in the statute it is limited and must be exercised by a judge.⁶⁶³ Sentencing as rehabilitative is as disfavored as treating sex offenders as ill rather than bad. This is especially true in those cases where the crime is sexual in nature, the punishment is less than death, and sentences are consistent in multiple jurisdictions without evidence of impermissible discrimination.

The canon law judgments mirror ones in civil law; both are retributive. When confronting the crime of sexual abuse of a minor, the objective is to punish the bad act, not to rehabilitate the ill offender.⁶⁶⁴ Past rehabilitative efforts of the bishops was a product of the outmoded conceptualization of the crime; the confidential agreements and reassignment following treatment complemented this attitude.⁶⁶⁵ American society had shifted to a mentality of retribution and the bishops suffered the consequences for their failure to recognize the shift.⁶⁶⁶ Mandatory removal and laicization provided in the *Revised Norms* respond to both the change in American attitude and the necessity of preventing further civil and criminal liability in the future. When compared to American jurisprudence associated with the Eighth Amendment and the Due Process Clause, it appears that the strict penalties

660. *Solem v. Helm*, 463 U.S. 277 (1983) (holding that proportionality must be present in non-death penalty cases); *The Supreme Court*, 1982 Term, 97 HARV. L. REV. 70 (1983). See generally F. ALLEN, THE REHABILITATIVE IDEAL 66 (1981) ("The severity of the sanctions visited on the offender should be proportional to the degree of his culpability.").

661. See generally Symposium, *The 25th Anniversary of the Model Penal Code*, 19 RUTGERS L.J. 519 (1988).

662. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 979-80 (1999); William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W. VA. L. REV. 373 (1995); Samuel H. Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 J. CRIM. L. & CRIMINOLOGY 726 (1989); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); C. S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1953); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. 14 (J. H. Burns & H.L.A. Hart eds., 1970).

663. See, e.g., CAL. PENAL CODE § 213(a)(2) (West 2002) ("Robbery in the second degree is punishable by imprisonment . . . for two, three, or five years."); KATE SMITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

664. See, e.g., THOMAS W. HUTCHINSON, ET AL., FED. SENTENCING LAW & PRACTICE § 243.2.

665. See Barry Werth, *Father's Helper; How the Church Used Psychiatry to Care for – and Protect – Abusive Priests*, NEW YORKER, June 9, 2003, at 61.

666. See Suzanne Gordon, *Why Americans Can't Think Straight About Crime*, WASH. POST, June 25, 1995, at X3.

of the *Revised Norms* are supportable.⁶⁶⁷ This is true even if the offense is a single occurrence, the sexual act falls far short of horrendous, and it took place long ago.⁶⁶⁸

9. A Suggested Process: Domestic Violence

The *Charter* and the *Revised Norms* respond to conduct that is gravely repugnant to society: the sexual abuse of children. This recognition justifies the following procedure: immediate suspension of an accused upon receipt of a credible allegation, a prompt and objective investigation by a review board, and then a hearing before a Church tribunal or a Vatican congregation.⁶⁶⁹ The levels of proof have yet to be established, but the initial allegation appears to warrant one level of proof to establish credibility, and then a different level of proof to establish guilt or innocence. A Promoter of Justice will be present at the initial stage, the decision to be made by the review board.⁶⁷⁰ Canonical and civil attorneys are implied, but not required. Only at the level of trial by either the tribunal or the Vatican congregation does the process take on the appearance of a juridical hearing.⁶⁷¹ In the event the bishop removes the priest under powers of governance, the process lacks even these basic safeguarding parameters.⁶⁷² The judgment of the tribunal may be appealed to the Vatican, where it is presumed both canonical and civil attorneys will have an opportunity to participate.⁶⁷³ But at the same time, the cleric's suspension results in severe ecclesiastical deprivation, and there is a concomitant process that may be taking place in the civil or criminal courts, or both.⁶⁷⁴

In spite of its complexity, there are two levels of review. The first level requires suspension in order to safeguard one or more individuals at risk; the second level provides an opportunity for the accused to rebut the accusations and to reclaim both reputation and property.⁶⁷⁵ Such a two-tiered process with concomitant public policy considerations has developed to address issues raised by domestic violence, a repugnant crime of abuse prevalent in American jurisdictions.

Traditionally, the crime of domestic violence occurs when two persons cohabit and one places the other in fear of bodily harm through physically

667. See, e.g., *Weems v. United States*, 217 U.S. 349 (1910) (punishment must be proportional to the offense).

668. See REVISED NORMS, *supra* note 3, at Norm 8.

669. 1983 Code c.1717-28.

670. *Id.* at c. 1721.

671. *Id.* at c.1717-28.

672. *Id.*

673. *Id.* at c.1628-40.

674. *Id.* at c.1722.

675. *Id.* at c.1717-28.

or emotionally threatening conduct.⁶⁷⁶ What constitutes such threatening conduct is the subject of frequent court decisions, similar to the discussion of what constitutes sexual abuse.⁶⁷⁷ For example, to place a cohabitant “in fear” does not require physical contact with the other party.⁶⁷⁸ This is similar to “interaction” in the *Norms* definition of sexual abuse.⁶⁷⁹ The definition of “in fear” is interpreted broadly so as to protect one of the parties, often the weaker of the two, particularly vulnerable and dependent on the other in a relationship of trust.⁶⁸⁰ The process may commence when one of the cohabitants, often a female, calls the police late on a Friday night alleging that her male lover has pushed her, yelled at her, threatened her with a kitchen knife and, immediately before storming out of their shared apartment, stated he was going to go out and get a gun so he could return and shoot her. There may be no discernable bodily contact, but she is asking the police—and hence the court—to protect her at that moment without his presence by barring him from returning to the apartment and any additional remedies that may be forthcoming. His name may be on the lease, he may pay some or all of the rent, and until this outburst of anger, was in an intimate relationship with the woman now making an accusation.

The response of civil authorities to this female caller and to complaints of domestic violence in every American jurisdiction is to issue an order barring the accused from physical contact with the alleged victim; he is suspended from entering the apartment or entering into communications with the accuser.⁶⁸¹ This is the minimum restraint upon the accused and is referred to as a protective order.⁶⁸² The protective orders obtained in these

676. See, e.g., Cheryl Hanna, *No Right to Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

677. For a discussion of battering identified as coercion and control by the batterer rather than physical violence, see Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973 (1995). Proof of the domestic violence is often obtained from expert testimony on a possible battered woman’s syndrome. See, e.g., *Connecticut v. Borrelli*, 629 A.2d 1105 (Conn. 1993).

678. See, e.g., *H.E.S. v. J.C.S.*, 815 A.2d 405 (N.J. 2003) (video and audio surveillance equipment in divorcing wife’s bedroom while living in the marital home was staking and sufficient to invoke the state’s domestic violence statute); *Feltmeier v. Feltmeier*, 798 N.E.2d 75 (Ill. 2003) (physical and mental abuse constituting domestic violence may also constitute a tort cause of action for intentional infliction of emotional distress).

679. The subjectivity of “interaction” in the context of the possible sexual abuse of children and in the context of “battering” domestic violence is similar in that both lack physical evidence corroborating the act and the intent. Thus, a battered child syndrome may be helpful in proving culpability and a battered spouse syndrome may be helpful in either assessing culpability or explaining a complainant’s subsequent behavior. But the court struggle with the admission. See *Michigan v. Christel*, 537 N.W.2d 194 (Mich. 1995) (denying expert testimony as to whether a complainant is actually a battered woman, but allowed it as to whether a battered woman’s syndrome exists in the complaint).

680. For an excellent review of the different forms of abuse constituting domestic violence, see Karla Fischer, Neil Vidmar, and Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 146 S.M.U. L. REV. 2117 (1993).

681. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 918-19 (1993).

682. *Id.*

cases make a distinction between the initiating process—the civil protective order—and the process that follows, often civil orders of support and custody; these work in tandem with the protective orders by providing support and custody of children if they are present in the relationship.⁶⁸³ In conjunction with the civil protective order, support, and custody, there may be criminal prosecution for assault and related felonies and misdemeanors associated with the domestic violence.⁶⁸⁴ The distinction between the civil protective orders and criminal prosecution is illustrative for purposes of the standard of proof used and the process by which fairness may be obtained for the accused, the victim, and civil society. Civil standards are far less stringent than criminal ones, only rising to the highest level with infringement of fundamental rights or suspect classifications.⁶⁸⁵

As true with the definition of child sexual abuse in America, domestic violence may also be placed within historical context. In the last few decades states have begun to pay increasing attention to domestic violence between married and unmarried cohabitants; it is only required that the cohabitants be somehow intimately connected through marriage, a common child, household, consanguinity, or affinity.⁶⁸⁶ Domestic violence, almost exclusively perpetrated against women by male partners, was officially recognized by the United States Supreme Court in 1992 in *Planned Parenthood v. Casey*.⁶⁸⁷ In *Casey*, the Court quoted statistics from the American Medical Association that estimated that four million women are assaulted each year and between one-fifth and one-third of all women will be assaulted by a partner or an ex-partner during their lifetime.⁶⁸⁸ Criminal assault statutes and civil tort remedies were ineffective in responding to the needs of these battered women,⁶⁸⁹ therefore, states enacted civil statutes that allowed, among other remedies, for the issuance of a civil order of protection if one of the parties placed the other in apprehension—in fear—of immediate physical injury.⁶⁹⁰

One of the parties obtains the order by making a complaint stating that he or she is in apprehension of immediate physical injury and the

683. *See id.* at 954, 990-91.

684. *See id.* at 1142-43.

685. *See* Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 42 JUV. & FAM. CT. J., No. 4, at 13 (1992).

686. *See, e.g.*, N.Y. FAM. CT. ACT § 812(1) (McKinney 1999 & Supp. 2002).

687. 505 U.S. 833 (1992).

688. *Id.* at 891.

689. *See, e.g.*, *State v. Culmo*, 642 A.2d 90 (Conn. 1993) (finding anti-stalking statute constitutional); *Warren v. State*, 336 S.E.2d 221 (Ga. 1985) (holding that marriage did not preclude a husband from being prosecuted for raping his wife).

690. *See, e.g.*, *State ex rel. Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982) (en banc) (interpreting state's Adult Abuse Act); *Baker v. Baker*, 494 N.W.2d 282 (Minn. 1992) (applying state's Domestic Abuse Act); Dorothy Carl Quinn, Comment, *Ex Parte Protection Orders: Is Due Process Locked Out?*, 58 TEMP. L. Q. 843 (1985).

reasonableness of this petition alone allows the court to provide protective measures that eventually precipitate a more thorough hearing.⁶⁹¹ Initially the proceeding is civil so as to make an immediate response—suspension of contact—and protect the alleged victim.⁶⁹² Then criminal charges may be brought against the accused or an enhancement of the civil remedy provided.⁶⁹³ But at the initial hearing very little evidence satisfies the issuance of the order, there is not need for the accused to even be present. Yet later there is a hearing where the process becomes more substantial.⁶⁹⁴

New York state legislation is illustrative of the civil and criminal interaction of the domestic violence legislation, as well as the process involved once an allegation has been made.⁶⁹⁵ The statute provides:

2. Information to petitioner or complainant. The chief administrator of the courts shall designate the appropriate persons, including, but not limited to district attorneys, criminal and family court clerks, corporation counsels, county attorneys, victims assistance unit staff, probation officers, warrant officers, sheriffs, police officers or any other law enforcement officials, to inform any petitioner or complainant bringing a proceeding under this article, before such proceeding is commenced, of the procedures available for the institution of family offense proceedings, included but not limited to the following:

(a) That there is concurrent jurisdiction with respect to family offenses in both family court and the criminal courts;

(b) That a family court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end the family disruption and obtain protection. Referrals for counseling, or counseling services, are available through probation for this purpose;

(c) That a proceeding in the criminal courts is for the purpose of prosecution of the offender and can result in a criminal conviction of the offender;

(d) That a proceeding or action subject to the provisions of this section is initiated at the time of the filing of an accusatory instrument or family court petition, not at the time of arrest, or request for arrest, if any

. . . .

691. Quinn, *supra* note 690, at 849-50.

692. *Id.*

693. *Id.* at 846.

694. *See id.* at 846-47.

695. N.Y. FAM. CT. ACT § 812 (McKinney 1999 & Supp. 2003).

... (f) That an arrest may precede the commencement of a family court or a criminal court proceeding, but an arrest is not a requirement for commencing either proceeding; provided, however, that the arrest of an alleged offender shall be made under the circumstances described in ... criminal procedure law;

(g) That notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section.⁶⁹⁶

The *ex parte* orders may prohibit specific conduct, or the state legislation may allow a judge to provide for an appropriate remedy to fit the circumstances.⁶⁹⁷ But most orders concern possession of a residence, monetary compensation, limiting communications and contact, emergency support and custody if there are children involved, monitoring of the alleged offender, and surrender of any firearm or weapon.⁶⁹⁸ Police detention for a limited time is also justified.⁶⁹⁹ As with any allegation made against a cleric, reputation is affected and there is the necessity of a response to what appears to have been a crime. Yet, up to this point, the procedure remains civil and the standards minimal.⁷⁰⁰

A judge may issue the protective order without notice to the alleged offender, most often upon a complaint made by a battered partner following an altercation.⁷⁰¹ Then, after the order has been issued, statutes provide for a hearing within a reasonable time at which the alleged offender may respond to the allegations.⁷⁰² But for a time the allegations alone, even without corroborating physical injury ("apprehension of immediate physical injury"), are sufficient to satisfy due process requirements of this civil procedure.⁷⁰³

696. *Id.*

697. As to the range of orders, see Klein & Orloff, *supra* note 681, and Hart, *supra* note 685.

698. See Klein & Olaff, *supra* note 681, at 910 (discussing potential remedies).

699. Studies show that in the past police sought to avoid arrest as a priority. See Joan Zorza, *The Criminal Law of Misdemeanor Violence*, 1970-1990, 83 J. CRIM LAW & CRIMINOLOGY 46 (1992). Today, protection orders are issued when there is immediate and present danger of abuse, but victims may request a police officer to remain on the scene and to detain an alleged abuser to accomplish the goals of the state adult abuse act. See, e.g., *State ex rel. Williams v. Marsh*, 626 S.W2d 223 (Mo. 1982).

700. The civil order may also serve as an exception to the Fourth Amendment's necessity of having probable cause in a criminal proceeding. See *Henderson v. Simi Valley*, 305 F.3d 1052, 1056-57 (9th Cir. 2002).

701. See Klein & Orloff, *supra* note 681, at 851.

702. See *id.* at 877.

703. See generally WALTER WADLINGTON & RAYMOND C. O'BRIEN, *FAMILY LAW IN PERSPECTIVE* 36-38 (2001); CATHERINE A. MACKINNON, *SEX EQUALITY: FAMILY LAW* 715-65

With very few and minor exceptions,⁷⁰⁴ state courts have upheld the ex parte statutes as a reasonable measure designed to protect important government interests of protection against abuse.⁷⁰⁵ Indeed, in 1994, Congress added its support to greater enforcement measures and passed the federal Violence Against Women Act (VAWA),⁷⁰⁶ which provided federal funding for state programs designed to encourage mandatory arrests, coordinate police enforcement, encourage judicial accountability, and strengthen legal advocacy programs.⁷⁰⁷ The federal legislation also made it a criminal offense to travel across state lines with the intent of injuring, harassing, or intimidating a spouse or intimate partner.⁷⁰⁸ VAWA made it possible to enforce protective orders across state lines.⁷⁰⁹ However, the civil tort remedy based in the federal VAWA legislation was later held to be unconstitutional as beyond the scope of Congress' power under either the Commerce Clause or section five of the Fourteenth Amendment,⁷¹⁰ but this does not diminish the scope of the federal legislation.

There are similarities between procedures provided in the *Charter* for addressing the preliminary investigation of a complaint against a priest or deacon for "credible" evidence,⁷¹¹ and the issuance of an ex parte protective order upon a complaint of domestic violence when there is an allegation of any "apprehension of immediate physical injury."⁷¹² Both acts respond to abusive conduct justifying severe consequences, and both result in suspension of the accused.⁷¹³ The lesser civil standard of reasonableness, preponderance of the evidence, is appropriate at this level of the process even though there are severe consequences to an allegation. Both domestic violence and child sexual abuse are actions associated with abuse, usually by

(2001); CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* (2001); NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW* (2001); ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000).

704. *See, e.g.*, Florida v. Byars, 823 So.2d 740 (Fla. 2002) (allowing an "open to the public" defense to burglary); *see also*, State v. Colvin, 645 N.W.2d 449 (Minn. 2002); Ohio v. Jones, No. 00JE18, 2002 Ohio App. LEXIS 2876 (May 28, 2002).

705. *See, e.g.*, A.R. v. M.R., 799 A.2d 27 (N.J. Super. Ct. App. Div. 2002) (allowing New Jersey to issue an ex parte protective order based solely on phone calls made from another state and thus without even the physical presence of the perpetrator in the state of issuance).

706. Pub. L. No. 103-322, 108 Stat. (1994).

707. *See id.*

708. The Sixth Circuit Court of Appeals has held the provision constitutional. *See United States v. Al-Zubaidy*, 283 F.3d 804 (6th Cir. 2002).

709. *See* 18 U.S.C. § 2262 (2000); *see also* Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 255-56 (1995).

710. *United States v. Morrison*, 529 U.S. 598 (2000). *See generally*, Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1 (2000); Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876 (1996); Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996); Reva B. Siegel, "The Rule of Love:" *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

711. *See Beal, supra* note 344, at 17-18.

712. *See, e.g.*, Baker v. Baker, 494 N.W.2d 282 (Minn. 1992).

713. *Compare Baker*, 494 N.W.2d at 288, with *Beal, supra* note 344, at 17-18.

a perpetrator more powerful and trusted; both actions are peremptory and necessitate financial and public hardships. To allow the consequences for the lowest level of proof available in civil proceedings seems unjustified. Nonetheless, domestic violence protective orders have met constitutional standards of due process because they respond to factors enumerated in *Mathews v. Eldridge*, which demanded that courts balance: (1) the private interests to be affected by the government action; (2) the risk of erroneous deprivation of those interests and the probable value of additional safeguards; and (3) the government's interests involved.⁷¹⁴ Deprivation of home, family, reputation, and wealth are substantial private interests to surrender even if only temporarily and based on an allegation made without notice to the alleged perpetrator. Nonetheless, there is a substantial government interest involved: "[T]he general public has an extraordinary interest in a society free from violence, especially where vulnerable persons are at risk."⁷¹⁵

In comparison to the *Charter* and the *Revised Norms*, the procedural safeguards of the domestic violence civil ex parte protective orders are substantial. For example, state statutes provide that any ex parte order must be supported by a sworn affidavit alleging specific facts and circumstances of past abuse, only specified persons may issue the order (e.g., judges or referees), the order is for short duration prior to the time when there is to be a full hearing, and the alleged perpetrator must be given full notice of the hearing.⁷¹⁶ Overall, the necessity of speed in the prevention of abuse is the justifying reason for the order and, it may be argued, so too for the prompt removal of an accused priest or deacon.⁷¹⁷ The marked difference in the two procedures, however, is that the procedural safeguards so prevalent in the domestic violence legislation are only vaguely implied in the *Charter's* provision.⁷¹⁸ Correspondingly, complaints are made that the *Charter* appears "to be disposing of complaints of sexual abuse against priests according to jury-rigged administrative procedures."⁷¹⁹

At a minimum, the *Charter* and the *Revised Norms* lack the specificity present in the domestic violence statutes, and the availability of a diocesan-supplied canonical attorney will not mitigate the procedural disparity.⁷²⁰ Furthermore, the civil protective orders have applicable statutes of limitations to bar allegations after a long period of time, usually from one to six years in duration depending on the nature of the allegation.

714. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

715. *Baker v. Baker*, 494 N.W.2d 282, 288 (Minn. 1992).

716. *Id.*

717. *Beal*, *supra* note 344, at 16-17.

718. *Id.*

719. *Id.* at 17.

720. One suggestion is that the canonical lawyer be subsidized by the diocese rather than provided, as a way to avoid a conflict of interest. *See McKenna*, *supra* note 361, at 11.

Commentators have argued against any statute of limitations because of the serious nature of domestic violence,⁷²¹ and they join child abuse victims demanding an unlimited time to pursue claims as well.⁷²² As with American law, there will be continued debate in the Church over the value of an unlimited or a specified time in which to make allegations,⁷²³ and question as to whether the *Revised Norms* contain any practical statute of limitations at all.

Many years have elapsed since the introduction of the first domestic violence statute. Initially there were complaints of due process violations, a denial of privacy and equal protection, and penalties far in excess of what the conduct warranted. But the threat and the conduct was grievous enough to prompt repeated legislative attempts to find a process that protected the vulnerable and provided a hearing to those accused in due course. Today, a process has evolved that complements the state's criminal procedures and the civil court's powers of domestic relations. At this stage of the *Charter's* and *Revised Norms'* development, lessons may be learned from the process of domestic violence.

721. See, e.g., Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 321, 360 (1997). Some states have allowed for the statute to be waived for such reasons as insanity. See, e.g., *Overall v. Estate of Klotz*, 52 F.3d 398 (2d Cir. 1995) (repressed memory); *Clary v. Stack*, 611 P.2d 80 (Ala. 1980) (duress); *Jones v. Jones*, 576 A.2d 316 (N.J. Super. Ct. App. Div. 1990).

722. See E.J. Dionne Jr., *Rebuked by Rome*, WASH. POST, Oct. 22, 2002, at A27. For examples of state statute of limitations in cases of childhood sexual abuse, see ALA. CODE § 6-2-34 (2003); ALASKA STAT. § 09.10.140 (Michie 2002); ARIZ. REV. STAT. ANN. § 12-542 (West 2003.); ARK. CODE ANN. § 16-56-130 (Michie 2001); COLO. REV. STAT. ANN. § 13-80-103.7 (West 2003); D.C. CODE § 12-301 (2003); CONN. GEN. STAT. ANN. § 52-577d (West 2003); FLA. STAT. ANN. § 95.11 (West 2003); GA. CODE ANN. § 9-3-90 (2003); HAW. REV. STAT. ANN. §§ 657-7, 657-13 (Michie 2002); IDAHO CODE §§ 5-219, 5-230 (Michie 1998); 735 ILL. COMP. STAT. ANN. 5/13-202.2 (West 2003); IND. CODE ANN. §§ 34-11-1-2, 34-11-6-1 (Michie 2003); IOWA CODE ANN. § 614.8A (West 2003); KAN. STAT. ANN. § 60-523 (2003); KY. REV. STAT. ANN. §§ 413.140, 413.170 (Michie 2002); 14 ME. REV. STAT. ANN. § 752-C (West 2003); MD. CODE ANN., CTS & JUD. PROC. §§ 5-101, 5-201 (2003); MASS. ANN. LAWS ch. 260, § 4C (West 2003); MICH. COMP. LAWS ANN § 600.5851 (West 2003); MINN. STAT. ANN. § 541.073 (West 2003); MISS. CODE ANN. § 15-1-35 (2003); MO. REV. STAT. § 537.046 (2003); MONT. CODE ANN. § 27-2-216 (2003); NEB. REV. STAT. §§ 25-207, 25-213 (2003); NEV. REV. STAT. § 11.215 (2003); N.H. REV. STAT. ANN. §§ 508:4, 508:8 (2003); N.J. STAT. ANN. § 2A:61B-1 (West 2002); N.M. STAT. ANN. § 37-1-30 (Michie 2003); N.C. GEN. STAT. §§ 1-52, 1-17 (2003); N.D. CENT. CODE §§ 28-01-18, 28-01-25 (2003); OHIO REV. CODE ANN. §§ 2305.111, 2305.16 (West 2002); OKLA. STAT. tit. 12, § 95 (West 2003); OR. REV. STAT. § 12.117 (2003); 42 PA. CONS. STAT. ANN. § 5524 (West 2003); R.I. GEN. LAWS § 9-1-51 (2003); S.C. CODE ANN. §§ 15-3-535, 15-3-40 (Law. Co-op. 2003); S.D. CODIFIED LAWS § 26-10-25 (Michie 1999); TENN. CODE ANN. §§ 28-3-104, 28-1-106 (2003); TEX. CIV. PRAC. & REM. CODE §§ 16.0045, 16.001 (Vernon 2002); UTAH CODE ANN. § 78-12-25.1 (2003); VT. STAT. ANN. tit. 12, § 522 (2002); VA. CODE ANN. §§ 8.01-229, 8.01-229 (Michie 2000); WASH. REV. CODE § 4.16.340 (2003); W. VA. CODE §§ 55-2-12, 55-2-15 (2003); WIS. STAT. § 893.587 (2003); WYO. STAT. ANN. § 1-3-105 (Michie 2003).

723. Canon law is being cited as specifying that for all alleged incidents of child abuse committed before Nov. 27, 1983, there is a five-year statute of limitations from the date of the offense. See Cooperman, *supra* note 23, A2. For offenses committed before April 25, 1994, the statute of limitations runs for five years after the alleged victim's 18th birthday. *Id.* For offenses committed after April 25, 1994, the statute runs for 10 years after the victim turns 18. *Id.*

IV. THE LAITY

A. *Second Vatican Council*

Priests and bishops have a significant stake in the response to the child sexual abuse crisis, but so does the laity. Generally, a lay person can be defined as a Catholic man or woman not ordained through the prescribed sacramental rite of the Church: thus, any Catholic who is neither a priest nor a deacon.⁷²⁴ This could be a man or a woman, a child or an adult, and a convert or a baptized at birth Catholic.⁷²⁵ The Second Vatican Council (1962-65) made a particular point to recognize the role of the laity in the life of the Church: "As sharers in the role of Christ the Priest, the Prophet, and the King, the laity have an active part to play in the life and activity of the Church."⁷²⁶ And more pertinent to the crisis resulting from the sex abuse of minors, the documents state that "[a]n individual layman, by reason of the knowledge, competence, or outstanding ability which he may enjoy, is permitted and sometimes even obliged to express his opinion on things which concern the good of the Church"⁷²⁷ but with the understanding that the laity "act under the superior direction of the hierarchy itself."⁷²⁸

In the American Catholic Church participation by the laity is unique and exemplary. In *American Catholic*, Charles Morris writes that, "[t]he great strength of the American Church is the 20 million or so active Catholics in the parishes—not its bishops or cardinals, or the hospitals and universities with Catholic names, or the public policy apparatus of its bishops' conferences."⁷²⁹ And these "active American Catholics are educated, literate, informed, and *interested* in their religion. And they are participants in it."⁷³⁰ According to Mr. Morris, these are people who are "trying to navigate a confusing world and guide their children, using their conscience, their own best judgment, and the Church's teaching as their compass."⁷³¹ These people are the product of the unique church-state relationship evolving in America since 1789. When lay people were confronted with a barrage of horrendous media reports involving priests, bishops and their children, they reacted with the vigor with which they had heretofore used to

724. See U.S. CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH, 237-41 (1994).

725. *Id.*

726. VATICAN COUNCIL II, *supra* note 16, at 777 (quoting from the Decree on the Apostolate of Lay People).

727. *Id.* at 394 (quoting from the Dogmatic Constitution on the Church).

728. *Id.* at 787 (quoting from the Decree on the Apostolate of Lay People).

729. MORRIS, *supra* note 9, at 430.

730. *Id.*

731. *Id.*

“run the parishes, plan liturgies, carry out works of mercy, [and] supervise the budget.”⁷³²

This story of American Catholics exhibiting vigor was the focus of an article in *The New Yorker* magazine in fall, 2002.⁷³³ The article described a parish in Newton, Massachusetts where the pastor was Father Walter Cuenin.⁷³⁴ Since the parish was under the jurisdiction of the Archdiocese of Boston and its archbishop, then Cardinal Bernard Law, the parishioners were constantly aware of the sex abuse scandal involving their Church.⁷³⁵ Their pastor, taking a leadership role in the parish, declining to contribute its usual donation to the Cardinal's Annual Appeal and suggested that there were other avenues for parishioners to contribute to needy cases.⁷³⁶ He also sought to “take on” the Cardinal on doctrinal issues that he thought needed reform and encouraged his parishioners to participate in a Voice of the Faithful rally in Boston.⁷³⁷ His parishioners responded. The group is organized and led by lay persons and animated by dissatisfaction with the Church's response to the sexual abuse scandal.⁷³⁸ They joined other men and women who had been meeting in church basements and schools ever since the scandal erupted to discuss “what it was about their Church that had enabled more than fifteen hundred priests to molest minors and had caused numerous bishops to shuffle problem priests from parish to parish rather than fire them or turn them over to prosecutors.”⁷³⁹

The lay group, often including clergy, but organized and dominated by lay persons, is one of many to evolve from the sexual abuse scandal. Often aided by the Internet and previously established parish bonds, the groups discussed withholding money from the diocese, petitioning the archbishop to resign, lobbying legislators and prosecutors, and praying for an end.⁷⁴⁰ Because the occasion of the scandal called into question Church leadership, many persons in the lay groups sought to establish other agendas for discussion.⁷⁴¹ Among these agendas were ordination of women, married clergy, greater lay participation in selection of bishops and pastors, and many more.⁷⁴² Their authority challenged on a theological level the bishops

732. *Id.* at 430-31.

733. See Paul Wilkes, *The Reformer*, THE NEW YORKER, Sept. 2, 2002, at 50.

734. *Id.*

735. *Id.*

736. *Id.* The influential Catholic magazine, *Commonweal*, supported withholding financial contributions to the archdiocese of Boston, writing in an editorial that “the only real weapon the laity have is cash withdrawal, a powerful and even dangerous weapon—one that should be resheathed when [Cardinal Law's] successor arrives and deal honestly and openly with the church of Boston.” *Lawless in Boston*, COMMONWEAL, May 17, 2002, at 6. Pledges to the Cardinal's Appeal dropped from \$7.5 million in 2001, to \$4.3 million in June of 2002. *Voices of the Faithful*, COMMONWEAL, Aug. 16, 2002, at 8.

737. See Wilkes, *supra* 733, at 51.

738. *Id.*

739. BETRAYAL, *supra* note 30, at 184. The web site for the group may be found at www.votf.org. *Voices of the Faithful*, COMMONWEAL, Aug. 16, 2002, at 8.

740. MORRIS, *supra* note 9, at 430.

741. *Voices of the Faithful*, COMMONWEAL, Aug. 16, 2002, at 8.

742. See *id.*

reacted defensively. Most of the reaction was directed towards a group called Voice of the Faithful.

B. *Voice of the Faithful*

Leadership of the Voice of the Faithful is opaque, but certainly among the leaders was Dr. James E. Muller, a cardiologist on the faculty of the Harvard Medical School and cofounder of Physicians for the Prevention of Nuclear War in 1980.⁷⁴³ He shared the Nobel Peace Prize in 1985.⁷⁴⁴ Muller is representative of the American Catholic laity that was empowered by the Second Vatican Council. "He wanted to enlist half of the world's Catholics, 500 million people, in an international congress of laypeople, with chapters in every parish that would debate policies and then represent the position of the faithful in shaping the future of their Church."⁷⁴⁵ When the archbishop of Boston resigned because of the scandal, there were those who thought that it was an indication of the growing influence of lay organizations in the governance of the Church.⁷⁴⁶ Perhaps it was, but it seems more likely that the bishops themselves recognized that lay persons represented a means of accountability within the American system that had allowed the Church to thrive. Accountability was the key to contrition and a restoration of that trust implicit in the church-state paradigm. The Vatican acquiesced.

Accountability through lay participation is championed by the former chairman of the National Review Board, established by the bishops' *Charter* to monitor its implementation. Governor Frank A. Keating of Oklahoma, the first chairman, supported the involvement of Catholic lay organizations as do theologians such as Thomas H. Groome of Boston College.⁷⁴⁷ But there are limits. It is reasonable to conclude that the bishops recognized that by being held accountable for past mistakes, and allowing lay participation to provide further accountability, they could meet the demands of the scandal. It is unreasonable to conclude however that the bishops will surrender even a modicum of doctrinal authority; one does not follow from the other. At present, "the group [Voice of the Faithful] is struggling to position itself as a credible middle-of-the-road alternative for Catholics with

743. BETRAYAL, *supra* note 30, at 190.

744. *Id.* Many notable lay Catholics, such as William Donohue, William J. Bennett, William F. Buckley, Jr., Patrick Buchanan, Ronald P. McArthur, and Lisa Sowle Cahill, have taken a vocal position on the scandal. *Id.* at 196-97.

745. *Id.* at 191.

746. See, e.g., Richard N. Ostling, *Rank-and-File Roman Catholics Driven by the Clerical Sex Abuse Crisis to Fight for Reform within the Church are About to Find Out if Their Movement can Handle Success*, AP ONLINE, available at 2002 WL 104357729 (quoting various influential lay Catholics as to the future role of the Voice of the Faithful).

747. Pamela Ferdinand, *Catholic Group Walks Fine Line on Reforms*, WASH. POST, Oct. 20, 2002, at A3.

widely divergent views who are seeking ways to democratize the Church.”⁷⁴⁸ But to the Vatican and to other American Catholics sensing that this is an organization seeking to reverse Church teachings or to establish itself as the purveyor of dogma, Voice of the Faithful is at minimum an object of suspicion and at worst, a vehicle for schism.⁷⁴⁹

Sensing a challenge to theological and fiscal independence, some bishops reacted to the activities of the group by banning them from meeting on Church property.⁷⁵⁰ But there are other venues open to Catholic lay organizations developed through their success in an upwardly mobile American culture and the activism already established in the American Church. For example, Catholic colleges have launched lectures, studies and conferences “looking for ways to help the faithful grapple with concerns about the scandal and assist the Church leadership in regaining people’s trust.”⁷⁵¹ There is also an extensive Catholic media structure—magazines, newspapers, and television—supported and utilized by the laity and clergy alike that continues to publicize articles and commentaries on the sexual abuse scandal and other topics. Meetings may still continue and if not with the bishops’ sanction, then with the acquiescence of supportive pastors and lay administrators of schools and charities.

But if Voice of the Faithful is viewed by some as a challenge to bishops, there are other groups that have formed to provide monetary and community support to bishops and priests—even those priests accused of sexual abuse. For example, one layman founded a group to help pay the legal expenses of Roman Catholic clergy accused of sex crimes. The group is called “Work for the Good of the Priesthood” [Opus Bono Sacerdotii] and is directed towards what the founder views as abandonment of the priests by the bishops.⁷⁵² Additionally, present and former priests have organized to form Voice of the Ordained, a group that seeks to support the rights of priests under civil and canon law. While both groups deplore sexual abuse of minors and should not be viewed as depreciating the harm caused by the crisis to victims, families, or to the Church, they think the present response goes too far in neglecting the due process rights of the accused clergy. Above all, they think that the *Charter* adopted by the American bishops in Dallas abandoned the priests to speculation and summary dismissal.

748. *Id.*

749. See Bruni, *supra* note 26 (suggesting that Vatican resistance to the initial draft of the *Charter* results from the bishops replacing their authority with scrutiny and censure from lay people).

750. See, e.g., *Nation in Brief*, WASH. POST, Oct. 2, 2002, at A8 (citing a ban by the Archdiocese of Boston); *N.J. Bishop Bans Catholic Lay Group*, WASH. POST, Oct. 12, 2002, at A10 (citing a ban by the bishops of Newark and Camden). The Diocese of Rockville Centre, N.Y., has also banned the group from meeting on Church property. See Ferdinand, *supra* note 747.

751. Pamela Ferdinand, *Catholic Theologians Debate Ills of Church Hierarchy: Inquiry on Outgrowth of Sexual Abuse Crisis*, WASH. POST, Sept. 21, 2002, at A3 (identifying Boston College’s two year program called “The Church in the 21st Century,” committee recommendations from Notre Dame, and courses offered at Georgetown University).

752. See Alan Cooperman, *Out of Zero Tolerance, New Support for Priests*, WASH. POST, Oct. 13, 2002, at A1. Additional groups formed recently are Boston Priests Forum and Faithful Voice. *Id.* at A23. Priest groups were very influential in the resignation of Cardinal Law. Jay Lindsay, *Boston Priests Forum Gains Power*, AP ONLINE, Dec. 12, 2002 available at 2002 WL 103843933.

The sexual abuse scandal has provided a dilemma for the Church. On the one hand the American bishops have enlisted the inclusion of lay persons on its review boards and offices in an effort to make themselves accountable for past mistakes that placed children at risk. Lay participation is a sign of contrition and a means to move ahead. But then on the other hand, lay persons, sensing the empowerment of participation at the level of personnel, priestly conduct, and diocesan review, want to progress to participating in the "the vision, or lack of vision—or superfluity of visions—of what the Church is and how it should carry out its mission, and who should do it."⁷⁵³ Whether this progression occurs is yet to be decided.

V. CONCLUSION

As often happens with institutions, situations arise to shape them in ways that could never have been anticipated. When Cardinal Law, the long-time archbishop of Boston admitted in a routine court filing in 2001 that he had made the Reverend John J. Geoghan a parochial vicar of a large affluent parish even though the priest had been accused of sexually molesting seven boys two months earlier, the institutional church in America was radically changed. The newspaper that reported and questioned the assignment eventually won the Pulitzer Prize for journalism, the Cardinal-Archbishop of Boston resigned in disgrace, additional bishops would be forced to sign apologies and relinquish control over their own personnel, and hundreds of millions of dollars of Church assets would be spent on litigation and negotiated court settlements with thousands of victims of abuse. Hundreds of priests would eventually be forced from active ministry, and Church attendance, donations and credibility would decline as well. And during the summer of 2003, the former priest who was the subject of the initial revelations, the Reverend John J. Geoghan, in prison for groping a ten-year-old boy in a swimming pool, was brutally beaten and strangled to death by another prisoner.⁷⁵⁴ After an extraordinary meeting of the American bishops, an agreement was reached to seek a return to normalcy. The details of the *Charter* are still being developed, but among the features to mark the future are the survey provided by each diocese detailing the extent of the abuse, and the cooperation with civil authorities to ensure that there is accountability. Lay involvement, credibility, and leadership are powerful undercurrents of the crisis.

This Article discusses the clergy sex abuse scandal affecting the Roman Catholic Church as a situation that challenges the traditional arrangement of the church-state relationship in America. It occurs in a country that is an

753. MORRIS, *supra* note 9, at 321.

754. Alan Cooperman & Rob Stein, *Pedophile Ex-Priest Is Killed in Prison*, WASH. POST, Aug. 24, 2003, at A1.

open society, catapulted into this reality by a media that ensures that neither the Oval Office nor the Church sacristy is a privileged zone. Because of this openness and the scandal that it chronicled, the Church is exposed to scandal, financial retribution, and a clamor for reform from within and outside of the institution. To address these concerns the bishops of the Church adopted a response, the *Charter for the Protection of Children & Young People*, and the *Revised Norms* to implement it, which detail an apology for past offenses, and establish a communications policy, an Office for Child and Youth Protection, a National Review Board, and an Ad Hoc Committee on Sexual Abuse. In addition, the *Charter* mandates screening of personnel, a new openness in the assignment and transfer of priests, an end to confidential settlement agreements, apostolic visitation of seminaries, and dialogue with other churches and interested organizations. But the most controversial aspects of the *Charter* involve the definition of sexual abuse and allegations arising thereunder that may exclude a cleric from ministry, the powers of the mostly lay review boards, and the procedures that balance due process towards the accused with the need to safeguard children. At the same time, the American Church must be accountable to the Vatican, the universal church, and to canon law.

This Article suggests that the experience of the American civil and criminal law is pertinent to issues raised in the *Charter*. First, in regards to the definition of sexual abuse of minors, physical contact between an adult and child is typical of every federal and state child abuse statute. Simple interaction without physical contact, although nebulous, is also an acceptable component within the changing nature of child sexual abuse. For example, statutes that refer to the sexual exploitation of children offer examples of sexual abuse without physical contact. And then, whether or not a statute of limitations is applicable must be debated in the same manner as is done in American law. That is, whether allowing an allegation to be brought, no matter how far in the past it occurred, will promote due process of law and prevent further acts of abuse. This same test is applicable to the ten-year statute provided in the *Charter* or to the zero-tolerance policy contemplated through dispensation from the same limitations period. The differences among the degrees and frequency of sexual abuse, and the penalties appropriate to each, should also be evaluated in light of whether zero-tolerance promotes due process towards offenders and the reduction of abuse to children.

Second, the mostly lay review boards created by the *Charter* offer an opportunity to the bishops and the Church to start over, to respond to a sense of mistrust on the part of American society in general and law enforcement personnel in particular. But the relationship between the bishops and these boards is only beginning and faces serious obstacles. The bishops are unused to sharing power over priest personnel; the theological groundings of the Church dictate strong bonds of solidarity between priests and bishops and among priests themselves. The lay persons are also occupying new roles; they are reviewing hierarchical policies, naming names of bishops not

in compliance, and most difficult of all, implementing a workable procedure that meets the demands of civil authorities and Vatican hegemony.

Involvement of lay persons in the administration of the *Charter* and the *Revised Norms* is essential. The review boards must be provided with greater direction as to both the levels of proof to be used and the procedures by which an allegation is processed. Simple inclusion of lay persons will not restore credibility; if the bishops do not provide support or the boards fail to act independently, the opportunity to move on will be lost. Instead, the national and review boards must develop operating procedures in cooperation with victims, victim organizations, civil authorities and certainly priests and bishops. Specifically, the board must provide for: (1) the receipt of allegations, (2) the standard of proof to be used in assessing credibility, (3) notice to all parties, (4) appointment of counsel, (5) time for a hearing, (6) the standard of proof necessary to recommend exclusion from the priesthood provided for in the *Charter*, (7) the manner of judgment, and (8) the process of appeal. And this must be done in tandem with canon law.

Specific elements of the *Charter's* policies such as the definition of sexual abuse, the statute of limitations, Church tribunals, and zero-tolerance are enforceable when compared to comparable elements within American civil and criminal law. What are presently lacking in the Church's policy are the procedures guaranteeing due process. Thus, problems inherent in specifics of the *Revised Norms* would nonetheless be workable if due process procedures were developed that complement them.

Third, this Article suggests that the procedures and what constitutes due process to all of the parties involved can find a model in the American law of domestic violence. Each state, in an effort to combat violence between intimate adults, has established a procedure that initiates inquiry into behavior, even on the allegations of only one of the parties, and then provides a procedure that may eventually result in civil or criminal repercussions. The domestic violence statutes require different levels of proof, the effort to ascertain the truthfulness of allegations through sworn statements and hearings, and the cooperation between the civil and criminal aspects of the law. This process seems appropriate to the procedures necessary to effectuate the policies of the *Charter*. At a very minimum, the *Charter* adopted by the American bishops offers an opportunity to confront what had been a bad policy with an approach certainly more in line with sexual abuse definitions, civil and criminal procedures, and openness in arriving at a consensus existing in America.

Fourth, this Article seeks to provide a public record, a chronology of what happened to cause the sexual abuse crisis in the Church and to identify how such a scandal could only occur in America. Books, newspaper and magazine articles, and opinions from columnists, lawyers, priests, and victims are a part of what happened. But the Article also seeks to answer the question of whether the *Charter* and the *Revised Norms* will restore the

mutually supportive relationship between church and state in America. The answer is that they will. If the *Charter* is implemented by the lay persons tasked thereunder, supported by the bishops, and recognized by the priests and all Church personnel as a means of accountability, the relationship will continue to evolve. The Church must prove itself a partner in trust once again.

Finally, what will happen with the lay organizations, the vast array of theological issues simmering under the surface, continuing civil and criminal litigation, and the loss of deference among civil leaders towards Church officials? Mark E. Chopko, General Counsel for the United States Conference of Catholic Bishops, writing long before the current sexual abuse of minors scandal occurred, captures a sense of the past and a prediction of the future when he writes:

[L]iability theory is often used as a means through which social change is either encouraged or regulated. To the extent that substantial liabilities can occur to religious organizations for actions of their members or their ministers, even when they are acting in complete accord with religious doctrine, litigation has a substantial educative effect on the organization. The effect litigation has on the organization is illustrated in both extraordinary and ordinary ways.⁷⁵⁵

755. Chopko, *supra* note 19, at 334.