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Church and State and Child Endangerment

*Raymond C. O'Brien**

ABSTRACT

As media in the United States revealed the number of minors sexually abused by clergy, the gravity of the offenses, and the inability to prosecute the offenders, a second offense was revealed. Gradually it was illustrated that bishops and their diocesan administrators knew of credible sexual crimes against children committed by clergy and they responded by protecting offenders, ignoring victims, and knowingly reassigning credibly accused clergy to other placements where they could endanger additional minors. In response to these developments the United States Conference of Catholic Bishops published policies to protect children, enacted norms to be followed in each diocese, made repeated statements that apologized for grave errors, and worked with victims and independent audits to review continuing efforts to comply with secular civil laws. Arguably clericalism formed the rationale that permitted child endangerment; addressing clericalism remains the issue in child protection and the current culture wars within the Roman Catholic Church.

Roman Catholic officials in the Vatican incrementally addressed the sexual abuse of minors by clergy by issuing reporting requirements, redefining crimes of sexual abuse, and willingly removing offending clergy from ministry. Most recently, Pope Francis abolished secrecy of files pertaining to sexual offenses, established a mechanism for prosecuting bishops who endanger children and vulnerable adults, and indicating an intent to work more closely with secular authorities at the local level. Nonetheless, in spite of efforts to end secrecy, disestablish the state-within-a-state and fully cooperate with secular authorities, continuing instances of purposeful child endangerment are revealed in dioceses such as Buffalo, New York. In response, many states abolish their civil and criminal statutes of limitations, continue to publish state grand jury reports, initiate look back windows to permit civil suits against offenders, and operate

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abuse hot lines to invite further reporting of sexual abuse. Public attention has shifted from acts of sexual abuse of minors to confronting the apparatus by which children could knowingly continue to be endangered.

This Article addresses the question of why persons responsible for administering the Roman Catholic Church in the United States would knowingly endanger children after receiving credible evidence of the possibility of sexual abuse by a cleric for whom they were responsible. Thus, this Article goes further than the crime of sexual abuse of minors, it addresses the actions of those who knowingly endangered additional children. While positing child endangerment upon the desire to protect the state-within-a-state that exists within the United States, this Article argues that the remedy lies in adherence to a spirit of openness sanctioned by Vatican II. While the Church struggles with this, the State will increasingly pursue accountability.

I. INTRODUCTION

On May 25, 1879, St. Patrick's Roman Catholic Cathedral, a mammoth undertaking on Fifth Avenue in New York City, was dedicated in an elaborate liturgical ceremony. For the city's working-class immigrant communities living in tenements in the poorest parts of the city this was a dazzling accomplishment. "If the hearts of the rough-handed men and women thronging around St. Patrick's swelled with pride, it was because they knew that the mighty building was genuinely the product of their own labors."¹

The early years of the nineteenth century witnessed the arrival of large numbers of European immigrants, especially the Irish, the Germans, and the French. Many were Roman Catholic and there were few priests and fewer bishops to minister to increasing communicants, but at the dedication ceremony there were forty-three bishops and archbishops in attendance, presided over by one cardinal. The lone cardinal was the current archbishop of New York City and the successor to the archbishop who laid the cornerstone to the cathedral in the summer of 1858. This formidable builder of cathedrals was Archbishop John Hughes, who administered the archdiocese from 1839 to 1864. Archbishop Hughes was "the prototype for a new breed of militant Irish working-class bishops, who turned the American Church away from its assimilationist path and forged a culturally and ethnically cohesive state-within-a-state."² This prototype—a state-within-a-state—mattered little during the nascent age of the Catholic Church in the United States, but argu-

¹CHARLES R. MORRIS, *AMERICAN CATHOLIC* 8 (1997). Due to financial difficulties the Cathedral was not completed and consecrated until 1908. MORRIS, *supra* note 1, at 4.

²MORRIS, *supra* note 1, at 6.

ably this separatist mentality would create a milieu conducive to lawlessness.

This Article acknowledges the sexual abuse of minors by clergy and the horrible consequences experienced by victims. But the focus of this Article is the reason why a significant number of persons in authority over credibly accused clergy permitted and facilitated continuing sexual abuse of minors. Child endangerment occurred through maintenance of secret files, illusory psychological treatment programs, reassignment and transfer of credibly accused clerics, legal obstructions hampering victims and state grand juries, and policies enacted by the Church itself in an attempt to reform.

Through revelations found in court filings, grand jury investigations, and internal Church audits, it is apparent that many persons in authority over clergy knowingly endangered children by permitting clergy to remain in access to children even though there existed credible accusations of sexual molestation against them. This Article argues that persons in authority disregarded state and federal laws, hampered state and federal investigations, and employed legal strategies to maintain the status of the Church. Furthermore, this was done to safeguard the state-within-a-state, historically identified with clericalism.

The consequences of the crisis involving the sexual abuse of minors has not abated for the victims or for the Church. States continue to investigate abusive conduct of clergy, child endangerment by persons in authority, and civil suits are encouraged through civil hotlines and extended civil statutes of limitations. The state increasingly pursues abusers and their facilitators through grand jury investigations, abolishing criminal statutes of limitations, enacting revival windows permitting civil suits, and victim hotlines allowing for increased reporting of allegations. Concomitantly, the United States Conference of Catholic Bishops provides procedures seeking to establish accountability, while the Pope and Vatican officials encourage whistleblowing, police errant bishops, and mandate cooperation with the laws of the secular state in which the Church is located.

As this Article explains, the clerical state-within-a-state construct officially ended with the enactment of the documents of the Second Vatican Council in 1965. But there continues to be a clerical mindset, on the part of clergy and laity, both groups seeking to serve what each think is the good of the Church. Insofar as clericalism fostered a defensive and secret world that isolated criminal behavior from prosecution by secular authorities, the day of reckoning has arrived. Throughout the United States thousands of people, both Catholic and non-Catholic, benefit from the largest private social welfare organization operating in each of the states. In addition, thousands more attend Mass, march in protest, and educate thousands. This occurs each day. The consequences of the Church's sexual abuse

crisis will not end any of these characteristics of Catholicism, but the dynamic between Church and state has changed.

II. AMERICAN ROMAN CATHOLICISM

A. Distinctively Catholic

Viewed in the context of the mid-nineteenth century American Church—poor, immigrant, persecuted, and often reviled—the dedication of so grand a building as St. Patrick’s was a benchmark. One American historian views it as such when he writes:

The cathedral was an announcement—Hughes *intended* it as an announcement—of a gravitational shift in the land. It enunciated a vision of Catholicism as a new power center, a major moral and political force in its own right—militant, expansionist, ethically grounded, unapologetically separatist wherever its interests or teaching diverged from those of the rest of society.³

Today, one hundred and fifty years after the dedication of St. Patrick’s Cathedral, the American Church has evolved dramatically. As of September 2019, the Roman Catholic Church in the United States consists of 195 archdioceses and dioceses, plus a separate Archdiocese for Military Services, and a Personal Ordinariate of the Chair of St. Peters.⁴ Each archdiocese or diocese is administered by a bishop appointed by the Pope, who is also the bishop of Rome. Some of these same American bishops are designated cardinals or archbishops by the Pope and each must report to the Pope every five years as part of a geographical group to provide an assessment of the bishop’s local church.⁵ In addition, each bishop is required to submit a letter of retirement to the Pope upon reaching the age of seventy-five, although the Pope is free to delay the retirement or to request it earlier. Undoubtedly, the Roman Catholic Church is a hierarchical organization, with ultimate authority residing in the Pope.

There are fifteen living American cardinals, five of whom currently administer archdioceses. There are 433 active and retired (arch) bishops, and as of 2018, there were 36,580 priests, 18,291 deacons,

³MORRIS, *supra* note 1, at 25.

⁴See *Bishops and Dioceses*, UNITED STATES CONF. OF CATHOLIC BISHOPS, www.usccb.org/about/bishops-and-dioceses/ (last visited Feb. 22, 2020). Although the Roman Catholic Church and the issue of sexual abuse of adults and minors is global, the focus of this Article is on the Roman Catholic Church in the United States.

⁵The bishops of the United States began their visits in 2019 on November 4, 2019. See Cindy Wooden, *U.S. Bishops Set to Begin Their “ad Limina” Visits to Rome*, CATH. NEWS SERV. (Oct. 31, 2019), <https://cruxnow.com/vatican/2019/10/u-s-bishops-set-to-begin-their-ad-limina-visits-to-rome/>.

44,117 religious sisters, and 3,897 religious brothers.⁶ Within the geographical dioceses and archdioceses, there are 17,007 parishes and a self-identified Catholic population of 76.3 million persons; a little more than one-half report that they attend Mass at least once every month.⁷ But numbers do not adequately convey the expansionist scope of the modern American Church. A Roman Catholic was elected president of the United States, and when the 116th Congress convened in January 2019, 163 members, or 30.5% of Congress, identified as Roman Catholic.⁸

By the end of the First World War, the American Church “was an immense and flourishing enterprise . . . Its 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.”⁹ And even as American civil society experienced increasing secularization, the American Church “attempted nothing less than creating a completely enveloping state-within-a-state for its own Catholic community. The goal was to make it possible for an American Catholic to carry out almost every activity of life—education, health care, marriage and social life, union membership, retirement and old-age care—within a distinctively Catholic environment.”¹⁰ And for a time, especially during the mid-twentieth century, this goal flourished. This will come as no surprise to those who experienced this environment, it was a “highly formal, even mechanical creed, enshrouded in bewitching mysteries and ritual, combining to a remarkable degree theological rigor and a high degree of abstraction with a practical religion that was intensely personal and emotional.”¹¹

But by the second half of the twentieth century, American Catholics were becoming increasingly assimilated into the civil mainstream, due in part to increased education, affluence, and media access that offered opinions and experiences that differed from Church teachings. Critical observers blame the documents of the Second Vatican Council (1962–1965) with precipitating the demise of the autonomously structured American Church, but the Vatican Council

⁶*Frequently Requested Church Statistics*, CTR. FOR APPLIED RES. IN THE APOSTOLATE, cara.georgetown.edu/frequently-requested-church-statistics/ (last visited Feb. 22, 2020).

⁷*Frequently Requested Church Statistics*, *supra* note 6. “Rightly or wrongly, most Catholics apparently feel that once or twice-a-month Mass attendance keeps them in sufficient touch with their religion.” MORRIS, *supra* note 1, at 308.

⁸*Faith on the Hill*, PEW RESEARCH CTR. (Jan. 3, 2019) <https://www.pewforum.org/2019/01/03/faith-on-the-hill-116/>.

⁹MORRIS, *supra* note 1, at 133.

¹⁰MORRIS, *supra* note 1, at 164.

¹¹MORRIS, *supra* note 1, at 174.

“merely baptized and advertised movements that had been under way for years.”¹² Young American Catholics and their affluent parents “could figure out that Fordham or Boston College did not open the same doors as Harvard.”¹³ Secular attractions, such as admission to Harvard University, were augmented by cultural disagreements over birth control, premarital sex, homosexuality, remarriage, women priests, and celibate clergy. Concomitantly, the “rigid separatism of the Church in America”¹⁴ wanes.¹⁵

The Increasingly international Church, through documents approved at the Second Vatican Council, “repudiated centuries of dogmatic opposition to secular states and more or less endorsed the American system of pluralistic democracy.”¹⁶ One document, *Gaudium et Spes*, the constitution of the Church, “extols the advance of ‘biological, psychological, and social sciences’ and the capacity of humanity for ‘forecasting and controlling its own demographic growth.’”¹⁷ Likewise, “the various documents of the Second Vatican Council set out a theology whose intent was to dismantle a pyramidal understanding of the Church, with the ordained at the top of the pyramid and the laity at the bottom.”¹⁸

In the early decades of the twenty-first century, a decreasing number of American Catholics remember the structured pyramidal Church of the mid-twentieth century. Instead, today’s American Catholic often finds the Church’s positions morally and intellectually unconvincing . . . “[yet] they [are] sincerely committed to Catholic values and [are] attempting to construct moral responses to real-life problems with precious little help from their Church.”¹⁹ Their attempts are further hampered by ongoing reported instances of sexual exploitation of minors by clergy,²⁰ and revelations of concealment and harassment by bishops and religious superiors. This overt conduct endangering children directly resulted in the continuing sexual abuse of minors and vulnerable adults, the latter defined as

¹²MORRIS, *supra* note 1, at 275.

¹³MORRIS, *supra* note 1, at 277.

¹⁴MORRIS, *supra* note 1, at 294.

¹⁵See generally, Raymond C. O’Brien, *Family Law’s Challenge to Religious Liberty*, 35 U. ARK. LITTLE ROCK L. REV. 3, 84–88 (2012).

¹⁶MORRIS, *supra* note 1, at 332.

¹⁷MORRIS, *supra* note 1, at 333.

¹⁸Kevin Seasoltz, *Clericalism: A Sickness in the Church*, 61 THE FURROW 135, 135–36 (2010).

¹⁹MORRIS, *supra* note 1, at 368–69.

²⁰Throughout this article reference to clergy include members of the Christian faithful serving as sacred ministers, while other members are called laity. See THE CODE OF CANON LAW: A TEXT AND COMMENTARY Canon 207 (James A. Coriden et al. eds., 1985), [hereinafter “CODE OF CANON LAW”].

“any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want to otherwise resist the offence.”²¹

B. Secular Confrontation

The American media was first to report instances of clerical sexual abuse and, often as a result, its concealment by clerical superiors.²² Until newspapers began reporting names and allegations, instances of sexual abuse of minors by clergy were handled secretly by the cleric’s local bishop; civil authorities were not notified even though this was required by state reporting statutes. Strict secrecy permeated the process.²³ Gradually, state attorneys general initiated grand jury investigations into instances of clerical abuse, concealment of alleged perpetrators after discovery of credible allegations, and reports of institutional indifference exhibited towards victims.²⁴ The Grand Jury Report of the First Judicial District of Pennsylvania (“Philadelphia Report”) concerning sexual abuse of minors by priests of the Archdiocese of Philadelphia and subsequent concealment by Archdiocesan officials was released in 2003. The Philadelphia Report, consisting of more than 400 pages, is illustrative of facts recited in others released previously and subsequently. The abusive conduct described includes: “Boys who were raped orally. Boys who were raped anally, girls who were raped vaginally.”²⁵ Even when victims were not raped they were subjected to “fondling, to masturbation, to pornography—[suffering] psychological abuse that scarred their lives and sapped the faith in which they had been raised.”²⁶

Gradually, investigations by successive prosecutors revealed two separate allegations. First, there were sexual misconduct allegations involving the alleged perpetrators. And second, religious superiors, ultimately bishops, allegedly: failed to make mandatory reports,

²¹ See Francis, *Vos Estis Lux Mundi*, Art. I § 2(b) (May 7, 2019), http://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html [hereinafter “*Vos Estis Lux Mundi*”].

²² See Raymond C. O’Brien, *Pedophilia: The Legal Predicament of Clergy*, 4 J. OF CONTEMP. HEALTH L. & POL’Y 91, 91 (1988).

²³ See Thomas P. Doyle, *Roman Catholic Clericalism, Religious Duress, and Clergy Sexual Abuse*, 51 PASTORAL PSYCHOL. 189, 202 (Jan. 2003).

²⁴ One of the earliest reports was the Suffolk County Grand Jury Report, which investigated the Diocese of Rockville Center, New York, documenting sexual abuse by specific priests and the failure of diocesan officials to take responsibility for their actions. See Suffolk County, New York Supreme Court, *Special Grand Jury Report CPL § 190.85(1)(C) 171–73* (Jan. 17, 2003).

²⁵ Ct. of C.P., First Jud. Dist. of Pa., Crim. Trial Div., *Grand Jury Investigation Report 2* (Sept. 17, 2003), http://www.bishop-accountability.org/reports/2003_09_25_First_Philadelphia_Grand_Jury_Report.pdf [hereinafter “*Philadelphia Grand Jury Report*”].

²⁶ *Philadelphia Grand Jury Report*, *supra* note 25, at 2–3.

acted so as to endanger the welfare of minors, and obstructed justice.²⁷ Pertinent to this Article is the second allegation, child endangerment, described as the “callous, calculating manner” of Church officials in response to allegations of sexual abuse by priests. Illustrative is a finding from the Philadelphia Report:

Archdiocese officials at the highest levels received reports of abuse; they chose not to conduct any meaningful investigations of those reports; that they left dangerous priests in place or transferred them to different parishes as a means of concealment; that they never alerted parents of the dangers posed by those offenders (who typically went out of their way to be friendly and helpful, especially with children); that they intimidated and retaliated against victims and witnesses who came forward about abuse; that they manipulated ‘treatment’ efforts in order to create a false impression of action; and that they did many of these things in a conscious effort simply to avoid civil liability.²⁸

The Philadelphia Report references instances of clerical superiors’ concealment, lack of transparency, and resistance to punishing offending clerics: “endangering the welfare of children, corruption of minors, victim/witness intimidation, hindering apprehension, and obstruction of justice.”²⁹ Furthermore, in addition to concealment, clerical superiors knowingly contributed to further acts of abuse by reassigning clerics concerning whom there were credible allegations, so that they could “continue in ministry, with full access to children.”³⁰ “Bishops . . . shuttled abusive priests from parish to parish, until there was no place left to go, ignored repeated reports of abuse, absent a direct confession or ‘diagnosis’ of pedophilia, and looked to legalisms, at the expense of decency”³¹

Incrementally, states began to confront clerical abuse with civil

²⁷ See, e.g., *In re Fortieth Statewide Investigating Grand Jury*, 647 Pa. 489, 494, 190 A.3d 560 (2018), subsequent determination, 649 Pa. 574, 197 A.3d 712 (2018). Current Norms of the United States Conference of Catholic Bishops mandate compliance with all applicable civil law with respect to reporting allegations of sexual abuse of minors to civil authorities and to cooperate in their investigation. United States Conference of Catholic Bishops, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegation of Sexual Abuse of Minors by Priests or Deacons* 11 (Dec. 8, 2002), http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20021216_recognitio-usa_en.html#ESSENTIAL%20NORMS%20FOR%20DIOCESAN/EPARCHIAL%20POLICIES%20DEALING%20WITH%20ALLEGATIONS%20OF%20SEXUAL%20ABUSE%20OF%20MINORS%20BY%20PRIESTS%20OR%20DEACONS [hereinafter “*Essential Norms*”].

²⁸ *Philadelphia Grand Jury Report*, *supra* note 25, at 4. Current Norms enacted by the United States Conference of Catholic Bishops mandate that: “No priest or deacon who has committed an act of sexual abuse of a minor may be transferred for a ministerial assignment in another [diocese].” *Essential Norms*, *supra* note 27, at 12.

²⁹ *Philadelphia Grand Jury Report*, *supra* note 25, at 7.

³⁰ *Philadelphia Grand Jury Report*, *supra* note 25, at 4.

³¹ *Philadelphia Grand Jury Report*, *supra* note 25, at 5–6.

and criminal accountability. The Philadelphia Report recommended that Pennsylvania law be amended to (1) abolish the state criminal statute of limitations for sexual offenses against children; (2) expand the offense of endangering the welfare of children to include reckless conduct; (3) increase the penalty for indecent assault when there is a pattern of child abuse; (4) tighten the obligation to report all instances of child abuse even if the child is no longer under the alleged abuser's control; (5) require background checks on any employee of any organization that supervises children; (6) hold unincorporated associations to the same standards as corporations for crimes concerning the sexual assault of children; and (7) enlarge or eliminate statutes of limitations on civil suits involving child sexual assault so as to enlist a financial disincentive.³²

In response to the accelerating sexual abuse crisis reported in the media, the bishops of the American Church implemented policies and norms, enacted by them and accepted by the Vatican.³³ Eventually, in 2019, Pope Francis issued an Apostolic Letter, *Vos Estis Lux Mundi*, which incorporates some of these same recommendations put forth by the American bishops in 2002.³⁴ Subsequently, and in addition, Pope Francis abolished what is termed the *pontifical secret* for cases of sexual abuse against minors, removing a barrier to civil authorities having complete access to Vatican and local diocesan files pertaining to cases of sexual abuse of minors.³⁵

Unanswered is the question shared by every person familiar with the crisis: How could this happen? The sexual exploitation of minors by men ordained after years of seminary preparation warrants disgust and incredulity. Also, the overt complicity of many church officials—ultimately bishops—in the sexually abusive conduct warrants the assessment that this is culpable material cooperation.³⁶ But the culpable bishops did not act alone. The assignment or reassignment

³² *Philadelphia Grand Jury Report*, *supra* note 25, at 7–8.

³³ See U.S. Conf. of Catholic Bishops, *Charter for the Protection of Children & Young People* (2002), http://www.usccb.org/bishops/charter_final.pdf [hereinafter *Dallas Charter*]; see also *Essential Norms*, *supra* note 27.

³⁴ See *Vos Estis Lux Mundi*, *supra* note 21, at Art. I § 2(b); Chico Harlan, *Vatican Establishes New Rule for Sexual Abuse Complaints and Coverups Involving Bishops and Other Church Leaders*, WASH. POST (May 9, 2019), https://www.washingtonpost.com/world/vatican-establishes-new-rule-for-sexual-abuse-complaints-and-coverups-involving-bishops/2019/05/09/4571e0b0-71b5-11e9-9331-30bc5836f48e_story.html.

³⁵ Andrea Torielli, Commentary, *Rescript of the Holy Father on the Instruction on the Confidentiality of Legal Proceedings* (Dec. 17, 2019), <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217d.html>.

³⁶ Anselma T. Dolcich-Ashley, *Precept, Rights and Ecclesial Governance: A Moral-Theological Analysis of the Catholic Sexual Abuse Crisis in the U.S.* 53 (unpublished doctoral dissertation, Univ. Notre Dame, 2011), <https://curate.nd.edu/downloads/v118rb71d9s>.

of credibly accused abusers was often aided by diocesan attorneys and psychiatric treatment facilities, both of which favored rehabilitation of credibly accused clergy.³⁷ Recalling their efforts at rehabilitation, two staff members of one psychiatric treatment facility claim that bishops regularly withheld essential information from psychiatrists and psychologists and furthermore, either intentionally misinterpreted medical reports or totally ignored psychiatrist's recommendations.³⁸ By failing to be forthright, the crisis is increasingly viewed not only as the sexual abuse of minors by clergy, but rather "the inappropriate and inadequate manner with which it has been handled by the bishops."³⁹

There is no adequate justification for conduct that endangers the welfare of children. But it is arguable that the culture of clericalism, particularly as it existed in the early American Roman Catholic Church, may explain why bishops, clerics and lay persons failed to conform to secular requirements such as reporting of allegations of sexual abuse of minors, and then the continuous resistance to defined standards of accountability. Starting as a crisis of the sexual abuse of minors, the situation has morphed into a church-state structural breakdown, a breakdown of authority and trust. "The Church must prove itself a partner in trust once again."⁴⁰ This must start with an evaluation of clericalism.

III. CLERICAL CULTURE

A. Cultural Characteristics

In 2002, Russell Shaw, a former secretary for public affairs at the United States Conference of Catholic Bishops located in Washington DC, published an article concerning the sex abuse crisis in the Jesuit magazine, *America*.⁴¹ In his article he writes that "clericalism and the

³⁷See, e.g., Bernard Cardinal Law, *Statement Apologizing for Clergy Sexual Abuse of Minors*, 31 ORIGINS 525–28 (Jan. 24, 2002) ("However much I regret having assigned him, it is important to recall that John Geoghan was never assigned by me to a parish without psychiatric or medical assessments indicating that such assignments were appropriate.").

³⁸Thomas P. Doyle, *Clericalism: Enabler of Clergy Sexual Abuse*, 54 PASTORAL PSYCHOL. 189, 202 (Jan. 2006); see also, e.g., *Com. v. Lynn*, 631 Pa. 541, 114 A.3d 796, 802 (2015) (illustrating how archdiocesan officials withheld information of a priest's history of touching, wrestling, placing hands inside minor's shorts, and massaging a minor's penis).

³⁹Doyle, *supra* note 23, at 203.

⁴⁰Raymond C. O'Brien, *Clergy, Sex, and the American Way*, 31 PEPP. L. REV. 363, 476 (2004).

⁴¹Russell Shaw, *Clericalism and the Sex Abuse Scandal*, AMERICA, June 2002, at 15.

clericalist culture are at the heart of this noxious episode.”⁴² Similarly, William A. Donohue, President of the Catholic League for Religious and Civil Rights, concludes in a separate article that clericalism enables bishops throughout the abuse crisis.⁴³ And finally, a student writes in her doctoral dissertation, that the sexual abuse crisis evidenced “ecclesiology’s triumph over [any] moral obligation”⁴⁴

What is meant by clericalism? How could it be at the heart of so odious a horror? Defining clericalism is elusive, even more so in the Roman Catholic Church. One author writes that it is “something like the pattern in the wallpaper: it’s been there so long you don’t see it anymore.”⁴⁵ But at its heart it is “an *ism* that describes the erroneous belief that clerics form a special elite within the Church and that because of their powers as sacramental ministers, they are superior to the laity, are deserving of special and preferential treatment and finally, have a closer relationship to God.”⁴⁶

1. Historical Evolution

The older version of Canon Law, the one promulgated in 1917, and the Church’s pre-Second Vatican Council theology, prior to 1965, protected the status of clergy, specifying that the laity committed a sacrilege if they do real injury to a cleric.⁴⁷ There existed in the Church a sacred divide between the ordained and the non-ordained. This division between church and state was illustrated in the penalty of excommunication for any person who summoned a cleric to appear in a civil court without first receiving permission from that cleric’s superior.⁴⁸ Overall, the 1917 Code of Canon Law “presumed that the Church was a *societas perfecta* in the classic sense, a ‘complete society’ likened in almost all aspects to the State and differentiated from it solely by reason of its proper supernatural purpose.”⁴⁹ And with this “complete society” came a culture of secrecy, fear that any imperfections will become known, loyalty to the institutional Church—especially to the Pope—and eventually the power over people created by the hierarchical structure.⁵⁰

During the last decades of the twentieth century, the Conference

⁴²Shaw, *supra* note 41, at 15.

⁴³See William A. Donohue, *The Problem with Clericalism*, SOCIETY, Mar. 2003, at 41.

⁴⁴Dolcich-Ashley, *supra* note 36, at 82.

⁴⁵Shaw, *supra* note 41, at 15.

⁴⁶Doyle, *supra* note 23, at 209.

⁴⁷1917 CODE C. 119.

⁴⁸1917 CODE C. 2341.

⁴⁹1917 CODE C. 8.

⁵⁰Doyle, *supra* note 23, at 221–22.

of Major Superiors of Men (“CMSM”), which is made up of the leaders of institutes and congregations of religious priests and brothers, formed a special task force to address the question of clericalism. In 1983, the task force submitted its Report and therein defined clericalism as “the conscious or unconscious concern to promote the particular interests of the clergy and to protect the privileges and power that have traditionally been conceded to those in the clerical state.”⁵¹ Protectionism certainly existed prior to recent revelations of sexual abuse. Certainly, there were instances of clerical sexual abuse prior to 1983,⁵² but criminal and civil authorities did not aggressively pursue clerics in the American Church until journalists began publishing articles describing abusive practices by clerics.⁵³ To illustrate, a book by Nicholas P. Cafardi, *Before Dallas*,⁵⁴ describes patterns of sexual abuse by clergy that galvanized public attention. The reassignment of credibly accused clergy by diocesan officials likewise occurred in the Diocese of Lafayette, Louisiana in 1984; the Archdiocese of Santa Fe, New Mexico in 1991, the Diocese of Fall River, Massachusetts in 1992; and the Diocese of Dallas in 1992. Bishops, aware of credible allegations of abuse against the cleric, reassigned the cleric to other ministries, thereby endangering children. In 2002 the turning point occurred when the Boston Globe newspaper published nearly three hundred stories on sexual abuse by various clergy, most pertaining to a Boston priest, John T. Geoghan.⁵⁵ The reporting also revealed a pattern of secrecy, reassignment, and victim harassment on the part of the Archdiocese of Boston.

The conduct of some bishops that resulted in child endangerment is attributable to protecting the reputation of the Church, the state-within-a-state, via a culture of clericalism. The CMSM Report offers a definition of—and an insight into—clericalism, drafted by those within the leadership of the American Church; it was published prior

⁵¹CONF. OF MAJOR SUPERIORS OF MEN, IN SOLIDARITY AND SERVICE: REFLECTIONS ON THE PROBLEM OF CLERICALISM IN THE CHURCH (1983), *reprinted in* 43 JURIST 430 (1983) [hereinafter “CMSM REPORT”].

⁵²See O’Brien, *supra* note 22, at 91–96. Complaints against clergy were generally not believed by Church authorities, they were handled by the bishop’s office, civil authorities were not informed, and there was no press coverage. Doyle, *supra* note 23, at 202.

⁵³See, e.g., Leslie Bennetts, *Unholy Alliances*, VANITY FAIR, Dec. 1991, at 224; James L. Franklin, *Sex Abuse by Clergy Called Crisis for Churches*, BOSTON GLOBE, July 17, 1991, at 11.

⁵⁴NICHOLAS P. CAFARDI, *BEFORE DALLAS* (2008).

⁵⁵See Michael Rezendes, *A Revered Guest; A Family in 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; see also, Ben Bradlee, Jr., *Foreword to* INVESTIGATIVE STAFF OF THE BOSTON GLOBE, *BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH* (2002).

to the multiple serious accusations concerning priests and bishops. It is important to consider the points made.

First, the Report concludes that among the manifestations of clericalism are “an authoritarian style of ministerial leadership, a rigidly hierarchical world view, and a virtual identification of the holiness and grace of the Church with the clerical state and, thereby, with the cleric himself.”⁵⁶ The 1917 Canon Law illustrates the model of inequality between cleric and laity: “Clergy were formed into a definite state or class, with its own rights and obligations, a privileged class vis-à-vis the rest of the Church.”⁵⁷

This ministerial structure did not develop overnight. Dominican priest Thomas P. Doyle, a vociferous critic of the American bishops’ response to the clerical abuse crisis, writes that the historical basis of clericalism originated with the conversion to Christianity of Emperor Constantine in the Fourth Century. Constantine’s embrace of the nascent Church transformed it from a “way of life to an established sociological and political entity.”⁵⁸ Gradually, the Church, with its expanding secular role and visible material resources, became identified with its clergy and clerics saw themselves “as accountable to no one but the Pope and God.”⁵⁹

Kevin Seasoltz, a Benedictine monk, traces clericalism to the classical era, with its emphasis on distinguishing matter from spirit, the latter being superior. Because of their commitment to the spiritual life, as evidenced by vows of celibacy, poverty, and obedience, there developed “an elitist spirituality available to clergy and religious but usually not available to lay people.”⁶⁰ As a result of their preferred status, many laity assume the attitude that “it is sinful to make any kind of accusation against a priest or bishop.”⁶¹ A reluctance to accuse a priest or bishop appears often in clerical abuse inquiries as to why no one reported such serious offenses. Today, the erosion of clericalism is illustrated in the success of clergy abuse hotlines established in various jurisdictions by state authorities.⁶²

Second, clericalism was imported into the American Church with

⁵⁶CMSM REPORT, *supra* note 51, at 432. The Report concludes that clericalism may be exhibited by non-ordained persons, and by any religious denomination, and at all levels of ministerial leadership.

⁵⁷CMSM REPORT, *supra* note 51, at 443.

⁵⁸Doyle, *supra* note 23, at 206.

⁵⁹Seasoltz, *supra* note 18, at 135.

⁶⁰Seasoltz, *supra* note 18, at 137. “By the end of the fourth century the clergy were subject to laws of ritual purity and regarded as possessing a kind of sacral status.” CMSM REPORT, *supra* note 51, at 435.

⁶¹Doyle, *supra* note 23, at 212.

⁶²*See, e.g.,* Office of the Att’y Gen. of Ill., *Preliminary Findings of the Investigation into Catholic Clergy Sexual Abuse of Minors in Illinois 1-2* (Dec. 19, 2018),

the establishment of the immigrant church. The dedication of St. Patrick's Cathedral in New York City, built mostly with Irish immigrant donations, illustrates both the connection with the European church and its inherited clerical disposition.⁶³ The separation of church and state embedded in the United States Constitution prohibited American clerics from exerting defined leadership in secular civil matters. But nonetheless there arose a state-within-a-state, the American Church flourishing within the confines of First Amendment Free Exercise of religion. With its hospitals, schools, charities, and worship, the Church could exist independently of the secular realm.

American bishops exercised legal ownership and control over church property as the "corporate sole,"⁶⁴ a legal structure whereby each bishop owned all church property, passing it on to succeeding bishops appointed by the Pope. This legal arrangement is unique, the American practice of other religious denominations was to hold church property in the name of specific lay persons, not the bishops. But within the American Church, since each diocesan bishop owned the church building and its property, each bishop could control clerical appointments and enforce orthodoxy among a disparate group of immigrant communities worshiping in the Catholic Church. Since lay persons had no legal control, bishops only had to be accountable to the Pope in Rome, who was absent and almost unconcerned. It was not until 1893 that the Vatican appointed its first apostolic delegate to the United States, a Papal Nuncio, who continues to serve in a diplomatic role, plus as someone who recommends priests to the Vatican to become future American bishops.

Gradually the Church took hold and flourished. There developed an "American Catholic sub-culture, unified by the disciplined leadership of bishops and priests. The clergy dominated the religious sphere, holding positions of prominence in a large network of associations . . . which attempted to monopolize all aspects of the lives of their members."⁶⁵ This structure, a state-within-a-state, flourished until significant numbers of Catholics became exposed to a broader culture through access to education, media, and the

http://www.bishop-accountability.org/reports/2018_12_19_IL_AG_Preliminary_Findings.pdf [hereinafter *Illinois Att'y Gen.*]. The "Office has received over 300 communications via telephone calls, letters, and e-mail messages from either survivors of clergy sexual abuse in Illinois or elsewhere, or family members and friends of survivors who have used the hotline to report information."

⁶³ See *supra* notes 3-21 and accompanying text.

⁶⁴ For an explanation and history of this form of ownership, see *Civil Incorporation of Church Property*, CATHOLIC ANSWERS, <https://www.catholic.com/encyclopedia/civil-incorporation-of-church-property> (last visited Feb. 25, 2020).

⁶⁵ CMSM REPORT, *supra* note 51, at 437.

individualism of the 1960s.⁶⁶ In retrospect, the immigrant church was “a unique cultural construct, a hybrid of Irish and other immigrant religions, a palimpsest of insecurities and aspirations of marginal people.”⁶⁷ But the modern American Church that witnessed the opening of the Second Vatican Council in 1962 was no longer so accepting of clerical authority. Instead, lay Catholics questioned Church pronouncements on sexual morality, reproduction ethics, the role of women in the Church, and expanding the role of ministry to women.⁶⁸ Unwilling and unable to remain confined in the state-within-a-state constructed in the century before, lay Catholics demanded dialogue, vision, and respect.⁶⁹ Failing to achieve this, many simply walked away.

2. Impact of Second Vatican Council

The church culture illustrated by the 1917 Code of Canon Law changed radically after the Second Vatican Council. The Council was called by Pope John XXIII in 1962 and attended by more than 2900 bishops from all parts of the world before ending in 1965.⁷⁰ Those bishops debated and over the course of three years approved sixteen documents that altered Church procedures and culture.⁷¹ At the local level, the liturgy was celebrated in the local vernacular rather than Latin, with a shift towards celebration rather than worship. Eventually, a new Code of Canon Law was promulgated in 1983, replacing the cleric-centrist one of 1917.

The Second Vatican Council documents, especially the 1963 document, *On the Church (Lumen Gentium)*, and the 1965 document, *Church in the Modern World (Gaudium et Spes)*, reorient the Church to a new style of interaction with others, one of dialogue, partnership, cooperation, and pluralism. Pertaining to the sexual abuse of minors crisis, the “main themes that the Council addressed that unknowingly would soon after lead to crisis in the Church are: collegiality, ecumenism, religious freedom, theological and cultural pluralism, a personalist approach to moral issues, dialogue and the use of biblical and historical criticism.”⁷²

Even today, the Church is experiencing a crisis between those wishing to adhere to a more structured and detached Church and

⁶⁶ See generally O'Brien, *supra* note 15, at 20–25.

⁶⁷ MORRIS, *supra* note 1, at 279.

⁶⁸ MORRIS, *supra* note 1, at 294.

⁶⁹ MORRIS, *supra* note 1, at 321.

⁷⁰ VATICAN II REVISITED: BY THOSE WHO WERE THERE 342 (ALBERIC STACPOOLE ed., 1986).

⁷¹ For full texts of the Vatican II documents, see <http://w2.vatican.va/content/vatican/it.html>.

⁷² Dolcich-Ashley, *supra* note 36, at 65.

those who envision the openness of the Council documents. It is not surprising that Pope Francis, through a series of directives abolishing papal secrecy, adopting local civil standards, and prompting reporting by whistleblowers, is viewed as a messenger of the Second Vatican Council and the abandonment of separateness, elitism, and clericalism. Those Catholics seeking to preserve the separateness of the Church argue that the Second Vatican Council's engagement with the reality of the secular world has diluted its message, thereby lessening its authority. One critic of the policies of Pope Francis writes that there are "many more Catholics than ever before, but the church's influence over secular politics has ebbed almost everywhere since the 1960s, and consumer capitalism rather than the church sets the cultural agenda and shapes the moral landscape for many of those baptized millions."⁷³

The vision of Pope Francis includes a Church that is poor-centric,⁷⁴ not careerist or clerical,⁷⁵ and led by a more global and diverse group of cardinals. Specifically, the new Pope restructured the Vatican bank, named cardinals from poor regions of the world, and convened an extraordinary synod of bishops to address changes in the family that impact evangelization. The Pope convened a synod in 2014 to address how to handle persons in same-sex unions, divorced and remarried Catholics, and the increasing number of cohabiting couples. The fact that the Pope was willing to engage these worldly issues, and to enlist the advice of bishops from throughout the world, is indicative of the Pope's embrace of Vatican II. He repeatedly condemns persons who "feel superior to others because they observe certain rules or remain intransigently faithful to a particular Catholic style from the past."⁷⁶ Illustrative of his embrace of the engagement attitude of the Second Vatican Council he writes:

In some people we see an ostentatious preoccupation for the liturgy, for doctrine and for the Church's prestige, but without any concern that the Gospels have a real impact on God's faithful people and the concrete needs of the present time. In this way, the life of the Church

⁷³ROSS DOUTHAT, *TO CHANGE THE CHURCH* 6 (2018).

⁷⁴Francis, *Evangelii Gaudium*, 198 (Nov. 24, 2013), http://www.vatican.va/content/dam/francesco/pdf/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium_en.pdf [hereinafter *Evangelii Gaudium*]. "I want a Church which is poor and for the poor." *Evangelii Gaudium*, *supra* note 74, at 156.

⁷⁵See Address of His Holiness Pope Francis, Presentation of the Christmas Greetings to the Roman Curia (Dec. 22, 2014), http://www.vatican.va/content/francesco/en/speeches/2014/december/documents/papa-francesco_20141222_curia-romana.html (listing the fifteen sicknesses threatening the Church).

⁷⁶*Evangelii Gaudium*, *supra* note 74, at 94.

turns into a museum piece or something which is the property of a select few.⁷⁷

More than by fear of going astray, my hope is that we will be moved by the fear of remaining shut up within structures which give us a false sense of security, within rules which make us harsh judges, within habits which make us feel safe, while at our door people are starving.⁷⁸

Catholics who favor assimilation are more likely to base their views on the documents of the Second Vatican Council.⁷⁹ Undoubtedly, the Council upended the foundation of clericalism. Overall, the Council envisioned a Church:

[As] a society of equals, although within the community members have diverse functions and responsibilities arising from them . . . Pastors are those called to serve, putting order and direction into the life of the Church so that its mission is pursued and the communion of the faithful is strengthened. They are not a caste set apart, but in virtue of their ministry of service they do have special obligations and the right to carry those out on behalf of all the Church.⁸⁰

At best, the Church envisioned by the Second Vatican Council is spotty, fledgling, and piecemeal. In spite of initiatives made by Pope Francis, there are those who continue to wonder “if the momentum initiated by Vatican II has not only dwindled, but has been urged along in a slow death by the centralizing influence of the totally clericalized Roman curia.”⁸¹ Arguably, those bishops who ignored civil requirements enacted to protect children and vulnerable adults did so to protect the Church, the state-within-the-state. A long-time observer of the crisis writes that bishops “are selected and named as bishops not because of their potential for revolutionary change but because of the assurance that they will preserve the institutional church as it is known.”⁸² For some, “the sexual abuse crisis was not a pastoral problem but a public relations problem.”⁸³

⁷⁷ *Evangelii Gaudium*, *supra* note 74, at 95.

⁷⁸ *Evangelii Gaudium*, *supra* note 74, at 49.

⁷⁹ See, e.g., Second Vatican Council, *Dogmatic Constitution on the Church ‘Lumen Gentium’* (Nov. 21, 1964), https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html; Second Vatican Council, *Decree Concerning the Pastoral Office of the Bishops in the Church ‘Christus Dominus,’* EWTN (Oct. 28, 1965), <https://www.ewtn.com/catholicism/library/decreed-concerning-the-pastoral-office-of-bishops-in-the-church-1511>; Second Vatican Council, *Decree on the Ministry and Life of Priests*, EWTN (Dec. 7, 1965), <https://www.ewtn.com/catholicism/library/decreed-on-the-ministry-and-life-of-priests-1527>.

⁸⁰ CMSM REPORT, *supra* note 51, at 444.

⁸¹ Doyle, *supra* note 23, at 214.

⁸² Doyle, *supra* note 23, at 203.

⁸³ Doyle, *supra* note 23, at 204.

The clergy involved in the abuse crisis were likely raised and educated in:

[T]he all-male, unmarried clerical world subculture that unofficially defined itself as “the Church.” It is still difficult for most clerics and many lay persons to move away from such a concrete, clearly defined notion of “church” to one that is much more spiritual and much less identified with traditional political structures.⁸⁴

And yet, as the subsequent facts illustrate, adherence to a clerical structure of secrecy and protectionism prompted a failure to adhere to duly enacted civil responsibilities, resulting in the endangerment of minors.

B. Clerical Consequences

1. Individual Bishops

When media began reporting instances of sexual abuse of minors by clergy, the overwhelming public response was disbelief and horror. But the abusive conduct of individual members of the clergy soon revealed an additional element of the clergy abuse crisis that was equally horrific. “Most shocking to everyday Catholics, and most damaging to the Church, was the incontrovertible evidence that [Church administrators] had engaged in . . . a massive cover-up. Rather than protect its most vulnerable members, the Church had been putting them in harm’s way.”⁸⁵

Boston’s Cardinal Bernard Law was the focus of the investigation by the Boston Globe in the first decade of the twentieth century. The staff of the Boston newspaper were alarmed that, in spite of having been notified that a priest of the archdiocese was alleged to have molested two boys, Cardinal Law assigned him to an affluent suburban parish. In spite of his “awareness of the abuse[,] [the Cardinal] had gone to enormous lengths to hide the scandal from public view.”⁸⁶ The newspaper’s investigative reporting was the subject of a motion picture, *Spotlight*, which eventually won two Academy Awards in 2016, one for best movie of the year. In addition, the newspaper was awarded a Pulitzer Prize and as a result of the publicity, Cardinal Law resigned in disgrace in 2002.

Media investigative reporting revealed a “culture of secrecy” that

⁸⁴Doyle, *supra* note 23, at 211.

⁸⁵INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 3 (2002) [hereinafter BOSTON GLOBE].

⁸⁶BOSTON GLOBE, *supra* note 85, at 3. Eventually the Massachusetts Attorney General would, during the course of an investigation, expose confidential archdiocesan files revealing that 250 priests and other Boston archdiocesan workers allegedly abused at least 789 children between 1940 and 2003. OFFICE OF THE ATT’Y GEN. OF MASS., THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON 11–14 (2003); Fox Butterfield, *789 Children Abused by Priests Since 1940*, *Massachusetts Says*, N.Y. TIMES, July 24, 2003, at A1.

enabled thousands of clerics to sexually abuse tens of thousands of vulnerable children and adults. Further, the “hierarchical leadership knew, covered up, and even facilitated sexual abuse by moving known perpetrators from parish to parish and diocese to diocese.”⁸⁷ In a book published by the staff of the Boston Globe in 2002, the authors provide convincing proof that bishops knew of credible sexual abuse allegations against current and former priests, retained personnel files on all of them, often provided treatment for the abusers, and upon the advice of attorneys and treatment facilities, re-assigned the priest to another location that permitted further access to children.⁸⁸ Indeed, when the Boston Globe reported on the abuse of one priest, John Geoghan, it then discovered and revealed that the Boston Archdiocese “had secretly settled sexual abuse claims against at least seventy other priests over the past decade.”⁸⁹ Within a few months of this discovery, “the archdiocese would give to prosecutors the names of more than ninety priest who had been accused of abuse.”⁹⁰ Since then multiple grand jury reports have revealed the extent of the secret files maintained within other dioceses throughout the United States.

In some instances, the sexual abuse of minors was reported to criminal authorities, but “deference to the Church” often prevented aggressive prosecution of the offender.⁹¹ Nonetheless, as the extent of the sexual abuse of minors by priests, and complicity by bishops, became increasingly visible, the “culture of deference that had taken more than a century to evolve seemed to erode in a matter of weeks.”⁹² Suddenly, prosecutors and legislatures mandated that clergy report all known instances of child sexual abuse, extended or abolished the bar of the statute of limitations for civil damages caused by abuse, and initiated criminal prosecutions of priests and bishops who should have known better.⁹³ As a result of aggressive civil suits brought by victims of abuse, more than twenty Roman

⁸⁷Doyle, *supra* note 38, at 191.

⁸⁸Vatican statements in 2001, reveal the misguided efforts of treatment. “The psychological therapy guided many decisions concerning diocesan or religious personnel, sometimes without adequate regard for the possibility of recidivism.” Congregation for the Doctrine of the Faith, *The Norms of the Motu Proprio Sacramentorum, Sanctitatis Tutela*, VATICAN (2001), http://www.vatican.va/resources/resources_introd-storica_en.html.

⁸⁹BOSTON GLOBE, *supra* note 85, at 98.

⁹⁰BOSTON GLOBE, *supra* note 85, at 98.

⁹¹See, e.g., BOSTON GLOBE, *supra* note 85, at 73; Doyle, *supra* note 38, at 210 (The crisis “would not have been possible without the cooperation of the laity who often believed that their cooperation with the bishops in such cover-ups was helping the church.”).

⁹²BOSTON GLOBE, *supra* note 85, at 120.

⁹³See O’Brien, *supra* note 40, at 441–54.

Catholic dioceses have declared bankruptcy since 2004. Most often, bankruptcy was a way to control the “process for settling a large number of law suits while holding on to as many assets as possible.”⁹⁴ In addition, as a protective measure, some diocese began to reorganize its assets, incorporating them separately, placing assets such as parishes, cemeteries, and buildings in separate trusts or subordinate organizations.⁹⁵ “When the Archdiocese of St. Paul and Minneapolis filed for bankruptcy in 2015, it said it didn’t own the parishes, the schools, or the ten cemeteries within its territories.”⁹⁶ Such actions, according to diocesan attorneys, were necessary to insulate itself from the onslaught of civil suits.

As the extent of the concealment of abusive priests by bishops became more evident, various explanations were given. Some argued that Church canon law had to be considered before any secular law could be addressed. In a meeting with Cardinal Bernard Law, then the archbishop of Boston, various lay experts on pedophilia were told by the Cardinal that canon law was an obstacle and they responded tersely. “Canon law was irrelevant to us. Children were being abuse. Sexual predators were being protected. Canon law should have nothing to do with it. But [bishops] were determined to keep this problem, and their response to it, within their culture.”⁹⁷ Others argued that the abusive priests suffered from a psychiatric condition that could be treated and cured.⁹⁸ And still others argued that they were victims of a failure to follow established policies, procedures, and protocols so information was not available to them that would have revealed a problem with a priest.⁹⁹ The remainder explained that they simply did not know what was

⁹⁴ Josh Saul, *Catholic Church Shields \$2 Billion in Assets to Limit Abuse Payouts*, BLOOMBERG BUSINESSWEEK (Jan. 8, 2020), <https://www.bloomberg.com/news/features/2020-01-08/the-catholic-church-s-strategy-to-limit-payouts-to-abuse-victims>.

⁹⁵ Saul, *supra* note 94.

⁹⁶ Saul, *supra* note 94.

⁹⁷ BOSTON GLOBE, *supra* note 85, at 153.

⁹⁸ See, e.g., STEPHEN J. ROSSETTI, *A TRAGIC GRACE: THE CATHOLIC CHURCH AND CHILD SEXUAL ABUSE* (1996) (contending that perpetrators can be successfully treated); see generally JOHN JAY COLL. OF CRIM. JUST., *THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950-2002*, 246–72 (2004) (bibliography of materials related to assessment and treatment of offenders).

⁹⁹ See, e.g., *Defenbaugh and Associated, Key Findings of Defenbaugh Due Diligence Report*, 35 ORIGINS 692–99 (Apr. 6, 2006) (The Archdiocese failed to report allegations against a priest and monitor his activity in violation of the USCCB’s 2002 *Charter for the Protection of Children and Young People.*); *Philadelphia Scandal Calls Into Question Bishops’ Reporting System*, NAT’L CATHOLIC REP. (Mar. 10, 2011) <http://ncronline.org/news/accountability/philadelphia-scandal-calls-question-bishops-reporting-system>.

happening. Finally, less objectified but most likely, are those bishops who simply wanted to protect the Church from scandal.¹⁰⁰

Cardinal Law was not alone. Cardinal Francis George, Archbishop of Chicago, admitted to grave errors for allowing children to be served by a priest against whom credible accusations of sexual abuse had been made.¹⁰¹ Likewise, in 2003, the Bishop of Phoenix acknowledged that he not only assigned priests to other pastoral positions after becoming aware of sexual misconduct allegations, but did so without disclosing this to superiors or to the communities where the priests served.¹⁰² The bishop of the Diocese of Manchester, New Hampshire, avoided criminal prosecution for child endangerment by admitting to the state attorney general that the state had evidence likely to sustain a conviction for placing children in danger.¹⁰³ Specifically, he admitted that he allowed priests credibly accused of sexual molestation of children to remain within parishes and afterwards further abuse was committed. The state prosecutor declined to present indictments to the grand jury because the Manchester Diocese admitted wrongdoing and agreed to several conditions that promised to safeguard children, ensure transparency of its decisions, and create a system of accountability.¹⁰⁴

Once it became apparent that multiple bishops were reassigning priests credibly accused of sexual abuse, some bishops sought to distinguish themselves by claiming their dioceses did not harbor credibly accused clergy, only to have church files disclose there were lists of priests credibly accused.¹⁰⁵ Other bishops allowed victims to believe that substantive actions were being taken to address the problem, but instead the strategy was to create delay and thwart criminal and civil liability.¹⁰⁶ Still other bishops, upon the advice of attorneys seeking to minimize financial restitution, offered alleged

¹⁰⁰ See Dolcich-Ashley, *supra* note 36, at 82–83.

¹⁰¹ Francis Cardinal George, statement at a March 20, 2006 press conference, *Chicago Archdiocese Releases Reports: Sexual Abuse*, 35 ORIGINS 691–92 (Apr. 6, 2006).

¹⁰² Bree Burkitt & Michael Kiefer, *Thomas O'Brien, Phoenix Bishop Who Hid Priests' Abuse Dies at 82*, ARIZ. REPUBLIC (Aug. 26, 2018), <https://www.azcentral.com/story/news/local/phoenix-breaking/2018/08/26/phoenix-bishop-thomas-obrien-dies-parkinsons/1104120002/>.

¹⁰³ Att'y Gen. of N.H., *Report on the Investigation of the Diocese of Manchester* 1 (Mar. 3, 2003).

¹⁰⁴ Att'y Gen. of N.H., *supra* note 103, at 2.

¹⁰⁵ See, e.g., LEON J. PODLES, *SACRILEGE: SEXUAL ABUSE IN THE CATHOLIC CHURCH* 36 (2008) (detailing the misstatements of Bishop William E. Franklin, Bishop of Davenport, Iowa).

¹⁰⁶ See, e.g., First Jud. Dist. of Pa., Crim. Trial Div., *Report of the Grand Jury*, 104–06 (Jan. 21, 2011), http://www.bishop-accountability.org/reports/2011_01_21_Philadelphia_Grand_Jury_Final_Report_Clergy_Abuse_2.pdf.

victims the option of signing confidential agreements to bar disclosure in return for immediate monetary compensation.¹⁰⁷ And further, some bishops relied upon the state's statute of limitations to bar recovery or criminal prosecution, common law charitable immunity,¹⁰⁸ clergy privilege,¹⁰⁹ the First Amendment Establishment Clause,¹¹⁰ or existing insurance coverage.

As more revelations of misconduct surfaced, alleged victims multiplied. “[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.”¹¹¹ In response, American bishops “defended the status quo of its own political structure while growing increasingly critical in areas of secular or civil public policy, social action and economic structure.”¹¹² The reaction of the bishops is illustrative of clericalism, the “consistent denial mechanisms which come into play whenever churchmen are confronted with internal corruption are the result of the Church’s understanding of itself and the clergy’s understanding of its place in the Church.”¹¹³

So too, civil authorities became more aggressive as revelations mounted. Armed with subpoenas and warrants to confiscate diocesan files—heretofore secret files—prosecutors sought to convict bishops and diocesan personnel for their endangerment of the welfare of a child. Nightly television news programs ran videos of police entering diocesan office doors and exiting with boxes of paper files and personal computers.

In one high profile case in 2011, prosecutors indicted a Philadelphia Roman Catholic priest, Monsignor William Lynn, for “engaging in a pattern of concealment and facilitation of child sexual molesta-

¹⁰⁷ See BOSTON GLOBE, *supra* note 86, at 47–48.

¹⁰⁸ See generally Matthew Cobb, *A Strange Distinction: Charitable Immunity and Clergy Sexual Abuse in Picher v. Roman Catholic Bishop of Portland*, 62 ME. L. REV. 703 (2010).

¹⁰⁹ See generally Robert F. Cochran, Jr., *Church Freedom and Accountability in Sexual Exploitation Cases: The Possibility of Both through Limited Strict Liability*, 21 J. CONTEMP. LEG. ISSUES 427 (2013) (favoring religious autonomy but asserting limited strict liability in cases of clergy sexual exploitation).

¹¹⁰ See *Turner v. Roman Catholic Diocese of Burlington, Vermont*, 186 Vt. 396, 2009 VT 101, 987 A.2d 960 (2009) (holding that religious autonomy does not shield a church from accountability for its negligent actions).

¹¹¹ BOSTON GLOBE, *supra* note 86, at 80.

¹¹² Doyle, *supra* note 38, at 200.

¹¹³ Doyle, *supra* note 38, at 203.

tion by abusive priests, conduct which led directly to [child abuse].”¹¹⁴ Specifically, the argument put forth by the prosecutors was that “one who acts in a capacity of protecting children, supervises another person who interacts with those children, and is aware that this other person is a threat to the welfare of those children, but does nothing, or, as in this case, takes actions which exacerbate child abuse, violates [the statute].”¹¹⁵

The indictment resulted from Monsignor Lynn’s service as Secretary for Clergy for the Philadelphia Archdiocese, where he was responsible for “handling clergy sexual abuse issues” from 1992 until 2004¹¹⁶ At his disposal were the “secret archives” of the Archdiocese, which contained information about priests against whom past allegations of abusive conduct were made.¹¹⁷ Based on information recorded in these archives and any available subsequent allegations, Monsignor Lynn made recommendations to the Archbishop of Philadelphia about what should be done with any accused priest, the options included dismissal, treatment, or possible reassignment.

In 1994 Monsignor Lynn was informed about misconduct by a particular priest¹¹⁸ and, after consulting the secret archives, which confirmed prior misconduct allegations against the priest, Monsignor Lynn became suspicious that there may be other priests in active ministry against whom allegations were made and recorded by the Archdiocese. After a review of the archives, Monsignor Lynn confirmed that there were more priests credibly accused. In 1994, he confirmed “35 priests in active service with previous complaints of sexual abuse of minors,”¹¹⁹ and also he personally concluded that “12 priests . . . were guilty of sexual misconduct with minors [and] he considered it his job to do something about them.”¹²⁰ Nonetheless, at no time did he notify the police or any public authority of the alleged sexual abuse of minors committed by the priests.

¹¹⁴*Com. v. Lynn*, 631 Pa. 541, 114 A.3d 796, 808 (2015). The statute with which Monsignor Lynn was indicted defined the offense of child endangerment as: “A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.” 18 PA. CONS. STAT. § 4304 (1995). The statute has since been amended. See 18 PA. CONS. STAT. § 4304(a)(1) (2007).

¹¹⁵*Lynn*, 114 A.3d at 820.

¹¹⁶*Lynn*, 114 A.3d at 798. The Archbishop of Philadelphia at the time of Monsignor Lynn’s indictment was Cardinal Anthony J. Bevilacqua, who died prior to an indictment being brought against him.

¹¹⁷*Lynn*, 114 A.3d at 799.

¹¹⁸The priest was Edward V. Avery. See *Lynn*, 114 A.3d at 800.

¹¹⁹*Lynn*, 114 A.3d at 800.

¹²⁰*Lynn*, 114 A.3d at 800.

The acts of sexual abuse committed by the priests named in the Archives involved groping, fondling genitals, and intoxicating minors.¹²¹ Monsignor Lynn illustrated a pattern. Not only were diocesan officials aware of illegal activities, but once they corroborated the abuse, these diocesan officials recorded the facts in their own secret files and then went “out of their way to accommodate” the offending priests, including transferring the priest to another parish to “avoid another breakdown.”¹²² In some cases, offending priests were sent to mental health facilities to receive outpatient evaluations; some were placed in residential treatment facilities. But even after mental health officials recommended that a priest be kept away from minors—and even after an admission of guilt by the credibly accused priest himself—Monsignor Lynn recommended reassignment of at least one priest to another parish where he was provided access to additional children.¹²³

The procedures employed by Monsignor Lynn were not unique to the Archdiocese of Philadelphia. Investigation by the Boston Globe revealed that the Archdiocese of Boston was doing the same. Finally, under pressure from many complainants, the United States Conference of Catholic Bishops adopted in 2002 the *Charter for the Protection of Children and Young People* (“Dallas Charter”), establishing protocols for the protection of young people.¹²⁴ Specifically, the *Dallas Charter* required the establishment of a diocesan Review Board in each diocese to review allegations of sexual abuse made against clergy, obviously an attempt to abandon the secrecy surrounding allegations made in the past. Subsequent to the adoption of the *Dallas Charter* by the Archdiocese of Philadelphia, another accusation was made against the priest previously accused and this time the Review Board removed the priest “from active ministry and rectory living”¹²⁵ Eventually, in January 2006, the Pope granted the request of the Archbishop of Philadelphia to laicize the priest, effectively depriving him of his status as a Roman Catholic cleric. Nonetheless, there remained the gravity of the harm done to his victims by the defrocked priest.

The prosecutors in the case against Monsignor Lynn detailed many instances when, as Secretary for Clergy, Monsignor Lynn wrote letters of recommendation for other priests credibly accused of sexual misconduct towards minors. Monsignor Lynn also approved reassignments of others and neglected to inform supervisors of offending priests of potential problems that the credibly accused priests

¹²¹ See *Lynn*, 114 A.3d at 800–02.

¹²² *Lynn*, 114 A.3d at 801.

¹²³ *Lynn*, 114 A.3d at 803.

¹²⁴ See O'Brien, *supra* note 40, at 407–68.

¹²⁵ *Lynn*, 114 A.3d at 806.

presented.¹²⁶ And while recommending and reassigning priests, the Archdiocese maintained secret archives of the sexual abuse of minors by the same. Secrecy was lifted only to consult with diocesan attorneys, health care professionals, and persons assigned to meet with victims to manage the situation.¹²⁷ But at no time did diocese report the sexual abuse of minors to civil authorities, even though there existed concrete evidence that treatment and reassignment of the credibly accused priests resulted in continuous future sexual abuse of minors.

After several months of testimony against Monsignor Lynn during 2011–2012, the trial court charged the jury to consider whether Monsignor Lynn was guilty of endangering the welfare of a child and the jury returned a verdict of guilty, thereby sentencing him to a term of three to six years of imprisonment.¹²⁸ An appeal was filed, which argued that the defendant had no supervisory role over children and thus did not come within the parameters of the existing criminal statute. In response to the appeal, a Pennsylvania Superior Court reversed the jury verdict, holding that the criminal statute did not apply to someone with no contact with children.¹²⁹ But then the state appealed and the Supreme Court of Pennsylvania affirmed the jury's verdict, holding that "the plain meaning and common sense of the phrase 'supervising the welfare of a child' leaves little doubt that [Monsignor's] actions constituted endangerment of [children]."¹³⁰

Nonetheless, the Supreme Court of Pennsylvania's decision upholding the conviction of Monsignor Lynn was remanded for further proceedings. At a subsequent hearing in the Pennsylvania Superior Court, the court vacated Monsignor Lynn's conviction for endangering the welfare of children, remanding the case for a possible new trial. The court concluded that the trial court abused its discretion by admitting a high volume of unfairly prejudicial other-acts evidence. The defendant was released from jail after serving three years of a six-year sentence¹³¹ State prosecutors could indict Monsignor Lynn for a second trial, but this course of conduct remains uncertain.¹³²

The protectionism of Church officials is illustrated in the summary

¹²⁶ See *Lynn*, 114 A.3d at 809–14.

¹²⁷ See, e.g., *Lynn*, 114 A.3d at 810 (describing the assignment of Reverend Thomas O'Brien to meet with victims).

¹²⁸ *Lynn*, 114 A.3d at 815.

¹²⁹ *Com. v. Lynn*, 2013 PA Super 328, 83 A.3d 434, 449 (2013), order rev'd, 631 Pa. 541, 114 A.3d 796 (2015).

¹³⁰ *Com. v. Lynn*, 631 Pa. 541, 114 A.3d 796, 826 (2015).

¹³¹ *Com. v. Lynn*, 135 A.3d 664 (Pa. Super. Ct. 2015), for text, see, 2015 WL 9320082 (Pa. Super. Ct. 2015).

¹³² See Aaron Moselle, *Msgr. Lynn Retrial Expected in 2019*, WHYY (July 9, 2018), <https://whyy.org/articles/msgr-william-lynn-retrial-expected-in-2019/>.

of Monsignor Lynn's actions taken from the opinion of the Supreme Court of Pennsylvania:

[Monsignor Lynn] mollified victims of sexual abuse by falsely telling them their allegations were being seriously investigated and that the particular priest would never again be assigned around children, despite knowing that the priests under his supervision would merely be reassigned to another parish with no ministry restrictions on contact with children; he informed parishioners that the priests transferred were moved for health reasons, leaving the welfare of children in jeopardy; he routinely disregarded treatment recommendations for priests; he failed to inform the relocated priest's new supervisor about abuse allegations; he took no action to ensure that the abusive priest was kept away from children at his new assignment; he suppressed complaints and concerns by the colleagues of the priest; all with the knowledge that sexually abusive priests rarely had only one victim and that all of these actions would endanger the welfare of the diocese's children . . . Finally, and even more egregiously, when [Monsignor Lynn] was contacted by law enforcement, he misrepresented facts to thwart their investigation of these priests, and their crimes.¹³³

Since media revelations concerning the Archdiocese of Boston became public in 2002, there has developed a breach of trust between civil and religious authorities. As a result, state prosecutors have convened numerous grand juries to investigate what had heretofore been diocesan secret archives. In response, the United States Conference of Catholic Bishops adopted the *Charter for the Protection of Children and Young People* in 2002, subsequently amending it multiple times and adopting corresponding *Essential Norms* and *Statements*. In 2004, a research study commissioned by the United States Conference of Catholic Bishops, reported on the Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950–2002.¹³⁴ In tandem, the Vatican has issued its own guidelines and seems committed to mak-

¹³³ *Com. v. Lynn*, 631 Pa. 541, 114 A.3d 796, 824–25 (2015). Current *Essential Norms* enacted by the United States Conference of Catholic Bishops require that before a “priest or deacon can be transferred for residence to another [diocese], his [diocesan] bishop shall forward, in a confidential manner, to the bishop of the proposed place of residence any and all information concerning any act of sexual abuse of a minor and any other information indicating that he has been or may be a danger to children or young people.” *Essential Norms*, *supra* note 27, at 12.

¹³⁴ See JOHN JAY COLL. OF CRIM. JUST., THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950–2002 (Feb. 2004), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/the-nature-and-scope-of-sexual-abuse-of-minors-by-catholic-priests-and-deacons-in-the-united-states-1950-2002.pdf>. Subsequent reports were issued: JOHN JAY COLL. OF CRIM. JUST., THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES: SUPPLEMENTARY DATA ANALYSIS (Mar. 2006), http://www.bishop-accountability.org/reports/2006_03_John_Jay/Supplementary_Data_Analysis.pdf; see also JOHN JAY COLL. RES. TEAM, THE CAUSES AND CONTEXT OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS IN THE UNITED STATES, 1950–2010 (May 2011), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/the-causes-and-context-of-sexual-abuse-of-minors-by-catholic-priests-in-the-united-states-1950-2010.pdf>.

ing priests and bishops accountable through mandated reporting, metropolitan investigations, and sanctioning whistleblowing.

In an effort to be transparent, many American dioceses released the names of dead, retired, and active priests against whom credible allegations were made. The advocacy blog Bishop Accountability reports that of this date 146 dioceses and twenty-one religious orders have released names of priests who have been accused.¹³⁵ Publishing its own list, the advocacy blog defends its action as an adequate response to the crisis, even though those listed have no access to due process response. At a minimum, the Blog illustrates the depth of public anger over the crisis.¹³⁶

The *New York Times* reports that seventeen U.S. bishops have “resigned or been forced from office under a cloud of accusations that they mishandled abuse cases.”¹³⁷ The resignations are a result of “a push to punish church leaders who did not intervene.”¹³⁸ A few state attorneys indicted bishops for failure to protect children—child endangerment—but the charges were almost always dropped because the diocese accepted settlement offers from the state. Settlements included agreeing to an independent audit of diocese archives, apologies to victims, and promises to comply with diocesan policies to provide for a safe environment for children. Illustrative of the settlement process is Santa Rosa, California, Bishop Daniel Walsh who avoided criminal charges in 2006 for failure to report to civil authorities the sexual abuse allegations against a diocesan priest. Because of the bishop’s failure to report, the priest had time to flee the country and avoid arrest. Prosecutors dropped charges

[p://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Cause-s-and-Context-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-in-the-United-States-1950-2010.pdf](http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Cause-s-and-Context-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-in-the-United-States-1950-2010.pdf).

¹³⁵ See *Lists of Accused Priests Released by Dioceses and Religious Institutes*, BISHOPACCOUNTABILITY.ORG (Feb 27, 2020 2:00 PM), http://www.bishop-accountability.org/g/AtAGlance/diocesan_and_order_lists.htm.

¹³⁶ The Blog provides a rationale for its disclosure policy: “The Database of Publicly Accused Priests does not state or imply that individuals facing allegations are guilty of a crime or liable for civil claims. The reports contained in the database are merely allegations. The U.S. legal system presumes that a person accused of or charged with a crime is innocent until proven guilty. Similarly, individuals who may be defendants in civil actions are presumed not to be liable for such claims unless a plaintiff proves otherwise. Admissions of guilt or liability are not typically a part of civil or private settlements.” *Database of Publicly Accused Roman Catholic Priests, Nuns, Brothers, Deacons, and Seminarians in the United States*, BISHOPACCOUNTABILITY.ORG, (Feb 27, 2020 2:00 PM), <http://bishop-accountability.org/member/>.

¹³⁷ Mitch Smith & Laurie Goodstein, *2 Bishops Resign in Minnesota Over Sexual Abuse Scandal*, N.Y. TIMES (June 15, 2015), <https://www.nytimes.com/2015/06/15/us/archbishop-nienstedt-and-aide-resign-in-minnesota-over-sex-abuse-scandal.html>.

¹³⁸ Smith & Laurie Goodstein, *supra* note 137.

against the bishop because he agreed to undergo counseling for four months.¹³⁹

In 2012, Bishop Robert Finn of Lincoln, Nebraska, was convicted of “one misdemeanor count of failing to report suspected child abuse.”¹⁴⁰ After the guilty verdict, the bishop received two years of probation, but the sentence was suspended; he is required to attend mandatory abuse reporter training.¹⁴¹ Nonetheless, in 2019 an auxiliary bishop in Cincinnati, Ohio, was relieved of his administrative duties overseeing priest personnel in the Archdiocese of Cincinnati. This action was taken by Archdiocesan officials when it was established that he failed to report to civil authorities credible accusations he received that an Archdiocesan priest behaved improperly with children.¹⁴² The 2019 dismissal by the Archdiocese is a reversal of what occurred in 2003 when the Cincinnati Archdiocese pleaded no contest to five misdemeanor counts that it had failed to report cases of sex abuse by clergy from 1978 to 1982.¹⁴³ Then, as a result of its plea agreement, the Archdiocese was fined \$10,000 and agreed to turn over to prosecutors all documents pertaining to allegations, to adopt more stringent reporting requirements, and to establish a \$3 million fund to compensate victims of sexual abuse by clergy.¹⁴⁴

2. The Vatican Response

The appointment of every bishop in the United States occurs through a process designed and administered by the Vatican. Once ordained a bishop, each one is involved directly or indirectly with periodic mandatory reports to the Vatican and observes an age of retirement or involuntary removal from an assignment. In addition, because the Roman Catholic Church is bound to a Code of Canon Law, most recently revised in 1983, there is uniformity in administration throughout the international organization.

¹³⁹Robin Hindery, *Santa Rosa Bishop Embroiled in Abuse Cases Resigns*, SFGATE (July 1, 2011), <https://www.sfgate.com/bayarea/article/Santa-Rosa-bishop-embroiled-in-abuse-cases-resigns-2366012.php>.

¹⁴⁰*Top Level Bishop Found Guilty of Shielding Priest Abuse*, CBS NEWS (Sept. 6, 2012), <https://www.cbsnews.com/news/top-level-bishop-found-guilty-of-shielding-priest-abuse/>.

¹⁴¹*Top Level Bishop*, *supra* note 140.

¹⁴²Dan Horn, *Shake-Up at Archdiocese: Cincinnati's No. 2 Bishop Failed to Share Complaints About Priest*, CINCINNATI ENQUIRER (Aug. 5, 2019), <https://www.cincinnati.com/story/news/2019/08/05/rev-geoff-drew-cincinnati-archdiocese-give-update-st-ignatius-priest/1920584001/>.

¹⁴³Dennis Coday, *Cincinnati Archdiocese Convicted for Failing to Report Sex Abuse*, NAT'L CATHOLIC REP. (Dec. 12, 2003), http://natcath.org/NCR_Online/archives/2/2003d/121203/121203i.htm.

¹⁴⁴Coday, *supra* note 143.

In conjunction with Vatican authority, the Congregation for the Doctrine of the Faith (“the Congregation”), supervises the canonical crime of sexual abuse of minors by clergy. In 1962 a Vatican document, *Crimen Sollicitationis*,¹⁴⁵ was issued to all bishops. The document addressed clerical abuse and is illustrative of the clericalism of the time. The document was to be kept “carefully in the secret archive of the Curia for internal use.” The Dominican priest and frequent commentator on the clergy abuse crisis, Thomas P. Doyle, writes that the document applies to all types of crimes involving clergy and sexual abuse and that the emphasis on secrecy is not in response to clergy sexual abuse per se, but rather a culture of secrecy that “has been deeply rooted in the ecclesial culture for centuries.”¹⁴⁶ Furthermore, the “obligation of secrecy only went into effect once a case had been initiated. Nothing prohibited a bishop or religious superior from notifying civil authorities of an allegation prior to the initiation of the canonical process.”¹⁴⁷

Subsequent to *Crimen Sollicitationis*, in 1971, the Congregation promulgated norms permitting diocesan bishops to request permission from the Congregation to laicize a priest for leading a “depraved life.” But in 1980 the norms were withdrawn, and bishops were no longer able to request laicization of a priest for any reason. Nonetheless, the 1983 Code of Canon Law permits dismissal from the clerical state, “if a cleric has otherwise committed an offense against the sixth commandment of the Decalogue . . . with a minor below the age of sixteen, [then] the cleric is to be punished with just penalties, including dismissal from the clerical state if the case warrants it.”¹⁴⁸ Pertinent to what occurred in multiple American dioceses, commentary to the 1983 Code provision notes that:

Great care should be exercised by church authorities in this delicate area. Frequently the most beneficial approach is a therapeutic rather than a penal one, especially if there is diminished imputability on the part of the cleric. However, while the well-being and future ministry of the offending cleric are key considerations, due cognizance also has to

¹⁴⁵ See The Supreme Sacred Congregation of the Holy Office, *Crimen Sollicitationis*, VATICAN POLYGLOT PRESS (1962), http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html.

¹⁴⁶ See Thomas Doyle, *The 1922 Instruction and the 1962 Instruction: “Crimen Sollicitationis” Promulgated by the Vatican*, VOTF (Aug. 16, 2003), http://www.votf.org/vineyard/Oct5_2006/bbc.html.

¹⁴⁷ Doyle, *supra* note 146.

¹⁴⁸ 1983 CODE C. 1395, § 2; see generally John A. Alesandro, *A Study of Canon Law: Dismissal from the Clerical State in Cases of Sexual Misconduct*, 36 THE CATHOLIC LAWYER 257 (1996).

be taken of the damage done to the community and individuals within it.¹⁴⁹

In 1993, following significant media attention given to the crisis in the United States, Pope John Paul II sent a letter to the American bishops announcing the formation of a joint committee of Vatican and American bishops to discuss canonical norms pertaining to the sexual abuse of children by clergy. Following this announcement and the formation of the committee, eventually three suggestions were forwarded to the Congregation: (1) raising the age of any victim from under sixteen to under eighteen,¹⁵⁰ (2) enlarging the statute of limitations from five to ten years from the eighteenth birthday of the victim, and (3) maintaining an appeal process to the Congregation.¹⁵¹ In addition, the committee reviewed the sexual abuse policies of 157 dioceses and made twenty-eight recommendations to serve as guidelines on how to handle future allegations of sexual abuse of minors.

In 2001 the Vatican issued new procedures for prosecuting clergy for sexual crimes against minors. Pope John Paul II promulgated the new norms with his apostolic letter, *Sacramentorum Sanctitatis Tutela*,¹⁵² which was then followed by specific norms a few weeks later. The norms confirm that under the then current practice, canon law trials of clergy were to be held in the cleric's diocese and appeals from judgements were to be made to the Roman Rota. But under the new norms promulgated by Pope John Paul II in 2001, there are certain crimes now reserved to the Congregation for the Doctrine of the Faith. Among those crimes reserved to the Congregations are: (1) the sexual abuse of a minor, defined as someone under the age of eighteen; (2) the statute of limitations remained at ten years; and also, (3) whenever the supervisor (an ordinary in the words of Canon Law) had at least probable knowledge of the commission of an offense, that cleric's supervisor (ordinary) is required to conduct a

¹⁴⁹1983 CODE C. 1395, Commentary.

¹⁵⁰See also *Vos Estis Lux Mundi*, *supra* note 21, at Art. I § 2(b) (defining minor as any person under the age of eighteen).

¹⁵¹See Ad Hoc Committee on Sexual Abuse, National Council of Catholic Bishops, *Restoring Trust: A Pastoral Response to Sexual Abuse-Volume I* (Nov. 14, 1994), http://www.bishop-accountability.org/reports/1994_11_NCCB_Restoring_Trust/rt94_complete_optimized.pdf. Two subsequent reports were issued, one in 1995 and one in 1996. See Ad Hoc Committee on Sexual Abuse, National Council of Catholic Bishops, *Restoring Trust: A Pastoral Response to Sexual Abuse-Volume II* (Nov. 13, 1995), http://www.bishop-accountability.org/reports/1995_11_NCCB_Restoring_Trust/rt95_complete.pdf; See Ad Hoc Committee on Sexual Abuse, National Council of Catholic Bishops, *Restoring Trust: A Pastoral Response to Sexual Abuse-Volume III* (1996).

¹⁵²See John Paul II, *Sacramentorum Sanctitatis Tutela*, VATICAN (Apr. 30, 2001), http://www.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu_proprio_20020110_sacramentorum-sanctitatis-tutela.html.

preliminary investigation and then communicate the facts to the Congregation, which would then tell the supervisor (ordinary) how to proceed.¹⁵³ Subsequently, in 2010 Pope Benedict XVI extended the statute of limitations from ten years to twenty years.¹⁵⁴

3. United States Conference of Catholic Bishops

In accordance with Vatican directives, in 2011 the United States Conference of Catholic Bishops revised its 2002 *Charter for the Protection of Children and Young People*, and then revised it again in 2018.¹⁵⁵ After the 2002 *Dallas Charter*, a second document, the *Essential Norms for the Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* (“*Essential Norms*”),¹⁵⁶ was drafted by the Ad Hoc Committee on Sexual Abuse, part of the United States Conference of Catholic Bishops (“USCCB”), and the Vatican-U.S. Bishops’ Mixed Commission on Sex Abuse Norms. It was promulgated in 2006 by the United States bishops. The *Essential Norms* are meant to be complementary to the universal law of the Church and are to be interpreted in accordance with that law. Specifically, the *Essential Norms* do the following: (1) require each diocese to have a written policy on the sexual abuse of minors by priests, deacons, or other church personnel; (2) the policy is to comply with the Code of Canon law, specifically canons 1468–70 and 1717–19; (3) each diocesan policy must be filed with the USCCB within three months of May 5, 2006; (4) each diocese is to appoint a competent person to coordinate assistance for persons who claim to have been sexually abused under the provisions of the *Dallas Charter*; (5) each diocese must appoint a review board in accordance with the goals of the *Dallas Charter*; and (6) allegations are to be conducted promptly and objectively and if any allegation is found credible then the Congregation of the Doctrine of the Faith is to be notified and the ministry of the accused is suspended pending the outcome of the process.

¹⁵³On May 3, 2011, the Congregation for the Doctrine of the Faith issued a Circular Letter directing the Church to make allowances for legislation within the country where each bishop’s diocese is located. Congregation for the Doctrine, *Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuses of Minors Perpetrated By Clerics*, VATICAN (May 3, 2011), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_en.html [hereinafter “CDF, *Circular Letter*”].

¹⁵⁴CDF, *Circular Letter*, *supra* note 153.

¹⁵⁵See *Charter for the Protection of Children and Young People*, UNITED STATES CONF. OF CATHOLIC BISHOPS (June 2018), <http://www.usccb.org/issues-and-action/child-and-youth-protection/charter.cfm> [hereinafter *Revised Dallas Charter*].

¹⁵⁶See *Essential Norms for the Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, UNITED STATES CONF. OF CATHOLIC BISHOPS (May 5, 2006), <http://www.usccb.org/issues-and-action/child-and-youth-protection/charter.cfm>.

A third document was published by the American bishops. The Ad Hoc Committee on Bishops' Life and Ministry of the USCCB promulgated the *Statement of Episcopal Commitment* in 2005. It was revised and published again in 2018.¹⁵⁷

In conformity with Vatican and local directives, American bishops have created committees to assist and monitor diocesan efforts at enforcement. For example, the Secretariat of Child and Youth Protection¹⁵⁸ was created to assist dioceses develop child and youth protection programs, plus to provide an annual report on the progress of each diocese in complying with the mandates of the *Dallas Charter*. The *Dallas Charter* is explicit in requiring dioceses to maintain "safe environment" programs, together with parents, civil authorities, educators, and community organizations. The goal is to educate church and community members as to proper conduct between clergy and minors.¹⁵⁹

In addition, the National Review Board reviews the work of the Secretariat and makes recommendations for improvement, alerts appropriate parties of actions that contradict the goals of the *Dallas Charter*, and advises the Committee for the Protection of Children and Young People.¹⁶⁰ Overall, the National Review Board is responsible for assessment of all diocesan compliance and to work with the information provided by the 2004 study conducted and reported by the John Jay College of Criminal Justice commissioned by the United States Conference of Catholic Bishops.

Other developments are noteworthy. In the 2018 version of the *Charter for the Protection of Children and Young People* the American bishops are admonished "not to enter into settlements which bind the parties to confidentiality, unless the victim/survivor requests confidentiality and this request is noted in the text of the agreement."¹⁶¹ And also, each diocese is to "report an allegation of sexual abuse of a person who is a minor . . . to the public authori-

¹⁵⁷ See The Ad Hoc Committee on Bishops' Life and Ministry, *Statement of Episcopal Commitment*, UNITED STATES CONF. OF CATHOLIC BISHOPS (June 2005), http://www.bishop-accountability.org/resources/resource-files/churchdocs/2005_Charter_Norms_Episcopal_Commitment.pdf.

¹⁵⁸ See *Who We Are*, UNITED STATES CONF. OF CATHOLIC BISHOPS, <http://www.usccb.org/about/child-and-youth-protection/who-we-are.cfm> (last visited Feb. 28, 2020).

¹⁵⁹ *Revised Dallas Charter*, *supra* note 155, at Art. 12.

¹⁶⁰ See *The National Review Board*, UNITED STATES CONF. OF CATHOLIC BISHOPS, <http://www.usccb.org/about/child-and-youth-protection/the-national-review-board.cfm> (last visited Feb. 28, 2020). The Revised Charter requires each individual diocese to establish its own review board, the majority of members being lay persons not employed by the Church, and the diocesan board is to assess allegations, review policies, and advise the bishop on any changes to be made.

¹⁶¹ *Revised Dallas Charter*, *supra* note 155, at Art. 3.

ties with due regard for the seal of the Sacrament of Penance.”¹⁶² In addition, all diocesan personnel are to “comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and cooperate in their investigation in accord with the law of the jurisdiction.”¹⁶³ Cooperation with civil authorities is mandated even if the allegation is made by a person who is not a minor.¹⁶⁴ And victims are to be told that they have a right to make a report to the civil authorities.¹⁶⁵

Contrary to the previous practice of bishops, when they assigned credibly accused priests for psychiatric treatment and then reentry into ministry—reassignment—the revised *Dallas Charter* now provides that “any priest or deacon . . . who has committed even one act of sexual abuse of a minor . . . shall not continue in ministry.”¹⁶⁶ Also, the *Essential Norms* are very specific regarding the power of a diocesan bishop to remove a credibly accused priest. For “the sake of the common good and observing the provisions of canon law, the [diocesan bishop] shall exercise [the] power of governance to ensure that any priest or deacon who has committed even one act of sexual abuse of a minor . . . shall not continue in active ministry.”¹⁶⁷

Consistent with American civil and criminal law, the *Dallas Charter* cautions that any priest or deacon accused of misconduct is to be accorded the presumption of innocence, encouraged to retain independent civil law and canon law counsel, and if the allegation is dismissed, restoration of his good name.¹⁶⁸ And during the course of an investigation into any credible allegation against a cleric, the *Es-*

¹⁶² *Revised Dallas Charter*, *supra* note 155, at Art. 4. See also 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); see also *Nunez v. Watchtower Bible and Tract Society of New York, Inc.*, 2020 MT 3, 398 Mont. 261, 455 P.3d 829 (2020) (holding that Jehovah’s Witnesses Church was exempt from state reporting statute because of church doctrine mandating confidentiality of reports).

¹⁶³ *Revised Dallas Charter*, *supra* note 155, at Art. 3.

¹⁶⁴ *Revised Dallas Charter*, *supra* note 155, at Art. 3.

¹⁶⁵ *Revised Dallas Charter*, *supra* note 155, at Art. 3.

¹⁶⁶ *Revised Dallas Charter*, *supra* note 155, at Art. 5. The 2002 version of the Charter also had a zero-tolerance policy. See O’Brien, *supra* note 40, at 392–97; see also *Essential Norms*, *supra* note 27, at 8.

¹⁶⁷ *Essential Norms*, *supra* note 27, at 9.

¹⁶⁸ *Essential Norms*, *supra* note 27, at 9. See also *In re Fortieth Statewide Investigating Grand Jury*, 647 Pa. 489, 190 A.3d 560, 577 (2018), subsequent determination, 649 Pa. 574, 197 A.3d 712 (2018) (holding that citizens have a right to security in their reputations and in reference to accused priests the Commonwealth must employ all reasonably available measures to prevent identification of the priests to safeguard due process rights).

essential Norms provide that the “alleged offender 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.”¹⁶⁹ While dioceses are obligated to be transparent with the public concerning sexual abuse of minors by clergy, throughout the process the diocese must respect the privacy and reputations of the individuals involved.¹⁷⁰

American civil and criminal law continues to grapple with what constitutes sexual abuse. Often with minors, and particularly with clergy cases, there is a consistent pattern described as “grooming.”¹⁷¹ The abuser seeks to get the victim “compliant with what he wants to happen,”¹⁷² often supplying the child with alcohol, pornography, engaging in sexual banter, gifts, and sharing mutual history so as to create a trusting relationship.¹⁷³ Once a level of trust has been obtained between the adult and the minor, there may be overt and graphic physical contact with the child, such as sodomy or rape, but the essence of any crime of sexual abuse is whether the act provides “sexual gratification” to the adult.¹⁷⁴ Thus, a minor may be sexually abused through non-physical contact if such act provides sexual gratification to the perpetrator. For example, voyeurism involves no physical contact, but it does involve a perpetrator spying on a child

¹⁶⁹ *Essential Norms*, *supra* note 27, at 7.

¹⁷⁰ *Revised Dallas Charter*, *supra* note 155, at Art. 7; *see also Essential Norms*, *supra* note 27, at 13.

¹⁷¹ *See generally* Kenneth Lanning, *Child Molesters: A Behavioral Analysis*, in NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN 27–28 (5th ed. 2010) (process whereby abuser identifies child targets, gathers information about the child's interests and vulnerabilities, and then begins to fill those needs, thereby lowering inhibitions and gaining control over the child); *State v. Transfiguracion*, 2013 WL 1285112 (Haw. 2013) (addressing characteristics of grooming).

¹⁷² *Morris v. State*, 361 S.W.3d 649, 651 (Tex. Crim. App. 2011).

¹⁷³ *Morris*, 361 S.W.3d at 651–52.

¹⁷⁴ *See, e.g., U.S. v. Ramirez-Garcia*, 646 F.3d 778 (11th Cir. 2011) (the physical or nonphysical act is done to provide for the perpetrator's sexual gratification). Physical exploitation of the child is defined in N.C. GEN. STAT. § 14-202.1 (2019) as:

- (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
 - (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
 - (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body or any child of either sex under the age of 16 years.

through cameras and peepholes.¹⁷⁵ Such conduct lacks person-to-person physical contact, but because it involves sexual gratification to the adult, it is considered abuse of the minor.

Internet interaction precipitates additional sex abuse offenses which do not involve physical contact. For example, the crime of “enticement” is defined in federal law as “using the mail or any facility . . . [which] knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in . . . any sexual activity for which any person can be charged with a criminal offense.”¹⁷⁶ Enticement is most often connected with emails and texting, a person may be guilty of misconduct if an adult knowingly exposes his or her genitals to a child in a manner that would cause a reasonable adult to believe that the conduct is likely to cause *affront or alarm* to the child.¹⁷⁷ What causes an affront is the operative issue. In a Missouri decision, the state’s highest court acquitted a male defendant when the facts revealed that, as a school monitor, he was urinating in the men’s room at school and exposed his genitals to four fourteen year-old boys.¹⁷⁸ When viewed in the context of the statute, the court held that the prosecution failed to demonstrate that defendant’s conduct caused affront or alarm to the boys who happened to be in the restroom.

Similarly, sexting is often associated with an adult’s sexual abuse of minors. Often this involves an adult male taking a “picture of his penis” and sending it to a minor over the Internet.¹⁷⁹ Some state courts refuse to prosecute unless the adult sending the text knew

¹⁷⁵ See, e.g., *State v. Wilson*, 192 Ohio App. 3d 189, 2011-Ohio-155, 948 N.E.2d 515 (11th Dist. Portage County 2011) (detailing that a victim found a camera in the air vent of her bedroom and a peephole that allowed viewing into her shower in her bathroom).

¹⁷⁶ 18 U.S.C.A. § 2422(b) (2012). This statute was utilized in *U.S. v. Taylor*, 640 F.3d 255 (7th Cir. 2011) (finding the defendant guilty under the statute for masturbating in front of his webcam while what he thought was a thirteen-year-old girl watched); see also *U.S. v. Fugit*, 703 F.3d 248 (4th Cir. 2012) (finding the defendant guilty for engaging in an inappropriate sexual conversation with a minor); see generally Korey J. Christensen, *Reforming Attempt Liability Under 18 U.S.C. § 2422(b): An Insubstantial Step Back From* *United States v. Rothberg*, 61 DUKE L. J. 693 (2011).

¹⁷⁷ See, e.g., KY. REV. STAT. ANN. § 510.148 (West 2019).

¹⁷⁸ *State v. Beine*, 162 S.W.3d 483 (Mo. 2005), as modified on denial of reh’g, (May 31, 2005).

¹⁷⁹ See, e.g., *State v. Stuckey*, 2013 WI App 98, 349 Wis. 2d 654, 837 N.W.2d 160 (Ct. App. 2013). This case involved WIS. STAT. § 948.10 (2019):

- (1) Whoever, for purposes of sexual arousal or sexual gratification, causes a child to expose genitals or pubic area or exposes genitals or pubic areas to a child is guilty of the following:
 - (a) Except as provided in par. (b), a Class I Felony.
 - (b) A Class A misdemeanor if any of the following applies:

the picture would go to a minor.¹⁸⁰ Some legislatures and courts are willing to criminalize sexting between an adult and a minor, but hesitate when applying criminal sanctions against various underage persons involved in texting pictures between and among themselves.¹⁸¹ The *Dallas Charter* requires each diocese to make public understandable clear boundaries for clergy, diocesan employees, and volunteers regarding texts and other forms of Internet usage.¹⁸²

a. *Vatican Supervision*

The President of the United States Conference of Catholic Bishops is required to “share with the Holy See the annual reports on the implementation of the Charter.”¹⁸³ Indeed, throughout the incremental response of the United States Conference of Catholic Bishops to the clerical sexual abuse crisis, the Vatican has exercised supervisory control. The American *Essential Norms* admit respect for local civil and criminal laws, but the *Essential Norms* caution that any local church is part of a larger, international, and hierarchical organization:

The 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. At the same time, the Church reaffirms her right to enact legislation binding on all her members concerning the ecclesiastical dimensions of the [crime] of sexual abuse of minors.¹⁸⁴

Because the American Roman Catholic Church is supervised by the Vatican an American plaintiff filed a civil suit in the United States District Court for the District of Oregon against, among others, the

1. The actor is a when the violation occurs.
 2. At the time of the violation, the actor had not attained the age of 19 years and was not more than 4 years older than the child.
- (2) Subsection (1) does not apply under any of the following circumstances:
- (a) The child is the defendant’s spouse.
 - (b) A mother’s breast-feeding of her child.

¹⁸⁰ See, e.g., *Stuckey*, 837 N.W. at 160. Courts are willing to enforce the crime of exposing the child to harmful material. *Stuckey*, 837 N.W. at 161.

¹⁸¹ See, e.g., *Miller v. Skumanick*, 605 F. Supp. 2d 634, 243 Ed. Law Rep. 805 (M.D. Pa. 2009), aff’d, 598 F.3d 139, 73 A.L.R.6th 719 (3d Cir. 2010) (stating that approximately 20% of minors between thirteen and nineteen years of age of send nude or semi-nude photos to others and that the minors and their parents have successfully asserted protection from prosecution under the Constitution); see also Henry F. Fradella & Marcus A. Galeste, *Sexting: The Misguided Penal Social Control of Teenage Sexual Behavior in the Digital Age*, 47 CRIM. L. BULL. 438 (2011).

¹⁸² See *Revised Dallas Charter*, supra note 155, at Art. 6.

¹⁸³ See *Revised Dallas Charter*, supra note 155, at Art. 11.

¹⁸⁴ *Essential Norms*, supra note 27, at 11.

Holy See (Vatican).¹⁸⁵ The plaintiff alleged that when he was fifteen or sixteen years old he was sexually abused by a priest of the Archdiocese of Chicago. The allegation is that the Holy See was vicariously liable based on the actions of the Holy See's employee, the Archdiocese of Chicago and the priest involved. The plaintiff alleged that the abuse occurred by a priest who had been transferred from Ireland to Chicago; the transfer occurred because the priest admitted to sexual abuse of young boys in Ireland but was nonetheless given a ministerial assignment in Chicago.

The plaintiff alleged that the Holy See was vicariously liable for negligence because it retained, supervised, and failed to warn plaintiff of the priest's proclivities.¹⁸⁶ The Vatican responded that it was immune from suit in all courts of the United States as a result of the Foreign Sovereign Immunities Act ("FSIA");¹⁸⁷ such immunity would preclude any need to respond to the substantive allegations made by the plaintiff. In addressing the claimed immunity, the federal district court, a lower court, held that statutory immunity did not apply because of the "tortious act" exception to sovereign immunity, and hence the suit against the Holy See could proceed.¹⁸⁸ The exception to the immunity doctrine provides that, as is stated in Section 1605:

- (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
 - (5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except that this paragraph shall not apply to -
 - (A) any claim based upon the exercise or performance or the failure to exercise or perform a *discretionary function* regardless of whether the discretion be abused; or
 - (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . .¹⁸⁹

On appeal from the federal district court decision, the United States Court of Appeals for the Ninth Circuit first held that because the Holy See created the Archdiocese (of Chicago) that eventually

¹⁸⁵ *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009).

¹⁸⁶ *Holy See*, 557 F.3d at 1069.

¹⁸⁷ *Holy See*, 557 F.3d at 1069; *see also* 28 U.S.C.A. §§ 1330, 1604 (2012).

¹⁸⁸ *Holy See*, 557 F.3d at 1071.

¹⁸⁹ *Holy See*, 557 F.3d at 1072 (citing 28 U.S.C.A. § 1605(a) (2012) (italics added)).

hired the priest accused of abuse, the district court had “jurisdiction over the Holy See for the claims to which the acts are relevant.”¹⁹⁰ But second, having assumed jurisdiction, the court then considered whether the plaintiff’s allegations were sufficient to permit jurisdiction over the Holy See itself for acts committed by its affiliated domestic corporations.¹⁹¹ In this case, the affiliated domestic corporation was the Archdiocese of Chicago.

After assuming subject matter jurisdiction, the Ninth Circuit held that the plaintiff did not allege sufficient facts to overcome the presumption of separate juridical status between the Holy See and the Archdiocese of Chicago.¹⁹² That is, there is a presumption that the Holy See is separate from the archdiocese. To overcome this presumption the plaintiff would have to establish that the Holy See exercised “day-to-day control” over its affiliate, the archdiocese.¹⁹³ The gravity of the conduct of the priest or the archdiocese is insufficient to overcome the presumption—there must be a controlling relationship between the two. No matter how heinous the acts of the individual cleric—or the archdiocese that employed him—this conduct “cannot determine whether the distinct wrongful acts of the affiliated *corporations* should be attributed to the Holy See.”¹⁹⁴ The presumption of separateness stands.

The exception to sovereign immunity contained in Section 1605 of the federal statute is qualified by the words in the statute exempting “discretionary” actions by the alleged perpetrator. Thus, even though there is an express exception to granting sovereign immunity, the exception *does not* apply if the conduct that is the subject of the petition—negligent hiring—was discretionary in nature. Relying on the wording of the exception, the Ninth Circuit held that any involvement of the Holy See in the appointment of the cleric was barred because of the discretionary character of his appointment by the Archdiocese of Chicago. The court concluded that the appointment of the cleric was discretionary because “social, economic, or political considerations could have influenced the decision [to hire the cleric and this] renders it the kind of judgement that the discretionary function exception was designed to shield.”¹⁹⁵

¹⁹⁰ *Holy See*, 557 F.3d at 1077.

¹⁹¹ *Holy See*, 557 F.3d at 1079.

¹⁹² *Holy See*, 557 F.3d at 1079. Plaintiff’s complaint does not allege day-to-day routine involvement of the Holy See in the affairs of the Archdiocese of Chicago. Even involvement with conduct and discipline is insufficient to overcome the presumption. *Holy See*, 557 F.3d at 1080.

¹⁹³ *Holy See*, 557 F.3d at 1080.

¹⁹⁴ *Holy See*, 557 F.3d at 1080.

¹⁹⁵ *Holy See*, 557 F.3d at 1085.

b. *Vatican Revisions*

The Vatican under Pope Francis has heightened its involvement in the discipline of bishops and clerics. As a result, the sustainability of sovereign immunity for the Holy See is not certain and commentators debate its applicability.¹⁹⁶ Increasingly, the Vatican promulgates new procedures and rules pertaining to the sexual abuse crisis. To illustrate, on December 3, 2019, the Pope amended the *Sacramentorum Sanctitatis Tutela* (2001). Under the amendments, Canon Law now corresponds with American law that the “acquisition, possession or distribution by a cleric of pornographic images of minors under the age of eighteen, for purposes of sexual gratification, by whatever means or using whatever technology” is a crime.¹⁹⁷ The canonical amendments also make clear that the Advocate in any canonical trials must be Roman Catholic and possess a doctorate in canon law, and approved by the presiding judge of the college. And only priests can serve as Judge, Promoter of Justice, and Notary.¹⁹⁸

Also, in May 2019, Pope Francis issued new rules “aimed at holding leadership [bishops] more accountable while overhauling how the Roman Catholic Church deals with accusations of abuse and coverup.”¹⁹⁹ The new document is intended for the universal Church and is titled *Vos Estis Lux Mundi*.²⁰⁰ Its provisions are very similar to those in the revised *Dallas Charter* and the *Essential Norms* enacted by the United States Conference of Catholic Bishops. Consistent with the *Dallas Charter* and *Essential Norms* is the admonition that the

¹⁹⁶ See, e.g., James Fantau, *Rethinking the Sovereign Status of the Holy See: Towards a Greater Equality of States and Greater Protection of Citizens in United States Courts*, 19 CARDOZO J. INTL. & COMP. L. 487 (2011); Jacob William Neu, “Workers of God”: The Holy See’s Liability of Clerical Sexual Abuse, 63 VAND. L. REV. 1507 (2010); Edan Burkett, *Victory for Clergy Sexual Abuse Victims: The Ninth Circuit Strips the Holy See of Foreign Sovereign Immunity in Doe v. Holy See*, 2010 BYU L. REV. 35 (2010).

¹⁹⁷ See Francis, *Rescript of the Holy Father Francis to Introduce Some Amendments to the “Normae de Gravioribus Delictis”* VATICAN (Dec. 17, 2019), <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217a.html>; see also *U.S. v. Ward*, 686 F.3d 879 (8th Cir. 2012) (defendant appealed his conviction for producing a visual depiction of sexually explicit conduct of minor); *U.S. v. C.R.*, 792 F. Supp. 2d 343 (E.D. N.Y. 2011), vacated and remanded on other grounds, 731 F.3d 204 (2d Cir. 2013) (defendant appeals sentence for distribution of child pornography shared on a computer); *U.S. v. Penton*, 380 Fed. Appx. 818 (11th Cir. 2010) (defendant convicted for showing child pornography to a minor for the purpose of sexual gratification of defendant).

¹⁹⁸ Francis, *supra* note 197.

¹⁹⁹ Chico Harlan, *Vatican Established New Rules for Sexual Abuse Complaints and Coverups Involving Bishops and Other Church Leaders*, WASH. POST (May 9, 2019), https://www.washingtonpost.com/world/vatican-establishes-new-rule-for-sexual-abuse-complaints-and-coverups-involving-bishops/2019/05/09/4571e0b0-71b5-11e9-9331-30bc5836f48e_story.html.

²⁰⁰ *Vos Estis Lux Mundi*, *supra* note 21.

new rules are not to prejudice any local civil reporting requirements.²⁰¹ In addition, *Vos Estis Lux Mundi* does the following:

(1) *Abuse*. Defines sexual abuse as first, engaging in sexual acts with a minor or vulnerable person; or by forcing someone by violence or threat or through abuse of authority, to perform sexual acts; or producing, exhibiting, possessing or distributing child pornography; or finally, the recruitment of or inducement of a minor or vulnerable person to participate in pornographic exhibitions.²⁰²

(2) *Reporting*. In response to the “secret files” and the obfuscation of bishops concealing criminal acts, the document includes within its lists of offenses any interference or avoidance of civil or canonical investigations involving a cleric allegedly involved in sexual abuse of a minor.²⁰³ Clearly this is a break with the mentality of a state-within-a-state, mandating that ecclesiastical authorities promptly report to civil authorities any credible allegation. However, it will only be effective if civil authorities are notified promptly and diocesan cooperation is transparent.²⁰⁴

In response to the Vatican revisions, American jurisdictions have updated their reporting requirements, mandating that groups, persons, or categories of professionals must report suspected acts of child abuse.²⁰⁵ But there is an exception for information received in “confession” or similar circumstances. Often state statutes will exempt clergy from reporting if the knowledge of the offense is obtained while in a confidential setting established in accordance with church doctrine, such as the Sacrament of Confession (Reconciliation). The Montana State Code is illustrative, mandating that certain professionals and officials report child abuse to the state Department of Public Health and Human Services when they know or have reasonable cause to suspect, as a result of information they received in their official capacity, that a child has been abused or

²⁰¹ *Vos Estis Lux Mundi*, *supra* note 21, at Art. 19.

²⁰² See *Vos Estis Lux Mundi*, *supra* note 21, at Art. 1(a). Federal and state laws have grappled with possession, production and exhibiting child pornography. See, e.g., *State v. Ritchie*, 349 Or. 572, 248 P.3d 405 (2011) (defendant appeals his conviction for Encouraging Child Abuse through the possession of sexually explicit images on his computers); *U.S. v. Haymond*, 672 F.3d 948 (10th Cir. 2012) (defendant was convicted of seeking out and downloading child pornography on the Internet); *U.S. v. Caparotta*, 890 F. Supp. 2d 200 (E.D. N.Y. 2012) (defendant convicted for producing a visual depiction of a minor engaging in sexually explicit conduct and then distributing the image).

²⁰³ *Vos Estis Lux Mundi*, *supra* note 21, at Art.1 (b).

²⁰⁴ The *Washington Post* reports that “some church watchdogs say the new rules fall short because they keep the handling of cases in-house.” Harlan, *supra* note 199.

²⁰⁵ See Child Welfare Information Gateway, *Mandatory Reporters of Child Abuse and Neglect* (Apr. 2019), <https://www.childwelfare.gov/pubpdfs/manda.pdf>.

neglected by anyone.²⁰⁶ Clergy are among the professionals required to report.²⁰⁷ Nonetheless, the state statute exempts clergy from the reporting requirement if the communication is required to be confidential by canon law, church doctrine, or established church practice.²⁰⁸

The document also mandates that by May 2020 each diocese must establish a “public, stable and easily accessible systems for submissions of reports” of allegations of sexual abuse of minors, which will concomitantly guarantee confidentiality. This system, created by each diocese, must then be shared with the Holy See.²⁰⁹ Furthermore, in addition to religious superiors, clerics themselves are obligated to report acts of sexual abuse that are well-founded and the reporting is to be done promptly, providing as many particulars as possible.²¹⁰ Persons characterized as “whistleblowers” are to be protected from “prejudice, retaliations or discrimination,” an obligation of silence may not be imposed upon them.²¹¹

(3) *Victims*. Alleged victims and their families are to be treated with dignity and respect and offered spiritual assistance, medical assistance, and be heard.²¹² No mention is made of monetary restitution to be paid to child sexual abuse victims. But note that in the 2018 version of the *Charter for the Protection of Children and Young People*, the bishops are admonished “not to enter into settlements which bind the parties to confidentiality, unless the victim/survivor requests confidentiality and this request is noted in the text of the agreement.”²¹³

(4) *Religious Superiors Including Bishops*. All bishops and persons exercising religious authority are bound by the obligations imposed by *Vos Estis Lux Mundi*. Indeed, procedures are established in this document for reporting offenses of sexual abuse or failing to report, both of which includes acts committed by bishops and superiors

²⁰⁶ MONT. CODE ANN. § 41-3-201(1) (2019).

²⁰⁷ MONT. CODE ANN. § 41-3-201(2)(h) (2019).

²⁰⁸ MONT. CODE ANN. § 41-3-201(6)(c) (2019). See generally Raymond C. O'Brien, *The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse*, 25 LOY. L.A. L. REV. 1 (1991).

²⁰⁹ *Vos Estis Lux Mundi*, supra note 21, at Art. 2 §§ 1–3.

²¹⁰ *Vos Estis Lux Mundi*, supra note 21, at Art. 3 §§ 1–4.

²¹¹ *Vos Estis Lux Mundi*, supra note 21, at Art. 4; see also Francis, *Rescript of the Holy Father Francis to Promulgate the Instruction on the Confidentiality of Legal Proceedings* (Dec. 17, 2019), <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217b.html>.

²¹² *Vos Estis Lux Mundi*, supra note 21, at Art. 5 § 1.

²¹³ *Revised Dallas Charter*, supra note 155, at Art. 3.

themselves.²¹⁴ The accountability of bishops was a demand made by commentators on the abuse crisis in the Church. This document specifically makes them accountable too.

The Vatican now requires the Metropolitan of the Ecclesiastical Province where an alleged perpetrator is located to investigate any allegation of sexual abuse or child endangerment reported to him.²¹⁵ For example, the Archbishop of New York would be the Metropolitan for the smaller dioceses located in the state. Once the Metropolitan receives the report he is to conduct an investigation, but throughout the “person under investigation enjoys the presumption of innocence.”²¹⁶ Unless there are just reasons to delay the investigation, it shall be completed within ninety days²¹⁷ and the Metropolitan shall inform the alleged perpetrator of the outcome.²¹⁸

In another Vatican revision, in December 2019, Pope Francis abolished what is termed “pontifical secrecy” in cases of child sexual abuse.²¹⁹ The effect of the papal pronouncement is that any information collected in connection with an allegation investigation is to be treated in such a way as to ensure its security, integrity, and confidentiality in accordance with canon law. But also, “[office confidentiality] shall not prevent the fulfilment of obligations laid down in all places by civil laws, including any reporting obligations, and the execution of enforceable requests of civil judicial authorities.”²²⁰ Supposedly, henceforth Church officials would not be able to claim secrecy of files when civil authorities request access.

In an interview, the Adjunct Secretary of the Congregation for the Doctrine of the Faith stated that removal of pontifical secrecy was in response to a meeting Pope Francis had with American bishops in February 2019 during which there was a full day of discussion on the question of transparency in cases of sexual misconduct.²²¹

²¹⁴ *Vos Estis Lux Mundi*, *supra* note 21, at Arts. 7–9.

²¹⁵ *Vos Estis Lux Mundi*, *supra* note 21, at Art. 9 § 1.

²¹⁶ *Vos Estis Lux Mundi*, *supra* note 21, at Art. 12 § 7.

²¹⁷ *Vos Estis Lux Mundi*, *supra* note 21, at Art. 14.

²¹⁸ *Vos Estis Lux Mundi*, *supra* note 21, at Art. 17 § 3.

²¹⁹ Francis, *supra* note 211; For a description of how the Pontifical secret was used among ecclesiastical authorities, see H.E. Msgr. Juan Ignacio Arrieta, Secretary of the Pontifical Council for Legislative Texts, and Professor Giuseppe Dalla Torre, former President of the Vatican City State Tribunal, *On the Publication of the Rescript of the Holy Father Francis on the Confidentiality of Legal Proceedings*, VATICAN (Dec. 17, 2019), press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217f.html.

²²⁰ Francis, *supra* note 211.

²²¹ Archbishop Charles Scicluna, Adjunct Secretary of the Congregation for the Doctrine of the Faith, *On the Occasion of the Publication of the Rescript of the Holy*

Specifically, removing what is called “pontifical secrecy” deprives any ecclesiastical official an excuse to withhold information.

It opens up, for example, avenues of communication with the victims, of collaboration with the state. Certain jurisdictions would have easily quoted the pontifical secret because that was the state of the law, in order to say that they could not, and that they were not, authorized to share information with either state authorities or the victims. Now that impediment, we might call it that way, has been lifted, and the pontifical secret is no more an excuse. However, the law goes further: it actually says, as also does *Vos Estis Lux Mundi*, that information is of the essence if we really want to work for justice.²²²

In his editorial, commenting on the decision to end the pontifical secret, the Editorial Director of the Holy See Press Office wrote that the papal action is another effort at transparency and does not affect the confidentiality of the confessional, which is different. Rather the pontifical secret covers documentation and testimony which can now be shared with civil authorities for the purpose of investigating cases for which canonical proceedings have already begun.²²³ But providing documentation to civil authorities does not prohibit a parallel canonical trial and in both proceedings, the “right of the victims and the witnesses to confidentiality must always be protected.”²²⁴

Taken together, the Vatican’s revisions promulgated in *Sacramentorum Sanctitatis Tutela*, and then *Vos Estis Lux Mundi*, plus the amendments made to each, illustrate a shift in Vatican perspective. For example, the Vatican’s mandatory reporting requirements, even for failure to report allegations of abuse by bishops or abuse committed by bishops themselves, indicates greater accountability of bishops. The elimination of the pontifical secret contributes to greater transparency. And repeated admonition in the *Essential Norms* promulgated by the American bishops, and implied in the Vatican revisions, suggest cooperation with civil authorities in state discovery

Father Francis Concerning the Instruction on the Confidentiality of Legal Proceedings, VATICAN (Dec. 17, 2019), press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217e.html.

²²² Scicluna, *supra* note 221.

²²³ Andrea Tornielli, Editorial Director, *On the Publication of the Rescript of the Holy Father on the Instruction on the Confidentiality of Legal Proceedings*, VATICAN (Dec. 17, 2019), press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217d.html.

²²⁴ Tornielli, *supra* note 223. Canon 417(2) requires that those persons administering each diocese must “observe secrecy within the limits and according to the manner determined by law or by the bishop.” See also *In re Fortieth Statewide Investigating Grand Jury*, 647 Pa. 489, 190 A.3d 560, 573 (2018), subsequent determination, 649 Pa. 574, 197 A.3d 712 (2018) (holding in support of “the right of citizens to security in their reputations”).

efforts. Professor Giuseppe Dalla Tore, former President of the Vatican City State Tribunal, writes that the revisions inaugurated by the Vatican “contribute to favoring the passage of the canonical order from an attitude of distrust and defence with regard to the state systems, to an attitude of trust and healthy collaboration.”²²⁵ Furthermore, he observes that what is being done is commensurate with what was inaugurated with the Second Vatican Council. Specifically, the Council documents provide that “[i]t is of supreme importance, especially in a pluralistic society, to work out a proper vision of the relationship between the political community and the Church.”²²⁶

Undoubtedly, the United States Conference of Catholic Bishops, in conjunction with Vatican revisions, have incrementally published rules and procedures meant to address failure to inform civil authorities of credible allegations of abuse, reassignment of known perpetrators of abuse, and intentionally frustrating the justifiable claims made by victims of abuse. And yet, there remains “institutional inertia, resistance and denial.”²²⁷ As the following grand jury reports illustrate, there continues to be revelations of concealment, fraud, child endangerment, and further illustrations of the clerical mentality illustrated as a state-within-a-state. For example, in spite of the *Dallas Charter* and *Essential Norms*, creation of committees, audits, and statistical reporting, the Office of the Attorney General of the State of Illinois reported in its December 19, 2018 *Preliminary Findings of the Investigation into Catholic Clergy Sexual Abuse of Minors in Illinois*, that diocesan “audits are seemingly not designed to discover clergy abuse, but rather are perfunctory, ‘check the box’ exercises done in a routine manner by the same entity nationwide, using a process that does not appear to involve a systematic review of the contents of files or the decisions a diocese made.”²²⁸

Further exacerbating the strained church and state relationship are instances of bishops unwilling to conform to established procedures designed to prohibit the endangerment of children.

²²⁵Tornielli, *supra* note 223.

²²⁶Paul VI, *Gaudium et Spes*, 76 VATICAN (Dec. 7, 1065), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html.

²²⁷Editorial Board, *Will Bishops at Last Be Held to Account in Abuse Cases? We’re About to Find Out*, WASH. POST (Sept. 19, 2019), https://www.washingtonpost.com/opinions/will-bishops-at-last-be-held-to-account-in-abuse-cases-were-about-to-find-out/2019/09/19/149ef946-da65-11e9-ac63-3016711543fe_story.html (editorializing on the investigation of Bishop Richard J. Malone) [hereinafter “WASH. POST Ed. Board”].

²²⁸*Illinois Att’y Gen.*, *supra* note 62, at 8.

IV. CHURCH AND STATE ACCOUNTABILITY

A. Bishop Richard J. Malone of Buffalo

When Monsignor William Lynn of Philadelphia was indicted in 2011 for endangering children between 1992 and 2004,²²⁹ Church reporting practices were significantly different from today. These reporting practices continue to evolve, becoming increasingly adaptive of civil requirements while remaining grounded in documents such as the *Dallas Charter* and the *Essential Norms*. From the era of Monsignor Lynn to the resignation of Bishop Malone in December 2019 the following changes were instituted to protect children from endangerment:

- (1) *Sacramentorum Sanctitatis Tutela* (2001):
 - (a) Rejected the requirement of secrecy contained in *Crimen Sollicitationis* (1922);
 - (b) Mandated that cases involving a cleric's sexual abuse of a minor under the age of eighteen be referred to the Congregation for the Doctrine of the Faith (CDF);
 - (c) Established a ten-year statute of limitations from the time the minor turns eighteen;
 - (d) Notification must be sent to the CDF whenever the cleric's bishop had at least probable knowledge of sexual abuse of a minor.
- (2) *Charter for the Protection of Children and Young People* (2002, revised in 2005, 2011, and 2018), which requires all United States bishops to:
 - (a) Report allegations of sexual abuse of minors (Article 4);
 - (b) Remove any cleric immediately even for a single act of abuse (Article 5);
 - (c) Provide data to the Secretariat of Child and Youth Protection established by the USCCB, which will share data with the National Review Board so recommendations may be made to the president of the USCCB (Articles 8–10);
 - (d) Make clear to clergy and the community standards of conduct for clergy (Article 12);
 - (e) Evaluate backgrounds of all incardinated priests and deacons, paid diocesan personnel, and volunteers (Article 13);
 - (f) Encourage an accused person to retain civil and canonical counsel.
- (3) *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* (2002, revised in 2006), which require that each bishop has:

²²⁹ See *supra* notes 114–33 and accompanying text.

- (a) A written policy on the sexual abuse of minors by clerics (Norm 2);
 - (b) A competent person to coordinate assistance for persons allegedly abused (Norm 3);
 - (c) A diocesan review board to assess allegations and offer advice (Norm 4);
 - (d) An obligation to initiate an investigation promptly whenever even a single credible allegation is received (Norms 6 and 8);
 - (e) An obligation to permanently remove a cleric if the act is admitted or established (Norms 8 and 9);
 - (f) An obligation to comply with the civil reporting laws (Norm 11); and
 - (g) An obligation not to transfer a cleric who has committed an act of sexual abuse (Norm 12).
- (4) *Statement of Episcopal Commitment* (2005, revised in 2011 and again in 2018), which commits each bishop to:
- (a) Implement the Charter for the Protection of Children and Young People (Commitment 1);
 - (b) Notify the Apostolic Nuncio if aware of the sexual abuse of a minor by another bishop or demands for financial settlements involving allegations of sexual misconduct by a bishop and to comply with civil laws (Commitments 2 and 3).
- (5) *Vos Estis Lux Mundi* (2019), which mandates that bishops must:
- (a) Avoid actions or omissions intended to interfere with or avoid civil investigations or canonical investigations against a cleric alleged to have committed sexual abuse of a minor (Article 1 § 1(b));
 - (b) Establish a public and easily accessible system for the submission of reports of allegations of sexual abuse of a minor (Article 2 § 1);
 - (c) Receive well-founded reports from clerics themselves who believe that sexual abuse has occurred (Article 3 § 1);
 - (d) Avoid retaliating against anyone who reports an offense (Article 4);
 - (e) Report credible allegations of sexual abuse, or failure to report allegations of abuse by a bishop to the Vatican and to the Metropolitan of the Ecclesiastical Province where the bishop is domiciled (Article 8);
 - (f) Commence an investigation of the bishop by the Metropolitan or an alternative appointed by the Vatican;
 - (g) Comply with all local obligations including reporting obligations to the competent civil authorities (Article 19).

Richard J. Malone was ordained a priest in 1972 and became an auxiliary bishop of the Archdiocese of Boston in 2000, two years prior to revelations by the Boston Globe of the sex abuse scandal in Boston under the leadership of Cardinal Bernard Law.²³⁰ As a result of his appointment as auxiliary bishop to Cardinal Law, Bishop Malone was impliedly aware of the issues that caused Cardinal Law's resignation and departure from the United States to residence in the Vatican.

Bishop Malone left the Archdiocese of Boston when he was appointed bishop of the Diocese of Portland, Maine, where he remained from 2004 until 2012, when he was appointed bishop of the Diocese of Buffalo. In February 2018, Michael F. Whalen, then 52 years of age, gave a news conference at which he accused a Buffalo diocesan priest of sexually abusing him when he was a teenager in the 1980s.²³¹ When the accused priest was asked to comment by the local newspaper, he admitted that he had abused multiple teenage boys during the 1970s and 1980s before entering into treatment and prior to his retirement in 2004.²³² Once the news of the sexual abuse of multiple minors by this one priest became public, multiple accusations against other priests surfaced, some of whom were still in active ministry.

One month after the announcement by Mr. Whalen, in March 2018, under pressure from priests, laypersons, and the media, Bishop Malone published a list of forty-two Buffalo priests identified by the diocese as credibly accused of the sexual abuse of a minor. This list provided to the media proved to be significantly underinclusive. Proof of this occurred when the bishop's administrative assistant revealed to the media that Bishop Malone was withholding many more names. As a whistleblower, the administrative assistant reported that there were actually 117 names on a secret list. When the list was made public, the bishop redacted the names of (1) priests who were still active in the diocese, and (2) priests whom the bishops had chosen to shield in the past.²³³ Four months later, in August 2018, the administrative assistant revealed in a television interview that she photocopied documents from the bishop's "secret black binder of accusations" and these were the names that she

²³⁰ *Buffalo's Bishop Richard Malone Resigns After Year of Scandal*, CATHOLIC NEWS AGENCY (Dec. 4, 2019), <https://www.catholicnewsagency.com/news/buffalos-bishop-richard-malone-resigns-after-year-of-scandal-67768>.

²³¹ Sharon Otterman, *Bishop's Secret List of Accused Priests Leaves Him Besieged*, N.Y. TIMES (Sept. 18, 2019), <https://www.nytimes.com/2019/09/18/nyregion/bishop-malone-uffalo.html>.

²³² Otterman, *supra* note 231.

²³³ Otterman, *supra* note 231.

released to the public.²³⁴ After supplying the names to the media she quit her job and appeared on *60 Minutes* in October 2018.²³⁵

The news of the bishop's secret file and the alleged endangerment of children precipitated a media frenzy. In response to allegations that Bishop Malone failed to adhere to civil and Church guidelines, the Vatican could have utilized its newly instituted policy of appointing a Metropolitan to investigate credible accusations of abuse or failure to report made against a bishop.²³⁶ But instead of appointing Cardinal Timothy Dolan, the Archbishop of New York and the Metropolitan for Buffalo, the Vatican appointed Bishop Nicholas DiMarzio of Brooklyn to investigate Bishop Malone. During the course of the investigation by Bishop DiMarzio there were complaints that the witnesses were told not to bring attorneys with them,²³⁷ a surprising development since state and federal authorities were currently investigating the Buffalo diocese and statements made could be used in any future criminal prosecutions.²³⁸ Admittedly, the papal document mandating the investigation by the Metropolitan does not require witnesses to be represented by civil or canonical counsel, but there is requirement that the Metropolitan, upon request, inform the person who has alleged an offense, or his or her legal representative, of the outcome of the investigation.²³⁹ So too, the *Revised Dallas Charter* stipulates that any priest or deacon accused of sexual abuse of a minor "is to be encouraged to retain the assistance of civil and canonical counsel."²⁴⁰ And likewise, the *Essential Norms* encourage the accused to have the assistance of counsel.²⁴¹

The canonical investigation, called an Apostolic Visitation, concluded in October 2019, the report was submitted to the Vatican's

²³⁴The administrative assistant found a 300-page binder detailing accusations against various priests in a cleaning cabinet. WASH. POST Ed. Board, *supra* note 227 (editorializing on the investigation of Bishop Richard J. Malone).

²³⁵WASH. POST Ed. Board, *supra* note 227

²³⁶*See Vos Estis Lux Mundi*, *supra* note 21, at Art. 8. Vatican protocol permits appointment of a person other than the Metropolitan. *See Vos Estis Lux Mundi*, *supra* note 199, at Art. 11.

²³⁷*See* Christopher Altieri, *New Questions Emerge Over Apostolic Visitation in Buffalo*, CATHOLIC HERALD (Nov. 11, 2019), <https://catholicherald.co.uk/commentandblogs/2019/11/11/new-questions-emerge-over-apostolic-visitation-in-buffalo/>.

²³⁸Altieri, *supra* note 237. In August 2019, a RICO lawsuit was filed against the diocese and the bishop, alleging that what was done by the bishop was comparable to an organized crime syndicate. *Buffalo's Bishop Malone Resigns After Year of Scandal*, CATHOLIC NEWS AGENCY (Dec. 4, 2019), <https://www.catholicnewsagency.com/news/buffalos-bishop-richard-malone-resigns-after-year-of-scandal-67768>.

²³⁹*See Vos Estis Lux Mundi*, *supra* note 21, at Art. 17 (2019).

²⁴⁰*Revised Dallas Charter*, *supra* note 155, at Art. 5.

²⁴¹*Essential Norms*, *supra* note 27, at 6.

Congregation for Bishops in November and the Pope accepted the resignation of Bishop Malone on December 4, 2019.²⁴² Undoubtedly, his early retirement resulted from Bishop Malone's knowledge of priests credibly accused of sexual abuse of minors and their retention in ministry. Specifically, Bishop Malone permitted credibly accused priests to remain in active ministry, thereby endangering children. Also, in addition, he failed to immediately notify civil authorities, he failed to notify the Vatican's Congregation for the Doctrine of the Faith, he failed to notify the communities where the credibly abused priests ministered, and he arguably interfered with civil and ecclesiastical investigations of alleged abusive conduct by clerics.²⁴³ His conduct towards those victimized by the sexual abuse is unknown.

While the Vatican document pertaining to the appointment and investigation by a Metropolitan mandates that the investigation of any bishop be completed in ninety days unless there are just reasons for an extension,²⁴⁴ the canonical investigation is independent of any civil investigation. There is no requirement that the Vatican share the information obtained in its investigation with civil authorities.²⁴⁵ The *Essential Norms* adopted by the United States Conference of Catholic Bishops in 2006 affirms the independent nature of any canonical investigation. "The 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."²⁴⁶ Nonetheless, retention by the Vatican of information obtained in its canonical investigation is inconsistent with the *Revised Dallas Charter*, which directs dioceses to cooperate with public authorities about reporting cases.²⁴⁷ Also, it is inconsistent with the *Circular Letter* received from the Congregation for the Doctrine of the Faith, dated May 3, 2011,

²⁴²David Wright & Pete Madden, *Scandal-Plagued Buffalo Bishop Resigns Following Vatican Review of His Diocese*, ABC NEWS (Dec. 4, 2019), <https://abcnews.go.com/US/buffalo-bishop-resigns-vatica-review-iocese/story?id=67489074>.

²⁴³*See Vos Estis Lux Mundi*, *supra* note 21, at Art. 1 § 1(b) ("[C]onduct carried out by the subjects referred to in article 6, consisting of actions or omissions intended to interfere with or avoid civil investigations or canonical investigations, whether administrative or penal, against a cleric or a religious regarding the delicts referred to in letter a) of this paragraph.").

²⁴⁴*Vos Estis Lux Mundi*, *supra* note 21, at Art. 14.

²⁴⁵*Vos Estis Lux Mundi*, *supra* note 21, at Art. 19. The bishop who conducted the investigation issued a statement that his team spoke with more than eighty people over a period of several weeks but gave no indication of whether or when the report would be made public. David Wright & Pete Madden, *Scandal-Plagued Buffalo Bishop Resigns Following Vatican Review of His Diocese*, ABC NEWS (Dec. 4, 2019), <https://abcnews.go.com/US/buffalo-bishop-resigns-vatica-review-iocese/story?id=67489074>.

²⁴⁶*Essential Norms*, *supra* note 27, at n.7.

²⁴⁷*Revised Dallas Charter*, *supra* note 155 at Art. 4.

which calls for making allowances for the legislation of the country where the Conference is located.²⁴⁸ And when Pope Francis ended the pontifical secret on December 6, 2019, the instructions provided that “[o]ffice confidentiality shall not prevent the fulfilment of the obligations laid down in all places by civil laws, including any reporting obligations, and the execution of enforceable requests of civil judicial authorities.”²⁴⁹

B. Civil Grand Jury Reports

In spite of Vatican pronouncements and the *Revised Dallas Charter, Essential Norms* and *Statement of Episcopal Commitment*, issued by the National Conference of Catholic Bishops, facts revealed in multiple grand jury investigations verified that secrecy and consequent child endangerment continue. The facts associated with the resignation of Bishop Richard J. Malone are not an isolated occurrence. For example, in 2015 Bishop Robert W. Finn from the Diocese of Kansas City-St. Joseph, Missouri, resigned from his post for failure to report clerical sexual abuse of a minor.²⁵⁰ Shortly thereafter, Archbishop John C. Nienstedt and an auxiliary bishop of the diocese, Lee A. Piche, resigned after state prosecutors accused the bishops of failing to act against a priest despite repeated complaints of sexual abuse of minors by the priest.²⁵¹ The New York Times cites sources reporting that, since 1978, 17 bishops have resigned or been forced from office due to accusations that they mishandled cases involving sexual abuse of minors.²⁵² The resignation of bishops results from the prosecution of priests over whom each bishop exercises supervision. Once the priest is arrested by civil authorities, the state may open an investigation into whether the priest’s bishop was aware of previous credible allegations and then permitted the priest access to additional children, thereby endangering them. For example, in 2002, when the Boston Globe exposed the horrific instances of sexual abuse of minors committed by Boston

²⁴⁸Congregation for the Doctrine of the Faith, *Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuses of Minors Perpetrated by Clerics*, § III(g), VATICAN (May 3, 2011), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_en.html (promoting more openness in addressing clerical sexual abuse of minors).

²⁴⁹Francis, *supra* note 211.

²⁵⁰Mitch Smith & Laurie Goodstein, *2 Bishops Resign in Minnesota Over Sexual Abuse Scandal*, N.Y. TIMES (June 15, 2015), <https://www.nytimes.com/2015/06/15/us/archbishop-nienstedt-and-aide-resign-in-minnesota-over-sex-abuse-scandal.html>.

²⁵¹Smith & Goodstein, *supra* note 250.

²⁵²Smith & Goodstein, *supra* note 250.

priest John J. Geoghan,²⁵³ the staff of the newspaper became aware of the priest's abuse and, as a result, the secrecy and protection of the priest by the Archdiocese of Boston. The pattern of child endangerment committed by the Boston Archdiocese resulted from routine court filings associated with the civil case.

Since 2002, an increasing number of victims have brought civil suits against their abusers, and concomitantly, diocesan officials for endangering children by permitting the priests to remain in ministry. At the same time, multiple state prosecutors sought grand jury subpoenas to gather diocesan records pertaining to the reassignment of priests, possibly after credible allegations of sexual abuse of minors. Like the prosecution of Monsignor William Lynn in Philadelphia, state prosecutors were seeking evidence to prosecute church officials for endangering the welfare of a child.²⁵⁴

For example, in 2002, the New Hampshire Attorney General, reacting to news reports of the abuse scandal in Boston, requested personnel records from the Diocese of Manchester.²⁵⁵ Initially, the Manchester Diocese provided the state's Attorney General with a redacted report, but after a court order was obtained, the Manchester Diocese then provided unredacted records. Investigators confirmed that "in multiple cases the Diocese knew that a particular priest was sexually assaulting minors, the Diocese took inadequate or no action to protect these children within the parish, and that the priest subsequently committed additional acts of sexual abuse against children that the priest had contact with through the church."²⁵⁶ Following the scandal in Boston, there were similar findings in other dioceses.

By 2002, the United States Conference of Catholic Bishops enacted the earliest version of the *Dallas Charter*, which the Vatican approved. Increasingly, some dioceses began cooperating with state authorities to "establish a procedure to turn over 'pertinent information to public authorities regarding past allegations of child abuse.'"²⁵⁷ The Maine Attorney General concluded an investigation of the Diocese of Portland, Maine, in 2004 and found "no criminal liability

²⁵³ See BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 11–30 (2002).

²⁵⁴ See, e.g., N.H. REV. STAT. ANN. § 639:3 (2020).

²⁵⁵ Office of the Att'y Gen. of N.H., *Report of the Investigation of the Diocese of Manchester* (Mar. 3, 2003), <https://www.bishop-accountability.org/resources/resource-files/reports/ManchesterReport02.pdf>. [hereinafter "*New Hampshire Report*"].

²⁵⁶ *New Hampshire Report*, *supra* note 255.

²⁵⁷ Office of the Att'y Gen. of Me., *A Report by the Attorney General on the Allegations of Sexual Abuse of Children by Priests and Other Clergy Members Associated with the Roman Catholic Church in Maine* (Feb. 24, 2004), <http://www.bishop-accountability.org/resources/resource-files/reports/MaineAG.pdf>. [hereinafter "*Maine Report*"].

on the part of the Bishop, the Diocese or its administrative staff.”²⁵⁸ But in its controversial report of over 1300 pages, the 2018 Commonwealth of Pennsylvania, Office of the Attorney General (“Pennsylvania Report”), documents a systematic failure of the institutional Church.²⁵⁹ Specifically, the Pennsylvania Report identified seven elements that were common to all of the Pennsylvania dioceses it investigated:

- (1) Use of euphemisms: . . . Violent criminal sexual acts, for example, were often described only as “inappropriate” contact or “boundary issues . . .”
- (2) Deficient or biased diocesan investigation: Investigations conducted by untrained clergy or teachers, given authority to make credibility determinations about fellow clergy members. Use of untrained support personnel for victims services.
- (3) Treatment provider bias: Treatment centers under Church auspices regularly relied upon the “self -reports” of the offenders, who typically downplayed or denied their criminal conduct. Failure to provide contrary information supplied by victims. Reliance on clinical “diagnosis” rather than actual conduct. Misallocation of the burden of proof: absent a definitive diagnosis, child abusers were often simply returned to ministry.
- (4) Lack of public disclosure: Failure to disclose criminal sexual conduct to parishioners—information that the community needed to protect children. Use of terms such as “retired” or “reassigned” that disarmed parents who might otherwise have looked for signs of abuse.
- (5) Financial support: Continuing to fund abusive priests, providing them with housing, transportation, benefits, and stipends—and leaving abusers with the resources to locate, groom and assault more children.
- (6) Transfer rather than removal: Regular, systemic, and institutionalized practice of reassigning a priest to a new location—rather than removing him from ministry—after complaints of child sexual abuse . . .
- (7) Insufficient reports to law enforcement: Refusal to make any report to law enforcement, or significantly delaying reports, or providing stripped-down reports. These minimal reports often lacked sufficient specificity to relay the gravity of the crime, the scope of the conduct, or relevant dates and locations.

²⁵⁸ *Main Report, supra* note 257.

²⁵⁹ Office of the Att’y Gen., Commw. of Pa., *40th Statewide Investigating Grand Jury REPORT 1 (Redacted)*, https://www.attorneygeneral.gov/wp-content/uploads/2018/08/A-Report-of-the-Fortieth-Statewide-Investigating-Grand-Jury-Cleland-Redactions-8-12-08_Redacted.pdf [hereinafter “*Pennsylvania Report*”]. The *Pennsylvania Report* investigated six of the eight dioceses in Pennsylvania.

Even confessions or corroborating pieces of evidence were often withheld.²⁶⁰

The Pennsylvania Report is based on information that concerned events occurring in the early 2000s and before.²⁶¹ The information provided is very graphic, purposely so. The Pennsylvania Report bluntly writes, “We are going to name their names, and describe what they did—both the sex offenders and those who concealed them. We are going to shine a light on their conduct, because that is what the victims deserve.”²⁶² In its zeal, the Pennsylvania Report named people who were not indicted and not given an opportunity to participate in a pre-deprivation hearing, “including the right to cross-examine Commonwealth witnesses, present witnesses of their own, and present evidence.”²⁶³

After the Pennsylvania Report’s release, numerous challenges were made from persons named in the Report. They complained that such a public document “discloses findings of criminal and/or morally reprehensible conduct . . . [and] are not supported by a preponderance of the evidence.”²⁶⁴ Such accusations “may be remembered long after equally informal denials or objections forthcoming from its targets are forgotten.”²⁶⁵ The challengers asserted claims of due process and fair play and the Supreme Court of Pennsylvania agreed, eventually holding that “some technique must be applied to temporarily mask all content which might give rise to an association between an appellant and discrete material in the report.”²⁶⁶ Furthermore, under the Declaration of Rights set forth in the Pennsylvania Constitution, “individuals enjoy the fundamental right to the protection of their reputations.”²⁶⁷ Accordingly, the “Commonwealth must employ all reasonably available measures to prevent the identification of the petitioner-appellants via either specific or contextual references in the report.”²⁶⁸

The Supreme Court of Pennsylvania ordered the Commonwealth to prepare a redacted version of its Report, which “specifically removes specific and contextual references to any petitioner who

²⁶⁰ See *Pennsylvania Report*, *supra* note 259, at 297–99.

²⁶¹ *Pennsylvania Report*, *supra* note 259, at 6.

²⁶² *Pennsylvania Report*, *supra* note 259, at 2.

²⁶³ *In re Fortieth Statewide Investigating Grand Jury*, 647 Pa. 489, 190 A.3d 560, 565 (2018), subsequent determination, 649 Pa. 574, 197 A.3d 712 (2018).

²⁶⁴ *In re Fortieth*, 190 A.3d at 562.

²⁶⁵ *In re Fortieth*, 190 A.3d at 571 (citing *In re Grand Jury of Hennepin County Impaneled on November 24, 1975*, 271 N.W.2d 817, 819 (Minn. 1978)).

²⁶⁶ *In re Fortieth*, 190 A.3d at 577.

²⁶⁷ *In re Fortieth*, 190 A.3d at 578.

²⁶⁸ *In re Fortieth*, 190 A.3d at 578.

has an appellate challenge pending.”²⁶⁹ And in December 2018, the Supreme Court of Pennsylvania held that the only remedy that will protect the reputations of the individuals named in the report is the permanent redaction of their names and identifying information.²⁷⁰ The court opined that, “While we understand and empathize with [other] perspectives, constitutional rights are of the highest order, and even alleged sexual abusers, or those abetting them, are guaranteed by our Commonwealth’s Constitution the right of due process.”²⁷¹

When the Pennsylvania Report was released in 2018 it acknowledged that “much has changed in the last fifteen years.”²⁷² And yet, as is illustrated by the Apostolic Visitation to the Diocese of Buffalo and the resignation of Bishop Malone, endangerment of children persists. Specifically, secret files exist, clerics with credible allegations of child sexual abuse are permitted to remain in ministry, and procedures established by the USCCB and the Vatican are being ignored. In addition to Bishop Malone, there may be other instances of failure to protect minors—the grand jury investigation in Illinois is illustrative.

In August 2018, the Illinois Attorney General opened an investigation into the six dioceses in Illinois.²⁷³ In September 2018, letters were sent to each of the state’s diocesan bishops requesting information and documents related to clergy sexual abuse within each diocese. The bishops provided copies of each diocesan policy for responding to and then investigating any credible allegations. Specifically, each diocese provided lists of clergy credibly accused of sexually abusing a minor, letters from the diocese to law enforcement officials related to each allegation, and audits of diocesan records pertaining to clergy sexual abuse. In a reversal of past practices, each diocese provided the Illinois Attorney General access to all clergy files. Based on this information, in December 2019, the Illinois Attorney General released its preliminary findings.

First, the Attorney General noted that the *Revised Dallas Charter* policies provide each diocese with “wide latitude in setting its own procedures to respond to sexual abuse allegations against clergy.”²⁷⁴ But this raised the concern that survivors may be confused when seeking to report allegations because some policies are too complex and some are too general.

²⁶⁹ *In re Fortieth*, 190 A.3d at 578.

²⁷⁰ *In re Fortieth Statewide Investigating Grand Jury*, 649 Pa. 574, 197 A.3d 712 (2018).

²⁷¹ *In re Fortieth*, 197 A.3d at 724.

²⁷² *Pennsylvania Report*, *supra* note 259, at 2.

²⁷³ See *Illinois Att’y Gen.*, *supra* note 62.

²⁷⁴ *Illinois Att’y Gen.*, *supra* note 62, at 4.

Second, the investigation revealed that “inconsistent policies, procedures, and practices have led to inconsistent handling of child sex abuse investigations . . . yielding, at best, inconsistent results and, at worst, inadequate investigations that fail to satisfy . . . the Charter.”²⁷⁵

Third, a review of the material provided by the dioceses prompted the dioceses to acknowledge that they “are aware of forty-five previously undisclosed clergy who they deemed to be ‘credibly’ accused of sexually abusing minors.”²⁷⁶ But the dioceses provided “no adequate justification for failing to disclose these names before the [Attorney General’s] investigation.”²⁷⁷ And overall, records reveal that the dioceses received allegations related to sexual abuse for approximately 690 clerics, but identified only 185 clerics as having been credibly accused of sexual abuse.²⁷⁸ The inference taken from the Preliminary Report issued by the Illinois Attorney General is that the dioceses are continuing to endanger children. Admittedly however, *Revised Dallas Charter* and Vatican policies stipulate that an alleged abuser is presumed innocent until any allegation is found to be credible.²⁷⁹ Likewise, the Pennsylvania Supreme Court commented that “an individual’s right to his or her personal reputation was regarded by the framers of our organic charter as a fundamental human right—one of the ‘inherent rights of mankind.’”²⁸⁰

If the attorney general were satisfied with the investigative process employed by the dioceses, there may be a reconciliation. But other than reporting each and every allegation to civil authorities, any in-house diocesan investigation is inherently suspect. Any conflict between failure to adequately investigate allegations properly and safeguarding the due process rights of an accused is best accom-

²⁷⁵ *Illinois Att’y Gen.*, *supra* note 62, at 5.

²⁷⁶ *Illinois Att’y Gen.*, *supra* note 62, at 5. “Each diocese has its own process for determining whether an allegation is ‘credible’ or ‘substantiated.’ The [Attorney General] is using the terms ‘credible’ and ‘substantiated’ to describe allegations because these are terms the Illinois Dioceses have used. While each diocese has a different process, the Illinois Dioceses all require that an allegation be deemed ‘credible’ or ‘substantiated’ before publishing the name of an accused clergy.” *Illinois Att’y Gen.*, *supra* note 62, at 5 n.14.

²⁷⁷ *Illinois Att’y Gen.*, *supra* note 62, at 5.

²⁷⁸ *Illinois Att’y Gen.*, *supra* note 62, at 5.

²⁷⁹ See *Revised Dallas Charter*, *supra* note 155, at Art. 5: “A priest or deacon who is accused of sexual abuse of a minor is to be accorded the presumption of innocence during the investigation of the allegation and all appropriate steps are to be taken to protect his reputation.” See also *Vos Estis Lux Mundi*, *supra* note 21, at Art. 5 § 2: “The good name and the privacy of the persons involved, as well as the confidentiality of their personal data, shall be protected;” Art. 13 § 7: “The person under investigation enjoys the presumption of innocence.”

²⁸⁰ *In re Fortieth Statewide Investigating Grand Jury*, 649 Pa. 574, 197 A.3d 712, 715 (2018).

modated in the *Revised Dallas Charter's* direction that dioceses are to report allegations of sexual abuse of a minor to public authorities and thus comply with all applicable civil laws with respect to reporting of allegations.²⁸¹ If civil reporting requirements are met, then the state investigation may complement any ecclesiastical investigation that may be warranted.

The Illinois Attorney General concluded that dioceses “often disregarded survivors’ allegations by either not investigating the allegations or finding reasons not to substantiate the allegations.”²⁸² Documents received from the dioceses reveal that investigation into an allegation did not occur if the accused cleric was deceased, resigned from ministry, or was an order priest, as opposed to a diocesan priest.²⁸³ In addition, a review of the material in diocesan files revealed that dioceses often failed to substantiate an allegation when it came from only one survivor, even when dioceses had reason to believe that survivor had reasons to investigate further. “The dioceses also often found reasons to discredit survivors’ stories of abuse by focusing on the survivors’ personal lives.”²⁸⁴

Fourth, the *Revised Dallas Charter* mandates transparency on the part of the Church in addressing sexual abuse of minors by clergy. Procedures for making complaints are to be readily available in printed and other forms of media;²⁸⁵ there are to be clear and well publicized standards of ministerial behavior for any diocesan personnel in contact with minors;²⁸⁶ and dioceses are to be transparent in communicating with the public about sexual abuse of minors by clergy.²⁸⁷ But the *Revised Dallas Charter* does not require the diocese to publish the names of clergy credibly alleged to have sexually abused a child; neither the *Revised Dallas Charter* nor the applicable Vatican documents require the dioceses to publish the names of credibly accused priests. The Attorney General’s investigation concluded that the names of clergy who have committed a “substantiated act” of sexual abuse of a minor should be published,

²⁸¹ *Revised Dallas Charter*, *supra* note 154, at Art. 4; *see also Vos Estis Lux Mundi*, *supra* note 21, at Art 19: “These norms apply without prejudice to the rights and obligations established in each place by state laws, particularly those concerning any reporting obligations to the competent civil authorities.”

²⁸² *Illinois Att’y Gen.*, *supra* note 62, at 5.

²⁸³ *Illinois Att’y Gen.*, *supra* note 62, at 5. “Additional reasons for not investigating include: a lawsuit was filed; the survivor wanted to remain anonymous; a criminal investigation was opened; and the clergy left the country.” *Illinois Att’y Gen.*, *supra* note 62, at 6.

²⁸⁴ *Illinois Att’y Gen.*, *supra* note 62, at 6.

²⁸⁵ *Revised Dallas Charter*, *supra* note 155, at Art. 2.

²⁸⁶ *Revised Dallas Charter*, *supra* note 155, at Art. 6.

²⁸⁷ *Revised Dallas Charter*, *supra* note 155, at Art. 7.

citing Chicago and Joliet as two dioceses that have voluntarily published complete lists of names. The investigation concludes that publishing the names holds clergy accountable and promotes healing for survivors.²⁸⁸

While the Church has not adopted a uniform response to publishing the names of credibly accused clergy, it is certainly worthy of consideration within diocesan review boards serving in a consultative role to the bishop.²⁸⁹ Also, the issue should be reviewed and considered by the Committee on the Protection of Children and Young People, which is a standing committee of the USCCB.²⁹⁰ There are many values, rights, and perspectives to consider and publishing the names of clerics and lay personnel, as well as the long-neglected rights of the survivors, demand more adequate consideration. But Church policies and federal and state constitutions emphasize the fundamental due process rights enjoyed by any person, especially by those unable to respond to allegations occurring long ago.

Fifth, the Illinois Attorney General recommended that the Catholic Church establish policies that would hold bishops accountable for concealing sexual abuse of minors by themselves or by clergy over which they have supervisory authority. “The [Attorney General] found multiple examples where the Illinois Dioceses failed to notify law enforcement of allegations they received pertaining to clergy sexual abuse of minors.”²⁹¹ This recommendation, occurring in 2018, may be preempted by a decision made by the Vatican in 2019. Currently the Vatican has a procedure in place for investigating a bishop for the act of sexually abusing a minor or for actions or omissions intended to interfere with or avoid civil investigations against a cleric.²⁹² The Vatican document, *Vos Estis Lux Mundi*, and then a subsequent pronouncement that removed the option of what is termed the “papal secret,” addresses, at least officially, the goals of transparency and accountability of clerics and bishops both.

And sixth, when reviewing documents submitted by the dioceses, the Illinois Attorney General concluded that the investigatory processes employed by the dioceses “often do not realize the [*Revised Dallas*] Charter’s goal to prioritize survivor healing,”²⁹³ particularly when victim interests conflict with the interests of the

²⁸⁸ *Illinois Att’y Gen.*, *supra* note 62, at 5.

²⁸⁹ *Revised Dallas Charter*, *supra* note 155, at Art. 2.

²⁹⁰ *Revised Dallas Charter*, *supra* note 155, at Art. 8.

²⁹¹ *Illinois Att’y Gen.*, *supra* note 62, at 6.

²⁹² *Vos Estis Lux Mundi*, *supra* note 21, at Art. 1. For discussion of *Vos Estis Lux Mundi* see *supra* notes 199–204 and accompanying text.

²⁹³ *Illinois Att’y Gen.*, *supra* note 62, at 8.

dioceses. Specifically, persons making allegations of abusive conduct “were not provided updates on the status of the investigation or informed when the diocese did determine that allegations against the accused had been substantiated.”²⁹⁴ In addition, the persons alleging the abuse often found that his or her personal life was used to discredit the allegation. Overall, and of importance, the Illinois Attorney General observed that there is an inherent tension between the goal of the dioceses to provide support to survivors and the fact-finding process related to confirming allegations of sexual abuse.²⁹⁵ “Given the important roles clergy have within dioceses, the potential financial impact of deeming an allegation ‘credible’, and the negative publicity related to a clergy member being ‘credibly’ accused of sexually abusing a minor, there is undoubtedly a conflict between the Catholic Church’s interests and the survivor’s interests.”²⁹⁶

Overall, the civil grand jury reports establish a pattern of child endangerment. Admittedly, much has improved since the horrific events reported in Boston in 2002 and the prosecution of Monsignor Lynn in Philadelphia afterwards. But the Pennsylvania Report and the Illinois Report question the impact of policies promulgated by the USCCB and the Vatican pertaining to the endangerment of children. The situation continues to evolve, precipitated in part by abuse hotlines and civil changes in applicable statutes of limitations.

C. Statutes of Limitations

Consistently, state grand juries and commentators on the sexual abuse of minors by clergy recommend that the criminal and civil statutes of limitations be lifted, thereby permitting prosecution of alleged abusers long after the abuse occurred.²⁹⁷ Observers are aware that it often takes considerable time for a minor to disclose the details of sexual abuse and, as a result, “between eighty and ninety percent of the clergy abuse claims on their face appear barred by statutes of limitations.”²⁹⁸ So too, by permitting civil and criminal actions against alleged perpetrators of abuse, authorities are able to investigate conduct on the part of the abuser’s supervisor that may have endangered children.

²⁹⁴ *Illinois Att’y Gen.*, *supra* note 62, at 8.

²⁹⁵ *Illinois Att’y Gen.*, *supra* note 62, at 8.

²⁹⁶ *Illinois Att’y Gen.*, *supra* note 62, at 8.

²⁹⁷ *See, e.g., Philadelphia Grand Jury Report*, *supra* note 25, at 15 (recommending abolition of the criminal statute of limitations pertaining to criminal prosecution).

²⁹⁸ Mayo Moran, *Carinal Sins: How the Catholic Church Sexual Abuse Crisis Changed Private Law*, 21 *GEO. J. GENDER & L.* 95, 115–16 (2019) (citing TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE* 60 (2008)).

1. **Criminal Statutes**

A federal or state criminal statute of limitations is meant to “limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions.”²⁹⁹ Hence, the crime itself must be enacted and then there is a time limit placed on prosecutors seeking to indict a person who allegedly violated that criminal statute. When the legislature establishes any time limitation, it is meant to “protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time.”³⁰⁰ There is an innate fairness mirrored in due process that envisions prosecution when facts are identifiable and the reality that after a certain period of time, no quantum of evidence is sufficient to convict.³⁰¹

But the nature of sexual abuse of minors makes it uncondusive to speedy prosecution. Often, the abuse occurs when the victim is very young, insecure, and afraid; there are issues of a child’s repressed memory.³⁰² Plus there are protective mechanisms that permit children to accommodate the abuse and isolate themselves from the painful realities of victimization,³⁰³ and often the perpetrator is an authority figure thwarting any attempt to report abuse. But child sexual abuse is often extremely graphic, often one abuser committing heinous acts against multiple children, and the horror warrants repeated media attention. Outraged at the offenses detailed by the media, citizens demand that legislatures punish both the offender and any persons responsible for permitting the offense to occur. As a result, following media reports of abuse in places such as Boston,

²⁹⁹ *Toussie v. U.S.*, 397 U.S. 112, 114, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970); see also O’Brien, *supra* note 40, at 441–43.

³⁰⁰ *Toussie*, 397 U.S. at 115.

³⁰¹ See *U.S. v. Marion*, 404 U.S. 307, 323, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); see also *Stogner v. California*, 539 U.S. 607, 615, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003) (“A statute of limitations reflects a legislative judgement that, after a certain time, no quantum of evidence is sufficient to convict.”).

³⁰² See, e.g., *State v. Burke ex rel. County of La Paz*, 2012 WL 1470103 (Ariz. Ct. App. Div. 1 2012) (discussing the admissibility of false memory syndrome); see also Joshua Lushnat, *Sexual Abuse Memory Repression: The Questionable Injustice of Demeyer*, 13 J. L. SOCIETY 529 (2012); Elizabeth A. Wilson, *Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA WOMEN’S L. J. 145 (2003).

³⁰³ See Roland C. Summit, *The Child Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983); see also *People v. Spicola*, 16 N.Y.3d 441, 922 N.Y.S.2d 846, 947 N.E.2d 620 (2011) (holding that child sexual abuse accommodation syndrome is admissible in prosecution of an alleged abuser). But see *Sanderson v. Com.*, 291 S.W.3d 610 (Ky. 2009), as modified on denial of reh’g, (Oct. 1, 2009) (holding that testimony relating to child abuse accommodation syndrome was reversible error).

Pennsylvania, or Buffalo, many states extended existing criminal statutes of limitations, and some abolished them altogether.

For example, Connecticut eliminated its criminal statute of limitations for any felony or misdemeanor offense involving sexual abuse, sexual exploitation, or sexual assault of a minor, to include risk of injury involving intimate conduct with a victim under the age of 16.³⁰⁴ In addition, the Connecticut legislature extended the criminal statute of limitations for sexual abuse, sexual exploitation or sexual assault of victims age eighteen, nineteen, or twenty to the age of fifty-one; sexual assault of a victim age twenty-one or older was extended to twenty years from the offense felonies, and ten years from the offense for other felonies and ten years from the offense for misdemeanors.³⁰⁵ Other states have gone further, abolishing their criminal statute of limitations altogether, ostensibly permitting prosecution of an alleged perpetrator until that person's death.³⁰⁶ Consistently, legislative changes to a state's statute of limitations resulted from the incendiary allegations of sexual abuse of minors committed by Roman Catholic clerics.³⁰⁷

In its zeal to provide alleged abuse victims with closure through criminal prosecution of alleged perpetrators, the state confronted the Ex Post Facto Clause of the U.S. Constitution. That is, may a state initiate criminal prosecution after expiration of the time period set forth in any previously applicable statute of limitations?³⁰⁸ The Constitution's Ex Post Facto Clause³⁰⁹ forbids time-barred prosecutions for criminal offenses. What this means is that, in the context of criminal prosecution of alleged offenders, states that have extended or abolished an *unexpired* statute of limitations may do so "unless the statute of limitations that was in effect when a crime was com-

³⁰⁴S. 3, 2019 Gen. Assemb., Reg. Sess. (Conn. 2019).

³⁰⁵S. 3, 2019 Gen. Assemb., Reg. Sess. (Conn. 2019).

³⁰⁶See, e.g., Montana: H.R. 640, 66th Leg., Reg. Sess. (Mont. 2019); Nebraska: Leg. B. 519, 106th Leg., 1st Sess. (Neb. 2019); Nevada: Assemb. 142, 2019 Leg., 80th Sess. (Nev. 2019); Pennsylvania: H.R. 962, 2019 Leg., Gen. Sess. (Pa. 2019) (eliminating the criminal statute of limitations for some sex abuse crimes and extending it for others); Vermont: H.R. 330, 2019 Leg., Reg. Sess. (Vt. 2019); Washington: S. 5649, 66th Leg., Reg. Sess. (Wash. 2019) (eliminating the statute of limitations for felony rape, sexual misconduct, child molestation, and sexual exploitation of a minor and extending the statute to 20 years for the offense for rape and indecent liberties regardless of the victim's age); Washington D.C.: Council, Act 22-593, 2019 Council (D.C. 2019).

³⁰⁷Mayo Moran, *Carinal Sins: How the Catholic Church Sexual Abuse Crisis Changed Private Law*, 21 GEO. J. GENDER & L. 95, 118–20 (2019).

³⁰⁸*Stogner v. California*, 539 U.S. 607, 609, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003).

³⁰⁹U.S. CONST. art. I, § 10, cl.1.

mitted has expired with respect to that crime.”³¹⁰ That is, if the existing statute of limitations applicable to an existing crime has expired, a newly enacted statute *may not* then make the same crime actionable again. But if the original statutory period has not expired, then the state may extend that period of prosecution or abolish the statute of limitations altogether.

This point is illustrated in a 2006 decision of the Connecticut Supreme Court, holding that “an amendment to a criminal statute of limitations is presumptively applicable to crimes *not previously barred* by the original limitations period.”³¹¹ Thus, any statute enacted after the original statutory period has elapsed cannot apply to an offense applicable to the old statute. “Such a statute . . . cannot operate to revive offenses that were barred at the time of its enactment, since that would make the statute *ex post facto*.”³¹² By implication, retroactive extension of *unexpired* statutes of limitations would be constitutional.³¹³

In 2003 the Supreme Court of the United States addressed the issue of amended criminal statutes of limitations. The facts involved California’s enactment of a new criminal statute of limitations governing sex-related child abuse crimes.³¹⁴ As the Court summarized, the new statute permitted prosecution of specified crimes *after the existing limitation period expired*, thereby reviving any cause of action barred by prior statutes of limitations.³¹⁵ The Court, in a 5 to 4 majority opinion, ruled the California statute unconstitutional because, “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.”³¹⁶

Drawing upon judicial tradition and legal commentators, the Court’s majority concludes that “numerous legislators, courts, and commentators have long believed it well settled that the Ex Post

³¹⁰ *State v. Skakel*, 276 Conn. 633, 888 A.2d 985, 1022 (2006) (italics added).

³¹¹ *Skakel*, 888 A.2d at 1024.

³¹² 21 AM. JUR. 2D 349–50, *Criminal Law* § 294 (1998). An *ex post facto* law is when a state’s law materially alters the situation of a party to his or her disadvantage. *Collins v. Youngblood*, 497 U.S. 37, 51, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

³¹³ *Stogner v. California*, 539 U.S. 607, 650, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003).

³¹⁴ *Stogner*, 539 U.S. at 609; CAL. PENAL CODE § 803(g)(3)(A) (West 2003).

³¹⁵ *Stogner*, 539 U.S. at 609.

³¹⁶ *Stogner*, 539 U.S. at 616.

Facto Clause forbids resurrection of a time-barred prosecution.³¹⁷ The Court agreed that a state's interest in prosecuting child abuse cases is an important one, but when the state's original statute of limitations expires, the state, in effect, grants the accused "amnesty" and it would be "unfair" to withdraw it at the will of a state legislature when that legislature decides to enact a new statute applicable to the original offense.³¹⁸ In spite of a formidable dissent, current interpretations of the Ex Post Facto Clause prohibit enacting extensions to expired criminal statutes of limitations—but debate remains.³¹⁹

Four justices dissented in the California decision, arguing that any retroactive extension of an expired criminal statute of limitations does not alter the definition of the crime, but only revives prosecution of that crime.³²⁰ Specifically, the dissent argues, if the Ex Post Facto Clause does not forbid extending *unexpired* limitations periods the Clause does not forbid applying a new limitations period to *expired* statutes.³²¹ "Both extensions signal, with equal force, the policy to prosecute offenders."³²² And there is no conflict with the Ex Post Facto Clause because a "law which does not alter the definition of the crime but only revives prosecution does not make the crime "greater than it was, when committed."³²³

The dissent argues that the statute's enactment demonstrates the state's commitment to punishing sexual abuse of minors, addressing "the continuing suffering endured by the victims of childhood abuse."³²⁴ And finally, the dissent argues that if the state is not barred by an expired statute of limitations applied to civil wrongs,³²⁵ why should criminal wrongs be treated differently?³²⁶

But civil wrongs are treated differently; civil statutes are not addressed by the Ex Post Facto Clause. But, like criminal statutes,

³¹⁷ *Stogner*, 539 U.S. at 616.

³¹⁸ *Stogner*, 539 U.S. at 632.

³¹⁹ See, e.g., Michael T. Flannery, *The "Uncanny Valley" and the Verisimilitude of Sexual Offenders—Part I: An "Ethorobotic" Perspective*, 6 TEX. A&M L. REV. 541 (2019); Paul D. Reingold & Kimberly Thomas, *Wrong Turn on the Ex Post Facto Clause*, 106 CAL. L. REV. 593 (2018).

³²⁰ *Stogner*, 539 U.S. at 633.

³²¹ *Stogner*, 539 U.S. at 650.

³²² *Stogner*, 539 U.S. at 650.

³²³ *Stogner*, 539 U.S. at 633.

³²⁴ *Stogner*, 539 U.S. at 649.

³²⁵ See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229, 115 S. Ct. 1447, 131 L. Ed. 2d 328, Fed. Sec. L. Rep. (CCH) P 98,681 (1995).

³²⁶ *Stogner*, 539 U.S. at 651.

states have extended their time limitations to address the sexual abuse of minors by clerics.

2. Civil Statutes

Unlike criminal statutes of limitations, expired and unexpired civil statutes may be extended or revived, and many states have done so in response to the media reports of the sexual abuse of minors. The Ex Post Facto Clause in Article I, § 10 of the U.S. Constitution has been construed as applicable only to criminal (penal) legislation,³²⁷ permitting this action.

For example, Connecticut recently extended the state's civil statute of limitations for alleged victims under the age of twenty-one to age twenty-one plus thirty years.³²⁸ Whether a state may amend its civil statute of limitations was addressed in a Connecticut decision involving a plaintiff who alleged he was abused by a Roman Catholic priest from 1981 through 1983. Plaintiff sued the Diocese of Hartford, alleging that the diocese acted negligently and recklessly when it assigned the priest to be the director of the parish elementary school attended by thirteen-year-old plaintiff.³²⁹ The priest, an alcoholic, admitted he committed acts of child molestation, but Church authorities attributed the acts to his drinking and disregarded his past conduct when assigning him. This reassignment gave the priest access to the plaintiff and the abuse that occurred.

Because the state amended its civil statute of limitation the cause of action proceeded to a trial court jury, who found the Diocese of Hartford guilty of negligence and recklessness when it assigned the priest to the elementary school. Specifically, the plaintiff:

had proven by a preponderance of the evidence that the defendant's conduct was a proximate cause of the plaintiff's injuries insofar as it had negligently and recklessly failed to: (1) supervise [the priest] adequately in "his interaction and conduct toward minors with whom he would have contact"; (2) "immediately remove . . . [the priest] from any position within the [Diocese] when it knew or had reason to know that he was a danger to minors"; and (3) "warn or advise its congregations, parishioners and employees, which would have included the plaintiff's mother and father, of the threat which . . . [the priest] posed to minor children, including the plaintiff."

Following the jury verdict, the diocese appealed, arguing that the amended civil statute of limitations that revived the civil claims of the plaintiff, violated the defendant's substantive due process rights

³²⁷ See *Landgraf v. USI Film Products*, 511 U.S. 244, 266, 114 S. Ct. 1522, 128 L. Ed. 2d 229 (1994) (citing *Calder v. Bull*, 3 U.S. 386, 390–91, 3 Dall. 386, 1 L. Ed. 648, 1798 WL 587 (1798)).

³²⁸ S. 3, 2019 Gen. Assemb., Reg. Sess. (Conn. 2019).

³²⁹ *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 119 A.3d 462, 470 (2015).

under the Connecticut constitution.³³⁰ But the Connecticut Supreme Court held that the state statute reviving the civil cause of action “does not violate a defendant’s substantive due process rights under the Connecticut constitution because it is a rational response by the legislature to the exceptional circumstances and potential for injustice faced by adults who fell victim to sexual abuse as a child.”³³¹ Indeed, the court concludes that the state statute is within the parameters of the “constitutional permissibility of ‘manifestly just’ retroactive legislation affecting existing legal rights and obligations.”³³²

State courts have relied upon U.S. Supreme Court opinion pertaining to substantive due process. For instance, the Connecticut Supreme Court ruled that a defendant does not have a vested property right under the Due Process Clause of the Fourteenth Amendment prohibiting a state from reviving an otherwise time-barred cause of action.³³³ And consistent with federal law, the state court held that the statute reviving the statute of limitations for the civil cause of action “does not create a substantive change in the law that would preclude its retroactive application.”³³⁴

In addition to the State of Connecticut, other states have extended their civil statute of limitations for pursuing claims based on sexual offenses against minors.³³⁵ Many states also apply a “discovery rule” permitting the limitation period to commence not when the act of

³³⁰ *Hartford*, 119 A.3d at 471 (citing CONN. GEN. STAT. § 52-577d (2015): “Notwithstanding the provisions of section 52-577, no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person later than thirty years from the date such person attains the age of majority.”).

³³¹ *Hartford*, 119 A.3d at 496.

³³² *Hartford*, 119 A.3d at 508.

³³³ *Hartford*, 119 A.3d at 500 (citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945); *Campbell v. Holt*, 115 U.S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885)).

³³⁴ *Hartford*, 119 A.3d at 504.

³³⁵ See, e.g., Alabama: S. 11, 2019 Leg., Prior Sess. Leg. (Ala. 2019) (extending to age nineteen plus six years); Arizona: H.R. 2466, 54th Leg., 1st Reg. Sess. (Ariz. 2019) (extending to age thirty); California: Assemb. 218, 2019 Leg., Reg. Sess. (Cal. 2019) (extending to eighteen plus twenty-two years); Illinois: S. 1868, 101st Leg., Reg. Sess. (Ill. 2019) (tolling the civil statute during the time the victim is subject to fraudulent concealment); Montana: H.R. 640, 66th Leg., Reg. Sess. (Mont. 2019) (extending to earlier of age twenty-seven or three years after discovery that injury was caused by childhood sexual abuse); New Jersey: S. 477, 218th Leg., Prior Sess. Leg. (N.J. 2019) (extending to age fifty-five or seven years after discovery, whichever is later); New York: S. 2440, 2019 Leg., Reg. Sess. (N.Y. 2019) (extending to age fifty-five); North Carolina: S. 199, 2019 Leg., Reg. Sess. (N.C. 2019) (extending to age twenty-eight); Pennsylvania: H.R. 962, 2019 Leg., Gen. Sess. (Pa. 2019) (extending to age fifty-five); Rhode Island: H.R. 5171, 2019 Leg., Jan. Sess. (R.I. 2019) (extending to eighteen plus thirty-five years); Tennessee: S. 368, 111th Leg., Reg. Sess. (Tenn. 2019) (extending to age thirty-

abuse took place, but rather when the victim discovers his or her abuse.³³⁶ An increasing number of states have established “revival windows” allowing plaintiffs to bring civil suits within the time period established by the newly revived window of opportunity.³³⁷

D. Revival Windows

In 2002, during the height of the Boston child sexual abuse of children revelations, the California legislature unanimously enacted a civil statute that provided a one-year revival window during which any person could file a civil claim for damages based on sexual abuse no matter when the abuse may have occurred.³³⁸ The state legislature had two goals when it enacted the statute, to permit civil actions to be filed against those persons who performed the abuse, and to identify and permit civil actions against those who, with knowledge, allowed the sexual abuse of minors to occur. In addition, the legislation sought to encourage plaintiffs to file civil suits against clerics and lay persons who allegedly committed abuse, but such litigation would also identify church officials who possessed credible knowledge of the abuse but chose to keep silent. Fortified with knowledge that they were not alone in suffering abuse, plus the promise of closure, many plaintiffs brought civil actions against alleged perpetrators.

Similar to what occurred during the Boston revelations, as a result of Pennsylvania’s *Fortieth Statewide Investigating Grand Jury Report* released in 2018, additional states opened “revival windows” similar

three); Texas: H.R. 3809, 86th Leg., Reg. Sess. (Tex. 2019) (extending to age eighteen plus thirty years); Vermont: H.R. 330, 2019 Leg., Reg. Sess. (Vt. 2019) (eliminating the civil statute of limitations and revived all expired claims against perpetrators and negligent institutions); Washington D.C.: Council, Act 22-311, 2019 Council (D.C. 2019) (extending to age forty).

³³⁶For current data, see *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, NAT’L CONF. OF STATE LEGISLATURES (May 30, 2017), <https://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexual.aspx>; *Statutes of Limitation for Civil Action for Offenses Against Children Compilation*, NAT’L DIST. ATT’Y ASS’N (May 2013), <https://ndaa.org/wp-content/uploads/Statutes-of-Limitations-for-Civil-Actions-for-Offenses-Against-Children-2013-Update.pdf>; *Statutes of Limitations*, RAINN, <https://www.rainn.org/statutes-limitations> (last visited Mar. 3, 2020).

³³⁷Associated Press, *15 States Make It Easier to Sue Church for Sex Abuse*, COURTHOUSE NEWS (Dec. 2, 2019), <https://www.courthousenews.com/15-states-make-it-easier-to-sue-church-for-sex-abuse/>; Joseph H. Saunders, *Eight States Have “Look Back” Windows Allowing Survivors of Priest Sex Abuse to Seek Justice*, LEGAL EXAMINER (Dec. 6, 2019), <https://losangeles.legalexaminer.com/legal/eight-sttes-hav-e-look-back-windows-allowing-survivors-of-priest-sex-abuse-to-seek-justice/>.

³³⁸CAL. CODE CIV. PROC. § 340.1(c) (West 2002); see also O’Brien, *supra* note 40, at 449–52 (discussing the legal arguments for extending the opportunity for civil suits).

to what California did in 2002.³³⁹ The revival window statutes were challenged as unconstitutional, and as a direct attack upon the Catholic Church. Nonetheless, the constitutionality of the civil legislation was upheld.

The constitutionality of states extending the statute of limitations to permit civil actions is illustrated in decisions such as *Sheehan v. Oblates of St. Francis de Sales*.³⁴⁰ The facts of *Sheehan* involved a former student at a Catholic school in Delaware who alleged that he was sexually abused by a teacher at the school. The teacher was a priest and a member of the religious order that administered the school, and the plaintiff alleged that the religious order was negligent in allowing the priest to be in contact with minors.³⁴¹ The record disclosed that the priest suffered from alcoholism, depression, and health problems, all known to the religious order.³⁴²

“The Child Victim’s Act (“CVA”), enacted in 2007, abolished the civil statute of limitations for claims of childhood sexual abuse and created a two year window to allow victims of childhood sexual abuse to bring civil suits that the statute of limitations previously barred.”³⁴³ The statute specified that “prior victims of abuse would be permitted to file civil actions previously barred by the then applicable statute of limitations. The statute also revived claims against

³³⁹ See, e.g., Arizona: H.R. 2466, 54th Leg., 1st Reg. Sess. (Ariz. 2019) (opening a nineteen-month revival window against perpetrators and institutions); California: Assemb. 218, 2019 Leg., Reg. Sess. (Cal. 2019) (opening a three-year revival window); Montana, H.R. 640, 66th Leg., Reg. Sess. (Mont. 2019) (opening a one-year revival window); New Jersey: S. 477, 218th Leg., Prior Sess. Leg. (N.J. 2019) (opening a two-year revival window); New York: S. 6574, 2019 Leg., Reg. Sess. (N.Y. 2019) (opening a one-year revival window against perpetrators and institutions); North Carolina: S. 199, 2019 Leg., Reg. Sess. (N.C. 2019) (opening a two-year revival window); Pennsylvania: H.R. 962, 2019 Leg., Gen. Sess. (Pa. 2019) (opening a two-year revival window); Washington D.C.: Council, Act 22-593, 2019 Council (D.C. 2019) (opening a two-year revival window). Hawaii reopened a window in 2018 and it remains open until April 2020 and Vermont eliminated age limits in May 2019 and its revival window never expires. Hawaii: S.B. 2719, 29th Leg., Reg. Sess. (Haw. 2018); Vermont: H.R. 330, 2019 Leg., Reg. Sess. (Vt. 2019).

³⁴⁰ *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 265 Ed. Law Rep. 1133 (Del. 2011); see also *Elliott v. Archdiocese of New York*, 682 F.3d 213, 82 Fed. R. Serv. 3d 797 (3d Cir. 2012); *Sliney v. Previte*, 473 Mass. 283, 41 N.E.3d 732 (2015); Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397 (2014).

³⁴¹ *Sheehan*, 15 A.3d at 1252.

³⁴² *Sheehan*, 15 A.3d at 1252.

³⁴³ *Sheehan*, 15 A.3d at 1251.

institutional defendants who employed or controlled alleged abusers, for claims arising from 'gross negligence.'³⁴⁴

When the defendant challenged the revival statute as unconstitutional, the state's highest court upheld the statute because such "statutes of limitations go to matters of remedy, not destruction of fundamental rights."³⁴⁵ As such, the revival window do not offend due process of law because the legislature has the power to determine such remedies and procedures as it may determine are reasonable.³⁴⁶ The trial court found that the religious order was negligent because of its "own records demonstrating prior knowledge of Norris' sexual abuse of the children and his many other problems

. . .³⁴⁷

Consistently, state legislatures enact revival windows for claims of civil negligence following media reports of sexual abuse of minors and child endangerment. In addition, state attorneys general create "Clergy Abuse Hotlines" to solicit reports of abuse by persons and institutions. When Illinois created a state hotline, the office "received over 300 communications via telephone calls, letters, and e-mail messages from either survivors of clergy sexual abuse in Illinois or elsewhere, or family members and friends of survivors who have used the hotline to report information."³⁴⁸ Overall, as a result of the extended civil statutes of limitations, the clergy abuse hotlines, and the public's increased awareness of abuse, "many of the dozen-plus lawyers and clergy abuse watchdog groups interviewed by the [Associated Press] expect at least 5,000 new cases, resulting in potential payouts that could surpass the \$4 billion paid out since the clergy sex abuse came to light in the 1980s."³⁴⁹ The end is not yet in sight.

V. CONCLUSION

Each day throughout the United States thousands of men, women, and children are educated, fed, clothed, housed, visited, and provided medical care by hundreds of charitable organizations directly associated with the Roman Catholic Church. Likewise, each day throughout these same states thousands of Roman Catholics attend Mass, celebrate baptisms, and seek reconciliation, anointing, and inspiration from Catholic prayers, scripture study groups, and Catholic devotions. The ethnic communities that formed the bedrock of Church during the nineteenth century have increasingly been as-

³⁴⁴ *Sheehan*, 15 A.3d at 1252.

³⁴⁵ *Sheehan*, 15 A.3d at 1259.

³⁴⁶ *Sheehan*, 15 A.3d, at 1259.

³⁴⁷ *Sheehan*, 15 A.3d at 1260.

³⁴⁸ *Illinois Att'y Gen.*, *supra* note 62, at 1.

³⁴⁹ Associated Press, *supra* note 337.

simulated into a broader pluralistic culture influenced by secular media and shifting social mores. But despite assimilation and the crushing disclosure of revelations of child endangerment perpetrated by many of its bishops—and the knowledge that so many children were victimized—the American Church continues, ordaining priests and bishops and attracting converts.

The premise of this Article is that child endangerment perpetrated by persons exercising supervisory authority in the Church occurred as a result of clericalism, a mentality that fostered the belief and practice that the Church existed as a state-within-a-state. As such, the Church was bound by its own laws, and accountable only to those in the upper echelons of the Church's hierarchy. The decisions made by those in authority were to be kept secret, inviolate, and irreconcilable with whatever the rules of a broader secular society might be. This mentality was codified into earlier versions of Church Canon Law and its spirit gave pride to those excluded from early American society, and individuality to their successors.

Admittedly, this clerical mindset was challenged by the documents of the Second Vatican Council, which ostensibly ended the status of a state-within-a-state. But the implementation of the policy of church-state engagement envisioned by the Council's documents remains challenged and piecemeal fifty years after the documents' promulgation. Only very recently, with the actions and decisions of Pope Francis does there appear to be a decided effort on the part of "the Church" to engage and cooperate with the increasingly secularized state.

As is illustrated throughout this Article, the hierarchical Church did not willingly cooperate with state enforcement agencies when confronted with the heinous facts of child sexual abuse by many of its clergy and diocesan personnel. Furthermore, when increasing numbers of criminal and civil suits progressed through the secular courts, the hierarchical Church thwarted discovery and restitution, changing the subject from its own failure to the failures of the state. But the American media is expert and relentless. Only when national media revealed the scope and gravity of clergy sexual abuse did American bishops enact the *Dallas Charter, Essential Norms*, and the corresponding committees to protect children.

But the sexual abuse of minors was the beginning. The revelations of abuse disclosed that many persons responsible for supervising abusive clerics were aware of credible evidence suggesting further abuse, and nonetheless these supervisors placed these clerics in positions where further child abuse could occur. And it did occur. Rightfully, media and the secular forces of the state are currently addressing this fact of child endangerment, prompting many dioceses and Vatican authorities to respond appropriately. Yet, as is illustrated in the case of the Bishop of Buffalo or the *Illinois*

Preliminary Grand Jury Report, the effectiveness of the guidelines mandated by the American bishops and the procedures employed by the Supreme Roman Pontiff are followed erratically. To foster trust within the Church and state relationship—the institutional element most harmed by those who ignored their civil responsibilities while clinging to their state-within-a-state—complete cooperation between the two is essential. There are many opportunities for this to occur in the near and distant future.

The inescapable conclusion is that state criminal and civil efforts to hold accountable those responsible for child endangerment are not ended. As illustration of this fact, this Article discusses a state's extension of unexpired criminal statutes of limitation, opening revival windows for civil claims of negligence by Church institutions, and aggressive investigations by state grand juries utilizing abuse hotlines and subpoenaed documents to draw back the veil of secrecy. In response, the Church's only adequate answer is to report allegations immediately to state authorities, to open personnel files when requested, and to provide restitution and contrition to all those so grievously harmed by what was done and what others failed to do.