

Washington University Law Review

Volume 81 | Issue 3

January 2003

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Recommended Citation

Laura Russell, *Pursuing Criminal Liability for the Church and Its Decision Makers for Their Role in Priest Sexual Abuse*, 81 WASH. U. L. Q. 885 (2003).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol81/iss3/7

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PURSuing CRIMINAL LIABILITY FOR THE CHURCH AND ITS DECISION MAKERS FOR THEIR ROLE IN PRIEST SEXUAL ABUSE

I. INTRODUCTION

“I remember a number of years ago, the statement was made, if we don’t get our act together, the story isn’t going to be about priests, it’s going to be about bishops. And that’s where we are today.”

—Bishop John F. Kinney¹

Victims of priest sexual abuse have brought civil suits against the Catholic Church for several years.² However, civil financial settlements are inadequate and fraught with many problems.³ Parishioners have been understandably angered that donations intended for good works in the community have been used to compensate for the criminal misdeeds of priests.⁴ Additionally, large civil settlements threaten diocesan solvency.⁵

1. Alan Cooperman, *Bishops Forced to Weigh Their Own Culpability*, WASH. POST, June 14, 2002, at A15.

2. See Sacha Pfeiffer, *Critical Eye Cast on Sex Abuse Lawyers: Confidentiality, Large Settlements Are Questioned*, BOSTON GLOBE, June 3, 2002, at A1. The BOSTON GLOBE reported that attorney Roderick MacLeish Jr. “estimates he has represented 400 alleged victims of sexual abuse by priests in the past decade.” *Id.* Additionally, the GLOBE reported that attorney Mitchell Garabedian “estimates he has represented 250 alleged victims of dozens of priests” between the “late 1980s” and 2002. *Id.* The GLOBE also stated that Jeffrey R. Anderson “estimates he’s represented more than 1,000 clergy sex abuse victims since taking his first case in the early 1980s.” *Id.* See also SUFFOLK COUNTY SUPREME CT. SPECIAL GRAND JURY, GRAND JURY REP. CPL § 190.85(1)(C), May 6, 2002 Term, at 115 (2003) at <http://www.co.suffolk.ny.us/da/drvc%20GRAND%20JURY%20REPORT.pdf> [hereinafter SUFFOLK REP.] The Diocese of Rockville Centre, New York, created an infrastructure to handle its “enormous” “potential liability.” *Id.* at 123. The Diocese created its Office of Legal Affairs in 1985. *Id.* at 115-16. “[I]ts primary purpose was to investigate and attend to allegations of child sexual abuse committed by priests.” *Id.* Also in 1985, the Diocese created the Uninsured Perils Fund, which was “established for the payment of claims relating to criminal activity by Diocesan priests . . . [I]ts ostensible purpose was to cover three areas of potential liability for which there was either zero, or limited amounts, of insurance available; sexual abuse claims, asbestos exposure and trampoline accidents.” *Id.* at 123. The Grand Jury quipped, “Not surprisingly, there have never been any payments made from the fund for either asbestos or trampoline accident claims.” *Id.*

3. See Pfeiffer, *supra* note 2. “In the view of their detractors, [attorneys who represented alleged victims] contributed to [the] coverup by signing secret settlements that prevented the scandal from erupting into public view sooner.” *Id.* See also Michael Paulson & Wendy Davis, *Law Testifies Before Panel Considering Criminal Charges*, BOSTON GLOBE, Feb. 26, 2003, at B3. “Victim advocates say they are convinced that the church will not punish bishops who failed to stop abuse, and so they are pinning their hopes on prosecutors.” *Id.*

4. James F. McCarty & Joel Rutchick, *Catholic Charities Seeks Pledge from Pilla: Don't Use Donations to Settle Sex Suits, Board Urges Bishop; Sex Scandal Roils Diocese Fund-Raisers; Catholic*

Tragically, many victims were only able to collect settlements if they promised to remain silent about their abuse.⁶ This condition of confidentiality enabled predatory priests to continue to have access to future victims.⁷ Most importantly, the Church's now-public failure to alter the pattern of behavior of its priests or their supervisors indicates that the years of civil settlements and damage awards did not provide adequate motivation for the Church to change its practices.⁸

While state authorities have criminally prosecuted a few predatory priests,⁹ there has been little or no personal accountability on the part of the Bishops and Cardinals who placed predatory priests in parishes with ready access to children;¹⁰ gave false assurances to the families of the

Charities Board Wants to Ensure Gifts Aren't Used to Settle Suits, PLAIN DEALER, Aug. 2, 2002, at A1.

5. See Walter V. Robinson & Stephen Kurkjian, *Bishops Blocked Bankruptcy Idea*, BOSTON GLOBE, Jan. 25, 2003 at A1 (detailing the financial difficulties posed by over 500 pending claims against the Boston Archdiocese); See also *Plight of Boston Archdiocese Is Not Unique*, 40 BCD NEWS AND COMMENT No. 14, Jan. 15, 2003 (pointing out financial problems faced by the church in Dallas, Texas, Santa Fe, New Mexico, and Tucson, Arizona).

6. "[V]irtually all those who went to the Church with claims of sexual misconduct by priests received settlements before they filed suit, an arrangement that left no public record of the crime committed by the abusing priests." THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 47 (2002) [hereinafter BETRAYAL].

7. See SUFFOLK REP., *supra* note 2, at 173. "[Diocesan officials] insisted upon confidentiality agreements in cases that were settled. This policy put children at risk inasmuch as victims were prohibited by law from speaking out about the criminal conduct of sexually abusive priests." *Id.*

8. The failure of the Church to pursue meaningful changes to better protect children from sexual abuse can be seen in the Suffolk County, NY, Grand Jury Report concerning the Diocese of Rockville Center. *Id.* The Grand Jury looked to "the history of the Diocese" and found that "[d]iocesan officials agreed to engage in conduct that resulted in the prevention, hinderance[,] and delay in the discovery of criminal conduct by priests" and "us[ed] deception and intimidation to prevent victims from seeking legal solutions to their problems." *Id.* Similarly, the Massachusetts Attorney General concluded:

[T]he widespread abuse of children was due to an institutional acceptance of abuse and a massive and pervasive failure of leadership. For at least six decades, three successive Archbishops, their Bishops and others in positions of authority within the Archdiocese operated with tragically misguided priorities. They chose to protect the image and reputation of their institution rather than the safety and well-being of the children entrusted to their care. And they failed to break their code of silence even when the magnitude of what had occurred would have alerted any reasonable, responsible manager that help was needed.

The Sexual Abuse of Children in the Roman Catholic Archdiocese of Boston, MASS. ATT'Y GEN. REP. at 73 (2003) [hereinafter MASS. REP.].

9. Cathy Lynn Grossman & Anthony DeBarros, *Special Report: Facts of Priest Sex Abuse at Odds with Perception*, USA TODAY, Nov. 11, 2002, at 1A ("23 priests have been convicted of sex crimes since 1965 . . .").

10. See MASS. REP., *supra* note 8, at 59-72. See also BETRAYAL, *supra* note 6, at 130. Essex County Massachusetts District Attorney Kevin Burke discussed his interaction with the Church during a 2000 prosecution of an abusive priest, stating, "They weren't sorry for what happened to those kids I don't think the cardinal and the rest of the hierarchy ever really got that they were dealing with kids here. I don't think they even see that today." *Id.* at 128, 130.

victims;¹¹ “shuffled” pedophile priests from one parish to another to avoid criminal prosecution;¹² and mislead parishioners to believe that predatory priests had been removed from pastoral service.¹³

The Archdioceses, Dioceses, and Church officials who engaged in conduct that enabled priests to sexually abuse children for decades should face criminal prosecution.¹⁴ Identifying the appropriate prosecutorial tools and theories of criminal liability is an essential first step.

State iterations of Racketeer Influenced Corrupt Organizations (RICO) Acts may prove to be adept tools to prosecute the Church and its decision makers.¹⁵ Currently, thirty-one states have their own RICO statutes.¹⁶ Several states have RICO statutes that include sex crimes against children as predicate acts.¹⁷ Many have predicate crimes which encompass fraud.¹⁸ Additionally, several state RICO provisions allow civil remedies and/or criminal fines for personal injury.¹⁹

11. See, e.g., *id.* at 44. “Church officials shuffled [accused priest] Porter from parish to parish in an effort to convince his victims that something had been done.” *Id.*

12. See, e.g., Complaint, Gomez v. Holy See et al., (Fla. 6th Judicial Cir.) at <http://www.news.findlaw.com/hdocs/docs/religion/gomezsee40302flcmp.pdf>. “Authorities . . . were . . . informed that Defendant [Fr.] Burke was no longer there or available for interrogation, arrest or prosecution by Florida authorities . . . Defendant Burke was intentionally moved by Defendants out of the jurisdiction of the local law enforcement authorities to New Jersey in order to avoid . . . criminal prosecution . . .” *Id.* at ¶ 14.

13. See SUFFOLK REP. *supra* note 2, at 174. “Diocesan officials used the hollow promise of treatment and re-assignment for offenders and the inducement of monetary payments to victims to guarantee their silence. This had the further effect of concealing and preventing the discovery of heinous crimes committed by priests.” *Id.*

14. See Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 328-29 (1985). “[A]ny director, manager, or other supervisor who is aware of an employee’s criminal design and is able to take preventive measures but does nothing contributes to the performance of the offense.” *Id.* at 328.

15. See discussion *infra* Parts II.B, III.A.

16. The following states each have their own RICO statute: Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Louisiana, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Washington, Wisconsin. 1 DAVID R. MCCORMACK, RACKETEER INFLUENCED CORRUPT ORGANIZATIONS, § 9, at 9-2 (11th ed. 2000). Additionally, Puerto Rico and the Virgin Islands have RICO statutes. *Id.*

17. Colorado, Georgia, Indiana, Michigan, Mississippi, Nevada, Oklahoma, Rhode Island, Texas, Utah, and the U.S. Virgin Islands each enumerate sexual crimes as predicate acts. *Id.* For a more detailed discussion, see discussion Part II.B.2 and accompanying footnotes *infra*.

18. 1 MCCORMACK, *supra* note 16, at 9-2. Arizona, Colorado, Florida, Idaho, Indiana, Michigan, New Mexico, New York, North Dakota, Ohio, Oklahoma, Texas, Utah, Wisconsin, and the U.S. Virgin Islands, each enumerate fraud as a predicate act. *Id.* For a more detailed discussion, see discussion Part II.B.3 *infra*.

19. 1 MCCORMACK, *supra* note 16, at 9-2. The state RICO statutes of Arizona, Florida, Idaho, Mississippi, Nevada, New Mexico, Ohio, Oklahoma, and the U.S. Virgin Islands allow recovery and or alternative bases for criminal fines based on personal injury. *Id.* For a more detailed discussion, see discussion Part II.B.4 *infra*.

For those states which do not have RICO statutes, or those whose RICO statutes are inadequate, prosecutors could possibly utilize alternative theories of criminal liability, including reckless endangerment²⁰ and hindering prosecution.²¹ Finally, prosecutors could rely on the master-servant relationship between the predatory priests and their bishop, cardinal, and/or archdiocese to pursue criminal charges against the employer or supervisor for the criminal acts committed by the predatory priests.²²

This Note will first outline in Part II.A the civil and criminal mechanisms used to date in the priest sex abuse context as well as the Church's response to the sex abuse cases. Part II.B will examine various theories of criminal liability. Part III of this Note will make the argument that because civil damages and criminal prosecution of priests have been inadequate to remedy to the problem of priest sex abuse, states should criminally prosecute the Church and its decision makers for their role in the abuse of children. To wit, Part III of this Note will explore the possibility of using state RICO acts for criminal and civil actions and consider alternative theories for criminal prosecution of the Church's decision makers. Part III will also address possible roadblocks to these methods of prosecution. Finally, Part IV will suggest how these problems might be overcome.

II. HISTORY

A. *The Scope of the Scandal*

In 1985, the National Conference of Catholic Bishops received a prescient report entitled, "The Problem of Sexual Molestations by Roman Catholic Clergy."²³ This report detailed the issues,²⁴ predicted potential

20. See generally WAYNE R. LAFAVE, CRIMINAL LAW § 3.7, at 246-56 (3d ed. 2000).

21. See, e.g., SUFFOLK REPORT, *supra* note 2, at 173.

22. See generally LAFAVE, *supra* note 20, § 3.3, at 215-24.

23. BETRAYAL, *supra* note 6, at 36.

This report was written by Rev. Thomas P. Doyle, a canon lawyer then stationed at the Vatican embassy in Washington; the late Michael R. Peterson, then a psychiatrist and director of the St. Luke Institute; and F. Ray Mouton, a Louisiana attorney who was representing Rev. Gilbert Gauthé, who had been criminally charged with sexually molesting eleven boys in the Lafayette diocese.

Id. at 36-37.

24. "[The authors of the report] reviewed the moral, spiritual, legal and economic consequences of sexual abuse by Catholic clergy and proposed a five-year project designed to protect children from pedophiles, homosexual and heterosexual predators, and the church itself." Paul M. Rodriguez, *Report of Church Troubles Proved Prophetic*, INSIGHT ON THE NEWS, May 20, 2002, at 48, available at

liability surpassing \$1 billion, detailed steps to limit the potential for harm, and advised against destroying damaging files or sending files concerning complaints to the Holy See²⁵ with the expectation that diplomatic immunity would protect them from discovery.²⁶ Furthermore, the report focused on the intractable nature of pedophilia, stating that “whether the person has received traditional psychiatric treatment or not[,] . . . [r]ecidivism is so high with pedophilia . . . that all controlled studies have shown that traditional outpatient psychiatric or psychological models alone DO NOT WORK.”²⁷ In conclusion, the report warned that pedophilia should be considered a “lifelong disease with NO HOPE AT THIS POINT IN TIME for [a] cure.”²⁸

However, the bishops failed to pay attention to the report.²⁹ Instead, the Church often responded to allegations of sex abuse by moving priests to different parishes rather than reporting the allegations to the police.³⁰ For example, rather than turn over Father James Porter to authorities for investigation,³¹ the Church hierarchy chose to move Porter to a succession of parishes “in an effort to convince victims that something had been done.”³² As a further illustration, Father John Geoghan engaged in thirty years of known sexual abuse in six successive parishes.³³

<http://www.lexis.com>.

25. “The Holy See is the international diplomatic branch of the Vatican City State. It is the Holy See, not the Vatican, that enters international agreements.” Rana Lehr-Lehnardt, Note, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 *BYU J. PUB. L.* 317, 352 n.228 (2002).

“The Holy See has full diplomatic relations with 157 countries.” Yasmin Abdullah, Note, *The Holy See at United Nations Conferences: State or Church?*, 96 *COLUM. L. REV.* 1835, 1866 (1996) (citing 1996 *CATHOLIC ALMANAC* 47 (Felician A. Foy & Rose M. Avato eds., 1996)).

26. BETRAYAL, *supra* note 6, at 40; Complaint, *Cicchillo v. Archdiocese of Los Angeles*, (C.D. L.A. Co.) et al., ¶ 16, at <http://news.corporate.findlaw.com/hdocs/docs/religion/cicchillomhny42902cmp.pdf>.

27. BETRAYAL, *supra* note 6, at 36 (quoting the 1985 Report to the National Conference of Catholic Bishops) (emphasis in original).

28. *Id.* at 36 (emphasis in original).

29. *Id.* at 39.

30. *See, e.g., id.* at 36, 44.

31. *Id.* at 44. According to the attorney representing Porter’s alleged victims, a minimum of ten people told the two priests in Porter’s parish about Porter’s abuse. *Id.* These two priests also personally witnessed Porter’s abuse. *Id.* Porter even acknowledged his predilection for child molestation to the Vatican. *Id.* When he resigned in 1973, he wrote to the Vatican:

I know in the past I used to hide behind a Roman collar, thinking it would be a shield for me. Now there is no shield. I know that if I become familiar with children, people would immediately become suspicious. . . . In the lay life, I find out of necessity that I must cope with the problem or suffer the consequences.

Id. at 44-45.

32. *Id.* at 44.

33. *Id.* at 53. *See also id.* at 207 (Letter from Rev. John Geoghan to Cardinal Humberto

In addition, the Church frequently responded to allegations of priest sex abuse by reaching financial settlements with alleged victims, often conditioned on secrecy.³⁴ Throughout the United States, millions of dollars have been paid by the Church to the victims of priest sex abuse.³⁵

However, some alleged victims of priest sexual abuse have refused to settle silently.³⁶ The parent of one of Reverend Gilbert Gauthé's victims took his case to court and was awarded \$1.2 million by a jury.³⁷ In addition to pain and suffering awards, some victims have sought and won punitive damages awards against the Church.³⁸ But even in the absence of punitive damages, jury awards have been quite high.³⁹ In Texas, the Dallas diocese came close to bankruptcy when a jury reached a \$119.6 million dollar verdict in favor of eleven families whose children were sexually abused by Reverend Rudolph Kos.⁴⁰ The jury stated that their large verdict was a result of the Church's disregard for prior allegations against Kos, and the jury's conclusion that Kos's actions had caused one of the abused to take his own life.⁴¹ These large jury awards arguably reflect jury dissatisfaction with the Church's response to allegations of abuse.⁴²

While there are no comprehensive statistics of the numbers of victims, molesters, or settlement amounts,⁴³ the New York Times conducted a

Mederiros while undergoing treatment in 1980); *Id.* at 229 (Memorandum of the Archdiocese of Boston indicating that Geoghan was defrocked in 1998).

34. *Id.* at 47. "[V]irtually all those who went to the Church with claims of sexual misconduct by priests received settlements before they filed suit, an arrangement that left no public record of the crime committed by the abusing priests." *Id.*

35. *See, e.g., id.* at 37. "In June of 1984, . . . the Lafayette [Louisiana] diocese secretly paid \$4.2 million dollars to nine of [Rev. Gilbert] Gauthé's victims." *Id.* A bishop subsequently revealed in a deposition that he was aware of allegations of sexual abuse against Gauthé as early as 1974. *Id.* Jeffery R. Anderson, a Minnesota lawyer, has represented "more than 400 alleged victims of clergy sexual abuse, winning millions of dollars in judgments and settlements from several dioceses across the country." *Id.* at 40, 42. In New Mexico, the Santa Fe archdiocese was almost bankrupt after "abuse victims had filed some two hundred claims . . . [and received] through a combination of settlements and judgments [an] estimated . . . twenty-five and fifty million [dollars]." *Id.* at 42. The victims of The Rev. James Porter received seven million dollars from the church. *Id.* at 43.

36. *See, e.g., id.* at 38.

37. *Id.* This father, Glenn Gastal, told reporters that "the priest . . . had anally raped his son so viciously that the boy had to be hospitalized." *Id.*

38. *Id.* at 41. "In 1990, a jury awarded [one former altar boy of the Rev. Thomas Adamson of Minnesota] \$3.6 million dollars in compensatory and punitive damages - the first time a jury had ever awarded punitive damages against the Catholic Church in a clergy sexual abuse case." *Id.* However, "[a] judge later stripped away most of the punitive damages . . ." *Id.*

39. *See, e.g., id.* at 43.

40. *Id.* The families negotiated a reduced settlement of \$31 million dollars with the Church. *Id.*

41. *Id.*

42. *See id.*

43. Laurie Goodstein & Anthony Zirilli, *Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, at 1. The New York Times labeled its survey "the most complete

survey which indicated that as of January 1, 2003, over 1,200 priests have been accused of sexually abusing over 4,000 victims since the 1940s.⁴⁴ Additionally, the Washington Post conducted a survey that encompassed financial settlements made by the Church.⁴⁵ The archdioceses were hesitant to discuss financial settlements with the Post; the survey showed only \$106 million in admitted deals.⁴⁶ However, attorneys for victims have asserted that the real figure approaches \$1 billion.⁴⁷ In September of 2003, the Boston Archdiocese agreed to an \$85 million settlement with over 500 victims.⁴⁸

Despite these statistics, only a relative handful of priests have faced criminal charges.⁴⁹ Furthermore, in several cases, the Church knew of allegations of abuse for a decade or more before the priests were prosecuted.⁵⁰ For example, the Reverend Gilbert Gauthé of Louisiana⁵¹ was prosecuted 10 years after the Church first became aware of allegations of his sexual abuse.⁵² Father James Porter of Massachusetts, alleged to have sexually abused over one hundred individuals⁵³ during the course of fourteen years,⁵⁴ plead guilty to over forty counts of sexual assault in 1992.⁵⁵ As in the Gauthé case, the Church hierarchy knew of allegations against him decades earlier.⁵⁶

During the 2002 meeting of the United States Conference of Bishops, the bishops received a great deal of criticism for their role in the sexual abuse scandal.⁵⁷ The Conference President, Bishop Wilton D. Gregory,

compilation of data on the problem available," but acknowledged that "[t]he Times data only include cases in which priests were named, and many bishops have released only partial lists of accused priests, or refused to identify any." *Id.*

44. *Id.*

45. Alan Cooperman and Lena H. Sun, *Hundreds of Priests Removed Since 60's: Survey Shows Scope Wider than Disclosed*, WASH. POST, June 9, 2002, at A1.

46. *Id.*

47. *Id.*

48. Mark Miller, *The Wages of Sin: The Archbishop of Boston Gets His \$85 Million Deal Done*, NEWSWEEK, Sept. 22, 2003 at 34.

49. Grossman & DeBarros, *supra* note 9 ("23 priests have been convicted of sex crimes since 1965, and 33 currently face charges.").

50. See, e.g., BETRAYAL, *supra* note 6, at 205-49 (compiling photographic images of Church documents and correspondence regarding priest sex abuse).

51. *Id.* at 38. Gauthé pled guilty to "charges that included rape and possession of child pornography - photographs that Gauthé himself had taken of his victims." *Id.*

52. *Id.* at 37-38.

53. Alan Cooperman, *Wisconsin Archbishop Kept Silent on Predator Priest*, WASH. POST, Apr. 14, 2002, at A1.

54. BETRAYAL, *supra* note 6, at 43.

55. *Id.*

56. *Id.* at 44.

57. Edward Walsh, *Bishops Told They Bear Responsibility for Scandal*, WASH. POST, June 14,

placed blame squarely on the shoulders of the bishops, repeatedly stating, “We are the ones.”⁵⁸ Bishop Gregory chastised his peers for permitting pedophile priests to continue in pastoral service; neglecting to inform the police of abuse allegations; sacrificing abuse prevention to protect the Church’s reputation; and failing to treat the victims and their families with appropriate care and concern.⁵⁹ Finally, almost twenty years after the 1985 report, the bishops voiced a movement towards “zero tolerance”⁶⁰ for abusive priests and a shift in policy to report allegations of abuse to law enforcement authorities.⁶¹

While the 2002 Conference may have signaled a sea change in the United States, the Vatican responded negatively to the bishops’ newfound intention to turn accused priests over to authorities.⁶² The Vatican revised the Dallas proposal to assert the primacy of Church run tribunals on the basis that the bishops’ proposal would violate canon law.⁶³ Indeed, church officials have previously deferred to canon law over civil criminal law in the matter of sexual abuse of children.⁶⁴ When Cardinal Law met with four experts in the field of child sexual abuse in 1993, he was told that “the way . . . [the Church] handled the cases was wrong and was endangering

2002, at A1 [hereinafter *Responsibility*].

58. *Id.*

59. *Id.* Furthermore, three bishops and one archbishop have resigned after allegations of *personal* sexual misconduct and sexual abuse of minors. Edward Walsh, 2 *More Bishops Resign in Sex Scandal: Church Leaders Meet to Discuss Policy on Abusive Priests*, WASH. POST, June 12, 2002, at A1. “In New York, Auxiliary Bishop James F. McCarthy, 59, resigned as bishop and pastor . . . after admitting to having had ‘a number of affairs with women’” *Id.* Additionally, “[i]n Lexington Ky., Bishop J. Kendrick Williams, 65, who has been accused of molesting three boys” resigned. *Id.* The list continues:

Archbishop Rembert G. Weakland of Milwaukee resigned after the disclosure of a \$450,000 settlement the archdiocese made in 1998 with a man who had accused Weakland of sexually abusing him as an adult more than 20 years ago Bishop Anthony O’Connell of Palm Beach, Fla., resigned after admitting he abused an underage student when he was the rector of a Missouri Seminary.

Id.

60. *Responsibility*, *supra* note 57.

61. Alan Cooperman, *Church’s Revised Abuse Rules Stir Debate: Canon, Civil Law May Conflict, Experts Say*, WASH. POST, Nov. 10, 2002, at A3 [hereinafter *Conflict*].

62. Alan Cooperman, *In Search of Clarity, and Fairness: Vatican Worries that U.S. Sex Abuse Policy Abandons ‘Due Process.’* WASH. POST, Oct. 21, 2002, at A2; Daniel Williams & Alan Cooperman, *Vatican Questioning Rules on Removal of U.S. Priests*, WASH. POST, Oct. 18, 2002, at A1.

63. *Conflict*, *supra* note 61. “Catholic Church tribunals in the United States have dealt mainly with requests for marriage annulments. But the centuries-old system of canon law also sets out detailed procedures for tribunals to determine the innocence or guilt of people accused of crimes under church law” *Id.* For more information on canon law, see Alan Cooperman, *Abuse Policy Has Roots in Middle Ages: Process Set Up to Prevent Arbitrary Dismissals*, WASH. POST, May 19, 2002, at A12.

64. See, e.g., BETRAYAL, *supra* note 6, at 153.

children.”⁶⁵ While the experts “stressed the importance of reporting these cases to civil authorities,” Cardinal Law remained focused on canon law.⁶⁶ It should be noted that United States courts have repeatedly concluded that the First Amendment does not entitle one to commit crimes under the ambit of free exercise of religion.⁶⁷

To date, no bishop, cardinal, or archdiocese has faced criminal charges in connection with the child sex abuse scandal.⁶⁸ However, grand juries were convened in Suffolk and Westchester Counties in New York.⁶⁹

The Westchester grand jury found that church officials recklessly concealed acts of child molestation and heaped shame upon the abused.⁷⁰ Furthermore, the grand jury concluded that diocesan officials “lied” to parish members during masses regarding the criminal acts of the priests.⁷¹ The grand jury stated that the actions of church officials constituted “an orchestrated effort to protect abusing clergy members from investigation,

65. *Id.* at 152.

66. *Id.* at 152-53. One of the experts commented that “[w]hatever we had just told [Cardinal Law] didn’t seem to be registering.” *Id.* at 153. This expert later lamented, “Children were being abused. Sexual predators were being protected. Canon law should have nothing to do with it. But they were determined to keep this problem, and their response to it, within their culture.” *Id.* The conflict between canon law and civil law is examined in Marianne Perciaccante, Note, *The Courts and Canon Law*, 6 CORNELL J.L. & PUB. POL’Y 171 (1996). Perciaccante asserts that “[t]he point at which courts unconstitutionally trespass on a religion’s private domain in cases where they attempt to resolve non-intrachurch religious disputes is not entirely clear from . . . any of the Supreme Court’s decisions in the past fifty years.” *Id.* at 171.

67. The Supreme Court has determined that “while [laws] cannot interfere with mere religious belief and opinions, they may with practices.” *Reynolds v. United States*, 98 U.S. 145, 166 (1878). This conclusion is echoed in more recent cases. *See, e.g., United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (C.A.N.Y. 1983). “The ‘free exercise’ of religion is not so unfettered. The first amendment does not insulate a church or its members from judicial inquiry when a charge is made that their activities violate a penal statute.” *Id.* The Supreme Court in *Reynolds* decided that to conclude otherwise “would . . . make the professed doctrines of religious belief superior to the law of the land . . .” *Reynolds*, 98 U.S. at 167. The court found that “[g]overnment could exist only in name under such circumstances.” *Id.*

Later, in *Cantwell v. Connecticut*, the Court stated, “The First Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.” 310 U.S. 296, 303-04 (1940).

Similarly, in *Prince v. Massachusetts*, the Supreme Court held that a law which prohibited children from working in the streets was constitutional, despite the law’s effect on Jehovah’s Witnesses. 321 U.S. 158, 169-70 (1944). The Court concluded that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction.” *Id.* at 167.

68. Michael Powell & Pamela Ferdinand, *N.Y. Grand Jury Accuses Diocese of Covering Up Abuse by Clergy*, WASH. POST, June 20, 2002, at A3. “No church official in a supervisory position has ever been charged with a crime in connection with a sex abuse case.” *Id.*

69. *Diocese Probed on Sex Abuse Coverup*, WASH. POST, Apr. 12, 2002, at A14; Powell & Ferdinand, *supra* note 68.

70. Powell & Ferdinand, *supra* note 68.

71. *Id.*

arrest and prosecution.”⁷² The Suffolk County Grand Jury reached disturbingly similar conclusions.⁷³

Another grand jury was convened by the Massachusetts Attorney General to examine evidence showing that the Boston Archdiocese and Cardinal Bernard F. Law “failed to protect clergy sexual abuse victims from suspected pedophile priests.”⁷⁴ Upon its release in 2003, the Attorney General’s report stated that “a tragedy of unimaginable dimensions” had transpired within the Boston Archdiocese.⁷⁵ According to the Attorney General’s report, the Boston Archdiocese had received reports of 789 victims of sexual abuse.⁷⁶ The records implicated 250 priests and Church employees.⁷⁷

The Massachusetts Attorney General determined that “widespread assault on children” took place over the course of sixty years, and during the reign of three different Archbishops.⁷⁸ While the Attorney General did not uncover evidence of current abuse, he stated that “it is far too soon to conclude that the abuse has stopped and will not reoccur in the future.”⁷⁹

The report attributed the staggering number of sexual assaults “to an institutional acceptance of abuse and a massive and pervasive failure of leadership.”⁸⁰ Nonetheless, the Massachusetts Attorney General “did not produce evidence sufficient to charge the Archdiocese or its senior managers with crimes.”⁸¹

72. *Id.*

73. SUFFOLK REP., *supra* note 2, at 172-74.

74. Powell & Ferdinand, *supra* note 68.

75. Letter from Thomas F. Reilly, Attorney General, Commonwealth of Massachusetts, to the People of the Commonwealth of Massachusetts, at 1 (July 23, 2003) (published in MASS. REP., *supra* note 8).

76. *Id.*

77. *Id.* at 2.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* The Attorney General’s “investigative team” looked for evidence of the following crimes:

Accessory After the Fact to a Felony—requires proof beyond a reasonable doubt that the defendant rendered aid to a felon with the specific intent to help him avoid or escape detention, arrest, trial, or punishment;

Accessory Before the Fact to a Felony—requires proof beyond a reasonable doubt that the defendant shared the primary felon’s state of mind and aided in the commission of the felony by counseling, hiring or encouraging the felony to be committed;

Conspiracy—requires proof beyond a reasonable doubt that the defendant entered into an agreement with one or more people where the objective was criminal or unlawful, or the means of achieving the objective was criminal or unlawful;

Obstruction of Justice (Common Law)—requires proof beyond a reasonable doubt that the defendant knowingly interfered with the testimony or role of a witness in a judicial proceeding.

MASS. REP., *supra* note 8, at 21.

Additionally, New Hampshire's Attorney General, Philip T. McLaughlin, notified the public that his office had amassed the evidence necessary to bring "one or more indictments against the Diocese of Manchester for endangering the welfare of children."⁸² However, the New Hampshire Attorney General decided not to pursue the indictments after the Diocese agreed to concede the sufficiency of the state's evidence and to take a number of measures designed to safeguard children.⁸³ To date, grand juries have convened in five additional cities.⁸⁴

Because civil damages, untimely criminal prosecution of priests, and the Church's reliance on canon law have been largely inadequate remedies to stop the overarching problem of priest sex abuse,⁸⁵ states should prosecute the Church and its decision makers for their role in the abuse of children. Corporations and their officers can face prosecution for criminal wrongdoing,⁸⁶ the Church and its officers should likewise be held criminally accountable for their role in the sexual abuse of children.⁸⁷

B. Prosecutorial Tools and Theories of Criminal Liability

State RICO statutes may prove to be a valuable tool to prosecute the Church and its officials.⁸⁸ While most RICO statutes were initially enacted to combat organized crime,⁸⁹ RICO statutes are also used to prosecute corporate crimes.⁹⁰

82. Paulson & Davis, *supra* note 3.

83. *Id.*

84. *Id.* "In several cities around the country, including Boston, Cincinnati, Cleveland, Los Angeles, Philadelphia, Phoenix, and St. Louis, grand juries are now investigating the Roman Catholic Church's handling of sexually abusive priests. None has issued criminal indictments." *Id.*

85. *See, e.g., id.* "Victim advocates say they are convinced that the church will not punish bishops who failed to stop abuse, and so they are pinning their hopes on prosecutors." *Id.* *See also* notes 2, 3, 49-56, 65-66 and accompanying text *supra*.

86. *See generally* KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY (2d ed. 1993); KATHLEEN F. BRICKEY, CORPORATE AND WHITE COLLAR CRIME, CASES AND MATERIALS [hereinafter WHITE COLLAR CRIME](3d ed. 2002).

87. *See supra* note 85 and accompanying text.

88. *See generally* discussion *infra* Parts II.B, III.A.

89. *See* David Kurzweil, Note, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 58 (1996). "The original purpose of RICO was to stop the infiltration of organized crime and racketeering into legitimate organizations by creating new criminal and civil remedies and investigative procedures." *Id.* (citing S. Rep. No. 91-617, at 76 (1969)).

90. WHITE COLLAR CRIME, *supra* note 86, at 527 (citing U.S. DEPT. OF JUSTICE, AN EXPLANATION OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE 2 (4th ed.) (regarding the role of Federal RICO in prosecutions of corporations). For an example of a state RICO law used to prosecute corporate crimes, see ARIZ. REV. STAT. ANN. §§ 13-201 – 13-2318 (West 2001). This statute "is one of the broadest and most frequently used state RICO statutes, as the Attorney General's Office has aggressively employed the statute both criminally and civilly against white-collar

There are several advantages to utilizing state RICO statutes. First, many state RICO statutes include a number of state crimes as predicate acts, including child sex abuse.⁹¹ Second, state RICO provisions generally afford a lengthy period of time to prosecute offenders.⁹² Third, some state RICO statutes recognize personal injury.⁹³ Fourth, state RICO statutes frequently provide injunctive relief.⁹⁴ Fifth, unlike the federal RICO statute, state RICO prosecutions do not require the participation or approval of the Justice Department.⁹⁵ Finally, most state RICO statutes do not mandate a financial motive and can therefore be used against non-profit corporations like churches.⁹⁶

1. Overview of RICO Elements

While the elements of state RICO statutes vary,⁹⁷ some generalizations may be made because many state statutes are modeled after the federal RICO statute.⁹⁸ Put very simply, the federal statute prohibits, among other things, “participat[ing], directly or indirectly, in the conduct of [an]

crime.” 1 MCCORMACK, *supra* note 16, § 9.01, at 9-10. “A trio of states makes false statements by corporate officials . . . predicate offenses.” *Id.* at 9-4.

91. See discussion *infra* Part II.B.2.

92. See 1 MCCORMACK, *supra* note 16, § 9.01, at 9-1.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 9-4. States that do mandate a financial incentive include Washington, Arizona, Tennessee, and California. *Id.*

97. See generally *id.* at 9-1 to 9-10.

98. *Id.* at 9-3 to 9-4. “Virtually all of the state laws have provisions modeled upon 18 U.S.C. § 1962(b) and (c).” *Id.* at 9-5. “[T]here are at least 4 states, Arizona, California, Georgia and North Dakota, that do not include an illegal investment provision modeled on 18 U.S.C. 1962(a).” *Id.* The Federal RICO statute 18 U.S.C. 1962 states:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in . . . interstate or foreign commerce.

...

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise which is engaged in . . . interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

...

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(a)-(d) (1988).

enterprise's affairs through a pattern of racketeering activity."⁹⁹ Accordingly, many state RICO statutes require prosecutors to establish the existence of an "enterprise" as well as a "pattern of racketeering activity."¹⁰⁰ Certain enumerated crimes constitute predicate acts that satisfy the "racketeering activity" requirement of the federal statute.¹⁰¹ However, many state statutes expand on the federal statute's list of predicate offenses to include a far greater variety of crimes.¹⁰²

2. *Sexual Abuse as a Predicate Crime*

Indeed, many state RICO statutes include sex crimes against children as predicate acts, including: Colorado,¹⁰³ Georgia,¹⁰⁴ Indiana,¹⁰⁵ Michigan,¹⁰⁶ Mississippi,¹⁰⁷ Nevada,¹⁰⁸ Oklahoma,¹⁰⁹ Rhode Island,¹¹⁰ Texas,¹¹¹ Utah,¹¹² and the U.S. Virgin Islands.¹¹³

99. *Id.*

100. 1 MCCORMACK, *supra* note 16, § 9.01, at 9-6 to 9-7.

101. *Id.* at 9-3. "One category is various state offenses, including murder, kidnapping, arson, [and] robbery Other offenses . . . include violation of Title 11, bankruptcy violations, . . . dealing in narcotics, violations of the Currency and Foreign Transactions Reporting Act, . . . [and] a lengthy list of violations of Title 18, the federal criminal code." *Id.*

102. *Id.* at 9-4. "Some of the state laws, such as those in Georgia and North Carolina, encompass almost the entire criminal code of the respective states." *Id.*

103. COLO. REV. STAT. ANN. § 18-17-103(5)(6)(V) (West 1999) ("sexual exploitation of children"). See also 1 MCCORMACK, *supra* note 16, § 9.03, at 9-28 (discussing predicate crimes under the Colorado Organized Crime Control Act generally).

104. GA. CODE ANN. § 16-14-3(9)(A)(V) (2003) ("bodily injury and related offenses"). See also 1 MCCORMACK, *supra* note 16, § 9.07, at 9-63.

105. IND. CODE ANN. § 35-45-6-1(8) (West 1998) ("child exploitation"). See also 1 MCCORMACK, *supra* note 16, § 9.11, at 9-84.

106. MICH. COMP. LAWS ANN. § 750.159g(n) (West 2003) ("child sexually abusive activity or material"). See also 1 MCCORMACK, *supra* note 16, § 9.13, at 9-95.

107. MISS. CODE ANN. § 97-43-3 (2000) ("exploitation of children and enticing children for concealment, prostitution or marriage"). See also 1 MCCORMACK, *supra* note 16, § 9.15, at 9-103.

108. NEV. REV. STAT. ANN. § 207.360(6), (11) (West 2000) (sexual assault and statutory rape). See also 1 MCCORMACK, *supra* note 16, § 9.16, at 9-109.

109. OKL. STAT. ANN. tit. 22, §§ 1402(10)(c), 1403 (West 2003). See also 1 MCCORMACK, *supra* note 16, § 9.23, at 9-158 ("various sex offenses" and "acts that cause bodily harm").

110. R.I. GEN. LAWS § 7-15-1(c) (1999) ("child exploitations for . . . immoral purposes"). See also 1 MCCORMACK, *supra* note 16, § 9.26, at 9-177 (describing the predicate acts of the Rhode Island RICO Act generally).

111. TEX. PENAL CODE ANN. § 71.02(a)(1) (Vernon 2003) (sexual assault). See also 1 MCCORMACK, *supra* note 16, § 9.28, at 9-195.

112. UTAH CODE ANN. § 76-10-1602(4)(n) (1999); ("sexual exploitation of a minor"). See also 1 MCCORMACK, *supra* note 16, § 9.29, at 9-197.

113. 14 VI. CODE ANN. § 604(c)(11) (1996) ("relating to children"). See also 1 MCCORMACK, *supra* note 16, § 9.33, at 9-219.

In *Miskovsky v. Oklahoma*, state prosecutors utilized Oklahoma's state RICO statute¹¹⁴ to convict an attorney who "was charged with racketeering by using his law practice to engage in criminal sexual behavior with both adult female clients and children of clients from 1976 through 1996."¹¹⁵ Following his conviction, Miskovsky appealed.¹¹⁶

First, Miskovsky asserted that "his prosecution was an attempt to punish him for 'garden-variety' sex crimes on which the statute of limitations had run."¹¹⁷ Nevertheless, the court concluded that "[t]he fact that the statute of limitations had expired on several of the substantive felony charges did not preclude their use as predicate offenses for RICO."¹¹⁸

Second, Miskovsky argued that his law firm could not constitute an enterprise.¹¹⁹ However, the court concluded that Miskovsky's practice did in fact constitute an enterprise.¹²⁰ Not only did it operate as a "legitimate business entity," but it also served as a means for Miskovsky to come into contact with his victims - women and children he would not have encountered but for his practice.¹²¹ The court found "evidence of a continuing pattern of sexual abuse to adults and children extending over several years."¹²²

Additionally, Miskovsky challenged the state's proof of the "pattern" requirement.¹²³ To determine whether the prosecution had met its burden, the court looked for evidence of "continuity of racketeering activity,"¹²⁴ a requirement that the Supreme Court imposed in *H.J. Inc. v. N.W. Bell Tel.*¹²⁵ This "continuity" can encompass "either a closed period of repeated

114. OKL. STAT. ANN. tit. 22 § 1403.

115. *Miskovsky v. Oklahoma*, 31 P.3d 1054, 1059 (Okla. Crim. App. 2001).

116. *Id.* at 1058.

117. *Id.* at 1059.

118. *Id.*

119. *Id.* at 1063.

120. *Id.* at 1062-63.

121. *Id.*

Evidence showed one child victim's father . . . first approached Miskovsky to consult him on a legal matter. Subsequently the families became friends, creating the opportunity for Miskovsky to commit rape by instrumentation on the victim in his swimming pool. Another child victim encountered Miskovsky at a work-related party given by Miskovsky and the man with whom he shared an office. The victim was the daughter of the other man's secretary, and neither would have been at the party absent the business relationship. A third child victim met Miskovsky when her mother approached him, seeking to give up her parental rights and place the child for adoption.

Id. at 1063. Furthermore, "he encountered all the adult victims through his law practice." *Id.*

122. *Id.*

123. *See id.*

124. *Id.*

125. *H.J. Inc. v. NW Bell Tel.*, 492 U.S. 229, 240 (1989) (imposing a necessary finding of "a

conduct, or . . . past conduct that by its nature projects into the future with a threat of repetition.”¹²⁶ The Miskovsky court found that the state had proven that “the predicate acts were part of an overall scheme and must be considered together . . . [T]he predicate acts encompass several victims, extended over several years, and required a series of schemes of actions resulting in distinct injuries to the victims.”¹²⁷ The Oklahoma Court of Criminal Appeals upheld Miskovsky’s conviction.¹²⁸

3. *Fraud as a Predicate Crime*

While some state RICO statutes do not include sexual abuse as a predicate offense, prosecutors may nevertheless be able to impose criminal liability on the Church and its officials under state RICO statutes by utilizing crimes of fraud as predicate acts. The following states have included predicate crimes of fraud in their RICO statutes: Arizona,¹²⁹ Colorado,¹³⁰ Florida,¹³¹ Idaho,¹³² Indiana,¹³³ Michigan,¹³⁴ New Mexico,¹³⁵ New York,¹³⁶ North Dakota,¹³⁷ Oklahoma,¹³⁸ Texas,¹³⁹ Utah,¹⁴⁰ Wisconsin,¹⁴¹ and the U.S. Virgin Islands.¹⁴² While the state RICO statutes utilize varying definitions of fraud, some generalizations can be made.¹⁴³

threat of continuing activity”).

126. *Id.* at 241. The Court further remarked, “Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case.” *Id.* at 242.

127. *Miskovsky*, 31 P.3d at 1064.

128. *Id.* at 1066.

129. ARIZ. REV. STAT. ANN. § 13-2301 (West 2001) (enumerating several types of fraud that can be used as predicate acts). Arizona’s RICO statute is “one of the broadest and most frequently used state RICO statutes, as the Attorney General’s office has aggressively employed the statute both criminally and civilly against white-collar crime. Private civil use of the statute also appears to be on the rise.” I MCCORMACK, *supra* note 16, § 9.01, at 9-10.

130. COLO. REV. STAT. ANN. § 18-17-103(5)(b)(IV) (West 1999) (“offenses involving fraud”).

131. FLA. STAT. ANN. § 895.02(25) (West 2000); FLA. STAT. ANN. § 772.102(22) et. seq. (West 1997).

132. IDAHO CODE § 18-7803(10) (Michie 1997).

133. IND. CODE ANN. § 35-45-6-1(16) (West 1998).

134. MICH. COMP. LAWS ANN. § 750.159g (West 2003).

135. N.M. STAT. ANN. § 30-42-3(6) (Michie 2002).

136. NY PENAL LAW § 460.10(a) (McKinney 2000) (“schemes to defraud”).

137. N.D. CENT. CODE, § 12.1-06.1-01(f)(15) (1997).

138. OKL. STAT. ANN. tit. 22, §§ 1402(10)(t), 1403 (West 2003).

139. TEX. PENAL CODE ANN. § 71.02(a)(8) (Vernon 2003).

140. UTAH CODE ANN. § 76-10-1602(4) (1999) (referencing several varieties of fraud that constitute predicate acts).

141. WIS. STAT. ANN. § 946.82(4) (West 1996).

142. 14 V.I. CODE ANN. § 604(e)(16) (1996).

143. *See supra* notes 129-42.

Overall, the federal courts have interpreted fraud “by [a] nontechnical standard”¹⁴⁴ rather than narrowly defining the term.¹⁴⁵ The federal bench has found fraud in a broad array of circumstances which fail to comport with the level of “moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.”¹⁴⁶ Accordingly, fraud has been found to encompass “conduct that involves a breach of duty and that results in harm to another, conduct that involves an attempt to gain an undue advantage or to inflict harm through misrepresentation or breach of duty, and conduct that is inconsistent with recognized moral standards.”¹⁴⁷

4. *Additional Benefits of State RICO Statutes*

Prosecutors may find an additional advantage to utilizing state RICO statutes to prosecute those responsible for priest sex abuse: several states’ RICO statutes consider the personal injury of victims as a factor affecting damages or criminal fines.¹⁴⁸ States that recognize personal injury in this manner include: Arizona,¹⁴⁹ Florida,¹⁵⁰ Idaho,¹⁵¹ Mississippi,¹⁵² Nevada,¹⁵³ New Mexico,¹⁵⁴ Oklahoma,¹⁵⁵ and the U.S. Virgin Islands.¹⁵⁶

144. *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958).

145. 2 BRICKEY, *supra* note 86, § 8:32, at 89 (citations omitted). Professor Brickey quotes *United States v. Proctor & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942) as follows: “[T]o try to delimit ‘fraud’ by definition would tend to reward subtle and ingenious circumvention and is not done.” *Id.* n.444.

146. *Gregory*, 253 F.2d at 109 *quoted in* *Blachy v. United States*, 380 F.2d 665, 671 (5th Cir. 1967), *cited in* 2 BRICKEY, *supra* note 86, § 8:32 at 90 n.448.

147. 2 BRICKEY, *supra* note 86, § 8:32 at 89 (citations omitted).

148. *See infra* notes 149-56.

149. 1 MCCORMACK, *supra* note 16, § 9.01, at 9-17.

Civil remedies for violations of Arizona’s racketeering laws are set forth in § 13-2314 and § 13-2314.04 each of which contains provisions for injunctive relief and the award of damages to civil plaintiffs injured by racketeering activities Section 13-2314 empowers the State of Arizona to file an action in superior court on behalf of a person who sustains injury to his person . . . by racketeering as that term is defined in the Act for the recovery of treble damages and the costs of the suit including reasonable attorney’s fees or to prevent restrain or remedy racketeering as defined in the Act.

Id.

150. FLA. STAT. ANN. § 895.04 (12) (West 2000). This statute states:

[I]n lieu of a fine otherwise authorized by law, any person convicted of . . . [unlawful racketeering activity] in violation of the provisions of § 895.03 through which he has derived pecuniary value, or by which he has caused personal injury . . . may receive a fine that does not exceed 3 times the gross value gained or 3 times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.

Id. § 895.04(2).

151. IDAHO CODE § 18-7805(d)(4) (Michie 1997). This statute “provides a treble-damages remedy for private parties who sustain injury to their . . . person . . . by a pattern of racketeering activity.” 1

In addition to the advantages of using state RICO provisions for criminal prosecutions, several state RICO statutes allow for civil RICO cases as well.¹⁵⁷ These provisions could potentially allow the victims of priest sex abuse a cause of action.¹⁵⁸ Usually, Attorneys General are also enabled by state RICO statutes to pursue civil actions.¹⁵⁹ Civil RICO suits can be used to seek treble damage awards, and sometimes punitive damages as well.¹⁶⁰

Because many state RICO statutes allow equitable relief, including drastic injunctions, these statutes may provide a powerful mechanism for change within offending churches.¹⁶¹ For example, Florida allows the court to mandate that the convicted offender “divest himself or herself of any interest in any enterprise.”¹⁶² Additionally, Florida courts may place “reasonable restrictions upon the future activities . . . of any defendant.”¹⁶³ Furthermore, the court may mandate “dissolution or reorganization of any enterprise” and may require “forfeiture of the charter of a corporation . . . upon a finding that . . . a managerial agent . . . authorized or engaged in conduct violative of . . . the [Act].”¹⁶⁴

In sum, prosecutors may find state RICO provisions provide powerful tools to hold the Church and its officials criminally responsible for the sexual abuse inflicted by predatory priests.

MCCORMACK, *supra* note 16, § 1.09, at 9-77.

152. MISS. CODE ANN. §§ 97-43-7, 97-43-9 (2000).

153. NEV. REV. STAT. ANN. § 207.410 (West 2000).

154. N.M. STAT. ANN. § 30-42-6(A) (Michie 1978).

155. OKL. STAT. ANN. tit. 22, § 1403(B) (West 2003).

156. 14 V.I. CODE ANN. § 606(b) (1996).

157. 1 MCCORMACK, *supra* note 16, at 9-1 to 9-2.

158. *See id.*

159. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-2314(A) (West 2001).

160. 1 MCCORMACK, *supra* note 16, § 9, at 9-2.

161. The following states provide injunctive relief: Florida (FLA. STAT. ANN. § 895.05(1) (West 2000)); Georgia (GA.CODE ANN. § 16-14-6(a) (2003)); Idaho (IDAHO CODE § 18-7805(b) (Michie 1997)); Michigan (MICH. COMP. LAWS, § 750.159j(4)(a)-(e) (West 2003)); Mississippi (MISS. CODE ANN. § 97-43-9(1) (2000)); New Mexico (N.M. STAT. ANN. § 30-42-6(B)-(C) (Michie 1978)); New York (N.Y. C.P.L.R. § 1353 (McKinney 2000)); North Dakota (N.D. CENT. CODE, § 12.1-06.1-05(1)-(2) (1997)); *see* Oklahoma (OKL. STAT. ANN. tit. 22 § 1409(A) (West 2003)); and the U.S. Virgin Islands (14 V.I. CODE ANN. § 604 (1996)).

162. FLA. STAT. ANN. § 895.05(1)(a) (2000).

163. *Id.* § 895.05(1)(b).

164. FLA. STAT. ANN. § 895.05(1) (2000).

5. *Reckless Endangerment*

In the absence of appropriate RICO provisions, some states could seek to prosecute Church decision makers under reckless endangerment statutes.¹⁶⁵ A typical definition of reckless endangerment requires an individual to “recklessly engage[] in conduct which creates a substantial risk of serious physical injury to another person.”¹⁶⁶ Unfortunately, this definition is unlikely to prove useful within the specific context of child sexual abuse because sexual abuse is unlikely to fall within statutory definitions of “serious physical injury.”¹⁶⁷

Nonetheless, a few states have defined reckless endangerment or reckless conduct in a manner that could possibly encompass sexual abuse of children because these definitions only require that a person “recklessly engage[] in conduct which creates a risk of physical injury to another person.”¹⁶⁸ The mental state of recklessness requires the actor to consciously disregard a substantial and unjustifiable risk created by the actor’s conduct.¹⁶⁹ Furthermore, the actor’s conduct must be a “gross

165. See generally LAFAVE, *supra* note 20, § 3.7, at 246-56.

166. See ALA. CODE § 13A-6-24(a) (1994); ALASKA STAT. § 11.41.250(a) (Michie 2002); N.Y. PENAL LAW § 120.20 (McKinney 1998). Several additional states utilize very similar language. See, e.g., COLO. REV. STAT. 18-3-208 (West 1999); HAW. REV. STAT. ANN. § 707-714(1) (2002); MD. CODE ANN., CRIMINAL § 3-204(a)(1) (2002); N.D. CENT. CODE, § 12.1-17-03 (1997); 18 PA. CONST. STAT. ANN. § 2705 (West 2000); TENN. CODE ANN. § 39-13-103(a) (1997); UTAH CODE ANN. § 76-5-112(1) (1999); VT. STAT. ANN. tit. 13 § 1025 (1998); WASH. REV. CODE ANN. § 9A.36.050(1) (West 2000); WYO. STAT. ANN. § 6-2-504(a) (Michie 1988).

167. For a typical definition of “serious physical injury,” see D.C. CODE ANN. § 22-3001(7) (2001):

(7) “Serious bodily injury” means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Id.

168. CONN. GEN. STAT. ANN. § 53a-64(a) (West 2001) (“Reckless endangerment in the second degree”). See also GA. CODE ANN. § 16-5-60(b) (2003) (defining “reckless conduct”):

(b) A person who causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation is guilty of a misdemeanor. *Id.* See also 720 ILL. COMP. STAT. 5/12-5(a) “Reckless Conduct. (a) A person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful.” *Id.*

169. LAFAVE, *supra* note 20, § 3.7, at 247, 254. See generally *id.* § 3.7, at 246-56.

‘Recklessness’ in causing a result exists when one is aware that his conduct *might* cause the result, though it is not substantially certain to happen . . . Indeed, if there is no social utility in doing what he is doing, one might be reckless though the chances of harm are something less than 1%. Thus, . . . recklessness requires a consciousness of something far less than certainty or even probability.

Id. at 254 (emphasis in original).

deviation” from the standard of care that a reasonable person would exercise in the same or similar circumstances.¹⁷⁰ In 2002, Massachusetts specifically enumerated the risk of child sexual abuse and a failure to “alleviate” that risk as part of its reckless endangerment statute.¹⁷¹

Several states might also be able to prosecute Church dioceses or archdioceses in their corporate forms under a recklessness theory implicating the actions of a “high managerial agent.”¹⁷² These states have statutes which establish corporate criminal liability when, “[t]he conduct constituting the offense is . . . recklessly tolerated by . . . a high managerial agent acting within the scope of his employment and in behalf of the corporation.”¹⁷³ Because church dioceses are non-profit corporations with

170. MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962).

171. MASS. GEN. LAWS ANN. ch. 265, § 13L (West 2003). The statute states in relevant part: “Whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act . . .” is criminally liable. *Id.* Furthermore, the statute states:

For the purposes of this section, such wanton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Id.

172. N.Y. PENAL LAW § 20.20(1)(b) (McKinney 1998). “‘High managerial agent’ means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.” *Id.*

173. *Id.* § 20.20(2)(b) (2002). For another example of statutory language describing the criminal liability of a corporation as incurred by a high managerial agent, see ARIZ. REV. STAT. ANN. § 13-305 (West 2001).

A. Notwithstanding any other provisions of law, an enterprise commits an offense if:

1. The conduct constituting the offense consists of a failure to discharge a specific duty imposed by law; or
2. The conduct undertaken in behalf of the enterprise and constituting the offense is engaged in, authorized, solicited, commanded or recklessly tolerated by the directors of the enterprise in any manner or by a high managerial agent acting within the scope of employment; or
3. The conduct constituting the offense is engaged in by an agent of the enterprise while acting within the scope of employment and in behalf of the enterprise; and
 - (a) The offense is a misdemeanor or petty offense; or
 - (b) The offense is defined by a statute which imposes criminal liability on an enterprise.

B. As used in this section:

1. “Agent” means any officer, director, employee of an enterprise or any other person who is authorized to act in behalf of the enterprise.
2. “High managerial agent” means an officer of an enterprise or any other agent in a position of comparable authority with respect to the formulation of enterprise policy.

Id. See also ARK. CODE ANN. § 5-2-502 (Michie 1997); COLO. REV. STAT. ANN. § 18-1-606 (West 1999); DEL. CODE ANN. tit. 11 § 281 (2001); HAW. REV. STAT. § 702-227 (Michie 1999); 720 ILL. COMP. STAT. 5/5-4 (2002); IOWA CODE ANN. § 703.5 (West 2003); KY. REV. STAT. ANN. § 502.050 (Michie 1999); MO. REV. STAT. § 562.056 (2000); MONT. CODE ANN. § 45-2-311 (2000); N.J. STAT.

bishops and cardinals staffing upper-level management positions, prosecutors could conceivably prosecute Church dioceses under these statutes.¹⁷⁴

6. *Hindering Prosecution*

Yet another theory of criminal liability for church officials might possibly be found in various state statutes which prohibit hindering prosecution.¹⁷⁵ The elements of hindering prosecution typically include the intent “to prevent, hinder or delay the discovery or apprehension of, or the lodging of a criminal charge against, another person whom such person knows or believes has committed a felony”¹⁷⁶ and the act of “prevent[ing] or obstruct[ing], by means of . . . intimidation or deception, any person from performing an act which might aid in the discovery or apprehension of such other person or in the lodging of a criminal charge against such other person.”¹⁷⁷

Many states, as well as Puerto Rico and the U.S. Virgin Islands, expressly prohibit hindering prosecution by statute.¹⁷⁸ Additionally, it should be noted that New York, North Dakota, and Utah enumerate hindering prosecution as a predicate crime under their state RICO provisions.¹⁷⁹ Prosecutors may find that hindering prosecution statutes,

ANN. § 2C:2-7 (West 1995); OHIO REV. CODE ANN. § 2901.23 (West 1997); OR. REV. STAT. § 161.170 (1990); 18 PA. CONS. STAT. ANN. § 307 (West 1998); TENN. CODE ANN. § 39-11-404 (1997); TEX. PENAL CODE ANN. § 7.22 (Vernon 2003); WASH. REV. CODE ANN. § 9A.08.030 (West 2000).

174. See generally *The U.S. Catholic Church: How It Works*, BUS. WK., Apr. 15, 2002 available at http://www.businessweek.com/magazine/content/02_15/b3778004.htm.

175. See, e.g., SUFFOLK REP., *supra* note 2, at 173. The Suffolk County Grand Jury Report reached the following conclusion concerning the Diocese of Rockville Center:

The evidence before the Grand Jury clearly demonstrates that Diocesan officials agreed to engage in conduct that resulted in the prevention, hindrance and delay in the discovery of criminal conduct by priests. They conceived and agreed to a plan using deception and intimidation to prevent victims from seeking legal solutions to their problems.

Id.

176. See, e.g., CONN. GEN. STAT. ANN. § 53a-165 (West 2003).

177. *Id.*

178. See, e.g., ALA. CODE §§ 13A-10-42 to -44 (1994); ALASKA STAT. § 11.56.770 (Michie 2002); ARIZ. REV. STAT. ANN. §§ 13-2510 to 13-2512 (West 2001); ARK. CODE ANN. § 5-54-105 (Michie 1997); CONN. GEN. STAT. ANN. §§ 53a-165 to 53a-167 (West 2001); DEL. CODE ANN. tit. 11, § 1244 (Michie 2001); HAW. REV. STAT. ANN. § 710-1028 to 710-1030 (Lexis 1999); KEN. REV. STAT. § 520.120 (2002); MO. REV. STAT. § 575.030 (2000); N.J. STAT. ANN. § 2C:29-3 (West 1995 & Supp. 2003); N.Y. PENAL LAW §§ 205.50, 250.55, 250.60 (McKinney 1999); ORE. REV. STAT. § 162.325 (1990); 18 PA. CONS. STAT. ANN. § 5105 (West 1983).

179. N.Y. PENAL LAW § 460.10(1)(a) (McKinney 2000); N.D. CENT. CODE § 12.1-06.1-01(f)(13) (1997); UTAH CODE ANN. § 76-10-1602(4)(tt) (1999). See also 1 MCCORMACK, *supra* note 16, § 9.19, at 9-130; § 9.21, at 9-141; § 9.29, at 9-197.

alone, or in connection with a state RICO statute, could be valuable tools to prosecute Church decision makers who act to protect pedophile priests instead of children.

7. *Omission to Act*

Because they failed to control the predatory actions of priests, church officials may also be criminally liable for their failure to act. While it is true that most theories of criminal liability are based on an individual's acts, crimes can be committed by an individual who does not act when the individual has a legal duty to do so.¹⁸⁰ Such a duty can be found in an employer-employee relationship.¹⁸¹ This duty is referred to as a "duty to control conduct of others."¹⁸² In order for the duty to arise, the employer must be aware of the circumstances which require action on his part,¹⁸³ and the employee must commit his crimes while in the scope of his employment.¹⁸⁴ Under this theory, church officials who knew of a priest's sexual abuse of children had a duty to control the conduct of the priest, provided that the priest was acting within the scope of his employment. While several jurisdictions considering tort actions¹⁸⁵ have concluded that a priest who engages in sexual abuse of a parishioner is not acting within

180. LAFAVE, *supra* note 20, § 3.3, at 214. "Most crimes are committed by affirmative action rather than by non-action. But there are a number of statutory crimes which . . . may be committed . . . by failure to act under circumstances giving rise to a legal duty to act." *Id.*

181. *Id.* at 219.

182. *Id.* "[A]n employer has a . . . duty to curb his employee while the latter is performing the employer's business." *Id.* While some may assert that the abusive priests were not performing the employer's business while children were being abused, this argument is unpersuasive. Children were molested as they readied the mass in the sacristy. SUFFOLK REP., *supra* note 2, at 13. Many children were abused in the churches' rectories. *See, e.g.,* BETRAYAL, *supra* note 6, at 85, 87. Furthermore, the predatory priests gained access to children as a direct result of their position as priests. *See, e.g., id.* at 88. "[The allegedly sexually abusive Rev. Joseph L. Welsh] had been a de facto family member for three decades." *Id.* "Much the same fate befell a Maine family . . ." as "their home became [an abusive priest's] second home." *Id.*

183. LAFAVE, *supra* note 20, § 3.3(b), at 219.

Though one might otherwise be under a duty to act, so that omission to do so would ordinarily render him criminally liable, the prevailing view is that he may not be held liable if he does not know the facts indicating a duty to act. Thus, while a father normally has a duty to rescue his young child from drowning, if he does not know that the child is in the water then his ignorance may relieve him from criminal responsibility for the child's death.

Id.

184. *Id.* § 3.3(a)(6), at 219.

185. *Id.* § 3.3(a)(7), at 219. LaFave notes that, "[o]ver the years of the development of tort and criminal law, the trend has been in the direction of creating new situations wherein an affirmative duty to act is imposed," and remarks that "[t]he civil cases are closely analogous to criminal cases. *Id.* at 219 n.36 (citing W. PROSSER & W. KEETON, TORTS § 56 (5th ed. 1984)).

the scope of his employment,¹⁸⁶ some jurisdictions have concluded that employee acts of sexual abuse did occur in the scope of employment.¹⁸⁷ These courts have found acts of sexual abuse to have occurred during the scope of employment when, *inter alia*, “the acts that led to the injury . . . were within the scope of employment.”¹⁸⁸

186. *See, e.g.*, *Doe v. Hartford Roman Catholic Diocesan Corp.*, 716 A.2d 960, 963 (Conn. 1998) (citing *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66, 69-70; *Rita M. v. Roman Catholic Archbishop of Los Angeles*, 187 Cal.App.3d 1453 (1986); *Joshua S. v. Casey*, 615 N.Y.S.2d 200 (1994); *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991); *Kennedy v. Roman Catholic Diocese of Burlington*, 921 F. Supp. 231, 233 (D.Vt. 1996); *Tichenor v. Roman Catholic Church of New Orleans*, 32 F.3d 953, 959 (5th Cir.1994)). *See also* *Byrd et al., v. Faber*, 565 N.E.2d 584, 588 (Ohio 1991) (“[A]n employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business); *but see* *Erickson v. Christenson*, 781 P.2d 383, 386 (Ct. App. Ore. 1989). *Erickson* states:

An employee’s act is within the scope of the employment if it occurs substantially within the time and space limits authorized by the employment, the employee is at least partially motivated by a purpose to serve the employer, and the act is of a kind which the employee was hired to perform.

Id. (citing *Chesterman v. Barmon*, 753 P.2d 404 (Ore. 1988) (*en banc*)).

187. *See, e.g.*, *Simmons v. United States*, 805 F.2d 1363, 1368-71 (9th Cir. 1986) (applying Washington state law to determine the scope of employment); *G.B. v. Archdiocese of Portland in Oregon*, 2001 WL 34041144, at *3-4 (D. Or. 2001); *Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., et al.*, 329 N.W.2d 306, 310-311 (Minn. 1983); *Fearing v. Bucher*, 977 P.2d 1163, 1166-68 (Or. 1999); *Chesterman v. Barmon*, 753 P.2d 404, 406 (Or. 1988) (*en banc*); *Gulf, C. & S.F. Ry. Co. v. Cobb*, 45 S.W.2d 323, 325-26 (Civ. App. Tex. 1931).

188. *Fearing*, 977 P.2d at 1166 n.4. The *Fearing* court remarked that “an employee’s intentional tort rarely, if ever, will have been authorized expressly by the employer. In that context, then, it virtually always will be necessary to look to the acts that led to the injury to determine if *those* acts were within the scope of employment.” *Id.* (emphasis in original) In *Fearing*, the court considered a case of priest sexual abuse. *Id.* at 1164. The court concluded that “a jury could infer that the sexual assaults were the culmination of a progressive series of actions that began with and continued to involve Bucher’s performance of the ordinary and authorized duties of a priest.” *Id.* at 1167. The court continued, stating “the jury also could infer that, in cultivating a relationship with plaintiff and his family, Bucher, at least initially, was motivated by a desire to fulfill his priestly duties and that, over time, his motives became mixed.” *Id.* Ultimately, the court determined that the priest’s intentional torts could be found by a jury to have occurred “within the scope of employment.” *Id.*

See also *Chesterman*, 753 P.2d at 406. The *Chesterman* court concluded that an employee, who ingested drugs to enable him to work, and while under the influence of these drugs, raped a woman in her home, could have been acting within the scope of his employment. *Id.* The court indicated that when there exists “a ‘time-lag’ between the act allegedly producing the harm [the taking of the drug to enable the employee to work] and the resulting harm [the rape] [,] [t]he focus should be on the *act* on which the vicarious liability is based and not on when the act results in *injury*.” *Id.* (emphasis in original) (citation omitted).

In a similar case, *Lourim v. Swensen*, the court concluded that “a jury could reasonably infer that the sexual assaults were merely the culmination of a progressive series of actions that involved the ordinary and authorized duties of a Boy Scout leader.” 977 P.2d 1157, 1160 (Ore. 1999). *See also* *Simmons*, 805 F.2d at 1368.

Washington agency law has long held that a master cannot excuse himself when any ‘authorized act was improperly or unlawfully performed,’ nor can he excuse himself when an unauthorized act is done in conjunction with other acts which are within the scope of duties the employee is instructed to perform.

Id. (citations omitted). *See also* *Marston*, 329 N.W.2d at 311 n.3 (suggesting a jury instruction

If Church officials failed to exercise the legal duty that arose from the employer-employee relationship, these officials may be criminally liable for the priest's crimes, provided that one more legal hurdle can be crossed.¹⁸⁹ Specifically, there must be a shared mental state on the part of the employer and the employee who commits the criminal act.¹⁹⁰ While this shared mental state is unlikely to be shared in acts of sexual abuse which commonly require specific intent, this shared mental state could theoretically exist in crimes which require a recklessness mental state.¹⁹¹ Several states have statutes for assault that could encompass the criminal act of the priest, and yet allow for a variety of mental states, including recklessness.¹⁹² These statutes would, at least on a theoretical level, allow

regarding the scope of employment that reads, in part: "The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the principal but rather whether such conduct should fairly have been foreseen from the nature of the employment and the duties relating to it."); *Archdiocese of Portland*, 2001 WL 34041144 at *3-4; *Cobb*, 45 S.W.2d at 326. The *Archdiocese of Portland* court states:

[T]he master is liable for any such act of the servant which, if isolated, would not be imputable to the master, but which is so connected with and immediately grows out of another act of the servant imputable to the master, that both acts are treated as one indivisible tort, which for the purposes of the master's liability, takes its color and quality from the earlier act.

Id.

189. *See* *Moreland v. State*, 139 S.E. 77, 78-79 (Ga. 1927) (holding the owner of a car criminally liable for involuntary manslaughter because he had a duty to control the unlawful driving of his chauffeur).

190. *See* LAFAVE, *supra* note 20, § 3.3(a)(6), at 219; *Id.* § 3.3(e), at 223.

191. *Id.* § 3.3(e), at 223.

It would seem that criminal battery may be committed by an omission to act (if there exists a duty to act), as well as by an affirmative act. If a parent, knowing that injury is substantially certain to result to his infant child unless he acts to prevent it, fails to act, and the infant is injured but not killed as a result, the parent would doubtless be guilty of battery. The same result should follow if his omission amounted to recklessness, though he did not intend any injury to the child.

Id. LaFave notes, "These hypothetical cases are but applications of the rules that battery may be committed by intention to injure or by recklessness." *Id.* n.66 (citation omitted).

192. *See, e.g.*, ALA. CODE § 13A-6-22 (1994). Under section (a) of this provision:

(a) A person commits the crime of assault in the third degree if:

(1) With intent to cause physical injury to another person, he causes physical injury to any person;

or

(2) He recklessly causes physical injury to another person

Id. *See also* MO. REV. STAT. § 565.070 (2000) ("1. A person commits the crime of assault in the third degree if: (1) The person attempts to cause or recklessly causes physical injury to another person"); ARIZ. REV. STAT. § 13-1203(West 2001) ("A. A person commits assault by: 1. Intentionally, knowingly or recklessly causing any physical injury to another person"); COLO. REV. STAT. ANN. § 18-3-204 (2002) ("A person commits the crime of assault in the third degree if he knowingly or recklessly causes bodily injury to another person"); MISS. CODE ANN. § 97-3-7 (2000) ("(1) A person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another"); N.H. REV. STAT. ANN. § 631:2-a (1996) ("I. A person is guilty of simple assault if he: (a) Purposely or knowingly causes bodily injury or unprivileged physical contact to another; or (b) Recklessly causes bodily injury to another"); N.J. STAT. ANN. § 2C:12-

for a finding of shared mental states between the priests who committed the assaults and their employers who acted recklessly when they failed to control the priests' conduct.¹⁹³

III. ANALYSIS

The prevalence and pervasiveness¹⁹⁴ of priest sex abuse indicate that the measures used in the past will likely prove insufficient to prevent future harm to children.¹⁹⁵ Given the Vatican's continued insistence on the primacy of canon law,¹⁹⁶ and its concomitant refusal to adopt a policy that would require the church to turn over suspected pedophiles to the police,¹⁹⁷ many are circumspect that anything will change.¹⁹⁸ Criminal liability for the decision makers would make it absolutely clear that perpetuating child sexual abuse is criminal; no measure of religious stature places one above the law.¹⁹⁹

A. Prosecution Under State RICO Statutes

States whose RICO provisions specifically enumerate sexual abuse as a predicate crime should be successful in prosecuting the church and its officials as well as sexually abusive priests under their RICO statutes. These prosecutions could closely mirror the successful prosecution in *Miskovsky*. Of particular significance in the priest sex abuse context is the

1 (West 2003) ("A person is guilty of [simple] assault if he: (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another . . ."); N.Y. PENAL LAW § 120.00 (McKinney 1998) ("A person is guilty of assault in the third degree when: 1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or 2. He recklessly causes physical injury to another person . . ."); S.D. CODIFIED LAWS § 22-18-1 (Michie 2003) ("Any person who: (1) Attempts to cause bodily injury to another, . . . and has the actual ability to cause the injury; (2) Recklessly causes bodily injury to another . . ."); TENN. CODE ANN. § 39-13-101 (2003) ("(a) A person commits assault who: (1) Intentionally, knowingly or recklessly causes bodily injury to another . . ."); TEX. PENAL CODE ANN. § 22.01 (Vernon 2003) ("Assault (a) A person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another . . ."); VT. STAT. ANN. tit. 13 § 1023 (2003) ("(a) A person is guilty of simple assault if he: (1) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another . . ."); WYO. STAT. ANN. § 6-2-501 (Michie 2003) ("(b) A person is guilty of battery if he . . . intentionally, knowingly or recklessly causes bodily injury to another.").

193. See WAYNE LAFAYE, *supra* note 20, §§ 3.3(a)(6), 3.3(e), at 219, 223.

194. Goodstein & Zirilli, *supra* note 43.

195. Paulson & Davis, *supra* note 3. "Victim advocates say they are convinced that the church will not punish bishops who failed to stop abuse, and so they are pinning their hopes on prosecutors." *Id.*

196. Cooperman, *supra* note 53.

197. See *id.*

198. See *supra* notes 8, 10, 195.

199. See *supra* note 66.

Miskovsky court's conclusion that crimes whose statute of limitations had run were nevertheless predicate crimes under the state's RICO statute.²⁰⁰ Moreover, the reasoning that supported a finding of an enterprise in *Miskovsky* supports a finding of an enterprise in the context of priest sex abuse.²⁰¹ Just as *Miskovsky's* law practice operated as a "legitimate business entity" and served as a means for *Miskovsky* to come into contact with his victims, so too have churches operated as legitimate non-profit corporations and served as a means for abusive priests to encounter their victims.²⁰² Finally, given the scale of abuse committed by individual priests, it should not be difficult for courts to find evidence of a "continuing pattern" of sexual abuse sufficient to satisfy RICO requirements.²⁰³

Likewise, states whose RICO provisions enumerate acts of fraud as predicate offenses may also successfully prosecute the Church and its officials under their RICO statutes.²⁰⁴ States might consider pursuing a theory of fraud which encompasses "conduct that involves a breach of duty and that results in harm to another."²⁰⁵ Specifically, prosecutors might explore theories of fraud involving a breach of fiduciary duty on the part of the Church or Diocese, owed to its parishioners who were sexually abused.²⁰⁶ Prosecutors could likely find fraudulent activity in the "priest shuffling" activities of church officials, because priest shuffling involved

200. 31 P.3d at 1059.

201. *Id.* at 1062-63.

202. *Id.* See *supra* notes 174, 188.

203. See *supra* notes 43-44 and accompanying text.

204. See, e.g., Pamela Ferdinand, *Suit Says Archdiocese Knew of Priest's Abuse: Parishes Not Told, Lawyer Alleges*, WASH. POST, Apr. 9, 2002, at A01. The WASHINGTON POST reported that "[t]he Archdiocese of Boston knowingly arranged the transfer of an accused serial pedophile priest to posts in [three states] for more than three decades without informing those parishes of his history, according to church documents . . ." *Id.* The WASHINGTON POST further reported that "a letter, which cleared the way for Shanley to work at [a parish in California], certified that Shanley was 'a priest in good standing. . .'" *Id.* This letter was penned by one of the Boston Archdiocese's high-level officials. *Id.* The WASHINGTON POST also relayed that "Church leaders in [California] told the Boston Globe they would not have permitted Shanley to serve in their diocese had they known about his history." *Id.*

205. 2 BRICKEY, *supra* note 86, § 8:32, at 89 (internal citations omitted).

206. For example, there are priest sexual abuse tort cases in which courts have found a fiduciary duty to exist between the Church or Diocese and the parishioner who suffered the abuse. See, e.g., *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 431 (2d Cir. 1999) ("Where a person's beliefs are alleged to give rise to a special legal relationship between him and his church, we may be required to consider with other relevant evidence the nature of that person's beliefs in order to properly determine whether the asserted relationship in fact exists."); *Doe v. Evans, III*, 814 So.2d 370, 375 (Fla. 2002) (determining that "Doe's breach of fiduciary [duty] claim states a cognizable cause of action). See generally Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45 (2001).

deception as well as contemplated harm.²⁰⁷ For example, church officials frequently lied to parishioners about the reason for their former priest's departure in order to conceal the priest's acts of sexual abuse.²⁰⁸ Lying, instead of disclosing the abuse, arguably delayed the revelation of other cases of abuse and in so doing, delayed treatment for those who had been abused and failed to prevent future incidents of abuse.²⁰⁹ Furthermore, when church officials recommended sexually abusive priests to new parishes without disclosing the danger posed by the priests' presence, these officials endangered parishioners in the new parishes.²¹⁰ Given the Church's knowledge of the problem of recidivism,²¹¹ Church officials could have contemplated the harm that would result from transferring an abusive priest to an unsuspecting parish, namely, more acts of abuse perpetrated against more children.²¹²

Certainly, the act of "priest shuffling" did not comport with the standard "of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."²¹³ However, the various churches' failure to inform its parishioners of sexual abuse allegations is insufficient to prove fraud in the absence of a duty to disclose this information.²¹⁴ This duty might be established as a fiduciary duty. Some jurisdictions considering tort cases involving priest sexual abuse have concluded that the Church or Diocese owed its parishioner a fiduciary duty.²¹⁵ For example, in one case, the Second Circuit concluded that "the Diocese owed [the plaintiff], and youths with a similar relationship with the Diocese, a duty of care including a duty to investigate and warn or inform so as to prevent or alleviate harm to additional

207. See *supra* note 204, Part II.A; *infra* note 208 and accompanying text.

208. Pamela Ferdinand, *Parishes Not Told of Charges Against Priests, Law Says: Suspected Child Molesters Have Served in Many of Boston Archdiocese's [sic] Churches, Cardinal Testifies in Deposition*, WASH. POST, Aug. 14, 2002, at A2. The WASHINGTON POST reported,

Cardinal . . . Law acknowledged returning priests to the ministry without alerting parishioners . . .

Overall, the Cardinal said he would consider it a 'conservative' estimate that suspected child molesters served at one time or another in more than 200 parishes in the Archdiocese of Boston."

Id.

209. See, e.g., *Martinelli* 196 F.3d at 426.

210. See *supra* note 204.

211. See *supra* Part II.A.

212. See *id.*

213. *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958); 2 BRICKEY, *supra* note 86, § 8:32, at 90.

214. See generally 37 AM. JUR. 2D *Fraud & Deceit* § 204 (2001). "Before nondisclosure or fraudulent concealment can be considered, a plaintiff must show that the defendant had a duty to disclose the information claimed to have been suppressed. Accordingly, silence may constitute fraud when a duty to disclose exists." *Id.* (citations omitted).

215. See *supra* note 206 and accompanying text

victims.”²¹⁶ These cases may be helpful to prosecutors, because theories of duty in tort and criminal law are considered “closely analogous.”²¹⁷

Provided that prosecutors can establish the predicate acts of fraud, prosecutors would likely be able to establish the existence of an enterprise as well as a pattern of racketeering activity in the same manner as described above.²¹⁸

Generally, the use of state RICO statutes should alleviate statute of limitations problems caused by delayed reporting of child sex abuse, because many state RICO statutes provide a lengthy statute of limitations.²¹⁹ Furthermore, state RICO prosecutions are not susceptible to ex post facto prohibitions provided that a predicate crime within the “pattern of racketeering activity” is committed after the statute became effective.²²⁰

B. Prosecution Under a Theory of Reckless Endangerment

When church decision makers placed sexually abusive priests in unsupervised parish settings, there can be little doubt that they acted recklessly;²²¹ their actions created a substantial and unjustifiable risk of

216. *Martinelli*, 196 F.3d at 430. The Second Circuit did not reach the issue of whether the Diocese owed a duty to “parishioners generally.” *Id.* at 429. The court determined, however, that a fiduciary relationship did exist between the plaintiff and the Diocese based on his relationship with the diocese which is described in detail by the court. *Id.* at 429-30.

217. *See, e.g., LAFAVE, supra* note 20, at § 3.3(a)(6), 219 n.36.

218. *See* notes 202-03 *supra* and accompanying text.

219. *See MCCORMACK, supra* note 16, at 9-1. *See, e.g., Estate of Kirschenbaum v. Kirschenbaum*, 793 P.2d 1102, 1106 (Ariz. Ct. App. 1989) (concluding that while statute of limitations had expired on individual crimes comprising predicate acts, the statute of limitations under Arizona’s RICO statute had not expired). *See supra* note 200 and accompanying text.

220. *See People v. Grant*, 973 P.2d 72, 77 (Cal. 1999). The court noted that “application of a newly amended or enacted law to a so-called ‘straddle’ offense, that is, a crime that begins before and continues after the law’s effective date, does not violate the federal Constitution’s prohibition against ex post facto laws.” *Id.* (citing *United States v. Campanale*, 518 F.2d 352, 355 (9th Cir. 1975) (allowing conviction provided that one act of racketeering activity within the “pattern” is committed after the statute’s effective date).

221. *See, e.g., SUFFOLK REP., supra* note 2, at 172.

The Grand Jury concludes that officials in the Diocese failed in their responsibility to protect children. They ignored credible complaints about the sexually abusive behaviors of priests. They failed to act on obvious warning signs of sexual abuse including instances where they were aware that priests had children in their private rooms in the rectory overnight, that priests were drinking alcohol with underage children and exposing them to pornography. Even where a priest disclosed sexually abusive behavior with children officials failed to act to remove him from ministry.

Id. However, a problem may exist for prosecutors under the reckless endangerment theory of criminal liability because some state statutes explicitly define the injury or harm suffered by the victim in a manner that precludes sexual abuse from falling within the statutory definition. *See, e.g. ALA. CODE* § 13A-1-2(9) (2002). “Serious physical injury. Physical injury which creates a substantial risk of

priest sex abuse and were accordingly a “gross deviation” from the standard of care that a reasonable person would have exercised in the same or similar circumstances.²²² Also, in some states, the actions of the cardinals and bishops should subject the Church to criminal liability because, while acting as diocesan “high managerial agents,” bishops and cardinals “recklessly tolerated” priest sexual abuse.²²³

C. Criminal Liability for Hindering Prosecution

By examining the actions of Church officials surrounding incidents of priest sex abuse, prosecutors should be able to establish the elements of hindering prosecution. Indeed, a 2003 Grand Jury Report regarding priest sex abuse in Suffolk County, New York reached that conclusion.²²⁴ The report stated that “Diocesan officials agreed to engage in conduct that resulted in the prevention, hindrance and delay in the discovery of criminal conduct by priests.”²²⁵ The Grand Jury also concluded that church officials “conceived and agreed to a plan using deception and intimidation to prevent victims from seeking legal solutions to their problems.”²²⁶ In sum, the Grand Jury’s findings indicate that diocesan officials hindered the prosecution of sexually abusive priests.²²⁷ Provided that prosecutors could find similar fact patterns in other dioceses, other states with similar statutes might be able to mirror their cases after the grand jury findings in New York.²²⁸ Additionally, prosecutors in New York, North Dakota, and Utah could examine the possibility of using acts of hindering prosecution as predicate crimes for their state’s RICO statutes.²²⁹ This will likely lengthen the statute of limitations as well as increase the applicable penalties and enhance available remedies.²³⁰

death, or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.” *Id.*

222. MODEL PENAL CODE § 2.02(2)(c). *See also, e.g.,* SUFFOLK REP., *supra* note 2, at 172. *See also supra* Part II.A.

223. *See, e.g.,* *People v. Aquarian Age 2000, Inc.*, 380 N.Y.S.2d 545, 548 (1976). “The broad principle is well established ‘that a corporation may be liable criminally for the acts of its agents in doing things prohibited by statute.’” *Id.* (internal citations omitted).

224. SUFFOLK REP., *supra* note 2, at 173.

225. *Id.*

226. *Id.*

227. *Id.*

228. *See* Goodstein & Zirilli, *supra* note 43.

229. *See supra* note 179 and accompanying text.

230. *See* discussion *supra* Part II.B.

D. Prosecution for Failure To Act

While it may seem strange to prosecute church officials for acts of assault committed by priests under their supervision, this theory of liability has been successfully used in the employer/employee context.²³¹ Employers have a duty to control the criminal actions of their employees, provided the employer is aware of the employee's acts and the employee is acting within the scope of his employment.²³² It can hardly be doubted that church officials were aware of the criminal acts of sexual abuse being committed by priests.²³³ As discussed above, some jurisdictions have found that acts of priest sexual abuse have occurred within the scope of employment.²³⁴ Additionally, several states have assault statutes that would encompass both the mental state of the priest and the priest's employer.²³⁵ While this approach is far from an easy tack for a prosecutor to take, it is arguably worth the difficulty involved and the risk of failure in order to place criminal liability on church officials for their failure to control the conduct of predatory priests.

Nevertheless, prosecutors face hurdles that may impede successful prosecution of the Church and its decision makers for their role in priest sexual abuse. Probably the most difficult obstacle for prosecutors to overcome is the problem posed by various statutes of limitation.²³⁶ Many children and their families did not come forward to police at the time of the sexual abuse.²³⁷ Victims and their families did not report the crimes to civil authorities for a host of reasons: because the Church told them not

231. The leading case is *Moreland v. State*, 139 S.E. 77 (Ga. 1927). In *Moreland*, the court held that the owner of a vehicle was guilty of "involuntary manslaughter in the commission of an unlawful act" even though the owner's chauffeur was driving. *Id.* at 78-79. The opinion states that because, "the owner of the car was in control thereof, . . . he should have seen to it that his chauffeur did not operate the car in such a manner contrary to law . . ." *Id.* at 79. The court remonstrated that "[i]t would be the owner's duty, when he saw that the law was being violated . . . to curb and restrain one in his employment and under his control, and prevent him from violating the law . . ." *Id.*

232. See generally LAFAVE, *supra* note 20, § 3.3(a)(6), at 219.

233. See, e.g., *Betrayal*, *supra* note 6, at 205-49 (containing photographic reproductions of Church documents concerning sexually abusive priests Fr. Geoghan and Fr. Shanley).

234. See *supra* note 187.

235. See *supra* note 192.

236. See, e.g., Walter v. Robinson, "Norfolk DA: Most Priests Can't Be Tried, BOSTON GLOBE, Apr. 10, 2002. "Norfolk District Attorney . . . Keating, in a sharp rebuke to the Archdiocese of Boston for its longtime practice of shielding priests who molested children, said yesterday that the passage of time will prevent prosecutions of most of the priests whose names were referred to his office." *Id.*

237. SUFFOLK REP., *supra* note 2, at 171. "Frequently, because of the nature of child sexual abuse, the victims of this criminal activity do not and did not, in these cases, disclose it until they were adults. This was almost always after the statute of limitations for the criminal prosecution of these crimes had lapsed."

to;²³⁸ because the Church assured the victims and their families that the offending priest would receive treatment and would not be allowed near children again;²³⁹ because the victim was ashamed;²⁴⁰ or because the family feared bringing the police into Church matters.²⁴¹

As discussed above, statute of limitation problems are less pronounced in the context of state RICO prosecutions. However, they remain a hurdle for the alternative criminal theories suggested, including reckless endangerment, hindering prosecution, and criminal liability based on an omission to act.

IV. PROPOSAL

State legislatures should act to remove the enforcement hurdles faced by prosecutors, so that in the future, all of those responsible for the sexual abuse of children can be held criminally liable.

In general, state legislatures should extend the statute of limitations on crimes of sexual abuse until the time the victim has reached adulthood.²⁴² It is well known that children often do not reveal sexual abuse until several years later.²⁴³ The phenomenon of delayed reporting in cases of sexual abuse should not prevent child molesters from facing prosecution.²⁴⁴

State legislatures should also add explicit provisions concerning child sex abuse to their reckless endangerment statutes and lengthen the statute of limitations for prosecutions of reckless endangerment that involve child sex abuse.²⁴⁵ Likewise, states would be well advised to extend the statute of limitations for hindering prosecution when the crime being concealed is child sex abuse.²⁴⁶

238. See, e.g., Betrayal, *supra* note 6, at 214-15. A family member of abused victims wrote a letter to Cardinal Mediros, which stated, *inter alia*, "It was suggested that we keep silent to protect the boys - that is absurd since minors are protected under law, and I do not wish to hear that remark again, since it is insulting to our intelligence." *Id.* at 214.

239. See, e.g., *id.* at 20. A mother of an abused child was told, "He will never be a priest again." *Id.*

240. See, e.g., SUFFOLK REP., *supra* note 2, at 97 (detailing the nature of Child Sexual Abuse Syndrome).

241. See, e.g., Betrayal, *supra* note 6, at 214-15. As discussed *supra* in note 238, a woman sent a letter to the then Cardinal of the Boston Archdiocese regarding her family members' abuse by a parish priest. The woman wrote, "We did not question the Authority of the Church two years ago, but left it entirely in your hands." *Id.*

242. SUFFOLK REP., *supra* note 2, at 175.

243. *Id.* at 173.

244. *Id.* at 175-76.

245. See, e.g., Annotated Laws of Massachusetts ch. 265, § 13L (2002).

246. SUFFOLK REP., *supra* note 2, at 176.

Currently, several states do not have a mandatory reporting statute that would require those who work in specific professions to report their suspicions of child abuse to civil authorities.²⁴⁷ Even when states have enacted mandatory reporting statutes, the statutes are often flawed because they only mandate reporting of suspected child abuse “committed by a parent, guardian, or other person legally responsible for a child.”²⁴⁸ Accordingly, child abuse committed by a priest or anyone outside of the child’s family who is not “legally responsible for [the] child” is not required to be reported.²⁴⁹ Additionally, many of these statutes do not include members of the clergy as mandatory reporters.²⁵⁰ To close the existing statutory gaps, all states should enact a reporting statute that includes the clergy, church officials and staff in its mandate.²⁵¹ Furthermore, these statutes should require reporting regardless of the relationship of the abuser to the victim: it should not matter if the suspected abuser is the child’s parent, guardian, or priest.²⁵²

V. CONCLUSION

State legislatures and prosecutors must not rely on the church to change itself; tragically, victims and their families have already made that

247. Currently the following states have mandatory reporting statutes. This list does not include those states who only require reporting post mortem. Alabama, ALA. CODE § 26-14-3 (1975); California, CAL. PEN. CODE § 11166 (2000); Florida, FLA. STAT. ch. 39.201 (2003); Georgia, GA. CODE ANN. § 19-7-5 (2003); Illinois, 325 ILL. COMP. STAT. 5/7.19 (2003); Iowa, IOWA CODE § 232.69 (2003); Kansas, KAN. STAT. ANN. § 38-1522 (2001); Louisiana, LA. CHILDREN’S CODE ANN. 609 (1995); Minnesota, MINN. STAT. § 626.556 (2002); Montana, MONT. CODE ANN., § 41-3-101 (2000); Nebraska, NEB. REV. STAT. § 28-711 (1995); New Hampshire, 12 RSA 169-C:2 (2002); New York, N.Y. PUB. HEALTH LAW § 2805-n (1999); North Carolina, N.C. GEN. STAT. § 7B-301 (2001); Oregon, OR. REV. STAT. § 419B.010 (1993); South Carolina, S.C. CODE ANN. § 20-7-510 (1995); Utah, UTAH CODE ANN. § 53A-6-502 (2000); Washington, WASH. REV. CODE § 26.44.030 (2000).

248. See, e.g., SUFFOLK REP., *supra* note 2, at 104-05.

249. *Id.* at 205. The Suffolk County Grand Jury Report states:

[Mandatory reporters] are not required to report cases of abuse and/or neglect where the perpetrator is a legal stranger to the child. Therefore, revising the current statute to make clergy mandatory reporters would give them the legal responsibility only to report the abuse of a child committed by a parent, guardian or other person legally responsible, not abuse committed by another member of the clergy.

Id.

250. See *supra* note 247 and accompanying text. See generally Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1987). It should be noted that the Boston Archdiocese opposed the inclusion of clergy in the Massachusetts mandatory reporting statute. See Betrayal, *supra* note 6, at 134. Following the revelations of abuse, however, clergy have been added. *Id.*

251. SUFFOLK REP., *supra* note 2, at 178 (demanding such a statute for New York).

252. *Id.* at 177.

mistake.²⁵³ Heinous crimes were committed with impunity for decades.²⁵⁴ Because current remedies have not proved sufficient either to change the Church's methods of handling abusive priests or to punish the Church's leadership for their role in the criminal sex abuse of children, states should pursue criminal charges against the Archdioceses, Dioceses, Parishes, Cardinals, Bishops, and Pastors who made decisions to place pedophiles in parish positions with unsupervised access to children, either through State RICO statutes or through alternate theories of criminal liability such as reckless endangerment, hindering prosecution, and omission to act.²⁵⁵ Additionally, states must legislate greater protection for children by creating effective reporting statutes, and extending the statute of limitations for crimes involving the sexual abuse of children.²⁵⁶

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253. *Id.* at 171. "The spotlight shining on the Diocese from the outside world is the only thing that caused them to change their behavior." *Id.*

254. Goodstein & Zirilli, *supra* note 43.

255. See discussion *infra* Parts II-III.

256. SUFFOLK REP., *supra* note 2, at 175-79.

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