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The Time Has Come for a Restatement of Child Sex Abuse

Marci A. Hamilton†

INTRODUCTION

Child sex abuse is a widespread, persistent, and prevalent evil that is finally getting the attention it needs in the media and the courts. For centuries, children's suffering on this account was accepted, taboo, or willfully ignored. That has changed as we have entered an era that portends a civil rights movement for children and dramatic increases in our knowledge about the realities of child sex abuse. The law, as usual, has been slow to catch up to the social science and policy needs, but the time is now to bring together the fast-advancing field of law that is assisting these victims and improving the odds of preventing abuse and bringing those who are responsible for it to justice.

Restatements are not only statements of black letter law, but also "re-statements" in the sense that the Reporters have latitude to point the way on legal developments in the field. The time is ripe to restate the law of child sex abuse. Not only has the law been rapidly developing over the last 20 years, but there is now a well-developed science of child sex abuse that informs the law and which is quite helpful for lawmakers setting public policy and judges interpreting the law. Thus, for lawyers, judges, policymakers, and scholars, the time has come to survey and document the many interrelated issues on which there is growing or even near-complete agreement and to chart the way for the future. It is also worthwhile to highlight where courts are struggling to find clear standards and whether legislatures need to clarify their standards or consider new approaches.

Importantly, social science is developing at an even faster rate than both federal and state law, with the law often laboring

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to catch up to the hundreds of studies on the causes and effects of child sex abuse, the difficulties victims face in coming forward, the ways in which institutions perpetuate abuse, and the effects of child pornography. The critical facts that have emerged from the social science research include: (1) 20-25% of children are sexually abused;[1] (2) only 10% report the crime to the authorities;[2] (3) most victims (roughly 75%) are abused by people they know well, either family members or someone outside the family the child knows and trusts;[3] (4) "Stranger Danger" cases are relatively rare, although they get the most publicity when they involve abduction and/or death;[4] and (5) the vast majority of victims need decades to come forward, and many never do.[5] The crime is accompanied by confusion, shame, embarrassment, fear, and guilt, which often lead to lifelong effects including Post Traumatic Stress Disorder, drug addiction, alcoholism, sex addiction and disorders, difficulties with personal relationships, a failure to fulfill one's potential at school or on the job, and a disproportionate number of suicides.[6] These facts are critically important for crafting the most appropriate statutes of limitations, mandatory reporting statutes, liability for perpetrators and institution-based abuse, protections for children abused within the home, and rules of evidence in child sexual abuse.

This paper will summarize some of the relevant topics that a *Restatement on Child Sex Abuse Law* should address. This summary is by no means intended to cover all of the issues that are relevant (after all, what are committees and Reporters for?), but rather to begin to sketch out for the ALI, lawyers, judges, and scholars some aspects of this critically

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[1] *See Prevalence of Individual Adverse Childhood Experiences*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/ace/prevalence.htm (last updated Jan. 18, 2013); *see also* Shanta R. Dube et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AM. J. PREV. MED. 430, 433 (2005), *available at* http://www.jimhopper.com/pdfs/Dube_(2005)_Childhood_sexual_abuse_by_gender_of_victim.pdf.

[2] *Statistics-Child Sexual Abuse*, PARENTS FOR MEGAN'S LAW & CRIME VICTIMS CENTER, http://www.parentsformeganslaw.org/public/statistics_childSexualAbuse.html (last visited Sept. 24, 2013).

[3] *See Statistics Surrounding Child Sexual Abuse*, DARKNESS TO LIGHT, http://oldsite.d2l.org/KnowAbout/statistics_2.asp (last visited July 2, 2012).

[4] *Id.*

[5] *See e.g.*, R.L. v. Voytac, 971 A.2d 1074, 1084 (N.J. 2009) (quoting Jones v. Jones, 576 A.2d 316, 321 (N.J. Super. Ct. App. Div. 1990) (noting that "long after the cycle of abuse itself has been broken, the victim will repress and deny, even to himself or herself, what has happened"); *see also Statistics-Child Sexual Abuse*, *supra* note 2.

[6] *See* Guy R. Holmes, Liz Offen, & Glenn Waller, *See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims of Childhood Sexual Abuse Receive Help for Abuse-Related Issues in Adulthood?*, 17 CLINICAL PSYCHOL. REV. 69, 72-73 (1997).

important area of the law which would benefit from a Restatement.

I. STATUTES OF LIMITATION FOR CHILD SEX ABUSE

A. *Introductory Material*

A statute of limitations (SOL) is the maximum amount of time one has to file charges or bring a civil lawsuit following an injury or other ground for a lawsuit. It is quite literally the threshold for victims' access to justice. Statutes of limitation vary from state to state and from claim to claim. For example, a limitation for a lawsuit over a contract may be different from a lawsuit about a personal injury and both may be of varying durations across different states. The SOL may also be set to begin running ("accrue") at different times. Under some statutes accrual begins at the time of the injury while others accrue only when a victim "discovers" any injuries,[7] or the causal connection of injuries to abuse, or when the victim becomes aware of information third parties had about the perpetrator. In many states, conditions may cause a statute of limitations to be "tolled," or legally suspended such that it does not begin to run until a proscribed time.

Child sex abuse SOLs are set by each state. For federal offenses, SOLs are set by the federal government. An adult SOL for child sex abuse is typically distinct from other child abuse or rape statutes of limitation. At one time, in most states, child sex abuse SOLs were triggered by the act of abuse itself, with the victim accorded a set number of years from the date of the abuse to bring the claim. For example, if a seven-year-old was raped by her father, in one state she would have two years, until age nine, to file charges or sue on civil claims. In another she might have until age 19, a year past reaching majority. The idea historically was that children "knew" they were being harmed during the act. In that era, there were few studies about the dynamic of abuse or its effects on the victims. Nor was there an adequate appreciation of the special dangers inherent in situations where one person has significantly more power over another. The vast majority of states have now rejected these approaches.

Social science studies have shown that children in fact do not fully understand (if they understand it at all) what sex is,

[7] Marci A. Hamilton, *What is a Statute of Limitations*, SOL REFORM, http://sol-reform.com/Pages/WhatIsSOL.php (last visited July 7, 2013).

and certainly have no idea of the lifelong consequences of being sexually assaulted. The aggressor always has power over them, and, in the case of parents or guardians, it is a particularly egregious power differential as the child is dependent on them for providing life's basic needs including shelter, food, and clothing. Abusers commonly threaten the child to maintain the silence. Where the abuser is a family member, the child is often charged, consciously or subconsciously, with keeping the secret to hold the family together. In the institutional setting, the adult exercises power through the structure of the organization. Thus, at Penn State, Coach Jerry Sandusky held power over the boys he abused because he had the capacity to "make" their football careers by getting them into Penn State; in religious institutions, the priest or rabbi holds spiritual power that can be every bit as compelling as the power of the parent; and in schools, teachers have power over grades and advancement. The predators' capacity to control the child is compounded by the fact that many predators choose children who are in need and offer gifts, money, and loving attention the child can get nowhere else.

All of these factors—failure to understand, powerlessness, and a sadly contorted sense of obligation or responsibility—contribute to victims' incapacity to come forward. Hundreds of studies have documented the psychological barriers to revealing the abuse and have shown that, typically, a survivor needs decades to process and understand the abuse. As a result, many do not tell others about the abuse until their forties, fifties, or even later. This dynamic has mobilized the movement to extend and eliminate SOLs, and to revive them for survivors for whom the SOL has expired.[8]

With 51 relevant jurisdictions in the United States, it can be difficult to stay abreast of current developments, which is why I created the website www.sol-reform.com. At this point, the 50 states and the District of Columbia are a patchwork of SOLs, which can change as often as every year.[9] A decided trend has emerged from this proliferation of amendments to SOL legislation in recent years, with all but one state liberalizing or eliminating the SOLs.[10] Delaware completely eliminated the

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[8] Marci A. Hamilton, *The Year in Review: 2012 Marks the Highest Watermark Yet for Victims of Child Sex Abuse*, JUSTIA (Dec. 13, 2012), http://verdict.justia.com/2012/12/13/the-year-in-review.

[9] My website, www.sol-reform.com, tracks the limits in each state and the federal government.

[10] Only South Dakota has shortened child sex abuse SOLs, when it retracted the SOL in the face of lawsuits filed by Native American victims against Roman Catholic priests. Marci A. Hamilton, *A Tale of Two States and Three Survivors: The Legal*

civil and criminal SOLs on claims of child sex abuse prospectively, and has enacted two windows for purposes of permitting victims to sue for damages even though their SOL already expired.[11] Other states, including Florida, have also eliminated some SOLs prospectively,[12] but have not taken action to create opportunities for survivors whose SOLs have expired.

At another end of the spectrum is New York, for example, which forecloses most criminal charges unless victims press charges by the age of 23; and forecloses civil claims after the victims reaches age 28. However, even New York has eliminated an SOL for felonious acts of child sex abuse.[13] In general, many states have successfully relaxed their child sex abuse SOLs over the last two decades and many place the issue on their legislative agendas on a regular basis.[14]

B. *Criminal v. Civil Statutes of Limitation*

1. Generally

There is a critical difference between criminal and civil statutes of limitation. While criminal SOLs cannot be applied retroactively,[15] the Supreme Court has ruled that civil SOLs are merely a legislative convenience, enacted by the grace of the various legislatures, which may be changed should the legislature see fit.[16] Thus, a civil SOL may be extended retroactively for victims whose SOLs have already expired. Some states have enacted "windows," which make it possible for survivors to file civil claims even if their SOL has expired, within a given period of time. For example, Delaware enacted a two-year window. In

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Obstacles Relating to Syracuse University's Sex Abuse Scandal, JUSTIA (Dec. 1, 2011), http://verdict.justia.com/2011/12/01/a-tale-of-two-states-and-three-survivors; Stephanie Woodard, *South Dakota Quashes New Childhood Sexual Abuse Bill*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 9, 2012), http://indiancountrytodaymedianetwork.com/article/south-dakota-legislature-quashes-new-childhood-sexual-abuse-bill-96429.

[11] DEL. CODE ANN. tit. 10, § 8145(a)–(b) (2013); DEL. CODE ANN. tit. 11, § 205(e) (2013); H.R. 326, 145th Gen. Assemb., (Del. 2010).

[12] FLA. STAT. ANN. §§ 95.11(9), 775.15(1) & (14) (West 2013).

[13] N.Y. CRIM. PROC. LAW § 30.10(3)(f) & (2)(a) (McKinney 2013).

[14] *See* Marci A. Hamilton, *Summary of Statutes of Limitations Reform Across the United States*, SOL REFORM (June 28, 2013), http://sol-reform.com/SNAPSHOT_OF_SOL_STATUTES_AND_2013_PENDING_BILLS_ACROSS_THE_US.pdf. It is my view that eventually the SOLs for child sex abuse will be eliminated in every state. The primary barrier is political, as opposed to principle; *see also* http://sol-reform.com/News/january-9-2014-marci-a-hamilton-2013-the-year-in-review-for-child-sex-abuse-victims-access-to-justice/.

[15] *See* Stogner v. California, 539 U.S. 607 (2003).

[16] Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

Sheehan v. Oblates of St. Francis De Sales,[17] the Supreme Court of Delaware upheld Delaware's civil window legislation. The Court held that application of a law that repeals the SOL on child sex-related abuse and permits a two-year window for victims to file civil suits on previously barred actions and revive gross negligence claims against institutional defendants that employed or controlled an alleged abuser did not violate federal or state due process.[18]

Because civil SOLs may be changed at the will of the legislature, it is constitutional for a legislature to allow victims who have run out of time under an SOL to later bring a suit. Some states have even passed "Window Legislation," which "essentially opens a specified duration [of time] in which civil claims that would have been barred [by the SOL] can be brought."[19] Windows were not invented for child sex abuse cases. The idea was initially tested to address mass torts for, for example, chemical or asbestos exposure, in Delaware, New York, Minnesota, and California.[20] However, California,[21] Delaware,[22] Hawaii,[23] Minnesota,[24] and Guam[25] have now all enacted window legislation, and similar legislation is pending in Massachusetts, New Jersey, New York, and Pennsylvania. Delaware, in response to a realization that, due to a technicality, its first window did not cover healthcare workers, enacted an additional window to provide access to justice for children abused in a healthcare setting.[26]

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[17] 15 A.3d 1247, 1248 (Del. 2011).

[18] *Id.*

[19] Marci A. Hamilton, *What is a SOL?* SOL REFORM, http://sol-reform.com/Pages/WhatIsSOL.php#window (last visited Oct. 6, 2013).

[20] Indep. Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990); 20th Century Ins. Co. v. Superior Court, 109 Cal. Rptr. 2d 611, 633 (Cal. Ct. App. 2001); *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 811-12 (E.D.N.Y. 1984); Mergenthaler v. Asbestos Corp. of America, Inc., 534 A.2d 272, 276-77 (Del. Super. Ct. 1987); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1079-80 (N.Y. 1989).

[21] Melanie H. v. Defendant Doe, No. 04-CV-1596-WQH-(WMC), at 25 (S.D. Cal. Dec. 21, 2005); Deutsch v. Masonic Homes of California, Inc., 80 Cal. Rptr. 3d 368, 378-89 (Cal. Ct. App. 2008); *see also* Marci A. Hamilton, *Here is What is Happening in California*, SOL REFORM, http://sol-reform.com/California/ (last visited Oct. 6, 2013).

[22] DEL. CODE ANN. tit. 10, § 8145(a)–(b) (2013); *see also* Marci A. Hamilton, *Here is What is Happening in Delaware*, SOL REFORM, http://sol-reform.com/Delaware/.

[23] S.B. 2588, 26th Leg., Reg. Sess. (Haw. 2012); *see also* Marci A. Hamilton, *Here is What is Happening in Hawaii*, SOL REFORM, http://sol-reform.com/Hawaii/ (last visited Oct. 7, 2013).

[24] 2011 Minn. Laws. ch. 190 § 541.073(2); Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 414, 418-20 (Minn. 2002); K.E. v. Hoffman, 452 N.W.2d 509, 512-14 (Minn. App. 1990).

[25] B. No. 34, 31st Leg. (Guam 2011); *see also* Marci A. Hamilton, *Here is What is Happening in Guam*, SOL REFORM, http://sol-reform.com/Guam/ (last visited Oct. 6, 2013).

[26] 18 DEL. CODE tit. 18, § 6856(3)(b) (2010).

Windows are only constitutional on the civil side of the law. On the other hand, once a criminal SOL runs out, a guilty perpetrator or institution cannot be criminally charged. The United States Supreme Court, in *Stogner v. California*,[27] held the California window on the criminal side unconstitutional as it violated the Ex Post Facto Clause.[28] Thus, when a criminal SOL expires, there is no possibility of reviving it. The only means of revival is through civil lawsuits for damages.

2. Criminal Statutes of Limitation

A criminal SOL is the maximum amount of time during which a prosecutor may bring charges after the time of injury occurs.[29] The criminal SOL, like the civil SOL, may be set to begin running at different times. There is a growing trend among states to increase or eliminate the SOL for crimes related to child sexual assault.[30] In the past year, Arkansas[31] and Illinois[32] eliminated their criminal SOLs. Some states do not require an SOL for first-degree child sex abuse offenses but do impose a limitation period on felony and misdemeanor sex crimes against minors.[33]

In cases with minors, in all but one state, the statutes of limitations are tolled until the age of majority, which is typically 18.[34] This means that the SOL does not begin to run until a proscribed time that is most often when the victim turns 18 and is no longer considered a minor. Thus, a tolled criminal SOL might be eight years after the moment a victim turns 18-years-old.[35]

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[27] 539 U.S. 607, 609 (2003).

[28] U.S. Const. art. I, § 10, cl.1.

[29] Jenna Miller, Note, *The Constitutionality of and Need for Retroactive Civil Legislation Relating to Child Sexual Abuse*, 17 CARDOZO J.L. & GENDER 599, 600 (2011).

[30] *Id.* at 625.

[31] S.B. 92, 2013 Gen. Assemb., 89th Gen. Assem. (Ark. 2013) (enacted) (eliminating limitation of time for bringing a criminal action with respect to child sex abuse).

[32] H.B. 1063, 2013 Gen. Assemb., Reg. Sess. (Ill. 2013) (passed but pending governor's signature).

[33] For example, New York has no limitations period for first-degree criminal offenses. N.Y. CRIM. PROC. LAW § 30.10(2)(a) (McKinney 2013). However, there is a five-year limitations period for all other felony sex offenses, N.Y. CRIM. PROC. LAW § 30.10(2)(b) (McKinney 2013), and a two-year limitations period for misdemeanor sex offenses. N.Y. CRIM. PROC. LAW § 30.10(2)(c) (McKinney 2013).

[34] *See generally* SOL REFORM, www.sol-reform.com.

[35] In California, under current law, the SOL is tolled 8 years, until the victim reaches 26, or for 3 years after the date "the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse." (with certificate of merit only). CAL. CIV. PROC. CODE § 340.1(a)–(h) (West 2013).

However, when a legislative body decides to increase or remove an SOL, it cannot apply the changes retroactively.[36] Thus any new criminal statutes of limitation laws are applied only to incidents *after* the date the law is effective. Once a statute of limitations runs out, even a guilty perpetrator cannot be criminally charged.

3. Civil Statutes of Limitation

A civil SOL does not begin to run until a claim "accrues," and accrual varies from state to state and depending upon the type of harm.[37] In the context of child sexual abuse, in those states which follow the discovery rule, accrual does not occur until a victim "discovers" any injuries,[38] or the causal connection to those injuries. It is widely accepted that the victims of child sexual assault do not discover the extent of their injuries until much later in life, after the actual abuse.[39] In some states, there is a special rule for cases of repressed memory.[40]

Legislation that eliminates the civil SOL or includes a discovery rule is supported by various studies on the long-term effects of child molestation and the likely delay in disclosure. Researchers in various studies have found—specifically in men who were sexually abused as children—that long-term adaptation will often include sexual problems, dysfunctions or compulsions, confusion and struggles over gender and sexual identity, homophobia and confusion about sexual orientation, problems with intimacy, shame, guilt and self-blame, low self-esteem, negative self–images, increased anger, and conflicts with authority figures.[41] There is also an increased rate of substance abuse, a tendency to deny and delegitimize the traumatic experience, symptoms of Post Traumatic Stress Disorder, and increased probability of fear and depression for all victims.[42] Often, it is not until years after the sexual abuse that victims

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[36] *See* Stogner v. California, 539 U.S. 607 (2003) (holding that the retroactive application of the California law violated ex post facto law).

[37] RESTATEMENT (SECOND) OF TORTS § 899 (1979).

[38] Marci A. Hamilton, *What is a Statute of Limitations*?, SOL REFORM, http://sol-reform.com/Pages/WhatIsSOL.php (last visited Oct. 6, 2013).

[39] Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983).

[40] *See e.g.*, KAN. STAT. ANN. § 21-5107(e)(6)(D) (West 2013); DEL. CODE ANN. tit. 11, § 205(e) (2013).

[41] *Major Findings*, *Adverse Childhood Experiences Study*, CENTERS FOR DISEASE CONTROL & PREVENTION (Jan. 18, 2013), http://www.cdc.gov/ace/findings.htm.

[42] *Id.*

experience these negative outcomes.[43] As clinician Mic Hunter has observed: "Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later . . . ."[44]

The lawsuits filed under window legislation have led to the public identification of previously unknown child predators, which reduces the odds that children will be abused in the future.[45] For example, the 2003 window in California led to the public identification of over 300 previously unidentified perpetrators.[46] Delaware's window has led to the public identification of dozens of previously hidden perpetrators. Hawaii's currently open window has identified Jay Ram, who allegedly used the foster care system to obtain boys, adopt them, and sexually abuse them while neglecting their needs,[47] while Minnesota's open window has triggered a waterfall of disclosures that never would have happened without the window.[48]

In civil suits, window legislation affording retroactive application does not violate the Ex Post Facto Clause, even if the court applies the criminal code active during the alleged assault, and not the code in existence at the time of trial.[49] While some courts differ on this issue, the majority of states do not find retroactive civil SOLs unconstitutional.[50]

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[43] *What are the Effects of Child Sexual Abuse?*, *Understanding Child Sexual Abuse: Education, Prevention, and Recovery*, AM. PSYCHOLOGICAL ASS'N, http://www.apa.org/pubs/info/brochures/sex-abuse.aspx?item=4 (last visited Sept. 25, 2013); *see also* R.L. v. Voytac, 971 A.2d 1074, 1084 (N.J. 2009) (quoting Jones v. Jones, 576 A.2d 316, 321 (N.J. Super. Ct. App. Div. 1990)) ("[L]ong after the cycle of abuse itself has been broken, the victim will repress and deny, even to himself or herself, what has happened.").

[44] MIC HUNTER, ABUSED BOYS: THE NEGLECTED VICTIMS OF SEXUAL ABUSE 59 (1990) (explaining that at the time the child is sexually abused he or she is often too young to appreciate the harmful nature of the acts).

[45] Jeffrey Pruzan, Note, *Abuse, Mediation and the Catholic Church: How Enforcing and Improving Existing Statutes Will Help Victims Recover*, 13 CARDOZO J. CONFLICT RESOL. 593, 605 (2012).

[46] Marci A. Hamilton, *The Maturing of a Movement: Statute of Limitations Reform for Sex Abuse Victims*, FINDLAW (June 11, 2009), http://writ.news.findlaw.com/hamilton/20090611.html.

[47] *Former Big Island Farmer Accused of Abusing Child,* HAW. NEWS NOW (Mar. 4, 2013, 4:11 PM). http://sol-reform.com/Hawaii/Hawaii-window-creates-justice-for-survivor-of-abuse-by-adoptive-father.pdf.

[48] Marci A. Hamilton, *News: Post MN Window* SOL REFORM, http://sol-reform.com/News/topics/mn-post-window/ (last visited Jan. 10, 2014).

[49] Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247, 1258 (Del. 2011).

[50] *Compare* Catholic Bishop of N. Alaska v. Does, 141 P.3d 719, 725 (Alaska 2006), Riggs Nat'l Bank v. Dist. of Columbia, 581 A.2d 1229 (D.C. 1990), *and* Neiman v. Am. Nat'l Prop. & Cas. Co., 613 N.W.2d 160, 161 (Wis. 2000) (holding that retroactive

4. Trends in Statutes of Limitation Reform

The pace of SOL reform has increased markedly over the last several years. In 2013 alone, SOL reform was enacted in Arkansas, where the state eliminated the criminal SOL;[51] Illinois, where the civil and criminal SOLs were eliminated;[52] Vermont, where the SOL was increased for certain sex crimes against children;[53] Nevada, where the criminal statute of limitations was extended;[54] and Minnesota, where a window was enacted.[55] Bills were introduced for at least the second time in Pennsylvania (window; civil and criminal elimination);[56] New Jersey (window and extension of discovery rule);[57] and

application of statutes of limitation is unconstitutional), *with* San Carlos Apache Tribe v. Superior Court *ex rel.* Cnty. of Maricopa, 972 P.2d 179, 192-93 (Ariz. 1999), *superseded by statute*, ARIZ. REV. STAT. ANN. § 12-505 (2010), Liebig v. Superior Court, 257 Cal. Rptr. 574 (Cal. Ct. App. 3d 1989), Mudd v. McColgan, 183 P.2d 10, 13 (Cal. 1947), Rossi v. Osage Highland Dev., LLC, 219 P.3d 319, 322 (Colo. App. 2009) (citing *In re* Estate of Randall, 441 P.2d 153, 155 (Colo. 1968)), Shell Western E&P, Inc. v. Dolores County Bd. of Comm'rs, 948 P.2d 1002, 1005 (Colo. 1997) (en banc), Roberts v. Caton, 619 A.2d 844 (Conn. 1993), Whitwell v. Archmere Acad., Inc., C.A. No: 07C-08-006 (RBY), 2008 Del. Super. LEXIS 141 at *3, 7-8 (Del. Super. Ct. April 16, 2008), Vaughn v. Vulcan Materials Co., 465 S.E.2d 661 (Ga. 1996), Gov't Emps. Ins. Co. v. Hyman, 975 P.2d 211 (Haw. 1999), Roe v. Doe, 581 P.2d 310, 314 (Haw. 1978), Henderson v. Smith, 915 P.2d 6, 10 (Idaho 1996), Hecla Mining Co. v. Idaho State Tax Comm'n, 697 P.2d 1161, 1164 (Idaho 1985), Metro Holding Co. v. Mitchell, 589 N.E.2d 217, 219 (Ind. 1992), Ripley v. Tolbert, 921 P.2d 1210, 1224 (Kan. 1996), Shirley v. Reif, 920 P.2d 405, 411-12 (Kan. 1996), Kienzler v. Dalkon Shield Claimants Trust, 686 N.E.2d 447, 451 (Mass. 1997), Rookledge v. Garwood, 65 N.W.2d 785, 791 (Mich. 1954), Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 419-20 (Minn. 2002), Cosgriffe v. Cosgriffe, 864 P.2d 776, 778 (Mont. 1993), Panzino v. Cont'l Can Co., 364 A.2d 1043, 1045-46 (N.J. 1976), Bunton v. Abernathy, 73 P.2d 810, 811-12 (N.M. 1937), Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1079 (N.Y. 1989), In Interest of W.M.V., 268 N.W.2d 781, 786 (N.D. 1978), Pratte v. Stewart, 929 N.E.2d 415, 422 (Ohio 2010), McFadden v. Dryvit Sys., Inc., 112 P.3d 1191, 1195 (Or. 2005), McDonald v. Redevelopment Auth., 952 A.2d 713, 717-18 (Pa. Commw. Ct. 2008), Bible v. Dep't of Labor & Indus., 696 A.2d 1149, 1156 (Pa. 1997), Stratmeyer v. Stratmeyer, 567 N.W.2d 220, 224 (S.D. 1997), Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 146 P.3d 914, 923 (Wash. 2006) (en banc) *superseded by statute*, WASH. REV. CODE § 25.15.303 (2013), *as recognized in* Chadwick Farms Owners Ass'n v. FHC, LLC, 207 P.3d 1251, 1260 (Wash. 2009) (en banc), RM v. State Dep't of Family Servs., Div. of Public Servs., 891 P.2d 791, 792 (Wyo. 1995) (all holding that retroactive application of statutes of limitation is not unconstitutional), *and* Alsenz v. Twin Lakes Village, Inc., 843 P.2d 834, 837-38 (Nev. 1992) (open question).

[51] S.B. 92, 2013 Gen. Assemb., 89th Gen. Assem. (Ark. 2013) (enacted).

[52] H.B. 1063, 98th Gen. Assemb., Reg. Sess. (Ill. 2013); S.B. 1399, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

[53] S.B. 20, 2013, Gen. Assemb., Reg. Sess. (Vt. 2013) (enacted).

[54] S.B. 103, 2013 Gen. Assemb., Reg. Sess. (Nev. 2013).

[55] H.B. 681, 88th Leg., Reg. Sess. (Minn. 2013) (enacted).

[56] H.B. 237, 2013 Gen. Assemb., Reg. Sess. (Pa. 2013); H.B. 238, 2013 Gen. Assemb., Reg. Sess. (Pa. 2013).

[57] S.B. 2281, 215th Leg., 1st Ann. Sess. (N.J. 2012).

Massachusetts (civil extension to age 55 with a window).[58] They were also introduced in New York (window; civil and criminal elimination);[59] Missouri (elimination of civil and criminal);[60] Oregon (elimination criminal for certain sex crimes against minors);[61] Washington (extension of criminal to 30);[62] and Wisconsin (elimination of civil with a window).[63] The California legislature passed a second window to capture those survivors who did not file under the window that was in effect in 2003; it was vetoed by Governor Jerry Brown.[64]

II. MANDATORY REPORTING AND REPORTERS

A. *Mandatory Reporters—Specified*

Mandatory reporting laws are essential in the pursuit of justice, as child sex abuse victims are often unable to report the abuse themselves. Every state has mandatory reporting laws that require specified individuals who suspect that a child has been or is being sexually abused to report the incident. Although mandatory reporting rules vary by state, 48 states currently have mandatory reporting laws that specify professionals who are subject to the legislation.[65] Two states have general reporting mandates.[66] Specified mandated reporters include teachers, nurses, physicians, other healthcare providers, social service employees, mental health professionals, law enforcement, and others in professional child care.[67] Some states also include individuals who work in film or photography processing, drug abuse counselors, staff at camps and recreation centers, domestic

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[58] H.B. 1455, 188th Gen. Ct., Reg. Sess. (Mass. 2013); S.B. 633, 188th Gen. Ct., Reg. Sess. (Mass. 2013).

[59] Assemb. A01771, 2013 Gen. Assemb., Reg. Sess. (N.Y. 2013).

[60] H.B. 247, 2013 Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

[61] H.B. 3284, 77th Leg. Assemb., Reg. Sess. (Or. 2013).

[62] S.B. 5100, 63rd Leg., Reg. Sess. (Wash. 2013).

[63] S.B. 225, 101st Leg., Reg. Sess. (Wis. 2013).

[64] S.B. 131, 2013 Leg., Reg. Sess. (Cal. 2013). It was vetoed by Governor Jerry Brown. Letter from Edmund G. Brown Jr., Governor of California, to Members of the California State Senate (Oct. 12, 2013), *available at* http://sol-reform.com/News/wp-content/uploads/2013/10/SB_131_2013_Veto_Message.pdf; Marci A. Hamilton, *Gov. Jerry Brown's Recent Veto of Child Abuse Legislation and What It Tells Us About the Civil Rights Movement for Children*, JUSTIA (Oct. 17, 2013), http://verdict.justia.com/2013/10/17/gov-jerry-browns-recent-veto-child-abuse-legislation-tells-us-civil-rights-movement-children.

[65] *Mandatory Reporters of Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY (Aug. 2012), https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf.

[66] New Jersey and Wyoming. *Id*. at 2.

[67] *Id*.

violence workers, court-appointed guardians, and members of the clergy.[68] Upon suspecting, observing, or having reason to believe that a child is being sexually abused, mandated reporters are responsible for calling and reporting the abuse to a hotline.[69]

If it is discovered that a mandated reporter knew or should have known of sexual abuse of a child and failed to report it, he or she is subject to prosecution by the state.[70] The reporter who fails to fulfill his obligation can also be subjected to fines.[71]

Generally there must be a concrete, reportable incident for the mandatory report to be triggered.[72] Otherwise, the failure of the reporter to inform the state of the abuse will not result in criminal or civil liability.[73] Reporters are usually kept anonymous, but this protection may be waived if it is determined that the caller knowingly and intentionally made a fraudulent report.[74] The reporter may also voluntarily waive the protection and have his or her identity disclosed.[75]

After a number of child sex abuse scandals were uncovered and publicized, there was an increase in new legislation aimed at expanding the scope of mandatory reporting laws. Arkansas, Washington D.C., Florida, Illinois, Iowa, Louisiana, Oregon, South Dakota, West Virginia, Virginia, and Washington all passed new laws that expand the list of mandatory reporters to include individuals who work in institutions of secondary and higher education.[76] Some of these laws also specifically include athletic personnel, who are generally considered outside the scope of educational professionals such as

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[68] *Id.* at 2-3.

[69] *Id.* at 3.

[70] *See Penalties for Failure to Report and False Reporting of Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY (Aug. 2012), https://www.childwelfare.gov/systemwide/laws_policies/statutes/report.pdf.

[71] *Id.*

[72] *Id.*

[73] *Summary Guide for Mandated Reporters in New York State*, NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES (Sept. 2012), http://ocfs.ny.gov/main/publications/Pub1159.pdf.

[74] *Mandatory Reporters of Child Abuse and Neglect*, *supra* note 65, at 5.

[75] *Id.*

[76] Ana M. Valdes*, Sex Abuse Reporting Requirements Taking Effect Nationwide, in Wake of Sandusky Case*, WPTV (June 30, 2012), http://www.wptv.com/dpp/news/sex-abuse-reporting-requirements-taking-effect-nationwide-in-wake-of-sandusky-case; *Mandatory Reporting of Child Abuse and Neglect: 2013 Introduced Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 5, 2013), http://www.ncsl.org/issues-research/human-services/mandatory-rprtg-of-child-abuse-and-neglect-2013.aspx.; *see also Illinois Aims to Head Off Sex Abuse Scandals Like at Penn State*, REUTERS (June 27, 2012, 11:57 AM), http://www.reuters.com/article/2012/06/27/us-usa-illinois-law-abuse-idUSBRE85Q14S20120627.

teachers.[77] Many additional states also attempted to pass wider-reaching mandatory reporting laws, which were stalled in their state legislatures.[78]

B. Mandatory Reporting—General/Unspecified

New Jersey and Wyoming are the only two states in the U.S. that have general mandatory reporting laws as opposed to specified professionals who are subject to the requirements.[79] General mandatory reporting laws require anyone who suspects or has reason to believe that the sexual abuse of a child is occurring to report the incident to a state agency. Mandatory reporting can also be based on actual knowledge or observation of abuse.[80] Like specified mandatory reporting, general mandatory reporter laws implement fines and criminal punishments for failure to report when it is uncovered that someone had reasonable cause to believe that abuse was occurring and did not report it.

Aside from New Jersey and Wyoming, a number of other states have additional provisions beyond the specified mandatory reporters that require *any* person who knows, suspects, or has reason to believe that child sexual abuse is occurring to report that abuse to a hotline.[81] Furthermore, while the focus of this section is mandatory reporters, all states *allow* anyone who knows, suspects, or has reason to believe that there is child sexual abuse occurring to report the incident. This is known as permissive reporting.[82]

C. Confessional Exemption

Most states allow for exceptions to reporting requirements for members of the clergy if the suspicion of abuse is based on a statement made in confession. Currently, only Connecticut, Mississippi, and New Jersey do not address the confessional exemption in their mandatory reporting laws.[83] New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas, West Virginia, and Guam explicitly reject the confessional exemption from mandatory reporting laws; clergy members may

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[77] *Mandatory Reporters of Child Abuse and Neglect*, *supra* note 65, at 3.

[78] *Mandatory Reporting of Child Abuse and Neglect: 2013 Introduced Legislation*, *supra* note 76.

[79] *Mandatory Reporters of Child Abuse and Neglect*, *supra* note 65, at 2 n.1.

[80] *Id.* at 3.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 4 n.9.

not claim that a statement related to child sex abuse was privileged as an excuse for failing to fulfill their obligations under mandatory reporting laws.[84]

Confessional exemptions cover all religions in the sense that if a believer converses with a religious leader and confesses to child sex abuse, that exchange might be privileged and the religious leader not subject to the mandatory reporting laws. Many religious institutions invoke these exemptions to justify the failure to report suspected child sex abuse occurring within their congregations. The breadth of the exemption varies from state to state. In some jurisdictions, the confessional exemption has been limited to statements made in seeking spiritual advice.[85] It is not enough that the statement was made to a religious leader; the statement must be made in confidence while seeking spiritual advice. In other jurisdictions, the exemption is interpreted more broadly.

Once a believer has waived the privilege, such as through voluntary admission to a non-clergy member or in a deposition or other pre-trial discovery, the exemption no longer applies.[86] So long as the believer knew when he voluntarily

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[84] *Id*. at 4 n.10.

[85] FLA. STAT. ANN. § 90.505(b) (West 2013). ("A communication between a member of the clergy and a person is 'confidential' if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication."); GA. CODE ANN. § 19-7-5(g) (West 2013). ("[C]lergy shall not be required to report child abuse reported solely within the context of confession or other similar communication required to be kept confidential under church doctrine or practice.").

[86] Monroe v. State, 14 So. 3d 1205, 1207 (Fla. Dist. Ct. App. 2009) (finding testimony by minister as to confession defendant-confessor made to minister was admissible because defendant knew when defendant voluntarily made disclosure that it would not be held confidential by minister and would be subject to disclosure to police under Fla. Stat. Ann. §§ 90.505(1)(b) and 90.507); Lifemark Hosp. of Fla., Inc. v. Hernandez, 748 So. 2d 378, 379-80 (Fla. Dist. Ct. App. 2000) (finding waiver of privilege where plaintiff previously provided psychologist's records to plaintiff's expert); Herron v. E. Indus., No. 5:07cv35/RH/EMT, 74 Fed. R. Evid. Serv. (Callaghan) 824, 2007 U.S. Dist. LEXIS 69339, *17 n.2 (N.D. Fla. Sept. 19, 2007) (noting that privilege may be waived via disclosures made in court documents under § 90.507, Fla. Stat. which provides that a "person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person . . . voluntarily discloses or makes the communication when . . . she does not have a reasonable expectation of privacy"); Doe v. Mann, No. 6:05-cv-259-Orl-31DAB, 2006 U.S. Dist. LEXIS 65769, *3 n.1 (M.D. Fla. Sept. 14, 2006) ("Under Florida law . . . privilege can be waived [if] the holder of the privilege . . . 'voluntarily discloses or makes the communication when he does not have a reasonable expectation of privacy or consents to disclosure of any significant part of the matter or communication.'"); State v. Gray, 2004-1197 (La. , Jan. 19, 2005), 891 So. 2d 1260, 1265 (Clergymen privilege waived if information disclosed to third parties); Perry v. State, 280 Ark. 36, 37 (1983) ("We agree with the trial court that Perry told about everyone he could about killing his wife and, therefore, waived any privilege he might claim."); Church of Jesus Christ of Latter-Day Saints v. Super. Ct. In & For Maricopa Cnty., 764 P.2d 759, 764 (Ariz. Ct. App. 1988)

disclosed the previously privileged statement that it was no longer confidential, it is unprotected in all future litigation. If the believer no longer has a reasonable expectation of privacy in the communication, the privilege has ceased.[87] Once the privilege is lost, typically a clergy member cannot claim confessional exemption under the mandatory reporter laws.[88] The clergy member cannot claim that he has a right to keep the information confidential because the privileged nature of the statement really belongs to the believer and not the clergy member or his institution.[89] Further, once the privilege has been waived it cannot be reinstated.[90]

Every state has made strides in increasing the protection to children through mandatory reporting laws, whether it be through specified or general reporting obligations, and through the permissive legislation.[91] While some states have also provided for a confessional exemption, the breadth and scope of that exemption varies. Courts should remain cognizant that once a believer waives the confidential nature of the confession, the exemption no longer applies and the statement may be used in subsequent litigation.[92]

("We hold that the clergyman/penitent privilege, like other privileges, is susceptible to implied waiver through conduct inconsistent with the maintenance of conversational privacy . . . .").

[87] Ray v. Cutter Labs., Div. of Miles, Inc., 746 F. Supp. 86, 88 (M.D. Fla. 1990) (holding that a disclosure of information eliminates the expectation of privacy, and waives the privilege); *see also In re* Grand Jury Investigation, 114 F. Supp. 2d 1054, 1055 (D. Or. 2000) (psychotherapist compelled to testify where defendant waived privilege by using psychologist's diagnosis of post traumatic stress disorder during prior hearing); Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 228 (D. Mass. 1997).

[88] R.K. v. Corp. of the President of the Church of Latter Day Saints, No. C04-2338RSM, 2006 WL2661059 at *1 (W.D. Wash. Sept. 14, 2006) (holding that when the clergy-penitent privilege does not apply, the clergy member does not have a legal right to not comply with mandatory reporting laws, and therefore had a duty to report).

[89] FLA. STAT. ANN. § 90.505(2) ("A person has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication by the person to a member of the clergy in his or her capacity as spiritual adviser.").

[90] In Florida, "[i]t is black letter law that once the privilege is waived, and the horse out of the barn, it cannot be reinvoked." Hamilton v. Hamilton Steel Corp., 409 So. 2d 1111, 1114 (Fla. Dist. Ct. App. 1982) (citing FLA. STAT. § 90.507 and 5 ERHARDT'S FLORIDA PRACTICE, FLORIDA EVIDENCE § 507.1 (1977)); *Cutter Labs.*, 746 F. Supp. at 88 (quoting *Hamilton*, 409 So. 2d at 1114); Doe v. Mann, No. 6:05-cv-259-Orl-31DAB, 2006 U.S. Dist. LEXIS 65769, *5 (M.D. Fla. Sept. 14, 2006) ("Once a confidential communications, or a diagnosis based thereon, becomes disclosed at the privilege-holder's request, the basis for the privilege departs and cannot be recaptured . . . .").

[91] *Supra* notes 68-85.

[92] *Supra* note 90.

III. INSTITUTION-BASED ABUSE

After the unveiling of numerous institutions hiding abuse, plaintiffs have filed suits under the Racketeer Influenced and Corrupt Organizations (RICO) statute, federal conspiracy statutes, civil and criminal fraud theories, and state tort theories, including the doctrine of *respondeat superior* and negligence theories.

A. *Criminal RICO and Conspiracy to Commit Sexual Abuse Crimes*

The RICO and federal conspiracy statutes provide newer avenues for plaintiffs to file suits. While both these theories allow for plaintiffs to hold institutions accountable for patterns of conduct that allowed abuse to occur for continued periods of time, the two differ in the elements that satisfy the claims and the penalties that result from conviction.

1. Background: Federal Prosecution of Sexual Abuse Crimes

Sexual abuse crimes are prosecuted in the federal system under The Sexual Abuse Act of 1986.[93] The age of the victim and whether force was used are two important facts that help determine the appropriate statute and punishment.[94] Section 2247 increases the maximum penalties for repeat offenders, and Section 2248 mandates restitution to the victims.[95]

According to the United States Attorneys' Manual, when investigating crimes involving child pornography, child sexual abuse, child sexual exploitation and obscenity:

> CEOS [Child Exploitation and Obscenity Section] and USAOs [United States Attorney Offices] will work together to ensure that [such] crimes . . . are vigorously enforced throughout the nation. Generally, such crimes are prosecuted by the USAO in the relevant district. However, CEOS attorneys have substantial experience in prosecuting these types of crimes and they are available to assist in the investigative stage and/or to handle trials as chair or co-chair.[96]

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[93] 18 U.S.C. §§ 2241–48.

[94] 18 U.S.C §§ 2241(a), (c) (2012).

[95] *Id.* §§ 2247(a), 2248.

[96] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-75.030 (2003), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/75mcrm.htm#9-75.030.

RICO defines the sexual abuse of a minor in 18 U.S.C. § 2243.[97] Section 2243 delineates two offenses involving a "sexual act," as defined in Section 2246(2).[98] Subsection (a) makes it an offense, in the special maritime and territorial jurisdiction of the United States or a Federal prison, for a person to engage in, or attempt to engage in, a sexual act with someone who is (1) at least 12 but less than 16 years old and (2) at least four years younger than that person. The maximum punishment is 15 years imprisonment and/or a fine under Title 18.[99]

This sexual abuse offense does not require the use of force or threats, or the administering of a drug, intoxicant, or other similar substance. It applies to behavior that the participants voluntarily and willingly engage in. The offense is intended to reach older, mature persons who take advantage of younger, immature persons, but not to reach sexual activity between persons of comparable age. Corroboration of the victim's testimony is not required. Because subsection (a) reaches non-coercive conduct, and because some states permit marriage by persons of less than 16 years of age, subsection (c)(2) sets forth a defense that the parties were married at the time of the sexual act.[100] The defendant has the burden of establishing this defense by a preponderance of the evidence.[101]

There are different provisions of RICO that apply to wards of the United States. Subsection (b) of Section 2243 also makes it an offense for a person to engage in a sexual act with someone (1) who is in official detention, and (2) who is under the custodial, supervisory, or disciplinary authority of the defendant.[102] The maximum punishment is one year's imprisonment and/or a fine under Title 18. Here too, corroboration of the victim's testimony is not required.

2. Criminal RICO v. Conspiracy

The federal RICO statute provides for prosecution based upon patterns of criminal behavior, and conspiracy to commit criminal behavior as a part of a larger criminal endeavor.[103] RICO creates a cause of action in both state and federal courts.[104] Sexual

[97] 18 U.S.C. § 2243 (2012).
[98] *Id.* §§ 2243, 2246(2).
[99] *Id.* § 2243(a).
[100] *Id.* § 2243(c)(2).
[101] *Id.*
[102] *Id.* § 2243(b).
[103] *Id.* §§ 1961-68.
[104] *Id.* § 1965.

abuse crimes under 18 U.S.C. §§ 2241 through 2248, including sexual abuse of a minor, are predicate crimes that may trigger RICO prosecution under 18 U.S.C. §§ 1961–1968.[105] Thus, if an organization engages in any two of 35 predicate crimes within a 10-year period, it may be charged with racketeering. In Ohio, two bishops were charged under RICO, but a grand jury failed to find their mishandling of child sex abuse claims to constitute criminal racketeering.[106] In addition, CEOS and the USAO have discretion as to whether a prosecution will take place under RICO.[107]

The maximum penalty for a RICO violation is up to 20 years in prison.[108] Further, RICO prosecutions are not limited to organizations of crime, like the mafia.[109] For example, while labor unions are not in the primary business of crime, they may still face RICO prosecutions.[110] Thus, religious or other private organizations could be subject to the RICO statute.[111]

In contrast to RICO, where particular categories of crimes must satisfy the requirements for prosecution, conspiracy under federal law may be triggered by the committing of any offense against United States law or the defrauding of the United States. So long as two or more persons conspire to commit crimes against the United States, they may be subject to prosecution.[112]

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[105] *Id.* §§ 1961-68 (2012); Hall v. Tressic, 381 F. Supp. 2d 101, 106-08 (N.D.N.Y. 2005).

[106] James F. McCarthy, *The Cost of Abuse: 7 Indicted in Diocesan Sex Cases*, CLEVELAND (Dec. 5, 2002), http://www.cleveland.com/abuse/index.ssf?/abuse/more/103908428283790.html.

[107] UNITED STATES ATTORNEYS' MANUAL, *supra* note 96, at 9-75.030.

[108] 18 U.S.C. § 1963 (2012).

[109] Pruzan, *supra* note 45, at 613-14.

[110] *Id.*

[111] Davis Lee Pharmacy, Inc., v. Manhattan Central Capital Corp., 327 F. Supp. 2d 159 (E.D.N.Y. 2004) (The plaintiff commenced a federal action against business associates and their business, minister and church elders for alleged RICO violations involving consumer fraud). United States v. Dickens, 695 F.2d 765 (3d Cir. 1982) (The court upheld a conviction under RICO based on the government's allegation that defendant's robberies were committed to finance defendants' religious Black Muslim organization. The court noted that while the First Amendment prohibits governmental interference with religious beliefs, it does not protect practices which imperil public safety, peace or order from government scrutiny.) Hall v. Tressic, 318 F. Supp. 2d 101 (N.D.N.Y. 2005) A student brought sued a church, alleging that it had violated RICO by covering up sex abuse by a local priest. However the student failed to demonstrate that the acts constituted a pattern of racketeering activity to sustain a RICO claim.

[112] 18 U.S.C. § 371 (2012) ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."); *see also* United States v. McGarity, 669 F.3d 1218, 1228 (11th Cir. 2012) (defendants convicted of conspiring to advertise, transport/ship, receive, and possess child pornography, and to obstruct an official proceeding, in violation of 18 U.S.C. § 371); United States v. Jass, 569 F.3d 47, 50 (2d Cir. 2009)

As compared to RICO claims, general conspiracy charges also threaten lesser sentences. Whereas the penalty for RICO prosecution is up to 15 years in prison,[113] a conspiracy regarding a criminal sex abuse crime only carries with it misdemeanor penalties, and the punishment for such conspiracy shall not exceed the maximum punishment provided for the misdemeanor.[114] Furthermore, conspiracy prosecutions generally must begin within three to five years of the last overt act.[115] However, for RICO prosecutions, where there may not be proof of an overt act, the conspiracy only must be proved to have continued into the limitations period. Many of the principles described above also apply to state RICO laws and state conspiracy laws.

B. Institutional Liability for the Abuse of Children

Institutions may be found liable for the abuse of children on the basis of vicarious liability or fraud. While sex abuse has been found to fall outside the scope of employment, juries have more recently been inclined to hold employers liable for the sex abuse acts by their employees. Liability based on fraud requires showing a misrepresentation or concealment of a material fact, but an institution could be criminally prosecuted for a cover-up if it violates a federal statute.

1. Civil Tort Liability of Employers for Employees and/or Volunteers

Under *respondeat superior*, an employer will be found liable for civil child sex abuse torts committed by an employee, provided that (1) the abuse was committed within the time and space limitations of the agency relationship, (2) the employee was at least partially motivated by a purpose to serve the employer, and (3) the act was of a kind that the employee was hired to perform.[116] This type of vicarious liability attaches to

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(Defendants convicted for conspiring to transport minors in interstate commerce with the intent of having the minors engage in illegal sexual activity).

[113] 18 U.S.C. § 371

[114] *Id.*

[115] *Id.* § 3282; *see also* Grunewald v. United States, 353 U.S. 391 (1957); United States v. Hitt, 249 F.3d 1010 (D.C. Cir. 2001).

[116] W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 70, at 502 (5th ed. 1984); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07(1) (2006) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.").

an employer whether or not the employer is negligent or has direct control over the employee.[117] It is distinguished from simple "but-for" causation (that the abuse would not have been committed but for the employment). In many jurisdictions, the abuse must have been a generally foreseeable consequence of the activity engaged in on behalf of the employer, such that the employer would not be shocked or startled by being held to account for the action.[118]

Some courts have found that in the context of child sex abuse cases, the act of wrongdoing is so severe that it cannot be considered within the scope of employment.[119] Without satisfaction of that requirement, *respondeat superior* liability cannot survive. However, the question of whether an act of sexual abuse can be within the scope of employment is most often a question of fact for the jury to decide, and the trend is toward finding employers liable for an employee's sexual abuse of minors.[120] In addition, while religious institutions have often raised First Amendment defenses to such liability, as discussed in Section VII.B. of this article, most states refused to recognize this defense against neutral, generally applicable criminal or civil tort laws, such as negligence.

The doctrine does not turn on payment to employees or other subordinates. These considerations do not alter the responsibilities of principal or agent, so even volunteers can trigger liability on behalf of the organization for the torts they themselves commit.[121] However, independent contractors, who are not under as much control or supervision as employers or certain volunteers, do not confer liability on behalf of the superior organization.[122] Employers are also liable for their own negligent acts putting children at risk. A failure to institute or follow child protection policies triggers liability. Placing a

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[117] KEETON ET AL., *supra* note 116, at 501-02.

[118] Doe v. Holy See, 557 F.3d 1066, 1082 (9th Cir. 2009) (citing Fearing v. Bucher, 977 P.2d 1163, 1166 (Or. 1999)); Cordts v. Boy Scouts of Am., Inc., 252 Cal. Rptr. 629, 633 (Cal. Dist. Ct. App. 1988); Minnis v. Or. Mut. Ins. Co., 48 P.3d 137, 144-45 (Or. 2002).

[119] Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66, 71 (D. Conn. 1995).

[120] Doe v. Holy See, 557 F.3d at 1082; Hardwicke v. American Boychoir Sch., 902 A.2d 900, 920 (N.J. 2006); Jane Doe 130 v. Archdiocese of Portland in Or., 717 F. Supp. 2d 1120, 1137 (D. Or. 2010).

[121] Southport Little League v. Vaughan, 734 N.E.2d 261, 272 (Ind. Ct. App. 2000) (upholding jury's verdict that Little League volunteer was employee for purposes of respondeat superior in child sex abuse case).

[122] Walderbach v. Archdiocese of Dubuque, Inc., 730 N.W.2d 198, 201 (Iowa 2007) (Archdiocese held not liable under respondeat superior for actions of independent contractor).

suspected or known pedophile at work with other children is the paradigm of negligent failure to protect children.

In circumstances in which both the tortfeasor and the principal organization are found liable, they may be held jointly and severally liable for damages.[123] While there is enough overlap to justify a Restatement including these issues, different states do maintain divergent rules for apportionment of the liability between the individual committing the abuse and the principal organization.[124]

2. Criminal and Civil Fraud

A civil fraud action for covering up a case of child sex abuse must demonstrate that there was a misrepresentation or concealment of a material fact. According to Professor Kathleen Brickey, "fraud has been found to encompass 'conduct that involves a breach of duty 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.'"[125]

Identifying which facts are material, as well as whether there was a duty to reveal those facts, is critical. If a party is not under a duty to speak, a cause of action for the failure to disclose will not stand. However, if there is active concealment, the duty to speak is irrelevant. A civil litigant must also prove *scienter*, intent, causation, justifiable reliance, and damages caused by the abuser.

Several federal statutes place the concept of "fraud" at their core, but there is no singular federal crime of "fraud." Instead, the prosecution must fall under one of a number of federal statutes. One who covers up child sex abuse could be

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[123] Conaty v. Catholic Diocese of Wilmington, Inc., C.A. No. 08C-05-050 CLS, 2011 WL 2297712 at *1 (Del Super. Ct., May 19, 2011); Kaho'ohanohano v. Dep't of Human Servs., State of Haw., 178 P.3d 538, 556 (Haw. 2008).

[124] For example, Kentucky dictates that liability be apportioned to each joint tortfeasor. Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286, 291 (Ky. Ct. App. 1998). On the other hand, Colorado mandates that liability be apportioned in proportion to the tortfeasors' respective fault. Bohrer v. DeHart, 943 P.2d 1220, 1231 (Colo. App. 1996).

[125] Laura Russell, Note, *Pursuing Criminal Liability for the Church and Its Decision Makers for Their Role in Priest Sexual Abuse*, 81 WASH. U. L.Q. 885, 900 (2003). *See generally* KATHLEEN F. BRICKEY, CORPORATE AND WHITE COLLAR CRIME, CASES AND MATERIALS (3d ed. 2002); KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY (2d ed. 1984).

prosecuted under conspiracy to defraud, mail or wire fraud, securities fraud, etc.[126]

Criminal fraud constitutes a wrong against the people as a whole, not simply a single individual; the federal government prosecutes on behalf of the public good. In contrast, civil fraud cases must target an individual who has committed a private wrong that offends or causes damage to the plaintiff's interests.

A civil action may be maintained in tandem with a criminal prosecution.[127] However, some states maintain strict rules against placing a party in the position of potential self-incrimination and other privileges. In these states, such as Oregon,[128] a civil litigant typically may prefer to wait to file a civil lawsuit until the end of the criminal prosecution.

IV. SAFETY NET FOR CHILDREN ABUSED WITHIN THE HOME

While the recovery process for children who have been sexually abused varies in duration, there is one known fact: a child cannot start the healing process until he or she has been able to identify the abuse as a product of the past. Given the finality associated with termination of parental rights it is understandable that courts are hesitant in issuing such orders carelessly. However, the legal complexities involved in such determinations can lead to continued abuse. Unfortunately, situations of continual abuse are not just limited to situations of familial custody, but have also been infiltrating the foster care systems. Children should feel safest at home, and in order to ensure the comfort of safety, the courts may need to reform the way in which child abuse claims are adjudicated.

A. Family Court Issues

Although there has been some legislative reform leading courts to terminate a parent's right to custody after being convicted of sexual abuse, most jurisdictions do not automatically terminate the parental rights upon the finding of abuse.[129] Rather, a court must conduct a hearing to determine

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[126] *See, e.g.*, John Doe 1 v. Archdiocese of Milwaukee, 734 N.W.2d 827 (Wis. 2007).

[127] Louis Vuitton Malletier S.A. v. LY U.S.A. Inc., 676 F.3d 83, 104 (2d Cir. 2012).

[128] United States v. Oberdorfer, No. 06:12-cr-00578-HU, 2013 WL 1760867, at *3 (D. Or. Apr. 24, 2013).

[129] *Grounds for Involuntary Termination of Parental Rights*, CHILD WELFARE INFORMATION GATEWAY 3 (Jan. 2013), https://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf. (Explaining that in approximately 24 States and Puerto Rico, a parent's rights *can* be terminated if he or she has been convicted of

the appropriateness of revoking the parental right of the accused.[130] Given that these hearings are in the province of a state's Family Court, the requirements for termination of rights may vary from state to state. However, the Supreme Court has established a minimum evidentiary standard to be applied regarding the termination of parental rights.[131] Under the Court's standard, the evidence provided against the parent in question must be clear and convincing.[132]

There are, of course, several issues implicated by the additional hearing used to determine the accused's parental rights. Most significantly, such proceedings subject the abused child to a "double dose of abuse."[133] Testimony of the victim may be crucial to satisfying the clear and convincing standard.[134] But testifying may be an all-too-difficult task for the victim, who will have to relive the traumatic experience. The second issue implicated is the inability, under traditional evidentiary hearsay rules, to introduce hearsay testimony when the victim is unable or unwilling to testify.[135] Fortunately, however, many states have adjusted their hearsay rules to allow for the hearsay statements of the victim, as they are highly relevant to the findings of the court.[136] Regardless of the issues, it is imperative that the courts put the safety of the child as the first priority.

In addition, the number of cases in which one parent accuses the other of sexually abusing their child continues to rise.[137] Although many claims of this nature are accurate and are thereby an imperative part of the custody litigation, some of these claims can be strategically fabricated to gain a favorable opinion

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committing sexual abuse or another sexual offense. In 15 States, a conviction for rape or sexual assault that results in the conception of the child is a ground for termination of rights. Being required to register as a sex offender constitutes a ground in five States.)

[130] *Understanding Child Welfare and the Courts*, CHILD WELFARE INFORMATION GATEWAY 2-4 (June 2011), https://www.childwelfare.gov/pubs/factsheets/cwandcourts.pdf.

[131] *See* Santosky v. Kramer, 455 U.S. 745 (1982).

[132] *Id.* at 748.

[133] Karla-Dee Clark, Note, *Innocent Victims and Blind Justice: Children's Rights to be Free from Child Sex Abuse*, 7 N.Y.L. SCH. J. HUM. RTS., 214, 271 (1990).

[134] *Santosky*, 455 U.S. at 769.

[135] *See* Idaho v. Wright, 497 U.S. 805, 827 (1990) (holding that the victim's statements to her pediatrician were inadmissible in court as hearsay).

[136] *See* Timothy L. Arcaro, *Child Victims of Sexual Abuse and the Law*, 12 MICH. CHILD WELFARE L. J. 2, 10 (2009), *available at* http://chanceatchildhood.msu.edu/pdf/CWLJ_sp09.pdf.

[137] Deborah H. Patterson, Note, *The Other Victim: The Falsely Accused Parent in a Sexual Abuse Custody Case*, 30 J. FAM. L. 919, 920 (1992).

from the custodial decision maker.[138] It is nearly impossible to quantify the number of false allegations made in custodial hearings, but there are certain issues that must be addressed to help prevent such statements.

While parents may fabricate claims to gain a favorable custody decision, it is unusual for a child to fabricate a sexual abuse allegation.[139] Studies suggest that intentionally false claims of child abuse made by children account for significantly less than one percent of all such claims.[140] In fact, children are much more likely to understate the extent of abuse, which is highlighted by the alarming number of child abuse claims that go unreported.[141] There is concern in custodial cases where one of the parents may be fabricating the allegations, which plays into the hotly debated issue of "parental alienation syndrome," which is discussed in the Defenses section of this article.

For example, to ensure the accuracy of statements about abuse, it is imperative for the reporting agency to follow strict and unified standards. Studies show that an overwhelming majority of agencies do not use the proper procedures when taking statements from those involved in custodial disputes.[142] In fact, some agencies do not even have established protocol.[143] One theory is that this haphazard method of investigating leads the agency official to "err on the side of caution."[144] Although it is theoretically impossible to absolutely prevent false allegations, the number of such incidents can be decreased with adherence to stricter agency protocol.

There is also a need for adequate training of mandated reporters and the agencies that receive reports. The leading expert in the field, Victor Vieth, founder of the National Child Protection Training Center, explains that though there are a variety of reasons why mandated reporters do not report, "When a report is not made, not only is the abuse of a given child likely to

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[138] Patricia L. Martin, *The Sacrifice of a Parent: An Analysis of Parental Rights Related to False Allegations of Child Sexual Abuse*, 7 T.M. COOLEY J. PRAC. & CLINICAL L. 251, 254 (2005).

[139] *How Often Do Children's Reports of Abuse Turn Out to be False?*, LEADERSHIP COUNCIL, http://www.leadershipcouncil.org/1/res/csa-acc.html (last visited Sept. 22, 2013).

[140] *Id.*

[141] *Id.*

[142] Martin, *supra* note 138, at 256.

[143] *Id.*

[144] *Id.* at 257.

continue, but the chances an offender will violate other children also increases."[145]

B. Inadequacies and Dangers of Foster Care

While it was originally intended to protect some of the nation's most vulnerable children, the reality is that the state foster care systems are plagued with abuse. Generally, the state functions as the *de facto* parent of a foster child.[146] Consequently, the state has assumed the responsibility of locating a safe home for the child, and has a continued obligation to ensure the safety of the child's environment.[147] Unfortunately, government practices have been inadequate to protect children.[148] First, prior to placement, the agency should screen potential homes. While investigating prospective foster parents, the agency must employ careful measures to ensure a child's welfare. Second, the agency must be sure to place children in appropriate homes. Third, the agency must provide adequate supervision of the foster homes. Of course, there are state regulations that have certain requirements for the agency workers.[149] However, to ensure a child's safety, all such requirements—and likely more—must be strictly followed, and often are not.

In order to understand a child's ability to bring suit against the state when foster care abuse does occur, we must first determine which type of claim is at suit. In situations where a foster child has been abused, the child is able to bring constitutional claims.[150] Given the nature of the suit, the child may bring such a claim against the state. The Fourteenth Amendment not only protects a foster child's liberty interest, but it also grants him or her protection from harm inflicted in the foster care system.[151] As prescribed by the Fourteenth

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[145] Victor I. Vieth et al., *Lessons from Penn State: A Call to Implement A New Pattern of Training for Mandated Reporters and Child Protection Professionals,* 3 CENTER PIECE: NATIONAL CHILD PROTECTION TRAINING CENTER 2 (2012), *available at* http://www.ncptc.org/vertical/sites/%7B8634A6E1-FAD2-4381-9C0D-5DC7E93C9410%7D/uploads/Vol_3_Issue_3__4.pdf.

[146] *See* Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989).

[147] *Id.*; *See* Griffith v. Johnston, 899 F.2d 1427, 1440 (5th Cir. 1990) (stating that a state official's duty to provide adequate care to a foster child generally terminates once the foster child is officially adopted).

[148] *See* Carolyn A. Kubitschek, *Government Liability for Abuse of Children in Foster Care*, 2 Ann.2005 ATLA-CLE 1743 (2005).

[149] *Id.*

[150] *See* Tamas v. Dep't of Soc. & Health Servs., 630 F.3d 933 (9th Cir. 2010).

[151] *See* Carlo v. City of Chino, 105 F.3d 493, 501 (9th Cir. 1997); *see also* Campbell v. Burt, 141 F.3d 927, 931 (9th Cir. 1998).

Amendment, all persons have a conditional right to be free from intrusions on personal integrity.[152] Moreover, eight federal courts of appeal have held that foster children have a constitutional right to safe conditions of confinement.[153] The Circuits that observe this constitutional right also hold that a foster child has a right to be protected by their governmental custodians from injuries by third parties.[154]

It has long been recognized that a governmental agency can be held accountable for the violation of a child's protected liability interests.[155] For example, since 1981 the Second Circuit has held that a state agency can be held liable for indifference to a foster child's right of adequate supervision.[156]

In situations where the state assumes control over an individual, such as in the context of foster care, an affirmative duty is triggered by which the state is mandated to provide protection to that person.[157] When the state provides inadequate protection, the individual's due process rights may be violated by the state's "deliberate indifference" to its duty to protect. The threshold requirement for indifference varies among the jurisdictions. For instance, the Ninth Circuit requires that the action "shock the conscience" to meet the requisite indifference triggering the violation of a child's liberty interest.[158]

In addition, in some jurisdictions an abused foster child may also bring a tort claim against the state.[159] Historically, all

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[152] U.S. CONST. amend. XIV.

[153] *See* Kubitschek, *supra* note 148, at 2 (referring to Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003); Nicini v. Morra, 212 F.3d 798 (3d Cir. 2000); Norfleet v. Ark. Dep't of Human Servs., 989 F.2d 289 (8th Cir. 1993); Yvonne L. v. N.M. Dep't of Human Servs., 959 F.2d 883 (10th Cir. 1992); Meador v. Cabinet for Human Res., 902 F.2d 474 (6th Cir. 1990); K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990); Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); Doe v. N.Y.C. Dep't of Soc. Servs., 649 F.2d 134 (2d Cir. 1981).

[154] *See* Kubitschek, *supra* note 148, at 2 (referring to Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003); Nicini v. Morra, 212 F.3d 798 (3d Cir. 2000); Norfleet v. Ark. Dep't of Human Servs., 989 F.2d 289 (8th Cir. 1993); Yvonne L. v. N.M. Dep't of Human Servs., 959 F.2d 883 (10th Cir. 1992); Meador v. Cabinet for Human Res., 902 F.2d 474 (6th Cir. 1990); K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990); Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); Doe v. N.Y.C. Dep't of Soc. Servs., 649 F.2d 134 (2d Cir. 1981).

[155] *See* Lipscomb v. Simmons, 962 F.2d 1374, 1379 (9th Cir. 1992).

[156] Doe v. N.Y.C. Dep't of Soc. Servs., 649 F.2d at 147.

[157] *See* Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995).

[158] *See* Brittain v. Hansen, 451 F.3d 982, 991 (9th Cir. 2006) (stating that to violate due process, state officials must act with such deliberate indifference to the liberty interest that their actions "shock the conscience"); *see also* Kennedy v. City of Ridgefield, 439 F.3d 1055, 1064 (9th Cir. 2006) (defining conduct that shocks the conscience as deliberate indifference to a known danger or so obvious as to imply knowledge of danger).

[159] *See* Kubitschek, *supra* note 148, at 1.

states were immune from suit.[160] While some states are still protected by sovereign immunity, many have since waived their immunity, making it possible for foster children to bring suit.[161] In states where immunity has been waived, the child can make a claim against, among other parties, the state.[162] In states where absolute immunity is still present, the foster child can make a claim against the individual government employee if the employee's failure to safeguard the child led to a violation of constitutional rights.[163]

There are two different liability standards applicable to the tort claim of a plaintiff in the government's custody. Several circuits adhere to some version of the deliberate indifference standard.[164] Under this standard, a defendant is deliberately indifferent when he or she disregards a risk of harm of which he or she knew or should have known.[165] Of course, what is necessary to reach the deliberate indifference standard varies among the jurisdictions recognizing this approach.[166] For instance, the Second Circuit has ruled that deliberate indifference "cannot exist absent some knowledge triggering an affirmative duty to act,"[167] whereas the Fourth Circuit has mandated that officials must have ignored a danger for which they were placed on notice before the court will find deliberate indifference.[168] Moreover, most jurisdictions allow the indifference to be inferred, with the most typical inference resulting from grossly negligent behavior.[169]

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[160] U.S. CONST. amend. XI; Hans v. Louisiana, 134 U.S. 1 (1890).

[161] *See* Kubitschek, *supra* note 148, at 2.

[162] *Id.*

[163] *See* L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992).

[164] The Second, Third, Fourth, Seventh, Tenth, and Eleventh Circuits have each phrased the deliberate indifference test along the same lines. *See* H.A.L. *ex rel.* Lewis v. Foltz, 551 F.3d 1227, 1231 (11th Cir. 2008) (assigning liability if the official was "deliberately indifferent to a known and substantial risk to the child of serious harm"); J.H. *ex rel.* Higgin v. Johnson, 346 F.3d 788, 792 (7th Cir. 2003) ("[T]he plaintiffs must not only prove their injuries but must also prove that the state actors knew of or suspected the specific risk facing plaintiffs and consciously ignored it or failed to stop the abuse once it was discovered."); Nicini v. Morra, 212 F.3d 798, 811-12 (3d Cir. 2000) (defining deliberate indifference as "conduct [that] shocks the conscience" while assuming that the "should have known" standard applies); White by White v. Chambliss, 112 F.3d 731, 737 (4th Cir. 1997) (including a requirement that state officials "were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice"); Doe v. New York City Dep't of Soc. Servs., 649 F.2d 134, 145 (2d Cir. 1981) (explaining that deliberate indifference "cannot exist absent some knowledge triggering an affirmative duty to act").

[165] *See Nicini*, 212 F.3d at 811-12.

[166] *See* Kubitschek, *supra* note 148, at 3.

[167] *See Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d at 145.

[168] *See White by White*, 112 F.3d at 737.

[169] *See* Kubitschek, *supra* note 148, at 3.

The other standard is the professional judgment standard. This standard, which focuses on a professional caretaker, is implicated when the professional's decision is a substantial departure from accepted practice or standards.[170] The presence of this departure leads to a violation of the foster child's constitutional rights.[171]

While it is appropriate for each jurisdiction to adhere to its own liability standard, there is one aspect of the adjudication process that must be unified across the entire justice system: mandating reporting agencies to follow strict and unified standards. By adequately training mandated reporters and agencies, each state will not only be protecting its employees, but they will also be ensuring that all claims of abuse are given the attention they require for the protection of children.

V. RULES OF EVIDENCE IN CHILD SEXUAL ABUSE PROCEEDINGS

While they may differ in their details, all courts are subject to evidentiary rules that are intended to fairly administer all judicial proceedings. Though discovery rules vary across jurisdictions, there are several pillars that are almost universal, for instance, the rule against hearsay. While the general rule against hearsay continues to be a staple in almost every jurisdiction's evidentiary rules, like most other judicial doctrines, it is subject to specific exceptions. It is also particularly important in proceedings relating to child sex abuse.

A. Federal Rule of Evidence 414—Similar Crimes in Child Molestation Cases

Federal courts currently allow past convictions of child molestation to be admitted as evidence against the defendant in a child molestation case.[172] The vast majority of other convictions may not be admitted, except for the purpose of demonstrating elements such as motive, opportunity, intent, preparation, plan, and knowledge, in the commission of a crime.[173] However, Federal Rule of Evidence 414 specifies previous convictions of child molestation as an exception to the general rule of evidence.

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[170] *Id.*
[171] *Id.*
[172] FED. R. EVID. 414(a).
[173] *Id.* at 404(b)(2).

Despite arguments to the contrary, it has been determined repeatedly that Rule 414 is constitutional.[174] The application of this rule does not violate the due process clause of the Fourteenth Amendment;[175] it does not impermissibly deprive defendants accused of the sexual abuse of a minor of the same rights enjoyed by other defendants accused of other crimes.[176] Similarly, "Rule 414 does not violate the Eighth Amendment, [because it] does not impose criminal punishment at all; it is merely an evidentiary rule."[177] Those accused of sexual child abuse are not guaranteed a right to a trial free from relevant prejudicial evidence.[178] When the proposed evidence is relevant to the charge at hand, and is not overly prejudicial, it may be used in assessing the character of the defendant.[179]

If a prosecutor intends to introduce past convictions of sexual child abuse into evidence, the prosecutor must provide the defendant with prior notice. Currently Rule 414 requires that the prosecution notify the defendant at least 15 days prior to the trial or at a later time that the court allows for good cause.[180] This ensures that the inclusion of such evidence does not violate the constitutional rights of the defendant.

To guarantee that Rule 414 survives constitutional attack, the evidence admitted under the rule must not be overly prejudicial. As a result, in all cases, the application of Rule 414, and thus the inclusion of past convictions of child sexual abuse, is subject to judicial discretion.[181] Though not specifically identified in Rule 414, the analysis of whether to allow evidence of such past convictions is subject to the standard balancing test, weighing the probative value of the evidence against the prejudicial effect as determined under Federal Rule of Evidence 403.[182] In the event that the evidence is overly prejudicial, such as explicit photographs depicting the previous crime, a judge may choose to exclude the evidence despite the prosecution's attempted application of Rule 414.

For past crimes to be included, it is not necessary for the current and past crimes to be identical. Currently, federal courts

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[174] United States v. LeMay, 260 F.3d 1018, 1022 (9th Cir. 2001).
[175] United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998).
[176] *Id.* at 883.
[177] *Id.* at 884.
[178] *LeMay*, 260 F.3d at 1026.
[179] *Id.* at 1027.
[180] FED. R. EVID. 414(b).
[181] *Id.* at 1028.
[182] *LeMay*, 260 F.3d at 1027.

may admit previous convictions of like crimes that demonstrate the propensity of the defendant to engage in sexual activities which victimize children.[183] In addition to crimes relating to the direct sexual abuse of children, which vary by element, past convictions regarding child pornography may also be admitted against the defendant.[184]

Past convictions of like or identical convictions may also be admitted into evidence regardless of the date of the previous convictions. While other evidentiary rules specify limits on the extent into which the past may be delved, there are no presumptive time limits for previous crimes relating to the sexual abuse of a child.[185] No such limitations are included in Rule 414, nor have any been established through its subsequent judicial application.[186]

B. Alternate Options to Rule 414

While a state judiciary can certainly enact its own judicial rule similar to that of Rule 414, the vast majority of states have not yet adopted rules of evidence patterned after Rule 414. Currently, California, Louisiana, and Texas have enacted evidentiary rules based on Rule 414.[187] In many state courts, however, the common law doctrine of the "lustful disposition" exception, codified in Federal Rule of Evidence 404(b), has arisen.[188] Thus, previous crimes of the sexual abuse of a child may be admitted, subject to an appropriate balancing test, as confirmation of a defendant's lustful disposition.[189] In many instances, for this exception to apply, the evidence must demonstrate a sexual desire for the specific victim.[190] In addition,

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[183] *Id.* at 1027-28 (explaining the relevant factors to consider in "whether to admit [propensity] evidence" include "(1) 'the similarity of the prior acts to the acts charged,' (2) the 'closeness in time of the prior acts to the acts charged,' (3) 'the frequency of the prior acts,' (4) the 'presence or lack of intervening circumstances,' and (5) 'the necessity of the evidence beyond the testimonies already offered at trial.'").

[184] United States v. Sturm, 590 F. Supp. 2d 1321, 1327 (D. Colo. 2008).

[185] United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) (holding "there is no time limit beyond which prior sex offenses by a defendant are inadmissible").

[186] *Id.*

[187] CAL. EVID. CODE § 1108 (West 2003); LA. CODE EVID. ANN. art. 412.2 (2004); TEX. R. EVID. 609 (1998).

[188] LeMay, 206 F.3d at 1025.

[189] Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 218 (1993).

[190] *Id.* at 193.

the evidence must represent conduct that would naturally be interpreted as an expression of sexual desire.[191]

States that employ the "lustful disposition" exception may in fact allow substantially more evidence to be admitted against a defendant than a court applying Rule 414. While Rule 414 allows specifically for the admission of past convictions, the "lustful disposition" exception through Rule 404(b) allows for additional character evidence, which may not have escalated into a conviction, but is nonetheless seen as applicable to the current case.[192] Thus, through the use of Rule 404(b), coupled with the Rule 403 balancing analysis, most states have not deemed a separate rule, such as Rule 414, a necessity.

While evidentiary rules are necessary to ensure fairness in the judicial process, the courts have also remained cognizant of the fragile nature of child sex abuse cases. The nature of child sex abuse crimes makes them "[t]he most difficult to prove in court,"[193] which is magnified by the stigma and legal ramifications associated with a conviction. Society, however, has a need to protect its children, and therefore evidentiary rules allowing for a more efficient child sex abuse proceeding are necessary.

VI. ENHANCED FEDERAL SENTENCING REQUIREMENTS

Many federal statutes prohibiting the sexual abuse of a child provide modification to the statutory minimums in sentencing. While federal sentencing is multi-faceted and subject to judicial discretion, many statutes identify the minimum and maximum sentences the court may apply following a conviction for violating the statute. In many cases the statutory guidelines for sentencing are increased, identifying a desire to deter recidivism among those who have been convicted of crimes concerning the sexual abuse of a child.

Currently, in the conviction of aggravated sexual abuse, in which a previous like conviction exists, the maximum sentence is doubled.[194] Similarly, conviction of the sexual exploitation of children, with a like conviction, increases the minimum sentence from 15 to 25 years imprisonment, and the maximum from 30 to 50 years.[195]

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[191] *Id.* at 192.

[192] *Id.*

[193] Cylinda C. Parga, *Legal and Scientific Issues Surrounding Victim Recantation in Child Sexual Abuse Cases*, 24 GA. ST. U. L. REV. 779, 804 (2008).

[194] 18 U.S.C. § 2241(c) (2012).

[195] *Id.* § 2251(e) (2012).

Currently, previous convictions need not correspond directly to the specific statute violated for the statutory sentencing guidelines to be increased.[196] For the most part, judicial discretion is employed in determining the applicability of a previous conviction to the provision of the statute allowing for the sentencing increase.[197] However, recent developments indicate that the range of applicable convictions may be narrowing. For example, 18 U.S.C. § 2252, entitled "Certain activities relating to material involving the sexual exploitation of minors," was replaced by the Child Protection Act of 2012.[198] While Section 2252 allows past convictions "under the laws of any State" to trigger the appropriate sentencing increase, the Child Protection Act of 2012 removes "state" convictions from the list of violations that may trigger increased sentencing guidelines. In this way, federal legislation may indicate an intent to erode the application of increased sentencing standards.

VII. DEFENSES

A. *Parental Alienation Syndrome and the Perils of Custody by the Abusing Parent*

Parental Alienation Syndrome (PAS) is a hotly contested theory promulgated by Dr. Richard Gardner in the 1980s. According to Dr. Gardner, PAS's primary manifestation is the child's campaign of denigration against the parent—a campaign that has no justification.[199] The supposed "disorder results from the combination of indoctrinations by the alienating parent [(the parent influencing the child)] and the child's own contributions to the vilification of the alienated parent."[200] In other words, the alienating parent may influence the child through both direct and indirect actions to disproportionately dislike the other, alienated parent.

PAS has become a point of controversy in numerous custody disputes involving child sex abuse because it has been the basis, at times, for transferring custody from the alienating parent to the alienated parent accused of sexual abuse.[201] For

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[196] United States v. Sinerius, 504 F.3d 737, 744 (9th Cir. 2007).

[197] United States v. Wiles, 642 F.3d 1198, 1202 (9th Cir. 2011).

[198] Child Protection Act of 2012, Pub. L. No. 112-206, 126 Stat. 1490 (2012).

[199] Richard A. Gardner, *Parental Alienation Syndrome: Sixteen Years Later,* 45 ACADEMY FORUM 1, 10 (2001).

[200] *Id.*

[201] *See* John A. v. Bridget M., 798 N.Y.S.2d 345 (N.Y. Fam. Ct. 2004); Karen B. v. Clyde M., 574 N.Y.S.2d 267 (N.Y. Fam. Ct. 1991); *see also* J.F. v. L.F., 694

instance, in *Karen B. v. Clyde M.*, an infant daughter made statements suggesting sexual abuse perpetrated by her father.[202] The mother filed for sole custody of the daughter based upon those claims.[203] The court, citing PAS, found the claims to be baseless and awarded sole custody to the father.[204] Similarly, in *John A. v. Bridget M.*, sexual abuse allegations levied against the father resulted in awarding custody of the children to the father on the basis of PAS.[205] There were no confirmed findings of abuse in either case.

The DSM, otherwise known as the *Diagnostic and Statistical Manual of Mental Disorders*, provides a common language and standard criteria for the classification of mental disorders. The DSM IV does not include PAS as there was not enough scientific evidence to warrant its inclusion.[206] In addition, PAS is routinely criticized for lacking a scientific basis and failing to meet the burden of proof to merit acceptance as a scientific hypothesis.[207]

B. First Amendment Issues: When a Religious Entity Is a Defendant

In 2002, the *Boston Globe* broke the story of a concerted cover up of child sex abuse by bishops in the Catholic Church.[208] Before then, there were isolated reports of abuse by individual priests, with the most disturbing being the abuse of dozens of boys by Louisiana priest Gilbert Gauthe. Gauthe was convicted in 1985 and served 10 years in prison.[209] In the aftermath of the *Globe*'s story, the issue of institutional cover-up came to the fore across the country, though editors at other newspapers resisted

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N.Y.S.2d 592, 599-600 (N.Y. Fam. Ct. 1999) (holding that evidence of parental alienation syndrome alone would allow for awarding sole custody to the father).

[202] *Karen B.*, 574 N.Y.S.2d at 268.

[203] *Id.*

[204] *Id.* at 272.

[205] *John A.*, 798 N.Y.S.2d at 345.

[206] Richard A. Gardner, *Denial of Parental Alienation Syndrome Also Harms Women*, 30 AM. J. FAM. THERAPY 3, 195-96 (2002).

[207] *See* Richard Bond, *The Lingering Debate Over the Parental Alienation Syndrome Phenomenon,* 4 JOURNAL OF CHILD CUSTODY 1, 37-54 (2008); Robert E. Emery, *Parental Alienation Syndrome: Proponents Bear Burden of Proof*, 43 FAM. CT. REV. 1, 8-13 (2005).

[208] INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 3 (2003).

[209] Jonathan Friendly, *Roman Catholic Church Discusses Abuse of Children by Priests*, N.Y. TIMES, May 4, 1986, *available at* http://www.nytimes.com/1986/05/04/us/roman-catholic-church-discusses-abuse-of-children-by-priests.html. For a fictionalized account written by one who was at the forefront of the Gauthe case, read RAY MOUTON, IN GOD'S HOUSE (2012).

the story. For example, reporter Marie Rhode was removed from the religion beat because she brought a similar story of cover-up to the editorial board of the *Milwaukee Journal Sentinel*.[210]

The Roman Catholic Church is the largest religious institution in the world.[211] With its numbers, and its mandatory policies of shielding predators from law enforcement and public disclosure while permitting them access to more children, this institution was the perfect one to establish the paradigm for the press and the public of institutional cover-up. Once the factual outlines became visible, reporters, prosecutors, and survivors in other institutions took notice. The result was an avalanche of information about religious institution-based abuse, spanning every religion imaginable, from the Catholic Church to Orthodox Jews, especially the Hasidim, to Jehovah's Witnesses, Baptists, and Latter-Day Saints.[212] Close on the heels of the religious institutions were the secular institutions including Penn State,[213]

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[210] Marie Rhode, *Justice Prosser's Link to Priest Case Assailed: As DA in '79, He Decided Not to Prosecute, Records Indicate*, JSONLINE (Feb. 5, 2008), http://www.jsonline.com/news/milwaukee/29510659.html; *see also* Bruce Murphy, *The Catholic Cover-up*, MILWAUKEE MAG. (Feb. 14, 2007), *available at* http://www.milwaukeemag.com/article/242011-TheCatholicCoverup.

[211] CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html (last visted June 13, 2013).

[212] REPORT OF THE GRAND JURY, *IN RE* COUNTY INVESTIGATING GRAND JURY OF SEPT. 17, 2003, COURT OF COM. PL., FIRST JUDICIAL DISTRICT OF PA., CRIM. TRIAL DIV., MISC. NO. 03-00239, at 4 (Sept. 15, 2005), *available at* http://media.philly.com/documents/grand_jury_report.pdf; REPORT OF THE GRAND JURY, *IN RE* COUNTY INVESTIGATING GRAND JURY XXIII, COURT OF COM. PL., FIRST JUDICIAL DISTRICT OF PA., CRIM. TRIAL DIV., MISC. NO. 0009901-2008, at 1 (Jan. 21, 2011), *available at* http://www.phila.gov/districtattorney/PDFs/clergyAbuse2-finalReport.pdf; Jon Hurdle & Erik Eckholm, *Cardinal's Aide Is Found Guilty in Abuse Case*, N.Y. TIMES (June 22, 2012), http://www.nytimes.com/2012/06/23/us/philadelphias-msgr-william-j-lynn-is-convicted-of-allowing-abuse.html; Ross Levitt & Susan Candiotti, *Philadelphia Priest Abuse Trial to Draw Plenty of Attention*, CNN (Mar. 25, 2012), http://articles.cnn.com/2012-03-25/justice/justice_pennsylvania-priest-trial_1_priest-abuse-defrocked-priest-monsignor-william-lynn; Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why it is Not Protected under Religious Liberty Constitutional Provisions*, 18 WM. & MARY BILL RTS. J. 953, 962-63 (2010); Amy Neustein & Michael Lesher, *Justice Interrupted: How Rabbis Can Interfere with the Prosecution of Sex Offenders—And Strategies for How to Stop Them*, *in* TEMPEST IN THE TEMPLE: JEWISH COMMUNITIES & CHILD SEX SCANDALS 197 (Amy Neustein ed., 2009); MICHAEL J. SALAMON, ABUSE IN THE JEWISH COMMUNITY: RELIGIOUS AND COMMUNAL FACTORS THAT UNDERMINE THE APPREHENSION OF OFFENDERS AND THE TREATMENT OF VICTIMS 43 (2011); Hella Winston, *Hynes Issues Warning To Rabbis On Abuse Policy*, JEWISH WEEK (May 29, 2012), http://www.thejewishweek.com/news/new_york/hynes_issues_warning_rabbis_abuse_policy.

[213] Nick Carbone, *Jerry Sandusky, Guilty of 45 Counts of Child Sexual Abuse, Faces 442 Years in Prison*, TIME (June 22, 2012), http://newsfeed.time.com/2012/06/22/jerry-sandusky-guilty-of-45-counts-of-child-sexual-abuse-faces-442-years-in-prison; Susan Candiotti, *Disturbing E-mails Could Spell More Trouble for Penn State Officials*, CNN (July 2, 2012, 10:05 AM), http://www.cnn.com/2012/06/30/justice/penn-state-emails/index.html.

Syracuse,[214] the Citadel,[215] Horace Mann,[216] Poly Prep,[217] the Los Angeles public school system,[218] and many others.

Religious institutions charged with abetting and covering up sexual abuse of children often raise First Amendment defenses. Religious organizations have routinely invoked the First Amendment to avoid discovery, liability, and damages. But the law is showing less willingness to accept these defenses. The law has developed in this arena to the point now that there is widespread consensus: the First Amendment is no defense to the application of neutral, generally applicable criminal or civil tort laws, e.g., negligence.[219]

At one point, lawyers proposed a theory of "clergy malpractice," but that entangled the courts in calibrating and determining religious law. Thus, arguments opposing "clergy malpractice" as the measure of duty and care were successful. Most states now approach these cases through analysis of the conduct taken, without reference to religious belief, and measure it by neutral criminal or tort principles.

Three states do recognize a First Amendment defense for religious organizations in child sex abuse cases, including Missouri, Utah, and Wisconsin.[220] In Wisconsin, at least, it does not operate as absolute immunity, because the Wisconsin Supreme Court has now recognized a fraud cause of action against religious organizations for the cover up of child sex abuse.[221] The trend is clear, though, in favor of rejection of a

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[214] Pete Thamel, *Syracuse Fires Fine After New Allegations in Molestation Case*, N.Y. TIMES (Nov. 27, 2011), http://www.nytimes.com/2011/11/28/sports/ncaabasketball/bernie-fine-fired-by-syracuse-in-wake-of-molestation-allegations.html.

[215] *The Citadel Apologizes for Not Reporting Allegation of Child Sex Abuse*, CNN (Nov. 14, 2011), http://www.cnn.com/2011/11/14/us/south-carolina-citadel-abuse/index.html?_s=PM:US.

[216] William Glaberson, *Legal Options Limited for Alumni who Told of Abuse at Horace Mann*, N.Y. TIMES (June 12, 2012), http://www.nytimes.com/2012/06/13/nyregion/legal-options-limited-for-abuse-victims-at-the-horace-mann-school.html?_r=1.

[217] Mosi Secret, *Suit Settled Over Claims of Sex Abuse at Poly Prep*, N.Y. TIMES, Dec. 27, 2012, at A22, *available at* http://www.nytimes.com/2012/12/28/nyregion/sexual-abuse-case-at-poly-prep-in-brooklyn-is-settled.html.

[218] Jason Kandel, *Senator Calls for Investigation into School Sex Abuse Cases*, NBC LOCAL NEWS (Jan. 28, 2013, 10:16 PM PDT), http://www.nbclosangeles.com/news/local/Senator-to-Call-for-Independent-Investigation-Rampant-Sex-Abuse-LAUSD-Schools-188697991.html; Christine Pelisek, *Los Angeles's School Nightmare: Another Sex-Abuse Scandal*, THE DAILY BEAST (Jan. 25, 2013, 4:45 AM EST), http://www.thedailybeast.com/articles/2013/01/25/los-angeles-s-school-nightmare-another-sex-abuse-scandal.html.

[219] Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 890 (1990); Rashedi v. Gen. Bd. of Church of Nazarene, 54 P.3d 349, 354-55 (Ariz. Ct. App. 2002).

[220] Gibson v. Brewer, 952 S.W.2d 239, 246-48 (Mo. 1997); Franco v. Church of Jesus Christ of Latter-Day Saints, 21 P.3d 198, 208-09 (Utah 2001); L.L.N. v. Clauder, 563 N.W.2d 434, 445 (Wis. 1997).

[221] John Doe 1 v. Archdiocese of Milwaukee, 734 N.W.2d 827, 842 (Wis. 2007).

First Amendment defense in these cases. The most comprehensive and recent analysis by a state supreme court to date is *Redwing v. Catholic Bishop for Diocese of Memphis*.[222]

The free exercise and establishment clauses of the First Amendment are implicated in cases where claims are brought against a religious organization, such as a church, temple, synagogue, or mosque. The establishment clause does not preclude the court's exercise of subject-matter jurisdiction over such claims.[223] The clause also does not bar the examination of religious organization documents relating to the underlying facts that are the basis of the claim.[224]

In general, most courts have ruled that the First Amendment does not bar civil claims arising from the sexual assault or abuse of a minor or adult by an employee/member/leader of a religious organization.[225] Courts may hear claims regarding tortious conduct where a resolution does not require interpretation of religious doctrine or religious duties.[226]

Secondly, common law duties, predicated on secular conduct, do not involve or implicate religious beliefs. As a result, in most states, the religious beliefs of an organization do not excuse it from abiding by a valid law prohibiting conduct that the state may regulate. For example, tort liability may be imposed without violating the First Amendment so long as it derives from neutral, generally applicable tort law.[227] However, where interpretation of religious doctrine is required, the First Amendment bars tort liability.[228] As a result, most courts have ruled that the First Amendment does not bar civil claims arising from the sexual assault or abuse of a minor or adult by an employee/member/leader of a religious organization.[229] Courts may hear claims regarding tortious conduct where a resolution does not require interpretation of religious doctrine or religious duties.[230]

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[222] 363 S.W.3d 436 (Tenn. 2012).

[223] Malicki v. Doe, 814 So. 2d 347, 351 (Fla. 2002).

[224] Antioch Temple, Inc. v. Parekh, 422 N.E.2d 1337, 1342 n.10 (Mass. 1981) ("Examination of [ecclesiastical] documents is not, in and of itself, an impermissible intrusion into the religious realm . . . ."), *rev'd on other grounds*, Callahan v. First Congregational Church of Haverhill, 808 N.E.2d 301, 306-09 (Mass. 2004).

[225] *Malicki*, 814 So. 2d at 351 n.2.

[226] Smith v. O'Connell, 986 F. Supp. 73, 77 (D. R.I. 1997).

[227] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

[228] *Smith*, 986 F. Supp. at 77.

[229] *Malicki*, 814 So. 2d at 351 n.2.

[230] *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir. 1999) (holding the free exercise clause did not bar finding of fiduciary relationship

Finally, the First Amendment does not prohibit recovery for the sexual assault of a minor or adult by a member/leader/employee of a religious organization. The application of secular standards to secular tortious conduct by a religious organization is constitutional.[231] The state has a strong interest in protecting children from sexual assault or abuse and may authorize civil damages against a religious organization that knowingly creates a situation in which such injuries are likely to occur.[232] Punitive damages, against the individual and the religious organization, are not barred by First Amendment guarantees or public policy.[233] While the free exercise clause protects religious beliefs and instances of religious conduct, it does not shield religious organizations from liability for child sex abuse where, for example, criminal sanctions are unavailable and punitive damages against individuals would be insufficient.[234]

PAS and the First Amendment have both been raised as defenses in sex abuse cases. Fortunately, courts have been rejecting these defenses, as they are both unmeritorious. PAS lacks scientific standing, while the First Amendment is not a defense to the application of neutral, generally applicable laws.

CONCLUSION

There is increasing agreement on a number of legal rules and principles in the child sex abuse arena. SOLs across the country are becoming increasingly liberalized, with all but one state either lengthening or eliminating child sex abuse SOLs entirely. Given the current trend, it is likely that all states will eventually eliminate these SOLs, and many will adopt civil revival legislation to create access to justice for victims whose SOLs have expired. This development alone will increase the number of child sex abuse cases in the future and the need for a *Restatement of Child Sex Abuse*.

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between diocese and parishioner for child sexual abuse by priest); Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1243 (Miss. 2005) (holding that loss of consortium and negligent infliction of emotional distress claims are not barred by First Amendment).

[231] *Malicki*, 814 So. 2d at 351 n.2.

[232] *Malicki*, 814 So. 2d at 359; Gibson v. Brewer, 952 S.W.2d 239, 249 (Mo. 1997) (en banc) ("[L]iability for intentional torts can be imposed without excessively delving into religious doctrine, polity, and practice.").

[233] *Malicki*, 814 So. 2d at 351 n.2.

[234] *Id.*

There will also be an increased likelihood of such cases, because states are strengthening their mandatory reporting laws, with 48 states currently requiring specific professionals to report child abuse, and many considering increasing the categories of those required to report. Exceptions, like the confessional exception, have been repealed in some states, and narrowed in others.

There are other areas where there is agreement as well, including agreement among a majority of federal courts on the standard to be applied when foster children sue the state for abuse—that foster children have a constitutional right to safe placements; that the Parental Alienation Syndrome phenomenon is largely discredited; and that the First Amendment is no defense to a religious employer's negligence in creating unsafe conditions for children. Of course, this forum is not the place to be comprehensive, and so there are more issues to be addressed, from child pornography and trafficking to state and federal civil rights claims on behalf of victims.

The time is ripe, therefore, to create a *Restatement of Child Sex Abuse*. There are thousands of child sex abuse cases across the country, mostly prosecuted in state court, but also at the federal level. As more survivors come forward, their bravery encourages even more to do so, and, therefore, there is likely to be a growing number of cases. The dust has settled on many of the issues, and strong, identifiable conclusions and trends are apparent. Lawyers, judges, public policymakers, and scholars would benefit from a compendium of the interrelated issues involved in these cases and an explanation of how the law has been shaped and where it is headed.