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Mobsters in the Monastery? Applicability of Civil RICO to the Clergy Sexual Misconduct Scandal and the Catholic Church

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And he [Christ] went into the temple, and began to cast out them that sold therein, and them that bought; Saying unto them, It is written, My house is a house of prayer; but ye have made it a den of thieves.[1]

Reports of sexual misconduct by clergy members and subsequent allegations of cover-ups by bishops and other members of the Roman Catholic Church hierarchy continue to grow at an alarming rate. Almost every day, newspapers, television, and radio all report new claims brought against priests, bishops, and dioceses by plaintiffs who claim that they were sexually abused by priests and other clergy members. Press coverage of many such lawsuits has been very extensive,[2] and "the damage from the scandals has been financial as well as spiritual."[3] As a result, liability has reached "crisis proportions" in the Roman Catholic Church (Church).[4] Al-

1. *Luke* 19:45, 46 (King James).

2. In response to media coverage, it is notable that the Vatican has identified what it feels is an anti-Catholic bias in coverage of the clergy sexual-abuse crisis, while contending that American news organizations are driven by "morbid and scandalistic curiosity." Michael Paulson, *Jesuit Journal Raps U.S. Media's Church Coverage*, BOSTON GLOBE, Mar. 31, 2002, at A1, *available at* 2002 WL 4130238.

3. *Sex Abuse Costs Have Church Reeling: Dioceses Have Sold Land, Buildings to Settle Cases*, SUBURBAN CHI. NEWS, Mar. 15, 2002, *available at* http://www.suburbanchicagonews.com/heraldnews/focus/churchabuse/031502costs.htm [hereinafter *Costs Have Church Reeling*].

4. James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 32 (1994). The Archdiocese of Boston has already spent approximately fifty million dollars in lawsuit settlements over the last ten years, with more than 450 cases presently pending. Pete Waldmeir, *Cardinal Law Betrayed Vows and Trust at High Cost*, DETROIT NEWS, Dec. 15, 2002, at B1, *available at* 2002 WL 102338869. Some commentators have suggested that bankruptcy may be the next step for the diocese. Larry Whitham, *Boston's Cardinal Law Expected to Offer Resignation*, WASH. TIMES, Dec. 13, 2002, at A3, *available at* 2002 WL

though the nationwide financial toll is unknown since most settlements are confidential, estimates of payments to victims range from three hundred million dollars to one billion dollars.[5] Most allegations are based on direct sexual abuse by clergy members and subsequent failure on the part of Church authority to take adequate and responsible steps following notification of such acts. Claims against bishops and archbishops allege that pedophile[6] priests, following some preliminary treatment or penance, are "assigned to another parish, usually at a calculated distance from [their] last assignment[s]."[7] Thus, two main themes run through almost every allegation: 1) failure on the part of Church hierarchy to "react vigorously when clergy are accused of sexual misconduct;" and 2) violations of the "religious leader's position of trust and abuse of the spiritual leader's power over the victim."[8]

Lawsuits against predator priests and the Church have traditionally been rooted in tort principles. In an attempt to reach the deep-pockets of the Church, plaintiffs have frequently attached respondeat superior[9] claims to those made against the individual priest,[10] some of which include negligent hiring and supervision,[11] and even sexual harassment.[12] Although these strategies have generally yielded favorable results for many plaintiffs of clergy sexual abuse, lawyers have been continually seeking new methods

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2923342. Declaring bankruptcy would protect the diocese from further abuse and negligence claims, but would subject the internal affairs of the Church to the investigative efforts of the legal system. *Id.* Additionally, the Vatican must approve a bankruptcy filing. *Id.*

5. *Costs Have Church Reeling*, *supra* note 3.

6. Pedophilia is defined as "[sexual perversion] in which children are the preferred sexual object." WEBSTER'S THIRD NEW INT'L DICTIONARY 1665 (1986). While ephebophilia, defined as "[homosexual attraction] to young men," *id.* at 761, may also be at issue in many clergy abuse cases, this Comment will use "pedophilia" to encompass all types of related sexual misconduct.

7. John J. Dreese, *The Other Victims of Priest Pedophilia*, COMMONWEAL, Apr. 22, 1994, at 11, *available at* 1994 WL 13177756.

8. O'Reilly & Strasser, *supra* note 4, at 36-37.

9. Respondeat superior is the "doctrine [that] stands for the proposition that when an employer . . . is acting through the facility of an employee or agent . . . and tort liability is incurred during the course of this agency due to some fault of the agent, then the employer . . . must accept the responsibility." STEVEN H. GIFIS, BARRON'S LAW DICTIONARY 437 (4th ed. 1996).

10. O'Reilly & Strasser, *supra* note 4, at 39.

11. *See, e.g.*, Jones v. Trane, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1993); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994).

12. *See* Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991).

and theories through which to attack pedophile priests, their bishops and archbishops, and the institutional church bodies they represent and oversee. The latest theory for recovery is the application of the federal Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO),[13] best known for its use against organized crime.[14] Although no case has yet gone to trial, claims have been filed in Florida,[15] Minnesota,[16] and California,[17] each based on the theory that the Catholic Church hierarchy is involved in "a conspiracy of silence to protect priests who abuse children"[18] by failing to keep predator priests away from children, failing to report abuse to authorities, and paying money to victims in order to keep the misconduct secret.[19]

Enacted as part of the Organized Crime Control Act of 1970 (OCCA)[20] that sought the "eradication of organized crime in the United States,"[21] RICO is traditionally associated with and was originally used as a tool to prosecute the mafia and similar underworld criminal enterprises. In general, a RICO violation results "from the use of power, acquired by crime, to gain or maintain a foothold in an enterprise that operates in interstate commerce."[22]

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13. 18 U.S.C. §§ 1961-1968 (2000).

14. *RICO Suit Filed in Bishop's Sex Abuse Case*, WASH. TIMES, Mar. 22, 2002 *available at* http://www.washtimes.com/upi-breaking/22032002-113039-7966r.htm.

15. *Id.* A team of Minnesota lawyers has filed RICO suits in both Florida and Minnesota against former Roman Catholic Bishop Anthony J. O'Connell. The Florida suit also names as defendants the dioceses of Jefferson City, Missouri; Knoxville, Tennessee; and Palm Beach, Florida. See *Priests as Racketeers?*, *at* About.com, http://law.about.com/library/weekly/aa042202a.htm (last visited Mar. 15, 2003) (on file with author) for a summary of the allegations against O'Connell.

16. *Id.*

17. Glenn F. Bunting & Richard Winton, *Ex-Altar Boy Alleges Priest Abused Him. Litigation: Complaint Filed Under Federal Racketeering Law Claims Mahoney Protected Father Baker. Cardinal Calls the Suit Baseless.* L.A. TIMES, May 21, 2002, at B1, *available at* 2002 WL 2477196.

18. Agence France-Presse, *Anti-mobster 'RICO' Law Used vs. Roman Catholic Church*, Mar. 23, 2002, *at* INQ7.net, http://www.inq7.net/wnw/2002/mar/24/wnw_6-1.htm (on file with author).

19. Bunting & Winton, *supra* note 17, at 1.

20. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified in scattered sections of 18 U.S.C.).

21. GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 3 (2d ed. 2000).

22. Mark Stephen Poker, *Reaching a Deep-Pocket Under the Racketeer Influenced and Corrupt Organizations Act*, 72 MARQ. L. REV. 511, 513 (1989) (citing Andrew P. Bridges, *Private RICO Litigation Based Upon "Fraud in the Sale of Securties,"* 18 GA. L. REV. 43, 48 (1983)).

To better achieve its goal, RICO provides both criminal and civil remedies to eliminate organized crime and justly compensate those injured by the criminal acts.[23] The inclusion of a treble damages provision for RICO violations has transformed the law into an attractive basis for recovery in suits that Congress by no means envisioned when formulating the statute.[24] Specifically, section 1964(c) of the act provides that "any person injured in his business or property by reason of a violation of section 1962 . . . may sue therefore in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."[25] In recent years, the inherent ambiguity of the statute itself, coupled with a broad reading by the Supreme Court, has led to RICO's application in areas well beyond its original and intended focus, including use of the statute against both tobacco companies[26] and pro-life abortion clinic protestors.[27]

Motivated by the treble damages provision and armed with precedent extending RICO's application to non-mafia entities, lawyers for victims of clergy sexual abuse are now attempting to apply the statute's prohibitions to pedophile priests and Church hierarchy.[28] This Comment will consider the viability of RICO-based claims against priests, high-ranking Church officials, and the Catholic Church itself, addressing the likely defenses and constitutional issues that may arise if a court is to entertain a RICO-based claim.[29] Following an examination of legislative history and case law, this analysis will illustrate that application of RICO to clergy sexual abuse cases is inappropriate, regardless of the statute's liberal interpretation in recent years.

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23. Anne Melley, *The Stretching of Civil RICO: Pro-life Demonstrators Are Racketeers?*, 56 UMKC L. Rev. 287, 289 (1988).

24. *Id.*

25. 18 U.S.C. § 1964(c) (2000).

26. *See, e.g.*, United States v. Philip Morris, Inc., 314 F.3d 612 (D.C. Cir. 2003); Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, 268 F.3d 103 (2d Cir. 2001).

27. *See* Northeast Women's Ctr., Inc. v. McMonagle, 624 F. Supp. 736 (E.D. Pa. 1985), *vacated and remanded*, 813 F.2d 53 (3d Cir. 1987), *on remand*, 665 F. Supp. 1147 (E.D. Pa. 1987), 670 F. Supp. 1300 (E.D. Pa. 1987).

28. *RICO Suit Filed in Bishop's Sex Abuse Case*, *supra* note 14.

29. Although clergy sexual abuse plagues many religious denominations, this Comment will address the problem in the context of the Roman Catholic Church. The two main reasons for this focus are the controversial and high-profile nature of the issue and the distinct hierarchal structure of the Roman Catholic Church.

Specifically, this Comment begins with an assessment of RICO's legislative history and purpose. After establishing this foundation, Part II will illustrate the significant liberal extensions of RICO in recent years in three particularly important cases. Part III will then specifically address the applicability of section 1962(b) to bishops, archbishops, and upper-level Church authorities, while Part IV will address the applicability of section 1962(c) to both individual pedophile priests and Church authorities. A discussion of the potential statute of limitations issues presented in this context will follow in section V, while Parts VI and VII will address vicarious liability and constitutional defenses, respectively. Finally, this Comment will conclude that application of RICO has extended far beyond its original focus and should be constrained by legislative action and amendment.

I. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

A. *General Text and Sections*

Section 1962 of the Racketeer Influenced and Corrupt Organizations Act is split into four distinct subsections.[30] In general terms, section 1962(a) prohibits the use of income derived from a pattern of racketeering activity to acquire an interest in an enterprise;[31] section 1962(b) prohibits the acquisition or maintenance of an interest in or control of an enterprise through a pattern of rack-

30. 18 U.S.C. § 1962(a)-(d) (2000).

31. Section 1962(a) declares that:

> It shall be unlawful for any person who has received income derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt in which such person has participated as a principle within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U.S.C. § 1962(a) (2000).

eteering activity;[32] section 1962(c) prohibits the conducting of the affairs of an enterprise through a pattern of racketeering activity;[33] and section 1962(d) prohibits conspiracy to violate any of the three preceding subsections.[34] The act provides for civil remedies in section 1964(c).[35]

B. *Legislative History and Purpose*

Following the Senate Committee determination that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy,"[36] Congress enacted RICO as part of the OCCA. However, what Congress meant by the term "organized crime" is still unclear decades later. Despite section 904(a)'s express provision that Title IX of the OCCA be "liberally construed to effectuate its remedial purpose,"[37] the congressional records support the proposition that RICO was designed to apply only to certain and distinct criminal entities.

There is evidence in the congressional record indicating that RICO's intended application was to traditional organized crime and underworld families. Senator John L. McClellan's detailed account of the business practices of the "mob" supports this proposition:

> The infiltration of legitimate businesses by organized crime has been increasingly documented in the past year. Once it

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32. Section 1962(b) declares that: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce." 18 U.S.C. § 1962(b) (2000).

33. Section 1962(c) declares that:

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

18 U.S.C. § 1962(c) (2000).

34. Section 1962(d) declares that: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d) (2000).

35. *See supra* text accompanying notes 23-25.

36. 115 CONG. REC. S1861, 9569 (1969).

37. Racketeer Influenced and Corrupt Organizations Act, ch. 96, § 904(a), 84 Stat. 947 (1970).

> invades a legitimate field of endeavor, the mob quickly brings with it a full range of corrupt practices. It sometimes uses terror tactics to obtain a larger share of the market. Labor unions are infiltrated, and then labor peace is sold to businesses . . . [i]n business, the mob bleeds a firm of assets, then takes bankruptcy. It steals securities and then uses the stolen securities to fraudulently obtain funds from lending institutions . . . [t]hrough the violence used in its operations and its rigidly enforced code of silence, as well as exploitation of non members in its schemes, the mob seeks to gain immunity from the rules of our society . . . .[38]

The Senator's detailed explanation of the practices of the "mob" supports the argument that RICO was intended only for those particular types of organized criminals, and not for "non-mob" organized groups. His explicit focus on the "mob's" methods of business infiltration strongly supports the proposition that the statute be applicable only to entities that function in such specified manners.

In addition to the above assertions, Senator McClellan's use of the terms mafia and "La Cosa Nostra" elsewhere in the congressional record supports the presumption that RICO was intended to be used as a tool against only these certain types of organizations:

> The most influential of these [organized crime] groups, the 26 families of La Cosa Nostra, estimated to have a total membership of some 3,000 to 5,000, operate, however, primarily in New York, New Jersey, Illinois, Florida, Louisiana, Michigan, Pennsylvania, and Rhode Island. The internal organization of these families is patterned after the ancient Mafia groups of Sicily.[39]

McClellan's obvious reference to "La Cosa Nostra" as the most influential of organized crime groups strongly supports the assertion that RICO's intended target be only "La Cosa Nostra" itself and other similarly functioning "families."

In addition to language contained in the congressional records, the general inability of authorities to control the mafia in the years prior to the passage of the OCCA also supports the law's narrow

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38. 116 CONG. REC. S30, 18,939 (daily ed. Jun. 9, 1970) (statement of Sen. McClellan).

39. 116 CONG. REC. S30, 18,913 (daily ed. Jun. 9, 1970) (statement of Sen. McClellan).

enforcement to such intended parties.[40] This difficulty in prosecution of mafia figures motivated the government to provide a "new arsenal for [f]ederal officials in their war against organized crime."[41]

Although both the timing of the bill's passage and the legislative history of the OCCA strongly suggest applicability only to traditional organized crime and mafia entities, RICO has recently been utilized in cases well beyond this original purpose. An understanding of these cases is helpful prior to an examination of RICO's potential applicability in the context of clergy sexual misconduct.

II. Liberal Interpretation of RICO Through Case Law

Since its inception in 1970, courts have broadly interpreted RICO to include defendants who do not fit into any of the aforementioned concepts of "organized crime." In support of such interpretation is section 904(a) of the OCCA, which expressly provides that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes."[42] The recent application of RICO in the following three cases highlights this liberal approach and helps illustrate the current status of civil RICO.

A. *Sedima, S.P.R.L. v. Imrex*

In *Sedima, S.P.R.L. v. Imrex*,[43] the United States Court of Appeals for the Second Circuit was faced with two issues concerning the use of civil RICO in a business fraud action.[44] The first issue was whether a criminal conviction on the underlying predicate offenses is a prerequisite to commencing a private civil action.[45] The second issue was whether, as a standing requirement in a civil RICO action, the plaintiff must allege and prove a "competitive" or

40. In the years following World War II, involvement of the FBI in organized crime investigations was hampered by the lack of possible federal laws covering crimes perpetrated by racketeers. Because many "mob" activities were carried out locally or otherwise did not fall within the Bureau's jurisdiction, RICO was enacted to counter this problem. Post-War America (1945-1960s), *at* FBI homepage, http://www.fbi.gov/libref/historic/history/postwar.htm (last visited Mar. 15, 2003).

41. 116 Cong. Rec. 844 (daily ed. Jan. 22, 1970) (statement of Sen. Kennedy).

42. Racketeer Influenced and Corrupt Organizations Act, ch. 96, § 904(a), 84 Stat. 947 (1970).

43. 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

44. Melley, *supra* note 23, at 292.

45. *Sedima*, 741 F.2d at 496.

"racketeering injury," defined as an injury additional to those resulting from predicate acts of racketeering.[46] After the Second Circuit answered both questions in the affirmative, creating two "artificial limitations on the availability of civil RICO,"[47] the Supreme Court granted certiorari.[48]

Following an examination of RICO's history and purpose, the Court found "no support in the statute's history, its language, or considerations of policy for a requirement that a private treble damages action under [section] 1964(c) can proceed only against a defendant who has already been criminally convicted."[49] In addition, the Court held that the Second Circuit's standing requirement, that plaintiff must allege an injury that RICO was designed to deter, was "unhelpfully tautological."[50] The Court rejected the need for an "additional, amorphous 'racketeering injury' requirement,"[51] finding it inaccurate in light of the specifically enumerated predicate acts that represented the kind of conduct that Congress sought to deter.[52] Accordingly, by "[d]eferring to the legislative mandate that RICO be read broadly to effectuate its remedial purposes,"[53] the Court reversed the Second Circuit and rendered a decision that effectively sanctioned liberal application of RICO far beyond the mobster context. The Court flatly rejected the generally understood requirement of a nexus to organized crime in order to state a claim under civil RICO,[54] making the cause of action potentially available given any violation of a predicate act.

While settling the legal issues presented in the case, *Sedima* opened the door for an "entirely new wave of problems, the most serious being the potential abuse of civil RICO's generous remedies by overzealous or overreaching practitioners."[55] The abortion

46. *Id.* at 494-95.
47. *Id.* at 487.
48. Sedima, S.P.R.L. v. Imrex, 469 U.S. 1157 (1985).
49. Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 492 (1985).
50. *Id.* at 494.
51. *Id.*
52. *Id.*
53. Melley, *supra* note 23, at 294.
54. *See id.* at 292 ("The pre-Sedima years in the history of civil RICO are marked by the unwillingness of certain courts to allow civil RICO to be used in cases involving persons other than the stereotypical 'mobster' or member of an organized crime family.").
55. *Id.*

clinic and protest cases that soon followed help illustrate the impact of *Sedima's* precedent.

B. *Northeast Women's Center, Inc. v. McMonagle*[56]

Following the Court's decision in *Sedima*, the Northeast Women's Center, a women's health center in Philadelphia that provides abortion and other services, "launched an unprecedented attempt" to institute a private civil RICO action against anti-abortion protesters following "sit-ins" that occurred at the clinic between 1984 and 1986.[57] The complaint alleged a conspiracy among the pro-life protestors to harass and terrorize plaintiff's clients and employees, unlawful entry onto the plaintiff's property, destruction of its equipment, admission to the clinic through fraudulent representations, libel and defamation of plaintiff's employees and clients, and distribution of false and misleading information to plaintiff's clients.[58] Based on these acts, the complaint alleged that the defendants were "engaged in an ongoing criminal enterprise and pattern of racketeering activity . . . in violation of 18 U.S.C. § 1962,"[59] and that the protestors had formed various organizations that, through a pattern of racketeering activity, disrupted, harassed, and otherwise harmed the clinic's "business and property with the goal of destroying both."[60]

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56. 689 F. Supp. 465 (E.D. Pa. 1988), *aff'd*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989).

57. Melley, *supra* note 23, at 296-97.

58. *Id.* at 298 (citing plaintiff's amended complaint).

59. *Id.* (citing plaintiff's amended complaint).

60. *Id.* at 299 (citing plaintiff's amended complaint). The plaintiffs alleged robbery and violations of the Hobbs Act as the predicate acts of their RICO claims. *Id.* RICO suits often allege violations of the Hobbs Act as racketeering activities under section 1961(1). The Hobbs Act prohibits the obstruction of commerce or the movement of any article therein through robbery or extortion and provides for fines of not more than $10,000 or imprisonment of not more than twenty years, or both. 18 U.S.C. § 1951 (2000). Section 1961(1) thus incorporates violations of the Hobbs Act as predicate acts for RICO purposes, requiring an examination of relevant Hobbs Act case law and history to determine whether a racketeering activity exists for the RICO claim asserted. *See* Alexander M. Parker, Note, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819 (1996) (arguing that the Hobbs Act's broad definition of extortion has allowed the statute, through RICO, to become a vehicle used to punish picketing and political protest).

In response, McMonagle argued that the clinic's attempted use of RICO was far from the purpose of the statute.[61] Despite pointing out that the clear purpose of RICO was to eradicate organized crime in the United States, the court sustained the clinic's claim, adding that it was fully aware that RICO had become a method for redressing virtually all means of misconduct rather than a "weapon for derailing the activities of 'the archetypal, intimidating mobster.'"[62] After four days of deliberation, the jury returned a verdict in favor of the clinic, finding that twenty-two of the protestors had violated section 1964(c), and that five others had violated section 1964(d).[63] Despite a strong First Amendment argument by the defense,[64] the district court sustained the jury verdict.[65]

The importance of *McMonagle* is that it represented a complete departure from the traditional notions associated with application of RICO, confirming the potential for the statute's use against parties that have no connection whatsoever to organized crime families. Following *McMonagle*, civil RICO now stands as a "dangerous vehicle [that] business, government, and other organizations can use [as a threat against] those wishing to stage demonstrations at their facilities."[66] Today, *McMonagle* represents the extent to which civil RICO has departed from its original intended purpose to fight organized crime, and serves as valuable precedent for plaintiffs attempting to bring RICO claims against priests, bishops, dioceses, and other Church institutions.

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61. The plaintiffs in *McMonagle* alleged that the purpose of the statute was to put an end to "the infiltration of legitimate businesses and labor unions by organized crime and to curtail the resultant interference with free competition and commerce." Melley, *supra* note 23, at 300 (citing Memo. of Law in Supp. of Def. Omnibus Mot. to Dismiss at 3-4, Northeast Women's Ctr., Inc. v. McMonagle, 624 F. Supp. 736 (E.D. Pa. 1985) (citing United States v. Forsythe, 429 F. Supp. 715 (W.D. Pa. 1977))).

62. *Id.* at 305 (citing Bench Op. on Def.'s Mots. for Directed Verdicts at 10, *McMonagle* (May 8, 1987) (quoting Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 499 (1985))).

63. Northeast Women's Ctr., Inc. v. McMonagle, 689 F. Supp. 465, 467 (E.D. Pa. 1988), *aff'd*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989); *see also* Melley, *supra* note 23, at 308.

64. *See* Parker, *supra* note 60, at 843-44.

65. *McMonagle*, 689 F. Supp. at 477. The jury's verdict was upheld as to all but one defendant where the district court held that there was insufficient evidence to convict her of conspiracy under section 1962(d), thus granting her motion for judgement not withstanding the verdict. *Id.* at 475-77.

66. Melley, *supra* note 23, at 309.

C. *National Organization for Women, Inc. v. Scheidler*

Subsequent to *Sedima* and *McMonagle*, the Supreme Court made a significant extension in RICO jurisprudence with *National Organization for Women, Inc. v. Scheidler.*[67] In *Scheidler*, the National Organization for Women, Inc. and two women's health care centers brought suit in the Northern District of Illinois against several anti-abortion activist organizations.[68] The plaintiffs alleged that the defendant organizations had conspired to destroy the business of the health care providers through a pattern of illegal activities in violation of RICO.[69] The district court dismissed the claim, "finding that absent an allegation that the racketeering enterprise or predicate acts have some profit-generating purpose, plaintiffs did not have a valid claim under RICO."[70]

After the United States Court of Appeals for the Seventh Circuit affirmed the decision below,[71] the Supreme Court reversed, holding that RICO does not require plaintiffs to show that a racketeering enterprise or the predicate acts of racketeering have a profit-generating purpose.[72] The Court noted that neither the definition of the term "enterprise" nor the language in section 1962(c) suggests any indication that RICO requires an economic motive,[73] adding that section 1962(c) prohibits racketeering activities performed by enterprises whose activities simply "affect" interstate and/or foreign commerce.[74] By removing any implicit requirement of an economic motive to state a valid RICO claim, the Court concluded that an "enterprise" under section 1962(c) need only be an association in fact that engaged in a pattern of racketeering activity.[75]

The significance of *Scheidler* lies in its removal of the final vestiges of the common associations and motives related to RICO

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67. 510 U.S. 249 (1994).

68. Nat'l Org. for Women, Inc. v. Scheidler, 765 F. Supp. 937, 938 (N.D. Ill. 1991).

69. *See id.*

70. Amy L. Mauk, Comment, *RICO-Abortion Protestors Subject to Civil RICO Actions*—National Organization for Women, Inc. v. Scheidler, 28 SUFFOLK U. L. REV. 288, 289 (1994) (citing *Scheidler*, 765 F. Supp. at 939-45).

71. National Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 614 (7th Cir. 1992).

72. *Scheidler*, 510 U.S. at 262.

73. *Id.* at 256-60.

74. *Id.* at 258.

75. *Id.* at 259.

claims. Rather than a tool to be used against organized crime entities seeking profit and economic gain, *Scheidler* sanctioned RICO's use in a multitude of situations wholly unrelated to organized crime. Because *Scheidler* no longer limits RICO to profit-seeking enterprises or financially motivated predicate acts, it significantly widens the class of defendants potentially liable under the statute.

The trend illustrated by *Sedima*, *McMonagle*, and *Scheidler* shows that RICO has become an attractive tool for various types of plaintiffs. By moving away from a traditional nexus with organized crime, courts have provided plaintiffs with another option in formulating their claims against potential defendants. This trend has made RICO the newest option for lawyers of the victims of clergy-related sexual abuse. In the context of RICO's expanded applicability, courts may soon have to determine whether such plaintiffs can state a claim under RICO.

III. APPLICABILITY OF SECTION 1962(B) TO BISHOPS, ARCHBISHOPS, AND OTHER HIGH-LEVEL CHURCH AUTHORITIES[76]

To state a valid claim under section 1962(b), clergy-related sexual abuse victims will need to prove each of several distinct elements as defined by both the statute itself and by subsequent case law.[77] Under section 1962(b), plaintiff must allege and prove that:

A) a person,
B) acting with the necessary mens rea,
C) through a pattern of
D) racketeering activity or collection of an unlawful debt,
E) acquired or maintained any interest in or control of,
F) an enterprise engaged in or affecting commerce,
G) resulting in injury to the plaintiff's business or property

76. This Comment will explain the applicability of section 1962(b) to upper-level Church authorities and the applicability of section 1962(c) to both individual priests and upper-level Church authorities. Because most courts have understood section 1962(a) to reach only those "injuries proximately resulting from defendant's *investment* of racketeering income," this Comment will not focus on its applicability in this context. *See* EDWARD F. MANNINO, THE CIVIL RICO PRIMER 3:1 (1996). Additionally, this Comment will not focus on section 1962(d) because conspiracy to violate sections 1962(b) and (c) would require satisfaction of the elements specified for each. Because this Comment concludes that victims of clergy related sexual abuse can not bring valid claims under either section 1962(b) or (c), inquiry into section 1962(d) is unnecessary.

77. JOSEPH, *supra* note 21, at 124.

> H) by reason of the defendant's acquisition or maintenance of the interest in, or control over, the enterprise.[78]

A. *Person*

Victims of clergy-related sexual abuse will be able to establish that upper-level Church officials, including bishops and archbishops, each qualify as "persons" for section 1962(b) purposes. RICO defines "person" to include any "individual or entity capable of holding a legal or beneficial interest in property."[79] This statutory definition of "person" applies to both plaintiffs bringing an action under section 1964(c) and defendants whose action is proscribed by section 1962(a), (b), (c), or (d).[80] In view of the broad definition of "person" provided in the statute, victims of clergy sexual abuse would have little difficulty satisfying this first requirement in their RICO claims.

B. *Acting with the Necessary Mens Rea*

In order to prove liability under RICO, plaintiffs must generally prove that a defendant acted with the appropriate mens rea,[81] possessing the specific intent associated with each underlying predicate offense.[82] In some circuits, the defendant must act with "the specific intent to participate in the overall RICO enterprise,"[83] although this is not the majority rule. Mens rea may be shown both directly, as by admission,[84] and circumstantially, as by the existence of a scheme reasonably calculated to deceive persons of ordinary comprehension and prudence when the intention is shown by examination of the scheme itself.[85]

Assuming likely allegations of obstruction of justice, mail and wire fraud, and bribery as predicate acts,[86] plaintiffs must prove the underlying intent for each act separately. Theoretically, plain-

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78. *Id.* at 125.
79. 18 U.S.C. § 1961(3) (2000).
80. JOSEPH, *supra* note 21, at 65.
81. *Id.* at 121.
82. *See, e.g.*, United States *ex rel.* Dunleavy v. Court of Delaware, 279 F.3d 219 (3d Cir. 2002); Genty v. Resolution Trust Co., 937 F.2d 899 (3d Cir. 1991); Schimpf v. Gerald, Inc., 2 F. Supp. 2d 1150 (E.D. Wis. 1998).
83. *See, e.g.*, Zolfaghari v. Sheikholeslami, 943 F.2d 451 (4th Cir. 1991).
84. JOSEPH, *supra* note 21, at 122.
85. Ikuno v. Yip, 912 F.2d 306, 310-11 (9th Cir. 1990).
86. *See* discussion *infra* Part III.D.

tiffs could prove the mens rea for obstruction of justice with evidence that the defendant knowingly refrained from reporting allegations of sexual abuse to authorities. For their mail and wire fraud claims, plaintiffs could prove the necessary mens rea with evidence that the defendant transferred predator priests with adequate knowledge that they would abuse again and with the intent to deceive parishioners. The admissions of Church authorities, such as former Cardinal Bernard Law of Boston, disclosing the secretive transfers of priests like John Geoghan and other varying attempts to keep word of clergy sexual abuse away from law enforcement authorities would be indicative of the intent necessary for each predicate act.[87] Additionally, plaintiffs could prove the necessary mens rea for their bribery allegations through representations made to plaintiffs by Church authorities or actual payment to plaintiffs in exchange for forbearance of their claims against the priests, in addition to calling attention to large bank accounts maintained by the Church for the sole purpose of making such payments.[88]

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87. Allegations of appalling conduct in the Archdiocese of Boston continue to become public, most implicating Cardinal Law "in a decades-long pattern of covering up sexual abuse by clerics, secretly settling lawsuits and quietly moving priests to new assignments, where they often molested other children." *Cardinal Law Must Go*, HARTFORD COURANT, Dec. 13, 2002, at A16, *available at* LEXIS, News Group File, All. Although Law has continually apologized for his actions, claiming that he did not know the extent of the abuse, new documents show that he was repeatedly informed of misconduct and only "coddled" abusive priests to minimize their evil acts. *Id.* After months of speculation, Pope John Paul II accepted Law's resignation on Dec. 13, 2002, making Law the highest-ranking Church official "felled" by the Church's sexual abuse scandal. Franci Richardson & Tom Mashberg, *Law Resigns*, BOSTON HERALD, Dec. 14, 2002, at 2, *available at* 2002 WL 4094957. Additionally, at least four bishops have resigned after being accused of sexual misconduct, while the Office of the Attorney General has recently subpoenaed Bishop Thomas Daily of Brooklyn, New York; Bishop John McCormack of Manchester, New Hampshire; Archbishop Alfred Hughes of New Orleans, Louisiana; Bishop William Murphy of Rockville Centre, New York; and Bishop Robert Banks of Green Bay, Wisconsin to appear before a grand jury looking into similar potential criminal violations. *Id.*; Larry Whitham, *Boston's Cardinal Law Expected to Offer Resignation; Meets with Pope Today to Discuss Sex-abuse Scandal, Bankruptcy*, WASH. TIMES, Dec. 13, 2002, at A3, *available at* LEXIS, News Group File, All.

88. Lawyers bringing RICO suits against the Church argue that RICO is warranted "because the church has engaged in a pattern of concealing criminal conduct to protect the priests and the church 'and maintaining bank accounts for the purpose of quietly paying off victims/complainants.'" Rita Ciolli, *Law Firm Moves Against Diocese: Files Suit Alleging Secret Settlement in Abuse Claims*, NEWSDAY, June 7, 2002, at A27, *available at* 2002 WL 2747383.

C. *Through a Pattern of Racketeering Activity*

Section 1961(5) defines "pattern of racketeering" to require "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[89] However, following the *Sedima* Court's implication that two isolated acts of racketeering activity alone do not constitute a pattern[90] and that there must be a "continuity plus relationship"[91] among the predicate acts, the meaning of a RICO "pattern" remains blurred.

The Supreme Court attempted to clarify the ambiguity by adopting and partially defining the "continuity plus relationship" approach in *H.J. Inc. v. Northwestern Bell Telephone Co.*[92] To define the "relationship" requirement, the Court looked to Title X of the OCCA, the Dangerous Special Offender Sentencing Act,[93] which contains a pattern requirement based solely on the relationship of a defendant's criminal acts to one another: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[94] The Court found no reason to suppose that Congress intended any other meaning for the relatedness of predicate acts under RICO.[95]

As for continuity, the Court adopted "both a closed and open-ended concept" of analysis.[96] Closed-ended continuity may be established with "proof of a series of related predicates extended over a substantial period of time,"[97] while open-ended continuity requires proof of "a threat of continued racketeering activity."[98] Most courts consider that the determination of what constitutes a "'substantial' duration" for the purposes of closed-ended continuity

89. 18 U.S.C. § 1961(5) (2000).
90. Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 496 n.14 (1985).
91. *Id.*
92. 492 U.S. 229 (1989).
93. 18 U.S.C. § 3575 (1970) (partially repealed 1986).
94. 18 U.S.C. § 3575(e) (1970).
95. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 240 (1985).
96. *Id.* at 241.
97. *Id.* at 242.
98. *Id.*

is a matter for case-by-case determination.[99] However, courts analyzing open-ended continuity usually look for a threat of repetition through the character of the predicate acts, a showing that the acts are part of an ongoing entity's way of doing business, and whether the predicate acts can be attributed to a defendant's "operating as part of a long-term association that exists for criminal purposes."[100]

Assuming that a court entertains their purported claims of racketeering activity, victims bringing a section 1962(b) claim against bishops, archbishops, and other Church authorities would also have little difficulty showing the presence of a pattern. Whether they allege at least two acts constituting obstruction of justice, bribery, mail fraud, or wire fraud, the predicate acts would likely be "related" in purpose and method of commission. Plaintiffs could also fulfill the "continuity" requirement by showing a period of repeated action along with the threat of repetition through the character of the individual crimes, the size of the bank accounts kept for bribery purposes, and evidence showing that the Church handled other sexual abuse scandals similarly.

D. *Racketeering Activity*

Section 1961(1) sets forth an all-inclusive list of conduct that can constitute predicate acts of racketeering under RICO,[101] thus,

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99. Walk v. Baltimore & Ohio R.R., 890 F.2d 688, 690 (4th Cir. 1989).

100. *H.J.*, 492 U.S. at 242-43.

101. According to 18 U.S.C. §1961(1), "racketeering activity" is defined as: (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the

reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B).

18 U.S.C. § 1961(1) (2000).

no non-enumerated act can constitute a predicate act of racketeering, regardless of its similarity to a specifically listed act.[102] In addition, there is no requirement that a defendant be convicted of any underlying predicate act before a civil RICO claim may be brought against him.[103]

Plaintiffs bringing claims under section 1962(b) against bishops and/or archbishops alleging acquisition or maintenance of an enterprise through a pattern of racketeering activity may have a more difficult time proving racketeering activity recognized by RICO. Their claims would likely allege, as racketeering activities, violations of section 1503 relating to obstruction of justice,[104] section 201 relating to bribery,[105] and sections 1341 and 1343 relating to mail and wire fraud, respectively.[106]

Claims brought against bishops and dioceses based upon section 1503 will undoubtedly collide with First Amendment protections asserted by the defendants.[107] The Church will claim that such matters regarding the handling of predator priests, including failure to report abuse to the authorities, falls within the ambit of the internal discretionary functioning of the Church, dictated by Canon law and long-recognized as protected from the intrusion of the State.[108] Claims brought against the bishops and dioceses

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102. JOSEPH, *supra* note 21, at 80.

103. Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 493 (1985) ("[W]e can find no support in [RICO's] history, its language, or considerations of policy for a requirement that a private treble-damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists.").

104. *See* Maureen Hayden, *National Suit Looks at Local Allegations*, EVANSVILLE COURIER, May 8, 2002, at A1, *available at* 2002 WL 13695598 (describing a lawsuit accusing all American bishops of being co-conspirators with the Vatican in a plan to obstruct justice by keeping secret priest files and bribing some victims to remain quiet); Ciolli, *supra* note 88 (describing a RICO suit brought against the Diocese of Rockville Centre due to the Church's protection of priests and maintenance of bank accounts for the purpose of paying off victims of sexual abuse).

105. *See* Ciolli, *supra* note 88.

106. *See Priests as Racketeers?*, *supra* note 15 (discussing a recent RICO claim filed against former Bishop Anthony O'Connell and the Dioceses of both Jefferson City, Missouri, and Knoxville, Tennessee and suggesting that plaintiffs in related cases can press a RICO claim by showing the existence of conspiracy through at least two telephone calls made in furtherance of the scheme).

107. *See* discussion *infra* Part VII.

108. *See* discussion *infra* Part VII; O'Reilly & Strasser, *supra* note 4, at 43-46 (discussing likely First Amendment challenges to intrusion into Church norms and practices in the context of tort principles of negligent hiring and supervision and negligent ecclesiastical hierarchy performance of duty).

based on section 201 would also meet challenges based on entanglement with Church norms and practices. If plaintiffs could show that they were offered money as an incentive to refrain from litigation against Church entities, their claims would be valid. However, the defendants might argue that maintenance of certain bank accounts and even the offerings of money to victims constitute protected Church practices.

Claims based on mail and wire fraud would require a complex analysis into the law of both racketeering acts. Generally, to state a violation under the mail or wire fraud statutes, it is necessary to show 1) a scheme to defraud, 2) participation by the defendant to defraud, 3) specific intent to defraud, and 4) the use of the United States wires or mails in furtherance of the scheme.[109] Plaintiffs would attempt to show that by using the phones or mail, the defendant bishop(s) and other Church authorities transferred known predator priests to different locations where they later abused the plaintiff-victims. Although plaintiffs may be able to show an appearance of a scheme to defraud parishioners, it is unlikely that they can show the requisite intent necessary to prove fraud. Courts have held that in order to allege a scheme to defraud, it is "essential that the evidence show the defendant entertained an intent to defraud."[110] In addition, acts done in good faith without any intent to defraud do not satisfy the mens rea necessary to state a valid claim based on either section 1341 or 1343.[111] Despite the fact that plaintiffs may show that they relied on their bishops and diocese to keep predator priests away from them, and that there is an inherent deception in the knowing transfer of predator priests to unsuspecting parishes, their section 1341 and section 1343 claims should fail due to the inability to prove that the Church authorities acted with the intent to defraud. While the Church authorities may have used the phones and mail to organize for the transfer and/or reassignment of priests, it would be difficult to prove that they did so with the knowledge and intent that the priests would abuse again. It would be equally difficult to prove

109. JOSEPH, *supra* note 21, at 83.

110. *See, e.g.*, Atlas Pile Driving Co. v. Dicon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989) (holding that "schemes using deceptive practices to induce the unwary to give up money or some other tangible property interest are within the scope" of fraud for RICO purposes).

111. *See* O'Malley v. New York Transit Auth., 896 F.2d 704 (2d Cir 1990).

that Church authorities acted in bad faith, especially considering that most predator priests are reassigned only after counseling following allegations of sexual abuse.[112] However, if plaintiffs could acquire enough evidence to show that Church authorities effectuated the transfer of repeat offenders with knowledge that they would likely strike again, courts might be willing to recognize an intent to defraud on the part of such parties. Thus, although it will be difficult to prove these racketeering activities under section 1962(b), courts may be willing to find the presence of fraud in some circumstances.

E. *Acquired or Maintained Any Interest in or Control Of*

Standing for section 1962(b) purposes requires an injury resulting from the defendant's acquisition or maintenance of an interest in, or control over, the pertinent enterprise.[113] Generally, under section 1962(b), a plaintiff must allege a "specific nexus between control of a named enterprise and the alleged racketeering activity."[114] Whereas determination of an "interest" in any enterprise is a "fairly straightforward, objective determination,"[115] "control" for section 1962(b) purposes is managerial in nature and requires a showing of participation of the defendant in the "operation or management of the enterprise itself."[116] Clearly, bishops, archbishops, and other high-level Church authorities maintain both an interest in, and often full control of individual dioceses and the Church institution itself. Because plaintiffs will allege that their injury resulted from the methods and tactics employed by defendants in the operation and management of their enterprises and that there was a nexus between their injuries and those actions, it is very likely that they could prove the necessary maintenance of an interest in or control of the RICO enterprise.

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112. *See* Eden Laikin & Steve Wick, *Chapter and Verse of the Accusations*, NEWSDAY, Feb. 11, 2003, at A23, *available at* 2003 WL 12020492.

113. JOSEPH, *supra* note 21, at 47.

114. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406 (3d Cir. 1991).

115. JOSEPH, *supra* note 21, at 47.

116. Rosemont Cogeneration Joint Venture v. N. States Power Co., Civ. No. 4-90-279, 1991 U.S. Dist. LEXIS 1504, at *22 (D. Minn. Jan. 18, 1991) (citing Bennett v. Berg, 710 F.2d 1361 (8th Cir. 1983)).

F. *An Enterprise Engaged in or Affecting Commerce*

The enterprise requirement is integral to all RICO claims. Section 1961(4) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[117] Prior to the Supreme Court's ruling in *United States v. Turkette*,[118] there was much debate over whether RICO intended to include within the definition of "enterprise" only those organizations that are exclusively criminal.[119] The Court found no restriction "embraced by the definition: an enterprise includes any union or group of individuals associated in fact," including both illegitimate and legitimate enterprises.[120] In addition, the Court has added that the enterprise need not be motivated by an economic purpose.[121]

In their section 1962(b) claims, victims of clergy-related sexual abuse would have to prove that the Church, as the employer of predator priests and as an "enterprise" in itself, is an "enterprise affecting interstate or foreign commerce" cognizable under RICO.[122] Based on the statutory definition and precedent, these plaintiffs would have little difficulty doing so. First, the Church is a legal entity, centered in Vatican City and established throughout the world. In many respects, it functions similarly to a large business or corporation, responsible for its own existence and dependant on the financial support of millions of Catholics worldwide.[123] The Church is also made up of an unambiguous hierarchal structure, similar to most large business entities.[124] In addition, the Church owns property throughout the world, has

117. 18 U.S.C. § 1961(4) (2000).

118. 452 U.S. 576 (1981).

119. *Id.* at 578.

120. *Id.* at 580.

121. Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 252 (1994).

122. 18 U.S.C. § 1962(b) (2000).

123. Following its most recent census in 1998, the Vatican's Central Statistics Office estimates that there are more than one billion Catholics worldwide. *Vatican Says More than One Billion Catholics Worldwide*, CATHOLIC WORLD NEWS, May 8, 2002, *available at* http://www.cwnews.com/Browse/1998/05/7581.htm.

124. Arguably, it is this hierarchal structure that leads to "secretness, subterfuge, and arrogance" in the context of clergy sexual abuse. George Bryjak, *The Power Struggle Within the Catholic Church*, SAN DIEGO UNION-TRIB., Nov. 29, 2002, at B9, *available at* 2002 WL 100358246.

thousands of employees, owns billions in assets,[125] and clearly holds itself out as a corporation whose goal and purpose is not profit, but religion. Because the Church affects both interstate and foreign commerce, and because a RICO enterprise need not have an economic purpose or motivation following *Scheidler*,[126] the Church would clearly satisfy the enterprise requirement under RICO.

G. *Injury to Business or Property*

Although *Sedima* altered the understanding of RICO injury to no longer require a "racketeering injury" independent of the harm caused by the predicate acts,[127] victims of clergy sexual abuse will face a tremendously difficult challenge to prove the type of injury compensable under the Act. Clearly, section 1964(c) of the civil RICO statute itself, provides that "[a] person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore."[128] In *Grogan v. Platt*,[129] the Eleventh Circuit interpreted the words "business and property" as words of limitation, strongly holding that had Congress intended for victims to recover for *all* types of injuries suffered, it would have purposefully omitted the terms "business and property" from the statute.[130]

To state a valid cause of action under RICO, plaintiff must show a proprietary type of damage.[131] Courts have not recognized physical injury or emotional suffering as legitimate injuries to business or property covered under the statute.[132] Although the *Grogan* court gave merit to the argument that persons who are killed or injured by RICO predicate acts may often suffer attenuated economic and proprietary harm, the court expressly rejected the contention: "We can do no more than interpret the statute according to

125. See Frank Gibney, Jr., *Can a Church Go Broke?*, TIME, June 3, 2002, at 50, for a discussion of the Catholic Church's annual income, assets, and finances.

126. *See* discussion *supra* Part II.A-B.

127. Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 497 (1985).

128. 18 U.S.C. § 1964(c) (2000).

129. 835 F.2d 844 (11th Cir. 1988).

130. *Id.* at 846 (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979)).

131. *Id.* at 847.

132. *See id.*; Berg v. First Interstate Ins. Co., 915 F.2d 460 (9th Cir. 1990); Rylewicz v. Beaton Servs., Ltd., 888 F.2d 1175 (7th Cir. 1989); Fleischhauer v. Feltner, 879 F.2d 1290 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990); Drake v. B.F. Goodrich Co., 82 F.2d 638 (6th Cir. 1986).

its plain language and as we believe Congress intended the language to be understood, and we do not understand Congress to have authorized recovery for [personal] injuries."[133] Additionally, the economic aspects of personal injuries, such as loss of earnings due to physical injury or pecuniary loss due to emotional distress, are not the types of injury recognized by RICO.[134]

Since most victims of clergy sexual abuse will only be able to allege mental and emotional injuries, it is unlikely that they will be able to establish standing under RICO. In addition, court precedent as in *Grogan* seems to proscribe elaborate theories of injury to business or property resulting either directly or indirectly from those personal injuries.[135] Thus, even though section 1961(1) explicitly lists as racketeering offenses sections 2251, 2251A, 2252, and 2260 of Title 18, all of which relate to the sexual exploitation of children,[136] RICO is explicitly drafted to compensate those injured in their business or property by commission of those specific acts, rather than those injured only physically and emotionally.

Lawyers for victims of sexual abuse may attempt to create rather elaborate theories in order to satisfy the injury requirement under RICO. However, if the core of the complaint is the physical or emotional injury sustained due to the commission of predicate acts, their suits will likely face dismissal. On the other hand, if plaintiffs can artfully allege an injury to business or property sustained as a result of the actions of the Church hierarchy or in connection with alleged pay-offs or bribery attempts in the context of clergy sexual abuse, courts might accept their RICO claims. However, precedent, along with the need to curtail RICO's liberal interpretation, may influence courts to deny the validity of such injuries as emanating from what are, for all intents and purposes, purely physical or emotional injuries.

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133. *Grogan*, 835 F.2d at 848. The court elaborated on its holding: "For example, a person physically injured in a fire whose origin was arson is not given a right to recover for his personal injuries; damage to his business or his building is the type of injury for which § 1964(c) permits suit." *Id.*

134. JOSEPH, *supra* note 21, at 30.

135. The court left open the question of whether the economic aspects of damages resulting directly from personal injuries could, as a theoretical matter, be considered an injury to business or property, and the Supreme Court has yet to accept a case dealing with this issue. *See* Fleischhauer v. Feltner, 879 F.2d 1290 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990).

136. 18 U.S.C. § 1961(1) (2000).

H. *By Reason of the Defendant's Acquisition or Maintenance of the Interest in, or Control of, the Enterprise*

Section 1964(c) imposes a proximate cause requirement on plaintiffs attempting to bring a claim under the statute. In short, the proximate cause requirement under section 1964(c) holds that the criminal conduct alleged as a violation of section 1962 must either directly or indirectly injure plaintiff's business or property.[137] If the RICO violation is a substantial factor causing the plaintiff's injury, provided that the injury is reasonably foreseeable as a natural consequence of the acts, proximate cause will be satisfied.[138] Because a proximate cause analysis requires a factual inquiry, courts usually consider several factors: whether plaintiff's injury was a direct or derivative result of the alleged RICO violation; whether the plaintiff was the intended target of the act; whether independent causes have intervened between the injury and the violation; and whether there is a risk of multiple recoveries.[139]

A proximate cause analysis would be necessary only if courts were to find the injuries alleged by victims of sexual abuse to be recognized injuries to business or property under RICO. However, plaintiffs attempting to prove that Church authorities proximately caused their injuries by transferring or failing to supervise predator priests might face a difficult task establishing an adequate nexus between those activities and plaintiff's subsequent injury. While the defendants would argue that the independent criminal acts of the priests would break any chain of causation, victims would argue that Church authorities breached their legal duty to prevent the risk of future abuse. Additionally, the risk of multiple recoveries vis-à-vis negligence-based causes of action might affect a court's reasoning. Again, a causation analysis would only be necessary if the injury alleged in plaintiff's complaint is first found to be sufficient. Because it is unlikely that the type of personal injury alleged by victims of sexual abuse will constitute injury to business or property for RICO purposes, it would be unnecessary for the court to examine whether such injury was proximately caused by defendants' actions.

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137. Haraco, Inc. v. Am. Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd per curiam*, 473 U.S. 606 (1985).

138. JOSEPH, *supra* note 21, at 36.

139. *Id.* at 37.

IV. Applicability of 1962(c) to Sexually Abusive Priests and Upper-Level Church Officials

To state a valid claim under section 1962(c), plaintiff must allege and prove that:

A) a person,
B) employed by or associated with an
C) enterprise that is engaged in or affects interstate or foreign commerce,
D) conducted or participated in the conduct of the enterprise's affairs
E) through a pattern of
F) racketeering activity or collection of an unlawful debt
G) while acting with the necessary mens rea resulting in,
H) injury to plaintiff's business or property.[140]

A. *Person*

For section 1962(c) purposes, the "person" who commits the criminal wrongdoing must be distinct from the "enterprise" whose affairs that person is "conduct[ing] or participat[ing] in conducting."[141] Generally, this distinction applies because section 1962(c) pertains only to persons associated with or employed by an enterprise.[142] Because only the "person" is liable under section 1962(c), this approach is logical and favored in most circuits.[143] Victims of clergy-related sexual abuse could easily prove that both upper-level Church officials and individual predator priests constitute "persons" for their respective section 1962(c) claims. Depending on how each plaintiff were to formalize his or her pleadings, plaintiffs would have little difficulty proving that bishops and archbishops, as employees, are distinct from their diocese or the Catholic Church itself, while individual priests, also employees, are distinct from their respective parishes.

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140. *Id.*
141. *Id.* at 50.
142. *Id.*
143. *See, e.g.*, Arzuaga-Collazo v. Oriental Fed. Sav. Bank, 913 F.2d 5 (1st Cir. 1990); Old Time Enters., Inc. v. Int'l Coffee Corp., 862 F.2d 1213 (5th Cir. 1989); Haraco, Inc. v. Am. Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984) *aff'd per curiam*, 473 U.S. 606 (1985). *But see* Cox v. United States Steel Carnegie Pension Fund, 17 F.3d 1386 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995).

B. *Employed by or Associated With*

Although determination of the "associated with" requirement of section 1962(c) is often a difficult question of fact in light of the totality of the circumstances of each case, "the 'employed by' side of the equation is relatively straightforward."[144] Because both high-level Church authorities and individual priests are each employees of their respective parishes, dioceses and the Church institution in general, they are "employed by or associated with" for section 1962(c) purposes.

C. *An Enterprise Engaged in or Affecting Interstate or Foreign Commerce*

As discussed above, individual parishes, dioceses, and the Church each constitute an "enterprise engaged in or affecting interstate or foreign commerce" for RICO purposes.[145] Each functions as a business entity and has employees, assets, property, and its own independent structure and support base.[146] Again, because a RICO enterprise need not have an economic motivation or purpose following *Schiedler*, plaintiffs would have little difficulty proving the existence of an enterprise for their respective section 1962(c) claims against Church officials and predator priests.

D. *Conducted or Participated in Conduct of the Enterprise's Affairs*

The Supreme Court has interpreted "conduct or participate" to require involvement of the defendant in the operation or management of the enterprise.[147] Specifically, the Court held that, "in order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs."[148] Additionally, *Reves v. Ernst & Young*[149] established

144. JOSEPH, *supra* note 21, at 55.

145. 18 U.S.C. § 1962(c) (2000); *see* discussion *supra* Part III.F.

146. The independent business nature of individual dioceses is reflected by the need for dioceses in Santa Rosa, California; Dallas, Texas; Santa Fe, New Mexico; and Tucson, Arizona, to each sell or mortgage property, borrow money from other dioceses, or borrow from parish savings accounts to pay multimillion-dollar settlements in clergy sexual misconduct cases. *Costs Have Church Reeling*, *supra* note 3.

147. Reves v. Ernst & Young, 507 U.S. 170, 179 (1993).

148. *Id.*

149. 507 U.S. 170 (1993).

that liability under section 1962(c) is not solely limited to upper management of an enterprise, but also extends to lower-level participants under the direction of upper management.[150] Since *Reves*, courts have held that lower-level figures within an enterprise "operate or manage" if they exercise broad discretion or knowingly implement criminal decisions.[151]

Bishops, archbishops, and other high-level Church authorities would most likely qualify as "operating or managing" their respective dioceses, and perhaps the Church itself, for section 1962(c) purposes. Clearly, bishops and archbishops are the principle controlling powers within their respective dioceses. On the other hand, allegations that such individuals operate or manage the affairs of the Catholic Church itself may fail due to the size of the enterprise, the number of similarly situated employees, and the existence of the Pope and governing body of the Church. Accordingly, courts would be hard-pressed to draw a line with respect to whether such Church officials are lower or higher-rung employees for RICO purposes.

Analysis of whether individual priests "operate or manage" their respective enterprises would also be contingent on the claims made by each plaintiff. Allegations that a priest conducted or participated in the conduct of his respective parish would more likely fall under section 1962(c), while allegations that each priest was conducting the affairs of the diocese or Church itself would require an analysis as set forth in *United States v. Diaz*[152] and *United States v. Posada-Rios*,[153] which focuses on the exercise of broad discretion or knowing implementation of criminal decisions. Because the sexually abusive conduct of priests constitute independent and intentional criminal acts, it is unlikely that such actions could be interpreted as implementations of criminal decisions made by the diocese or Church administration.

E. *Through a Pattern of Racketeering Activity*

Based on the above analysis of the "pattern" requirement,[154] victims of clergy-related sexual abuse should have little difficulty

150. *Id.*
151. *See, e.g.*, United States v. Diaz, 176 F.3d 52 (2d Cir. 1999).
152. *Id.*
153. 158 F.3d 832 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1792 (1999).
154. *See* discussion *supra* Part III.C.

proving a "pattern of racketeering activity" in their section 1962(c) claims against individual priests. Instances of at least two acts of sexual abuse by a priest would clearly be "related" under RICO due to similar purposes, results, participants, victims, and methods of commission. Plaintiffs would also fulfill the "continuity" requirement by showing both a closed-ended period of sexual abuse occurring during a certain time period and an open-ended continual threat of repetition and recidivism.[155]

Similarly, plaintiffs would have little difficulty proving a pattern in their section 1962(c) claims against bishops, archbishops, and high-level Church authorities. As stated above in reference to section 1962(b) claims, whether plaintiffs were to allege two acts of obstruction of justice, mail or wire fraud, or bribery, the predicate acts would likely be considered as "related" in both purpose and method of commission.[156] In addition, a showing of a closed period of repeated action, threat of repetition evidenced by the character of the crimes, and the similar handling of sex scandals would establish "continuity" for RICO pattern purposes.

F. *Racketeering Activity*

Claims brought under section 1962(c) naming individual priests as defendants would undoubtedly allege the specifically enumerated racketeering activity contained in 18 U.S.C. §§ 2251, 2251A, 2252, and 2260, "relating to the sexual exploitation of children."[157] Because the sexual exploitation of children is the central element of the claims against predator priests, plaintiffs would easily establish a racketeering act under RICO. Considering that such conduct is specifically listed as a predicate act in section 1961(1), the sexual misconduct of predator priests would certainly be considered racketeering activity.

However, plaintiffs would face an arduous task in proving "racketeering activity" for section 1962(c) claims against bishops,

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155. Recidivism is defined as "a tendency to relapse into a previous condition or mode of behavior." WEBSTER'S THIRD NEW INT'L DICTIONARY 1895 (1986). For an explanation of the analyses, hypotheses, issues, and statistics of recidivism in the context of child sexual abuse, see *Recidivism in Sex Offenders*, May 2001, *at* Center for the Sex Offender Management website, http://www.csom.org/pubs/recidsexof.html.

156. *See* discussion *supra* Part III.C.

157. 18 U.S.C. § 1961(1) (2000).

archbishops, and high-level Church authorities.[158] Just as with section 1962(b) claims, if plaintiffs are able to prove the defendant's commission of racketeering acts of bribery, mail or wire fraud, and obstruction of justice, they would satisfy the requirement of "racketeering activity" needed for section 1962(c) claims.[159]

G. *While Acting with the Necessary Mens Rea*

As stated above, in order to prove liability under RICO, plaintiffs must prove that a defendant possessed the "specific intent associated with the various underlying predicate offenses,"[160] while a minority of circuits require proof of the "specific intent to participate in the overall RICO enterprise."[161] In their section 1962(c) claims against individual priests, victims of sexual abuse would specifically allege that the defendant possessed the mens rea to commit the racketeering activity of sexual exploitation of a minor and would likely encounter insanity and other defenses associated with pedophilia. Determination of the mens rea of the priests would require close examination of circumstances surrounding the actual misconduct, including an inquiry into the priest's ability to form the requisite intent to commit criminal acts in the context of his pedophilia or similar mental deficiency.

Likewise, section 1962(c) claims against bishops, archbishops, and other high-level Church authorities would require proof of mens rea for each alleged racketeering act. As discussed above in reference to section 1962(b),[162] plaintiffs could prove intent to commit predicate acts through failure of the defendants to report allegations of sexual abuse to authorities, through representations made by defendants to victims to effectuate silence and keep complaints out of court, and by evidence that such individuals, like former Cardinal Law of Boston, knew that transferred pedophile priests were certain to abuse again and put children in harm's way by allowing such priests to remain in parish work.[163]

158. *See* discussion *supra* Part III.D.

159. *See* discussion *supra* Part III.D (regarding a more in-depth discussion of the "racketeering activity" requirement in section 1962(b)).

160. JOSEPH, *supra* note 21, at 121; *see* discussion *supra* Part III.B.

161. *See* Zolfaghari v. Sheikholeslami, 943 F.2d 451 (4th Cir. 1991).

162. *See* discussion *supra* Part III.B.

163. *Church Moves to Dismiss Abuse Suits*, PROVIDENCE J., Jan. 18, 2003, at A2, *available at* 2003 WL 7051536.

H. *Resulting in Injury to Plaintiff's Business or Property*

The analysis of the "injury to business or property" requirement would be the same for all section 1962 claims. Therefore, as discussed above,[164] it is unlikely that plaintiffs will be able to adequately prove injury to business or property in their section 1962(c) claims against both individual priests and Church authorities. Because no court has recognized that RICO authorizes recovery for personal injuries or the economic damages or emotional distress resulting therefrom, claims stemming from physical abuse do not fall within the intended scope of RICO, in accordance with the express wording of section 1964(c).

V. STATUTE OF LIMITATIONS

RICO was significantly modeled after the Clayton Act,[165] which contains a four-year statute of limitations.[166] Accordingly, the Supreme Court has found that civil RICO actions also carry a four-year statute of limitations, considering the similarities of purpose and structure of the two acts.[167] Following the Court's recent ruling in *Rotella v. Wood,*[168] this four-year statute of limitations begins to run at the time of the discovery of the injury caused by the predicate act.[169] This "injury discovery rule" sets forth that "each time a plaintiff suffers an injury caused by a violation of 18 U.S.C. § 1962, a cause of action to recover damages based on that injury accrues . . . at the time [plaintiff] discovered or should have discovered the injury."[170] The *Rotella* Court held that both the "injury and pattern discovery rule"[171] and "last predicate act rule"[172]

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164. *See* discussion *supra* Part III.G.

165. 15 U.S.C. § 15 (2000).

166. JOSEPH, *supra* note 21, at 174.

167. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987).

168. 528 U.S. 549 (2000).

169. *Id.* at 555.

170. Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102 (2d Cir. 1988).

171. Under the "injury and pattern discovery" rule, "a civil RICO claim accrues only when the claimant discovers, or should discover, both an injury and a pattern of RICO activity." *Rotella,* 528 U.S. at 553.

172. Under the "last predicate act" rule, the "statute begins to run when the plaintiff knows or reasonably should know of the last injury or last predicate act in the pattern, whether or not the plaintiff himself has suffered any injury from the last act." Klehr v. A.O. Smith Corp., 521 U.S. 179, 180 (1984).

were not ideal for RICO's purposes on a number of different grounds.[173]

If a court was to entertain civil RICO suits brought by victims of clergy sexual abuse, their claims would face strong statute of limitations defenses. Because most instances of clergy sexual abuse occur during the youth of victims, an automatic four-year statute of limitations accruing from the date of the sexual exploitation would bar a large percentage of claims made by those victims later in adulthood. In response, courts have begun to recognize "repressed memory syndrome" or "dissociative amnesia" for statute of limitations purposes.[174]

Child victims of sexual abuse are often psychologically unable to cope with abuse and as a result develop coping strategies to avoid both reminders and memories of traumatic events.[175] As a consequence, childhood victims of sexual abuse commonly experience amnesia or memory loss following such high levels of stress and trauma, burying all memory of the abuse[176] through a complex mental process known as "repressed memory syndrome" (RMS) or "dissociative amnesia."[177]

Because victims of childhood sexual abuse experience an abundance of emotional and psychological problems in their lives, they often turn to psychotherapy, where various techniques are employed to recover such repressed memories.[178] In the course of

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173. *Rotella*, 528 U.S. at 555-60.

174. *See, e.g.*, Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988); Doe v. LaBrosse, 588 A.2d 605 (R.I. 1991); Evans v. Eckelman, 216 Cal. App. 3d 1609 (Cal. App. 1. Dist. 1990).

175. Laura Johnson, *Litigating Nightmares: Repressed Memories of Childhood Sexual Abuse*, 51 S.C. L. REV. 939, 944 (2000) (citing Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 135-36 (1993)).

176. *Id.* at 942-45.

177. The American Psychiatric Association has officially recognized Repressed Memory Syndrome referring to it by its medical term, "dissociative amnesia" stating:

> The essential feature of Dissociative Amnesia is an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness . . . . This disorder involves a reversible memory impairment in which memories of personal experience cannot be retrieved in a verbal form (or, if temporarily retrieved, cannot be wholly retained in consciousness).

Id. at 943.

178. *Id.* at 945-46.

therapy, victims often recover memories of their abuse, but usually long after the expiration of applicable statutes of limitation.[179] However, based on the strong scientific evidence in support of the theory, several states have recognized RMS as a valid method of injury discovery for statute of limitations purposes,[180] and to date, at least twenty-one states toll the statute of limitations in civil cases when a victim of child sexual abuse has repressed all memory of the incident.[181] In addition, the United States Court of Appeals for the Ninth Circuit has held Washington's statutory discovery rule applicable to claims based on the sexual abuse of children not only in "cases involving repressed memories, but also in cases involving delayed discovery of the causal connection between the remembered assault and the injury."[182]

If a court were to entertain section 1962(b) and (c) claims against priests and Church officials, the victims of preterit sexual abuse could avoid a statute of limitations bar by asserting RMS. Because the Court gave its approval to the "injury discovery rule" in *Rotella,* courts would likely be willing to accept the doctrine in

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179. *See id.* at 939-40.

180. *See id.* at 952, n.117 (calling attention to the states that have enacted laws based on Repressed Memory Syndrome):

> ALASKA STAT. § 9.10.140 (Michie 1999); ARK. CODE ANN. § 16-56-130 (Michie Supp. 1999); CAL. CIV. PROC. CODE § 340.1 (West Supp. 1999); COLO. REV. STAT. ANN. § 13-80-103.7 (West 1999); FLA. STAT. ANN. § 95.11(7) (West Supp. 1999); ILL. COMP. STAT. ANN. 110/13-202.2 (West Supp. 1999); IOWA CODE ANN. § 614.8A (West 1999); KAN. STAT. ANN. § 60-523 (Supp. 1999); MASS. GEN. LAWS ANN. ch. 260, § 4C (West Supp. 1999); ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1999); MINN. STAT. ANN. § 541.073 (West Supp. 1999); MO. ANN. STAT. § 537.046 (West Supp. 1999); MONT. CODE ANN. § 27-2-216 (1999); NEV. REV. STAT. ANN. § 11.215 (Michie 1998); N.H. REV. STAT. ANN. § 508:4 (Supp. 1992); N.J. STAT. ANN. § 24:61 B-1 (West Supp. 1999); N.M. STAT. ANN. § 37-1-30 (Michie Supp. 1999); OKLA. STAT. ANN. tit. 12, § 95(6) (West Supp. 2000); OR. REV. STAT. § 12.117 (Supp. 1999); R.I. GEN. LAWS § 9-1-51 (1997); S.D. CODIFIED LAWS § 26-10-25 (Michie 1999); UTAH CODE ANN. § 78-12-25.1 (Supp. 1999); VT. STAT. ANN. tit. 12 § 522 (Supp. 1999); VA. CODE ANN. § 8.01-249(6) (Michie Supp. 1999); WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1999); WIS. STAT. ANN. § 893.587 (West 1997); WYO. STAT. ANN. § 1-3-105 (Michie 1999).

181. Mick Frasca, *Tolling the Statute of Limitations in Childhood Sexual Abuse Civil Cases,* 11 J. CONTEMP. LEGAL ISSUES 45, 50 (2000).

182. Arnold v. Amtrak, 13 Fed. Appx. 573, 576, *available at* 2001 WL 725123, at *2 (9th Cir. June 27, 2001) (concluding that the appropriate focus of the statute's discovery rule is to determine when the victim becomes aware of the nexus between the injury he claims and the sexual assault, not necessarily the simple remembrance of the injury).

relation to RICO if supported by sufficient evidence and expert testimony on a case by case basis.[183] Assuming the existence of a valid substantive RICO claim on the merits, courts might be willing to accept the Ninth Circuit's position, which interpreted the tolling of Washington's statute of limitations as not when the victim first remembered the sexual abuse, but at the later date when the victim understood the nexus between his emotional problems and the abuse.[184]

VI. VICARIOUS LIABILITY

Imputation to the individual dioceses or the Catholic Church of the RICO liability of priests, bishops, and archbishops would serve as another viable option for victims of sexual abuse. Because of the Church's formidable assets and wealth, plaintiffs may desire to apply respondeat superior claims against the Church for the acts of its employees, effectively reaching the "deep pocket" of the wealthy entity.

Respondeat superior claims against the diocese and Church cannot be attached to section 1962(c) claims against individual priests. Courts have found that imposition of vicarious liability for such claims would "improperly evade [section 1962(c)'s] statutory requirement that the person and the enterprise be distinct."[185] In *Landry v. Air Line Pilots Ass'n*,[186] the Fifth Circuit found that it would be "incongruous" to hold an enterprise vicariously liable for the acts of its employee or agent under section 1962(c), adding that "if this were the rule, all legal enterprises could be found liable under RICO if their employees or agents were involved in perpetrating predicate acts through or against them . . . [t]his is contrary to the rule Congress meant to impose . . . ."[187] Thus, vicarious liability may be applied under section 1962(c) only where the organization is distinct from the enterprise and its imposition would not operate as an "impermissible end-run around the mandatory distinction between person and enterprise."[188] Because section 1962(c) claims would assert that priests have committed predicate

183. *See* Johnson, *supra* note 175, at 961-63.
184. *Arnold*, 13 Fed. Appx. at 576.
185. JOSEPH, *supra* note 21, at 130.
186. 901 F.2d 404 (5th Cir. 1990), *cert. denied*, 498 U.S. 895 (1990).
187. *Id.* at 425.
188. JOSEPH, *supra* note 21, at 130.

acts as employees or agents of the Church, acceptance of vicarious liability with such claims would effectively ignore the distinctiveness requirement of section 1962(c).

Vicarious liability may be available to victims of clergy sexual abuse in section 1962(b) claims against bishops and archbishops. Unlike section 1962(c) claims, all circuits impose vicarious liability on section 1962(b) claims because the statute itself does not distinguish between the "person" and "enterprise."[189] In *Liquid Air Corp. v. Rogers,*[190] the Seventh Circuit held that vicarious liability was not barred for section 1962(b) claims, flatly disagreeing with the district court's finding that section 1962(b) claims require that the "person" and "enterprise" be distinct as required for section 1962(c) claims.[191] The court found that because the defendant corporation had benefited from the criminal conduct, the corporation was properly held liable under vicarious liability.[192]

To determine vicarious liability under sections 1962(a) and (b), courts have articulated a variety of standards.[193] "Some courts distinguish between upper-level and lower-level employees, requiring express or implicit authorization of senior management for misconduct committed by subordinates."[194] Other courts distinguish between corporations that are passive tools of the criminal actor and those that actively participate in it, finding vicarious liability in the latter case.[195] Another approach focuses on whether the organization benefited from the RICO violation as the "critical criterion in assessing the propriety of imputing liability."[196] Generally, each approach to analyzing vicarious liability looks principally at the level of the agent or employee whose conduct is at issue and "whether that person was acting within the scope of his or her authority when committing the violations."[197] However, under both section 1962(a) and (b), vicarious liability is regularly im-

189. *Id.* at 131.

190. 834 F.2d 1297 (7th Cir. 1987), *overruling* Bruss Co. v. Allnet Communications Servs., Inc., 606 F. Supp. 401 (N.D. Ill. 1985).

191. *Id.* at 1307.

192. *Id.*

193. *Id.*

194. R.E. Davis Chem. Corp. v. Nalco Chem. Co., 757 F. Supp. 1499 (N.D. Ill. 1990).

195. *See, e.g.*, Collective Fed. Savings Bank v. Creel, 746 F. Supp. 1307 (M.D. La. 1990).

196. *Liquid Air Corp.*, 834 F.2d at 1307.

197. JOSEPH, *supra* note 21, at 133.

posed – in all circuits – because those subsections do not distinguish between the "person" liable and the "enterprise" used.[198] Thus, vicarious liability is available for section 1962(b) violations.

Theoretically, victims of clergy sexual abuse can hold both dioceses and the Church vicariously liable for the RICO violations of bishops and archbishops if they can prove some express or implicit acquiescence in their conduct by the upper levels of the Church's hierarchy. Thus, depending on the forum, plaintiffs may be required either to show that the Church benefited from the misconduct of the bishops and archbishops or that the bishops and archbishops actively participated in the criminal conduct to warrant imposition of vicarious liability to the Church. Because most victims allege a complicated conspiracy of silence throughout the Church hierarchy and, as in one case, among *all* American dioceses,[199] vicarious liability is a very attractive legal tool. Utilization of vicarious liability to reach individual dioceses and the Church itself would hold those responsible for the furtherance of the alleged conspiracy accountable, consistent with the underlying policy of RICO "to cleanse the market of corrupt businesses and enterprises, not innocent ones."[200] Considering that many clergy sexual abuse claims allege that Church authorities were aware of reports of sexual abuse, quietly paid settlements, and made transfer decisions, vicarious liability for their actions within the scope of their employment seems both fair and just.

Assuming their section 1962(b) claims are valid, victims may still have a difficult time acquiring the evidence to prove acquiescence, involvement, or benefit from the alleged misconduct in order to prove vicarious liability against dioceses and the Church. Furthermore, attempts by courts to examine the inner-workings and dealings of the Church to help assess liability may unconstitutionally interfere with the internal affairs of the Church and would certainly meet strong opposition on such grounds.[201]

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198. *Id.* at 131.

199. *See* Robert Jablon, *Four Accuse L.A. Cardinal of Covering Up Sex Abuses: Two Suits Under Federal Racketeering Law Allege Robert Mahoney Protected Pedophile Priests*, CONTRA COSTA TIMES, Apr. 30, 2002, at 1, *available at* 2002 WL 17139516.

200. JOSEPH, *supra* note 21, at 134.

201. *See* discussion *infra* Part VII.

VII. THE CONSTITUTIONALITY DEFENSE

Section 1962(b) claims against Church hierarchy would likely face First Amendment challenges of excessive entanglement with religious affairs. The basis of such objections would be that determination of the liability of Church authorities under RICO inevitably requires examination of the ecclesiastical actions of the Church itself, and would, as elucidated by the Supreme Court in *Serbian Eastern Orthodox Diocese v. Milivojevich*,[202] "undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of the church tribunals as it finds them."[203] Arguably, the decisions of the bishops, archbishops, and other high-ranking members of the Church with regard to the handling of predator priests would fall within the internal discipline of the Church, which is governed by Canon law.[204] Because the Church contains its own prohibitions, penalties, sanctions, and methods[205] for dealing with various violations and criminal actions by priests, inquiry into the failure of Church authorities to handle predator priests in more socially prudent manners often clashes with the Canon's mandates.[206] The Canon's governance of internal discipline methods and practices would make such inquiries a judicial tightrope.[207]

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202. 426 U.S. 696 (1976).

203. *Id.* at 713.

204. O'Reilly & Strasser, *supra* note 4, at 46.

205. *See* JOHN P. BEAL ET AL., NEW COMMENTARY ON THE CODE OF CANON LAW, 1525-1604 (2000) (providing commentary on Book VI of the Canon, which outlines the sanctions in the Church, 1983 CODE cc.1311-1399).

206. *See id.* at 1543; *see* 1983 CODE c.1324 (providing that "the perpetrator of a violation is not exempt from penalty, but the penalty established by the law or precept must be tempered or a penance employed in its place . . . [g]enerally, the Church's penal order has three main purposes: repairing scandal, restoring justice, and reforming the offender."); *see* BEAL ET AL., *supra* note 205, at 1558 (accordingly, Church authorities do not impose penalties too quickly, but should use all available non-penal legal-pastoral options before imposing penalties).

207. In *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66 (D. Conn. 1995), the United States District Court for the District of Connecticut refused to recognize the Church's First Amendment argument that inquiry into the negligent hiring and supervision of predator priests represented an impermissible entanglement with protected ecclesiastical concerns. *Id.* at 74-75. The court found that the First Amendment did not create a blanket tort immunity for religious institutions. *Id.* at 72-74. However, in *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780 (Wisc. 1995), the Supreme Court of Wisconsin refused to inquire into the hiring practices of the Church in a negligent hiring and retention case since such deter-

Although the First Amendment may protect from judicial scrutiny the transfer and reassignment decisions of high-ranking Church officials, those actors may not be able to mount a First Amendment defense to some of the other racketeering allegations made by RICO plaintiffs, including, but not necessarily limited to, mail fraud, wire fraud, and bribery of victims. Although the Church authorities might argue that *Serbian's* rule applies to *all* internal functioning of the Church, First Amendment protection does not extend to criminal actions, considering the fundamental tenet that "the First Amendment does not insulate a church or its members from judicial inquiry when a charge is made that their activities violate a penal statute."[208] Thus, inquiry into the criminal conduct of Church officials would be generally permissible, although subject to other potential difficulties. The pastoral privilege might work to shield the communications made by the sexually abusive priest to his bishop outside of the confessional, while the internal investigations of the Church in response to charges of sexual misconduct may also be protected under the work product exception, which privileges material acquired during preparation for anticipated litigation.[209] In addition, an issue of absolute treaty privilege could arise as a result of the "dual nature of the Papal Nuncio, the Vatican representative to the [United States'] bishops, who may have a role in the hierarchal process of Vatican dismissal of an errant priest."[210] Because the files held in the office of the Papal Nuncio are immune from civil discovery under "its treaty role as the Vatican's ambassador to the United States," a civil subpoena seeking a personnel record submitted by a

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mination would require interpretation of Church canons and internal Church policies and practices. *Id.* at 790. One court has found that the First Amendment does not preclude a negligent hiring claim where a diocese knew of a priest's problems of depression, low self-esteem, and his struggle with his sexual identity. *See* Moses v. Diocese of Colo., 863 P.2d 310, 320, 328 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994). Thus, determination of whether certain inquiries unconstitutionally infringe on the protected internal functioning of the Church is a very difficult task. *Id.* at 336.

208. United States v. Snowden, 770 F.2d 393, 398 (4th Cir. 1985).

209. The pastoral privilege doctrine shields admissions made by priests that generally are "confessional in nature or in the nature of 'religious counseling.'" O'Reilly & Strasser, *supra* note 4, at 62.

210. O'Reilly & Strasser, *supra* note 4, at 62.

bishop to the Papal Nuncio would be "opposed on grounds of diplomatic immunity."[211]

Because the section 1962(b) claims against high-level employees of the Church allege criminal predicate acts which are prohibited by numerous penal statutes, privilege and First Amendment defenses will fail. This is consistent with the long-recognized view that religion, though protected, "must be subordinate to the criminal laws of [our] country."[212] Thus, although Canon law governs the Church, and the First Amendment ensures against governmental entanglement with the internal affairs of the Church, neither will protect bishops, archbishops, and other Church officials from liability for criminal conduct. Although it may be difficult for victims to amass enough evidence to prove their claims, they must not be precluded from presenting their claims by a shield of invincibility masquerading as the First Amendment.

CONCLUSION

Although section 1964(c) of the Racketeering Influenced and Corrupt Organizations Act is an attractive theory of recovery for victims of sexual assault, it is unsuitable for several reasons. First, and most importantly, the injuries alleged by victims of clergy sexual abuse, against both the individual priests under section 1962(c) and the high-ranking Church authorities under section 1962(b), are not the types of injury to "business or property" intended to be covered by section 1964(c). No matter how craftily pleaded, the injuries to victims of sexual exploitation are, at their core, personal and emotional. Although, for all intents and purposes, the charges made against the Church allege a very organized and complicated scheme aimed at concealing wrongdoing within the Church, and such concealment resembles what one

211. *Id.* O'Reilly and Strasser add that such files would be absolutely privileged from ordinary subpoenas, but if the plaintiff names the Vatican as a party defendant in the lawsuit, and meets other requirements for inclusion of the Vatican as a tortfeasor, then discovery of the relevant files would be permitted under ordinary civil procedure rules. *Id.* at 63 n.244 ("Few plaintiffs will opt to sue the Vatican, however, because to do so requires waiver of any punitive damages as a prerequisite to jurisdiction, 28 U.S.C. § 1606 (1994); proof of agent relationship of the priest to the Vatican, because such an agency is required to gain jurisdiction; and proof that the conduct was within the agent's scope of employment, 28 U.S.C. § 1605(a)(5) (1994).").

212. Davis v. Beason, 133 U.S. 333, 342-43 (1890).

would liken to an "organized crime" entity, the failure to allege the type of injury cognizable would nullify a civil RICO suit in the context of clergy sexual abuse. However, given the previously unforeseen RICO decisions in *Sedima, McMonagle,* and *Scheidler*, an expanded view of the "injury to business or property" requirement may not be far off. As more and more RICO claims are brought against "non-mafia" and non-underworld defendants, the injury requirement specified in section 1964(c) might slowly erode through liberal interpretation of "business or property."

Second, alternative avenues of recovery are available to victims of clergy sexual abuse. Causes of action against individual priests for assault and clergy malpractice, along with claims against bishops and other Church authorities based on negligent hiring and supervision, respondeat superior, and agency law, have all been recognized in a number of states and jurisdictions.[213] More well-suited causes of action benefit both the plaintiffs, whose burden of proof might be less burdensome when compared to such a complex statute as RICO, and the courts, which will save time by avoiding baseless, ill-contrived, or unintended claims under the statute.

Third, application of RICO in clergy sexual abuse cases to priests and other Church authorities might represent a "point of no return" for the statute, permitting its use in any case where an injured party alleges wrongdoing by any corporation, partnership, organization, or other group of individuals. As stated above, RICO was enacted as part of Congress's war against organized, underworld crime families. Although the statute's broad language and construction has resulted in its application outside the sphere of organized crime, there is strong evidence in the legislative history of the statute that such application was not intended. The Senate Committee's Statement of Findings and Purpose for the Organized Crime Control Act focused exclusively on organized crime and the effect that it has on legitimate business, industry, and the national economy.[214] Moreover, in the congressional debates, Senator McClellan voiced the opinion that RICO was intended only for use against organized criminals: "[U]nless an individual not only com-

213. *See* O'Reilly & Strasser, *supra* note 4 (summarizing and examining the various theories of recovery utilized against both priests, high-ranking Church employees, and the Church institution itself).

214. 115 CONG. REC. S1861, 9568 (1969).

mits such an enumerated crime but engaged in a pattern of such violations, and uses the pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under [RICO]."[215] Another RICO supporter, Representative Richard A. Poff, asserted that RICO "does not violate the civil liberties of those who are not engaged in organized crime, but who nonetheless are within the incidental reach of provisions primarily intended to affect organized crime."[216]

On the other hand, application of RICO to its intended sphere of underworld crime is not as easily executed as it is suggested. Although the average American's concept of "organized crime" is unfailingly tied to the "Mafioso" image made famous by films like "The Godfather"[217] and "Goodfellas,"[218] true organized crime extends far beyond the prosciutto and provolone covered tables of "The Sopranos"[219] and the Italian, Russian, and Irish "mobs" commonly featured in weekly A&E cable specials.[220] Should RICO apply only to these entities and not to abortion protestors, legitimate corporations, and even religious organizations that are analogous to those "Mafiosi," and may systematically commit many of the same acts so intertwined with the popular concepts of the mafia such as bribery, fraud, embezzlement, robbery, and murder? In the face of this complex argument, it is necessary for Congress to intervene by amendment to carefully define and curtail RICO's application. But in what manner, and with what limitations this is to be done requires a complex inquiry: how should Congress, if it so desired, distinguish between different "types" of organized crime?

Although application of the civil cause of action created by 18 U.S.C. § 1964(c) is not yet valid in the context of clergy-related sexual abuse, RICO could theoretically be applied to priests, bishops, and the Church as defendants in the future. Unless RICO is legislatively amended or restricted, an artfully pleaded case based on clergy sexual abuse could, theoretically, be accepted by a court.

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215. 116 CONG. REC. S18,940 (1970) (statement of Sen. McClellan).

216. 116 CONG. REC. H35,344 (1970) (statement of Rep. Poff). See Parker, *supra* note 60, at 831-34, for a commentary on the arguments of the American Civil Liberties Union in response to the OCCA.

217. THE GODFATHER (Paramount Pictures 1972).

218. GOODFELLAS (Warner Bros. Pictures 1990).

219. *The Sopranos* (HBO Original Series 1999-2002).

220. *See, e.g., Mafia: The History of the Mob in America* (A & E Entertainment 1993); *Biography - John Gotti: A Mafia Story* (A & E Entertainment 1987).

Possible legislative changes could include a more specific definition of "pattern of racketeering activity," a requirement that a private civil RICO plaintiff "prove the alleged racketeer acted with a motive for the imposition of the prior criminal conviction requirement," and the imposition of harsher sanctions against lawyers who file frivolous civil RICO actions.[221] Although current case law suggests that victims of clergy sexual abuse will have a difficult time sustaining civil RICO claims, continual expansion of RICO's meaning could allow successful use in upcoming years. As more and more reports of the sexual abuse committed by priests and allegations of subsequent cover-ups implemented by high-level Church authorities are made public, courts may eventually accept the cause of action to hold those parties liable for their socially reprehensible acts. Despite this future possibility, application of civil RICO to clergy-related sexual abuse is at odds with the statute's own requirements, legislative history, and current case law. But for how long RICO remains the carefully tailored cause of action it was intended to be, rather than the discretionary option in a limitless number of cases that it is slowly becoming, remains uncertain.

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221. Melley, *supra* note 23, at 312.

Dedication

The Board of Editors of the Roger Williams University Law Review respectfully dedicates this issue to Justice John P. Bourcier and Senior Justice Victoria S. Lederberg, both of whom passed away during the latter part of 2002. The untimely and unexpected passing of these two outstanding justices of the Rhode Island Supreme Court shocked and saddened us all. The Board of Editors wishes to extend its deepest sympathies and heartfelt condolences to the families, friends, and colleagues of these truly remarkable citizens and members of the judiciary.

In honor of Justices Bourcier and Lederberg, this issue includes memorial dedications to the justices by their colleague and friend, Chief Justice Frank J. Williams of the Rhode Island Supreme Court.