

# SEARCHING FOR ADEQUATE ACCOUNTABILITY: SUPERVISORY PRIESTS AND THE CHURCH'S CHILD SEX ABUSE CRISIS

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## ABSTRACT

*In 2002, the Boston Globe published a report exposing child sex abuse by priests and a cover-up by supervisory priests. Supervisory priests—church officials who supervise lower-ranking priests—concealed reports of sexual abuse by lower-ranking priests and created substantial risks of sexual abuse to children. Prosecutors tried to hold supervisory priests accountable by turning to statutes that either did not capture the moral culpability of priests, like statutes prohibiting obstruction of justice or contributing to the delinquency of a minor; or that did not legally encompass their misconduct, like child-endangerment statutes. Child endangerment captures the moral culpability of supervisory priests' misconduct, but child-endangerment statutes based on the Model Penal Code (MPC) do not legally cover supervisory priests or their acts. Though supervisory priests chose to suppress reports of child sex abuse, prosecutors cannot constitutionally shoehorn misconduct into statutes—like child endangerment—that were never before interpreted to apply to individuals like supervisory priests. Instead of breaching the supervisory priests' constitutionally guaranteed notice that their conduct constituted child endangerment, prosecutors should encourage state legislatures to: 1) extend statutes of limitations for crimes against minors and include clergy as mandatory reporters; 2) amend child-endangerment statutes to include supervisory priests and those similarly situated; and 3) criminalize the reckless creation of a substantial risk of child sex abuse, and the reckless failure to alleviate that risk when there is a duty to do so. Absent legislative action, prosecutors should use statutes that represent a lesser degree of moral culpability, such as contributing to the delinquency of a minor*

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*or mandatory-reporter statutes. Enacting statutes that both legally encompass and adequately reflect the blameworthiness of supervisory priests will hopefully deter similar misconduct and protect children from sex abuse in institutional settings.*

## INTRODUCTION

On September 27, 2015, in Philadelphia, Pennsylvania, Pope Francis told victims of child sexual abuse by Catholic priests that all responsible will be “held accountable.”<sup>1</sup> But to whom and to what type of accountability was the pope referring? Even though the Catholic Church’s (Church) child sex abuse scandal was exposed by the *Boston Globe* in 2002,<sup>2</sup> pervasive child sexual abuse by priests continues, with over 2000 new credible, substantiated<sup>3</sup> allegations since 2010.<sup>4</sup> Achieving accountability measures for the priests’ victims through the U.S. criminal-justice system has proved easier said than done. Problems holding individuals accountable have been especially prevalent with the prosecution of high-ranking supervisory priests,

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1. Pope Francis, Remarks of the Pope Francis for Philadelphia Meeting with Survivors 1, <http://www.usccb.org/about/leadership/holy-see/francis/papal-visit-2015/media-resources/upload/papal-visit-2015-meeting-with-survivors.pdf> [<https://perma.cc/43JF-3S56>].

2. Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2002), <http://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTTrAT25qKGVbUDNM/story.html> [<https://perma.cc/T3NM-4HG4>].

3. Credible allegations are defined as “those that have been substantiated by a preliminary investigation [by the relevant diocese, eparchy, or religious institute] and would be eligible to be sent to Rome according to Canons 1717 and 1719.” *Id.* at 61, 63 (emphasis omitted). Canon 1717 relates to when a church official should undertake a preliminary investigation for a suspected violation of Canon Law and certain duties of the official undertaking the investigation. 1983 CODE c.1717. Canon 1719 requires that the results of the preliminary investigation be kept secret if they are not necessary for the Church’s penal process. 1983 CODE c.1719. To determine the credibility of a sexual abuse allegation against a church official, “[e]very diocese and eparchy follows a process . . . as set forth in canon law and [Articles 4 and 5 of] the *Charter for the Protections of Children and Young People*.” U.S. CONFERENCE OF CATHOLIC BISHOPS, 2015 ANNUAL REPORT FINDINGS AND RECOMMENDATIONS: REPORT ON THE IMPLEMENTATION OF THE CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 36 (2016) [hereinafter 2015 ANNUAL REPORT] (citing U.S. CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 7–8 (2002)).

4. See 2015 ANNUAL REPORT, *supra* note 3, at 36–37, 42–43 (listing 180 new credible, substantiated allegations of sexual abuse of a minor in 2014 and 213 in 2015); U.S. CONFERENCE OF CATHOLIC BISHOPS, 2013 ANNUAL REPORT FINDINGS AND RECOMMENDATIONS: REPORT ON THE IMPLEMENTATION OF THE CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 26, 32, 35, 41 (2014) [hereinafter 2013 ANNUAL REPORT] (listing 424 new credible, substantiated allegations of sexual abuse of a minor in 2010, 532 in 2011, 411 in 2012, and 391 in 2013).

such as bishops, archbishops, and parish leaders.<sup>5</sup> Supervisory priests are typically bishops or other “diocesan leaders [who are] responsible for the care of [other] priests whose ability to carry out their responsibilities in ministry is impaired by physical or psychological illness,” such as sexual behavior with a minor.<sup>6</sup> Supervisory priests often “received . . . report[s] of sexual abuse of a minor by a priest of the diocese [and chose] how to respond to the victim and family and how to make choices about a course of action for the priest involved.”<sup>7</sup> After receiving reports of abuse by lower-ranking priests—typically pastors, associate pastors, or resident priests<sup>8</sup>—supervisory priests sometimes “transferred known abusers to other parishes . . . where their reputations were not known . . . in direct conflict with [clinicians’] advice,” “misled [parishioners about] the reason for the abuser’s transfer,” “tried to keep their files devoid of incriminating evidence,” “rarely provided information to local civil authorities and sometimes made concerted efforts to prevent reports . . . from reaching law enforcement.”<sup>9</sup> By doing so, supervisory priests provided abusive priests with “a continuing supply of victims.”<sup>10</sup>

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5. While this Note focuses on the conduct of supervisory priests, it applies to all people who supervise others and use the contact their work with children affords them to abuse children. In this Note, I choose to focus specifically on the Church scandal because (1) the *Boston Globe* reports in 2002 caused a wave of reaction throughout the United States, and the ensuing prosecutions of supervisory priests offer an illustrative snapshot of how states with similar statutes employed them differently to address supervisory priests’ conduct, and (2) the high-profile nature of the Church’s sex abuse crisis provides a readily understandable vehicle through which to explore the egregious conduct of supervisors of individuals who abuse children and the dearth of adequate statutes with which to prosecute them.

6. KAREN J. TERRY, MARGARET LELAND SMITH, KATARINA SCHUTH, JAMES R. KELLY, BRENDA VOLLMAN, & CHRISTINA MASSEY, JOHN JAY COLL. RESEARCH TEAM, *THE CAUSES AND CONTEXT OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS IN THE UNITED STATES, 1950–2010*, at 76 (U.S. Conference of Catholic Bishops 2011) [hereinafter 2011 JOHN JAY REPORT].

7. *Id.*; see also Report of the Grand Jury at 43, *In re* Cty. Investigating Grand Jury XXIII, Misc. No. 0009901-2008 (Ct. Com. Pl. Crim. Div. Pa. 2011) [hereinafter 2011 Philadelphia GJ Report] (noting that a supervisory priest had a responsibility “to investigate any allegations of sexual abuse by priests, . . . [and] make sure that no priest with a history of sexual abuse of minors was recommended for assignments, much less for assignments with continued access to children”).

8. JOHN JAY COLL. OF CRIMINAL JUSTICE, *THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950–2002*, at 79 (U.S. Conference of Catholic Bishops 2004) [hereinafter 2004 JOHN JAY REPORT] (noting that approximately 77.8 percent of offending Church officials were serving as pastors, associate pastors, or resident priests when the abuse was alleged to have occurred).

9. 2011 JOHN JAY REPORT, *supra* note 6, at 89.

10. 2011 Philadelphia GJ Report, *supra* note 7, at 44; Report of the Grand Jury at 6, *In re* Cty. Investigating Grand Jury of September 26, 2001, Misc. No. 01-00-8944 (Ct. Com. Pl. Crim.

In light of the pervasive child sex abuse by priests, this Note analyzes the various methods that states have embraced to hold supervisory priests accountable. After acknowledging that the delayed reporting of sexual abuse by victims led to the expiration of the statute of limitations for many claims, this Note examines instances in which states have used statutes that criminalize obstruction of justice, contributing to the delinquency of a minor, failure to report suspected child abuse in violation of a duty, and child endangerment to prosecute supervisory priests and the Church. Jurisdictions that extracted concessions from supervisory priests should be applauded; however, not all of the statutes employed to prosecute them adequately capture their conduct. Either the statute used fails to capture the moral desert of supervisory priests—as with obstruction of justice, contributing to the delinquency of a minor, and mandatory reporting—or the statute does not legally encompass the misconduct of supervisory priests, as with child endangerment. After describing the circumstances in which two jurisdictions successfully used child-endangerment statutes based on the Model Penal Code (MPC) against supervisory priests and churches, this Note argues that those jurisdictions were wrong to do so because child-endangerment statutes based on the MPC do not legally encompass supervisory priests or their conduct. Lastly, this Note suggests other potential methods of prosecuting supervisory priests.

Prosecutions involving child sex abuse in the Archdiocese of Philadelphia provide a striking example of the problem with holding supervisory priests accountable under child-endangerment statutes. Prosecutors from the Philadelphia District Attorney's office sought to hold a supervisory priest, Monseigneur William Lynn, Secretary for Clergy for the Archdiocese of Philadelphia,<sup>11</sup> accountable for his role in the crisis by seeking charges against him for child endangerment.<sup>12</sup> Pennsylvania's child-endangerment statute was modeled on the MPC statute for endangering the welfare of children, which criminalizes "violat[ing] . . . a duty of care [of a parent, guardian, or other person supervising the welfare of a child] that endangers the child."<sup>13</sup> The

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Div. Pa. 2003) [hereinafter 2003 PHILADELPHIA GJ REPORT] ("[Supervisory priests] most directly put children at risk when they knowingly permitted priests whom they knew, or were substantially certain, had sexually abused children to have continuing access to children.").

11. Commonwealth v. Lynn, 83 A.3d 434, 437 (Pa. Super. Ct. 2013).

12. 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 2–3.

13. MODEL PENAL CODE § 230.4 (AM. LAW INST., Official Draft and Revised Comments 1980); *see also* 18 PA. STAT. AND CONS. STAT. ANN. § 4304 cmt. Joint State Government Commission (1967) ("This section is derived from Section 230.4 of the Model Penal Code.").

Philadelphia grand jury agreed that “[i]n the common sense of the term, the actions of the church hierarchy clearly constituted endangerment of the welfare of children,” but decided it could not charge Msgr. Lynn under the statute.<sup>14</sup> The grand jury concluded that the child-endangerment statute was “too narrow to support a successful prosecution of the decisionmakers who were running the Archdiocese” because “[h]igh-level Archdiocese officials . . . were far removed from any *direct* contact with children.”<sup>15</sup>

After finding that the child-endangerment statute can apply only when a person with a duty of care directly supervised the abused child, consistent with Pennsylvania precedent,<sup>16</sup> the grand jury recommended statutory amendments to cover this conduct in future prosecutions.<sup>17</sup> In 2006, with the district attorney’s blessing, the Pennsylvania legislature took the grand jury’s recommendations, extending the statute of limitations<sup>18</sup> and expanding the class of individuals covered by the statute to include “a person that employs or supervises . . . a person” who supervises a child’s welfare.<sup>19</sup>

The Philadelphia district attorney sought to indict Msgr. Lynn again in 2011 after previously unknown instances of child sexual abuse

*Compare* 18 PA. STAT. AND CONS. STAT. ANN. § 4304 (West 2006) (“A parent, guardian or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.”), *with* MODEL PENAL CODE § 230.4 (“A parent, guardian, or other person supervising the welfare of a child under 18 commits a misdemeanor if he knowingly endangers the child’s welfare by violating a duty of care, protection or support.”).

14. Report of the Grand Jury at 65, *In re* Cty. Investigating Grand Jury of September 17, 2003, Misc. No. 03-00-239 (Ct. Com. Pl. Crim. Div. Pa. 2005) [hereinafter 2005 PHILADELPHIA GJ REPORT]. The 2005 Philadelphia GJ Report was actually a continuation of a report started by a 2003 Philadelphia grand jury, which was “unable to complete [its] investigation before the expiration of the term” for several reasons, including “the magnitude of the abuse, the complexity of the issues presented, the large number of clerics accused of molesting children, [and] the enormous number of victims.” 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 14–15.

15. 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 65 (emphasis added).

16. *See Lynn*, 83 A.3d at 450 (noting that “neither [the Superior Court] nor [the] Supreme Court ha[d] ever affirmed a conviction for [child endangerment] where the accused was not actually engaged in the supervision of, or was responsible for supervising, the endangered child”).

17. 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 69–76. The grand jury argued that amending the child-endangerment statute to include those who supervise individuals who directly supervise and abuse children would criminalize “endangerment as a course of conduct” and would “clarify that even a person who does not directly come into contact with a child may nevertheless be supervising the welfare of the child in a very real sense.” *Id.* at 72.

18. Act of Nov. 29, 2006, No. 179, 2006 Pa. Laws 1586 (codified as amended at 42 PA. STAT. AND CONS. STAT. ANN. § 5552(c)(3) (West 2007)).

19. *Id.* at 1581 (codified as amended at 18 PA. STAT. AND CONS. STAT. ANN. § 4304(a)(1) (West 2007)).

came to light.<sup>20</sup> The alleged abuse was more recent than the prior alleged conduct, but the pre-amendment version of the statute applied because even the more recent allegations occurred before the statute was amended.<sup>21</sup> Contrary to the 2005 grand jury's interpretation of the child-endangerment statute, the 2011 grand jury indicted Msgr. Lynn after applying the same law to substantially similar facts.<sup>22</sup> In fact, the 2011 grand jury "d[id] not hesitate to conclude that the Archdiocese understood itself to be responsible for 'supervising the welfare' of the students . . . entrusted to its care."<sup>23</sup> It concluded that "Msgr. Lynn had a duty . . . [and] was responsible for supervising [children's] welfare with respect to abusive priests."<sup>24</sup> After a trial in 2012, a jury convicted Msgr. Lynn of endangering the welfare of children when he breached that duty by knowingly supervising priests who sexually abused children and failing to protect the children.<sup>25</sup>

But on appeal the following year, a Pennsylvania Superior Court judge overturned Msgr. Lynn's conviction.<sup>26</sup> Just as the 2005 grand jury had declined to indict because the statute was written too narrowly to include supervisory priests,<sup>27</sup> the Pennsylvania Superior Court concluded that the statute required "actual supervision of children to be an element of the offense."<sup>28</sup> Because Msgr. Lynn had "had no direct involvement with the child, [and] never met [nor] knew the child,"<sup>29</sup> the court deemed him to be outside the scope of the statute.<sup>30</sup> The Pennsylvania Supreme Court disagreed, reinstating Msgr. Lynn's conviction in April 2015.<sup>31</sup> The Court declared that only the "welfare" of the child needs to be supervised<sup>32</sup> and that there is no limit on how

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20. 2011 Philadelphia GJ Report, *supra* note 7, at 112–17.

21. *Id.* at 114.

22. *Id.*

23. *Id.*

24. *Id.*

25. Commonwealth v. Lynn, 83 A.3d 434, 445 (Pa. Super. Ct. 2013), *rev'd*, 114 A.3d 796 (Pa. 2015).

26. *Id.* at 453–54.

27. 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 65.

28. Lynn, 83 A.3d at 452.

29. *Id.* at 446.

30. *Id.* at 453–54.

31. Commonwealth v. Lynn, 114 A.3d 796, 827 (Pa. 2015).

32. *Id.* at 823.

far removed a supervising individual can be from the child to be covered by the statute.<sup>33</sup>

These striking disagreements in the Pennsylvania courts and the reversal by the 2011 grand jury exemplify the uncertainty about the applicability of child-endangerment statutes to supervisory priests. Driven by public pressure and an overwhelming desire to hold supervisory priests accountable, prosecutors and courts may be shoehorning conduct into legally inadequate statutes. Even though supervisory priests recklessly enabled other clergy to sexually abuse children for decades,<sup>34</sup> it is unconstitutional to convict them under an interpretation of a child-endangerment statute based on the MPC that represents “an unforeseeable and retroactive judicial expansion of narrow and precise statutory language,” depriving supervisory priests “the right of fair warning.”<sup>35</sup>

Apart from prosecutions of supervisory priests, prosecutors used supervisory priests’ conduct as the basis for plea agreements with individual churches. Several state prosecutions, including those in New

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33. *Id.* at 824 (“[T]he requirement of supervision is not limited to only certain forms of supervision, such as direct or actual . . . . By its plain terms it encompasses all forms of supervision of a child’s welfare.”).

34. Despite their enablement of abusive priests, supervisory priests cannot be criminally charged as accomplices to the sexual abuse itself. Accomplice liability requires that the individual has “the *purpose* of promoting or facilitating” the offense. MODEL PENAL CODE § 2.06(3)(a) (AM. LAW INST. 2001) (emphasis added); *see id.* (describing the elements required to qualify as an accomplice). Here, the offense to which the supervisory priest would be an accomplice is child sex abuse; however, supervisory priests did not have the specific intent to sexually abuse children. As one grand jury report that analyzed supervisory priests as accomplices noted, “While the actions of the Archdiocese leaders clearly facilitated rapes and other sexual offenses, and ensured that more would occur, the evidence . . . did not demonstrate that the leaders acted with the *specific goal* of causing additional sexual violations.” 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 64–65 (emphasis added).

35. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964); *see also United States v. Harris*, 347 U.S. 612, 617 (1954) (“The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. . . . [N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”).

Hampshire,<sup>36</sup> Minnesota,<sup>37</sup> Missouri,<sup>38</sup> and Ohio,<sup>39</sup> used respondeat superior liability to obtain pleas from churches themselves instead of from supervisory priests. Institutions can typically be held vicariously liable for the actions of their employees through the theory of respondeat superior.<sup>40</sup> For the Church entity to be liable for the crimes of its employees, the employees must act within the scope of their employment with intent to benefit the entity.<sup>41</sup> A supervisory priest who failed to act on reports of child sex abuse would have acted within the scope of his employment because it was his responsibility to hear reports of inappropriate behavior and supervise lower-ranking priests.<sup>42</sup> And such a supervisory priest would have intended to benefit the Church by concealing the reports because he wanted to protect the reputation of the Church and the abusive priest from the allegations.<sup>43</sup>

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36. Agreement at 14–15, *In re* Grand Jury Proceedings, No. 02-S-1154 (N.H. Super. Ct. 2002) [hereinafter 2002 New Hampshire Agreement].

37. Gross Misdemeanor Criminal Complaint, *State v. Archdiocese of Saint Paul and Minneapolis*, No. 2139124 (Dist. Ct. 2d Jud. Dist. Minn. 2015) [hereinafter 2015 Minnesota Complaint].

38. Closed Indictment, *State v. Finn*, Police No. 11-033224 (Mo. Cir. Ct. Crim. Div. 2011) [hereinafter 2011 Missouri Indictment].

39. Laurie Goodstein, *Archdiocese of Cincinnati Fined in Sex Abuse Scandal*, N.Y. TIMES (Nov. 21, 2003), <http://www.nytimes.com/2003/11/21/us/archdiocese-of-cincinnati-fined-in-sex-abuse-scandal.html> [<http://perma.cc/G8K4-8RPG>].

40. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494–95 (1909).

41. *Id.*

42. For further discussion of supervisory priest responsibilities over lower-ranking priests, see *supra* notes 6–7 and accompanying text.

43. See, e.g., PETER W. HEED, N. WILLIAM DELKER & JAMES D. ROSENBERG, NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE, REPORT ON THE INVESTIGATION OF THE DIOCESE OF MANCHESTER 97 (2003) [hereinafter 2003 NEW HAMPSHIRE AG REPORT] (recounting a diocesan response to an allegation of child sex abuse, which stated that “[m]aking those problems public would destroy [the offending priest’s] ability to contribute further [to the Church]” and “going public now with the [abuse allegations] would . . . jeopardize [the offending priest’s] limited ministry, to no constructive end”); *id.* at 133 (describing statements by a diocesan official related to sexual abuse allegations against a priest and noting that the diocese “w[as] not really looking . . . for any publicity” and “wanted this to be something . . . that [it] could handle . . . and it would be quiet”); 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 3 (finding that despite their awareness of priests who posed a danger to children, “these Archdiocesan managers continued and/or established policies that made the protection of the Church from ‘scandal’ more important than the protection of children from sexual predators”); see also APRIL ‘E’ 2002 WESTCHESTER CTY. GRAND JURY, REPORT OF THE APRIL ‘E’ 2002 WESTCHESTER COUNTY GRAND JURY CONCERNING COMPLAINTS OF SEXUAL ABUSE AND MISCONDUCT AGAINST MINORS BY MEMBERS OF THE CLERGY 7 (2002) [hereinafter 2002 WESTCHESTER NY GJ REPORT] (inferring that the supervisory priests’ failure to act on allegations of child sex abuse “was an orchestrated effort to protect abusing clergy members from investigation, arrest and prosecution . . . [and to] protect[] the religious institution from adverse publicity that might have affected its economic welfare”); 2011 Philadelphia GJ Report, *supra* note 7, at 43 (finding that a



Because any church plea is merely an extension of the supervisory priest's criminal conduct, a plea or conviction of a church based on supervisory priests' conduct is treated here in the same light as if it were a conviction of a supervisory priest.

This Note argues that although child-endangerment statutes are the only statutes used to prosecute supervisory priests that adequately reflect their moral culpability, child-endangerment statutes based on the MPC do not legally encompass supervisory priests' conduct. Holding supervisory priests liable under those statutes is an unconstitutional attempt to shoehorn morally reprehensible conduct into a statute that was not meant to—and legally does not—apply to that class of individuals. Such shoehorning by states like Pennsylvania breaches the Constitution's notice requirement for criminal conduct to achieve accountability for misconduct by supervisory priests.

But there are better approaches to holding these priests accountable. In light of the legal insufficiency of child-endangerment statutes, states should employ the following strategies to prosecute supervisory priests now and for future conduct: (1) extend or eliminate statutes of limitations for crimes involving the abuse of minors and include clergy as mandatory reporters of child abuse; (2) amend child-endangerment statutes to cover the conduct of supervisory priests and other similarly situated individuals; (3) pass statutes, like those in Massachusetts, that criminalize the reckless creation of a substantial risk of child sex abuse and the failure to alleviate that risk;<sup>44</sup> and (4) as a last resort, use existing statutes that cover the conduct of supervisory priests but do not reflect their moral blameworthiness, such as mandatory-reporting and delinquency statutes.

Part I of this Note provides a brief background of the Church's sex abuse crisis and profiles state criminal investigations into child sex abuse by priests. This Part evaluates the purposes of and moral culpability associated with different statutes used to hold supervisory priests and churches liable for their roles in the crisis. Part II focuses on the use of child-endangerment statutes based on the MPC to prosecute supervisory priests and churches and argues that those

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supervisory priest purposefully abdicated his responsibility to protect children from sexual abuse by priests so that "the Archdiocese was spared public exposure or costly lawsuits"); OFFICE OF THE ATT'Y GEN., COMMONWEALTH OF PA., A REPORT OF THE THIRTY-SEVENTH STATEWIDE INVESTIGATING GRAND JURY 6, 12 (2016) [hereinafter 2016 PENNSYLVANIA GJ REPORT] ("[Supervisory priests] took actions that further endangered children as they placed their desire to avoid public scandal [and protect the institution] over the wellbeing of innocent children.").

44. MASS. GEN. LAWS ANN. ch. 265, § 13L (West 2015).

statutes reflect the moral culpability of supervisory priests but do not legally cover their conduct. Part III offers prescriptions for holding supervisory priests accountable in the future by suggesting amendments and new statutes that more effectively target the conduct of supervisory priests. Part IV concludes by encouraging state legislatures to enact statutes that legally encompass the conduct of supervisory priests and result in punishments that reflect the seriousness of their actions.

## I. STATE PROSECUTIONS OF SUPERVISORY PRIESTS

### A. *Background*

Between 1950 and 2002, there were 10,667 individual reports of sexual abuse in the United States against 4392 different priests.<sup>45</sup> Despite the overwhelming number of reports by the end of 2002, just 14 percent of those abusers were referred to the police, resulting in criminal convictions in only 3 percent of cases.<sup>46</sup> Approximately one third of the 10,667 abuse reports were made in 2002 alone, up from fewer than three hundred each year for the previous five years.<sup>47</sup> This striking surge in sex abuse reports in 2002 was likely the product of an investigative series published by the *Boston Globe*<sup>48</sup> into reports of child sex abuse by Father John Geoghan of the Archdiocese of Boston.<sup>49</sup> With reports of child sex abuse in the Church thrust into the national consciousness, prosecutors around the country were determined to hold Church officials accountable.

Prosecutors sought to charge not only the priests who engaged in abuse but also supervisory priests who knew of abuse and who denied, concealed, and enabled it. These supervisory priests were responsible for “investigat[ing] any allegations of sexual abuse by priests . . . [and] mak[ing] sure that no priest with a history of sexual abuse of minors was recommended for assignments.”<sup>50</sup> Instead of fulfilling these duties,

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45. 2011 JOHN JAY REPORT, *supra* note 6, at 27.

46. *Id.* at 10.

47. *Id.* at 9.

48. *See id.* at 6.

49. Rezendes, *supra* note 2. The uncovering of the abuse and the *Boston Globe*'s investigative reports were most recently profiled in the critically acclaimed film, SPOTLIGHT (Anonymous Content 2015). The continued focus on the Church sex abuse scandal, especially in pop culture, reflects how prominent the crisis still is in America's national consciousness.

50. *E.g.*, 2011 Philadelphia GJ Report, *supra* note 7, at 43. For further discussion of supervisory priest responsibilities, see *supra* notes 6–7 and accompanying text.

they routinely suppressed reports of abuse and “passively allow[ed] the molesters to remain in positions where they could continue to prey on children.”<sup>51</sup> Worse, “[w]hen victims complained or scandal threatened,” supervisory priests recommended transferring the abusive priests to new parishes<sup>52</sup> “where unsuspecting parents and teachers would entrust children to their care.”<sup>53</sup>

State and local prosecutors called for grand jury investigations and issued attorneys general reports detailing supervisory priest conduct and analyzing possible prosecution strategies. District attorneys and state attorneys general in at least nine states have sought to hold supervisory priests or churches criminally liable for their roles in enabling child sexual abuse.<sup>54</sup> The first grand jury investigation of a supervisory priest was opened in Westchester County, New York, on April 29, 2002,<sup>55</sup> just four months after the *Boston Globe* published the initial investigative reports.<sup>56</sup> The public pressure arising from the flood of child sex abuse reports led state and local prosecutors to turn to a variety of different statutes to hold the supervisory priests and

51. *E.g.*, 2011 Philadelphia GJ Report, *supra* note 7, at 43.

52. *E.g.*, *id.*; see also David Gibson, *The Bishop and the Prosecutor*, N.Y. TIMES (June 7, 2003), <http://www.nytimes.com/2003/06/07/opinion/the-bishop-and-the-prosecutor.html> [<https://perma.cc/CER4-SUXA>] (“In exchange for immunity from prosecution, Bishop O’Brien admitted that several times during his 22-year tenure he placed children in harm’s way by transferring priests who had been accused of sexual abuse to parishes, and that he never informed either the priests’ new superiors or parishioners.” (emphasis omitted)). For further discussion of how supervisory priests responded to allegations of sexual abuse by lower-ranking priests, see *supra* note 43 and accompanying text. *Cf.* 2011 JOHN JAY REPORT, *supra* note 6, at 81 (noting that from 1950–2003, just 8.5 percent of priests who allegedly sexually abused children were required to resign or retire).

53. 2011 Philadelphia GJ Report, *supra* note 7, at 45; see, e.g., G. STEVEN ROWE, STATE OF MAINE OFFICE OF THE ATT’Y GEN., A REPORT BY THE ATTORNEY GENERAL: ON THE ALLEGATIONS OF SEXUAL ABUSE OF CHILDREN BY PRIESTS AND OTHER CLERGY MEMBERS ASSOCIATED WITH THE ROMAN CATHOLIC CHURCH IN MAINE 11 (2004) [hereinafter 2004 MAINE AG REPORT] (describing an instance where an abusive priest was transferred to a new parish, but the diocese “did not notify the [new] parish of the past allegations”); 2002 WESTCHESTER NY GJ REPORT, *supra* note 43, at 7–8 (finding that after receiving reports of child sex abuse by priests, the religious institution would ignore communications from the victims, conduct an “internal investigation . . . [that] was primarily geared to delay, with the hope that the victim . . . would not persist in pursuing their claim” and “consistently shuttle[] the abuser from place to place each time an allegation came to light . . . without notifying anyone locally, including the other clergy at the new assignment, of the transferee’s prior troubling history . . . put[ting] more children at risk”).

54. For a detailed description of these efforts, see *infra* Parts I.B–E, 2.C–D.

55. 2002 WESTCHESTER NY GJ REPORT, *supra* note 43, at 2.

56. See *supra* notes 49–50 and accompanying text.

churches accountable. These statutes included obstruction of justice,<sup>57</sup> contributing to the delinquency of a minor,<sup>58</sup> mandatory reporting of suspicions of child sex abuse,<sup>59</sup> and child endangerment.<sup>60</sup> Other jurisdictions concluded that no statute could hold supervisory priests accountable either because the relevant statutes of limitations had expired or because the conduct did not meet statutory requirements.<sup>61</sup>

*B. Failure to Charge Due to Statutes of Limitations or Other Legal Inadequacies*

In many cases, supervisory priests avoided criminal prosecution because of the extended delays in victims reporting abuse<sup>62</sup> and the relatively short statutes of limitations for the offenses with which the supervisory priests were most likely to be charged.<sup>63</sup> Delayed reporting

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57. *E.g.*, Alan Cooperman, *Bishop Avoids Charges: Phoenix Prelate Gives Up Power in Sex Abuse Cases*, WASH. POST (June 3, 2003), <https://www.washingtonpost.com/pb/archive/politics/2003/06/03/bishop-avoids-charges/f77a4dab-ee8c-4c0d-9a53-ebd882f6efb4> [http://perma.cc/4MHA-JWN2] (discussing the investigating attorney's threats of prosecuting under felony obstruction-of-justice charges under ARIZ. REV. STAT. ANN. § 13-2409 (2016)).

58. *E.g.*, 2015 Minnesota Complaint, *supra* note 37, at 1–2 (charging under MINN. STAT. § 260B.425.1(a) (1999)).

59. *E.g.*, 2011 Missouri Indictment, *supra* note 38, at 1 (charging under MO. ANN. STAT. § 210.115 (West 2014)); Jim Doyle, *Santa Rosa/Bishop Avoids Charge in Failure to Swiftly Report Abuse Claims/Counseling Instead of Misdemeanor for Delay in Notification*, SFGATE (Nov. 21, 2006, 4:00 AM), <http://www.sfgate.com/bayarea/article/SANTA-ROSA-Bishop-avoids-charge-in-failure-to-2466423.php> [https://perma.cc/5K8P-AAB4]; Goodstein, *supra* note 39.

60. *E.g.*, Commonwealth v. Lynn, 114 A.3d 796, 798 (Pa. 2015) (charging under 18 PA. CONS. STAT. § 4304(a) (1995)); 2002 New Hampshire Agreement, *supra* note 36, at 2 (charging under N.H. REV. STAT. ANN. § 639:3 (LexisNexis 2016)); 2011 Philadelphia GJ Report, *supra* note 7, at 114 (charging under 18 PA. CONS. STAT. § 4304(a) (1995)).

61. *E.g.*, 2004 MAINE AG REPORT, *supra* note 53, at 2; OFFICE OF THE ATT'Y GEN. COMMONWEALTH OF MASS., THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON: A REPORT BY THE ATTORNEY GENERAL 2 (2003) [hereinafter 2003 MASSACHUSETTS AG REPORT]; 2003 NEW HAMPSHIRE AG REPORT *supra* note 43, at 154; 2016 PENNSYLVANIA GJ REPORT, *supra* note 43, at 146; 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 69–70; 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 15–16; SUFFOLK CTY. SUPREME COURT SPECIAL GRAND JURY, GRAND JURY REPORT, at 175 (2003) [hereinafter 2003 SUFFOLK NY GJ REPORT]; 2002 WESTCHESTER NY GJ REPORT, *supra* note 43, at 13.

62. In 2002, a study found that although 80.5 percent of the reported incidents of abuse “had taken place by 1985 . . . only 810 incidents had been reported to dioceses by that time.” 2011 JOHN JAY REPORT, *supra* note 6, at 9. *See* 2004 MAINE AG REPORT, *supra* note 53, at 6 (“Most of the complaint were not brought to the Diocese’s attention (or the attention of authorities) until many years after the alleged conduct.”).

63. Virtually all grand jury reports related to charges for supervisory priests cited an expired statute of limitations as a reason for failing to bring at least some charges and recommended increasing or removing the statute of limitations. For examples of these reports, see *supra* note 61 and accompanying text.

of abuse is common, as “many victims need decades to come forward . . . often [because] it is not until years after the sexual abuse that victims experience negative outcomes.”<sup>64</sup> Many negative effects of child sexual abuse do not surface until adulthood, “includ[ing] ‘sexual problems, dysfunctions or compulsions, confusion and struggles over gender and sexual identity, homophobia . . . problems with intimacy, shame, guilt and self-blame, low self-esteem and negative self-images, and anger.’”<sup>65</sup> Most statutes of limitations for child sex abuse crimes still fail to account for the typical reporting delay, allowing many child sex abusers to escape prosecution.<sup>66</sup> Even if a prosecutor attempted to charge a supervisory priest in 2002 just after receiving a delayed report of child sex abuse, the statute of limitations for misdemeanors or nonmajor felonies would likely have long expired.<sup>67</sup> To address this discrepancy, nearly all of the grand jury or attorneys general reports that investigated supervisory priest conduct recommended that state legislatures extend the statutes of limitations for certain claims—including for crimes “where the victim of a sex offense is a minor”<sup>68</sup>—

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64. Marci A. Hamilton, *Child Sex Abuse in Institutional Settings: What Is Next*, 89 U. DET. MERCY L. REV. 421, 429 (2012); see also 2002 WESTCHESTER NY GJ REPORT, *supra* note 43, at 3 (explaining that “children who are sexually abused often experience memory suppression,” sometimes causing reporting delays of “[t]wenty to thirty years”); cf. Laura Russell, Note, *Pursuing Criminal Liability for the Church and Its Decision Makers for their Role in Priest Sexual Abuse*, 81 WASH. U. L.Q. 885, 914 (2003) (recognizing how the delayed reporting of child sex abuse and insufficiently long statutes of limitations preclude criminal liability for supervisory and abusive priests). For statistics on victims’ delayed reporting of child sex abuse by priests, see *supra* notes 46–48, 61–63 and accompanying text.

65. Hamilton, *supra* note 64, at 429 (quoting David Lisak, *The Psychological Impact of Sexual Abuse: Content Analysis of Interviews with Male Survivors*, 7 J. TRAUMATIC STRESS 525, 526 (1994)).

66. See *id.* at 431–33 (describing how victims of sexual abuse are thwarted by the short statutes of limitations for criminal and civil laws that could be used to hold their attackers accountable). For examples of statutes of limitations for some state child-endangerment statutes, see *infra* note 67.

67. New Hampshire’s statute of limitations for endangering the welfare of a child, N.H. REV. STAT. ANN. § 639:3 (LexisNexis 2015), a misdemeanor, is one year after the conduct. *Id.* § 625:8. New York’s child-endangerment statute, N.Y. PENAL LAW § 260.10 (McKinney 2015), also a misdemeanor, has a statute of limitations of two years, *id.* § 30.10(2)(c). Pennsylvania’s child-endangerment statute, 18 PA. STAT. AND CONS. STAT. ANN. § 4304 (West 2015), a misdemeanor or felony based on the course of conduct, has the longest statute of limitations and, until 2007, tolled the statute of limitations until the minor’s eighteenth birthday and then added two years. 41 PA. STAT. AND CONS. STAT. ANN. § 5552(c)(3) (West 2006). Even the longest statute of limitations for child endangerment would have expired by 2000 for a five-year-old child abused in 1985, considering the minor would have turned eighteen in 1998 and adding two years, per the Pennsylvania statute of limitations.

68. 2002 WESTCHESTER NY GJ REPORT, *supra* note 43, at 1; see also 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 15–17 (recommending that the statute of limitations be extended);

or amend child-endangerment<sup>69</sup> or mandatory-reporting statutes<sup>70</sup> to ensure that supervisory priests' conduct is within the scope of liability.

In the first attempt to criminally charge supervisory priests, a grand jury from Westchester County concluded:

[I]n the face of overwhelming evidence of sexual abuse and misconduct . . . the religious institution never reported such allegations to law enforcement authorities. . . . The Grand Jury infers that this was an orchestrated effort to protect abusing clergy members from investigation, arrest and prosecution . . . [and] the religious institution from adverse publicity.<sup>71</sup>

Despite these excoriating findings, the grand jury was unable to charge any supervisory priest. The grand jury recommended that the legislature include clergy among mandatory reporters of child sex abuse and criminalize “the reckless supervision by employers of employees known to have harmed children.”<sup>72</sup> In recognizing that a major impediment to prosecution was the victims' prolonged delay in reporting abuse, the grand jury “urge[d] the Legislature to amend the . . . [l]aw to eliminate the Statute of Limitations where the victim of a sex offense is a minor.”<sup>73</sup>

One year later, a Suffolk County, New York, grand jury released a 181-page report regarding alleged child sexual abuse by the Diocese of Rockville Centre that came to similar conclusions.<sup>74</sup> The grand jury likewise found that the diocese “ignored credible complaints [and] failed to act on obvious warning signs of sexual abuse . . . [e]ven where

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2003 SUFFOLK NY GJ REPORT, *supra* note 61, at 175–76 (same); 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 69–70 (same); 2016 PENNSYLVANIA GJ REPORT, *supra* note 43, at 146 (same).

69. 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 17; 2003 SUFFOLK NY GJ REPORT, *supra* note 61, at 177; 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 72–73.

70. 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 73–74; 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 17; 2003 SUFFOLK NY GJ REPORT, *supra* note 61, at 178; 2002 WESTCHESTER NY GJ REPORT, *supra* note 43, at 1; *see also* OFFICE OF THE ATT'Y GEN., COMMONWEALTH OF MASSACHUSETTS, THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON: EXECUTIVE SUMMARY AND SCOPE OF INVESTIGATION 3 (2003) [hereinafter 2003 MASSACHUSETTS AG EXEC. REPORT] (noting that Massachusetts's “child abuse reporting law [was] not applicable because it was not expanded to include priests until 2002”).

71. 2002 WESTCHESTER NY GJ REPORT, *supra* note 43, at 7.

72. *Id.* at 13.

73. *Id.* at 6.

74. 2003 SUFFOLK NY GJ REPORT, *supra* note 61.

a priest disclosed sexually abusive behavior with children.”<sup>75</sup> Although supervisory priest conduct “warranted criminal prosecution . . . [it is] precluded because there was no legal responsibility on the part of priests to report what they knew about child abuse and . . . prosecution [is] beyond the statute of limitations.”<sup>76</sup> Because supervisory priest conduct did not fall within any New York criminal statute, the grand jury recommended amending mandatory-reporter statutes to include religious officials, expanding child-endangerment statutes to include supervisory priests and religious institutions, and either eliminating the statute of limitations for crimes against minors or extending it to a minimum of fifteen years after the minor turns eighteen.<sup>77</sup>

Later that year, similar impediments led the Massachusetts attorney general to issue a report resulting in no criminal charges against the Roman Catholic Archdiocese of Boston or its supervisory priests. The report found that the archdiocese did not adequately supervise priests whom it knew sexually abused children, concealed reports of abuse from law enforcement, and placed children at risk by transferring abusive priests to other parishes without telling the new parish about the allegations against the priest.<sup>78</sup> Unfortunately, despite the overwhelming evidence of abuse and cover-up by diocese officials, Massachusetts could not bring charges because, until 2002, Massachusetts’s law requiring the mandatory reporting of child abuse did not include priests,<sup>79</sup> and its child endangerment law did not encompass the conduct of supervisory priests.<sup>80</sup> “If these laws had been in place earlier, . . . [Massachusetts] would have had much more effective tools at [its] disposal as [it] sought to hold accountable those responsible for placing children at risk for sexual abuse.”<sup>81</sup>

In 2004, Maine’s attorney general investigated the Catholic Diocese of Portland “to determine whether the Diocese, the Bishop or other administrative personnel had any criminal liability arising from their supervisory role over the accused priests.”<sup>82</sup> Like the other charging attempts by the Massachusetts attorney general and New

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75. *Id.* at 172.

76. *Id.* at 174.

77. *Id.* at 175–78.

78. 2003 MASSACHUSETTS AG EXEC. REPORT, *supra* note 70, at 3–5.

79. *Id.* at 3; 2003 MASSACHUSETTS AG REPORT, *supra* note 61, at 22–23.

80. *See* 2003 MASSACHUSETTS AG REPORT, *supra* note 61, at 24 (describing a law passed by the Massachusetts legislature in 2002 that created the crime of recklessly endangering children).

81. *Id.*

82. 2004 MAINE AG REPORT, *supra* note 53, at 2.

York grand juries, the Maine attorney general concluded that “no prosecutable cases [fell] within the statute of limitations”<sup>83</sup> and that there was “no criminal liability on the part of the Bishop, the Diocese or its administrative staff” under the current statutes as written.<sup>84</sup>

In 2003, 2005, and 2016, grand juries in Pennsylvania concluded that the applicable statutes of limitations prevented the prosecution of supervisory priests, or that the relevant statutes did not legally encompass the conduct of supervisory priests. A 2003 Philadelphia grand jury recognized that “the statute of limitations currently in effect may preclude the prosecution of . . . those individuals who covered up the crimes and/or allowed them to occur”<sup>85</sup> and that current Pennsylvania statutes were not legally sufficient to prosecute supervisory priests.<sup>86</sup> In 2005, a Philadelphia grand jury concluded that “while the actions of the Archdiocese leaders clearly facilitated rapes and other sexual offenses [by priests] and ensured that more would occur,” “legal definitions and statute of limitations problems . . . prevent prosecution.”<sup>87</sup> Finally, in 2016, a grand jury found that certain supervisory priests in the Diocese of Altoona-Johnstown “failed to protect children entrusted to their care and guidance” by “plac[ing] their desire to avoid public scandal over the wellbeing of innocent children” and “return[ing the abusive priests] to ministry with full knowledge they were child predators.”<sup>88</sup> The grand jury then recognized that supervisory priests could not be prosecuted because the statutes of limitations for many of the relevant criminal statutes had expired.<sup>89</sup> To resolve these issues, the grand juries called for extending or eliminating statutes of limitations for sexual offenses against minors<sup>90</sup> and amending or enacting statutes to criminalize the conduct of supervisory priests.<sup>91</sup>

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83. *Id.* at 2.

84. *Id.* at 3.

85. 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 15.

86. *See id.* at 17 (calling for the enactment of a statute that criminalizes recklessly engaging in conduct that creates a substantial risk of harm to a child and for the clarification of the mandatory-reporter law as applied to clergy).

87. 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 64–69 (analyzing various ways that archdiocesan officials could be prosecuted and finding them all legally insufficient).

88. 2016 PENNSYLVANIA GJ REPORT, *supra* note 43, at 6.

89. *Id.* at 146.

90. 2016 PENNSYLVANIA GJ REPORT, *supra* note 43, at 146; 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 69–72; 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 16–17.

91. 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 72–74; 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 17.



### C. Obstruction of Justice

Statutes that prohibit obstructing justice help protect the integrity of legal proceedings and the justice system by targeting “a broad range of behavior that impedes or defeats the operation of government.”<sup>92</sup> In upholding a statute that criminalized obstructing justice, the Supreme Court recognized the “legitimate interest [of states] in protecting [their] judicial system[s],” and “the utmost importance that the administration of justice be absolutely fair and orderly.”<sup>93</sup> Specific formulations of what qualifies as obstruction vary from state to state, but, generally, individuals who knowingly obstruct, delay, or prevent government operations, criminal investigations, or the communication of information related to a criminal violation to government officials, violate the statute.<sup>94</sup> The mere act of doing something that might eventually obstruct justice, such as destroying an incriminating document, typically does not qualify as obstructing justice unless there is some nexus between the destruction of the document and knowledge of an investigation or official proceeding.<sup>95</sup> Because the actions of supervisory priests in covering up allegations of child sexual abuse precluded the government from investigating and potentially charging the abusive priests, some jurisdictions tried to charge supervisory priests with obstruction of justice.

In one case, a bishop of the Roman Catholic Archdiocese of Phoenix, Arizona, entered into a legal agreement with the Maricopa County district attorney, admitting to “conceal[ing] sexual abuse of children by priests” in lieu of being prosecuted for obstruction of justice.<sup>96</sup> The district attorney considered charging Bishop Thomas J. O’Brien with obstruction of justice for “instruct[ing] a priest . . . to persuade a Catholic family not to report an incident of sexual molestation to the police” and for firing the priest when he refused.<sup>97</sup> Instead of charging O’Brien, the district attorney entered into a comprehensive agreement with the archdiocese to stop the abuse and implement adequate controls to prevent future child sex abuse.<sup>98</sup> The

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92. MODEL PENAL CODE § 242.1 Introductory Note for Sections 242.1–242.8 (AM. LAW INST. 2001).

93. *Cox v. Louisiana*, 379 U.S. 559, 562 (1965).

94. *E.g.*, ARIZ. REV. STAT. ANN. § 13-2402 (2016); *id.* § 13-2409.

95. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 709 (2005); *United States v. Aguilar*, 515 U.S. 593, 600 (1995).

96. Cooperman, *supra* note 57.

97. *Id.*

98. *Id.*

district attorney successfully extracted admissions from O'Brien about his complicity in enabling priests to sexually abuse children by failing to take action to stop them.<sup>99</sup> As part of the agreement, O'Brien "acknowledge[d] that he allowed . . . priests under his supervision to have contact with minors after becoming aware of allegations of criminal sexual misconduct . . . [and that he] transferr[ed] offending priests to situations where children could be further victimized."<sup>100</sup> The district attorney also secured for the church a new sexual-misconduct policy, victim-advocate positions, a training program on the mandatory-reporting law, and a \$300,000 fund to support the counseling of those victimized by the church's priests.<sup>101</sup>

The Maricopa County district attorney should be commended for securing admissions from a supervisory priest and for requiring the archdiocese to pay restitution and implement safeguards against future abuse. Using the threat of an obstruction-of-justice charge against O'Brien was effective in securing a measure of justice. But the conduct meant to be covered by obstruction statutes pales in comparison to the conduct in which O'Brien and other supervisory priests engaged.

Obstruction statutes can be violated by simply destroying an incriminating document or trying to persuade a witness not to testify.<sup>102</sup> Statutes that criminalize such conduct seem deficient in addressing the conduct of supervisory priests, who endangered the welfare of children by knowingly putting them in positions where they were likely to be abused by historically abusive priests and actively concealing that abuse.<sup>103</sup> Supervisory priests' conduct by itself, no matter how reprehensible, would not even constitute obstruction of justice unless the conduct was in some way connected to a government investigation or proceeding.<sup>104</sup> Although O'Brien may have in fact been guilty of obstruction of justice, to threaten prosecution under that statute seems, as a normative matter, woefully inadequate to address the seriousness

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99. May 3, 2003 Agreement between State of Arizona, *ex rel.* Richard M. Romley, Maricopa County Attorney, Thomas J. O'Brien, Bishop of the Roman Catholic Diocese of Phoenix, and the Roman Catholic Diocese of Phoenix (Ariz. 2003), <http://www.cbsnews.com/htdocs/pdf/bishopagreement.pdf> [<https://perma.cc/9DSH-D6WX>].

100. *Id.* at 3.

101. *Id.*

102. For further discussion on what constitutes obstruction of justice and the purpose of that type of statute, see *supra* notes 92–95 and accompanying text.

103. For further discussion of supervisory priests' role in perpetuating child sex abuse by lower-ranking priests, see *supra* notes 43, 52–53 and accompanying text.

104. For further discussion on what qualifies as obstruction of justice, see *supra* note 95 and accompanying text.

of O'Brien's depraved conduct. Even if a degree of justice was achieved through the prosecutor's threatened obstruction charge, the tangential relation of the charge to O'Brien's true crimes leaves a wide gap between the culpability associated with obstruction of justice and O'Brien's misconduct.

*D. Contributing to the Delinquency of a Minor*

Prosecutors have also attempted to hold supervisory priests liable for concealing child sex abuse through "contributing to the delinquency of a minor" statutes. By the 1960s, most states had a statute that criminalized conduct that "corrupt[s] the morals"<sup>105</sup> or "contributes' to the 'delinquency, dependency, or neglect' of a child."<sup>106</sup> The purpose of these statutes was "to punish an adult for subjecting a child to influences requiring judicial intervention on the child's behalf."<sup>107</sup> Delinquency statutes are expansive, criminalizing "[a] range of behavior . . . as broad as the whole penal code and more."<sup>108</sup> Some examples of conduct punishable under a delinquency statute include encouraging a child to refuse to salute the American flag,<sup>109</sup> allowing a minor "to be present in a place where [intoxicating] beverages were sold,"<sup>110</sup> and taking a teenage girl for a ride in a car "against her father's orders . . . even though the girl asked for the ride."<sup>111</sup> Despite the breadth of conduct covered by delinquency statutes, most states uniformly "treated . . . [all conduct that results in] contributing to the delinquency of a minor . . . as a misdemeanor punishable by imprisonment of one year or less."<sup>112</sup> Delinquency statutes therefore assign the same misdemeanor-grade punishment to "such disparate behavior as raping a child, buying stolen goods from a juvenile, serving alcohol to a teenager, and encouraging an adolescent to evade the control of his parents."<sup>113</sup> Although most of the cases under the delinquency statute "had some sexual connotation,"<sup>114</sup>

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105. MODEL PENAL CODE § 230.4 cmt. 1 at 444 (AM. LAW INST., Official Draft and Revised Comments 1980).

106. *Id.* at 445.

107. *Id.*

108. *Id.* at 446.

109. *Id.* (citing *State v. Davis*, 120 P.2d 808 (Ariz. 1942)).

110. *Id.* (citing *State v. Sobelman*, 271 N.W. 484 (Minn. 1937)).

111. *Id.* at 448 (citing *State v. Harris*, 141 S.E. 637 (W. Va. 1928)).

112. *Id.* at 449.

113. *Id.* at 450.

114. *Id.* at 447.

delinquency statutes “contravene the general precept that criminal laws should state their proscriptions with fair specificity and precision.”<sup>115</sup> The broad range of conduct covered by delinquency statutes made them a candidate for use in prosecutions of supervisory priests and churches.

In June 2015, the district attorney of Ramsey County, Minnesota, issued a forty-four page indictment of the Archdiocese of Saint Paul and Minneapolis, charging it with “Contribut[ing] to Need for Protection or Services” and “Contributing to Status as Juvenile Petty Offender or Delinquency.”<sup>116</sup> The indictment recounted the archdiocese’s awareness of priest Curtis Wehmeyer’s long history of child sexual abuse and lascivious conduct.<sup>117</sup> Wehmeyer had an extensive record of child sex abuse: he sexually assaulted two boys in 2010 and pleaded guilty in November 2012 to sexual assault and possession of child pornography.<sup>118</sup> The indictment alleged that the archdiocese had policies “to prevent harm to children . . . [which] were not followed”<sup>119</sup> and that the archdiocese’s practice of covering up priest sex abuse was “not isolated or unique.”<sup>120</sup> After over a year of settlement negotiations, the district attorney agreed to drop the charges against the archdiocese “in exchange for its admission that it failed to protect three children from sexual abuse.”<sup>121</sup>

Just as the Maricopa County district attorney gained concessions through his threatened prosecution of the Phoenix archdiocese under the obstruction statute, the Ramsey County district attorney should be commended for using Minnesota’s delinquency statute to extract admissions from the Archdiocese of Saint Paul and Minneapolis. But the widely disparate conduct captured by the delinquency statute diminishes the perceived egregiousness of the supervisory priests’ conduct. The indictment details repeated instances in which

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115. *Id.* at 449.

116. 2015 Minnesota Complaint, *supra* note 37, at 1.

117. *Id.* at 4–29.

118. Melanie Sommer, *Defrocked Priest Curtis Wehmeyer Pleads Guilty, Is Sentenced in a 3rd Sexual Abuse Case*, BRING ME THE NEWS (Aug. 18, 2015), <http://bringmethenews.com/2015/08/18/defrocked-priest-curtis-wehmeyer-pleads-guilty-is-sentenced-in-a-third-sexual-abuse-case> [<http://perma.cc/NP4J-N9TM>].

119. 2015 Minnesota Complaint, *supra* note 37, at 25.

120. *Id.* at 29.

121. Laurie Goodstein & Richard Pérez-Peña, *Minnesota Priest’s Memo Says Vatican Ambassador Tried to Stifle Sex Abuse Inquiry*, N.Y. TIMES (July 20, 2016), <http://www.nytimes.com/2016/07/21/us/minnesota-priests-memo-says-vatican-envoy-tried-to-stifle-sex-abuse-inquiry.html> [<https://perma.cc/2LAE-K2BU>].

supervisory priests were made aware of Wehmeyer's child sex abuse, chose to conceal the reports, promoted Wehmeyer, and placed him in a training program the supervisory priests knew was ineffective, leaving more children vulnerable to a known sexual predator.<sup>122</sup> Prosecuting the supervisory priests' misconduct under the same type of statute that also criminalizes encouraging a minor to refuse to salute the American flag<sup>123</sup>—both of which could be punished as misdemeanors carrying a maximum sentence of one year of imprisonment and a modest fine<sup>124</sup>—adds insult to the injuries of Wehmeyer's many victims and fails to capture the moral desert of the supervisory priests. Thus, although the threat of a delinquency charge was effective in obtaining admissions of guilt, the moral blameworthiness associated with the delinquency statute does not approach the egregiousness of supervisory priests' conduct and the harm they inflicted on innocent children.

#### *E. Mandatory Reporting of Child Abuse*

Statutes that require clergy to report suspicions of child abuse seem like an obvious tool for prosecutors to use against supervisory priests. As of November 2013, all fifty states and the District of Columbia had statutes identifying persons who are required to report suspected child abuse to authorities, and forty-eight states had statutes that designate certain professions whose members must report.<sup>125</sup> States began passing mandatory-reporting laws based on model language proposed by the Children's Bureau<sup>126</sup> in 1963 as a reaction to a prominent study on the pervasiveness of child abuse.<sup>127</sup> By the time

122. 2015 Minnesota Complaint, *supra* note 37, at 4–29.

123. For examples of other conduct criminalized by delinquency statutes, see *supra* notes 109–11 and accompanying text.

124. ARIZ. REV. STAT. ANN. § 43-1008 (1939) (stating that the maximum sentence for contributing to the delinquency of a minor is one year of imprisonment or a \$350 fine, or both); 2015 Minnesota Complaint, *supra* note 37, at 1 (stating that the maximum sentence for a violation of the delinquency statute is “1 year or \$3,000 fine, or both”). The definitions of the relevant gradations of crimes are found in MINN. STAT. ANN. § 609.02 (2015).

125. CHILD WELFARE INFO. GATEWAY, CHILDREN'S BUREAU, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2015), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [<http://perma.cc/EE3E-FK3T>] [hereinafter CHILDREN'S BUREAU MANDATORY REPORTERS].

126. Robert E. Shepard, Jr., *The Abused Child and the Law*, 22 WASH. & LEE L. REV. 182, 190 (1965).

127. Leonard G. Brown, III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the*

the federal government passed the Child Abuse Prevention and Treatment Act (CAPTA)<sup>128</sup> in 1974, which conditioned federal grants on the enactment of mandatory-reporting laws, every state had a mandatory-reporting law.<sup>129</sup> The purpose of these laws was “to facilitate the discovery of instances of suspected child abuse by requiring . . . physicians and others to report their suspicions [of abuse] . . . [with the] hope[] th[at] steps taken subsequent to the report diminish the prospect of further injury to the child.”<sup>130</sup> These laws initially targeted physicians because of their role in monitoring health and the physical nature of child abuse,<sup>131</sup> and the laws typically “cloth[ed] the physician with a statutory immunity from [civil and criminal] liability” arising from a good-faith report of abuse.<sup>132</sup>

A mandatory reporter who fails to report child abuse is guilty of a misdemeanor in most states, with just four states classifying the conduct as a felony under certain circumstances.<sup>133</sup> Twenty-seven states include clergy as professionals who are required to report known or suspected instances of child abuse or neglect.<sup>134</sup> As a result of the limited number of states that include clergy among mandatory reporters, only some states that considered charges against the Church or supervisory priests were able to prosecute them under mandatory-reporting statutes.<sup>135</sup>

In one case from November 2003, the Archdiocese of Cincinnati pleaded guilty to a misdemeanor for “failing to report sexually abusive

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*Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 37 (2013). The prominent study on the pervasiveness of child abuse is titled “The Battered-Child Syndrome.” *Id.*

128. Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101–5116 (2012)).

129. Brown & Gallagher, *supra* note 130, at 38.

130. Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 2 (1967); see also Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 WM. MITCHELL L. REV. 131, 155 (1998) (noting that “it is logical to require [teachers] to report [child] abuse” because they “are in regular contact with children”).

131. Paulsen, *supra* note 130, at 3–4.

132. *Id.* at 31.

133. Brown & Gallagher, *supra* note 127, at 63.

134. CHILDREN’S BUREAU MANDATORY REPORTERS, *supra* note 125, at 2.

135. See 2003 MASSACHUSETTS AG EXEC. REPORT, *supra* note 70, at 3 (finding that clergy were not listed as reporters until 2002, too late to cover the conduct). *But see* 2004 MAINE AG REPORT, *supra* note 53, at 9, 11 (declining to prosecute the Archdiocese for failing to report in part because the Archdiocese consistently reported suspected instances of child abuse after clergy were added to the list of mandatory reporters in 1997).

priests in the 1970s and 80s.”<sup>136</sup> The guilty plea came just before prosecutors went to the grand jury to indict the archdiocese.<sup>137</sup> The archdiocese paid the maximum fine of \$10,000 and agreed to set up a “\$3 million fund to compensate sexual abuse victims who cannot sue the church because their cases are beyond the statute of limitations.”<sup>138</sup>

In another instance, Bishop Robert Finn of the Diocese of Kansas City-St. Joseph, Missouri, was convicted of failing to report suspected child abuse in September 2012.<sup>139</sup> Finn failed to report Father Shawn Ratigan for taking “pornographic pictures of young girls” for five months from 2010 through early 2011.<sup>140</sup> Finn also knew of Ratigan’s previous “inappropriate behavior with children” and his possession of child pornography but continued to employ him and give him access to children to abuse.<sup>141</sup> Finn was convicted for failing in his duty as a mandatory reporter, a misdemeanor, and the judge dropped two charges against the diocese.<sup>142</sup> Finn was sentenced to two years of court-supervised probation, and was required to set up a \$10,000 fund for victim counseling and “start a [mandatory-reporter] training program for diocesan employees in detecting early signs of child abuse, and in what constitutes child pornography and obscenity.”<sup>143</sup>

Though he failed to obtain a conviction under a mandatory-reporter statute, Sonoma County District Attorney Stephan Passalacqua used the threat of prosecution under such a statute to obtain an admission of guilt and mandatory counseling for a supervisory priest.<sup>144</sup> On April 27, 2006, Reverend Francisco Ochoa-Perez, as assistant pastor, confessed to Bishop Daniel Walsh of the Santa Rosa Catholic Diocese that he had sexually abused children

136. Goodstein, *supra* note 39.

137. *Id.*

138. *Id.*

139. Bill Draper, *Events of the Child-Porn Case that Brought Down a U.S. Bishop*, CRUX (Apr. 22, 2015), <http://www.cruxnow.com/church/2015/04/22/events-of-the-child-porn-case-that-brought-down-a-us-bishop> [<http://perma.cc/YN5W-3FNZ>].

140. John Eligon & Laurie Goodstein, *Kansas City Bishop Convicted of Shielding Pedophile Priest*, N.Y. TIMES (Sept. 6, 2012), <http://www.nytimes.com/2012/09/07/us/kansas-city-bishop-convicted-of-shielding-pedophile-priest.html> [<http://perma.cc/7SAG-Z2ZC>].

141. *Id.*

142. *Id.*

143. *Id.*

144. Doyle, *supra* note 59; Guy Konver, *Reaction: Catholics Praise Deal; Victim Advocates Angry*, PRESS DEMOCRAT (Nov. 21, 2006), <http://www.pressdemocrat.com/news/2116569-181/reaction-catholics-praise-deal-victim> [<https://perma.cc/K7UN-XHQF>].

three different times.<sup>145</sup> Instead of immediately telling the authorities, as was required by California's mandatory-reporting law,<sup>146</sup> Walsh first consulted with the diocese's attorney.<sup>147</sup> Walsh waited three days before telling Sonoma County's Child Protective Services about Ochoa-Perez's admissions of child sex abuse.<sup>148</sup> During the three-day delay, Ochoa-Perez escaped to Mexico.<sup>149</sup> Walsh's failure to immediately report Ochoa-Perez was likely a violation of California's mandatory-reporting law; however, because Walsh had no prior criminal record and admitted wrongdoing, the district attorney offered Walsh a four-month counseling program instead of filing misdemeanor charges, which Walsh accepted.<sup>150</sup>

The Kansas City and Cincinnati convictions were watershed moments in holding the Church and supervisory priests accountable because the mandatory-reporter statutes were enforced consistently with their purpose: punishing those who breached their duty to protect children suspected of being abused from further harm.<sup>151</sup> Mandatory-reporter statutes can successfully target clergy as required reporters of child abuse, but the statutes fail to adequately encapsulate the egregiousness of the supervisory priests' conduct. Supervisory priests did much more than merely fail to report suspected child abuse. Supervisory priests knowingly concealed child sex abuse by priests over whom they had authority, and sometimes transferred the offending priests to new congregations without making the new congregations aware of the child-abuse allegations against the priests.<sup>152</sup> By not acting to protect children, supervisory priests enabled the offending priests to continue sexually abusing children.

The situation at issue here also differs from the prototypical situation in which mandatory-reporting statutes were meant to apply. The original purpose of mandatory-reporting statutes was to require physicians and other professionals who may observe physical injuries

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145. Doyle, *supra* note 59.

146. CAL. PENAL CODE § 11166 (West 2006) (requiring the mandated reporter to "make an initial report . . . immediately . . . and send . . . a written followup report within 36 hours of receiving the information concerning the incident").

147. Doyle, *supra* note 59.

148. *Id.*

149. *Id.*

150. *Id.*

151. For further discussion on the original purpose of mandatory-reporter laws, see *supra* notes 130–32 and accompanying text.

152. For further discussion of supervisory priests' role in perpetuating child sex abuse by lower-ranking priests, see *supra* notes 43, 52–53 and accompanying text.



in the course of their work with children to report suspected child abuse to the relevant authorities.<sup>153</sup> Supervisory priests are unlike typical mandatory reporters because they have authority over the perpetrators of the abuse and, by failing to use that authority to protect children from the abusers, facilitate further child sex abuse. With supervisory priests, there is often a repeated failure to act on reliable reports of offending priests' sexual abuse. The failure to report the offending priest is the most basic crime of which supervisory priests are guilty. But supervisory priests' conduct is more egregious, enabling individuals under their authority to sexually abuse children by failing to remove the abusive priest even after receiving credible allegations of abuse. Therefore, although mandatory-reporter statutes are legally sufficient to cover the conduct of supervisory priests, those statutes, like delinquency and obstruction-of-justice statutes, do not adequately capture the culpability of supervisory priests.

## II. CHILD ENDANGERMENT: MORALLY SUFFICIENT YET LEGALLY INADEQUATE

The final way prosecutors have attempted to hold supervisory priests accountable is through child-endangerment statutes. Child endangerment is an apt description of supervisory priests' conduct, but child-endangerment statutes are not legally sufficient to cover the conduct of supervisory priests because supervisory priests 1) are not a class of individuals targeted by the statute, and therefore do not have a duty to the abused children, and 2) do not engage in the direct supervision of children. Although "an argument could be made that the individual priests had a duty of care for the children they assaulted, it is impossible to transfer this duty to [supervisory priests]."<sup>154</sup> In addition, "it is even more difficult to show that [supervisory priests] were responsible for 'supervising the welfare' of all the children

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153. For further discussion of supervisory priests' role in perpetuating child sex abuse by lower-ranking priests, see *supra* notes 130–32 and accompanying text.

154. Jesse Belcher-Timme, *Unholy Acts: The Clergy Sex Scandal in Massachusetts and the Legislative Response*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 264 (2004) (referring specifically to child-endangerment statutes based on the MPC). *But cf.* *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 430 (2d Cir. 1999) (finding that it was reasonable for a jury to conclude that a diocese owed a fiduciary duty to a minor parishioner who was sexually abused by a priest when the diocese received detailed allegations of abuse and failed to investigate them or warn other parishioners).

alleging abuse.”<sup>155</sup> Nevertheless, despite these legal inadequacies, several jurisdictions have attempted to prosecute supervisory priests or churches under child-endangerment statutes.

A. *Legal Elements of the MPC’s Child-Endangerment Statute*

The modern child-endangerment statute used in many states is based on MPC § 230.4,<sup>156</sup> which criminalizes endangering the welfare of a child.<sup>157</sup> That statute reads, “A parent, guardian, or other person supervising the welfare of a child under 18 commits a misdemeanor if he knowingly endangers the child’s welfare by violating a duty of care, protection, or support.”<sup>158</sup> The scope of individuals covered under the statute is limited to parents, guardians, or others in similar roles.<sup>159</sup>

Because the statute imposes a duty on a certain class of individuals, a breach of that duty can occur by the duty-bearers’ acts or omissions. The statute was meant to apply only “to those legal duties arising by reason of the actor’s status as a ‘parent, guardian, or other person supervising the welfare of the child.’”<sup>160</sup> The legal duty “may arise from contractual obligation, from settled principles of tort or family law, or from other legal sources.”<sup>161</sup> The MPC commentary explicitly distinguishes the legal duty from a duty “owed by all citizens to one another or . . . which a stranger may owe to a minor.”<sup>162</sup> The commentary also states that “the actor must know of the facts giving rise to the duty of care, protection, or support, though . . . [not that] the law . . . imposes the legal duty.”<sup>163</sup>

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155. Belcher-Timme, *supra* note 154, at 264–65; *see also* 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 65 (justifying a grand jury’s decision not to charge supervisory priests with child endangerment because “[h]igh-level Archdiocese officials . . . were far removed from any *direct* contact with children” (emphasis added)).

156. MODEL PENAL CODE § 230.4 cmt. 4 at 452 (AM. LAW INST., Official Draft and Revised Comments 1980).

157. MODEL PENAL CODE § 230.4; *see also* 18 PA. STAT. AND CONS. STAT. ANN. § 4304 (West 2006) (using similar wording as § 230.4); 2003 NEW HAMPSHIRE AG REPORT *supra* note 43, at 3 (noting that New Hampshire’s statute was adapted from § 230.4).

158. MODEL PENAL CODE § 230.4.

159. *Id.*

160. MODEL PENAL CODE § 230.4 cmt. 2 at 450 (AM. LAW INST., Official Draft and Revised Comments 1980).

161. *Id.* § 230.4 cmt. 3 at 450–51.

162. *Id.* § 230.4 cmt. 3 at 451.

163. *Id.* § 230.4 cmt. 3 at 452.

*B. Child-Endangerment Statutes Reflect the Moral Culpability of Supervisory Priests' Conduct*

As the Philadelphia grand jury pointed out in its 2005 report, “In the common sense of the term, the actions of the church hierarchy clearly constituted endangerment of the welfare of children.”<sup>164</sup> In the case of supervisory priests, endangering the welfare of children is the most appropriate description of their wrongful conduct. After becoming aware of abuse by certain priests, supervisory priests routinely ignored or concealed the offending priests' conduct at the expense of children's physical and emotional welfare.<sup>165</sup> These supervisory priests actively chose to endanger the welfare of minors—one of the most vulnerable populations that the law seeks to protect<sup>166</sup>—by knowingly allowing them to be in the care of priests who had a record of child sex abuse.<sup>167</sup> Supervisory priests also endangered the welfare of children by transferring priests to other parishes without notifying the parish of why the priest was being transferred or his history of sexual abuse, endangering more unwitting children.<sup>168</sup> The harm that statutes seek to prevent is often not a perfect match with the conduct in particular cases; however, the harm sought to be prevented by child-endangerment statutes comes closest to the harm inflicted on sexually abused children by supervisory priests. This match between supervisory priests' conduct and child endangerment led prosecutors in two states to use child-endangerment statutes based on the MPC to hold supervisory priests accountable.

*C. Child-Endangerment Plea: 2002 Diocese of Manchester, New Hampshire*

1. *Relevant Conduct and the New Hampshire Child-Endangerment Statute.* A report released by the New Hampshire attorney general

164. 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 65.

165. For further discussion and examples of supervisory priests' role in perpetuating child sex abuse by lower-ranking priests, see *supra* notes 43, 50–53, 75, 78, 100 and accompanying text.

166. See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (describing children as having peculiar vulnerabilities and noting that states can adjust legal systems to protect them); see also 2016 PENNSYLVANIA GJ REPORT, *supra* note 43, at 147 (“There is no member of the public in greater need of protection than our children.”).

167. For further discussion and examples of supervisory priests' role in perpetuating child sex abuse by lower-ranking priests, see *supra* notes 43, 50–53, 75, 78, 100 and accompanying text.

168. For further discussion of how supervisory priests transferred known abusive priests to other parishes without disclosing prior abuse allegations against those priests, see *supra* notes 9, 52–53, 100 and accompanying text.

detailed the conduct of eight priests at the Diocese of Manchester who sexually abused children and the diocese's failure to remove those priests after repeated reports of abuse.<sup>169</sup> Beyond just knowing about the child sex abuse and failing to terminate or report the offending priests, the diocese transferred the priests to other congregations without any limitations, leading to sexual assaults of more children.<sup>170</sup>

New Hampshire's child-endangerment statute is modeled on the MPC child-endangerment statute.<sup>171</sup> In relevant part, it reads, "A person is guilty of endangering the welfare of a child . . . if he knowingly endangers the welfare of a child under 18 years of age . . . by purposely violating a duty of care, protection or support he owes to such child."<sup>172</sup> Based on the breadth of individuals covered by New Hampshire's child-endangerment statute,<sup>173</sup> which just mentions "a person" and not parents or guardians, the attorney general determined that "the Diocese owe[d] a duty of care to its minor parishioners."<sup>174</sup> Accordingly, the Roman Catholic Bishop of Manchester signed a nonprosecution agreement with the New Hampshire attorney general in December 2002.<sup>175</sup> As part of the nonprosecution agreement, the diocese acknowledged that the state likely could have convicted the diocese of child endangerment had the case gone to trial.<sup>176</sup> Additionally, the attorney general found that "the Diocese knew that a particular priest was sexually assaulting minors, . . . took inadequate or no action to protect these children within the parish, and . . . the priest subsequently committed additional acts of sexual abuse against children that the priest had contact with through the church."<sup>177</sup> Lastly, the agreement called for the Diocese to ensure "that no person who is known to have abused a child will either continue or ever be placed in

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169. 2003 NEW HAMPSHIRE AG REPORT, *supra* note 43.

170. *See id.* at 71, 112.

171. *Id.* at 3. Compare N.H. REV. STAT. ANN. § 639:3, I (LexisNexis 2015) ("A person is guilty of endangering the welfare of a child . . . if he knowingly endangers the welfare of a child under 18 years of age . . . by purposely violating a duty of care, protection or support he owes to such child . . ."), with MODEL PENAL CODE § 230.4 (AM. LAW INST., Official Draft and Revised Comments 1980) ("A parent, guardian, or other person supervising the welfare of a child under 18 commits a misdemeanor if he knowingly endangers the child's welfare by violating a duty of care, protection or support.").

172. N.H. REV. STAT. ANN. § 639:3, I.

173. 2003 NEW HAMPSHIRE AG REPORT *supra* note 43, at 4.

174. *Id.* at 5.

175. 2002 New Hampshire Agreement, *supra* note 36.

176. *Id.* at 2.

177. 2003 NEW HAMPSHIRE AG REPORT, *supra* note 43, at 1.

ministry”<sup>178</sup> and to train staff and abide by mandatory-reporting requirements.<sup>179</sup>

2. *Legal Inadequacy of New Hampshire’s Child-Endangerment Statute for Prosecution of Supervisory Priests.* By obtaining an admission that the New Hampshire attorney general had sufficient evidence to convict the Diocese of Manchester of child endangerment, the attorney general avoided adjudicating the matter. If he had gone to court, he likely would have lost. One difference between the MPC and New Hampshire child-endangerment statutes is that the New Hampshire statute does not limit the individuals covered to a “parent, guardian, or other person having supervisory control over the child,”<sup>180</sup> but broadens the statute to cover any “person.”<sup>181</sup> The New Hampshire attorney general issued an investigatory report that detailed the legal theories underpinning the nonprosecution agreement and based the likelihood of a successful prosecution on the more expansive language used in the New Hampshire statute.<sup>182</sup> After stating that “whether the Diocese owed a duty of care to its child parishioners” is the “essential threshold issue” for the diocese’s culpability, the report argues in favor of diocesan culpability because, unlike the MPC statute, “New Hampshire’s statute is not limited to a parent, guardian, or other person having supervisory control over the child, but includes *anyone* who owes the child a duty of care.”<sup>183</sup> By this logic, the New Hampshire statute, unlike the MPC statute, covers individuals like supervisory priests who do not have a relationship akin to that of a parent or guardian to the child-victim.

However, a later decision of the New Hampshire Supreme Court concluded that the legislature had no intent to broaden the MPC version of the child-endangerment statute to include individuals like supervisory priests. In *State v. Yates*,<sup>184</sup> the court addressed the scope

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178. 2002 New Hampshire Agreement, *supra* note 36, at 3.

179. *Id.* at 4–6.

180. MODEL PENAL CODE § 230.4 (AM. LAW INST., Official Draft and Revised Comments 1980).

181. N.H. REV. STAT. ANN. § 639:3, I (LexisNexis 2015); 2003 NEW HAMPSHIRE AG REPORT *supra* note 43, at 4. For a comparison of the MPC and New Hampshire statutory language, see *supra* note 171.

182. See 2003 NEW HAMPSHIRE AG REPORT *supra* note 43, at 4–6 (using a case that dealt with the broadening language as the basis for the State’s expectation of proving the diocese owed a duty).

183. *Id.* at 4.

184. *State v. Yates*, 876 A.2d 176 (N.H. 2005).

of the term “duty of care” as used in the New Hampshire statute—an issue of first impression.<sup>185</sup> *Yates* was a child-endangerment prosecution of an eighteen-year-old man who gave alcohol to a fourteen-year-old girl until she became intoxicated, removed her clothes, sexually assaulted her,<sup>186</sup> and then “abandon[ed] her outside in below freezing temperatures.”<sup>187</sup> Because “duty of care” is not defined in the statute, the court examined the legislative history, which indicated that the New Hampshire statute is based on the MPC version.<sup>188</sup> The court found that the change in statutory language did not reflect an intentional broadening of the statute’s scope.<sup>189</sup> First, the court reasoned that the MPC commentary demonstrates the duty mentioned in the statute “was intended to refer only to those who have a parental or supervisory relationship with a child,” and because the legislature is “not presumed to . . . enact redundant provisions,” the legislature enacted the statute to include “[a] person” instead of “parents, guardians, or other persons” merely to avoid redundancy with the duty part of the statute.<sup>190</sup> Next, because the legislature kept the MPC’s language related to a duty “of ‘care, protection, or support,’” the court reasoned, consistent with the MPC statute, that the legislature intended to “limit criminal liability . . . to those who have a familial, or similar/supervisory relationship with [the] minor.”<sup>191</sup> Finally, the court looked to the title of the criminal code chapter in which the statute is located, titled “Offenses Against the Family,” to further support its reasoning that the statute was only meant to cover those “persons having a familial, or similar/supervisory relationship with the victim.”<sup>192</sup>

Given the New Hampshire Supreme Court’s subsequent rejection of the theory on which the Manchester Diocese’s nonprosecution agreement rested, it is likely that the diocese and its supervisory priests were not within the scope of the child-endangerment statute. The defendant in *Yates* directly supervised and assaulted a child, and the

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185. *Id.* at 184 (“[The defendant] challenges only the application of the term ‘duty of care’ [in the statute] to the circumstances of this case. The defendant’s challenge presents an issue of first impression.”).

186. *Id.* at 178–79.

187. *Id.* at 187.

188. *Id.* at 185.

189. *Id.*

190. *Id.* at 185–86.

191. *Id.* at 186.

192. *Id.*

court still found that he had no duty to the child. Thus, it is unlikely that the court would have held that a supervisory priest, who had no direct contact with minor parishioners, had a duty to them under New Hampshire's child-endangerment statute.

*D. Child-Endangerment Conviction: 2011 Archdiocese of Philadelphia, Pennsylvania*

1. *Relevant Conduct and the Pennsylvania Child-Endangerment Statute.* The other child-endangerment conviction for a supervisory priest was the Philadelphia district attorney's conviction of Msgr. Lynn.<sup>193</sup> Msgr. Lynn, as Secretary of the Clergy, was responsible for "investigat[ing] any allegations of sexual abuse by priests . . . [and] mak[ing] sure that no priest with a history of sexual abuse of minors was recommended for assignments."<sup>194</sup> By failing to act on knowledge that Reverend Edward V. Avery and other priests were sexually abusing children, Msgr. Lynn "allow[ed] [Avery and others] to remain in positions where they could continue to prey on children . . . [and] recommended . . . that the abusers be transferred to new parishes."<sup>195</sup> Msgr. Lynn was charged and convicted under Pennsylvania's child-endangerment statute, which is based on the MPC's statute.<sup>196</sup> Pennsylvania's child-endangerment statute states, "A parent, guardian, or other person supervising the welfare of a child under 18 years of age . . . commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support."<sup>197</sup> Unlike the nonprosecution agreement with the Diocese of Manchester, the prosecution of Msgr. Lynn was tried in state court.<sup>198</sup>

2. *Legal Insufficiency of Pennsylvania's Child-Endangerment Statute.* After a grand jury reversed a prior grand jury's decision, a jury convicted Msgr. Lynn, and the Superior Court threw out the conviction

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193. For a more detailed description of the case against Msgr. Lynn, see *supra* notes 11–33 and accompanying text.

194. 2011 Philadelphia GJ Report, *supra* note 7, at 43.

195. *Id.* (emphasis omitted); *see also id.* at 43–53 (specifying the priests, including Avery, who Lynn knew had sexually abused children).

196. For further discussion, see *supra* notes 13, 25, 31 and accompanying text.

197. 18 PA. STAT. AND CONS. STAT. ANN. § 4304(a)(1) (West 2015).

198. For a more detailed description of Msgr. Lynn's trials in Pennsylvania state court, see *supra* notes 25–33 and accompanying text.

on appeal,<sup>199</sup> the Pennsylvania Supreme Court reinstated Msgr. Lynn's conviction of child endangerment in April 2015.<sup>200</sup> The court based its opinion on the notion that the child-endangerment statute was meant "to cover a broad range of conduct in order to safeguard the welfare and security of . . . children."<sup>201</sup> Given that purpose and the statute's "plain and unambiguous" language,<sup>202</sup> the court concluded that "criminal liability does not turn on whether the offender was supervising . . . the . . . children" because it would "render meaningless the precise statutory language encompassing the child's welfare."<sup>203</sup> The court continued, "[T]he requirement of supervision is not limited to only . . . direct or actual [supervision] . . . [but] [b]y its plain terms it encompasses all forms of supervision of a child's welfare."<sup>204</sup> But holding Msgr. Lynn liable for child endangerment was an impermissible expansion of the scope of the statute that is inconsistent with the MPC commentary, the statute's legislative history, and Pennsylvania court precedent.

The first grand jury that sought an indictment against Msgr. Lynn concluded, consistently with the MPC commentary and Pennsylvania's historic interpretation,<sup>205</sup> that "the offense of endangering welfare of children is too narrow to support a successful prosecution of the decisionmakers who were running the Archdiocese . . . [because they] were far removed from any direct contact with children."<sup>206</sup> The grand jury recommended that the legislature broaden the child-endangerment statute to include individuals in positions like those of supervisory priests.<sup>207</sup> The Pennsylvania legislature subsequently amended the child-endangerment statute with the support of the

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199. For a more detailed description of these events, see *supra* notes 14–30 and accompanying text.

200. For further discussion on the Pennsylvania Supreme Court reinstating Msgr. Lynn's conviction, see *supra* notes 31–33 and accompanying text.

201. *Commonwealth v. Lynn*, 114 A.3d 796, 818 (Pa. 2015) (quoting *Commonwealth v. Mack*, 359 A.2d 770, 772 (Pa. 1976)).

202. *Id.* at 823.

203. *Id.* at 824.

204. *Id.*

205. For further discussion on the first Philadelphia grand jury's findings regarding Msgr. Lynn, see *supra* notes 16–19 and accompanying text.

206. 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 65.

207. For a more detailed description of the first Philadelphia grand jury's recommendations to the Pennsylvania legislature, see *supra* notes 17–19 and accompanying text.



Philadelphia district attorney.<sup>208</sup> In *Commonwealth v. Lynn*,<sup>209</sup> Pennsylvania argued that the legislature’s amendment to the statute was merely a clarification of the statute’s applicability to supervisory priests;<sup>210</sup> however, “[a] change in the language of a statute ordinarily indicates a change in legislative intent.”<sup>211</sup> Here, the consensus among the first grand jury, the Pennsylvania legislature, and the previous Philadelphia district attorney that the pre-amendment child-endangerment statute did not apply to supervisory priests provides strong support for the inapplicability of the pre-amendment statute to people in Msgr. Lynn’s position.

In addition, holding individuals who never had direct contact with children liable for child endangerment was unprecedented in Pennsylvania. The Superior Court noted in *Lynn* that “neither [the Superior Court] nor [the] Supreme Court ha[d] ever affirmed a conviction for [child endangerment] whe[n] the accused was not actually engaged in the supervision of, or was responsible for supervising, the endangered child.”<sup>212</sup> Individuals have been convicted under the child-endangerment statute who were not the parent or guardian of the child,<sup>213</sup> but there was not one conviction for child endangerment when the individual was not engaged in the direct supervision of a child. That fact—combined with the plain language of the statute, the MPC commentary, and the initial consensus between the grand jury, district attorney, and state legislature—makes it likely that Pennsylvania convicted Msgr. Lynn of violating a statute that had never been interpreted to apply to his conduct. Accordingly, Msgr. Lynn likely had no constitutionally required notice that the child-endangerment statute covered his reprehensible conduct.<sup>214</sup>

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208. For further discussion of the Pennsylvania legislature’s actions in response to the first Philadelphia grand jury’s recommendations, see *supra* notes 18–19 and accompanying text.

209. *Commonwealth v. Lynn*, 83 A.3d 434 (Pa. Super. Ct. 2013).

210. *Id.* at 448 (“The Commonwealth contends . . . the amendment was merely a clarification of, rather than a substantial change of, the pre-amended statute’s scope of liability.”).

211. *Masland v. Bachman*, 374 A.2d 517, 521 (Pa. 1977).

212. *Commonwealth v. Lynn*, 83 A.3d 434, 450 (Pa. Super. Ct. 2013).

213. See, e.g., *Commonwealth v. Trippett*, 932 A.2d 188, 195 (Pa. Super. Ct. 2007) (finding defendant liable under a child-endangerment statute when he was not a parent or guardian but lived in the same home as the child and took care of the child).

214. See *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (noting that an unconstitutional “deprivation of the right of fair warning can result . . . from an unforeseeable and retroactive judicial expansion of . . . statutory language [and interpretation]”).

## III. PRESCRIPTIONS FOR PROSECUTION

Despite the Church's efforts since 2002 to combat pervasive child sex abuse by priests,<sup>215</sup> there continue to be hundreds of new reports of such abuse each year.<sup>216</sup> States can pursue several methods to ensure that supervisory priests are held accountable for any role they play in covering up and facilitating reports of abuse.

A. *Extend Statutes of Limitations and Include Clergy as Mandatory Reporters*

First, clergy should be added to the list of mandatory reporters, and the statutes of limitations for mandatory-reporting statutes and child-endangerment should be eliminated.<sup>217</sup> Because not all states include clergy among mandatory reporters,<sup>218</sup> states could simply amend those statutes to include clergy so they can prosecute clergy for failing to report suspicions of child sex abuse committed by other priests.

Additionally, just as the Pennsylvania legislature recognized when it extended the statute of limitations for child endangerment in 2006,<sup>219</sup> victims of child sex abuse typically fail to report the abuse until long after it occurred.<sup>220</sup> Child sex abusers and individuals who have a duty to report suspicions of abuse should not escape criminal liability merely because the psychological harm resulting from abuse hinders reporting for decades after abuse occurs.<sup>221</sup> As of May 2016, thirty-eight states have removed the criminal statute of limitations for many child sex

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215. See 2015 ANNUAL REPORT, *supra* note 4, at 3 (2016) (citing the annual audits of dioceses and eparchies by the Church for child sex abuse allegations since the implementation of the Charter for the Protection of Children and Young People in 2002).

216. For more detailed statistics, see *supra* note 4.

217. See, e.g., Hamilton, *supra* note 64, at 431–36 (discussing the effects of statute-of-limitations extensions for child sex abuse and suggesting the addition of mandatory-reporting requirements for clergy); Russell, *supra* note 64, at 914–15 (proposing amending mandatory-reporter statutes to include clergy and extending statutes of limitations for child sex abuse crimes as ways to hold supervisory priests accountable).

218. For further discussion of states' approach to mandatory reporting, see *supra* notes 134–35 and accompanying text.

219. Act of Nov. 29, 2006, No. 179, 2006 Pa. Laws 1581 (codified as amended at 42 PA. STAT. AND CONS. STAT. ANN. § 5552(c)(3) (West 2007)).

220. For statistics on the prevalence of delayed reporting of child sex abuse by victims and further discussion on the negative effects of child sex abuse, see *supra* notes 45–47, 62–64 and accompanying text.

221. Cf. Russell, *supra* note 64, at 914 (arguing that “delayed reporting . . . of sexual abuse should not prevent child molesters from facing prosecution”).

crimes, and eight states have removed the civil statute of limitations for child sex abuse.<sup>222</sup> Other states have had difficulty making these changes, as states like New York and Pennsylvania have struggled to pass legislation expanding the statutes of limitations for all crimes involving child sex abuse due to “opposition from Roman Catholic leaders, who say the changes could target them unfairly and could bankrupt church organizations.”<sup>223</sup>

As an alternative to eliminating or extending statutes of limitations for sex crimes against children, some states have passed “window” statutes, which create brief periods during which victims can bring claims against child sex abusers when their causes of action have otherwise expired.<sup>224</sup> These statutes have typically succeeded in encouraging victims of child sex abuse to come forward. For example, approximately 1150 claims were filed during a one-year window in 2003 in California, and approximately 1175 claims were filed during a two-year window from 2007–2009 in Delaware.<sup>225</sup> The relative success of reopening statutes of limitations for designated periods demonstrates that giving child sex abuse victims an opportunity to come forward later in life, either by extending or eliminating the statute of limitations, will ensure greater accountability for culpable supervisory priests and direct abusers of minors.

#### *B. Amend Child-Endangerment Statutes Based on the Model Penal Code*

Second, legislatures can choose to amend child-endangerment statutes to encompass the conduct of supervisory priests and others similarly situated. Pennsylvania expanded the scope of its statute in 2006 to include “a person that employs or supervises” a parent, guardian or other person supervising the welfare of a child.<sup>226</sup> The

222. MARCI A. HAMILTON, CARDOZO LAW JACOB BURNS INST. FOR ADVANCED LEGAL STUDIES, SUMMARY OF STATUTES OF LIMITATIONS REFORM ACROSS THE UNITED STATES 5–7 (2016), <http://sol-reform.com/snapshot.pdf> [<https://perma.cc/QF9R-EXB9>].

223. Brian Mann, *Catholic Church Groups Fight Bills to Revive Old Sex Abuse Cases*, NPR (Aug. 24, 2016, 4:29 PM), <http://www.npr.org/2016/08/24/484995344/catholic-church-groups-fight-bills-to-revive-old-sex-abuse-cases> [<https://perma.cc/KZ57-HHAR>].

224. Hamilton, *supra* note 64, at 433.

225. MARCI A. HAMILTON, CARDOZO LAW JACOB BURNS INST. FOR ADVANCED LEGAL STUDIES, THE RELATIVE SUCCESS OF SOL WINDOW AND REVIVAL STATUTES STATE-BY-STATE 1–3 (2016), [http://sol-reform.com/News/wp-content/uploads/2013/08/RelativeSuccess\\_5\\_16\\_16.pdf](http://sol-reform.com/News/wp-content/uploads/2013/08/RelativeSuccess_5_16_16.pdf) [<https://perma.cc/LM3F-T6K2>].

226. Act of Nov. 29, 2006, No. 179, 2006 Pa. Laws 1581 (codified as amended at 18 PA. STAT. AND CONS. STAT. ANN. § 4304(a) (West 2007)).

amendment also clarified that “the term ‘person supervising the welfare of a child’ means a person other than a parent or guardian that provides care, education, training or control of a child.”<sup>227</sup> But it is unclear whether that amendment now includes the conduct of supervisory priests because the statute still requires that the individual violate “a duty of care, protection or support.”<sup>228</sup> The determinative issue in *Lynn* was whether supervisory priests could be said to be “supervising” children, not whether the defendant had a duty to them.<sup>229</sup> The 2006 amendment did not say anything about whether those newly included individuals had a duty of care, protection, or support for the child.<sup>230</sup> It would make sense to read the statute as implying that the supervisors of those who care for the welfare of a child have a duty to the child, but without relevant legislative history or court interpretations of the amended statute, it is unclear whether supervisors have such a duty. Therefore, in amending child-endangerment statutes to include supervisory priests within their scope, states should explicitly indicate that a duty of care to the minor is imposed on individuals who supervise employees who directly care for the minor.

C. *Enact Statutes that Prohibit the Reckless Creation of or Failure to Alleviate a Substantial Risk of Child Sex Abuse*

Another way to criminalize future conduct of supervisory priests is to enact an entirely different statute that criminalizes the reckless creation of a substantial risk of child sex abuse, and the reckless failure to alleviate that risk when there is a duty to do so.<sup>231</sup> This type of statute was recommended by the Westchester County grand jury<sup>232</sup> and the 2003 Philadelphia grand jury,<sup>233</sup> and was enacted by the Massachusetts legislature in 2002.<sup>234</sup> In responding to sexual abuse allegations against

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227. *Id.*

228. 18 PA. STAT. AND CONS. STAT. ANN. § 4304(a) (West 2015).

229. For further discussion of the Pennsylvania Supreme Court’s rationale in reinstating *Msg.* *Lynn*’s conviction, see *supra* notes 201–04 and accompanying text.

230. 2006 Pa. Laws 1581.

231. *Cf.* Russell, *supra* note 64, at 911–14 (analyzing reckless-endangerment and failure-to-act statutes as potential avenues of prosecution for supervisory priests and churches, and proposing amendments to make those statutes apply more directly to them).

232. See 2002 WESTCHESTER NY GJ REPORT, *supra* note 43, at 13 (recommending that New York enact a statute that would criminalize “the reckless supervision by employers of employees known to have harmed children”).

233. 2003 PHILADELPHIA GJ REPORT, *supra* note 10, at 17.

234. Belcher-Timme, *supra* note 154, at 252.

the Church, the Massachusetts state legislature passed a new statute that reads:

Whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act shall be punished by imprisonment . . . for not more than 2 ½ years.

For the purposes of this section, such wanton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.<sup>235</sup>

This statute criminalizes the reckless creation of a substantial risk of child sex abuse, and the reckless failure to alleviate that risk when there is a duty to do so. In comparison with child-endangerment statutes based on the MPC, this statute 1) broadens the type of individuals covered under the statute by omitting references to parents or guardians, 2) lowers the mens rea, 3) removes the supervision requirement, and 4) removes the “care, protection, or support” qualifiers to the statutory duty.<sup>236</sup>

First, instead of limiting the scope of the statute to a parent, guardian, or other person similarly situated,<sup>237</sup> the Massachusetts statute covers anybody who engages in the actions listed in the statute.<sup>238</sup> Similar to what the New Hampshire attorney general believed about the scope of his state’s child-endangerment statute before the *Yates* decision,<sup>239</sup> the Massachusetts statute explicitly covers “whoever,” leaving no mistake about the potential scope of the

235. MASS. GEN. LAWS ANN. ch. 265, § 13L (West 2015) (emphasis added).

236. Compare *id.* (covering “[w]hoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child”), with MODEL PENAL CODE § 230.4 (AM. LAW INST., Official Draft and Revised Comments 1980) (covering “[a] parent, guardian, or other person supervising the welfare of a child under 18 . . . [who] knowingly endangers the child’s welfare by violating a duty of care, protection or support”).

237. MODEL PENAL CODE § 230.4.

238. MASS. GEN. LAWS ANN. CH. 265, § 13L.

239. For further discussion of the New Hampshire attorney general’s basis for the nonprosecution agreement with the Diocese of Manchester, see *supra* notes 180–83 and accompanying text.

statute.<sup>240</sup> The breadth of the “whoever” language in the Massachusetts statute includes individuals such as supervisory priests or others in similar positions.

Second, the Massachusetts statute lowers the mens rea requirement to recklessness from knowledge, as required by the MPC child-endangerment statute and statutes based on it. The supervisory priests who have been investigated or prosecuted thus far usually knew subordinate priests were committing abuse, and requiring knowledge under this statute would still likely capture their conduct.<sup>241</sup> Nevertheless, supervisory priests should be exposed to criminal liability when they recklessly disregard a substantial and unjustifiable risk that child sex abuse will occur because “it isn’t hard for the people at the top – the people with real power, who should have real responsibility – to close their eyes to danger, enabling them to claim that they lacked ‘knowledge.’”<sup>242</sup> Hopefully, the lower mens rea requirement under the Massachusetts statute will incentivize supervisory priests to more actively protect children than if they could only be held liable for having knowledge of the risk of abuse.

Next, the Massachusetts statute removes any consideration of whether the person directly or indirectly supervised the abused child by excluding any mention of supervision from the statute.<sup>243</sup> The statute does not limit liability to those who supervise children, or to those who supervise those who supervise children, but extends it to individuals who either create a substantial risk of child sex abuse or fail to alleviate

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240. See MASS. GEN. LAWS ANN. § 13L. In finding that the scope of the New Hampshire child-endangerment statute was not greater than that of the MPC statute, the court in *Yates* supported its conclusion by noting that the legislature changed the actors referenced because it sought to eliminate redundancy in statutes, and the New Hampshire statute retained the MPC language related to a duty of “care, protection, or support.” For further discussion, see *supra* notes 180–83 and accompanying text. Unlike the New Hampshire statute, the Massachusetts statute does not retain the MPC language related to a duty of “care, protection, or support.” Compare N.H. REV. STAT. ANN. § 639:3, I (LexisNexis 2015) (including only “person[s] . . . purposely violating a duty of care, protection or support to [a] child), with MASS. GEN. LAWS ANN. § 13L (containing no language addressing an individual’s duties).

241. For further discussion on what supervisory priests knew about child sex abuse committed by lower-ranking priests, see *supra* notes 43, 50–53 and accompanying text.

242. 2005 PHILADELPHIA GJ REPORT, *supra* note 14, at 73 (recommending, based on its investigation of the Philadelphia Archdiocese, that supervisory priests be held to a recklessness standard under child endangerment).

243. See MASS. GEN. LAWS ANN. § 13L (lacking any mention of supervision in the statute). Child-endangerment statutes based on the MPC, on the other hand, include the requirement that the individual be responsible for “supervising the welfare” of a child. MODEL PENAL CODE § 230.4 (AM. LAW INST., Official Draft and Revised Comments 1980).

one when there is a duty to do so.<sup>244</sup> Thus, individuals like supervisory priests, who often did not directly supervise children, would be covered by the Massachusetts statute.

Finally, the Massachusetts statute only criminalizes recklessly failing to alleviate a substantial risk of child sex abuse when the person had a duty to act.<sup>245</sup> The duty question exists both in the Massachusetts statute and the MPC child-endangerment statute. Neither state that used child-endangerment statutes to prosecute supervisory priests and the Church seriously analyzed the duty requirement in the statute: New Hampshire assumed that the supervisory priests had a duty to children,<sup>246</sup> and the Pennsylvania courts never reached a duty determination because they decided the issue on the “direct supervision” element.<sup>247</sup> But the MPC child-endangerment statute and statutes based on it likely refer to a different duty than the one in the Massachusetts statute. First, as noted above, the MPC child-endangerment statute applies to a “parent, guardian, or other person . . . [who] violat[es] a duty of care, protection or support.”<sup>248</sup> The individuals to whom the duty could apply and the type of duty that applies are both narrowed in the MPC child-endangerment statute.<sup>249</sup>

In contrast, the Massachusetts statute applies to anyone and refers to a nonspecific duty.<sup>250</sup> Supervisory priests, by virtue of their ability to control the employment, assignment, and discipline of offending priests, could be said to have breached a duty to protect minor parishioners when they had knowledge of credible child sex abuse allegations against an offending priest and failed to alleviate the risk of harm that priest posed to children. Alternatively, continuing to employ a priest against whom there were credible allegations of child sex abuse or transferring the priest to another parish without disclosing those reports to the new parish may be considered creating a substantial risk of child sex abuse. In light of supervisory priests’ authority over the

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244. MASS. GEN. LAWS ANN., ch. 265, § 13L.

245. *Id.*

246. For further discussion of this interpretation, see *supra* notes 181–85 and accompanying text.

247. See *Commonwealth v. Lynn*, 114 A.3d 796, 823 (Pa. 2015) (noting that the court did not think it needed to engage in an analysis of whether the supervisory priest owed a duty of care to the abused children); see also *supra* notes 201–04 and accompanying text.

248. MODEL PENAL CODE § 230.4.

249. For further analysis of the MPC state, see *supra* notes 180–83, 239–40 and accompanying text.

250. MASS. GEN. LAWS ANN. § 13L.

abusive priests and their responsibility to investigate allegations of child sex abuse, supervisory priests would likely have a duty to minor parishioners under the Massachusetts statute.<sup>251</sup>

Enacting statutes similar to the Massachusetts statute is likely the best way to hold supervisory priests liable for their egregious conduct toward children. In addition to legally encompassing supervisory priests and their conduct, the statute punishes supervisory priests with up to two-and-a-half years of imprisonment. Because the statute specifically targets individuals who create or fail to alleviate a substantial risk of child sex abuse—a close fit with supervisory priests' wrongful conduct—the blameworthiness associated with the Massachusetts statute is commensurate with the moral culpability of supervisory priests.

#### *D. Continue Prosecutions Under Legally Sufficient Statutes*

Finally, if states do not enact statutes similar to Massachusetts's statute, prosecutors can simply continue prosecuting individuals under obstruction-of-justice statutes, delinquency statutes, and mandatory-reporting statutes that include clergy as mandatory reporters. Although those statutes fail to reflect the moral culpability of supervisory priests, some accountability is better than none at all—especially if the threat of prosecution leads to institutional reforms and more protections for children.

### CONCLUSION

Supervisory priests played an active role in concealing reports of sexual abuse by offending priests and knowingly created substantial risks of sexual abuse to children. The drive to hold supervisory priests accountable led prosecutors to turn to statutes that either did not match the moral culpability of supervisory priests or did not legally encompass their misconduct. Child endangerment matches the moral culpability of supervisory priests' misconduct, but child-endangerment statutes modeled on the MPC do not cover supervisory priests or their acts. Though supervisory priests chose to ignore and suppress reports of child sex abuse by lower-ranking priests, prosecutors may not shoehorn misconduct into statutes that do not legally cover it. Instead of breaching the supervisory priests' constitutionally guaranteed notice by charging them under MPC-based child-endangerment statutes,

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251. See *supra* notes 6–10, 43, 50–53 and accompanying text.



prosecutors would be better off encouraging state legislatures to pass statutes that both legally cover the conduct of supervisory priests and adequately reflect their moral culpability. In the absence of amendments or newly enacted statutes that meet these criteria, prosecutors should settle for statutes that represent a lesser degree of moral culpability, such as contributing to the delinquency of a minor or mandatory-reporter statutes. The protection of children from future institutional concealment and enablement of sexual abuse is paramount, and enacting statutes that hold accountable supervisory priests and others in like positions will go a long way to deterring similar conduct and ensuring that nothing like the Church's child sex abuse crisis happens again.