

Section IV

Legal Analysis and Recommendations

A. Legal Analysis

1. *Prosecution of Individual Priests*

But for the windfall provided by Pennsylvania’s statutes of limitation for serious sexual offenses, the priests who sexually and psychologically abused Archdiocesan children could be prosecuted for the following serious crimes: **rape, statutory sexual assault, involuntary deviate sexual intercourse, indecent assault, endangering welfare of children, corruption of minors.**

Unfortunately, the law currently stands in the way of justice for the victims of childhood sexual abuse. Although we have a wealth of evidence against many of the abusers – including their own admissions (and, in many cases, the Archdiocesan Review Board’s own determination that the charges against the priest are “credible”) – we cannot indict any priest who abused a child for any of the crimes of which we are currently aware, because the relevant statutes of limitation have expired for every single act of abuse known to us.¹ Offending priests are, therefore, immune from prosecution for all the crimes detailed in this report – all the anal, oral and vaginal rapes, all the fondlings,

¹ The sole exception is Fr. James Behan, who, by leaving Philadelphia shortly after molesting his victim and residing elsewhere ever since, triggered a tolling provision of the statute of limitations that permitted his prosecution.

all the caressings, and all the unwanted and inappropriate touchings and undressings they perpetrated upon Archdiocesan children. Nothing changes this result – not the severity of the sexual assault, the degree of force or psychological coercion, or the age of the victim at the time of the abuse. Under present Pennsylvania law, the single, dispositive fact is the date of the final act of abuse, and we do not know of any act of priest child sexual abuse recent enough to permit prosecution in the Commonwealth under the current statutes of limitation.

Pennsylvania's statutes of limitation for sexual crimes have been revised numerous times since 1982. The most recent amendment, as of 2002, requires child sexual abuse cases to be initiated by the date of the child victim's 30th birthday. The experts have told us that this statute is still too short. We ourselves have seen that many victims do not come forward until deep into their thirties, forties and even later. Moreover, even the 2002 amendment cannot be applied to the cases we have seen, because changes that lengthen a limitations period cannot be used to revive criminal prosecutions that were already barred under the original deadline – as the United States Supreme Court has recently made clear. *See Stogner v. California*, 539 U.S. 607 (2003).

Thus, in order to determine whether prosecutable cases existed, it was necessary to begin by examining the law as it stood when particular incidents of abuse were occurring. This turned out to be a complicated process. Our review showed that, until July 11, 1982, the statute of limitations barred any prosecution not commenced within two years of the date of the crime for all sexual crimes other than involuntary deviate sexual intercourse, which had a five-year statute of limitations. Beginning on July 12, 1982, rape and incest became five-year statute of limitations crimes. Then, from

September 8, 1985, through February 17, 1991, an amendment to the statute provided the statute was tolled (did not run) prior to the child's eighteenth birthday for crimes involving injury to the child caused by a "person responsible for the child's welfare."

From February 18, 1991, through May 29, 1995, the statute of limitations barred any prosecution not commenced within five years of the child victim's eighteenth birthday for involuntary deviate sexual intercourse, incest, and rape, and within two years for statutory rape, aggravated indecent assault, indecent assault, indecent exposure, endangering welfare of children, corruption of minors, and sexual abuse of children. From May 30, 1995, through August 26, 2002, the statute of limitations became five years for the crimes of statutory rape, sexual assault, and aggravated indecent assault. From August 27, 2002, through the present, the statute of limitations bars any prosecution not commenced within twelve years after the child victim's eighteenth birthday for involuntary deviate sexual intercourse, rape, statutory sexual assault, sexual assault, aggravated indecent assault, incest, and sexual abuse of children. For all other sexual crimes, the limitations period is two years after the child victim's eighteenth birthday.

As mentioned, none of these numerous extensions of the statute of limitations can be applied retroactively to crimes that were already immunized from prosecution; we are stuck with the statutes of limitations that were in effect at the time of the abuse. As a result:

- 1) No priest can be prosecuted for sexually abusing a child prior to July 12, 1982. Assuming a July 11, 1982 act of involuntary deviate sexual intercourse (the offense with the longest statute of limitation at the time), prosecution would have had to commence by

July 10, 1987. Because no reports had been made to law enforcement by that date, the statute of limitation operates as an absolute bar to prosecution for any such offense.

2) No priest can be prosecuted for sexually abusing a child prior to September 7, 1985. As reflected elsewhere in this Report, we have heard evidence of numerous instances of abuse before that date. Assuming a September 6, 1985 crime with a five-year statute of limitations, prosecution would have had to be commenced by September 5, 1990. Because the abuse was still successfully hidden at that point, the statute of limitation operates as an absolute bar to prosecution.

3) No priest can currently be prosecuted for sexually abusing a child prior to February 17, 1991, based on the evidence now before us, although such a prosecution is not impossible. The amended version of the statute of limitations that became effective on September 8, 1985 tolls (stops the running of) the statute at all times prior to the child victim's eighteenth birthday where the abuse involves injury to the child and is inflicted by "a person responsible for the child's welfare." Therefore, if, for example, a seven-year-old had been the victim of rape by a priest before February 17, 1991, the statute of limitations would not bar that prosecution, provided that the court found that the priest was a "person responsible for the child's welfare" under the statute and that the crime "involved injury to the person of the child." The seven-year-old would not have turned 18 until 2002 and so the five-year statute of limitations would allow the commencement of prosecution until 2007.

By contrast, if a priest had subjected a thirteen-year-old victim to the same crime in 1991, prosecution would be barred by the statute of limitations. Even assuming the priest were found to be responsible for child's welfare and the crime were found to have

caused injury to the person of the child, the statute of limitations would have begun to run in 1996 when the child turned 18 and the five-year statute would have run fully in 2001.

4) Similarly, no priest can currently be prosecuted for sexually abusing a child prior to May 29, 1995, based on the evidence now before us, although such a prosecution is not impossible. The amended version of the statute of limitations that became effective on February 18, 1991 tolls the statute at all times prior to the child victim's eighteenth birthday regardless of the abuser. It is quite likely, in our view, that children were sexually abused during that time period. The tolling provision in effect at that point would have prevented the statute of limitations from running at any time prior to the child victim's eighteenth birthday, and could therefore permit a timely prosecution. For example, if someone who is twenty-three years old today was abused in May 1995, the perpetrator could be prosecuted. However, we currently know of no victim who fits those criteria. Ironically, the more recent the abuse, the less likely it is that the child victim would be ready to report the crime.

5) The same rules apply to the prosecution of priests who sexually abused children prior to August 26, 2002.

6) Finally, prosecution of a priest who abused a child after August 27, 2002 could also go forward. But we have no evidence from any such recent victim at this time.

Undoubtedly, this analysis must seem capricious and hypertechnical to the average citizen; that is exactly how it seemed to us. And that is why we have concluded that the prosecution of clergy sexual abuse is being stymied by arbitrary and mechanical procedural rules, not by any overriding principle of justice or fairness. Recent efforts by our legislature to extend the statute of limitations are commendable. But in the end, as

we formally recommend later in this section, there should be no statute of limitations for childhood sexual abuse. The law must be changed.

2. *Prosecution of Archdiocesan Officials*

Existing law in Pennsylvania is equally inadequate to permit us to charge the leaders of the Archdiocese. We have already reviewed the extensive evidence that Archdiocese officials behaved disgracefully in response to the crisis of priest sexual abuse of children. Cardinal Bevilacqua, Cardinal Krol, and their top aides all abdicated their duty to protect children. They concealed priests' sexual abuses instead of exposing them. We considered three categories of possible crimes arising from these actions. Unfortunately, none provide prosecutable offenses against the Archdiocese officials.

Conspiracy/Accomplice Liability for Sexual Abuse of Children

There is no doubt that the Cardinals and their top aides knew that Philadelphia priests were sexually abusing children. There is no doubt that these officials engaged in a continuous, concerted campaign of cover-up over the priests' sexual offenses. To establish conspiracy or accomplice liability for those crimes, however, the law requires more than knowledge or concealment. A conspirator or accomplice must have the specific intent required for the underlying offense. That is, a conspirator or accomplice to a crime like rape, for example, must share the goal that a rape occur, even if he does not participate in the physical act.

While the actions of the Archdiocese leaders clearly facilitated rapes and other sexual offenses, and ensured that more would occur, the evidence before us did not demonstrate that the leaders acted with the specific goal of causing additional sexual

violations. Instead their goal was to protect against “scandal” at any cost, without the slightest concern for the consequences to children. Let us caution: we do not mean to imply here that the motives of the Archdiocese officials were less blameworthy than those of abusive priests. Indeed, judged on a moral scale, the opposite conclusion might be reached; and we trust that someday there will be such judgment. Under Pennsylvania law, however, the actions of the Cardinals and their aides do not expose them to conspiracy or accomplice liability for the sexual assaults committed by individual priests.

Direct Liability for Endangering Welfare of Children

Even if the Archdiocese leaders did not display a specific intent to cause sexual assaults, they clearly knew that their actions were endangering children. That conduct in itself potentially gave rise to criminal liability for a number of offenses. Ultimately, however, we concluded that weaknesses in the law – especially the statute of limitations – preclude prosecution on this basis.

In the common sense of the term, the actions of the church hierarchy clearly constituted endangerment of the welfare of children. The Archdiocese officials permitted abusive priests to maintain their special access to young victims, and even arranged new venues for the abusers when the heat became too much in their old parishes. As defined under the law, however, the offense of endangering welfare of children is too narrow to support a successful prosecution of the decision-makers who were running the Archdiocese. The statute confines its coverage to parents, guardians, or other persons “supervising the welfare of a child.” High-level Archdiocese officials, however, were far removed from any direct contact with children. Perhaps that remove made it easier for the officials to remain so apathetic about the sexual assaults that resulted from their actions. But it should not insulate them from criminal liability. We make appropriate recommendations to close this legal ambiguity in Part B. of this section. We also looked at related charges. Recklessly endangering another person makes it a crime to engage in reckless conduct that places the victim in danger of death or “serious bodily injury.” Plainly, the Archdiocese officials recklessly placed children in danger of sexual abuse. As defined by statute, however, the “serious bodily injury” required for this offense is legally distinct from sexual abuse.

The crime of corruption of minors punishes those who by any act corrupt or tend to corrupt the morals of a minor. This offense, however, presents the same attenuation problem arising with endangering welfare of children. The Cardinals and high aides in their quiet corridors of power were quite distant from the boys and girls affected by the cover-up. The offense of corruption of minors does not readily reach such indirect conduct, however foreseeable its impact.

In any case, there is a more immediate impediment to charges based on crimes in this category: the statute of limitations. The available statute for these offenses is even shorter than that for the sex crimes addressed earlier. Because of the success of the cover-up, and because of the reluctance of more recent victims to come forward yet, the conduct we know about is too old to support a prosecution for endangering/corrupting offenses.

Crimes Against the Administration of Justice

The handling of priest sexual abuse by Archdiocese officials was designed to do more than hide the abuse from parishioners: the hope was to hide it from police as well. The sexual assaults clearly constituted crimes; at least one priest employed by the diocese had been prosecuted; and surely the Church did not want law enforcement officers carting dozens more away. Accordingly, we considered the class of offenses involving obstruction of justice. Unfortunately, we again found that legal definitions and statute of limitations problems would prevent prosecution.

The crime of obstructing administration of law requires that the obstruction constitute force, violence, physical interference, breach of official duty, or other unlawful act. Here we did not have evidence of actual force or violence or similar unlawful acts,

and the “breach of official duty” provision applies only to public officials, not private parties such as the church leaders.

We also considered the crime of hindering apprehension or prosecution. This offense, however, primarily applies to harboring or concealing a fugitive for whom the police are looking. Because sexual assaults by priests almost never came to the attention of law enforcement, there was no occasion for such hindering.

The story is similar for the crime of tampering with or fabricating physical evidence. Tampering requires the belief that an official proceeding or investigation is pending or about to be instituted. Archdiocese officials knew, however, that reports of priest sexual abuse had been contained, and that there were no official proceedings to tamper with.

Another related offense is intimidation of witnesses or victims. Certainly Archdiocese leaders did not want witnesses or victims to complain to law enforcement authorities. Generally, however, church officials were able to employ more indirect means of achieving this goal. Even without actual intimidation, abusive priests were almost never reported to police – because they were spirited away when suspicions arose, because they enjoyed a special status as emissaries of God, and because their victims in any case were young and scared.

Thus Archdiocese officials typically did not have to commit obstruction offenses in order to effect a cover-up – but even if they had, they would have been protected, as with other possible crimes, by the passage of time. The statute of limitations for these offenses during the 1990’s and before was only two years. By the time the true scope of the scandal came to light, the church leaders were already immune.

There is one final offense in this category that calls for special comment – the failure to make a mandatory child abuse report under the Child Protective Services Law. The law requires reporting from anyone who, in the course of employment, comes into contact with children who have been abused. Archdiocese officials took the position that they were not bound by this requirement, even when they heard about abuse, because they themselves were not “in contact” with the children. The law should not allow such a troubling evasion of the reporting requirement. Nor is the current statute of limitations adequate for this important provision. We propose fixes below.

3. *Prosecution of the Archdiocese – an “Unincorporated Association”*

Even though individual officials escape prosecution, we also considered whether the Archdiocese itself could be prosecuted. After all, the policy of protecting abusive priests over abused children transcended the tenure of any particular official. While a committed leader could certainly have changed that culture, we felt that the Archdiocese as a whole should be held responsible for the decades of sexual abuse.

Unfortunately, that too proved impossible under the law. The Philadelphia Archdiocese has organized itself as a legal entity in a way that leaves Pennsylvania law incapable of holding the Archdiocese criminally accountable. Although the Archdiocese of Philadelphia functions in a corporate fashion, it is technically an “unincorporated association,” and therefore is treated more favorably under Pennsylvania criminal law than a corporation.

Corporations can be prosecuted if a crime was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high manager.

Unincorporated associations, on the other hand, can be prosecuted only in very limited circumstances not applicable here – for instance, where a specific criminal offense expressly provides for the association’s liability. The Archdiocese would be subject to prosecution under the corporate standard, because it clearly tolerated sexual assaults and consciously disregarded a substantial, unjustifiable and unreasonable risk that additional abuse would occur. But it avoids prosecution under the unincorporated standard, because none of the relevant offenses expressly addresses liability for mere associations.

Under the vagaries of current Pennsylvania law, therefore, this final theory of prosecution is also unavailable.

B. Recommendations of the Grand Jury

1. *Abolish the Statute of Limitations for Sexual Offenses Against Children.*

We recommend that the statute of limitations be eliminated for the following crimes committed against children: 1) Rape, 18 Pa. C.S.A. § 3121; 2) Statutory Sexual Assault, 18 Pa. C.S.A. § 3122; 3) Involuntary Deviate Sexual Intercourse, 18 Pa. C.S.A. § 3123; 4) Sexual Assault, 18 Pa. C.S.A. § 3124.1; 5) Aggravated Indecent Assault, 18 Pa. C.S.A. § 3125; 6) Indecent Assault, 18 Pa. C.S.A. § 3126 (where the offense constitutes a course of conduct); 7) Sexual Exploitation of Children, 18 Pa. C.S.A. § 6320; 8) Endangering Welfare of Children, 18 Pa. C.S.A. § 4304; and 9) Corruption of Minors, 18 Pa. C.S.A. § 6301. Endangering Welfare of Children and Corruption of Minors also punish non-sexual conduct. We would eliminate the statute of limitations for these

crimes only as they relate to the sexual abuse of children or exposure of children to potential sexual abuse.

Powerful psychological forces often prevent child sexual abuse victims from reporting the abuse until well into adulthood, if at all. Many victims feel that their abuse is their fault; many feel that they should not get their abusers into trouble; many are ashamed of their abuse; and many simply repress for decades any memories of the abuse. The harm that sexual abusers inflict on their child victims distinguishes crimes of sexual abuse of children from other crimes for which it is fair to impose a statute of limitations.

To maintain a statute of limitations for crimes involving the sexual abuse of children would be to reward abusers who choose children, the most defenseless victims. Because the harm inflicted by child sexual abuse is so deep and child victims are so vulnerable, the existence of any statute of limitations, however long, virtually ensures that some crimes will not be timely reported and too many abusers will never have to pay for their crimes. It is time to stop giving a pass to child abusers who count on the statute of limitations and the fears and immaturity of their victims to avoid criminal liability.

No constitutional provision or other law would prevent Pennsylvania from eliminating the statute of limitations for sexual crimes committed against children. Pennsylvania has no statute of limitations for other serious crimes: murder, voluntary manslaughter, conspiracy to commit murder or solicitation to commit murder if a murder results from the conspiracy or solicitation, any felony perpetrated in connection with a murder of the first or second degree, and fatal vehicular accidents where the accused is the driver. There is no reason the Legislature could not determine that any or all crimes

of child sexual abuse are serious enough to merit the elimination of the statute of limitations.

Moreover, several other states have statutes of limitations that allow child sexual abuse prosecutions regardless of when the abuse occurred. Some states, such as South Carolina and Wyoming, do not have criminal statutes of limitations at all. Some states, such as Kentucky and West Virginia, have no statute of limitations for felony offenses. Some states have specifically enacted legislation abolishing statutes of limitations for some or all sexual crimes committed against children. Thus, Alabama has no statute of limitation for any sex offense involving a victim younger than sixteen; Maine has no statute of limitations for incest, unlawful sexual contact, sexual abuse of a minor, rape or gross sexual assault committed against children younger than sixteen; Alaska has no statute of limitations for felony sexual abuse of a minor; and Rhode Island has no statute of limitations for rape, first degree sexual assault, or first or second degree child molestation sexual assault.

Even a former official of the Archdiocese has recognized the need for this proposal. Edward Cullen, who was Cardinal Bevilacqua's Vicar of Administration, and who has since himself been elevated to bishop, was asked about the issue during his grand jury testimony. "I think it would be good for society if they had no statute of limitations," acknowledged Bishop Cullen. "I really do. Yes, I do."

It is distressing that a technical, procedural, and somewhat arbitrary rule, a statute of limitations, is the primary barrier precluding the prosecution of priests who sexually abused minors and those who covered up the crimes and allowed them to occur. Whatever justifications exist for statutes of limitation, those justifications are clearly

outweighed where the sexual abuse of children is concerned. Society's interest and responsibility in protecting its children is paramount.

2. *Expand the offense of endangering welfare of children.*

In 1996, the Legislature amended the crime of endangering welfare of children to provide that those who commit endangering as a course of conduct are guilty of a felony of the third degree. We recommend, if the statute is unclear, that a clause be added providing that a person commits endangering as a course of conduct where he endangers at least two children once or one child twice. We further recommend that a person "supervising the welfare of a child" be defined to include: 1) a person who has direct contact with a child or children, *and* 2) a person who employs or otherwise supervises a person who has direct contact with a child or children.

The proposed amendments are designed to address two potential problems with the existing statute. First, we believe that, where a supervisor places a child in continuing contact with a person known to represent a risk to children, that placement constitutes multiple acts and, therefore, endangerment as a course of conduct. Second, we believe it will be helpful to 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. An Archdiocesan leader, daycare supervisor or Boy Scout official can endanger the welfare of a child without having direct day-to-day contact with children.

We also recommend one further expansion of the offense of endangering welfare of children. Currently, the statute limits liability to those who "knowingly" place a child in danger. As our investigation demonstrates, however, 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.” We believe that, given the vulnerability of children, reckless disregard should be sufficient to create exposure to criminal liability.

3. *Increase the penalty for indecent assault.*

We recommend amendment of the indecent assault statute, 18 Pa. C.S.A. § 3126, to provide that, if the indecent contact with the victim is a course of conduct, it will be graded as a felony of the second degree where the victim is less than 13 years of age, and a felony of the third degree where the victim is older than 13. A spur-of-the-moment grab is obviously a very different crime than a long-term effort to exploit a relationship for unwelcome physical contact. The grading of the offense should reflect this significant difference.

4. *Tighten the Child Protective Services Law reporting requirement.*

We found that Archdiocesan officials used loopholes in the law to avoid reporting abuse to law enforcement authorities, and we want those loopholes closed.

The Pennsylvania Child Protective Services Law currently requires professionals, including clergy, to report abuse when, in the course of their employment, occupation or practice of their profession, they come into contact with children whom they have reasonable cause to suspect are abused. The law arguably applies, however, only where the child personally comes before the reporter. The statute should be amended to clarify that a mandatory reporter must report an allegation of abuse to authorities regardless of whether the source of the report is the child himself or herself or anyone else.

As we have learned from this investigation, although the Archdiocese and its employees have been mandatory reporters since at least 1996, Archdiocese officials read the law as narrowly as they could, so that if they did not have personal contact with an

abused child, they felt no obligation to report the abuse – no matter how accurate the source of the information. Our proposed revision would answer this effort to enfeeble the statute: the employer must report the abuse whether he learns about it from the child or someone else having knowledge.

We also recommend another change affecting the reporting requirement: extend the applicable statute of limitation. Currently, only a two-year window applies, whether the failure to report is a one-time oversight or, as it was here, an ongoing policy. The reporting statute already appropriately raises the grading of the offense where there is a pattern of failing to report. We believe that, where such a pattern exists, the statute of limitations should be increased from two years to five years. An institution that steadfastly fails to report child abuse should not be immune from prosecution if it successfully manages to hide its conduct for 24 months.

5. *Amend the Child Protective Services Law to require background checks in non-school organizations.*

A separate provision of the Child Protective Services law currently requires background checks for applicants for employment in schools. 23 Pa. C.S.A. § 6355. Non-school employers are not obligated to perform such checks, even if their employees and volunteers have extensive contact with children. We would amend the statute to require all employers and organizations to perform background checks on all of their employees or volunteers who have regular contact with children.

This proposed amendment derives from our discovery that no law requires the Archdiocese to conduct background checks of church employees who have contact with children outside of an official school setting. Clergy are entrusted with children in many

roles – for example, as supervisors of altar servers, as employers of children in rectory jobs, as confessors, as CYO supervisors, and as children’s coaches. We believe that an employer who places a person in substantial contact with children, whether as a teacher or in any other activity, should have to perform a background check of that employee or volunteer.

6. *Hold Unincorporated Associations to the Same Standard as Corporations for Crimes Concerning the Sexual Abuse of Children.*

Currently, legal corporations can be criminally culpable if a statute so provides or if “the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.” 18 Pa. C.S.A. § 307. Certainly the decades-long cover-up of priest sexual abuse was authorized and performed by high managerial agents acting on behalf of the Philadelphia Archdiocese within the scope of their employment. But the Archdiocese is not technically a corporation; it is instead considered to be an “unincorporated association.” Unincorporated associations like the Archdiocese can be held criminally culpable only if a statute expressly provides for the association’s culpability.

We do not believe that an entity’s decision to select one corporate form instead of another should determine whether it can be criminally prosecuted for its actions or inactions resulting in the sexual abuse of children. Other jurisdictions do not maintain such a distinction based on corporate status. We would amend 18 Pa. C.S.A. § 307 to provide that, where a corporation would be guilty of an offense relating to the sexual abuse of children, an unincorporated association committing the same act would also be criminally culpable.

7. *Enlarge or eliminate statutes of limitation on civil suits.*

As a grand jury, our function is of course limited to examination and application of criminal offenses. We recognize the reality, however, that civil liability may also provide a disincentive to the kind of systemic sexual abuse that occurred here. Indeed, Archdiocese officials never seemed to believe that clergymen could ever go to jail for abusing, or allowing the abuse of, children; but they did display an obvious fear that they would be sued for such conduct. For many victims of sexual abuse by priests, civil liability may be the only available means to seek recognition of their injuries and a measure of repose. Moreover, unlike statutes of limitation for criminal offenses, the time for bringing a civil suit can be lawfully extended or revived even after the original limitations period has expired.

Accordingly, we ask the legislature to consider lengthening or suspending civil statutes of limitation in cases of child sex abuse.