[*PG1061]PROSECUTING DIOCESES AND BISHOPS

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Abstract: Although the sexual abuse scandals in the Catholic Church and the financial scandals in corporate America have been unfolding side by side over the last few years, federal prosecutors have been more hesitant in prosecuting bishops and dioceses than corporate executives and companies. A recent agreement between the Diocese of Manchester and the New Hampshire Attorney General, however, has the potential to change this. Bishops have contributed to their current predicament by failing to act more publicly as teachers and judges of Church doctrine and natural moral law; however, this Article argues that bishops and their dioceses are not proper targets for possible criminal indictment for the crimes of individual priests. Regardless of the very serious criminal and moral wrongs perpetrated by some priests, and the terrible spiritual, moral, and psychological damage to the victims, negligence in responding to these crimes does not constitute criminal conduct by a bishop or diocese.

The sexual abuse scandals in the Roman Catholic Church (the "Church") and the financial scandals in corporate America have been unfolding side by side over the last year and a half. Federal prosecutors were quick to indict both individual corporate executives and companies. As for the Church, state prosecutors have readily prosecuted priests, but have been more hesitant in prosecuting bishops and dioceses. A December 10, 2002 agreement between the Diocese of Manchester (New Hampshire) (the "Diocese") and the state's Attorney General, however, has the potential to change the landscape.1

In what amounts to a pre-indictment diversion-from-prosecution agreement, the Diocese conceded that the state had evidence that likely would convict the Diocese of child endangerment.2 In my view, although there was plenty of evidence against the priests who actually committed the abuse, the case against the Diocese makes out nothing more than a civil damage case. An impassioned jury might convict the [*PG1062] Diocese, but the legal basis for the criminal case is quite a stretch. Any conviction would not have been based on actual criminal culpability. Prosecutors in the Attorney General's office acknowledge using "novel" theories.3 Other dioceses and state prosecutors ought not view the New Hampshire case as any kind of compelling precedent.

Along with legitimate reporting about sexual misconduct by priests, there has been irresponsible reporting about religious leaders in ways that abuse the freedom of the press.4 But for the climate of public opinion created by such sensational reporting, I doubt the state prosecutors in New Hampshire would have been so bold as to threaten a criminal prosecution of the Diocese. Public scorn for bishops as a group, especially in the northeastern United States, has been as virulent as that directed at disgraced corporate executives. When public opinion weighs heavily against a targeted class of defendants, prosecutors can bend and stretch the law more easily before grand juries, judges, and juries. It clearly has been such a time for CEOs in corporate America and in the Church. This comparison does not endorse the view that bishops are CEOs. The Church teaches, of course, that bishops are "the successors of the Apostles"5 and that "individual *bishops* are the visible source and foundation of unity in their own particular Churches."6 The "first task" of bishops is "to preach the Gospel of God to all men."7 Nevertheless, from the perspective of those outside the Church, viewing bishops as CEOs is understandable.

Bishops "run" large (nonprofit) corporate entities. They act as administrators, builders of buildings, and fundraisers. With some notable exceptions, such as the late Cardinal John O'Connor of New York, individual bishops rarely challenge the secular culture by teaching about abortion, euthanasia, and other moral issues. Much like corporate CEOs, bishops engage the general community by promoting non-controversial projects such as the United Way.

In my view, bishops in the United States too often have failed to exercise their moral authority. In this, they are not alone. Beginning [*PG1063] with parents, those in authority in America have had, since the 1960s, a difficult task knowing how to exercise their responsibilities. Nevertheless, bishops have contributed to their current predicament by failing to act more publicly as teachers and judges of Church doctrine and natural moral law. That includes their handling of priests accused of sexual misconduct. By avoiding moral leadership, they should not have been surprised to be treated merely as corporate leaders. Indeed, in a conversation with the New Hampshire prosecutors, one of them compared their pursuit of bishop misconduct to the hypothetical managers' misconduct at a local Wal-Mart.8 Regardless of their failings and whether they are viewed as corporate executives or successors of the Apostles, however, bishops and their dioceses are not proper targets for possible criminal indictment for the crimes of individual priests.

I. Prosecuting Crimes or "Reforming" the Catholic Church?

Targeting bishops and dioceses for criminal indictment is not only unprecedented, but previously unthinkable and potentially explosive. As in New Hampshire, a choice to investigate a diocese or bishop for likely criminal indictment requires obtaining information from the priests who committed the sexual misconduct; but this means giving the real criminals some kind of grant of immunity.9 Prosecutors proceed against bishops and dioceses the same as they do in prosecuting CEOs and corporations. The decision to let off the "small fish" assumes a greater guilt with the "bigger fish." As with cases against business corporations, this "white collar" investigation proceeds on the basis of vicarious liability.10 That means, as argued by the New Hampshire Attorney General, that the diocese (like any corporation) can be guilty because its agent violated Church (or corporate) rules.11 Although there are separate church-state issues of great importance, the prosecution of bishops and dioceses raises some very basic principles of criminal law. In April of 2002, after the indictment of Arthur Andersen LLP in Houston, I published a piece in *The Wall Street Journal* criticizing the [*PG1064] practice of indicting business entities.12 The same week, a colleague published a piece in the *Houston Chronicle* calling for the indictment of the Church.13 Both scandals involve the issue of whether corporations or other enterprises are proper subjects for indictment. Possible indictments of a Catholic diocese, however, also have constitutional, political, and practical problems of an unprecedented nature. Unlike a business corporation, the Church does not owe its existence to a state and its incorporation laws. These concerns apparently do not bother my colleague and others, who see no problem with prosecuting the Church. It is curious, though, that my colleague, as far as I am aware, is the only self-described ACLU activist to publish an article calling for anyone's indictment.

Since April of 2002, what might have once seemed unthinkable came much closer to occurring. The December 10, 2002 agreement between the Diocese and New Hampshire's Attorney General avoided an indictment of the Diocese, but it set a terrible precedent of allowing state oversight of diocesan operations.14 The New Hampshire Attorney General's 154-page report detailing his allegations of criminality seemed, in part, designed to trigger prosecutions in other states. A special grand jury in Suffolk County, New York, did issue a 180-page report alleging misconduct in the handling of sexual abuse allegations against priests, but did not indict the Diocese of Rockville Centre.15 In Massachusetts, Attorney General Tom Reilly indicated that he would have prosecuted church leaders, including Cardinal Bernard [*PG1065]Law, if there were a criminal statute under which he could indict them.16

A. *Indicting "the Catholic Church"*

To indict "the Catholic Church," as suggested by my colleague, 1 could mean indicting any of several defendants: one or more dioceses, the Catholic people as a "corporate body," the U.S. Bishops' Conference, or even the Vatican, as well as one or more bishops, including the Pope. In terms of criminal law theory (as opposed to possible constitutional arguments), indicting any of these possible defendants has its precedents in the indictments of commercial corporations, non-incorporated organizations (for example, Arthur Andersen), and any group said to be a "criminal enterprise." Once one rejects the centuries-old common-law rule against indicting corporations, no other criminal-law principle prevents indictment of any of the above.17

Acceptance of the principle of vicarious criminal liability eliminates most limits on whom a prosecutor can indict. Indeed, but for sovereign immunity, the Pope or the Vatican might be indicted on the same theory that the prosecutor would apply to a diocese or bishop. Other than sovereign immunity, the limits on a prosecutor's ability to indict entities are only practical and political considerations. Political realities would likely prevent a prosecutor from indicting a congregation (or larger religious body that is not a corporation) as a criminal enterprise.

The common law prevented the indictment of corporations because they lack a soul and thus are incapable of forming a mens rea.18 The principle is apparently derived from the pronouncement of Pope Innocent IV that corporations could not be excommunicated because they lack a soul.19 The United States Supreme Court abandoned the common-law rule in 1909 in *New York Central & Hudson River Railroad Co. v. United States.*20 The Court did not offer much of a rationale. [*PG1066]Others, however, have made attempts to justify the indictment of corporations. There are two basic justifications. One takes the anthropomorphic approach of analogizing a corporation to a human person. Thus, the board of directors is compared to the intellect, and the management is compared to the will of a person. The approach assumes that it is important, even if fictionally, to impute a mens rea. This view coincides with the provisions of the Model Penal Code, which require that the actions be imputable to the board of directors or senior management.21 The other approach, recognizing that corporations are incapable of mens rea, candidly bases liability on tort principles of respondeat superior or vicarious liability. The justification is simply a supposed necessity. This view reflects federal cases, which do not require the endorsement by the board of directors or senior management.22

It is only necessary that an employee has acted for the benefit of the corporation. However justified, corporate criminal liability and the vicarious liability it imposes "is a substantial departure from the ordinary rule that a principal is not answerable criminally for the acts of his agent without the principal's authorization, consent or knowledge, and thus corporate criminal liability continues to be a matter of vigorous debate."23

Whether a defendant's mens rea is imputed or actual, the prosecutor must offer some proof as to the mental element required by the statute. In the case against the Diocese, the theory differs from the usual corporate indictment. When an employee of a business violates a particular criminal statute, an indictment against the corporation generally charges the same crime—on the theory that what the employee did benefited the corporation. Of course, the New Hampshire prosecutors do not claim that the sexual misconduct of priests benefited the Church—whether considered as diocese, bishop, conference of bishops, Vatican, or Pope. Indeed, the victims were part of the Church as a corporate body.

The alleged vicarious criminal liability of the Diocese is not based directly on the priests' conduct, but on the reaction to that conduct by past ordinaries and other Diocesan officials.24 The New Hampshire [*PG1067]Attorney General's Report on the Investigation of the Diocese of Manchester alleges that the Diocese committed several kinds of crimes:25 1) contributing to the delinquency of a minor;26 2) failure to make mandatory reports of child abuse;27 3) compounding a crime;28 4) perjury;29 5) false swearing;30 6) unsworn falsification;31 and 7) child endangerment.32 The report acknowledges, as it must, that the statute of limitations has run on potential charges under the first three crimes and may have run on the next three crimes.33 Nevertheless, the report claims the ability to use evidence of these crimes to prove several elements of the charges under the one crime on which they rely: child endangerment. As discussed below, the theory of the prosecutors on child endangerment effectively imposes a negligence standard.34 Again, however, these child endangerment charges would appear to be barred by the one-year statute of limitations. Nevertheless, by using a theory that the Diocese through fraud violated a "fiduciary duty" the Diocese supposedly owes its parishioners, the prosecutors contend the statute of limitations tolled until recently.35 In response to my wonderment about such a theory, the prosecutors conceded it was "novel."36

However well-intentioned and plausible their legal theories, the New Hampshire prosecutors are ignoring the fundamental moral basis of criminal law. In saying that, I am not questioning their good faith. Having spoken with the two principal prosecutors, I am impressed by their competence, their sincerity, and their desire to protect the public. Nevertheless, even if a previous bishop was not merely negligent but criminally reckless, what their self-described "novel theory" does is impose moral stigma on a clearly innocent bishop and the Church itself. Priests, who are "agents" of the Church, have violated its basic teachings and damaged the Church, but the Church, not the [*PG1068]actual offenders, is the target of indictment. Whatever justification all of this might arguably have in terms of a business corporation with multiple shareholders and directors, the Diocese is, like many dioceses, a "corporation sole."37 To indict the diocese is to indict the current bishop who, in the case of Manchester and many dioceses, was not even connected to the diocese at the time of the relevant events.

Generally, state prosecutors do not indict many corporations. Indicting corporations is more common at the federal level. States are often too occupied with street crime. The most notable state investigation during the current period of corporate scandals has been New York Attorney General Eliot Spitzer's investigation of Wall Street brokerage firms. Although he could have done so, Mr. Spitzer had the good (political) sense not to indict because he recognized the danger of terminating those businesses.[38] His aggressive civil actions nevertheless forced an agreement with brokerage houses to submit to a certain amount of oversight. This gave Mr. Spitzer a national profile and expanded his jurisdiction. The agreement with the Diocese elevates the political profile of the New Hampshire Attorney General, at least within that state. It expands the jurisdiction of his office by granting oversight of the Diocese for a period of years, as Mr. Spitzer has over brokerage houses.

Although the Bush administration has aggressively pursued business corporations, it has shown no indication of considering indictment of dioceses (which would hardly be in keeping with its promotion of faith-based initiatives). Indeed, it would be quite a stretch for a federal prosecutor to attempt an indictment as the law presently exists. Current federal criminal law related to sexual abuse is, as it should be, quite limited. If one were to file a federal criminal indictment, it probably would be based on every federal prosecutor's favorite tool, the ever-elastic mail or wire fraud statutes, as a predicate for a charge under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). As discussed by Professor Robert Blakey, a significant number of civil RICO cases have been filed against various dioceses.[39] In theory, if those cases could establish a violation of the federal fraud [*PG1069] statutes, for purposes of a civil action, the same evidence might prove a criminal indictment. That, however, is not intended to endorse attempts to abuse the federal fraud and RICO statutes.

Whether it is a federal or state indictment, indicting any corporation for a criminal offense violates the basic requirement of *personal* guilt, which is based on an actual, not a fictional or imputed, mens rea. The essence of crime, that which distinguishes it from torts, involves a public, rather than a merely private, wrong. The punishment for public wrongs—the stigma of being branded a criminal—is properly applied only to individuals. As a matter both of moral principle and political liberty, convicting abstract entities confuses the principle of personal responsibility.

B. *Crimes and Sins of Omission*

Prosecutors sometimes prefer indicting corporations because they cannot prove that a particular individual committed a crime. As discussed above, the situation is different in the attempt to indict a diocese or bishop in connection with priest sexual abuse allegations. Essentially, prosecutors are pursuing an omission or failure-to-act theory. Thus, in New Hampshire, the charge is that "the Diocese took inadequate or no action to protect these children within the parish."[40] Moreover, as in New Hampshire where the alleged criminal omissions occurred, bishops who headed the Diocese at the time of the incidents—mostly in the 1970s and 1980s—no longer serve as the local ordinary.[41] In New Hampshire and many dioceses, the prosecutor cannot plausibly prosecute the current local ordinaries. It becomes attractive, therefore, to indict the Diocese as a corporation instead.

One may be guilty through omission. This is a familiar concept in moral matters. Thus, the Catholic Catechism refers to sins of omission.42 In American criminal law, however, guilt on the basis of omission or failure to act has been the exception. Here, American criminal law has—rightly—been more restrictive than the moral law. That is to say, certain omissions that are clearly immoral nevertheless may not be criminal.

Some countries do criminally punish such omissions under what are called "Good Samaritan" laws. In the United States, however, we [*PG1070]have generally only punished omissions in connection with a narrow category of duties, namely the omissions 1) by parents to children; 2) by spouses to each other; 3) by parties obligated by contract; and 4) by someone who voluntarily assumes a responsibility to another.43 Statutes can and have added to those duties. Of course, bishops have obligations to all those within their dioceses. But what duties count for purposes of criminal law? What constitutes failure or omission with respect to that duty? And when is the failure criminally culpable?

In order for a failure to act to constitute a culpable omission, one must not only have a duty cognizable by the criminal law, but one must also know of the duty and the facts that trigger the obligation in the particular situation. As the U.S. Supreme Court recognized in 1957 in *Lambert v. California*, the Due Process Clause limits how states can impose criminal liability on the basis of omission.44 Assuming, however, that the criminal law imposes some obligation on bishops and that an omission in the sexual abuse cases might be cognizable by the criminal law, the following issues remain: 1) whether the particular facts gave rise to a legal duty to act; and 2) whether a bishop had actual knowledge of sufficient facts to know that his failure to act was criminally culpable.45

In addition to the particular mens rea required by a criminal statute, cases of omission involve a general principle of causation.46 Without a clear understanding of causation in criminal law, many prosecutors have the tendency to characterize facts that involve only tort negligence as involving a criminally culpable omission. As a general principle, causation is most often encountered in the context of criminal homicide. It arises in the routine homicide case because someone, such as the coroner, must establish the cause-in-fact of death. In some complicated cases, causation becomes a legal issue in which more than one factual (or "but for") cause exists, from which is determined the legal cause of death. Causation, however, underlies other doctrines, even though the term is rarely mentioned in that context. Importantly, the principle of causation is the foundation for the doctrine of complicity, also referred to as "aiding and abetting," or the doctrine of principals.47 An accomplice or a principal can be tried for a crime even though he does not commit the necessary [*PG1071] criminal act. To be criminally liable, the accomplice must have had a mens rea and must have done some act—although not the actual criminal act—which makes him a "cause" of the act. One can be a motivating cause of the crime by counseling, encouraging, or in some way assisting the criminal act.48 That aid has to be within the knowledge and the willed actions of the alleged accomplice. Thus, if one in ignorance assists a criminal act, then one is not an accomplice. One must possess a mens rea (i.e., knowing, intentional, purposeful, or reckless mental attitude) connected to the criminal act—a state of mind qualitatively different from ordinary negligence.

American criminal law has long been conflicted about criminal negligence.49 The difficulty has been to distinguish criminal negligence from ordinary tort negligence. Most attempts by courts and legislatures to express the difference have proved unsatisfactory.

There was general agreement that "something more" was required for one to be branded a criminal, but just what was unclear. The general use of the term "gross negligence" appeared to be quantitative, rather than qualitative. As Professor Jerome Hall wrote, for criminal negligence to constitute a mens rea, the defendant must have engaged in a conscious choice.50 Rather than negligence, the basis of criminality in "criminal negligence" is, or should be, recklessness. That is to say, for a mens rea to exist, a defendant must have been aware of the prohibited conduct and have consciously disregarded a high degree of risk that the action he or she was undertaking would cause the prohibited conduct. Ultimately, the Model Penal Code articulated this principle of recklessness and labeled it as such. Unfortunately, the Model Penal Code also carved out a category of "criminal negligence," which is less serious than recklessness and, arguably, does not involve actual moral culpability. Still, even the Model Penal Code's "criminal negligence" supposedly involves something more than ordinary tort negligence, although it is not obvious how this is so.51

The Attorney General's approach to the New Hampshire child endangerment statute endangers the innocent by effectively eroding protections that would prevent a conviction on what amounts to no more than negligence. The New Hampshire child endangerment [*PG1072]statute has two parts to its mens rea: requiring "knowingly" endangering the welfare of a child under age eighteen and "purposely" violating a duty of care owed to the child.52 To prove a "knowing" omission, the Attorney General must identify the duty. For that, he quotes from a Pennsylvania case, which states that child endangerment "'involves the endangering of the physical or moral welfare of a child by an act *or omission* in violation of [a] legal duty *even though such legal duty does not itself carry a criminal sanction.*'"53 Imposing a duty in criminal law that was not clearly known raises precisely the kind of due process problem addressed by the U.S. Supreme Court in *Lambert*.54

The Attorney General's report must acknowledge that the New Hampshire child endangerment statute has a more rigorous mens rea than similar statutes from other states.55 Nevertheless, the Attorney General's expansive interpretation would undo that statutory protection. That interpretation would allow for conviction based on what amounts merely to negligence, i.e., failing to take effective steps. The Attorney General's litigation plan involves further diluting the mens rea by using evidence of misdemeanors, i.e., the failure to report child abuse, which themselves are time barred and, therefore, cannot be charged. The Attorney General claims these might be admissible to establish parts of the mental element required for child endangerment.56

The Attorney General then goes on to ignore the substance of the term "purposely." By adding "purposely" to the statute, the legislature deliberately made it more difficult to prove child endangerment. The term "purposely" requires that the actor's "conscious object is to cause the result."57 In the only New Hampshire case interpreting the child endangerment statute, that state's supreme court said that a husband could be guilty of "purposeful disregard" of his duty of care to his child when he watched his wife severely beat their child on a regular basis without doing anything.58 The Attorney General's report concludes that "[t]his case, thus, recognizes that a person can be [*PG1073] guilty of violating RSA 639:3, I, for failing to take effective steps to protect a child from the dangerous acts of another."59

The Attorney General analogizes the case of the parent who is actually present at a beating of his or her child by the other parent with the omissions of past bishops.60 In the situation of the parent, his or her knowledge of both the general duty and its application at the moment could not be clearer. The required knowledge is properly inferable due to the immediacy of the danger to the child while in the parent's presence. Such parental knowledge provides the evidence to support a claim that the parent's "conscious object is to cause" the proscribed harm by failing to do anything.61 Indeed, almost the only reasonable inference from the evidence is that the "do-nothing parent" chose to permit the physical abuse of the child. For the two situations to be truly analogous, the bishop or other diocesan official would have had to be present while a priest was sexually abusing a minor without the bishop or diocesan official making an attempt to intervene.62

It is the contention of the prosecutors that they can show the Diocese "purposely" violated its duty of care by showing "that the Diocese consciously choose [sic] to protect itself and its priests from scandal, lawsuits, and criminal charges instead of protecting the minor parishioners."63 Even if a motive was to protect priests and the Church, such a decision does not prove the purpose required in the statute. The term "purposely" is defined by a New Hampshire statute, following the Model Penal Code, as follows: "A person acts purposely with respect to a material element of an offense when his conscious object is to cause the result or engage in the conduct that comprises the element."64 That means that the bishop would have as "his conscious object" to cause endangerment of children.

The Attorney General's approach to mens rea virtually empties it of meaning. His very broad view of mens rea would be unjust enough as applied to the omissions of a particular bishop or to the Diocese, based on the bishop's acts. But the Attorney General imputes criminal [*PG1074] liability on the basis of the "collective knowledge" of the Diocese.65

The Attorney General's report focuses on the "institutional failings of the Diocese and not the criminal responsibility of particular Diocesan officials."66 As with white collar crime and hate crime generally, the Attorney General has focused not on the offense, but the offender.67 The report does so, I suggest, because the Attorney General is unable to prove any personal criminal act beyond those of the individual priests who committed the abuse.

In the case of bishops, as in other criminal negligence cases, people seem to be confusing tort and criminal law. No one—bishop or otherwise—should be branded with a criminal conviction unless the person's conduct is at least reckless with respect to a criminal act, and the statute permits conviction on that basis. Ordinary tort negligence, even under the Model Penal Code, is not sufficient.68 Whether or not one had a guilty mind, however, is very fact specific. In hindsight, it may appear very clear that the bishops "should have known" better. I certainly believe they should have known in some cases. In assessing whether one "should have known," there is a difference between whether a bishop was aware of the particular criminal risk and consciously chose to disregard it, or whether the bishop simply did not know enough to be fully aware and chose consciously to disregard it. The fact that with 20/20 hindsight we can say that a bishop should have known or taken more action does not constitute recklessness.

People are generally unaware that there was a "radical change in attitudes toward child sexual abuse that had occurred during the late 1970s and early 1980s."69

As explained by a leading expert in the field, Professor Philip Jenkins, until that time, "professional and scholarly opinions generally underplayed the significance and harmfulness of 'sex abuse.'"70 As he says, "[t]his perspective makes it easier to understand why church authorities were so prepared to exercise tolerance toward priests found to be sexually involved with minors: the behavior was not then thought to be harmful or 'abusive.'"71 During this [*PG1075] period, bishops were regularly consulting psychologists about the potential for rehabilitation of priests who had engaged in sexual misconduct.72 These "experts" advised bishops that priests who had engaged in sexual misconduct could be rehabilitated and safely moved to other places.73 Since then, that advice has proven to be very misguided. Maybe these "experts" should be sued for malpractice, but would anyone seriously suggest that psychologists be criminally prosecuted for judgments that may have been very misguided and, therefore, negligent in a tort sense? By the same standard, bishops should not be criminally responsible for relying on bad advice, upon which many, myself included, think bishops should have known not to rely.

II. Alleged Omissions as the Basis for State Intrusion into Church Operations

The child reporting statutes and the child endangerment statutes raise issues with respect to the intrusion of state power into the jurisdiction of the Church. The New Hampshire Attorney General's Report on the Investigation of the Diocese of Manchester briefly considered the First Amendment's religion clauses and too quickly concluded that the relevant statutes met the test of *Employment Division v. Smith*.74 The report correctly cited *Smith* for the proposition that the Free Exercise Clause does not require the State to provide religious exemptions to laws of general application.75 The report, however, failed to mention that the opinion also notes that a state can grant certain religious exemptions if it so chooses.76 The report reflects no awareness that reporting statutes threaten the priest-penitent privilege, or that New Hampshire's child endangerment statute has an explicit religious exemption that may be applicable.77

A. *Reporting Statutes*

The most likely criminal charge against dioceses or bishops would be the failure to report evidence of child abuse. Most allegations of sexual abuse of minors are for misconduct that occurred years [*PG1076] ago, however, and thus would be barred by the statute of limitations. This legal barrier has not prevented New Hampshire prosecutors from making use of child abuse reporting statutes in creatively cobbling together a case.78
Reporting statutes vary in coverage.79 Some states impose the obligation to report on a limited list of professionals, namely physicians and teachers. Others impose the obligation on every person with knowledge. Those statutes pose policy and constitutional problems quite apart from their application to the Church. Insofar as those statutes apply to every person, they represent a notable exception for criminal liability in the United States. Generally, failure to report a crime—as distinct from concealing a crime—has been rejected as a crime itself in this country.

Whereas the common law may have punished misprision of a felony, namely the failure to report a felony, almost all American jurisdictions have rejected the common-law offense.80 Federal law has an offense labeled misprision of a felony, but it actually requires proof of concealment.81 New Hampshire law does not even punish concealment of a crime, except for its reporting statute.82

Reporting statutes have particular application to school teachers. The ongoing relationship between teacher and student means that a teacher may be more informed about family situations than many persons. The accuracy of that proposition, however, varies widely. Based on my own unscientific surveys, teachers greatly resent statutes that require them to report evidence of child abuse. They find themselves in a dilemma due to terrible uncertainty about what circumstances trigger that obligation. To some people, any physical discipline of a child represents child abuse. To others, physical discipline for a child is essential and may be a matter of religious obligation. If a teacher knows that a parent has spanked a child, does the teacher have a duty to report? How much spanking is too much? Insofar as such statutes impose an obligation on public school teachers, it can be argued at least that the state is exercising its role as parens patriae. Applied to non-public school teachers, however, such statutes may be [*PG1077] interfering with the relationship freely chosen between parents and teachers.

Little attention, meanwhile, has been given to the issue of sexual abuse by public school teachers. According to a longtime national wire service reporter, the members of the media have downplayed public school teacher sexual abuse in comparison to the treatment given to the Church, even though the same issues of breach of trust are involved.83 Quite apart from whether the media is in fact operating according to a double standard, however, what about the responsibility of principals, school administrators, and school districts in notorious cases of sexual abuse by public school teachers? Are any grand jury investigations being targeted against the administrators involved? Certainly, the theory of vicarious criminal liability can be applied equally well (although wrongly) to public school officials.

The uncertainties of child abuse reporting statutes have generated challenges that they are unconstitutionally vague.84 Although such challenges generally have not been successful, the reality remains that imposing guilt by omission under a very broad duty, for example, in New Hampshire "having reason to suspect," creates an indeterminate obligation.85 Moreover, in some states like New Hampshire, the crime effectively has no mens rea requirement.86 It imposes [*PG1078]de facto strict liability.87 The failure to require a mens rea, coupled with ambiguous language, often renders a statute unconstitutionally vague.88 The New Hampshire Attorney General contends he can use violations of this statute to establish the mens rea required by the child endangerment statute. This illustrates how prosecutors often confuse a lot of tort negligence with what is qualitatively different—a criminal mental element or mens rea.89

Broad child abuse reporting statutes, like New Hampshire's, potentially impose liability on anyone who has any contact with minors. Yet, in practice, these statutes are not applied against many people who literally could be charged under the statute—not even those, such as teachers, who have actual contact with the children at issue. How, then, can these statutes be used against bishops who are far removed from actual contact with the children?

Applying these statutes to teachers who observe physical signs of child abuse is problematic, but the application of these statutes to bishops who lack the same firsthand knowledge is groundless. Application of these reporting statutes to bishops is likely to conflict with the priest-penitent privileges.90 As happened in New Hampshire, some priests will personally inform a bishop of their sexual misconduct. In such a one-on-one situation, when a priest admits his sin, one would hope that he would be making his confession with a plea of forgiveness and promise to sin no more. Within the context of the sacrament, the bishop-priest's first responsibility would be to dispense absolution and an appropriate penance. The state cannot prescribe the penance. Even when such conversations do not begin under the seal of confession, they soon would likely come therein.

[*PG1079]Moreover, almost any conversation between a priest and his bishop might be privileged in those states that have expanded the privilege into a spiritual-counselor privilege.91 For courts to question bishops about the priest's confession, or to use the knowledge gained by the bishop as a basis for claiming the bishop and the diocese have committed a crime, would violate the seal of confession and intrude on the jurisdiction of the Church.

It is not difficult to imagine the ramifications of imposing such statutes on bishops. If a state statute imposes a reporting obligation on the bishop, does not the bishop become an agent of the state when he questions the priest? How should the bishop clarify for himself and the priest whether he is acting in his canonical or state-agent capacity? Without pursuing law classroom-type hypotheticals, I mean this only as an introduction to the larger issue of the civil versus ecclesiastical jurisdiction, a topic discussed more fully in other Articles from this Symposium.92

B. *The Child Endangerment Statute's Religious Exemption*

The New Hampshire child endangerment statute contains a specific religious exemption, which reads as follows: "A person who pursuant to the tenets of a recognized religion fails to conform to an otherwise existing duty of care or protection is not guilty of an offense under this section."93 The provision clearly applies and was intended to apply to Christian Scientists, in deference to their religious objection to medical treatment.94 In the opinion of the New Hampshire prosecutors, the exemption has no application to the Diocese because the Church does not endorse sexual abuse of children.95 Of course not! But that does not mean this statute is inapplicable. State prosecutors cannot be expected to understand the obligations of bishops under Church law. More to the point, their attempts to make secular judgments about ecclesiastical matters unavoidably intrude into matters protected by the religion clauses of the Constitution, as discussed [*PG1080] by Professor John Mansfield.96 State officials must respect the fact that they lack the competence to interpret those ecclesiastical obligations. Therefore, their attempts to draw inferences about whether a bishop had a mens rea when he did or did not act are very likely to be erroneous.

As previously discussed, the New Hampshire prosecutors would prove the mens rea "purposely" on the theory "that the Diocese consciously choose [sic] to protect itself and its priests from scandal, lawsuits, and criminal charges instead of protecting the minor parishioners."97 In doing so, they have adopted a certain social construction about how Catholic bishops generally acted in response to the sexual abuse by priests.

As explained by Professor Jenkins in 1996, the current view of the priest sexual abuse scandal became dominant around 1989, which was well after the events in question occurred in New Hampshire.98 The New Hampshire prosecutors apparently never considered the possibility that they were retroactively applying a view that was not even held at the time of the events. Nor did they give any weight to Church law, which imposes duties on bishops in their handling of priests.

The New Hampshire legislature probably was not thinking about the Church when it adopted the religious exemption to the child endangerment statute. That, however, does not end the inquiry. What matters is the meaning of the text. The fact is that the New Hampshire prosecutors are imposing a duty retroactively as to how they think the bishops should have acted. This statutory exemption, however, makes clear—in a way that statutes in some states do not—that state law enforcement should not be in the business of second-guessing whether the obligations imposed by a particular religion are reasonable.

Last year when the bishops met in Dallas, some groups of Catholics and the media were pushing for a "zero-tolerance" policy, which ignored Church requirements for due process for priests.99 Those who are not Catholic, and even those who are, may not understand that the Church has its own legal process, as provided in the 1983 *Codex Iuris Canonici*—the Code of Canon Law. Within that process, the [*PG1081] local ordinary has judicial powers, along with executive and legislative powers. Unlike federal and state governments, these powers are not separated into three branches of governance, but reside unitarily in the local bishop. Decisions made by a local bishop regarding offending priests involve elements of ecclesiastical discipline and punishment.

As with any judge, we may disagree with what we consider to be a lenient punishment. But when a state judge imposes light punishments that allow criminals back on the streets where they commit other crimes, including murder or rape, no one seriously believes that the judge can be criminally prosecuted—unless the judge took a bribe to give a light sentence. Indeed, the judge has absolute immunity even from a civil suit.100 An outraged public can make its case in the media, seek mandatory sentencing statutes, or attempt recall or impeachment—when those options are available. If the judge has done something that is not a crime but violates judicial ethics, a complaint may be filed before the appropriate body—but that body is a system separate from the regular courts. So it should be with bishops. If there is a case against one or more bishops for their failures in the sexual abuse scandals, the proper jurisdiction is that of the Church. A bishop's obligations under Church law are, and should be, more demanding than under state law. Charges against bishops can be brought within the ecclesiastical courts.101

As reflected in the religious exemption in New Hampshire's child endangerment statute, secular authorities should not make judgments about the reasonableness of *omissions* that are intertwined with religious doctrine. Now, the New Hampshire Attorney General has prescribed a stricter-than-the-statute reporting obligation for the Diocese.102 These new reporting requirements can be compared to and contrasted with the new attorney reporting provisions of the Sarbanes-Oxley Act.103 For the first time, federal law has inserted itself into matters of lawyer conduct and ethics, which until now have been almost entirely matters of state law. Pursuant to Sarbanes-Oxley, the Securities and Exchange Commission ("SEC") has recently proposed regulations governing when, what, and to whom outside legal counsel must [*PG1082]"report evidence of a 'material violation.'"104

In the view of federal prosecutors, however, a lawyer should be required to report "up-the-ladder" *immediately* upon learning of material evidence.105 After extensive comments, the SEC disagreed with this view and recognized that there should be a reasonable investigation by the lawyer before advising the corporation about its obligation to report.106 This view represents a recognition that there are considerations of process within a corporate culture that should be respected for good reasons, and that prosecutors should not jump to the conclusion of criminal conduct because outside counsel failed to act as quickly as a prosecutor thinks in hindsight he or she should have acted. If, however, one were to apply the theory of the New Hampshire Attorney General to the recent corporate scandals in the same retroactive fashion, federal prosecutors should be able to indict any number of in-house attorneys and outside counsel for their failures to report suspected corporate misrepresentations to the SEC.

C. *State Oversight*

As in federal criminal cases against corporations, the New Hampshire prosecutors have extracted concessions from the Diocese that involve oversight by the state. As taken from the Attorney General's report, these requirements, inter alia, impose stricter reporting obligations on the Diocese than the already strict law and give the Attorney General ongoing oversight of Diocesan policies and protocols regarding priest and personnel training on child sexual abuse issues.107

[*PG1083] What the New Hampshire prosecutors are doing simulates the federal trend of effectively imposing "codes of conduct" on corporations. When deciding whether to indict a corporation, the United States Department of Justice has considered whether a corporation has a code of conduct.108 The federal Sentencing Guidelines consider codes of conduct as a sentencing factor.109 These codes give the federal government power over corporations it otherwise lacks. The federal government does not charter private corporations and, therefore, does not generate authority over even public corporations. Recent corporate scandals and prosecutions have served to extend federal control through codes of conduct. The recently passed Sarbanes-Oxley law makes "codes of conduct" virtually mandatory for public corporations and asserts authority, for the first time, over attorney-client relations.110

The Church should recognize the New Hampshire settlement for what it potentially is: "the camel's nose inside the tent." Over the years, the U.S. Department of Justice has set precedents by bringing and then settling dubious cases against corporations and other business entities. Over time, prosecutors use these unlitigated "precedents" to launch bolder prosecutions, as circumstances permit. This intrusion by a state prosecutor into the jurisdiction of the Church may encourage and be the basis for actions by other state prosecutors. However well-intended, in order "to heal the wounds," the decision by the Diocese to enter into this agreement represents a dangerous [*PG1084] capitulation by one diocese that may have created a serious threat to the other dioceses in the United States. Some will object that bishops have a moral obligation to act with regard to priests that justifies intrusion by the state. As a matter of moral law and Church law, bishops certainly have a serious responsibility. Indeed, Canon Law imposes on bishops the obligation to exercise the Church's penal jurisdiction over priests who engage in certain sexual misconduct.111

The fact that bishops may be culpable under Church law for omissions with respect to the exercise of their jurisdiction,112 however, does not mean that they are criminally culpable under secular law, or that the state has any jurisdiction to determine such matters.113 Moral culpability should be a necessary condition for criminal liability, but it is not a sufficient condition for criminal liability.

Bishops may be morally culpable under Church law even when they are not criminally culpable under secular law. Under Canon Law, persistent, public violations of the Sixth Commandment by priests constitute penal offenses,114 but not so under state criminal law. Although media reports suggest that most of the sexual misconduct by priests involves pedophilia, this is not true. The term "pedophilia" applies to young children up to prepubescent youngsters.115 The vast majority of instances of priest sexual abuse involve teenage boys or young men.116 Although indefensible, such conduct is not the same as pedophilia. In other words, most of the sexual misconduct is homosexual conduct. In most states, homosexual conduct itself has been decriminalized. The U.S. Supreme Court, in *Lawrence v. Texas*, recently declared unconstitutional those state statutes that criminalize homosexual sodomy.117 Even before *Lawrence*, for consensual homosexual conduct to constitute a crime, most states required that the younger man's age fall within the definition of the particular state statute relating to sex with minors. So, even though a bishop does not violate secular law for failure to discipline a priest's homosexual con[*PG1085]duct, he could be culpable under Canon Law for failing to discipline properly a priest who persists in homosexual conduct.118

Conclusion

The attempts to indict bishops and dioceses based on the sexual abuse crimes of priests amount to efforts to impose vicarious liability, which is appropriate only in civil or administrative cases. Understandably, angry laypeople may not care to distinguish between civil and criminal liability. Moreover, charitable immunity from civil liability in Massachusetts simply increases the anger and prompts the desire for punishment through the criminal justice system.119 Regardless of the very serious criminal and moral wrongs perpetrated by some priests, and the terrible spiritual, moral and psychological damage to the victims, however, negligence in responding to these crimes does not constitute criminal conduct by a bishop or diocese.

For a criminal case based on the failure to act by a bishop, the facts would have to demonstrate that he acted in ways that reflected a clear mens rea. Not even the New Hampshire prosecutors claim any bishop specifically intended to assist a priest in sexually abusing anyone. At most, what New Hampshire prosecutors claim they might prove would amount to recklessness if the evidence established that a bishop knew a particular priest posed a high risk of sexually assaulting children and the bishop consciously chose to act or not act in a way that he knew put children in immediate danger of sexual assault. Under the facts, however, the conduct of the bishops does not appear to involve that kind of conscious or deliberate disregard of danger to particular persons. Arguments about what and when bishops knew or should have known certain facts necessarily involve very debatable inferences. But any argument that rests on the claim that bishops "should have known" amounts to no more than negligence.

Moreover, in making judgments about whether bishops "consciously disregarded" their obligations, secular authorities are giving virtually no weight to—and indeed are incapable of judging—the legitimate obligations of the office of bishop under Church law.

[*PG1086] Bishops in the United States certainly need to rethink their handling of their responsibilities. Perhaps they think of themselves more as executives than as judges. Good executives delegate and tend to judge only the results. A judge, on the other hand, rules on the validity of particular actions, not merely their consequences. It seems that bishops have not reflected much on exercising their judicial authority. Bishops may wish to consider taking steps to reinvigorate the penal part of their jurisdiction.120

If bishops are simply secular CEOs, they, along with dioceses, should expect to be treated like other CEOs and corporations, meaning they can be indicted for crimes committed by their employees even though they were not actually complicit in the crime. Hopefully, prosecutors beyond New Hampshire will realize and respect that the Church as a "corporation" does not owe its existence to the state, and that state officers exceed their jurisdiction by judging Church procedures and doctrines. If they appreciate the entanglement with Catholic doctrine and ecclesiastical jurisdiction, they should have the good sense not to indict. Any indictments of bishops or dioceses would constitute an even greater intrusion into ecclesiastical jurisdiction. To preserve that jurisdiction in practice, however, bishops must exercise it. That involves local ordinaries acting in a clearly judicial capacity. Few people realize that bishops are judges within the Church's jurisdiction. Moreover, for several decades bishops in the United States seem to have de-emphasized the legal dimensions of the Church.121 The public needs to witness bishops exercising their judicial jurisdiction more vigorously.

If bishops had exercised their criminal jurisdiction over sexual misconduct of priests, it would have gone a long way toward convincing others that they had not failed or omitted to perform their duty. Some contend that bishops should automatically and simply turn priests over to the state for prosecution. I would argue that the Church has the right to insist on exercising its own penal jurisdiction. That is not to claim that Church jurisdiction is exclusive. Rather, the situation involves dual jurisdictions similar to that of two or more secular jurisdictions that want to prosecute the same person. As with the D.C.-area snipers, who are being prosecuted by several states and the federal government, it is often necessary for the different [*PG1087] jurisdictions to work out some kind of accommodation as to the order of prosecution.122

The initial reaction to this crisis by the bishops—meeting as a group in Dallas—was a weak-kneed attempt to stem the torrent of criticism. They should have known that it would be unacceptable in Rome, because it failed to provide accused priests with adequate procedural protections. Within the Church itself, as bishops well know, the force of popular opinion has only limited impact. Within the political arena, on the other hand, public opinion may be prompting or pressuring elected prosecutors to launch criminal probes of bishops and dioceses. Against what has become a lynch-mob mentality in some areas of the country, the Church must defend its doctrine and jurisdiction against the intrusions of the state.

End

FOOTNOTES:

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1 *See* N.H. Attorney Gen., Report on the Investigation of the Diocese of Manchester (2003) [hereinafter N.H. Att'y Gen. Rep.]; *see also* Fox Butterfield, *Report Details Sex Abuse by Priests and Inaction by a Diocese*, N.Y. Times, Mar. 4, 2003, at A16.

2 *See* N.H. Att'y Gen. Rep., *supra* note 1, at 21.

3 Telephone Interview with N. William Delker, Senior Assistant Attorney General, and James Rosenberg, Assistant Attorney General, State of New Hampshire (Mar. 20, 2003).

4 *See generally* Rodney K. Smith & Patrick A. Shea, *Religion and the Press: Keeping First Amendment Values in Balance*, 2002 Utah L. Rev. 177, 181–90.

5 1983 Code c.330.

6 Catechism of the Catholic Church para. 886 (2d ed. 2000) (internal quotations omitted).

7 *Id.* para. 888 (internal quotations omitted).

8 Telephone Interview, *supra* note 3.

9 *See* N.H. Att'y Gen. Rep., *supra* note 1, at 25 (discussing grant of immunity to Father Aube).

10 *See* Wayne R. LaFave, Criminal Law 3.10(a) (3d ed. 2000); *see, e.g.*, N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 491–95 (1909) (finding a corporation criminally liable for employee's act performed in the scope of employment).

11 *See* N.H. Att'y Gen. Rep., *supra* note 1, at 15.

12 John S. Baker, Jr., *Corporations Aren't Criminals*, Wall St. J., Apr. 22, 2002, at A18.

13 Stuart P. Green, *We Should Consider Prosecuting Catholic Church*, Hous. Chron., Apr. 18, 2002, Viewpoint section.

14 For example, Bishop Thomas J. O'Brien recently avoided prosecution by, among other things, committing the Diocese of Phoenix to (a) appoint a Moderator of the Curia to handle administrative issues "relating to the revision, enforcement and application" of the Diocese's sexual misconduct policy; (b) create the position of, and appoint, a Youth Protection Advocate "responsible for the implementation and enforcement of the policy on sexual misconduct by Diocesan personnel"; and (c) review and modify the Diocese's sexual misconduct policy after giving the Maricopa County Attorney's Office and the public an opportunity to influence the revision. *See* News Release, Richard M. Romley, Maricopa County Attorney, Six Priests Indicted: Bishop, Diocese Sign Agreement Insuring Protection of Children, http://www.maricopacountyattorney.org/Press/fullreleases.asp (June 2, 2003) (containing 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).

15 Robert D. McFadden, *L.I. Diocese Deceived Victims of Abuse, a Grand Jury Says*, N.Y. Times, Feb. 11, 2003, at A1. The grand jury report is available from the Suffolk County District Attorney's Office at http://www.co.suffolk.ny.us/da/home.htm (last visited Sept. 11, 2003).

16 *See* Walter V. Robinson & Michael Rezendes, *Abuse Scandal Far Deeper Than Disclosed, Report Says Victims of Clergy May Exceed 1,000, Reilly Estimates*, Boston Globe, July 24, 2003, at A1.

17 *See* Green, *supra* note 13.
18 *See* LaFave, *supra* note 10, § 3.10(a).
19 *See* John C. Coffee, Jr., *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 386–87 (1981).
20 *Id.* at 386 n.2.
21 212 U.S. at 492–93.
22 *See* Model Penal Code § 2.07 (1962).
23 *See* LaFave, *supra* note 10, § 3.10(c) & n.62.
24 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.10(b), at 364 (footnotes omitted).
25 Under Canon Law, an "ordinary" is any church leader (such as a diocesan bishop) who has executive power over a particular church or equivalent community. *See* 1983 Code c.134, § 1.
26 N.H. Att'y Gen. Rep., *supra* note 1, at 3–14.
27 N.H. Rev. Stat. Ann. § 169:32 (Supp. 1972) (repealed 1979). The Attorney General investigated whether the diocese had engaged in conduct that would have violated this statute before its repeal. *See* N.H. Att'y Gen. Rep., *supra* note 1, at 10.
28 N.H. Rev. Stat. Ann. § 169-C:29 (1996).
29 *Id.* § 642:5.
30 *Id.* § 641:1, I(a).
31 *Id.* § 641:2, I.
32 N.H. Rev. Stat. Ann. § 641:3, II(a).
33 *Id.* § 639:3, I.
34 N.H. Att'y Gen. Rep., *supra* note 1, at 3–14.
35 *See infra* notes 56–68 and accompanying text.
36 N.H. Att'y Gen. Rep., *supra* note 1, at 8–9.
37 Telephone Interview, *supra* note 3.
38 A corporation sole is "a series of successive persons holding an office; a continuous legal personality that is attributed to successive holders of certain monarchical or ecclesiastical positions, such as kings, bishops, rectors, vicars, and the like." Black's Law Dictionary 342 (7th ed. 1999).
39 John Cassidy, *The Investigation: How Eliot Spitzer Humbled Wall Street*, The New Yorker, Apr. 7, 2003, at 54.
40 Robert Blakey, Address at the Boston College Law School Symposium (Apr. 4, 2003).
41 N.H. Att'y Gen. Rep., *supra* note 1, at 1.
42 *See* Laurie Goodstein & Anthony Zirilli, *Decades of Damage: Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. Times, Jan. 12, 2003, at 1.
43 Catechism of the Catholic Church, *supra* note 6, para. 1853.
44 *See, e.g.*, Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962).
45 355 U.S. 225, 228 (1957).
46 *See* LaFave, *supra* note 10, § 3.3(b).
47 *See* Jerome Hall, General Principles of Criminal Law 195–97 (2d ed. 1960).
48 *Id.* at 270–74.
49 *See id.*
50 *See id.* at 158–63, 165.

51 *See id.* at 114–15.
52 *See* Model Penal Code and Commentaries 2.02 cmt. n.31 (1985) ("It will of course be noticed that the requirements established are considerably more rigorous than simple negligence as usually treated in the law of torts.").
53 N.H. Rev. Stat. Ann. 639:3 (1996).
54 N.H. Att'y Gen. Rep., *supra* note 1, at 6 (quoting Commonwealth v. Cardwell, 515 A.2d 311, 314 (Pa. Super. Ct. 1986)) (second emphasis added).
55 355 U.S. at 228.
56 *See* N.H. Att'y Gen. Rep., *supra* note 1, at 7.
57 *Id.* at 13.
58 N.H. Rev. Stat. Ann. 626:2, II(a).
59 *See* State v. Portigue, 481 A.2d 534, 539, 544 (N.H. 1984); *see also* N.H. Att'y Gen. Rep., *supra* note 1, at 7–8.
60 N.H. Att'y Gen. Rep., *supra* note 1, at 8.
61 *See id.*
62 *See* N.H. Rev. Stat. Ann. 626:2, II(a).
63 *See Portigue*, 481 A.2d at 544.
64 N.H. Att'y Gen. Rep., *supra* note 1, at 8.
65 N.H. Rev. Stat. Ann. 626:2, II(a); *see also* N.H. Att'y Gen. Rep., *supra* note 1, at 7–8; Model Penal Code 2.02(2)(a) (1962).
66 *See* N.H. Att'y Gen. Rep., *supra* note 1, at 18–19.
67 *Id.* at 19 (emphasis omitted).
68 *See* Nicholas N. Kittrie & Elyce H. Zenoff, Sanctions, Sentencing, and Corrections 634–35 (2002).
69 The Model Penal Code includes the mental state of negligence as distinct from recklessness, but distinguishes criminal negligence from ordinary tort negligence. *See* Model Penal Code and Commentaries 2.02 cmt. n.31 (1985).
70 Philip Jenkins, Pedophiles and Priests 16 (1996).
71 *See id.*
72 *Id.*
73 *Id.* at 91–92.
74 *See id.*
75 N.H. Att'y Gen. Rep., *supra* note 1, at 19–20; *see* 494 U.S. 872, 885 (1990).
76 *Smith*, 494 U.S. at 884.
77 *See id.* at 890.
78 See *infra* notes 99–114 and accompanying text for an analysis of the potential application of this religious exemption.
79 *See* N.H. Att'y Gen. Rep., *supra* note 1, at 12–13.
80 *See* Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. Rev. 1127, 1138–39 (2003).
81 *See* LaFave, *supra* note 10, 13.6(b).
82 18 U.S.C. 4 (1994).
83 *See* Warren C. Nighswander, *Reporting Child Sexual Abuse Under the Child Protection Act: An Unofficial Primer for the General Practitioner*, 36 N.H. Bar J. 52, 52–53 (1995).
84 James D. Clifford, *It's Not Just Priests*, America, Dec. 2, 2002, at 10.

85 *See* Sheriff, Washoe County v. Sferrazza, 766 P.2d 896, 897 (Nev. 1988) (holding child abuse reporting statute unconstitutionally vague). *But see* People v. Cavaiani, 432 N.W.2d 409, 413 (Mich. Ct. App. 1988); State v. Grover, 437 N.W.2d 60, 63 (Minn. 1989); State v. Hurd, 400 N.W.2d 42, 45–46 (Wis. Ct. App. 1986) (all upholding child abuse reporting statutes against vagueness challenges).

86 *See* N.H. Rev. Stat. Ann. § 169-C:29 (1996).

87 The New Hampshire child abuse reporting statute has a "knowingly" requirement, which would seem to require a mens rea. *See id.* A "knowingly" requirement attached to an act, otherwise known as a general intent, simply requires that one act with the knowledge that he or she is acting. The fact that one performs the act is a sufficient basis for inferring that it was done "knowingly." Omissions are very different, however. People are continually "not doing things," if only because they are doing other things. Whether "not doing something" constitutes an omission depends on whether one had a duty to act and also whether one was aware of the duty to act. Without knowledge of the facts that give rise to the duty, one's failure to act cannot be done "knowingly." Under the New Hampshire reporting statute, however, "to *act* 'knowingly' in failing to make a report as required is simply to have *knowledge of the circumstances* giving rise to the obligation to report." Nighswander, *supra* note 83, at 53 (emphases added). If one in good faith misjudges "the circumstances," that good-faith failure would not seem to be defensible because "the duty to report is *absolute* so long as there is a 'reason to suspect' that a *particular* child has been abused or neglected." *Id.* (emphases added). Note that per the Attorney General's report, the bishops in question did not necessarily have knowledge at relevant times about particular children. See, for example, Dr. Edward Conners's 1976 letter to Bishop Gendron concerning Father Aube's homosexual conduct with an eighteen year-old male, who does not fall within the child reporting statute. N.H. Att'y Gen. Rep., *supra* note 1, at 39–40. The report emphasizes statements in the letter generally about the need to keep Fr. Aube away from children. Such a letter could not give rise to a reporting requirement. Incidents involving particular juveniles came to Bishop Gendron's attention in 1981. *Id.* at 47–54. The Attorney General's office and the Diocese disagree as to the point (either 1976 or 1981) at which the Diocese knew of its obligations. *See id.*

88 *See* N.H. Rev. Stat. Ann. § 169-C:29.

89 *See, e.g.*, NAACP Anne Arundel County Branch v. City of Annapolis, 133 F. Supp. 2d 795, 807–12 (D. Md. 2001) (holding city's anti-loitering statute unconstitutionally vague due to lack of mens rea element and narrow scope of people who fit under the statute who would be prosecuted).

90 *See* Hall, *supra* note 47, at 116.

91 *See generally* J. Michael Keel, Comment, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 Cumb. L. Rev. 681 (1997–98); *see also* N.H. Rev. Stat. Ann. § 516:35 (1996) (privilege for communications made to religious leaders).

92 *See* Abrams, *supra* note 80, at 1133.

93 *See* Rev. John J. Coughlin, *The Clergy Sexual Abuse Crisis and the Spirit of Canon Law*, 44 B.C. L. Rev. 977, 982, 995–96 (2003); John Mansfield, *Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty*, 44 B.C. L. Rev. 1167, 1177–78 (2003).

94 N.H. Rev. Stat. Ann. § 639:3, IV.
95 *See* John T. Noonan, Jr. & Edward McGlynn Gaffney, Jr., Religious Freedom 556–57 (2001).
96 Telephone Interview, *supra* note 3.
97 Mansfield, *supra* note 93, at 1178–79.
98 N.H. Att'y Gen. Rep., *supra* note 1, at 8; *see also supra* notes 64–65 and accompanying text.
99 *See* Jenkins, *supra* note 70, at 3.
100 *See* Mary McGrory, Editorial, *The Bishops Come up Short,* Wash. Post, June 23, 2002, at B7.
101 *See, e.g.*, Stump v. Sparkman, 435 U.S. 349, 355–56 (1978).
102 *See* 1983 Code cc.1405, 1444.
103 *See* N.H. Att'y Gen. Rep., *supra* note 1, at 2.
104 *See* Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (2002).
105 Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,674 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205).
106 *See* Howard Goldstein, *They're Here! Sort of... 'Final' Sarbanes-Oxley Rules on Standards of Professional Conduct for Attorneys,* Bus. Crimes Bull., Feb. 2003, at 1, 4.
107 *See* Implementation of Standards of Professional Conduct for Attorneys, *supra* note 105, at 71, 691–97.
108 The N.H. Att'y Gen. Rep., *supra* note 1, at 2 provides:

> Protection of Children: Under the agreement, the Diocese is required to comply with mandatory *reporting requirements for sexual abuse of minors* (children under the age of eighteen) *that are even more stringent than under current law*. All Diocesan personnel will be required to acknowledge, in writing, their knowledge and understanding of these reporting requirements. The Diocese is obligated to train its personnel on issues of child sexual abuse. The Diocese will establish a centralized office to handle allegations of sexual abuse of minors, to establish policies and protocols for handling such cases, and to maintain all records and information relating to such matters.
>
> Accountability: The Diocese is obligated to submit to an annual audit by the AGO, focusing on the manner in which the Diocese has responded to allegations of sexual abuse of minors. It is also required to permit the AGO to review and comment on policies, protocols, and training materials relating to such matters. The agreement will be reviewed in five years upon a motion by the State. In addition, all terms of the agreement are enforceable by the Hillsborough County Superior Court.
>
> Transparency: The agreement also provides for a complete disclosure of the facts relating to the Diocese's past handling of sexual abuse allegations against priests. This report details the facts discovered by the State during its investigation of those cases that the Task Force investigated. In addition, the State is releasing copies of documents obtained from the Diocese, as well as investigative reports and other information gathered by the Task Force during the course of this investigation.

Id. **(emphasis added).**

109 ***See*** **Memorandum from Larry D. Thompson, Deputy Attorney General, to the Heads of Department Components, United States Attorneys VII (Jan. 20, 2003),** ***at*** **http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.**

110 U.S. Sentencing Guidelines Manual 8C2.5(f) (2002) (subtracts points for corporations having "an effective program to prevent and detect violations of law").

111 ***See*** **2 Thomas Lee Hazen, The Law of Securities Regulation 9.7, at 23 (4th ed. Supp. 2003).**

112 1983 Code c.1395.

113 ***See id.*** **cc.135, 391.**

114 ***See*** **Mansfield,** ***supra*** **note 93, at 1170.**

115 1983 Code c.1395, 1.

116 Jenkins, ***supra*** **note 70, at 78.**

117 ***See id.*** **at 79–80.**

118 123 S. Ct. 2472, 2483–84 (2003).

119 ***See*** **1983 Code cc.392, 1395. A violation of Canon Law "by omitting necessary diligence," may not actually be subject to a canonical penalty. Moreover, only the Roman Pontiff can judge bishops in penal cases.** ***Id.*** **c.1405, 1.**

120 ***See*** **Catharine Pierce Wells,** ***Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy,*** **44 B.C. L. Rev. 1201, 1202, 1224–27 (2003).**

121 ***See*** **1983 Code c.1311–1363.**

122 ***See generally*** **Coughlin,** ***supra*** **note 93.**

123 ***See*** **Susan Schmidt & Katherine Shaver,** ***Muhammad Interrogation in Dispute; U.S. Attorneys Cut Off Talks, Local Prosecutor Alleges,*** **Wash. Post, Oct. 31, 2002, at A1.**