Practice What You Preach: How Restorative Justice Could Solve the Judicial Problems in Clergy Sexual Abuse Cases

Diana L. Grimes*

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* Candidate for J.D., Washington and Lee University, 2007; B.A., Grinnell College, 2004. I wish to thank Professors C. Quince Hopkins, Joan Shaughnessy, and Ronald Krotoszynski as well as Erica Richards for their guidance throughout this project. I also wish to thank the parties from Scott County who helped develop this topic and shared their views, especially Craig and Laura Levien. Thank you to my family and friends for their unending love and support. This Note is dedicated to the memory of Louis P. Ruocco (1917–2005) and Willard M. Grimes, Jr. (1917–2006).

I. Introduction

> The molestation at the hands of my uncle, priest and namesake began on Thanksgiving Day 1953. I was 5 years old. . . . The abuse continued for approximately 9 years until I reached puberty at age 14. . . . He would often abuse me right in my parents' home. He would excuse us saying he was going to hear my confession and take me to my room where the abuse would occur. On February 7, 2000, I reported my bi-polar illness was the result of child sexual abuse . . . .[1]

The case of *Wells v. Janssen*[2] resulted in a million-dollar jury verdict for J.W., the above-quoted plaintiff, after a lengthy trial, an admission, and a later recantation by the offending priest. Many other victims of clergy sexual abuse fail to receive this level of compensation, however, because the court system prevents them from reaching the trial stage. The discrepancies in judicial treatment of victims in similar situations based solely on where they live have led victims around the country to demand an alternative that will treat them equally and provide a satisfactory remedy from the offending priest and the Catholic Church.[3] When the Church and priest

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1. Affidavit of J.W. at 1–9, Wells v. Janssen, No. LACE 101220 (Iowa Dist. Ct. for Scott County 2005).

2. Wells v. Janssen, No. LACE 101220 (Iowa Dist. Ct. for Scott County 2005).

3. *See, e.g.*, Al Burke, Letter to the Editor, DEWITT OBSERVER (DeWitt, Iowa), Sept. 24, 2005 [hereinafter Burke Letter to the Editor] (writing as a victim and expressing the belief that most victims would prefer an apology over monetary damages) (on file with the Washington and Lee Law Review); *see also* Ann McGlynn, *Uhde: 'Victims are not the enemy'*, QUAD CITY TIMES (Davenport, Iowa), Oct. 15, 2006, at A1 (quoting victim Michl Uhde) (on file with the Washington and Lee Law Review). Uhde explained:

> We did not ask for money. We asked for answers. We asked the diocese to help us find out why this happened to us and why the priests and bishops responsible were never punished, but instead in many cases, they were promoted.

Id.

fail to satisfy a request for an apology, victims typically respond by filing lawsuits against the priests and the institution, and the Church becomes less cooperative as the threat of financial ruin looms.[4] Though most lawsuits name both the Church and the individual offending priests as defendants, the Church is the defendant with financial resources and therefore faces the largest financial burden.[5] This Note proposes that the best way to break this cycle would be for the Church and the offending priests to meet with the victims and settle the problems outside of the judicial system. Though victims could turn to any method of alternative dispute resolution, restorative justice could provide the most successful model. Restorative justice brings together the victims, the offenders, and the community to talk about the harm and to come to a mutually agreeable remedy, while focusing on compassion, rehabilitation, and equalization of the power imbalance among the parties. Thus, this Note suggests that victims and the Church should consider the benefits of applying a restorative justice approach to the particular problems of clergy sexual abuse.[6]

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4. *See, e.g.*, Angela Hill, *Priest Abuse Spurs Layoffs*, OAKLAND ARGUS, Feb. 1, 2006 ("The Roman Catholic Diocese of Oakland has laid off seventeen administrative employees in its chancery offices to help cover a $1.2 million budget deficit.") (on file with the Washington and Lee Law Review); Deirdre Cox Baker, *Catholics Feel for Victims But Want Diocese to Move Forward*, QUAD CITY TIMES (Davenport, Iowa), Oct. 13, 2006 ("Davenport is the fourth Roman Catholic diocese in the United States to seek bankruptcy protection . . . ."); *see also* NATIONAL CATHOLIC REPORTER ABUSE TRACKER, http://www.ncrnews.org/abuse (listing all the news stories related to clergy sexual abuse in the Catholic Church and updated daily) (last visited Aug. 26, 2006).

5. *See, e.g.*, U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 152 (2004), http://www.bls.gov/oco/pdf/ocos063.htm (last visited Dec. 15, 2005) (noting that the Roman Catholic Church requires that "religious priests take a vow of poverty" and that diocesan priests' "low-end salaries average $15,921 per year in 2002; high-end salaries averaged $18,478 per year") (on file with the Washington and Lee Law Review). The handbook explained the differences between diocesan priests and religious priests as follows:

> *Diocesan priests* commit their lives to serving the people of a diocese, a Church administrative region, and generally work in parishes, schools, or other Catholic institutions as assigned by the bishop of their diocese. Diocesan priests take oaths of celibacy and obedience. *Religious priests* belong to a religious order, such as the Jesuits, Dominicans, or Franciscans. In addition to the vows taken by diocesan priests, religious priests take a vow of poverty.

Id. While some of the priests involved in the current litigation belong to specific religious orders, many serve in parishes under the direction of the Diocese and therefore receive a modest salary. *Id.*

6. One restorative justice specialist has already initiated the first restorative justice program for clergy sexual abuse. *See* Linda Harvey Curriculum Vitae, http://www.rjcouncil.org/about_harvey.html (noting that Harvey is "President of the Restorative Justice Council on Sexual Misconduct in Faith Communities, an organization which focuses on alternatives to litigation such as [sic] by training experienced mediators in restorative mediation in a multi-discipline system as well as by providing consultation and mediation directly") (on file with the

To begin, Part II of this Note will detail the history of the crisis in the Catholic Church, including the cover-up perpetrated by Church officials. It will present the remedies developed by the Church and explain why those remedies have not sufficiently satisfied the victims. Part III will define restorative justice and its varying applications in both individual and institutional contexts. Part IV will then explain why this issue requires an alternative remedy like restorative justice by describing the current drawbacks of judicial remedies. It will detail the psychological underpinnings of litigation and demonstrate why victims may prefer a non-judicial remedy like restorative justice to encourage healing. It will also argue that statutes of limitations and the varying interpretations of the First Amendment's religion clauses may prevent some members of the Church "Body" from receiving a judicial remedy.[7] Part V will explain a possible method for applying restorative justice and examine some potential complications with its application. After offering solutions to these difficulties, this Note concludes that restorative justice could serve the needs of all the parties involved including the Church, the priests, the victims, and the community, and lead to a more constructive and satisfactory resolution than those provided by the courts.[8]

II. The Problems in the Catholic Church

In 1990, Frank Fitzpatrick, a victim of child sexual abuse at the hands of Father James Porter, decided to contact his abuser.[9] When Frank asked him how many children he had molested, Father Porter replied, "I don't know. There could have been quite a few. I don't remember names."[10] By September of 1992, Fitzpatrick had gathered a large group of Porter's victims and Porter

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Washington and Lee Law Reivew); *see also* Letter from Lisa Rea, President, The Justice and Reconciliation Project, to the United States Conference of Catholic Bishops (Feb. 23, 2006) ("As the cases of sexual misconduct came to the public's attention I thought what a perfect opportunity for the Catholic Church to show the world how to apply restorative justice principles both to itself as a body but more importantly to the victims in each and every case.") (on file with the Washington and Lee Law Review).

7. *See 1 Corinthians* 10:16–17, 12:12–31; *Romans* 12:4–8 ("The Church is the Body of Christ, in which many members are united with Christ their head.").

8. *See infra* Part V.A (listing the possible independent restorative justice projects with which the victims and Church could work).

9. *See* FRANK BRUNI & ELINOR BURKETT, A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE, AND THE CATHOLIC CHURCH 1–25 (2002) [hereinafter GOSPEL OF SHAME] (detailing the story of Father Porter and his victims).

10. *Id.* at 5.

was facing "forty-six counts of sodomy and sexual assault" and "a total of 317 years in prison."[11]

A. The Crisis is Born

As the story of Father Porter unfolded in the media, victims of abuse by other Catholic priests started to come forward, requesting that the Church provide them with a remedy.[12] Though the victims were not limited to children from within the Catholic faith,[13] the problems in the Catholic Church were widespread and received most of the media attention. As such, this Note focuses only on the Catholic Church and its parishioners.[14]

In response to the question why the Catholic Church has faced so many allegations, some commentators have suggested that Catholicism particularly appeals to men who have always had improper sexual impulses toward children because they are required to take a vow of celibacy and repress those urges.[15] Priests from other denominations have suggested that perhaps the isolated lives of Catholic priests drive them to act inappropriately.[16] The United States Conference of Catholic Bishops commissioned its own study by the National Review Board in 2004 which determined that the problems developed throughout all stages of priesthood.[17] Regardless of the reasons, the crisis in

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11. *Id.* at 24; *see also id.* at 11 (highlighting how Fitzpatrick placed an ad in the newspaper asking for people who knew James Porter and the resulting flurry of abuse reports).

12. *See id.* at 26 ("As it unfolded like a grotesque soap opera on the nightly news throughout 1992, hundreds of victims of other priests from across the nation were emboldened by the example of the Porter survivors and, following their lead, came forward to unmask their abusers and demand justice from the Church.").

13. *See, e.g.*, Schmidt v. Bishop, 779 F. Supp. 321, 324 (S.D.N.Y. 1991) (alleging sexual abuse by a Presbyterian minister); F.G. v. MacDonell, 696 A.2d 697, 699–700 (N.J. 1997) (alleging clergy malpractice by an Episcopal minister).

14. *See, e.g.*, INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (2002) [hereinafter BETRAYAL] (summarizing all the important stories reported in *The Boston Globe* regarding the crisis in the Archdiocese of Boston and including comments from victims and commentary on the current state of the Roman Catholic Church).

15. *See* GOSPEL OF SHAME, *supra* note 9, at 51 (quoting Dr. Gabbard who treats abusive priests at the Menninger Clinic in Topeka). "They have the feeling that these impulses are overwhelming and hard to control, so they think that maybe the structure of the Church and the code of celibacy will somehow help them avoid acting on them." *Id.*

16. *See id.* at 55 (citing statements from Episcopal Reverend Margaret Graham). "Despite the vestments, despite the collar, despite the cross, these are people who are also God's creatures, and they are subject to loneliness. Their vows make them very much isolated. Do they not reach out in ways that are inappropriate because of this?" *Id.*

17. *See* THE NATIONAL REVIEW BOARD FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE, A REPORT ON THE CRISIS IN THE CATHOLIC CHURCH IN THE UNITED STATES 64–90 (2004),

the Catholic Church has reached troubling proportions. Of the 177 Latin Rite Dioceses in the United States, only sixteen remain free from allegations of abuse.[18] The reported allegations come from every geographical region of the country, and the alleged abuses occurred throughout the 1960s, 1970s, and 1980s.[19] Though the offending priests sometimes abused girls, "[e]ighty percent of the priests were accused of molesting boys."[20]

The true nature of the problems in the Catholic Church began to unfold after victims in Massachusetts revealed the story of Father James Porter, but it did not reach the current critical proportions until 2002 when *The Boston Globe* revealed the stories of Father John Geoghan[21] and Father Paul Shanley, exposing the deeper problem of a Church cover-up.[22]

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available at http://www.usccb.org/nrb/nrbstudy/nrbreport.pdf [hereinafter NATIONAL REVIEW BOARD 2004 REPORT] (explaining that the main problems occur during the selection of the candidates, the theological formation of those candidates in seminary, the repression of sexual identity throughout the process, and the celibate life of spirituality upon leaving seminary).

18. *See* Laurie Goodstein, *Decades of Damage: Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, at 1 [hereinafter *Decades of Damage*] (summarizing *The New York Times* survey containing "the names and histories of 1,205 accused priests"); *see also* THE JOHN JAY COLLEGE RESEARCH TEAM, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES, EXECUTIVE SUMMARY 6 (2004), *available at* http://www.usccb.org/nrb/johnjaystudy/ (noting that by 2002, 4,392 Catholic priests faced allegations of sexual abuse of a minor); NATIONAL REVIEW BOARD 2004 REPORT, *supra* note 17, at 4 (noting that four percent of priests in the last half of the twentieth century committed acts of sexual abuse against minors).

19. *See Decades of Damage*, *supra* note 18, at 1 ("Every region was seriously affected, with 206 accused priests in the West, 246 in the South, 335 in the Midwest, and 434 in the Northeast.").

20. *Id.*

21. Though many of the priests convicted of child sexual abuse—including John Geoghan and Paul Shanley—have since been defrocked by the Vatican, this Note will refer to them as "Father" to assist in identification of the abusers.

22. *See* Kathleen Burge, *Geoghan Found Guilty of Sex Abuse*, THE BOSTON GLOBE, Jan. 19, 2002, at A1 (reporting the guilty verdict against former Catholic priest John Geoghan for touching a ten-year-old boy); Michael Rezendes & Sacha Pfeiffer, *Shanley is Arrested in California, Retired Priest Faces Three Counts of Child Rape, Shanley to Face Child Rape Charges*, THE BOSTON GLOBE, May 3, 2002, at A1 (reporting the charges of child rape that occurred while Shanley worked in a Massachusetts Catholic Church). *Priest Slain to "Save the Children,"* Jan. 11, 2006, http://www.cnn.com/2006/LAW/01/11/priest.killed.ap/index.html (last visited Jan. 12, 2006) (explaining that "a prison inmate strangled defrocked priest John Geoghan to 'save the children'" when he overheard Geoghan telling his sister that he planned to work with children again upon completion of his ten year prison sentence) (on file with the Washington and Lee Law Review); BETRAYAL, *supra* note 14, at xii ("On January 31, the newspaper ran the piece . . . revealing that over the past decade the Archdiocese of Boston had secretly settled cases in which at least seventy priests had been accused of sexual abuse."); *id.* at xi (explaining how *The Globe* succeeded in convincing a judge to remove the confidentiality seal from the documents in the Geoghan case in November of 2001).

B. The Church Attempts to Hide

Prior to 2002, the Church had successfully brushed away any negative publicity or concern about a sexual abuse problem by claiming that the priests accused of such acts were anomalies and that the problem was not widespread.[23] The documents used by *The Globe*, however, revealed a deeper problem in the Boston Diocese, claiming "Cardinal Law and his top aides were repeatedly warned about dangerous priests, but continued to put these sexual abusers in a position to attack children."[24] As did most Church officials at that time, Cardinal Law sent Geoghan for psychiatric counseling but permitted him to return to his work with children as long as the doctors provided him a clean bill of health.[25] Once *The Globe* broke the story about the cover-up, Law was forced to "turn over to enforcement officials the names of nearly 100 priests against whom credible allegations of abuse ha[d] been made"[26] and to hire bodyguards for his own protection when he entered the church.[27]

Allegations of cover-ups by the Church hierarchy proliferated with the claims against the abusive priests.[28] Through the course of litigation, many Dioceses have had to admit to their decisions to hide the allegations, and the resulting outrage from the Catholic community in the United States forced the worldwide Catholic Church to respond.[29]

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23. *See* BETRAYAL, *supra* note 14, at 5 ("[T]he Church had engaged in largely successful damage control, taking advantage of the widespread deference toward it . . . ."). Interestingly, the Archdiocese of Boston insisted that the problem there was being blown out of proportion by the anti-Catholic elements within *The Boston Globe*. *Id.*

24. *Id.* at 5–6.

25. *See id.* at 20 ("[I]n the decade between 1980 and 1990, Geoghan received several clean bills of health that the Archdiocese used to justify assigning him to two parishes despite his extensive record of abuse.").

26. Editorial, *Losing Faith in Law*, THE BOSTON GLOBE, April 10, 2002, at A22.

27. *See id.* (noting that Law was "flanked by bodyguards as he entered his own parish" on Easter Sunday in 2002).

28. *See* Kathleen Burge, *Judge Rules Church Suits Can Proceed, Archdiocese's First Amendment Motion Rejected*, THE BOSTON GLOBE, Feb. 20, 2003, at A1 ("More than 500 alleged victims of sexual abuse by Catholic clergy have brought legal claims against the Archdiocese of Boston, arguing that bishops were negligent in moving abusive priests from parish to parish."); *see also* Doe v. Hartz, 52 F. Supp. 2d 1027, 1036–38 (N.D. Iowa 1999) (stating all claims made by the victim and showing that about half of them were made against Bishop Soens and the Roman Catholic Diocese of Sioux City). Some victims have even extended their claims to the Vatican and the Pope himself. *See U.S. Asks Court to Dismiss Abuse Suit That Names Pope*, N.Y. TIMES, Sept. 21, 2005, at A22 ("The Justice Department has told a Texas court that a lawsuit accusing Pope Benedict XVI of conspiring to cover up the sexual molestation of three boys by a seminarian should be dismissed because the pontiff enjoys immunity as head of state of the Holy See.").

29. *See, e.g.*, Supplemental Answer to Interrogatory No. 11 at 5, Wells v. Janssen, No.

C. The Church Responds

The United States Conference of Catholic Bishops (USCCB) alerted the Vatican to the American crisis early in 2002, but an early response from Pope John Paul II in his pre-Easter letter to priests alluded to the issue as a strictly American problem.[30] After meeting in early April with two American Bishops who emphasized "the loss of moral credibility of the [C]hurch" from the crisis,[31] the Pope called all the American Cardinals to Vatican City to discuss the issue.[32] In the speech to the Cardinals, the Pope admitted that "the abuse which has caused this crisis is by every standard wrong and rightly considered a crime by society," and he emphasized that "[p]eople need to know that there is no place in the priesthood and religious life for those who would harm the young."[33] He concluded by charging the Cardinals and Bishops of the United States to craft an appropriate and just response to the crisis.[34]

In early June of 2002, the USCCB met in Dallas to debate whether the Church should adopt a zero-tolerance policy for priests accused of sexually abusing children.[35] In the end, the Conference voted 239 to 13 to approve a policy "that would remove offenders from any job connected with the [C]hurch

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LACE 101220 (Iowa Dist. Ct. for Scott County 2005) (detailing the cover-up of abuse by a priest in the Diocese of Davenport and the continuous failed attempts by the Bishop to prevent the priest from having contact with children) (on file with the Washington and Lee Law Review).

30. *See* Melinda Henneberger, *Vatican Summons All U.S. Cardinals to Talks on Abuse*, N.Y. TIMES, Apr. 16, 2002, at A1 (citing the March 21 letter from the Pope saying, "'a dark shadow of suspicion' had been cast over all priests by 'some of our brothers who have betrayed the grace of ordination'").

31. Laurie Goodstein, *The Bishops and Urgency*, N.Y. TIMES, Apr. 16, 2002, at A1.

32. *See id.* ("[T]he Vatican said it was summoning American cardinals and the elected leaders of the American bishops to Rome for meetings next week to take up the issue of sexual abuse by clergymen.").

33. Pope John Paul II, Address to the Cardinals of the United States (Apr. 23, 2002), http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/april/documents/hf_jp-ii_spe_20020423_usa-cardinals_en.html (last visited Dec. 15, 2005) (on file with the Washington and Lee Law Review). *But see id.* (reminding the Cardinals to always remember that even the offending priests possess "the power of Christian conversion, that radical decision to turn away from sin and back to God, which reaches to the depths of a person's soul and can work extraordinary change").

34. *See id.* ("I beg the Lord to give the Bishops of the United States the strength to build their response to the present crisis upon the solid foundations of faith and upon genuine pastoral charity for the victims, as well as for the priests and the entire Catholic community in your country.").

35. *See* Edward Walsh, *Bishops Pass Compromise on Church Sex Abuse Policy; Plan Would Not Necessarily Spur Ouster from Priesthood*, WASH. POST, June 16, 2002, at A4 (detailing both sides of the two-day debate).

but would not necessarily force them out of the priesthood."[36] Survivors complained that this was not the zero-tolerance policy they had hoped for, but the Bishops explained the need for the compromise: Only the Vatican had the authority to defrock priests, and the new policy prevented accused priests from free contact with children, requiring them to "lead a life of prayer and penance."[37] The USCCB simultaneously adopted a Charter for the Protection of Children and Young People (the Charter) and used its Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests (the Norms) to implement the Charter.[38] The USCCB continues to demonstrate its concern over the severity of this crisis by revising the Charter and the Norms regularly.[39]

Despite the adoption of these strict policies, the Church has faced victims' anger and hurt in the form of litigation.[40] The Norms and the Charter implied that the Church would cooperate with judicial and civil authorities in support of the victims, but in reality, the Church has not followed its guidelines.[41] Many victims

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36. *Id.*

37. *Id; see also* Letter from Most Rev. Bishop William E. Franklin to the People of the Diocese of Davenport, Iowa (Feb. 25, 2004) (stating that "only Rome has the authority to laicize or defrock a priest.") (on file with the Washington and Lee Law Review).

38. *See* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 6 (2005 Revision), *available at* http://www.usccb.org/bishops/charter.pdf [hereinafter 2005 CHARTER] ("In fulfilling this article, dioceses/eparchies are to follow the requirements of the universal law of the Church and of the *Essential Norms* approved for the United States.") (on file with the Washington and Lee Law Review).

39. *See, e.g.*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, ESSENTIAL NORMS FOR DIOCESAN/EPARCHIAL POLICIES DEALING WITH ALLEGATIONS OF SEXUAL ABUSE OF MINORS BY PRIESTS OR DEACONS 1–4 (June 2005), *available at* http://www.usccb.org/ocyp/2005EssentialNorms.pdf [hereinafter 2005 NORMS] (expanding the list to thirteen norms to be followed by every Church in every diocese) (on file with the Washington and Lee Law Review). The Norms require every Diocese to adopt a written policy on sexual abuse of minors and to appoint a coordinator to assist victims. *Id.* They also require the appointment of a review board to advise Diocesan officials on allegations of sexual abuse and require that the majority of the review board be lay persons in good standing. *Id.* The Norms require every Diocese to conduct a preliminary investigation into any allegations of abuse and require that the offending priest have an opportunity for a medical and psychological evaluation. *Id.* Every Diocese must now permanently remove any priest from ecclesiastical ministry upon the admittance or establishment of an act of abuse, and the bishops have permission to remove a priest at any time. *Id.* Any priest may now request dispensation from the obligations of the clerical state, and the Diocese must comply with applicable civil laws regarding reporting allegations of abuse. *Id.* Finally, the Norms prohibit transferring priests who have committed sexual abuse to another Diocese. *Id.*

40. *See Decades of Damage*, *supra* note 18, at A1 (noting that the survey by *The New York Times* "counted 4,268 people who have claimed publicly or in lawsuits to have been abused by priests").

41. *See* 2005 CHARTER, *supra* note 38, at 5 ("Dioceses/eparchies are to report an allegation of sexual abuse of a person who is a minor to the public authorities."); 2005 NORMS,

have explained that they would not have filed suit against the Church had it actually cooperated with them and expressed some desire to help them overcome the harms they faced as a result of the abuse.[42] With victims feeling forced to file lawsuits against the Church and the Church protesting litigation in every creative way possible, a new set of challenges has arisen. The result has divided the courts in the various states and has led victims to demand a non-judicial remedy to address their concerns. One possible way to answer this demand is to adopt a restorative justice approach.

III. What is Restorative Justice?

Restorative justice specialist Tony Marshall asserts, "Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[43] The use of restorative justice began before the rise of the Roman Empire and re-emerged in the late twentieth century.[44] Restorative justice focuses on rehabilitation of both victim and offender and applies in both individual and institutional contexts.

A. History of Restorative Justice

Though restorative justice has been the "dominant model of criminal justice throughout most of human history for perhaps all of the world's

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supra note 39, at 4 ("The diocese/eparchy will comply with all civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and will cooperate in their investigations. In every instance, the diocese/eparchy will advise and support a person's right to . . . report to public authorities."). For examples of the Church's uncooperative tactics, see *infra* Part IV.B–C.

42. *See, e.g.*, Burke Letter to the Editor, *supra* note 3 (explaining the results of his interviews with victims). Mr. Burke writes:

> I have met with many victims. In nearly every case, the victims' only request was for the bishop and leaders of the diocese to name the pedophiles (not ask for money). When the diocese refused to name the pedophiles, the victims' only way to get the abusers' names before the public was to sue the diocese and the abusers.

Id.

43. *See* Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 372–73 (1999) (citing Tony Marshall's workable definition).

44. *See infra* Part III.A (detailing the disappearance of restorative justice based on the actions of the Roman Church and its re-emergence based on the work of Canadian theorists).

peoples,"[45] the United States and many other nations have shifted away from this approach to an adversarial, retributive system. A restorative justice approach requires the legal community to change its focus from ridding society of the evils of crime by punishing offenders to inspiring grace in victims and offenders by showing compassion.[46] Religious leaders have advocated this approach throughout history,[47] and Church confessions developed as a restorative approach to encourage personal responsibility and reconciliation with God.[48] Despite this early practice of forgiveness and redemption, Church officials in the ninth century began to turn away from restorative justice as they attempted to secure their own power.[49] In fact, the Roman Catholic Church "laid the foundations for state laws that formally shifted criminal law away from its restorative framework" in twelfth century canon law.[50] Because the Church played a key role in the initial use and subsequent initial movement away from restorative justice, it seems appropriate that the Church should be one of the first participants in a newly re-established restorative justice system. The Church's initial focus on repentance and forgiveness remains a key part of its teachings today, highlighting its predisposition to espouse restorative justice values.

Although restorative justice remains mostly a remnant of the past, it gained some support in the late twentieth century. The Maori tribes of New Zealand have utilized restorative justice for many years, and New Zealand "mainstreamed . . . conferencing innovation into a Western juvenile justice system."[51] The Western leader of the current movement, however, has been neither the Church nor the western European governments—those most responsible for the historical switch to retributive justice—but rather the

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45. JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 5 (2002).

46. *See id.* at 3 (noting that "the more evil the crime, the greater the opportunity for grace to inspire a transformative will to resist tyranny with compassion").

47. *See id.* (quoting Saint Paul: "Where sin abounded, grace did much more abound"). Braithwaite also quotes the words of the Dalai Lama:

> Learning to forgive is much more useful than merely picking up a stone and throwing it at the object of one's anger, the more so when the provocation is extreme. For it is under the greatest adversity that there exists the greatest potential for doing good, both for oneself and for others.

Id.

48. *See id.* at 5 (explaining the rise of confessions and penitentials by Celtic monks in the late sixth century as an "important moment in the institutionalizing of restorative ideas").

49. *See id.* at 7 (using the example of the Bishop of Le Mans who castrated the priests in his Diocese who did not follow his orders).

50. BRAITHWAITE, *supra* note 45, at 7.

51. *Id.* at 25.

government of Canada.[52] Through the development and success of a victim-offender reconciliation program in Ontario in 1974, Canada demonstrated the potential of a restorative justice approach, resulting in 300 new programs in North America and 500 in Europe.[53] The researchers and administrators of these emerging programs defined restorative justice as a meeting of all involved parties to achieve collective resolution to a problem.[54] Using this definition and a core set of restorative justice values, each program applies a unique approach directed to the particular crimes or problems it chooses to address.[55]

B. Purpose of Restorative Justice

The purpose of restorative justice is not to impose a harsher punishment than those available to the courts[56] but rather to act in accordance with the fundamental human rights listed in internationally adopted covenants, including the Universal Declaration of Human Rights and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[57] Using these values, restorative justice creates an opportunity for both the victim and offender to express their feelings on the harm, for the victim to forgive if he or she so chooses, and for the offender to safely express remorse if he or she wishes.[58] Restorative justice has been shown to reduce recidivism with some

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52. *See id.* at 8 (detailing the history of the Canadian program).

53. *See id.* (citing figures from the mid-1990s).

54. *See* Llewellyn & Howse, *supra* note 43, at 372 (quoting Tony Marshall's definition).

55. *See* BRAITHWAITE, *supra* note 45, at 14–15 (listing restorative justice values and giving some examples of different approaches).

56. *See id.* at 12 (noting that "it should be forbidden for a restorative justice process to impose a punishment beyond that which would be imposed by the courts for that kind of wrongdoing").

57. *See id.* at 14 (noting that the fundamental rights also come from the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Opinion Protocol, and the United Nations Declaration on the Elimination of Violence Against Women). The values listed in these documents include the following:

> Restoration of human dignity, Restoration of property loss, Restoration of injury to the person or health, Restoration of damaged human relationships, Restoration of communities, Restoration of the environment, Emotional restoration, Restoration of freedom, Restoration of compassion or caring, Restoration of peace, Restoration of empowerment or self-determination, and Restoration of a sense of duty as a citizen.

Id. at 14–15.

58. *See id.* at 15 (emphasizing the importance of forgiveness as a gift rather than a duty and the destruction of remorse if demanded).

crimes because of its rehabilitative focus.[59] It has also been shown to deter crime more efficiently than the regular criminal justice system.[60] Australian restorative justice researcher John Braithwaite posited the following nine hypotheses to explain these successful deterrent effects: increasing the certainty of punishment, motivating the public to speak up, allowing participation of many affected parties, providing for specific deterrence, spreading knowledge for general deterrence, maintaining a fallback of traditional methods of deterrence, providing dynamic and responsive penalties, persuading the offender before resorting to punishment to insure compliance, and increasing the deterrent power of punishment.[61]

Restorative justice also serves other, more indirect purposes. Generally, restorative justice "places emphasis on repairing harm, empowering a victim-driven process, and transforming the community's role in addressing crime."[62] Because the judicial system and the Constitution provide protections for the offender but not the victim, restorative justice gives victims greater opportunity to express themselves without fear of having their veracity questioned.[63] From a financial standpoint, legislatures also find restorative justice alternatives appealing because they reintegrate offenders at a much lower cost by avoiding the courts and the penal system.[64]

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59. *See* BRAITHWAITE, *supra* note 45, at 40 (finding a 50% reduction in recidivism for serious offenders who participated in a restorative justice program). Braithwaite also outlines the following five reasons for increased rehabilitation with restorative justice:

> (1) Restorative justice can build motivation; (2) Restorative justice can mobilize resources; (3) Restorative justice reinforces the social cognitive principles that have been shown to be hallmarks of effective rehabilitation programs; (4) Restorative justice can foster plural deliberation that delivers "responsivity;" (5) Restorative justice can improve follow-through.

Id. at 97.

60. *See id.* at 121 ("Virtuous circles of restorative justice deter more than vicious circles of punitive justice.").

61. *See id.* at 121–22 (listing all nine hypotheses and describing each of them in depth).

62. C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 294 (2004).

63. *See* C. Quince Hopkins & Mary P. Koss, *Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses*, 11 VIOLENCE AGAINST WOMEN 693, 695 (2005) ("Yet it is only the victim whose veracity is questioned because most offenders will safely stand mute, insulated by the constitutional protections of the presumption of innocence and the privilege against self-incrimination."); *see also infra* Part IV.A (detailing the psychological harms victims may face during litigation).

64. *See* RUTH ANN STRICKLAND, RESTORATIVE JUSTICE 93 (2004) (arguing that "one of the reasons why restorative justice has become a more frequent item in public discourse is due to its potential ability to cut the costs of administering justice").

C. Restorative Justice Techniques

"Restorative justice models include (a) civil proceedings, (b) victim-offender reparation through mediation, and (c) community conference approaches."[65] Restorative justice usually occurs outside the context of the regular court system, but some models, such as the adversarial, tort-like civil justice approach, use judicial remedies as a fallback.[66] Most advocates of the restorative model encourage an extrajudicial process because of the potential harms to the victim inherent in the criminal justice system. For example, the adversarial process itself has been shown to cause harm to victims of certain sexual crimes, and the victims in those situations do not share offenders' protections of presumed innocence or privilege against self-incrimination while in court.[67]

Using the general models stated above, each community applying restorative justice can "identify practices that work best for them."[68] Some specific and frequently used approaches in the United States include: diversion (a pretrial alternative program where the offender admits guilt); victim-offender mediation (a program in which the actual victims meet face to face with the actual offenders); victim-offender panels (a program where victims meet with offenders of a similar crime but not the crime for which they are actually victims); community sentencing circles (a program that asks the community to take on some of the blame and develop an appropriate punishment); reintegrative shaming (a program using apology-forgiveness ceremonies); and problem-solving courts (a program applied to specific crimes such as drug use).[69] The community is often seen as a secondary victim of crime, so most of these techniques encourage community participation in both the mediation and the remedy.[70] Though it might seem like a difficult task to convince community members to participate in restorative justice activities, studies have shown that people are often more willing to attend and support either the victim or offender if offered a personal invitation.[71]

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65. Hopkins, *supra* note 62, at 294–95.

66. *See id.* (explaining the limited applicability of the civil justice approach).

67. *See* Hopkins & Koss, *supra* note 63, at 695 (citing documented research of harm to sexual assault victims from the criminal justice system).

68. STRICKLAND, *supra* note 64, at 5.

69. *See id.* at 7–13 (explaining these various techniques).

70. *See id.* at 91 ("When a community is adversely affected by crime, it should have the right to address the crime and the issues raised for the community.").

71. *See* BRAITHWAITE, *supra* note 45, at 91 (noting that many community members feel touched by the invitation to be supportive).

D. Applications of Restorative Justice

Restorative justice has been applied to various offenses and to many different types of offenders around the world. Though most of the early restorative justice models focused almost exclusively on crimes committed by juveniles, some international leaders adopted this approach for dealing with institutional political violence. Archbishop Desmond Tutu viewed his Truth and Reconciliation Commission in South Africa as a restorative justice process.[72] Braithwaite also expanded the scope of restorative justice when he investigated cases of white-collar crime and found that "the regulation of corporate crime in most countries was rather restorative."[73] Braithwaite applied a regulatory pyramid approach based on "the presumption that it is better to start with dialogue at the base of the pyramid."[74] He explained that "however serious the crime, our normal response is to try dialogue first for dealing with it, to override the presumption only if there are compelling reasons for doing [so]."[75] The pyramid contained a large base of persuasion that eventually worked up to civil and criminal penalties only if the restorative justice techniques failed.[76] Braithwaite also advocated a pyramid-based restorative justice approach for repeat criminal offenders through the use of targeting procedures and intensive surveillance for certain types of criminals.[77]

Though many of the previously mentioned techniques could apply to any number of offenses, sexual crimes usually require a more tailored approach. Other methods of alternative dispute resolution involve similar procedures and may reach similar conclusions, but restorative justice focuses on the victims and their goals for the most preferable outcome while emphasizing the need to reintegrate the offender. Mediation theory "rests on the assumption of equal or near-equal bargaining power between the parties."[78] However, with sexual crimes—especially those against children—the power dynamic often shifts in favor of the offender because he or she has used that power to perpetrate the

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72. *See* Llewellyn & Howse, *supra* note 43, at 372 ("Archbishop Desmond Tutu, chairperson of the TRC [Truth and Reconciliation Commission], has explicitly stated that he understands the Commission to be an exercise in restorative justice."); *see also* BRAITHWAITE, *supra* note 45, at 16 (detailing international uses of restorative justice beyond application to juvenile crime).

73. BRAITHWAITE, *supra* note 45, at 16.

74. *Id.* at 30.

75. *Id.*

76. *See id.* (diagramming the regulatory pyramid).

77. *See id.* at 37 (giving an example of dialogue that police could repeat to the targeted victim).

78. Hopkins, *supra* note 62, at 295–96.

sexual abuse.[79] Therefore, communities using restorative justice usually apply a community conferencing approach to sexual crimes because conferencing provides all parties with a support network. It also prepares them in advance to deal with the potential problems in both the community meeting and the later enforcement of the agreement.[80]

One example of a successful restorative justice program dealing with sexual violence is the RESTORE program of Pima County, Arizona. Described as a "victim-driven, postarrest, but pre-conviction community conference response to certain offenses,"[81] RESTORE focuses solely on non-penetration sexual offenses against women.[82] Before meeting with the victim, the offender must undergo a psychological evaluation and regular monitoring.[83] At the professionally facilitated conference between the victim and the offender, the victim can describe the offense and resulting harm, and the offender can acknowledge the wrong and the harm.[84] The support networks for both the victim and the offender also have an opportunity to describe the broader impact of the offense.[85] In the end, the parties reach a mutual agreement that "outlines what the responsible person is going to do to make right the wrong done, not just to the survivor but also to the community support network and the broader community."[86] Though this model uses a community conferencing approach, it also maintains a fallback of criminal charges, and the "case is referred back to the prosecutor should the responsible person fail to abide by the terms of the agreement."[87] Thus, successful restorative justice approaches can focus first on restorative techniques but also retain judicial

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79. *See id.* at 295 (noting the feminist theory "that a batterer uses violence as a tool to maintain power and control over his victim"); *see also* Michael J. Sartor, Note, *Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct: The Implications of* Fearing v. Bucher, 62 WASH. & LEE L. REV. 687, 691 (2005) (noting that "the inherent power imbalance between priest and parishioner renders the relationship extraordinarily susceptible to manipulation").

80. *See* Hopkins, *supra* note 62, at 296 ("[M]any experts believe community conferencing comes the closest to achieving restorative justice ideals, addressing the power disparities often present in crimes of violence against women, and avoiding the trauma and other problems of traditional civil justice.").

81. Hopkins & Koss, *supra* note 63, at 697.

82. *See id.* (noting that RESTORE "addresses date and acquaintance rape where force did not exceed that necessary to compel unwanted sex, and nonpenetration sex offenses").

83. *See id.* (explaining the treatment plan and psychological evaluation requirements).

84. *See id.* (detailing the opportunities for victim and offender explanations of harm).

85. *See id.* (highlighting the community's supporting role in the community conferencing approach).

86. Hopkins & Koss, *supra* note 63, at 697.

87. *Id.*

remedies in the event that the restorative model fails. Victims of clergy sexual abuse turned to restorative justice to avoid the challenges of judicial resolution, however, so they may be unlikely to turn back to the courts as an alternative.

IV. Why We Need Restorative Justice: The Problem of Judicial Remedy

Victims of clergy sexual abuse who choose to litigate their claims will all face a psychologically challenging day in court. The design of the U.S. judicial system aids the accused with constitutional protections while leaving the accuser in a vulnerable position for attack on cross-examination.[88] Victims experience this harm even when the system functions as it should.[89] Victims, therefore, may choose an alternative remedy like restorative justice in order to avoid the trauma inherent in the court system.

Though all victims as plaintiffs must deal with the psychological drawbacks of litigation, many must also circumvent legal barriers to avoid dismissal of their claims. Statutes of limitations and First Amendment defenses raised by the Church often succeed in the courts and completely foreclose a judicial remedy for the victims in a given state.[90] For example, the varying statutes of limitations provide that victims in California who suffered abuse twenty years ago may bring a claim against the Church, while courts dismiss similar claims by victims in Pennsylvania.[91] Differing interpretations of the

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88. *See infra* Part IV.A (explaining that lawyers often question only the veracity of the accuser because constitutional protections allow the offender to remain silent).

89. *See* Thomas Gutheil et al., *Preventing "Critogenic" Harms: Minimizing Emotional Injury from Civil Litigation*, 28 J. PSYCHIATRY & L. 5, 6 (2005) (explaining that a critogenic harm relates to the *intrinsic and often inescapable harms* caused by the litigation process itself, even when the process is working exactly as it should").

90. *See, e.g.*, Malicki v. Doe, 814 So. 2d 347, 351, 359 (Fla. 2002) (listing the state and federal courts that have ruled either to use the First Amendment as a complete bar to clergy sexual abuse claims or to reject all First Amendment claims made by the Church). Those states and federal courts finding no First Amendment bar are as follows: the Second Circuit, the Fifth Circuit, the Eighth Circuit, the District of Rhode Island, the Northern District of Iowa, the Northern District of Texas, the District of Connecticut, the Eastern District of Michigan, Colorado, Illinois, Indiana, Minnesota (under most circumstances), New Jersey, New York, North Carolina, Ohio, Oregon, Texas, and Washington. Those states and federal courts finding a First Amendment bar are as follows: the Seventh Circuit, the Tenth Circuit, the District of Colorado, the Southern District of New York, Louisiana, Maine, Michigan, Minnesota (under limited circumstances), Missouri, Nebraska, and Wisconsin. *Id.*

91. *Compare* Roman Catholic Bishop of Oakland v. Super. Ct., 28 Cal. Rptr. 3d 355, 369 (Cal. Ct. App. 2005) (upholding the revived California statute of limitations and a punitive damages award against the Bishop), *with* E.J.M. v. Archdiocese of Philadelphia, 622 A.2d 1388, 1395 (Pa. Super. Ct. 1993) ("Appellant did recognize that something was amiss, and although he allegedly blamed himself for these feelings, that alone does not relieve him of the duty to

First Amendment allow victims in Indiana to sue the Church for negligent hiring and supervision of an abusive priest, while similar victims in Minnesota will lose on a motion to dismiss.[92] Victims object to this disparate treatment because they believe, "The Church is the Body of Christ, in which many members are united with Christ their head."[93] As members of the same body who have suffered the same harm, they therefore believe that they should receive the same treatment regardless of where they live.

The U.S. system of federalism permits this type of disparate treatment among the states by allowing each state to set its own civil statutes of limitations for state offenses.[94] State constitutions may also provide more religious protections than the First Amendment of the U.S. Constitution, thus yielding differences among the states on decisions of fundamental religious questions.[95] Because state legislatures retain the freedom to choose an appropriate limitations period, and the U.S. Supreme Court has not definitively ruled on these federal First Amendment issues, the states will continue to provide disparate treatment to similar victims.[96] This general disparity in legal treatment compounds the larger problem of psychological harm to victims. Consequently, restorative justice is a more uniform method of dealing with allegations of clergy sexual abuse.

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investigate and bring suit within the limitations period.").

92. *Compare* Konkle v. Henson, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996) (holding that the victim could bring claims of negligent supervision and hiring against the Diocese despite potential First Amendment concerns), *with* Mulinix v. Mulinix, 1997 WL 585775, at *6 (Minn. Ct. App. Sept. 22,1997) (finding that any inquiry into negligence in supervision and hiring by the Church excessively entangles the court with religious doctrine and is therefore barred by the First Amendment).

93. *1 Corinthians* 10:16–17, 12:12–31; *Romans* 12:4–8.

94. *See, e.g.*, Jodi Patt, Comment, *The Need to Revamp Current Domestic Protection for Cultural Property*, 96 NW. U.L. REV. 1207, 1232 n.194 (2002) (noting in a discussion on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects that "[t]he Bush Administration . . . is likely to be committed to federalism, and therefore, not in favor of taking the power to impose a statute of limitations away from the states").

95. *See* Robert K. Fitzpatrick, Note, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1833 (2004) ("For more than three decades, observers have vigorously debated the desirability of judicial federalism—the practice of state courts interpreting their state constitutions to provide greater protections for individual rights than does the U.S. Constitution."); *see also* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

96. *See* Malicki v. Doe, 814 So. 2d 347, 357 (Fla. 2002) ("The question unanswered thus far by the United States Supreme Court is how far the religious autonomy principle may be extended to bar the adjudication of a third-party tort claim that calls into question a religious institution's acts or omissions.").

A. Victim Psychology

Victims of sexual abuse who decide to bring their claims to court often experience what psychologists call "the second rape," or the psychological trauma of the judicial process.[97] All of the procedures of the judicial system can lead victims to "hysteria, rage, disillusionment, and profound distrust of people and the world in general."[98] For child sexual abuse victims who have already suffered from many of these psychological harms for years, the inherent challenges within the judicial system may lead victims away from the courts to remedies like restorative justice, which reduce the threat of broad public ridicule.

One common request by victims of clergy sexual abuse is permission to bring the case under a pseudonym. Some victims choose to reveal their names as part of the healing process, but the use of pseudonyms in this type of litigation remains common.[99] Although most courts grant this request, the decision is left to the discretion of each court.[100] Some courts have applied a strict test for pseudonym use and have concluded that "there is considerable appeal to the defendants' argument that they should not be held up to public ridicule while their accuser remains anonymous, when it is their accuser who has focused public attention on the circumstances [he or] she finds embarrassing."[101] Thus, victims may feel "raped" by a state system that differs from the majority and refuses to grant their privacy requests when bringing cases to court.

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97. *See, e.g.*, LEE MADIGAN & NANCY GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 7 (1989) [hereinafter THE SECOND RAPE] ("The second rape is exemplified most dramatically when the survivor is strong enough, brave enough, and even naïve enough to believe that if she decides to prosecute her offender, justice will be done.").

98. *Id.*

99. *See, e.g.*, Gary Gilson, *Truth Telling v. Minimizing Harm*, NEWSWORTHY (1994), *available at* http://www.news-council.org/archives/94gg.html (quoting Sandy Garry, a psychologist for a victim of clergy sexual abuse) (on file with the Washington and Lee Law Review). Garry stated, "[S]ome abuse victims heal faster if their names and details are disclosed—victims who have resolved that they bear no blame and who say, 'I took all this abuse, now I'm going to give some back,' and who, for the first time, exercise some control." *Id.*

100. *See* Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity When a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV. 1659, 1681 (1995) ("Accordingly, when a court is deciding whether to allow a plaintiff to proceed anonymously, the ultimate inquiry must be whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings.").

101. Doe v. Hartz, 52 F. Supp. 2d 1027, 1048 (N.D. Iowa 1999).

During litigation, the victim faces many other psychological challenges mandated by the U.S. Constitution for the protection of the defendant.[102] Some psychologists have described the effects of litigation on sexual victims as "critogenic harms."[103] A "critogenic harm" is any harm that is caused by the law and "relates to the intrinsic and often inescapable harms caused by the litigation process itself, even when the process is working exactly as it should."[104] Though psychiatrists acknowledge that victims may receive psychological benefits or empowerment simply from bringing their case to court, they believe that the harms often outweigh the potential benefits.[105] As legal commentators have noted with sexual offense litigation, "[I]t is only the victim whose veracity is questioned because most offenders will safely stand mute, insulated by constitutional protections of the presumption of innocence and the privilege against self-incrimination."[106] These protections for the defendant often lead the defense to place blame with the victim. The additional opportunity for the defense to simultaneously sequester any witnesses who might lend support to the victim could easily lead to emotional trauma. The tactics of the defense to try to "expose inconsistencies in the survivor's testimony" for the Church's advantage may also cause the victim serious psychological harm.[107] With these procedures confronting victims of clergy sexual abuse, it is understandable that many continue to call for an alternative remedy like restorative justice.

B. The Statute of Limitations

If victims choose to litigate despite the psychological harms, most will face legal barriers to their claims from defenses available to the Church including statutes of limitations and the First Amendment. Because the courts

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102. *See, e.g.*, U.S. CONST. amends. IV, V, & VII (detailing the right of the accused against unreasonable searches and seizures and the rights to due process, and civil trial by jury).

103. *See* Gutheil, *supra* note 89, at 6 ("The Program in Psychiatry and Law uses the adjective 'critogenic' (to convey 'law-caused') and the corresponding noun 'critogenesis.'").

104. *Id.*

105. *See id.* at 11 (listing the following harms inherent in the legal system: "delay; adversarialization; splitting or elimination of ambivalence; retraumatization; boundary violation; loss of privacy; and prolongation, vitiation or even arrest of the emotional resolution or healing process from a claimed injury").

106. Hopkins & Koss, *supra* note 63, at 695.

107. *See* THE SECOND RAPE, *supra* note 97, at 105 ("Even if a . . . [victim's] reputation is immaculate and her judgment perfectly sound, she must be on guard while on the stand, and she must always be consistent. . . . It is, at best, a nerve-racking, degrading experience.").

consider constitutional issues only as a last resort, victims will first need to overcome the obstacle of the statute of limitations.[108] The statutes of limitations in judicial cases developed mostly as a public policy provision, and today every civil claim has a corresponding time period in which to bring the claim.[109] Some courts adopt a provision that temporarily prevents the running of the statute of limitations until the victim fully discovers his or her injury. This provision, known as the discovery rule, aids victims who have latent mental health issues or who have been deceived by the offending priests into thinking that his actions were acceptable.[110] State courts have recognized three basic approaches to dealing with statutes of limitations in clergy sexual abuse cases: (1) dismiss the claim because the statute of limitations has run and the victims should have had enough information to bring it earlier, (2) accept the victims' claim that they discovered the abuse's true nature and harm later in life and therefore apply the discovery rule to toll the statute of limitations, or

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108. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 123 (1979) (noting the "general principle that dispositive issues of statutory and local law are to be treated before reaching constitutional issues"); *see also* Interview with Craig Levien, Victims' Attorney, Cases against the Diocese of Davenport, Partner, Betty, Neuman, & McMahon, in Davenport, Iowa (Mar. 2, 2006) [hereinafter Craig Levien Interview] (explaining his concerns about the statute of limitations after attending a legal convention for victims' attorneys in New York) (on file with the Washington and Lee Law Review). Craig stated, "This included the lead lawyers from Boston, Rhode Island, New Jersey, and Minnesota. This was an open legal meeting where many experts spoke. The general consensus was that it was very difficult to beat the statute of limitations." *Id.*

109. *See* James Wilson Harshaw III, Comment, *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation*, 50 OHIO ST. L.J. 753, 753 (1989) (listing the policies behind statutes of limitations, including "[c]oncern that evidence will become stale, lost, or destroyed, . . . recognition of judicial economy[,] . . . perceived unfairness to potential defendants who may be forced to defend themselves long after the alleged act, the concept of grace, and recognition of self-reformation by potential defendants"); *see also* H.R.B. v. J.L.G., 913 S.W.2d 92, 95 (Mo. Ct. App. 1995) (listing specific times under tort statute of limitations in Missouri). The court stated:

> An action for sexual abuse may be brought as a battery action, in which case the plaintiff has two years to file the action, or the action may be brought pursuant to [Missouri Revised Statutes] § 516.120(4), which requires that tort actions not specifically enumerated by statute (but recognized at law) be brought within five years.

Id.

110. *See* McGrath v. Dougherty, 275 N.W. 466, 471 (Iowa 1937) (providing an example of a common definition of the discovery rule). The Iowa Supreme Court defined it as follows:

> When a party against whom a cause of action has accrued, by fraudulently concealing the same, prevents the injured party from obtaining knowledge thereof, then the statute [of limitations] does not commence to run until the cause of action was discovered or might be discovered by the use of reasonable diligence.

Id.

(3) persuade the legislature to adopt a time frame in which courts will revive the statute of limitations and hear the claims even though the time period has technically run and the discovery rule does not apply.

1. Time-Barred Cases

Courts that strictly adhere to the statute of limitations period usually justify their actions by citing the public policy behind the statute or by highlighting the inaptness of the discovery rule. Some states maintain strict rules regarding the statute of limitations while relaxing their stance on the Church's other defenses.[111] These courts often acknowledge the persuasiveness of the argument for adopting a liberal discovery rule but refuse to contradict all precedent in order to do so.[112] Therefore, any victims in those states alleging child abuse by priests in the distant past will lose on a motion to dismiss and thus never get a trial regardless of the actual delay in discovering their injury.

Other courts rejecting the discovery rule focus instead on the actual knowledge of the victim. Though the courts express concern over the abuse, they nonetheless find that victims have a responsibility to discover their harms earlier and should not be excused from their failure to do so.[113] Despite the popularity of this view, some states continue to declare that they will apply the discovery rule in some cases if appropriate.[114] Because only a few courts are

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111. *See* N.Y. C.P.L.R. § 201 (McKinney 1987) ("No court shall extend the time limited by law for the commencement of an action."); Malicki v. Doe, 814 So. 2d 347, 351 (Fla. 2002) (listing New York as one of the states that rejects the Church's First Amendment claims in motions to dismiss).

112. *See, e.g.*, Schmidt v. Bishop, 779 F. Supp. 321, 331 (S.D.N.Y. 1991) (granting summary judgment for the defendant priest and Church because New York does not recognize the discovery rule in sexual abuse cases and the claims of clergy malpractice and negligent hiring violated the First Amendment). The court also explained that New York courts are "sensitive to the obstacles to filing a timely complaint in child sex abuse cases," but "that there was no discovery rule in this class of cases." *Id.* at 329.

113. *See, e.g.*, E.J.M. v. Archdiocese of Philadelphia, 622 A.2d 1388, 1395 (Pa. Super. Ct. 1993) (holding that the victim's self-blame did not excuse him from his duty to bring his claims within the statutory time period). The court held that the priest's false assurances that the situation was normal "do not rise to the level of fraudulent concealment where the plaintiff's own common sense should inform him that he has been injured." *Id.* at 1395. The Court placed much responsibility on the plaintiff when it stated, "Appellant did recognize that something was amiss, and although he allegedly blamed himself for these feelings, that alone does not relieve him of the duty to investigate and bring suit within the limitations period." *Id*; *see also* Hartz v. Diocese of Greensburg, 94 Fed. Appx. 52, 55 (3d Cir. 2004) (citing *E.J.M.* and adopting the same rule despite the added concern of the priest serving the victim alcohol).

114. *See* Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans, 32 F.3d 953, 962 (5th Cir. 1994) (finding that "[t]he Mississippi Supreme Court has applied the

open to the discovery rule, many victims throughout the country must either accept that they do not have a judicial remedy because of the statute of limitations or consider the possibility of a non-judicial remedy like restorative justice.

2. The Tolling Rules

Victims in states with more lenient interpretations of the statute of limitations may have more success with their claims because some courts accept the discovery rule as a method of tolling.[115] Other courts refuse to dismiss at the pleading stage even if they do not automatically accept the discovery rule.[116] Courts taking this approach aid victims in getting to trial while avoiding a broader holding that would greatly expand the statute of limitations. The Supreme Court of Oregon in *Fearing v. Bucher*[117] accepted an expansive interpretation of the statute of limitations and permitted a claim of child abuse to go forward long after the abuse allegedly happened, basing its decision on the late discovery of the causal connection between the abuse and the harm.[118] Oregon's plaintiff-friendly system not only allows the victims to bring their claims based on the discovery rule but also allows claims of negligence against the hierarchy of the Church—claims precluded by some courts under the First Amendment.[119]

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discovery rule to what it has termed 'inherently undiscoverable' intentional torts," but "Tichenor has provided no evidence to counter the fact that he should have known of the basis for this suit at least by May 1989 when . . . [the police] notified him that the New Orleans District Attorney's office was investigating").

115. *See, e.g.*, Wells v. Janssen, No. LACE 101220 (Iowa Dist. Ct. for Scott County 2005) (tolling the statute of limitations until victim discovered the cause of his illness).

116. *See, e.g.*, H.R.B. v. J.L.G., 913 S.W.2d 92, 97 (Mo. Ct. App. 1995) (refusing to grant a motion to dismiss because the tolling of a statute of limitations was a question of fact for the jury).

117. *See* Fearing v. Bucher, 977 P.2d 1163, 1168–69 (Or. 1999) (holding that the claims against the diocese alleged conduct that constituted child abuse and were therefore included under the discovery rule). In *Fearing*, the court decided whether to expand the discovery rule to include the supervision and cover-up by the Archdiocese of Portland. *Id.* at 1164. The court first examined the abuse and determined that "[t]he Archdiocese . . . could be found vicariously liable, if the acts that were within Bucher's scope of employment resulted in the acts which led to injury to plaintiff." *Id.* at 1166. Finally, the court determined that the actions against the Church were based on conduct that qualified as child abuse and that the claims against the Archdiocese were also within the extended statute of limitations for child abuse. *Id.* at 1168.

118. *See id.* at 1169 (holding that any action taken by the Archdiocese "clearly is *based on* child abuse") (emphasis added).

119. *See infra* Part IV.C (detailing the First Amendment claims raised in clergy sexual abuse cases).

Though Oregon uses the discovery rule to toll the statute of limitations, other states have different tolling options, including a fraudulent concealment tolling statute.[120] Courts tolling on this basis place a stricter burden on the victim to establish "his own lack of knowledge of his cause of action."[121] "[If] the Diocese has demonstrated by clear and convincing evidence that it lacked knowledge of the plaintiff's cause of action," however, it may "avoid application of the tolling statute on that basis."[122] This secondary holding should not discourage victims because once one victim provides evidence of a cover-up by the Diocese, other victims may rely on that evidence to establish the knowledge of the Diocese and toll the statute. With many victims joining forces in groups like the Survivors' Network of those Abused by Priests (SNAP)[123] and utilizing the expertise of nationwide victims' rights attorneys,[124] plaintiffs in different cases within the same region should have access to evidence uncovered in other cases. Victims may win one battle when their state opts to extend the statute of limitations, but the war does not end until victims overcome the obstacles posed by the Church's First Amendment defenses. Thus, even victims in states with tolling rules who are willing to face the psychological drawbacks of the courts may prefer a less adversarial option like restorative justice.

3. Revived Statute of Limitations

A new, plaintiff-friendly alternative for dealing with the statute of limitations developed in 2002 when the California legislature amended section 340.1 of the

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120. *See, e.g.*, Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 418–19 (2d Cir. 1999) (holding that the Connecticut fraudulent concealment tolling statute applies to sexual assault claims). The court held that the statute of limitations for sexual abuse, which normally extended seventeen years after the victim reached the age of majority, could be tolled for a longer period of time unless the defendant could prove that it did not act fraudulently to conceal information. *Id.* The court further upheld the decision of the lower court that "there existed a special relationship of trust and confidence between Martinelli and not only Father Brett, but the Diocese." *Id.* at 430.

121. *Id.* at 432.

122. *Id.*

123. For more information on SNAP, see SNAP Homepage, http://www.snapnetwork.org (last visited Aug. 27, 2006), detailing the mission of SNAP, providing up-to-date news on clergy sexual abuse cases, and declaring itself "the nation's largest, oldest and most active support group for women and men wounded by religious authority figures."

124. *See, e.g.*, Biography of Jeff Anderson, http://www.andersonadvocates.com/JeffAnderson/index.html (last visited Aug. 27, 2006) (explaining that Anderson has taken clergy sexual abuse cases for twenty years and won over twenty cases against the Church with verdicts of over one million dollars) (on file with the Washington and Lee Law Review). Jeff Anderson and his assistant, Patrick Noaker, also served as secondary counsel to J.W. in *Wells v. Janssen*, No. LACE 101220 (Iowa Dist. Ct. for Scott County 2005).

California Code of Civil Procedure "to permit a one-year period for the revival of such abuse claims that had expired under the previous limitations period."[125] The U.S. Supreme Court struck down the revival period in criminal cases because it violated the ex post facto clause of the Constitution,[126] but it left untouched the revival period for civil claims. California victims had an opportunity in 2003 to file their previously expired civil suits,[127] and many did so to get the offending priests' names publicized.[128]

With so many new civil lawsuits arising in California, the Church became concerned with the financial repercussions of these actions.[129] A recent California case affirming the Church's financial liability was *Roman Catholic Bishop of Oakland v. Superior Court*.[130] In that case, a victim sued the priest and the Bishop under the revived civil statute of limitations. The victim later "sought punitive damages against the Bishop . . . based on allegations that the Bishop knew [the priest] was a child molester but took no steps to protect young Churchgoers from his advances."[131] The court held that the victim could make this claim against the Bishop because punitive damages did not qualify as a criminal sanction and were therefore authorized by the revived civil statute of limitations.[132] The Diocese and all other negligent California Dioceses thus faced the possibility of verdicts including both actual and punitive damages.

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125. Roman Catholic Bishop of Oakland v. Super. Ct., 28 Cal. Rptr. 3d 355, 358 (Cal. Ct. App. 2005); *see also* CAL. CODE CIV. PROC. § 340.1 (2002) (providing the full text of the rule).

126. *See* U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . ex post facto law . . . ."); Stogner v. California, 539 U.S. 607, 616 (2003) ("[N]umerous legislators, courts, and commentators have long believed it well settled that the Ex Post Facto Clause forbids resurrection of a time-barred prosecution.").

127. *See* Steve Carney, *Ruling May Boost Civil Abuse Suits, Victims See Another Route After Court Rejects California Law*, THE BOSTON GLOBE, June 28, 2003, at A2 ("[A] window of opportunity remains open for victims to seek recourse in civil courts because of a law the California Legislature passed last year suspending the statute of limitations in abuse lawsuits for the entirety of 2003.").

128. *See id.* ("The media will not print names unless there's some legal action.").

129. *See id.* ("[T]he Church could be facing suits totaling billions of dollars.").

130. *See* Roman Catholic Bishop of Oakland v. Super. Ct., 28 Cal. Rptr. 3d 355, 369 (Cal. Ct. App. 2005) (holding that the revival portion of the statute applies to non-criminal punishment, that punitive damages are non-criminal, and that punitive damages are therefore applicable against the Diocese). After examining previous cases dealing with punishments qualifying as criminal in nature, the court held that "despite certain similarities with criminal sanctions, punitive damages arising from common law causes of action possess and retain a quintessentially civil flavor." *Id.* at 365.

131. *Id.* at 358.

132. *See id.* at 360–69 (applying the *Mendoza-Martinez* test and finding that punitive damages are not wholly criminal in nature).

This gave victims in California an opportunity to use the judicial system to tell their stories and recover large monetary awards from their abusers.

The California approach may seem ideal for victims, but it also appears highly destructive for the Church. Other states have not followed California's lead in reviving the statute of limitations.[133] A recently defeated bill in the Ohio legislature mirrored the California rule and would have allowed Ohio to set a time period in which to accept cases under a revived statute of limitations.[134] As expected, the victims showed strong support for the proposal while the Church vigorously objected with claims that a revival period could lead to financial ruin.[135] The Ohio statute differed from other proposed revival periods because the Rev. Thomas Gumbleton, a Catholic bishop, publicly supported the proposition.[136] In taking that stance, Gumbleton acted not just as a bishop but also as a victim of clergy sexual abuse—Gumbleton was the first American bishop to admit that he was also a victim.[137]

Victims, like Gumbleton, embraced the revived statute of limitations because they wanted an opportunity to bring their claims, but overcoming the statute of limitations problem does not necessarily provide relief for all victims. If the state recognizes a discovery rule, or other tolling statute, or permits a revived period for bringing civil claims, the courts will not automatically dismiss the case but will face the more difficult question of how to reconcile

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133. *See* Editorial, *A Path to Justice*, N.Y. TIMES, Jan. 18, 2006 ("[A] one-year window in California led to about 800 lawsuits . . . .").

134. *See id.* ("The bill would relax the statute of limitations on sexual abuse, granting a one-year window for lawsuits by those whose right to a day in court lapsed long ago. . . . [A]dvocates for the victims of abusive priests have supported this path to justice for long-hidden crimes."); Laure Quinlivan, *House Kills Key Provision In Clergy Sex Abuse Bill*, WCPO.com, http://www.wcpo.com/news/2006/local/03/28/iteam-update.html (last visited Oct. 3, 2006) ("[R]epublicans killed the bill's one year window to allow victims to file civil suits against their abusers.") (on file with the Washington and Lee Law Review).

135. *See id.* (noting that with potential lawsuits, "the bills could easily reach hundreds of millions of dollars").

136. *See id.* ("The Rev. Thomas Gumbleton, an auxiliary bishop of the Roman Catholic Archdiocese of Detroit, urged lawmakers in Ohio last week to support a bill that would put his Church at great risk of embarrassment, shame and financial hardship.").

137. *See* Alan Cooperman, *Bishop Says Priest Abused Him as Teenager*, WASH. POST, Jan. 11, 2006, at A3 (summarizing the Gumbleton story). Cooperman wrote:

> Gumbleton, 75, is the first U.S. bishop to disclose that he was a victim of clergy sexual abuse. He is also the first to endorse proposals in Ohio, Pennsylvania, New York and other states to follow California's example and open a one-year window for victims to file lawsuits over sexual abuse, no matter how long ago it took place.

Id.; *see also* Oralandar Brand Williams, *Bishop's Future? Talk with Maida*, DETROIT NEWS, Jan. 27, 2006 ("Gumbleton, one of Metro Detroit's longest-serving and politically outspoken priests, has offered his resignation as auxiliary bishop of the Archdiocese of Detroit.").

claims of clergy sexual abuse with the First Amendment religion clauses and the doctrine of separation of church and state.[138]

C. The First Amendment Religion Clauses

Victims who make claims against the Catholic Church and succeed on statute of limitations grounds will most likely face a motion to dismiss their suit based on a violation of the First Amendment.[139] Although some victims may argue that child molestation and its cover-up could never qualify as protected religiously motivated conduct, the Church almost always raises First Amendment defenses, and many courts have accepted the arguments. The First Amendment contains two clauses relating to religion: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[140] The language of the Amendment does not contain the words "separation of church and state," but the Supreme Court has long since incorporated this language into First Amendment doctrine.[141] Another principle used by the Supreme Court to actualize this separation is the ecclesiastical abstention doctrine, which requires civil courts to follow the decisions made by the Church hierarchy.[142] The Supreme Court has formulated

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138. The history of the phrase "separation of church and state" actually dates back to a letter written by President Thomas Jefferson in 1802 and not directly to the Bill of Rights or the U.S. Constitution. Letter from Thomas Jefferson, U.S. President, to Danbury Baptist Association (Jan. 1, 1802), *available at* http://www.usconstitution.net/jeffwall.html; David Barton, The Changing First Amendment, Address to the Students of Washington and Lee University (Jan. 18, 2006).

139. The Church often files First Amendment claims, but some victims' lawyers have expressed greater concern over the statute of limitations issue. *See, e.g.*, Craig Levien Interview, *supra* note 108 ("I was not concerned about the First Amendment arguments. . . . I did not see the First Amendment rights to religious freedom as impacting the State's rights to curb illegal tortious conduct.").

140. U.S. CONST. amend. I, cl. 1.

141. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting the 1802 letter from Thomas Jefferson to the Danbury Baptist Association in which he tied "the separation between church and state" to the Free Exercise Clause); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.").

142. For an early explanation of the ecclesiastical abstention doctrine, see *Watson v. Jones*, 80 U.S. 679, 727 (1872), noting that "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" are final and binding on the civil courts. *See also* Christopher R. Farrell, Note, *Ecclesiastical Abstention and the Crisis in the Catholic Church*, 19 J.L. & POL. 109, 115–20 (2003) (detailing the history of the ecclesiastical abstention doctrine and its application to the current controversy).

tests for dealing with religion cases under both the Free Exercise Clause and the Establishment Clause of the federal Constitution, but the differing interpretations of the tests by state courts often leave victims without a remedy. Restorative justice could help avoid these challenges.

1. The Free Exercise Clause and Neutral Principles Approach

Though the Supreme Court sometimes deals with questions of Free Exercise and Establishment together, the doctrines differ and even conflict with each other on occasion.[143] In one of the Supreme Court's early cases answering religious questions, *Watson v. Jones*,[144] the Supreme Court laid the foundation for what would become both the ecclesiastical abstention doctrine and the neutral principles approach.[145] The Court further expanded the neutral principles approach in 1979 in *Jones v. Wolf*.[146] The new, expanded interpretation "relie[d] exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges."[147] This modern interpretation, recently explained by the Supreme Court in a few well known religion cases,[148]

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143. *See, e.g.*, Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting) ("To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations . . . would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause."); Calvin Massey, *The Political Marketplace of Religion*, 57 HASTINGS L.J. 1, 3–5 (2005) (detailing four possible outcomes of judicial attempts to "mediate the tension between the Religion Clauses").

144. *See* Watson v. Jones, 80 U.S. 679, 728–30 (1871) (holding that the decisions of the highest ecclesiastical courts bind civil courts but the civil courts will consider property disputes with religious institutions as parties).

145. *See* John S. Brennan, *The First Amendment Is Not the 8th Sacrament: Exorcizing the Ecclesiastical Abstention Doctrine Defense from Legal and Equitable Claims for Sexual Abuse Based on Negligent Supervision or Hiring of Clergy*, 5 T.M. COOLEY J. PRAC. & CLINICAL L. 243, 259 (2002) (interpreting the *Watson v. Jones* decision). Brennan explains the emerging neutral principles approach: "Ecclesiastical acts that violate secular morality or the rights of person or property protected by the state are thus logically subject to review by civil courts." *Id.* However, he also notes the importance of ecclesiastical abstention: "[C]ivil courts lack competency in the realm of ecclesiastical law and religious faith, making civil courts ill-equipped and illogical arbiters of last resort in religious-based disputes." *Id.* at 258.

146. *See* Jones v. Wolf, 443 U.S. 595, 604 (1979) (holding that courts can apply a neutral-principles approach with Church property disputes to examine Church documents from a secular point of view). The Court found, "The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organizations and polity." *Id.*

147. *Id.* at 603.

148. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 514–20 (1997) (setting forth a two

aids victims of clergy sexual abuse by strengthening their claims that the Church should not be exempted from basic tort laws.

The Free Exercise question becomes thornier when applied to the claims raised by most victims including breach of fiduciary duty, negligent hiring, and negligent supervision.[149] Courts deciding whether the Church's actions should be exempted from judicial review on Free Exercise grounds normally reject First Amendment defenses related to claims of fiduciary duty owed by the priest or Church hierarchy because fiduciary relationships fall into the category of neutral law.[150] When the courts start to look at claims of negligent hiring and supervision by the Church, however, they must decide if these actions have a foundation in religious belief and therefore require First Amendment protection.[151] The Free Exercise clause protects religiously motivated conduct by requiring that state action "directed toward the religious motivation for the conduct . . . must be justified by a compelling state interest and must be

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prong test for analyzing free exercise in which the courts (1) consider whether the law is neutral and generally applicable and therefore governed by *Smith* and (2) move to the compelling interest test of *Lukumi* if they find that the law is not neutral and generally applicable); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (finding that laws targeting religions and lacking facial neutrality "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest"); Employment Div. v. Smith, 494 U.S. 872, 878–79 (1990) (finding that the court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law"); *see also* Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 6 (1961) (arguing that the two Religion Clauses "should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden").

149. *See* Emily C. Short, Comment, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice*, 57 OKLA. L. REV. 183, 192–98 (2004) (listing the following as claims most often brought by victims: battery, negligent infliction of emotional distress, intentional infliction of emotional distress, breach of fiduciary duty, respondeat superior, negligent hiring, and negligent supervision).

150. *See, e.g.*, Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431 (2d Cir. 1999) ("To the extent that the jury did consider religious teachings and tenets, moreover, it did so to determine not their validity but whether, as a matter of fact, Martinelli's following of the teachings and belief in the tenets gave rise to a fiduciary relationship . . . ."). *But see* Schmidt v. Bishop, 779 F. Supp. 321, 326, 332 (S.D.N.Y. 1991) (holding that any investigation into religious doctrine to establish a standard of care violates the First Amendment and extending that to a decision on breach of fiduciary duty).

151. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."); *see also* Isely v. Capuchin Province, 880 F. Supp. 1138, 1150–51 (E.D. Mich. 1995) ("Questions of hiring and retention of clergy necessarily will require interpretation of Church canons, and internal Church policies and practices. . . . [U]nlike in case of hiring decisions, matters pertaining to the supervision of Fathers Buser and Leifeld can be decided without determining questions of [C]hurch law and policies.").

narrowly tailored to advance that interest."[152] Because the conduct of hiring and supervising clergy arguably qualifies as religiously motivated rather than governed by neutrally applicable tort law, victims' claims of negligent hiring and supervision against the Church may violate the Free Exercise Clause. To get around this hurdle, some courts reason that "protection of children and other vulnerable persons from sexual abuse is a 'compelling state interest.'"[153]

The Florida Supreme Court glossed over the Free Exercise question in *Malicki v. Doe*[154] when it found that religious conduct does not deserve absolute First Amendment protection.[155] Victims in Florida will likely benefit from the majority ruling in *Malicki* because it prevents Florida courts from dismissing sexual abuse claims at the pleading stage on First Amendment grounds.[156] At the same time, the minority opinions in *Malicki v. Doe* exemplify the contrary arguments made on First Amendment issues in courts across the country. In his concurrence, Chief Justice Wells expressed a pressing concern of many courts ruling against the Church when he stated, "My concern is that the religious organizations in this state are going to be severely financially burdened by having to defend claims for undefined and unlimited 'tortious conduct' which claim to be grounded upon the majority opinion."[157] In another concurrence, Justice Quince used the charitable immunity doctrine to support the victims' position, noting, "[S]hielding religious organizations from

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152. Brennan, *supra* note 145, at 282. *But see* Employment Div. v. Smith, 494 U.S. 872, 888 (1990) (declining to extend strict scrutiny to all laws that burden Free Exercise).

153. Brennan, *supra* note 145, at 291; *see also* New York v. Ferber, 458 U.S. 747, 757 (1982) ("Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.").

154. *See* Malicki v. Doe, 814 So. 2d 347, 354 (Fla. 2002) ("The State may . . . regulate conduct through neutral laws of general applicability."). In *Malicki*, the Florida Supreme Court decided whether the First Amendment barred an action by a third-party against a Miami Catholic Church based on the alleged tort of sexual abuse conducted by its clergy. *Id.* at 351. In this case, two female parishioners—one a minor working at the Church in exchange for tuition at the local Catholic high school and the other an adult parishioner working at the Church—alleged that Father Malicki "fondled, molested, touched, abused, sexually assaulted and/or battered" them on Church premises. *Id.* at 352. The Court held that the First Amendment did not serve as a shield for the Church against liability in cases where a Church employee committed battery. *Id.* at 351. The Court also found that an inquiry into Church hiring practices did not violate the First Amendment because it was based on a reasonable foreseeability determination. *Id.* at 365.

155. *See id.* at 354 (holding that states can utilize laws of general applicability with religious institutions).

156. *See id.* at 365 ("Our holding today is only that the First Amendment cannot be used at the initial pleading stage to shut the courthouse door on a plaintiff's claims . . . .").

157. *Id.* at 366 (Wells, C.J., concurring).

tort liability solely because of their status would have the impermissible effect of recognizing a religion in violation of the Establishment Clause."[158] In his dissent, Justice Harding refused to examine the Church's rationale for making its hiring decisions—an approach that almost always favors the Church over the victims.[159]

A related principle frustrating plaintiffs in their search for justice is the doctrine of ecclesiastical abstention, adopted in the case of *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevich*.[160] Whenever an ecclesiastical court makes a determination regarding Church policy or discipline, the civil courts must accept that decision as binding and not attempt to redefine proper Church policy. The ecclesiastical abstention doctrine arises most often in the context of claims against the Church for negligent hiring and supervision.[161] Some courts have dismissed claims of negligent hiring but allowed claims of negligent supervision because the former involves interpretation of religious doctrine and policy, while the latter does not.[162] Other courts have refused to allow any claims of negligence, allowing only claims of intentional action.[163] Some courts have even used the

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158. *Id.* at 367 (Quince, J., concurring).

159. *See id.* at 368 (Harding, J., dissenting) ("I find the majority's conclusion is falsely premised on the notion that the instant case is a 'purely secular' dispute. . . . [A] closer inquiry reveals that the *nature of the dispute* in this instance . . . implicates a secular examination into '*intra*-Church' process and procedure; an action proscribed by our Constitution.").

160. Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 724–25 (1976) (finding that civil courts must follow the decisions made by ecclesiastical courts). The Court held:

> [T]he First and Fourteenth Amendments permit hierarchical organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Id.

161. *See, e.g.*, Isely v. Capuchin Province, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995) (citing to *Serbian Eastern Orthodox*, "It is well-settled that when a court is required to interpret Canon Law or internal Church policies and practices, the First Amendment is violated because such judicial inquiry would constitute excessive government entanglement with religion").

162. *See id.* at 1150–51 ("Plaintiff's claims of negligence predicated upon a 'negligent hiring' theory will be dismissed. . . . However, the Supreme Court has made clear that if only 'neutral' principles of law can be applied without determining underlying questions of Church law and policies, then a court may intervene.").

163. *See, e.g.*, Gibson v. Brewer, 952 S.W.2d 239, 249 (Mo. 1997) ("Applying a negligence standard to the actions of the Diocese in dealing with its parishioners offends the First Amendment. . . . [U]nder the First Amendment, liability for intentional torts can be imposed without excessively delving into religious doctrine, polity, and practice.").

ecclesiastical abstention doctrine to introduce a new, "constitutionally protected legal status of 'ecclesiastical relationship' based on . . . the religious beliefs . . . at the core of the relationship between bishop and priest."[164] Despite its sporadic and varied application, ecclesiastical abstention generally undermines victims' claims because the Catholic Church, applying canon law, rarely imposes harsh disciplinary measures on the offending priests.[165]

The U.S. Supreme Court has not yet clearly decided whether courts should favor victims or the Church on Free Exercise questions. In any case, the more serious obstacle for victims comes not from the varying interpretations of the Free Exercise Clause, but instead from the Establishment Clause.[166]

2. The Establishment Clause

Since 1971, plaintiffs bringing a claim implicating the Establishment Clause usually must convince the courts that their claims do not violate the three prongs of the *Lemon* test.[167] In *Lemon v. Kurtzman*,[168] the Supreme Court developed a test requiring that any statute touching religion must have a secular purpose, that the statute's primary effect must neither advance nor inhibit religion, and that the statute must not involve excessive entanglement with religion.[169] Though the Court provided a three prong test, it decided *Lemon* based only on the final prong, and thus many lower courts—especially in the

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164. Brennan, *supra* note 145, at 276–77 (referencing *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 445 (Me. 1997)).

165. *See, e.g.*, John H. Arnold, *Clergy Sexual Malpractice*, 8 U. FLA. J.L. & PUB. POL'Y 25, 35 (1996) ("In Canon Law, the penal process is derailed if a pedophilic priest simply expresses sorrow and seeks reconciliation.").

166. *See* Farrell, *supra* note 142, at 116 ("It is unclear whether the text of the First Amendment compels civil courts to refrain from deciding matters of religious controversy . . . .").

167. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (establishing a three prong test to determine whether an activity infringing a religious belief violates the First Amendment's Establishment Clause). The Court stated, "In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.*

168. *See id.* at 625 (holding that Rhode Island and Pennsylvania's education legislation providing special reimbursement to parochial schools violated the religion clauses of the First Amendment).

169. *See id.* at 612–13 (laying out the three prong test); *see also* Ivan E. Bondensteiner, *The "Lemon Test," Even With All Its Shortcomings, Is Not the Real Problem in Establishment Clause Cases*, 24 VAL. U.L. REV. 409, 409 (1990) (explaining the problems with the *Lemon* Test but also "caution[ing] against expecting too much of any test in this difficult area of constitutional law").

area of clergy sexual abuse—have focused almost exclusively on the third prong of excessive entanglement.[170] As one court stated, "It may be argued that it requires no excessive entanglement with religion to decide that reasonably prudent clergy of any sect do not molest children," but the court concluded:

> Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable . . . clergy of the community. . . . It fosters excessive entanglement with religion.[171]

Many victims attempt to get around the *Lemon* test by charging clergy malpractice, but no court—state or federal—has yet accepted clergy malpractice as a valid claim.[172] The Washington Supreme Court once acknowledged a clergy malpractice claim as conceivable in the future, but even that court has since refused to accept it.[173] Many courts find that the very act of defining a standard of care for a reasonable clergyman constitutes excessive entanglement, and therefore they dismiss all such claims.[174]

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170. *See Lemon*, 403 U.S. at 613–14 ("We need not decide whether these legislative precautions restrict the principal or primary effect . . . to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes . . . involves excessive entanglement between government and religion.").

171. Schmidt v. Bishop, 779 F. Supp. 321, 328 (S.D.N.Y. 1991).

172. *See* F.G. v. MacDonell, 696 A.2d 697, 703 (N.J. 1997) ("[T]he Appellate Division acknowledged that F.G.'s claim presented an issue of first impression in New Jersey, and that no other court in the United States had yet recognized a clergy-malpractice claim."); Borchers v. Hrychuk, 727 A.2d 388, 395 (Md. 1999) ("[N]o other courts in the United States (including New Jersey) have recognized the tort of clergy malpractice."); *see also* Dausch v. Rykse, 52 F.3d 1425, 1432 (7th Cir. 1994) (Ripple, J., concurring in part and dissenting in part) (listing the states that had refused to recognize clergy malpractice as a cause of action: Alabama, California, Colorado, Louisiana, Missouri, Nebraska, New York, Ohio, Oklahoma, and Pennsylvania).

173. *See* Lund v. Caple, 675 P.2d 226, 231 (Wash. 1984) ("It is conceivable that a malpractice action would be appropriate where a counselor fails to conform to an appropriate standard of care . . . ."); *see also* S.H.C. v. Lu, 54 P.3d 174, 179 (Wash. Ct. App. 2002) ("[T]he court would have to examine the religious doctrine of the True Buddhist faith to determine whether the Temple was negligent in its supervision and retention of Grandmaster Lu. That necessarily would involve the excessive entanglement that First Amendment jurisprudence forbids.").

174. *See* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995) ("[W]e conclude that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of [C]hurch canons and internal [C]hurch policies and practices."). *But see* Short, *supra* note 149, at 183 ("[C]ourts may look to secular documents adopted by the Church regarding personnel policies to define the standard of care.").

Other courts have expanded the scope of the First Amendment and have refused even to examine the issue of whether a priest's actions fall within the scope of his employment.[175] Some courts use excessive entanglement as a justification for refusing to define a standard of care for a priest but then proceed to delineate his duties as a fiduciary in order to provide a claim for breach of that duty.[176] Other courts have focused on the charitable immunity doctrine and announced, "Clergy and religious organizations are not absolutely immune from civil liability," but they have then refused to take the case because "[r]eligion was not merely incidental to plaintiff's relationship with the defendant, the archbishop, and the [C]hurch; it was the foundation for it."[177] If courts dismiss the victims' claims solely on the basis of the religious foundations of the relationship, the Church will never face civil liability, and the victims will remain without a satisfactory judicial remedy. Thus, the increased probability for a First Amendment dismissal of any claim against the Church leads victims to search for an alternative. Restorative justice avoids these judicial obstacles by removing the courts and the government from the process, thereby offering a potential solution to the challenges of litigation in the area of clergy sexual abuse.

V. Applying Restorative Justice to Clergy Sexual Abuse

The daunting situation of alleging wrongdoing by a powerful worldwide Church, combined with the "Rambo litigation tactics" employed by Diocesan lawyers, has convinced victims that a remedy outside of the court system might better serve their interests.[178] The goals of restorative justice help both victims

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175. *See Pritzlaff*, 533 N.W.2d at 791 ("Problems of excessive entanglement seem inevitable if the court is asked to determine whether a priest . . . was on or off duty when he engaged in conduct that was against the laws of the religious denomination and beyond the scope of employment.").

176. *See, e.g.*, F.G. v. MacDonell, 696 A.2d 697, 703–04 (N.J. 1997) (refusing to define a standard of care by identifying religious practices and explaining the practices of the fiduciary relationship as well as the trust and inherent power imbalance).

177. H.R.B. v. J.L.G., 913 S.W.2d 92, 98–99 (Mo. Ct. App. 1995). Though the reasoning in *H.R.B.* appears in many other cases, some courts have taken a view that is more favorable to victims. *See, e.g.*, Doe v. Hartz, 52 F. Supp. 2d 1027, 1079 (N.D. Iowa 1999) (refusing to dismiss the victim's claims on the basis of excessive entanglement because the court follows a "wait and see" approach); *see also* Martinelli v. Bridgeport Roman Catholic Diocese Corp., 196 F.3d 409, 431 (2d Cir. 1999) ("The First Amendment does not prevent courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters.").

178. *See, e.g.*, Allen K. Harris, *The Professionalism Crisis—The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 551 (2002)

and offending priests to reintegrate into the community and provide appropriate alternative solutions to the problems faced by victims in the court system. Though this solution raises problems of enforcement and control over the Church, the benefits of a restorative justice program extend to all parties involved. The final section of this Part offers solutions to the potential difficulties in application and concludes that restorative justice is the best alternative.

A. How to Apply Restorative Justice to this Offense

Though the RESTORE system of Pima County, Arizona, is only in its early stages, a restorative justice approach to clergy sexual abuse could use it as a model.[179] RESTORE is not a perfect solution, however, because it deals only with individual wrongdoers and individual victims, and the clergy abuse problem requires the coordination of multiple victims, offending priests, and the institutional hierarchy of the Church.[180] The institutional aspect of the

("After at least fifteen years of lament over the presence of Rambo lawyer tactics, Rambo and his progeny—discovery abuse, overzealous advocacy, excessive zeal, zealotry (the 'z' words), incivility, frivolous lawsuits, and other forms of unprofessional or unethical conduct—are very much in our midst . . . .").

179. *See supra* notes 81–87 and accompanying text (describing the RESTORE program approach to nonpenetration sexual offenses); *see also* Kathleen A. Shaw, *Catholic Church Sees Restorative Justice as Way to Heal*, WORCESTER TELEGRAM & GAZETTE, Feb. 10, 2005, *available at* http://ncrnews.org/abuse2005archives/009133.html (explaining how some commentators believe the Catholic Church should approach the problem) (on file with the Washington and Lee Law Review). Other advocates of a restorative justice approach for clergy sexual abuse cases have encouraged the Church to initiate other types of restorative justice programs. Janine Geske, a former Wisconsin Supreme Court Justice and Marquette University law professor, advocates the Navajo peace circle approach—an approach that shares important characteristics with the community conferencing approach of RESTORE including support network presence. *Id.*; *see also* Peter Geigen-Miller, *Church Eyes New Process for Sex Cases: A London Lawyer Proposes a Faster, Kinder Way to Resolve Complaints of Abuse*, LONDON FREE PRESS, Jan. 18, 2006, at B3, *available at* http://lfpress.ca/newsstand/Cityand Region/2006/01/18/pf-1399593.html (detailing the alternative dispute resolutions presented by a victims' lawyer in London, Ontario, Canada) (on file with the Washington and Lee Law Review).

180. Because many of the priests abused more than one child, situations will likely arise in which multiple victims bring actions against the same priest. *See, e.g.*, Wells v. Janssen, No. LACE 101220 (Iowa Dist. Ct. for Scott County 2005) (alleging child molestation by Father James Janssen); Schildgen v. Janssen, No. LACE 102464 (Iowa Dist. Ct. for Scott County 2005); (same); John Doe III v. Janssen, No. LACE 101428 (Iowa Dist. Ct. for Scott County 2005) (same); John Doe IV v. Janssen, No. LACE 101726 (Iowa Dist. Ct. for Scott County 2005) (same); John Doe V v. Janssen, No. LACE 101755 (Iowa Dist. Ct. for Scott County 2005) (same); John Doe VI v. Janssen, No. LACE 101845 (Iowa Dist. Ct. for Scott County 2005) (same).

Church complicates the issue, but Braithwaite and other restorative justice theorists have concluded that restorative justice approaches should function efficiently in both individual and group contexts.[181]

The benefits of restorative justice extend not only to the victim, who has a chance to share his or her story and the harm he or she has suffered, but also to the institution that has a chance to explain the reasons for its choices and the changes it intends to make in the future.[182] The Church divides itself into Archdioceses/Dioceses and parishes, so the restorative justice approach could occur at three different levels: the United States Catholic Church level, the Diocesan level, or the parish level.[183] Because the litigated suits have alleged wrongdoing by various Diocesan officials, a restorative justice approach at the Diocesan level would most effectively address the needs of the victims and the institution. Acting at the level of the entire United States Catholic Church would be inefficient and overly broad, while acting within individual parishes might exclude some of the necessary actors in the community at the Diocesan level.

The offense of clergy sexual abuse concerns not only the victim, the offender, and their respective support networks but also the entire faith community. Therefore, a community conferencing approach would be the best method to address the concerns of all the parties affected. Under this system, the victims and offending priests could invite their families and supporters from

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181. *See* BRAITHWAITE, *supra* note 45, at 93–94 (describing the potential for applying restorative justice to organized crime and highlighting the success of corporate restorative justice programs); Llewellyn & Howse, *supra* note 43, at 373 ("[R]estorative justice is sensitive to context and thus appropriate to a variety of situations. A restorative justice approach . . . is not limited to the individual level . . . but can be applied to the institutional level . . . .").

182. *See* Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 580–81 (2004) (describing the results of interviews with parents and schools involved in a mediation). Welsh found that the benefits extended to both "one-time" disputants and "repeat players":

> "One-time" disputants . . . seek and appreciate a process that provides: . . . with the opportunity to express their views[,] . . . assurance that their views have been heard and considered by the decisionmakers[,] . . . and evenhanded, dignified treatment. . . . More sophisticated "repeat players" . . . also value mediation for its procedural justice . . . [which fulfills] their need to hear and understand the parents' concerns and for the parents to hear and understand (or at least accept) the norms that the school officials are entitled to apply.

Id.

183. *See* United States Catholic Church Structure, http://www.catholic.org/clife/usccs/ (last visited Sept. 4, 2006) ("The organizational structure of the Catholic Church in the United States consists of thirty-three Provinces with as many Archdioceses (Metropolitan Sees); 148 Suffragan Sees (Dioceses).").

both inside and outside the Catholic Church to participate. The Diocese would also send representatives to attend as the officials responsible for the offending priest as well as a support system for the victims. Because the community conferencing approach focuses on the community response, people from the Church congregation who have concerns regarding the particular offense could also attend and participate as part of an accountability board.[184] Though this approach sounds ideal, many members of the community may be hesitant to participate simply because the stories of the victims "are so grim and disturbing that few wish to hear them, much less be exposed to details which can become numbing."[185] As long as the victims, offending priests, and Diocesan officials agree to bring their support networks to the conference, however, the approach would satisfy the community representation requirement. The community support aspect of the approach plays a crucial role because when the community takes part in the process, it also plays a role in ensuring that the process has a successful outcome.[186] Thus, the community takes on an important enforcement function.

At a basic level, this approach glosses over the multiple victim aspect of this crisis. With multiple victims alleging wrongdoing by the same priest and Diocese, an individualized meeting for each victim could lead to the offending priests sitting through ten to twenty conferences, while the Dioceses could face hundreds. To streamline this process, the administrators of the program could hold initial meetings with victims to ascertain their goals and whether they agree to participate in a multiple-victim conference.[187] Victims who hoped to compromise for a small monetary remedy for emotional damages, for example, could all meet together with the offending priest and Diocese and develop similar agreements. Victims who preferred a private apology could meet individually. However, the administrators would have to ensure that the number of victims meeting with the Diocese and offending priest did not become overwhelming. The restorative justice approach attempts to neutralize inequality among all the parties, so the number of victims should remain small

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184. *See, e.g.*, Hopkins & Koss, *supra* note 63, at 697 ("A Community Accountability and Reintegration Board, made up of carefully prescreened members of various institutions and perspectives within the community, oversees . . . compliance with that agreement subsequent to receiving extensive training.").

185. DENNIS SULLIVAN & LARRY TIFFT, RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES 39 (2001); *see also infra* Part V.B (detailing many of the potential problems with a restorative justice approach to this offense).

186. *See* Llewellyn & Howse, *supra* note 43, at 380 ("Having been a part of the process, these communities have a stake in its successful outcome.").

187. *See, e.g.*, BRAITHWAITE, *supra* note 45, at 50 (noting that programs in which victims choose to participate show more positive results).

enough that the Diocese and offending priest do not feel that they have lost their voice in the process.[188]

While the idea of multiple victims may encourage some to call for mass tort litigation rather than a restorative approach, restorative justice theorists view offenses with multiple victims as an opportunity for widespread rehabilitative transition rather than mass litigation. A prime example is the South African Truth and Reconciliation Commission.[189] The case of post-Apartheid South Africa is a clear illustration of a state in a time of transition, and the current state of the Catholic Church exemplifies a similar time of transition.[190] In 2002, the Church realized the extent of the sexual abuse crisis and has since taken steps to combat any future problems.[191] Therefore, the current wave of litigation will likely conclude after the victims of abuse from the 1960s to the 1990s have received appropriate compensation.[192] The restorative justice approach would thus remain in effect only as long as needed to aid the Church in its transition.

As an example of how this process could work, the victims would choose to participate in the restorative justice conference and then would have the opportunity, together or individually, depending on their preference, to face the

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188. *See, e.g.*, Hopkins, *supra* note 62, at 295–96 (explaining the major differences between mediation and restorative justice in terms of accommodating the power imbalance). Hopkins, Koss, and Bachar summarize the difference as follows:

> [M]ediation's conceptual foundation is *inappropriate* for application to . . . [sexual crimes] because it fails to acknowledge the structural inequalities between the victim and offender and wrongly presumes that there is "voice parity" between the parties such that they have the same "truth-telling capacity. . . ." Mediation theory, however, rests on the assumption of equal or near-equal bargaining power between the parties. The underlying power dynamic in domestic violence cases thus makes it inappropriate for mediation.

Id.

189. *See* Llewellyn & Howse, *supra* note 43, at 356 (describing the work of the South African Truth and Reconciliation Commission in terms of restorative justice).

190. *See id.* at 379 (explaining the importance of restorative over retributive justice for entities in transition). Llewellyn and Howse write:

> After decades of violent human rights abuses, oppression, and essentially, civil war, South Africa needs transformation and reconciliation; it needs restoration. In contrast to the alternative "retributive" model, restorative justice does not seek to avenge the wrongs of the past. Restorative justice looks backward in order to look forward and build a different future.

Id.

191. *See supra* Part II.C (detailing the adoption of the Charter for the Protection of Children and Young People and the accompanying Essential Norms).

192. *Cf.* Llewellyn & Howse, *supra* note 43, at 384 (explaining that in South Africa, "it is unlikely that these crimes will recur").

offending priest and explain what happened and how it has harmed them. For many, this would include a narrative of multiple events of sexual abuse, followed by an analysis of their lives since the time of the abuse—including resulting psychological problems.[193] The offending priest would then have a similar opportunity to acknowledge the offense and the harm and apologize if he so chooses. Although the offending priests and the Diocese are not required to apologize for the abuse or the cover-up,[194] some victims have implied that an apology is the only relief they truly want.[195] Even if the offending priest or Diocese would choose to apologize to the victim, the victim has no obligation to accept the apology or offer forgiveness.[196] The information revealed in a conference should remain confidential unless it forms part of an agreement concerning future action.[197]

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193. *See, e.g.*, Affidavit of J.W., *supra* note 1, at 1–4, 7–9 (detailing nine years of abuse and the discovery of his resulting bi-polar disorder).

194. *See* BRAITHWAITE, *supra* note 45, at 15 ("Remorse that is demanded is remorse that is destroyed.").

195. Burke Letter to the Editor, *supra* note 3 ("I have met with and talked with many victims. In nearly every case, the victims' only request was for the bishop and leaders of the diocese to name the pedophiles (not ask for money)."); *see also* Julie Bycowicz, *A Feeling of Peace as Trial Approaches; Court: Dontee Stokes Looks Ahead to Trial of Ex-Priest Maurice Blackwell, Who Stokes Says Abused Him*, BALT. SUN, Feb. 9, 2005, at 1A, *available at* http://www.baltimoresun.com/news/local/bal-te.md.stokes09feb09,1,5282117.story (explaining the story of victim Dontee Stokes). The article states:

> Stokes was seeking an apology, he says, when he drove past Blackwell's home May 13, 2002. He spotted the priest outside, rolled down his window and began talking to Blackwell, he testified at his own trial. When Blackwell seemed to not recognize him, Stokes says he had an "out-of-body experience" in which he pulled out an illegally purchased .357 Magnum revolver and shot the priest three times.

Id.

196. *See* BRAITHWAITE, *supra* note 45, at 15 ("Yet it is wrong to ask victims to forgive and very wrong to expect it of them. Forgiveness is a gift victims can give. We destroy its power as a gift by making it a duty."); *see also infra* Part V.C (responding to concerns about the sincerity of the offending priest's apology).

197. *See* Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 297 (2005) (noting that some states have enacted statutory provisions requiring confidentiality of restorative justice approaches). *But see* BRAITHWAITE, *supra* note 45, at 165 ("Most restorative justice programs . . . do not legally guarantee the American Bar Association's (1994) guideline that 'statements made by victims and offenders and documents and other materials produced . . . [should be] inadmissible in criminal or civil court proceedings.'"); Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 686 (2005) ("Legislation is not providing the solution to this concern in most states, because it is unclear whether restorative justice programs are covered by statutory confidentiality provisions in existence for other types of mediation, and there are few states with statutes specific to restorative processes.").

Though remorse and forgiveness would be an ideal conclusion to a community conference, the enforceable outcome is derived from the mutual agreement on further action. Both parties should decide on a remedy that requires the offending priest and the Diocese to act in a way that repays the victim—financially or through other restorative action. For example, some Dioceses who have settled with victims out of court have included terms such as a Diocesan-promoted child abuse hotline or a monument to victims.[198] Once the parties reach a mutually acceptable agreement, the community review and accountability board would oversee the offending priest and Diocese as they carry out their agreement.

Before reaching the meeting and enforcement stages, however, the parties would need to overcome the barriers to implementing this approach. The victims might consider lobbying the legislature for statutory enactment of a restorative justice approach, but this process requires the participation of the Church, and a statute requiring the Church to act would likely run afoul of the First Amendment.[199] To avoid this complication, the victims and the support networks could convince the Church to sign a consent agreement for a restorative justice approach.[200] Rather than involving the government directly, this agreement would act as a private contract, and the restorative justice procedures could take place under the guidance of pre-established restorative justice projects.[201] Those contracts could mirror the ones used by the

198. DIOCESE OF DAVENPORT, REPORT UPDATE: NON-MONETARY SETTLEMENT TERMS 1–2 (2005), *available at* http://www.davenportdiocese.org/ddo-library/Non-MonetarySettlement Terms.pdf (listing terms such as the promotion of the Iowa Child Abuse Hotline and the placing of a monument "at the Chancery or Cathedral grounds honoring the Diocese's commitment to protecting God's children and the victims of abuse") (on file with the Washington and Lee Law Review).

199. *See supra* Part IV.C (discussing the First Amendment bars to judicial remedies); *see also* Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1672 (2003) (reviewing PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002)) ("State action is the difference between government religious activity, restricted by the Establishment Clause, and private religious activity, explicitly protected by the Free Exercise Clause.").

200. *See infra* Part V.C (giving examples of carrots and sticks that the victims could use to negotiate with the Church).

201. Many law schools and restorative justice professionals throughout the country have established programs that could provide a good venue for clergy sexual abuse cases. *See, e.g.*, Restorative Justice Council, http://www.rjcouncil.org (providing restorative justice to faith communities); The Justice and Reconciliation Project, http://www.theJRP.org (offering restorative justice programs in varied areas); University of Minnesota Center for Restorative Justice and Peacemaking, http://rjp.umn.edu (serving as an international resource center for restorative justice); Fresno Pacific University Restorative Justice Project, http://www.fresno.edu/pacs/rjp/ (offering itself as a Victim Offender Reconciliation Program resource and training center).

RESTORE program and provide a clause requiring the Church to waive its statute of limitations defense in the judicial system so that victims could return to that remedy in the event restorative justice failed.[202] Because the parties would privately agree to the process with the aid of these independent organizations, the governmental funding of many of the projects should not raise violations of the First Amendment.[203] By making an effort to legitimate the process of restorative justice through these community resources, victims might succeed in convincing the Church that participation in a restorative justice program would best serve its interests. With the Church's voluntary participation and support, victims could overcome many of the obstacles that arise in applying restorative justice in this context.

B. Potential Problems with a Restorative Justice Approach

Although a restorative justice approach may address the needs of the victims in a different and more effective way than the judicial system, this approach also has many potential problems. Victims bringing civil suits against the Catholic Church have already experienced the Church's lack of cooperation in these matters.[204] For a restorative justice approach to function properly, the parties do not necessarily have to apologize and forgive each other, but they must meet together and come to a mutual agreement. If the Catholic Church refuses to settle with victims bringing court claims and admit wrongdoing or apologize, the likelihood that the Church will voluntarily participate in an independent restorative justice system seems low unless victims can exert influence over the Church.[205] The Church prefers to use its own mediation program and sometimes refuses outside arbitration because "[it] does not want

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202. *See* Questions and Answers about RESTORE, http://restoreprogram.publichealth.arizona.edu/questions/legal.htm#leg3 (last visited Sept. 4, 2006) (explaining that if the restorative justice program fails, the case returns to the prosecutor).

203. The programs at state universities fall under the direction of the Regents of those universities and thus receive governmental funding. Other programs such as the Restorative Justice Council work in conjunction with nonprofit organizations. Restorative Justice Council, *available at* http://www.rjcouncil.org (last visited Jan. 31, 2007).

204. *See* Craig Levien Interview, *supra* note 108 ("The Diocese of Davenport fought, and continues to fight, the turning over of fifty years of records. . . . There was a lack of general cooperation among the priests.").

205. *See* Michelle Rosenblatt, *Hidden in the Shadows: The Perilous Use of ADR by the Catholic Church*, 5 PEPP. DISP. RESOL. L.J. 115, 127 (2005) ("[T]he Church has taken the position that the most appropriate way to deal with cases of clergy abuse is through independent Church mediation."); *see also infra* Part V.C (explaining the ways in which victims could exert influence over the Church).

its officials forced into a decision or 'exposed to a program that can arbitrarily overturn (their) decision and cause them to lose face in a public way.'"[206] The Church is a powerful institution and victims may feel that the judicial system is their only option for gaining control.[207] Because the courts exercise control over the Church at least some of the time, victims may choose to stay with the judicial system because cooperation is compelled.

Even if the Church agrees to cooperate in a restorative justice system, all alternative dispute resolution (ADR) approaches raise problems for the victims. Most ADR approaches, including restorative justice, guarantee some privacy to all the involved parties.[208] While this may seem like a benefit, many victims would like the public to know the names of the offending priests so that the Church cannot secretly move them to new parishes and thus to new groups of unsuspecting victims.[209] Another potential problem arises from the imbalance of power between the Catholic Church, the offending priest, and the victim. Restorative justice neutralizes the power struggle more successfully than does mediation, but the power imbalance among parties in a sexual abuse situation will never completely disappear.[210]

A third problem for victims comes from the lack of procedural safeguards in a restorative justice system. Though the procedural safeguards in the judicial system might harm victims psychologically because they protect the defendant, the judicial system follows a regulated procedure and results in a relatively predictable outcome in the form of a verdict for damages.[211] The form of the

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206. Rosenblatt, *supra* note 205, at 127 (quoting Jessie C. Dye et al., *Intra-Church Dispute Resolution*, 38 CATH. LAW. 133, 137–38 (1998)).

207. *See, e.g.*, Kate Irish Collins, *Local Catholic Churches Could Lead the Way to Reform*, http://www.keepmecurrent.com/Community/story.cfm?storyID=15111 (last visited Feb. 17, 2006) (quoting a Eucharistic Minister at the Most Holy Trinity Church: "Power corrupts and the more power and the more money the Church has, the more it wants.") (on file with the Washington and Lee Law Review). Another party who wishes to remain anonymous has said that the problem with the Church in these cases stems from its vast power and cited to Lord Acton's famous line, "Power tends to corrupt; absolute power corrupts absolutely." The New Dictionary of Cultural Literacy 30 (3d ed. 2002).

208. *See* Rosenblatt, *supra* note 205, at 130 ("Currently, mediations and all that occurs within mediations remain confidential."). *But see supra* note 197 (explaining how restorative justice proceedings do not remain strictly confidential).

209. *See supra* note 128 and accompanying text (explaining that the media will not release offending priests' names unless the victims have taken legal action).

210. *See supra* note 188 and accompanying text (describing how restorative justice differs from mediation in balancing the power between the parties); *see also supra* note 79 and accompanying text (explaining the inherent imbalance of power in sexual abuse situations).

211. For more information on the psychological damage to victims through "critogenic harms" inherent in the legal system, see *supra* Part IV.A. *See also* Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 18–30

restorative justice approach depends on the will and wishes of the parties, and the resulting agreement comes directly from their compromises. This technique leaves the victims in a vulnerable position because they must stand up for themselves in the face of a powerful and formerly harmful adversary in order to achieve their goals for the agreement.[212]

A related problem arises if the agreement between the parties fails, and the layperson accountability board cannot enforce the measures. In that instance, most restorative justice parties resort to the judicial system and prosecute as they would have prior to the restorative justice attempt.[213] Even if the restorative justice approach expressly provides for resort to the courts, however, it is the judicial system that drove victims to request a non-judicial remedy in the first place.[214] Restorative justice provides a more satisfactory alternative for victims only if their agreements with the Church and offending priests succeed. Moreover, if states adopt the California revived statute of limitations in the meantime, victims might even lose the chance to bring their previously expired claim because they relied on what proved to be a faulty compromise.[215] Victims must weigh these potential drawbacks to the restorative justice system against the benefits they would receive from an extra-judicial remedy as they consider the value of a restorative justice approach.

C. Why Restorative Justice is the Best Solution

Even with the potential difficulties, restorative justice best serves the goals of the victims, avoids the problems inherent in civil litigation, and comports with the values of the Church regarding forgiveness and healing.[216] Probably

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(2004) (detailing potential constitutional problems with a restorative justice approach including denial of due process rights, denial of the Fifth Amendment privilege against self-incrimination, and denial of the Sixth Amendment right to effective assistance of counsel).

212. *But see* Craig Levien Interview, *supra* note 108 ("[T]he individual victim has, for the first time, the power to make the statements that they were powerless to make at age ten, eleven, twelve or thirteen when they were abused. The recapturing of this power is helpful to their healing.").

213. *See* Hopkins & Koss, *supra* note 63, at 697 ("Successful completion of the terms of the agreement results in a dismissal of charges, while the case is referred back to the prosecutor should the responsible person fail to abide by the terms of the agreement.").

214. *See, e.g.*, BRAITHWAITE, *supra* note 45, at 121 ("Traditional deterrence targeted on criminals cannot be abandoned under a restorative justice system because in some cases restorative justice will repeatedly fail.").

215. *See supra* Part IV.B.3 (explaining the revived statute of limitations and noting that other states currently have bills similar to the California statute under consideration).

216. The words of the Lord's Prayer, a prayer used at daily services, include the phrase ". . . forgive us our trespasses, as we forgive those who trespass against us . . . ." Book of

the biggest challenge to this approach is obtaining the participation of the Church, and people involved in these proceedings have expressed the fear that the Church will not voluntarily submit to a restorative justice program.[217] Although this fear has merit based on the Church's previous actions, the Church might find that a restorative justice approach could provide long-term benefits. The Church's strength comes from its moral authority, and its parishioners may refuse to recognize that authority if they perceive that the Church is not practicing the forgiveness and reconciliation that it preaches.[218] Victims' lawyers have explained that victims "believe that they were betrayed and that the betrayal continues" and that "[m]ost of them have lost all belief in any type of religion."[219] When other parishioners realize that "the [strong faith] the Catholic Church values the most is what has been taken from the vast majority of the victims," they might stop supporting the Church.[220] The Church would therefore benefit from any attempt to reconcile with the victims because it would prevent a decrease in funding. If the Church intends to continue successfully spreading its message throughout the country and the world, it should voluntarily accept an approach—like restorative justice—that allows it to act in a way that is consistent with the values it encourages in all of its members.[221]

Common Prayer English Edition of the Lord's Prayer (1559), *available at* http://www.georgetown.edu/faculty/ballc/oe/pater_noster.html (last visited Oct. 4, 2006).

217. This information came from a conversation in January 2006 with a party involved in the litigation who wishes to remain anonymous.

218. *See* Arnold, *supra* note 165, at 36 ("When a religious organization evades responsibility by using a legal escape-hatch, it gives up its only stock-in-trade, namely its moral authority."); Craig Levien Interview, *supra* note 108 ("Approximately 80% of the victims that I have represented have nothing to do, and would have nothing to do, with the Catholic Church.").

219. Craig Levien Interview, *supra* note 108.

220. *Id; see also* Dustin Lemmon, *Lawsuits Put on Hold for Bankruptcy*, QUAD CITY TIMES (Davenport, Iowa), Oct. 14, 2006, at A2 ("Pending lawsuits filed against the Diocese of Davenport by victims of sexual abuse by priests will be put on hold while the diocese goes through Chapter 11 bankruptcy . . . .").

221. *See, e.g.*, *Wiping Away Tears: A Faith Community Responds to Clergy Sexual Abuse in the Roman Catholic Church*, VOMA CONNECTIONS (Victim Offender Mediation Association, Minneapolis, Minn.), Autumn 2002, at 1 [hereinafter VOMA CONNECTIONS 2002] (giving the Albany Catholic Worker Community's thoughts on restorative justice and clergy sexual abuse). The parishioners explained:

> In 2000, the bishops of New York state issued a pastoral statement on restorative justice and the criminal justice system, *Restoring All to the Fullness of Life*. This important document speaks about meeting the needs of persons who have been harmed, those responsible for the harm, and society at large. Unfortunately, the document does not deal directly with issues of harm or crime that take place within our Church. While the bishops call upon Christians to "incorporate restorative

Another option to bring the Church to the restorative justice table would come from the terms of the parties' contract. The victims and the Church could agree that if the restorative justice approach achieves a successful outcome, the victims agree not to return to civil litigation. However, the parties must retain the option of civil litigation upon failure of the restorative justice approach to encourage the Church to participate fairly. With that option looming in the background, the contract would need to contain a confidentiality clause stating that neither side would reveal the information discussed during the community conference in later civil litigation.[222] Restorative justice requires openness from both parties, and a confidentiality agreement within the contract would encourage communication.

While the Church may insist that other remedies would serve the same interests with a smaller outside influence, these options are not feasible. Some commentators have suggested that the Church offer itself as a refuge for victims, but this option will not work for those victims who have lost all trust in higher authority or feel that the Church has completely betrayed them.[223] The offending priests have compounded this problem by convincing the victims that God sanctioned the abusive actions.[224] The Church and the offending priests would therefore need to overcome a large obstacle to their ability to aid victims if they attempted to act as an independent resource. "[T]he Church can have a unique spiritual role in helping survivors heal from abuse by priests,"[225] but it should utilize that role in the more neutral setting of restorative justice without requiring victims to trust the institution that previously failed them.

Other religious organizations have already advocated the adoption of a restorative justice approach. In 2000, the Unitarian Universalist Association

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practices" in "our homes, schools, communities, and workplaces," noticeably absent from this list is "Churches."

Id.

222. *See* RESTORE Process, http://restoreprogram.publichealth.arizona.edu/process/RESTORE _Overview_Manual.pdf (last visited Sept. 4, 2006) (explaining how RESTORE utilizes these contract provisions to bring the parties to the program).

223. *See* Ruth Jones, *The Extrajudicial Resolution of Sexual Abuse Cases: Can the Church be a Resource for Survivors?*, 38 SUFFOLK U. L. REV. 351, 355 (2005) ("Abuse by a priest has caused some survivors to lose their belief in God and the Church and to disconnect from their religious community.").

224. *See* Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 3 (1996) (describing clergy malpractice as "especially contemptible because the perpetrator's power and authority are perceived as derived from God"); Eduardo Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions*, 19 FLA. ST. U. L. REV. 499, 501 (1991) ("A parishioner can seldom give true consent to sexual relations with a clergyman when she believes that his power and authority come from God.").

225. Jones, *supra* note 223, at 352.

decided to "implement a plan of response and ministry to victims/survivors of clergy sexual misconduct with restorative justice as the primary goal."[226] The Unitarians have a different view of God and religion from that of the Catholic Church, but their conclusion applies to any religious institution:

> We must affirm our covenant, as individuals and as an institution, to work toward the goal of restorative justice, which focuses on the victim, the perpetrator and the community in which the injustice occurred. The goal of restorative justice is nothing less than the return to right relations for all involved. It results from a process that involves truth-telling, acknowledging the violation, compassion, protecting the vulnerable, accountability, healing, restitution and vindication.[227]

Thus, the Catholic Church would follow the lead of another denomination in affirming its values and aiding victims by adopting a restorative justice approach.

More importantly, Catholics across the United States have also advocated a restorative justice approach and have attempted to convince the Church of this position.[228] These parishioners recognize how difficult it is for offending priests to face their victims but explain, "As a Church . . . we are called to help these priests to confess and repent for their destructive behavior."[229] Catholics therefore acknowledge the complexities of the situation but still promote restorative justice because it follows the values they have learned from the Church.[230] With this mandate from its members, the Church should recognize the hypocrisy of its current litigation strategy of preaching confession but practicing denial and instead turn to the promising alternative of restorative justice.[231]

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226. SAFE CONGREGATIONS PANEL, RESTORATIVE JUSTICE FOR ALL: RECOMMENDATIONS TO THE UNITARIAN UNIVERSALIST ASSOCIATION (2002), http://www.uua.org/cde/csm/report.html (last visited Oct. 5, 2006) (on file with the Washington and Lee Law Review).

227. SAFE CONGREGATIONS PANEL, RESTORATIVE JUSTICE FOR ALL: THEOLOGICAL GROUNDING (2002), http://www.uua.org/cde/csm/spiritual.html (last visited Oct. 5, 2006) (on file with the Washington and Lee Law Review).

228. *See, e.g.*, VOMA CONNECTIONS 2002, *supra* note 221, at 6 ("[T]oday's Church must initiate processes that lead to forgiveness through confession, apology, and penance.").

229. *Id.*

230. *See id.* ("To facilitate confession and penance among those priests who have abused and healing for adults who were sexually abused as children, we propose that our Church embrace the principles and practices of restorative justice.").

231. *See* Janna S. Nugent, Note, *A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy*, 30 FLA. ST. U. L. REV. 957, 986 (2003) ("It is unethical to preach confession and repentance in a house of God while practicing denial in a court of law. It is time for the Church to set down its shield. This is not war."); *see also* McGlynn, *supra* note 3, at A3 ("Diocese leaders learned hard lessons along the way not only in court, but in how we handled victims . . . . Sometimes we did a bad job of that and tried to get better.").

The offending priests would also benefit from restorative justice for many of the same reasons that parishioners advocate this approach. The easiest answer for many offenders might be to deny their inappropriate acts—a necessary practice in the case of litigation—because publicly confronting the victims can cause emotional trauma and result in a permanent societal stigma. The restorative justice approach tries to rehabilitate the offender, however, and help him reintegrate back into society with the aid of the supporting community.[232]

Those in favor of the judicial system suggest that one of the problems with restorative justice concerns the apology of the offending priest and diocese.[233] While some commentators have noted that "remorse and apology are fundamentally moral, and the law cannot force them," they have also noted, "If encouraged in the right way, remorse and apology can help offenders cleanse their consciences and return to the moral fold. It can also touch victims, allowing them to achieve catharsis, let go of their anger, and forgive."[234] Studies have indicated that even a small showing of remorse and apology in tight-knit communities, like the Church, helps victims to heal by giving them affirmation that they did not cause the offense.[235]

The larger problem, however, is ensuring that the apology is complete and sincere. Any apology made by the Church helps the victims more than no apology, but the best situation arises when the offending priest and Diocese actually show and feel remorse.[236] The Church and its members, with a shared value system, represent ideal participants for successful reintegrative shaming of the offending priest and Diocesan officials.[237] Because the Catholic community shares one faith,

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232. *See supra* Part III.C (describing the community conferencing approach to restorative justice—the most appropriate approach for clergy sexual abuse cases).

233. *See* Craig Levien Interview, *supra* note 108 ("I am not in favor of the theory of restorative justice in that the abuser(s) themselves will not admit responsibility and acknowledge what they've done. Perhaps, if that were to have occurred in any case, it would be helpful.").

234. Stephanos Bibos & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 148 (2005).

235. *See id.* at 146 ("Remorse and apology can nonetheless vindicate victims, teach them that the crimes were not their fault, and heal both victims and offenders. Remorse and apology may be most powerful in small, close-knit communities and homogeneous cultures.").

236. *See, e.g.*, ROY L. BROOKS, *The Age of Apology*, *in* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 3, 4 (1999) ("Head-bowed apologies from the leaders of Germany and the United States have only quieted the survivors' apprehension. But without such apologies, there would be greater concern, perhaps not just among the survivors, that those shameful acts might be repeated."). Brooks analyzes the notion of apology in the context of Nazi Germany and the South African Truth and Reconciliation Commission to reach the conclusion that sincere apologies lead to the most successful resolution. *Id.* at 10–11.

237. *See, e.g.*, Toni M. Masarro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1916 (1991) ("Informal sanctions appear to work best within relatively bounded,

its members share a religious identity with other members and can help them to re-join the community after a restorative justice conference.[238] All parties will benefit from the application of a restorative justice process through this supportive reintegration.

In addition to benefiting the Church in various ways, restorative justice represents the most beneficial option for victims. Instead of suffering the critogenic harms involved in civil litigation,[239] victims can begin to heal by sharing their experience with the people who have the power to make changes for the future.[240] Victims should not feel obligated to remain silent about their injuries, and victim support groups who encourage them to recognize their injuries might also help victims speak out about the benefits of restorative justice.[241] Because a restorative justice system benefits all the involved parties, they should come together and initiate an independent, third party restorative justice process.

VI. Conclusion

The victims of clergy sexual abuse have suffered at the hands of the offending priests and the hierarchy of the Catholic Church for many years. Though many

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close-knit communities, whose members 'don't mind their own business' and who rely on each other. These cultures have widely shared moral or behavioral expectations of their citizens, which are publicly expressed.").

238. *See id.* ("High expectations of social responsibility . . . produce conditions that are conducive to reintegrative shaming. Effective shaming also entails a strong identification between the shamed offender and other members of the community.").

239. *See supra* Part IV.A (explaining the psychological harms to victims from the court system).

240. *See* Shaw, *supra* note 179 (quoting law professor and former Wisconsin Supreme Court Justice Janine Geske during a speech at the College of the Holy Cross). Ms. Geske explained healing and the goals of victims as follows:

> Healing can come when all those affected by a crime have had a chance to share their stories . . . and get to know about the other's experience and how they thought and reacted to the crime. Victims have a need to tell what happened to them and how it affects them and their lives as well as those who are around them . . . . Many want to tell the bishops . . . .

Id.

241. *See, e.g.*, Shirley Ragsdale, *Healing from Abuse by Clergy Is Focus of Weekend Event*, DES MOINES REG., June 14, 2005 (giving the details of 'A Weekend of Hope and Understanding: Responding to the Sexual Abuse Crisis in the Catholic Church'). Sponsors of the weekend included various Iowa SNAP chapters and the Concerned Catholics of the Davenport Diocese. *Id.* One of the speakers at the event, Craig Levien, served as the attorney for all of the victims in the cases against the Diocese of Davenport. *Id.* Another speaker and national spokeswoman for a nationwide Church reform group "said she believes Catholics who think they've seen the last of the scandal are deluding themselves." *Id.*

discovered the association between their early instances of abuse and their psychological problems later in life, only some victims have received a jury verdict in their favor. For the victims who choose to litigate, the critogenic psychological harms imposed by the judicial system often prevent healing.[242] Courts compound the harm when they dismiss the victims' claims because the statute of limitations has run, there is no applicable discovery rule, or the First Amendment bars the courts from delving into Church policy.[243] Because some states have lenient statutes of limitations, and because some have adopted a renewed claim period like California,[244] victims who are part of the same faith body and have suffered the same type of abuse have received differing treatment.[245] For these reasons, the victims have requested an extrajudicial remedy.

Taking a restorative justice approach to the problem of clergy sexual abuse would benefit not only the victims and the offending priests but also the Catholic Church as an institution. This Note has proposed one possible way to apply restorative justice through a consent agreement and pre-established programs, but the discussion remains open for other possible applications. The restorative justice process, lasting only as long as necessary to aid the victims from the era before the Church enacted broad policy changes,[246] provides the opportunity for victims to overcome haunting memories while confronting the offending priest. The priest, in turn, has the opportunity to listen and express any remorse that he might have been battling internally for years. The Church may resist giving power to a third party community conference in a restorative justice setting, but this option would greatly benefit the Church by allowing it to follow its own teachings—forgiveness and reconciliation rather than denial and deception. As the Catholic Church has faced the backlash from this crisis and has attempted to deal with the victims in various ways, it should accept restorative justice as a possible solution because the best outcomes result when you practice what you preach.

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242. *See* Gutheil, *supra* note 89, at 6 (explaining the harms to victims inherent in the judicial system).

243. *See supra* Part IV (detailing fully the problems with the current judicial remedies).

244. *See* Roman Catholic Bishop of Oakland v. Super. Ct., 28 Cal. Rptr. 3d 355, 358 (Cal. Ct. App. 2005) ("[P]ermit[ting] a one-year period for the revival of such abuse claims that had expired under the previous limitations period.").

245. *See Romans* 12:4–8 ("The Church is the Body of Christ, in which many members are united with Christ their head.").

246. *See, e.g.*, 2005 CHARTER, *supra* note 38, at 2 ("Let there now be no doubt or confusion on anyone's part: For us, your bishops, our obligation to protect children and young people and to prevent sexual abuse flows from the mission and example given to us by Jesus Christ himself, in whose name we serve."); 2005 NORMS, *supra* note 39, at 3 ("When even a single act of sexual abuse of a minor by a priest or deacon is admitted or is established . . . the offending priest or deacon will be removed permanently from ecclesiastical ministry, not excluding dismissal from the clerical state, if the case so warrants.").