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Response

A Response to Timothy Lytton: More Conversation is Needed

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I. INTRODUCTION

In August 2006, the family of the late Daniel O’Connell filed suit in a St. Croix County, Wisconsin state court against the United States Conference of Catholic Bishops (USCCB) and many of the Catholic Bishops in the United States alleging—of course “on information and belief”—that the USCCB and the Bishops conspired to avoid the reporting of allegations of sexual abuse against Catholic priests.¹ “On information

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¹ Complaint ¶ 233, *O’Connell v. U.S. Catholic Conference of Bishops*, No. 06CV581 (Wis. Cir. Ct. filed Aug. 8, 2006), available at <http://www.andersonadvocates.com/cases/OConnell.pdf> [hereinafter *Complaint*]. Two earlier lawsuits seeking similar relief were filed by plaintiff’s counsel against diocesan defendants in Illinois, both alleging the same “policy.” *Archdiocese Class Action Complaint, Mother Doe 100 v. Archdiocese of Chicago*, No. 06CH02017 (Il. Cir. Ct. filed Jan. 31, 2006); *Amended Class Action Complaint, Knotek v. Diocese of Joliet*, No. 06 CH 00351 (Ill. Cir. Ct. filed Feb. 21, 2006). As will be developed in this piece, the allegation of a “policy” is—to be kind—untrue. Both were subject to motions to dismiss, which in some way previews the flaws in the instant case.

and belief,” this conspiracy was “enforced, required and practiced in every state” pursuant to “a policy of harboring and protecting suspected child molesting agents.”² Daniel O’Connell and another man were allegedly killed by Father Ryan Erickson after they allegedly confronted him about abusing children.³ The actual motive remains unknown, as Father Erickson killed himself when questioned about the murders.⁴ There is no allegation he abused either of the men killed. This is a horrible crime with a tragic aftermath, and no one can imagine the depths of the families’ grief.

In response to the murders, the O’Connell family is promoting a “five point action plan,” which includes publicly releasing the names of “every admitted, proven or credibly accused abusive Catholic cleric.”⁵ The day after the *Washington Post* ran a story about the O’Connell family and their tragedy, they (along with their lawyer Jeffrey Anderson and victim advocate Barbara Blaine) arrived unannounced at the site of the Bishops’ annual meeting, and met briefly with USCCB staff, who expressed shock and sympathy at their story and followed up on their demands.⁶ Subsequently, there were meetings with their local Bishop and the Bishop Chairman of the USCCB Committee for the Protection of Children and Young People, where, again, sympathy of the Bishops was expressed and the list of O’Connell family’s demands were reviewed.⁷ When the family declared that insufficient action occurred on the demands, this lawsuit followed.

² Complaint, *supra* note 1, ¶¶ 1, 235. The allegations of conspiracy are expressed in *id.* ¶¶ 233–35, while the supposed “policy” is described *inter alia* at *id.* ¶¶ 1, 189. In addition to the USCCB, the complaint names the Latin Rite Catholic Bishops in the United States, individually and in their capacities as Bishops. *See id.* at 1–9. It does not name Eastern Rite Catholic Bishops (called Eparchs, who head dioceses of the Eastern Rite Church in communion with Rome) or superiors of Catholic religious orders (e.g., the Franciscans, etc). An amended complaint making substantially the same allegations was filed on December 7, 2006. Amended Complaint, O’Connell v. United States Catholic Conference of Bishops, No. 06CV581 (Wis. Cir. Ct. filed Dec. 7, 2006) (on file with Connecticut Law Review) [hereinafter Amended Complaint]. Unless material, all references are to the original complaint.

³ Associated Press, *Families of Hudson Murder Victims Discuss Reforms*, Feb. 26, 2006, available at http://wcco.com/topstories/local_story_052072334.html.

⁴ *Id.*

⁵ CRUSADE AGAINST CLERGY ABUSE, O’CONNELL-ELLISON FIVE POINT PLAN, <http://www.crusadeagainstclergyabuse.com/htm/the5pointplan.htm> (last visited Nov. 17, 2006).

⁶ Alan Cooperman, *Two Families Seek Church Accountability in Abuse Cases*, WASH. POST, Nov. 14, 2005, at A3, available at LEXIS, News Library, WPOST File. The meeting with Teresa Kettelkamp, who directs the Office for the Protection of Children and Young People, is described in a subsequent Cooperman article. Alan Cooperman, *Families Try, Fail to Talk to Bishops*, WASH. POST, Nov. 15, 2005, at A2, available at LEXIS, News Library, WPOST File. Ms. Kettelkamp received information from the families, and was quoted as saying: “I have children as well. I can’t even imagine a child being murdered. It’s just got to be a continual heartache.” *Id.* The families do not claim their son was a victim confronting his abuser.

⁷ Associated Press, *supra* note 3.

The complaint claims that the supposed conspiratorial “policy” of not reporting abuse accusations violates a duty to warn and a duty to release names of all accused priests (ever and prospectively) to law enforcement and to the public.⁸ That the litigation proceeds on a false premise,⁹ and seeks relief based on a legal duty that does not exist, illustrates how, after more than twenty years of litigation, the legal system is being asked to create relief that may cause as many problems as it intends to solve.¹⁰ Yet, that is the edge of the litigation against Catholic Church agencies in 2006.

Professor Lytton’s thoughtful piece about the way in which tort litigation has set the agenda of the media, the Catholic Church and its

⁸ See Complaint, *supra* note 1, ¶¶ 240–42. The amended complaint deletes the demand for addresses and records. Amended Complaint, *supra* note 2, ¶ 239. It should be noted that the Charter for the Protection of Children & Young People, approved by the Bishops in Dallas, Texas in June 2002 (reaffirmed in 2005), provides in Article 4 that all cases of complaints by minors will be reported to proper state authorities, dioceses will cooperate with state authorities involving review and reporting of all cases involving complaints by persons who allege abuse when they were minors (but reported when they are adults), and all dioceses will advise and support all persons of their right to report. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE art. 4 (2005), available at <http://www.usccb.org/ocyp/charter.shtml> [hereinafter CHARTER]. Public compliance audits indicate near complete adherence by dioceses with this policy in the years following its adoption. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, 2005 ANNUAL REPORT ON THE IMPLEMENTATION OF THE CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 13 (2006), available at <http://www.usccb.org/ocyp/OCYPREPORT.pdf> [hereinafter 2005 ANNUAL REPORT] (“All diocese/eparchies that participated in the 2005 audit were found to be compliant with Article 4.”).

⁹ As will be obvious from the subsequent discussion, there is *no* policy of harboring abusers, nor is there or was there any conspiracy to shield abusers against law enforcement or the public. The earliest policies of the USCCB are all to the contrary and are publicly available. See *infra* notes 35, 54. For background information, see generally United States Conference of Catholic Bishops, USCCB Efforts to Combat Clergy Sexual Abuse Against Minors: A Chronology 1982–2006, <http://www.usccb.org/comm/combatefforts.shtml> (last visited Nov. 17, 2006) [hereinafter Chronology].

¹⁰ See, e.g., DAN B. DOBBS, THE LAW OF TORTS §§ 322, 329 (2000). One issue is that given the decentralized nature of the Church, see *infra* note 36, no list could ever be complete or accurate. Furthermore, given media interest in cases, no innocent person would ever avoid the stain of publicity once accused. For example, the false claim against Cardinal Bernardin will follow him to his grave. Jack C. Doppelt, *Panel One: Coverage of the Cardinal Joseph Bernardin Case*, in GUILT BY ALLEGATION: LESSONS FROM THE CARDINAL BERNARDIN CASE (2004), available at <http://www.annenberg.northwestern.edu/pubs/guilt/>.

The families’ concede the risk that innocent people may be named as a result of their lawsuit, but believe that on balance, the protection of the public requires that risk. Crusade Against Clergy Abuse, Questions & Answers, <http://www.crusadeagainstclergyabuse.com/htm/QAs.htm> (last visited Nov. 17, 2006). Naming names and providing information on offenders is a part of the Bishops’ agendas, individually and collectively. The consideration of the public reporting of all names (since by virtue of the Charter, law enforcement already has access to this information) of those credibly accused and removed from public ministry is being pursued on its own merits, not because of litigation, press attention, or other pressure. Los Angeles is one example where extensive public reporting has occurred. See generally ARCHDIOCESE OF LOS ANGELES, ADDENDUM TO THE REPORT TO THE PEOPLE OF GOD (2005), available at <http://www.archdiocese.la/protecting/pdf/Addendum-11-15-05.pdf>; ARCHDIOCESE OF LOS ANGELES, REPORT TO THE PEOPLE OF GOD: CLERGY SEXUAL ABUSE ARCHDIOCESE OF LOS ANGELES 1930–2003 (2004), available at http://www.archdioces.la/protecting/pdf/White_Paper-10-12-2005.pdf.

people, and civil governments to the question of clergy sexual abuse provides a useful framework in which to discuss the contours of this problem, including the developments in litigation during the intervening years since the first cases were reported in 1984. No one could dispute that the crimes committed by individual clerics created liability for those dioceses and religious orders whose leadership knew of these activities beforehand. These crimes are despicable acts, and leaders who looked the other way suffer for their poor judgment.¹¹ More often today, however, as cases are filed twenty years or more beyond the expiration of the civil statutes of limitations, the leaders today are responding to the problems inherited from predecessors, now retired or dead, whose decisions were made in another time. “Prior to the 1980s both lawyers and psychologists had been similarly skeptical about the value of children’s charges about sexual abuse”¹² Attitudes changed in the 1980s, as skepticism diminished, and people became more responsive to victims, resulting in legitimate disgust toward such acts committed anywhere, by anyone.¹³

But since the mid-1980s, the main target of litigation has not been abusive family members, teachers, school officials, or youth serving organizations. Instead thousands of liability cases have been filed against Catholic Church institutions. The tort litigation against Catholic Church agencies indisputably, as Professor Lytton describes, was designed to solicit media attention.¹⁴ The media attention, in turn, created broader awareness of the scope of the problem of clergy sex in abuse in the Catholic Church, and, therefore, the impetus for further discussion by Church leadership in 1985. Once that process began, however, and writing as a “first person observer,” it is incorrect to say that the Church *only* acted or reacted in the years that followed because it was forced to do so. The Bishops of the Church in this country were shocked and dismayed by what they learned in the 1980s some of it through media reporting about litigation. Committed as they are to the future of the Church and the health and salvation of the people, the Bishops started a series of action steps: education, information, training, and response in the dioceses.¹⁵ Once it was recognized that this kind of situation was more than episodic and required the efforts of all for its eradication, the process of action began,

¹¹ Mark E. Chopko, Commentary, *Continuing the Lord’s Work and Healing His People: A Reply to Professors Lupu and Tuttle*, 2004 BYU L. REV. 1897, 1897–98.

¹² PHILIP JENKINS, *PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS* 140 (1996) (noting the change in the social and institutional reaction to claims of abusive behavior).

¹³ Compare *id.* at 84–85 (noting criticism of “public hysteria” over abuse), with *id.* at 140–41 (explaining how changing attitudes and changing laws around abuse opened the doors for more discussion and better awareness).

¹⁴ See generally Timothy D. Lytton, *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. REV. 809 (2007).

¹⁵ Mark E. Chopko, *Restoring Trust and Faith*, 19 HUM. RTS. 22, 23 (1992).

and continues to this date as a permanent fixture in the dioceses and religious institutes of the Catholic Church in the United States.¹⁶

Likewise it is incorrect to assume that the transfer of more than a billion dollars from dioceses, religious orders, and their insurers to the plaintiff's bar and claimants has been "beneficial."¹⁷ At this point in the Church's history, some twenty years later, the magnitude of the litigation, conducted overwhelmingly well beyond the expiration of the civil statutes of limitations, is anything but "beneficial." Rather, the persistence of such a large volume of litigation, directed largely at entities of the Catholic Church, is having and will likely continue to have a deleterious effect on the ability of Church institutions to provide Catholic people and those in need with the religious, educational, and social services that they deserve. As I have written elsewhere, "[I]itigation will waste resources on attacking and defending the Church that can be better spent resolving claims with fairness and justice. Bankrupting churches and forcing them to recede from the ministries of preaching, teaching, sanctifying, and serving is not the answer."¹⁸ Indeed, in four places in the United States, litigation has driven Catholic dioceses to seek protection of the U.S. Bankruptcy Courts, which has in turn spawned a whole other set of litigation problems and legal issues with which the diocesan leadership must contend.¹⁹

This response to Professor Lytton's article proceeds in three pieces. First, I examine the nature of the relationship between litigation and the media. Second, I challenge what Professor Lytton at times refers to as the "reluctant" Church and its leadership.²⁰ Finally, I critique the nature of the reaction of the Church to litigation and the prospects of further efforts to expand, rather than contract, tort liability. While no one can dispute Professor Lytton's scholarly approach to this problem, I fear without balanced consideration of the other aspects of this important and complex

¹⁶ See generally CHARTER, *supra* note 8, pmb1.

¹⁷ But cf. Lytton, *supra* note 14, at 877 (arguing that the tort litigation process has had a "beneficial" effect on overall Catholic Church policymaking). The figure is found in JOHN JAY COLL. OF CRIM. JUSTICE, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES, pt. 6.1, tbl.6.1.1 (2002), available at <http://www.usccb.org/nrb/johnjaystudy/Costs.pdf>, and 2005 ANNUAL REPORT, *supra* note 8, at 45–46. Since under the First Amendment government lacks the authority to punish or reform religion, it is also debatable how efforts at compelled institutional change are legally beneficial if the "relief" violates Constitutional principle. See Lytton, *supra* note 14, at 875.

¹⁸ Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 154 (2003).

¹⁹ See Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363 & n.3, 384 (2006); see also John B. Jarboe, *Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments*, 37 CATH. LAW. 153, 161–64 (1996) (describing the pitfalls of filing bankruptcy). One can also perceive that the original relief demanded in the O'Connell lawsuit would have had the effect (if not the intent) of creating additional liability cases and providing records to be used in all cases of the "named" clergy.

²⁰ Lytton, *supra* note 14, at 812, 876.

issue, his work could be misused to advance further attempts to single out the Catholic Church and its leadership for punishment, while paying only lip service to the claims of victims. What Professor Lytton has begun is a conversation, and one that needs to continue as objectively and honestly as possible. That is not the way that tort litigation in 21st century America is conducted.

II. THE MEDIA CONNECTION

Media interest in the story of sexual abuse in the Church, as do all media stories, has its ebbs and flows.²¹ Until the crisis began anew in 2002, there had not been an exhaustive media barrage around the question of clergy sexual abuse and the perceived and real flaws of the Church's management of the problem in nearly ten years. In between seminal events, as documented in Lytton's article in 1985 and 1992, until 2002, media attention around the subject was minimal.²² The toxic environment, however, that persisted in 2002²³ obscured the real proactive steps the Church was taking to deal more consistently with this difficult problem.²⁴ Indeed every step the Church took was viewed with suspicion.

Moreover, for all of the attention to the abuse problem in the Catholic Church, the media has paid scant attention to the problems of abuse in society more generally and especially to the largest volume of victims in

²¹ *Id.* at 852–55.

²² *Id.* at tbls.1–3, chs. 1–2. I remember that even the appointment of a new Bishops' Committee in 1993 and the \$120 million verdict against the Dallas Diocese in 1997 attracted only modest attention, in contrast to the persistent attention in 2002. See generally Philip Jenkins, *The Uses of Clerical Scandal*, FIRST THINGS, Feb. 1996, available at <http://www.firstthings.com/ftissues/ft9602/opinion/opinion.html> (“Though such cases continue to appear, . . . [c]lerical sex abuse is today most often seen as a lamentable but rare occurrence.”).

²³ Chopko, *supra* note 18, at 153 & n.155 (“For example, there was an abundance of news coverage surrounding RICO suits against dioceses, orders, and the Holy See”); see CBSNews.com, *New Tactic in Catholic Sex Scandal*, Mar. 22, 2003, <http://www.cbsnews.com/stories/2002/03/22/national/printable504352.shtml> (indicating that although plaintiffs have sued under federal racketeering laws, such suits have often failed); Amy Driscoll, *Church Faces Racketeering Suit*, MIAMI HERALD, Mar. 22, 2002, available at <http://www.miami.com/mld/miamiherald/2910364.htm> (announcing an ex-seminarian's racketeering claims against a former Florida Bishop). By contrast, no news coverage occurred when the claims in Los Angeles and Florida were withdrawn; the coverage was almost non-existent. The best example is the Dallas Morning News report of Bishops' alleged actions concerning accused priests on the eve of the June Bishops meeting. Brooks Egerton & Reese Dunklin, *Two-Thirds of Bishops Let Accused Priests Work*, DALLAS MORNING NEWS, June 12, 2002, available at LEXIS, News Library, DALNWS File. The report simply repeats claims (even unproved ones), but not their resolution. *Id.*; see also L. Martin Nussbaum, *Changing the Rules*, AM., May 15, 2006, at 13, available at <http://www.americamagazine.org/gettext.cfm?articletypeid=1&textID=4783&issueID=572&search=1> (documenting that in 2002, newspapers “published 728 stories in January, 1,095 in February and 2,961 in March [about abuse only in the Church]. By April these papers were publishing a new story every nine minutes, 160 every day, 4,791 for the month. By year end, American papers provided their readers over 21,000 stories of sexual abuse by Catholic priests.”).

²⁴ See *infra* Part III.

any institution, the victims in America's public schools.²⁵ Part of this difficulty is in no way attributable to the litigation system at all. For example, the Poynter Institute²⁶ started a service for other journalists called "Abuse Tracker." It still exists. News stories about abuse in the Catholic Church were compiled and stored where they then can be researched and expanded by other journalists.²⁷ Because the service only focused on the problem of abuse in the Catholic Church and only by Catholic clergy to the exclusion of all other kinds of abuse in all other institutions and in the home, there was little objective sense of the immense nature of the social problem. However well intentioned, this service exemplified the misperception that sexual abuse of minors is exclusively a Catholic and clerical problem and did a disservice to a discussion of the larger issue in the broader society.²⁸ In terms of Professor Lytton's framing of the issue and its relationship to the policy agenda of advocacy groups and others, there could be no better evidence. Unfortunately, the issue was never framed in its broader societal context and little attention was given to the far larger number of victims in the greater society. That is not a benefit of tort litigation. Neglect of the broader issue through this distorted framing inevitably harms society.

Professor Lytton does a service to the larger community in documenting the connection between the claimants' advocates and the media. Indeed, in one of the first cases in which I was directly involved, counsel for the claimant, a minor child, told a federal magistrate that unless he was allowed to try his case in the press, he could not win.²⁹ The result of this concession was that the seemingly shocked magistrate sealed the records in order to protect the identity of the claimant and the claimant's

²⁵ Nussbaum, *supra* note 23, at 13–14 (citing CHAROL SHAKESHAF, U.S. DEP'T OF EDUC., EDUCATOR SEXUAL MISCONDUCT: A SYNTHESIS OF EXISTING LITERATURE 20 (2004)) (finding 6.7% of public school children report being victims of physical sexual abuse in the schools); *see also* Dennis Coday, *Uncovering Sex Abuse in Schools Mirrors Church Experience*, NAT'L CATH. REP., Mar. 26, 2004 (also citing Shakeshaft's report); Jon E. Dougherty, *Sex Abuse by Teachers Said Worse Than Catholic Church*, NEWSMAX, Apr. 5, 2004, <http://www.newsmax.com/archives/articles/2004/4/5/01552.shtml> (same).

²⁶ As described on its web site, "[t]he Poynter Institute is a school dedicated to teaching and inspiring journalists and media leaders. It promotes excellence and integrity in the practice of craft and in the practical leadership of successful businesses. It stands for a journalism that informs citizens and enlightens public discourse." Poynteronline, About Poynter, Oct. 13, 2006, <http://www.poynter.org/column.asp?id=62>.

²⁷ The Abuse Tracker was continued by the *National Catholic Reporter* and located on its web site: <http://www.ncrnews.org/abuse/>. In 2007, it is found at <http://www.bishop-accountability.org/AbuseTracker>. It now routinely contains some reports of abuse cases in other churches but is still overwhelmingly Catholic in focus and exclusively religious in reportage. The host site exists to "document the abuse crisis in the Roman Catholic Church," not a broader societal perspective.

²⁸ *See* JENKINS, *supra* note 12, at 56 (noting the "distinctively Catholic nature" of the problem, and listing the numerous language choices characterizing the institution, to put it mildly, as flawed).

²⁹ *Spann v. Thorne*, No. J87-0114(B) (S.D. Miss. filed Mar. 3, 1987).

family from further attention. The case was eventually settled.³⁰ But the lawyer had a point about the media connection, which has been manifest in other areas of tort law: persistent media attention to the alleged problems of an institution has the effect of poisoning public attitudes including the attitudes of potential jurors and lawmakers.³¹ This sets the stage for further alleged reforms such as ending the privilege against disclosure of sacramental communications, expanding the bases on which liability occurs, and changing settled rules, such as statutes of limitations for these, and only these, cases.³² Unless punishing the Church is perceived to be, by the larger society, “beneficial,” further scrutiny about the deliberate use of litigation inspired media to change these laws in ways that are harmful to the Church *should* be studied.³³

III. THE “RELUCTANT” CHURCH

Professor Lytton suggests that the Church’s actions at various points in his timeline are related to avoiding the negative consequences of litigation and media attention, and therefore are grudging or, in his words, “reluctant.”³⁴ As someone who was there throughout the relevant history, this claim should not be accepted at face value. The Church is not a corporate monolith but is composed of many parts. If what Professor Lytton means by “reluctant” is that no one willingly embraces “bad news,” especially about horrific abuse of children within organizations dedicated to their protection, then I agree with his point. But to conceive of the Church’s response to clergy sexual abuse as something that it was forced into by litigants or the media, as a general matter, is simply wrong. This is, after all, a Church, and where sin and error prevail, those who lead the Church are obliged to root it out.

It is true that media attention in 1985, not just to the case involving Father Gilbert Gauthé, but to others, brought the matter to the attention of the leadership of the Bishops Conference. However it is also true that, until 1984, only two instances of clergy sexual abuse from different

³⁰ I have discussed this case previously in Mark Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADV. 289, 295 & nn.13, 15 (1993).

³¹ See Nina Schuyler, *Searching for the Tort Reform Playbook of the Corporate Defense Bar*, CHIEF LEGAL OFFICER, Spring 2002, at 16, 17.

³² Chopko, *supra* note 18, at 153; Nussbaum, *supra* note 23.

³³ The most egregious example of the impact of the media barrage was on the decision of the California legislature to repeal the civil statute of limitations for sexual abuse. In the process, the legislature decided that attempts at treating an abuser could not be introduced as “reasonable” efforts at prevention of future harm by an intuitional defendant. That repeal has resisted efforts at invalidation. *E.g.*, *Melanie H. v. Doe*, Civ. No. 04 CV 1596 WQH- (WMC) (S.D. Cal. Dec. 21, 2005).

³⁴ Lytton, *supra* note 14, at 812, 877.

dioceses were brought to the Conference's attention.³⁵ Not only an outpouring of claims in 1984, but also legal changes in reporting statutes in several states and the overall change in public attitudes, caused Bishops around the country to begin to take a more careful and comprehensive look at the situation. It ended the "natural" perception that such matters were simply isolated instances of human failing that could be dealt with by individual dioceses without any coordination or conversation with others.³⁶ The Bishops spent an afternoon at their summer meeting in 1985, in a closed session that was mentioned by *Time* magazine the following month,³⁷ hearing informational reports from a psychiatrist, a lawyer, and a Bishop on aspects of the problem of child molestation.³⁸

At the same time, a separate group of canonical, medical, and legal experts (Rev. Michael Peterson, Rev. Thomas Doyle and Ray Mouton) were drafting their own report (the "1985 Report" or "Report") containing their advice on how to best deal with the problem of clergy abuse in Catholic dioceses.³⁹ Much ink has been spilled about the compilation and

³⁵ The USCCB is a membership association of the Catholic Bishops of the country. It is not part of the governance of the Church, but a forum in which Bishops discuss common problems and propose actions. Chopko, *supra* note 11, at 23. Unless actions are approved by the Church authorities in Rome, they are not binding. 1983 CODE c.455 (Canon Law Soc'y of Gr. Brit. and Ir. trans., 1983). Notwithstanding the absence of authority, the Conference has addressed the problem of child sexual abuse. See Chronology, *supra* note 9; see also Report of the Ad Hoc Committee on Sexual Abuse, *Brief History: Handling Child Sex Abuse Claims*, reprinted in 23 ORIGINS 666 (1994) [hereinafter Report of the Ad Hoc Committee].

³⁶ I say "natural" here because each of the 195 dioceses in the United States is canonically and civilly separate from each other. See Chopko, *supra* note 15, at 23. The responsibility for the selection, assignment, supervision, and discipline of an individual priest rests exclusively in the hands of these 195 diocesan Bishops and their corresponding authorities in religious institutes, of which there are several hundred. See *id.* ("In the matter of priestly discipline . . . the Conference has no governing authority. Such authority rests with each bishop or religious superior."); see also Chopko, *supra* note 11, at 1906. Such clergy discipline matters are not historically handled either on a local or national, or even international, basis. Thus, an incident in which the priest commits the canonical crime of the abuse of a child—and that is what it is under Canon 1395, a crime—would be handled by each Bishop individually. These responsibilities historically have never been shared by Bishops with other Bishops. Chopko, *supra* note 15, at 23. In 2001, in a letter from then-Cardinal Joseph Ratzinger, the Church declared abuse of a minor to be among the "most grave crimes" in Church law, and directed all cases to be brought to the attention of the Congregation for the Doctrine of the Faith in Rome for further action. Letter from Joseph Ratzinger, *Graviora Delicta* (May 18, 2001), translated in WILLIAM WOESTMAN, ECCLESIASTICAL SANCTIONS AND THE PENAL PROCESS 310–13 (2d ed. 2003). All cases under the U.S. Norms on abuse are processed under canon 1395. See *infra* note 55.

³⁷ *Painful Secrets: Priests Accused of Pederasty*, TIME, July 1, 1985, at 51.

³⁸ See Chronology, *supra* note 9.

³⁹ See generally MICHAEL PETERSON, F. RAY MOUTON & THOMAS P. DOYLE, THE PROBLEM OF SEXUAL MOLESTATION BY ROMAN CATHOLIC CLERGY: MEETING THE PROBLEM IN A COMPREHENSIVE AND RESPONSIBLE MANNER (1985), available at http://natcath.org/NCR_Online/archives2/2002b/051702/051702a.htm (follow "Part 1," "Part 2," "Part 3" or "Part 4" hyperlink).

transmission of this Report, which I note in the margin.⁴⁰ Two things, however, are true: at the time of the 1985 meeting, the work product of these individuals was intended by them to be confidential and Bishops who received their report were requested not to discuss it with others.⁴¹ And, as the authors themselves say, this was intended to be their personal opinion—it was not prepared as a proposal to either individual Bishops or the Bishops Conference, and never offered by its authors as the definitive approach to dealing with child molestation.⁴² Subsequent characterizations of the 1985 Report as a proposal to the Bishops Conference that had been either summarily ignored or rejected are flat wrong.⁴³

From that point to 1992, when the case involving James Porter and his nearly 100 victims in several states caught public attention, the Bishops Conference was not absent from its work. The Conference continued to assist development of diocesan policies, report new approaches and information, and study aspects of the problem including treatment of offenders and pastoral approaches to victims.⁴⁴ Little if any of this was reported by the media.

Returning to the theme of the impact of tort litigation, and contrary to Professor Lytton's claims (based as they are on media reports), the Porter litigation was not the instigation for a return of clergy abuse to the agenda of the Bishops Conference, resulting ultimately in the formation of a special Conference Committee on clergy sexual abuse. Rather, the continued study of the problem, discussed on the floor of the annual

⁴⁰ The Bishops' Conference discusses it in the Chronology noted above, *see* Chronology, *supra* note 9, and it is described more fully in the report of the special committee. One of its authors also discusses its history and responds to criticisms. Thomas Doyle, *A Short History of the Manual*, <http://www.priestsofdarkness.com/manual.html> (last visited Nov. 17, 2006).

⁴¹ Report of the Ad Hoc Committee, *supra* note 35, at 667. The authors of the 1985 Report themselves wrote:

It is requested that each reader return the document to the person from whom they received same, without copying. It is requested that no copy be retained by the reader. The rationale for this request is the great interest of the press. . . . Security for the entire Project is extremely important.

PETERSON, MOUTON & DOYLE, *supra* note 39, at 3.

⁴² The Report later contained this Confidential Note in an Executive Summary prepared by Rev. Michael Peterson. Michael R. Peterson, Executive Summary Confidential Note, <http://www.priestsofdarkness.com/execsum.html> (last visited Nov. 17, 2006) ("Please treat the contents of this document as confidential. Further, it is my opinion that the contents of this document are my professional and personal remarks and should not be construed as a national plan for the National Conference of Catholic Bishops, for Major Superiors of religious communities.").

⁴³ *E.g.*, Complaint, *supra* note 1, ¶ 9. Rev. Michael Peterson, one of the authors of the Report, sent every Bishop who was a diocesan Bishop in 1985 a copy of the Report with an Executive Summary and a long summation of medical issues involved in abuse. Report of the Ad Hoc Committee, *supra* note 35, at 667. The 1985 Report noted important issues of civil and canon law and pastoral practice that were being addressed in nascent diocesan policies, and the report informed that discussion. *See generally id.*

⁴⁴ Chronology, *supra* note 9. Professor Lytton's paper graphically lists the decreased media attention. Lytton, *supra* note 14, at 883 et seq.

Bishops' Meetings which were cablecast around the country, resulted in the formation of a special Think Tank which brought together victims, abusers, advocates on all sides of the issues, seminary rectors, parishioners, and Bishops along with therapists, educators, and media professionals to formulate a series of action steps for the Bishops Conference.⁴⁵ One of these action steps was the formation of a special committee (the "Committee" or "Ad Hoc Committee").⁴⁶ That Committee was appointed in 1993,⁴⁷ and the Committee issued public reports in 1994, 1995, and 1996.⁴⁸ Those reports provided detailed review of more than 150 diocesan policies, a description of various treatment centers, and articles and insights on topics ranging from pedophilia and its victims to pastoral outreach to victims.⁴⁹ Indeed, when the Ad Hoc Committee was reauthorized in November 1997, it was directed to concentrate its work on the healing of victims, continuing education of dioceses about abuse prevention, and future options for priest offenders after treatment.⁵⁰ Much more has and could be said about the catalogue of actions by the Bishops of the Conference. As noted above, the summary chronology of this work is publicly available and includes events beyond those thought newsworthy by the media.

Rather than characterize the reaction by Church leaders as "reluctant,"⁵¹ I view it as careful, over a few years, based on first learning about the problem, trying several approaches, and passing along these lessons to the dioceses so that improvements could be made at the local level. This experience was consolidated in a statement of the Conference President in 1992, and became known as the Five Principles.⁵² Professor Lytton correctly notes that they are "non-binding,"⁵³ but the Principles themselves, on the merits, provide a useful basis on which policy

⁴⁵ Report of the Ad Hoc Committee, *supra* note 35, at 669–70.

⁴⁶ The Ad Hoc Committee on Clergy Sexual Abuse was appointed in June 1993. Chronology, *supra* note 9. It was ad hoc not because it was temporary but because, as a result of the Think Tank, the Conference decided to call on the services of Bishops from various Conference committees (Priestly Formation, Priestly Life, Canon Law, Communications, etc). See Ad Hoc Committee Report, *supra* note 35, at 670.

⁴⁷ Lytton, *supra* note 14, at 863–64. The Porter litigation did not put clergy abuse back on the USCCB agenda. It was always on the agenda, and the response to the "Think Tank" led to a more systematic and public approach. *Contra id.*

⁴⁸ BISHOP'S AD HOC COMMITTEE ON SEXUAL ABUSE, RESTORING TRUST: A PASTORAL RESPONSE TO SEXUAL ABUSE 8–9 (1996) [hereinafter 1996 COMMITTEE REPORT].

⁴⁹ The reports were entitled "Restoring Trust" and since the advent of the Internet, portions of these reports have been posted on the USCCB website. United States Conference of Catholic Bishops, Restoring Trust: Response to Clergy Sexual Abuse, <http://www.nccbuscc.org/comm/restoretrust.shtml> (last visited Jan. 10, 2007). 1996 Committee Report, *supra* note 48, at pmb1., 1–3, 14, 18–20.

⁵⁰ Chronology, *supra* note 9.

⁵¹ Lytton, *supra* note 14, at 812, 877.

⁵² *Id.* at 863.

⁵³ *Id.*

formation could occur.⁵⁴ Indeed, they form the underpinnings of the 2002 Charter for the Protection of Children and Young People. The Principles, like the Charter, are based around rooting out abusers, being accountable to the larger community including the government, and responding to the real needs of victims. What the crisis of 2002 exposed was the absence of consistency, transparency, and accountability, issues that are addressed in various ways in the Charter. Key elements—removal from ministry for offenders and involvement of lay review boards in reviewing cases—are now binding through action of the Apostolic See in Rome in a series of Church laws for the United States called the Essential Norms.⁵⁵

Neither the Think Tank in 1993, nor the appointment of the Ad Hoc Committee in 1993, nor the drafting of the Charter 2002, were the results of litigation. Litigation inexorably preceded and followed these events. But, these steps were taken by a Church that grappled with how best to deal with a difficult human problem in a way that served its mission and took account of the human toll.

As I first described in 1992,⁵⁶ the goal was, and remains, to prevent harm to children and young people who are served in Church institutions. The goal is to lower the incidence of abuse and to educate and train people to be more aware of the problem of abuse and, through these efforts, to prevent it from occurring. When abuse does occur, the Church hopes that it is immediately reported, so that effective and permanent correction can be taken to ensure that an offender never offends again in a church institution. Public studies indicate that these measures have been successful.⁵⁷ The decrease in abuse cases is not the result of tort litigation or media attention. It is the result of hard work on the part of many people.

⁵⁴ Professor Lytton summarizes the Principles in his article, *id.*, but in full text they show the kind of experience the Conference provided to the dioceses:

1. [R]espond promptly to all allegations of abuse where there is reasonable belief that abuse has occurred.
2. [I]f such an allegation is supported by sufficient evidence, relieve the alleged offender promptly of his ministerial duties and refer him for appropriate medical evaluation and intervention.
3. [C]omply with the obligations of the civil law as regards reporting of the incident and cooperating with the investigation.
4. [R]each out to the victims and their families and communicate sincere commitment to their spiritual and emotional well-being.
5. [W]ithin the confines of respect for privacy of the individuals involved, deal as openly as possible with the members of the community.

Chronology, *supra* note 9.

⁵⁵ Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons (re-approved in 2006), available at <http://www.usccb.org/ocyp/2005EssentialNormsFinalHighlighted.pdf>. See *supra* notes 35–36 and accompanying text.

⁵⁶ See Chopko, *supra* note 15, at 22, 23.

⁵⁷ JOHN JAY COLL. OF CRIM. JUSTICE, THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950–2002: 2006 SUPPLEMENTARY REPORT 16, 53 (2006), available at <http://www.usccb.org/ocyp/JohnJayReport.pdf> (documenting a decrease in reports and correlation to action steps taken by the Bishops). The Report does conclude,

IV. REACTION TO LITIGATION

From the outset, Professor Lytton highlights litigation aimed at allegations of institutional failure. No one should regard this frame as novel. The earliest cases were filed against dioceses alleging *respondeat superior* liability, on liability regardless of the fault of the hierarchical “employer.”⁵⁸ Those claims routinely failed for a variety of reasons, including the absence of an agency or employment relationship between cleric and Bishop and the fact that criminal assault would never reasonably be considered within the scope of priestly duties.⁵⁹ Litigation quickly shifted to negligence torts involving a failure to supervise.⁶⁰ At the heart of that cause of action was the ignorance of a foreseeable risk based on at least one prior incident.⁶¹ If there were no basis on which antecedent knowledge could be established, such a claim failed.⁶² Thus, framing the case in such a way as to charge supervisor neglect of a risk should neither be viewed as remarkable nor nefarious. It was a necessary element in pursuing a claim of negligent supervision.⁶³ But an underdeveloped aspect of Professor Lytton’s work is the timing of the claims after about 1990 and the relationship of those claims to a broader legislative agenda.

however, that “[t]he only plausible explanation for the number and distribution of cases reported in 2002 [more than 1000] is that individuals were prompted to report abuse after many years by the intensity and detail of the press coverage of the sexual abuse crisis.” *Id.* at 53.

⁵⁸ *E.g.*, *Scott v. Cent. Baptist Church*, 243 Cal. Rptr. 128, 130–31 (Cal. Ct. App. 1988) (noting that the plaintiff attempted to bring his supervisor’s conduct within the doctrine of *respondeat superior*, but to no avail).

⁵⁹ *E.g.*, *Milla v. Tamayo*, 232 Cal. Rptr. 685, 690 (Cal. Ct. App. 1986); *see also* Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1111 (2003) (reasoning that the exploitation of minors by priests is morally wrong and, therefore, such actions could never be reasonably assumed to be expected duties of a minister).

⁶⁰ *Malicki v. Doe*, 814 So. 2d 347, 360–61 (Fla. 2002) (noting that the court has recognized the common law cause of action for the negligent supervision of an employee for more than forty-five years); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 445 (Me. 1997) (noting that there is limited authority reasoning that a claim for negligent supervision of a member of the clergy if the Church knew he or she was potentially dangerous); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (stating the five elements necessary to prove for intentional failure to supervise a member of the clergy).

⁶¹ *See, e.g.*, *Swanson*, 692 A.2d at 445 (noting that previous authority has noted that a cause for action for negligent supervision can be stated if the Church knew the offending clergyman was potentially dangerous); *Gibson*, 952 S.W.2d at 248 (reasoning that an essential element in proving a claim for intentional failure to supervise is that the supervisor must have known that the harm was certain or substantially certain to result).

⁶² *See, e.g.*, *Moses v. Diocese of Colo.* 863 P.2d 310, 327 (Colo. 1993) (reasoning that the Diocese could be liable based on a claim of negligent supervision if it knew of a potential undue risk of harm based on the employee’s previous conduct); *Swanson*, 692 A.2d at 445 (noting that in order to prove a claim for negligent supervision, the Church must have known the offending clergyman was potentially dangerous).

⁶³ For a summary review of these liability questions, *see* Mark E. Chopko, *Derivative Liability*, in *RELIGIOUS ORGANIZATIONS IN THE UNITED STATES*, 609–11 (Serritella et al. eds., 2006).

In 1985, most of the cases that were presented to Church officials involved claims that had only recently occurred and thus were well within the civil statutes of limitations.⁶⁴ These cases involved parents who were bringing their children to diocesan Chanceries complaining about abuse.⁶⁵ Beginning in the late 1980s, and continuing at an even greater rate today, the dynamics of the cases presented began to change. The abuse being reported did not occur a week ago or a year ago, but occurred many years ago. The overwhelming number of these incidents is rooted in particular years, mostly from the 1970s to 1980s. Several studies by the John Jay College of Criminal Justice corroborate that the cases being presented to diocesan officials today remain as they were in the 1990s and in 2002, largely cases complaining of abuse in the 1970s to 1980s.⁶⁶ As noted above,⁶⁷ the studies likewise indicate that after each action step taken by the Bishops in the mid-1980s, and the early 1990s, the incidence of abuse declined.⁶⁸ When such cases are presented in the courts demanding recoveries in six and seven or more figures, there is often no alternative (at least at the beginning of these cases) to litigation.⁶⁹ Although the dioceses have defended themselves in litigation, they also settle cases as they are presented. Even in instances where dioceses have won court victories on statute of limitations grounds, the dioceses involved have successfully negotiated settlements of these claims.⁷⁰ I expect that to continue.

Nonetheless, despite attempts to resolve cases on a fair basis, efforts persist to lift the civil statutes of limitations in various states or alter other defenses and immunities only on the subject of sexual abuse.⁷¹ Although these legislative initiatives are framed more broadly, the testimonial and media impetus comes from victims alleging abuse at the hands of Catholic clergy.⁷² From this perspective, one could certainly guess that efforts to

⁶⁴ JOHN JAY COLL. OF CRIM. JUSTICE, *supra* note 57, at 11–12 (reporting that in 1985, 85% of the cases were reported within one year of the incident, while in 2002, only 10% of cases were reported within one year).

⁶⁵ See Ad Hoc Committee Report, *supra* note 35, at 668. The victims, as minors, were invariably brought by parents in my experience.

⁶⁶ See JOHN JAY COLL. OF CRIM. JUSTICE, *supra* note 17, at 89, 90; JOHN JAY COLL. OF CRIM. JUSTICE, *supra* note 57, at 4, 7; KAREN J. TERRY & JENNIFER TALLON, CHILD SEXUAL ABUSE: A REVIEW OF THE LITERATURE 11 (2004), available at <http://www.usccb.org/nrb/johnjaystudy/litreview.pdf>.

⁶⁷ See *supra* Part III.

⁶⁸ See JOHN JAY COLL. OF CRIM. JUSTICE, *supra* note 57, at 4, 7.

⁶⁹ See Chopko, *supra* note 11, at 1900–02.

⁷⁰ *E.g.*, *id.* at 1902 n.22 (noting that some churches, despite being victorious in litigation, reach a mediated result that provides compensation to a victim of abuse); Chopko, *supra* note 18, at 151 n.139.

⁷¹ Nussbaum, *supra* note 23.

⁷² See, e.g., David Clohessy & Barbara Blaine, *Repeal the Statute of Limitations: By Far, The Most Important Reform Issue for Keeping Children Safe*, <http://www.survivorsfirst.org/RepealStatute.htm> (last visited Nov. 17, 2006) (advocating the repeal of the statute of limitations for criminal and civil matters regarding the sexual abuse of minors).

release names, addresses, and personnel records are related to this agenda. Although Professor Lytton does not discuss this more recent phenomenon,⁷³ and deducing from his opinion on the subject, such an effort should not be seen by the larger society as beneficial. Among other things, lifting the civil statutes of limitations will not protect any child at risk today because it undermines—by calling into question—the Church’s commitment to victim assistance, and creates the potential for catastrophic disruption in worship and other services offered by churches in states. This is fundamentally unjust.⁷⁴

Children are better protected by encouraging prompt reporting of abuse to law enforcement and others in a position to combat it. Hearing about abuse ten, twenty, or, in some cases, fifty or sixty years later is less effective in protecting others from abuse than prompt reporting. Prompt reporting means that abusers will be identified and removed more quickly than in the past. Since the advent of the Charter in 2002, more than 1000 Roman Catholic priests have been permanently removed from ministry.⁷⁵ This occurred through Church processes, not through the process of civil litigation. The actions by Church leadership today in this regard have been praiseworthy. No other institution in this society in recent years has done as much to protect children. These legislative measures target a Church that no longer exists, and places the responsibility to compensate victims on the heads and in the pockets of the generation of Catholics who sit in the pews today.⁷⁶ Despite being unjust, such punitive measures are unnecessary for victims to be heard, responded to in justice, and offered assistance. All of this Church activity occurs regardless of the legislative process and, for the most part, out of the media spotlight.

IV. CONCLUSION

Much more could and will be said about Professor Lytton’s contribution to the scholarship around the subject of clergy sexual abuse. Indeed, his article will long be read for the research and resources that it

⁷³ Lytton does not discuss the disclosure of names and records, but he does discuss grand jury reports and recommendations, Lytton, *supra* note 1, at 869–70, as well as the statute of limitations issue, *id.* at 867, 871.

⁷⁴ See Charles J. Chaput, *Suing the Church*, 163 FIRST THINGS 12, 13–14 (2006), available at <http://www.firstthings.com/ftissues/ft0605/opinion/chaput.html>.

⁷⁵ Removals are audited and reported publicly. See, e.g., 2005 ANNUAL REPORT, *supra* note 8, at 14; *700 Priests Removed Since January 2002* (Feb 27, 2004), <http://www.nccbuscc.org/comm/archives/2004/04-040.shtml>.

⁷⁶ The USCCB and the California Bishops filed an amicus brief in a case filed challenging the lifting of California’s statute of limitations that expands on these points. Brief for United States Conference of Catholic Bishops & California Catholic Conference as Amici Curiae Supporting Counterclaimant at 8–13, *Melanie H. v. Doe*, No. 04 CV 1596 WQH (JFS) (S.D. Cal. filed June 17, 2005), available at <http://www.usccb.org/ogc/Melanie.pdf>.

documents. In addition, it positively correlates the media attention with the actions of the bar around the subject of Catholic clergy sexual abuse. But the issue is broader and more complex than simply an issue involving the Catholic Church or just litigation. It is a problem that faces society and occurs in institutions, public and private, and in the family itself, despite best efforts at prevention. It would have been better, therefore, if the litigation and media attention had been more broadly focused, on healing, restoring trust, and prevention. But that is not Professor Lytton's problem—he is only the reporter. In my view, however, neither of those tasks are the jobs of the tort system or the media. They are works of the Church.