SOLVING THE PENN STATE PROBLEM:
HOLDING THE INSTITUTION ACCOUNTABLE FOR ITS
CONSPIRACY OF SILENCE

SARAH J. KROPP*

In institutions have a potent impulse to avoid public scandal, and do an execrable job of policing themselves. To protect their reputations or simply to avoid conflict, they minimize even the most destructive behavior. . . . And they persuade themselves that their mission, be it the inculcation of religious faith or the scoring of touchdowns, trumps the law’s mandates.1

I. INTRODUCTION

On October 15, 2007, thirty-six-year-old “Ben” confided to an archdiocese victim coordinator that a priest had sexually violated him when he was an altar boy at St. Mark Parish in Bristol, Pennsylvania.2 An archdiocese victim coordinator, as well as an archdiocese investigator, interviewed Ben on multiple occasions and forced him to repeat the details of his abuse.3 Despite Ben’s credibility, the corroboration of several witnesses, and another allegation made concerning the same priest a year prior, the Archdiocesan Review Board (board) found Ben’s accusation unsubstantiated.4 On July 24, 2008, the board notified Ben that it did not find his allegation credible and would not discipline the priest who he believes harmed him.5 “Less than a year later, Ben committed suicide.”6 Ben’s abuser remains active at several parishes in the Philadelphia area,

Copyright © 2014, Sarah J. Kropp.

* Capital University Law School, J.D, May 2013; Allegheny College, B.A. in English Literature, May 2010. I would like to express my appreciation to Professor Scott Anderson of Capital University Law School for his invaluable guidance and inspiration as I wrote this Comment. I would also like to thank my family, friends, and, in particular, my friend and former Editor in Chief of the Law Review, Alexis Haddox, for their encouragement during the tumultuous writing process.

3 Id. at 58.
4 Id. at 57, 60.
5 Id. at 60.
6 Id.
and the Philadelphia Archdiocese has yet to notify parishioners of the allegations of child sexual abuse made against the priest.\footnote{Id. at 60–61.}

Recently, there have been major scandals involving sexual crimes against minors; these crimes were largely institutionally affiliated and went largely unreported for years.\footnote{See generally Timeline: Philadelphia Archdiocese Trial, N.Y. TIMES, http://www.nytimes.com/interactive/2012/06/01/us/priest-trial-timeline.html (last visited Jan. 3, 2014) [hereinafter Child Abuse Timeline].} This Comment discusses the sexual abuse scandals involving two Catholic dioceses: one in Philadelphia, Pennsylvania and the other in Kansas City, Missouri.\footnote{See infra Part II.} While the actions of pedophiles are reprehensible, the conduct of those individuals is not the epicenter of discussion. Rather, this Comment focuses on the culpability of the institutions that foster and acquiesce to the crimes of the sexual offenders they harbor.\footnote{See infra Part IV.B.} As evidenced by the examples of scandals in Catholic dioceses, these are inherently “institutionalized” cover-ups involving the suppression of victims and evidence.\footnote{See infra Parts II, V.B.} These institutions systematically enabled such crimes to occur and actively concealed crimes in order to keep businesses and reputations intact.\footnote{See infra Parts II.B, V.B.}

Ben’s story exemplifies some of the difficulties involved in bringing a large institution, such as the Catholic Church, to justice for its role in covering up and fostering the crimes of its employees. Using the examples of one recent success—and a near miss—in holding high-level church employees responsible for their roles in these types of crimes,\footnote{See infra Part II.C.} this Comment proposes a solution\footnote{See infra Part VI.} to the piecemeal justice currently available to the victims of Gerald A. Sandusky (Jerry Sandusky).\footnote{See infra Part V.C–E.} Authorities and victims could use the proposed solution in connection with Pennsylvania State University’s furtherance of Jerry Sandusky’s crimes through a “conspiracy of silence.”\footnote{Steve Eder, Former Penn State President Is Charged in Sandusky Case, N.Y. TIMES, Nov. 2, 2012, at B9 [hereinafter Eder, Former Penn State President Charged].} This proposed solution to the institutionalization of sex crimes against minors comes in the form of a proposed John Doe
Statute (Statute). This Statute imposes strict liability on an institution for its employees’ sexual crimes against minors and also incentivizes plaintiffs to prosecute an institution for its involvement in their victimization.

The institutionalized cover-up is a modern problem that the law has yet to resolve. The purpose of this Comment is to propose a statute equipped to impose liability upon the Pennsylvania State University (Penn State or university) for its role in covering up and fostering the crimes of Jerry Sandusky. This Comment begins by discussing the prosecution of high-ranking church officials, which serves as a model of imposing liability on the institution itself. Next, this Comment examines the Racketeer Influenced and Corrupt Organizations Act (RICO) as a potential cause of action for imposing liability on institutions for sex crimes committed by an employee. Thereafter, this Comment examines different theories of liability and culpability to probe the foundations for imposing vicarious liability on an entity. Lastly, this Comment examines the background and legal proceedings involving Jerry Sandusky and other employees of Penn State to determine the adequacy of the legal charges against those involved.

As a means of holding Penn State accountable for its role in fostering Jerry Sandusky’s crimes, this Comment proposes a John Doe Statute. This Statute imposes strict liability on institutions when their employees commit a sexual crime against a minor, and it also includes specific civil and criminal penalties that offer a more certain means of accountability for the institution and justice for the victims. Finally, this Comment concludes by explaining the advantages of this Statute, exploring how it could help Sandusky’s victims obtain justice, and urging institutional accountability to counter the modern problem of the institutional cover-up.

---

17 See infra Part VI.
18 See infra Part VI.
19 See infra Part II.
21 See infra Part III.
22 See infra Part IV.
23 See infra Part V.
24 See infra Part VI.
25 See infra Part VII.
26 See infra Part VIII.
II. COVER-UPS WITHIN THE CATHOLIC CHURCH

Two prominent leaders in the Catholic Church hierarchy were recently convicted for their involvement in child sexual abuse scandals: Bishop Robert Finn and Monsignor William Lynn. They were convicted of failure to report suspected child abuse and child endangerment, respectively. Upon examination of these two incidents, it is evident that (1) the current trend is to go beyond the abuser in terms of culpability for the actions of predatory priests in these circumstances and (2) the law is presently inadequate to hold the institution responsible for its part in these crimes.

A. The Diocese of Kansas City

Bishop Robert Finn is the first American bishop to be found criminally responsible for his failure to act in the face of confirmed child abuse. The judge sentenced him to two years of probation for failing to report a priest under his supervision who had a penchant for taking pornographic photographs of schoolgirls. Finn and the Kansas City Diocese both initially faced two misdemeanor counts of failure to report after officials discovered that Father Shawn Ratigan had hundreds of indecent photographs on his laptop computer.

29 Eligon & Goodstein, supra note 27, at A1.
30 Hurdle & Eckholm, Cardinal’s Aide, supra note 28.
32 Bruni, supra note 1, at A23.
33 Eligon & Goodstein, supra note 27, at A1.
The presiding judge dropped both charges against the Kansas City Diocese. The Diocese had faced a fine of up to $5,000 per charge.

In May 2010, the Diocese of Kansas City received a memorandum from a neighboring parochial school principal that voiced concerns about Father Ratigan’s peculiar behavior during interactions with children. This behavior included instructing children to reach into his pockets for candy and sitting with young girls on his lap. In December 2010, a computer repairperson discovered hundreds of lewd photographs of schoolgirls on Ratigan’s computer. Ratigan then attempted suicide after the repairman informed Ratigan’s diocese of what he had found. Bishop Finn, as head of the diocese, sent Ratigan to counseling. He then reassigned Ratigan to a new position as chaplain.

At his new assignment, Bishop Finn did not restrict Ratigan from contact with children. In fact, Ratigan hosted an Easter egg hunt; during a separate event, a parent caught Ratigan taking a photograph under the table, up the skirt of a young girl.

In May 2011, a diocesan representative informed the police about Ratigan’s collection of child pornography—an entire year after the principal informed the diocese of suspicions regarding Ratigan’s behavior. Ratigan pleaded guilty to possession of child pornography in August 2012. The judge later sentenced him to fifty years’ imprisonment.

---


36 Thomas & Morris, *supra* note 34.

37 Bruni, *supra* note 1, at A23.

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 See *id.*

44 *Id.*

45 *Id.*

46 *Id.*

Bishop Finn was found guilty of one charge of failure to report suspicions of child abuse. Each count carried a maximum punishment of one year in jail and a $1,000 fine, but the judge sentenced Bishop Finn to two years of probation. Finn’s sentence requires him to start a training program for Diocese of Kansas City employees for detecting signs of child abuse and to create a fund to pay for victims’ counseling. Bishop Finn and the diocese still face twenty-seven civil lawsuits from various victims seeking compensation.

The verdict against Bishop Finn is “unprecedented,” as Finn is the first bishop in the United States to be convicted in criminal court for shielding an abusive priest from prosecution. According to USA Today, Finn’s verdict is “hailed as a landmark in the effort to bring accountability to the church's hierarchy.”

B. The Archdiocese of Philadelphia

Monsignor William Lynn was the first church official in the United States to be tried on accusations of enabling the sexual misconduct of priests. Officials tried him for charges of endangering minors and conspiracy to keep an accused priest in the active ministry—charges that could have put him in jail for 10.5 to 21 years. A jury ultimately convicted Lynn on child endangerment charges, which stemmed from his lax oversight of Father Edward Avery, a priest Lynn reassigned to an unrelated case of priest sexual abuse where one of the victims committed suicide, which is the largest settlement made to date by the diocese “in a single priest sexual abuse lawsuit.”

---

48 Bruni, supra note 1, at A23.
49 Gibson, What’s Next, supra note 35.
50 Eligon & Goodstein, supra note 27, at A1.
51 Id. The diocese also settled a wrongful death lawsuit for $2.25 million in an unrelated case of priest sexual abuse where one of the victims committed suicide, which is the largest settlement made to date by the diocese “in a single priest sexual abuse lawsuit.” Judy L. Thomas, Catholic Diocese Settles Wrongful-Death Lawsuit During Jury Selection in Independence, KAN. CITY STAR (July 9, 2013), http://www.kansascity.com/2013/07/09/4335444/catholic-diocese-settles-wrongful.html
52 Gibson, What’s Next, supra note 35.
53 Id.
56 Jon Hurdle, Ex-Teacher and a Priest Are Convicted in Abuse Case, N.Y. TIMES, Jan. 31, 2013, at A14 [hereinafter Hurdle, Ex-Teacher and Priest].
unwarned parish despite Lynn’s knowledge that Avery spent months in a psychiatric facility following an episode of child sexual abuse in 2003.  

Monsignor Lynn held the position of Secretary for Clergy for the 1.5-million-member Archdiocese of Philadelphia from 1992 to 2004. Lynn’s position entailed recommending jobs for priests and investigating charges of sexual abuse against priests within the diocese. A grand jury indicted Lynn following the release of a grand jury report in 2011 that accused Lynn and other diocesan officials of “playing down credible abuse charges against dozens of priests, and of working to protect the archdiocese from scandal and lawsuits rather than to protect children.” Lynn’s attorney, however, insisted that Lynn maintained a “middle-management job” and did not have the authority to remove accused priests from the clergy. 

Lynn was the most senior Roman Catholic Church official convicted of charges regarding sexual abuse of minors by priests. The Archdiocese of Philadelphia is currently conducting an investigation involving the allegations of sexual abuse against a number of priests placed on administrative leave following the release of the grand jury report. There are currently eight civil suits pending against the Archdiocese of Philadelphia relating to clergy members accused of sexual abuse. 

Monsignor Lynn, convicted on charges of child endangerment, faced a sentence of 3.5 to 7 years in prison. Following the verdict, Philadelphia district attorney, R. Seth Williams, said, “It sends a message to archdiocese organizations across the country. Don’t protect pedophiles because you are more concerned with your institution.” Williams is hopeful that Lynn’s conviction is a turning point in the history of the institutional
cover-up, stating, “This monumental case will change the way business is done in many institutions.”68

A Pennsylvania appeals court overturned Monsignor Lynn’s child endangerment conviction in December 2013 on the basis of disputed interpretation of child welfare law.69 While there was sufficient evidence to show Lynn “prioritized the archdiocese’s reputation over the safety of [child] victims,” the court did not find child welfare law could be used to prosecute Lynn as a mere supervisor.70 The legislature modified the law in 2007, after Lynn’s retirement, to explicitly apply to both employers and supervisors, moving beyond parents, guardians, and persons supervising the welfare of a child.71 While prosecutors likely will appeal the decision, Lynn’s trial remains a warning to church officials everywhere that they are not invincible.72 “Everyone in the chancery now knows they could be arrested and prosecuted if they do not follow the law carefully.”73

C. The Impact of the Convictions of High-Ranking Diocesan Officials

Monsignor Lynn and Bishop Finn’s convictions serve as a milestone for victims because, while victims subjected Catholic dioceses to civil suits seeking monetary damages, prosecutors only recently began to file criminal charges against church officials.74 “What has not happened up to now is for church officials to be held criminally accountable,” said Timothy Lytton, an expert on Catholic abuse cases.75 Lytton believed that Lynn’s trial resulted in a “dramatic[] increase [of] pressure on diocese officials to fulfill the church’s promises to be more transparent and accountable.”76 Since Lynn’s conviction has been overturned, it is apparent that, while society is prepared to hold church officials responsible for their role in fostering child sexual abuse, the law is not there yet. Therefore, the law must adapt to hold these individuals and the entities they work to protect properly responsible.

---

68 Hurdle & Eckholm, Cardinal’s Aide, supra note 28, at A1.
69 Erik Eckholm & Steven Yaccino, Philadelphia Monsignor’s Conviction Overturned in Cover-up of Sexual Abuse, N.Y. TIMES, Dec. 27, 2013, at A16.
70 Id.
71 Id.
72 Id.
73 Id.
74 Erik Eckholm & Jon Hurdle, In a First, a Trial Tests Whether a Church Supervisor Is Liable for Abuse by Priests, N.Y. TIMES, Mar. 27, 2012, at A11.
75 Id.
76 Id.
By analyzing the theories of liability under which prosecutors have prosecuted dioceses and their officials thus far, it is apparent that current law is not equipped to prosecute crimes of this nature. The following table illustrates the statutes under which officials prosecuted Bishop Finn, the Diocese of Kansas City, and Monsignor Lynn, as well as the success of the charges and their potential criminal penalties:

Table 1. Charges and Penalties Against Finn, Lynn, and the Diocese of Kansas City

<table>
<thead>
<tr>
<th>Code Section</th>
<th>Crime</th>
<th>Defendant(s)</th>
<th>Potential Penalties</th>
<th>Success of Claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>[KAN. STAT. ANN. § 38–2223 (West 2008)]</td>
<td>Failure to report suspected child abuse</td>
<td>Bishop Finn &amp; the Diocese of Kansas City</td>
<td>Willful and knowing failure to make a report required by this section [KAN. STAT. ANN. § 38–2223(e) (West 2008)] is a class B misdemeanor, which carries a jail term not to exceed six months [Id. § 21–6602(a)(2) (West 2012)] and a fine of no more than $1,000. [Id. § 21–6611(b)(2) (West 2012)]</td>
<td>The judge dropped the charges against the Diocese. [Eligon &amp; Goodstein, supra note 27, at A1.] The judge found Finn guilty of one count and sentenced him to two years of probation. [Bruni, supra note 1, at A23.]</td>
</tr>
</tbody>
</table>
An offense under this section constitutes a first-degree misdemeanor (up to five years in prison). However, where there is a course of conduct, the offense constitutes a third-degree felony (up to seven years in prison).

A jury found Lynn guilty of one charge of child endangerment, and a judge sentenced him to three to six years in prison on July 24, 2012. This conviction was overturned on appeal in December 2013.

The penalty depends upon the underlying crime. A jury acquitted Lynn.

---

83 Id. § 106(b)(6) (West 1998).
84 Id. § 4304(b).
85 Id. § 106(b)(4).
86 David Gibson, Monsignor William Lynn Sentenced to 3–6 Years for Catholic Sex Abuse Cover-Up, RELIGION NEWS SERVICE (July 24, 2012), http://www.religionnews.com/2012/07/24/monsignor-william-lynn-sentenced-to-3-6-years-in-catholic-sex-abuse-cover-u/
87 Eckholm & Yaccino, supra note 69, at A16.
88 18 PA. CONS. STAT. ANN. § 905(a) (West 1998).
89 Hurdle & Eckholm, Cardinal’s Aide, supra note 28, at A1.
This table illustrates that, while prosecutors could not successfully prosecute the dioceses, their ability to convict Bishop Finn and Monsignor Lynn indicates that officials within the institution had the requisite culpability stemming from their roles as employees to be found guilty for child endangerment and failure to report child abuse.90 Thus, one can infer that the institutions could be subject to suit if there was a statutory provision under which officials could properly prosecute them. However, Part III discusses that suits attempting to hold a church or diocese criminally responsible for sexual offenses against minors have been largely unsuccessful.91

III. A MODERN ATTEMPT TO HOLD INSTITUTIONS ACCOUNTABLE FOR THEIR INVOLVEMENT IN COVERING UP SEX CRIMES AGAINST MINORS

A new form of accountability is necessary to properly handle the modern problem of institutional involvement with sex crimes against minors. Traditional theories of institutional culpability are not precise enough to hold the institution responsible for its role in this deviant, modern crime of the institutional cover-up.

Authorities recently have attempted to prosecute institutions, such as the Catholic Church, under RICO.92 While this cause of action is an attractive one to pursue because of the potential for attorney fees and treble damages, these attempts have not been successful for a variety of reasons.93 These reasons, most importantly, include a lack of specificity to sex crimes, the remote connection between the underlying business and the crime committed, the behavior of the employee falling outside the scope of employment, and a lapse in the statute of limitations by the time the crime comes to light.94

A. The RICO Statute as an Example for Reform

Authorities use RICO as a tool in prosecuting organized crime.95 It provides a private cause of action against persons employed by or associated with any enterprise engaged in a “pattern of racketeering

90 See Child Abuse Timeline, supra note 8.
91 See infra Part III.
92 See infra Part III.B.
93 See infra Part III.B.
94 See infra Part III.B.
activity. RICO provides both criminal penalties and civil remedies for violations of its provisions, and a RICO defendant could have to pay treble damages and attorney fees. However, RICO is now a fearsome weapon for plaintiffs in litigation because its use expanded beyond prosecutions just concerning organized crime. The civil RICO action is so formidable that commencement of such an action has "an almost inevitable stigmatizing effect' on those named as defendants."

The elements necessary to make a successful RICO claim include: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a ‘pattern’ (4) of racketeering activity (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an ‘enterprise’ (7) the activities of which affect interstate or foreign commerce." RICO claims contain a four-year statute of limitations.

B. Recent Attempts to Use RICO to Prosecute Institutions Involved in Sex Crimes Against Minors

RICO claims against churches are slowly emerging as a cause of action, due in large part to the conspiratorial nature of the institution’s conduct. A plaintiff must allege three primary factors in a RICO claim: (1) enterprise, (2) pattern, and (3) racketeering activity. In these RICO claims, the enterprise is usually the diocese or the involved church officials. RICO claims made against institutions related to sexual offenses against minors have yet to be successful. In Doe v. O’Connell, a former seminary student sued a bishop under federal and state RICO and conspiracy claims for alleged sexual abuse that

---

102 91 AM. JUR. Trials § 18 (2004).
104 91 AM. JUR., supra note 102, § 18.
105 See supra Part III.C.
106 146 S.W.3d 1 (Mo. Ct. App. 2004).
occurred when he was a minor. The Missouri Court of Appeals held that all causes of action had accrued when the plaintiff reported his allegations to another bishop and, thus, the statute of limitations had expired. The statute of limitations did not toll for fraudulent concealment because the plaintiff knew of the cause of action and did not plead any conduct or statement by the bishop that would justifiably cause a reasonable person to refrain from suit. The court based its decision on the four-year statute of limitations and would have allowed either the injury-discovery rule or the injury-occurrence rule.

2. Hoatson v. New York Archdiocese

In Hoatson v. New York Archdiocese, the plaintiff—a priest—alleged that members of the clergy sexually abused him for many years. He also claimed that, after he testified about his abuse and the cover-up of the Church's handling of internal acts of sexual abuse before the New York Senate, the archdiocese fired him from his position as Director of Schools. The named defendants included various clergy members, church officials, the local archdiocese, and the Roman Catholic Diocese of Albany. He further alleged that the defendants

[E]ngaged in an intentional and long standing practice of intimidating victims of clergy sexual abuse and their advocates including Plaintiff, and [had] a longstanding pattern or scheme of protecting priests from being arrested, charged, indicted or convicted for crimes of a sexual nature, as well as a criminal cover-up of same, and have retaliated against, harassed and discharged the plaintiff for exposing same.

Plaintiff testified to the state senate on behalf of clergy sexual abuse victims in support of legislation to change New York’s statute of

107 Id. at 3.
108 Id.
109 Id. at 4.
110 Id. at 3.
111 No. 05 Civ. 10467(PAC), 2007 WL 431098 (S.D.N.Y. Feb 8, 2007).
112 Id. at *1.
113 Id.
114 Id.
115 Id. at *2 (quoting Amended Complaint at 13, Hoatson v. N.Y. Archdiocese, No. 05-CV-10467 (S.D.N.Y. Jan. 10, 2006)).
limitations for sexual abuse crimes.\textsuperscript{116} After doing so, the defendants fired him from his position with the Church.\textsuperscript{117}

The United States District Court for the Southern District of New York held that plaintiff did not have standing to bring a RICO claim because he did not suffer an injury to business or property that the defendants’ acts caused, so he was not within the scope of victims that RICO protects.\textsuperscript{118} However, the court went on to determine that, even if the plaintiff did have standing, his RICO claims were not persuasive.\textsuperscript{119} The court found that the plaintiff did not plead enough facts to sufficiently allege the existence of a pattern, enterprise, or racketeering activity; thus, the court found no remedy under the RICO statute.\textsuperscript{120} In fact, the court sanctioned the plaintiff’s counsel for his use of RICO as a cause of action because the court deemed the claim to be so deficient.\textsuperscript{121}

\textbf{C. Conclusions}

Courts have not embraced RICO actions in this context for a number of reasons. These reasons include: (1) lack of standing; (2) no injury to business or property; (3) victims are not within the scope of those RICO protects; (4) plaintiffs do not have enough evidence to specifically plead RICO elements; and (5) the statute of limitations has expired because it began to run when victims reported within the institution, even though they did not contact outside authority.\textsuperscript{122} Therefore, even a more modern law dealing with the accountability of institutions is inadequate to prosecute a situation where an institution like the Catholic Church fosters a sexual crime its employees committed against a child. Most importantly, the fact that RICO is not a statute geared towards the prosecution of sex crimes and is, instead, focused on business or property injuries makes RICO an imperfect substitute for what is truly needed—a statute engineered toward dealing with institutional malfeasance at the level of Penn State’s internal cover-up. Next, Part IV reviews theories of liability and culpability, including a look at the history surrounding institutional accountability, and

\begin{itemize}
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.} at *1.
  \item \textsuperscript{118} \textit{Id.} at *6.
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} \textit{Id.} at *10.
  \item \textsuperscript{121} \textit{Id.} at *16.
  \item \textsuperscript{122} \textit{See supra} Part III.B.
\end{itemize}
examines the legal and philosophical theories under which institutions like the Catholic Church or Penn State can be held accountable.\textsuperscript{123}

IV. THEORIES OF LIABILITY AND CULPABILITY

Some legal scholars do not believe that high-ranking officials or organizations are the appropriate target for litigation involving sexual misconduct.\textsuperscript{124} These legal scholars believe that pursuing such litigation would involve obtaining information from the offenders who committed the sexual misconduct, which would result in that culpable individual getting a lighter sentence.\textsuperscript{125} In terms of culpability, commentators may take issue with the imputation of \textit{mens rea} and punishing individuals for omissions.\textsuperscript{126} Below is a brief overview of theories of punishment and how the law has historically dealt with culpability of the institution.

A. Historic Roots of Institutional Culpability

Criminal culpability for the institution has been a legal issue since the mid-nineteenth century, when corporations gained a heightened role in society through urbanization and the Industrial Revolution.\textsuperscript{127} “Criminal liability for . . . legal entities has been a fixture of American law at least since 1909, when the Supreme Court held that a New York railroad was not exempt from criminal prosecution simply because it was a legal . . . entity.”\textsuperscript{128} Since then, prosecutors have successfully prosecuted entities for acts committed by their employees.\textsuperscript{129}

1. Vicarious Liability

The common law originally recognized that authorities could not hold institutions directly liable for the conduct of their employees because

\begin{itemize}
  \item \textsuperscript{123} See infra Part IV.
  \item \textsuperscript{125} Id. at 1063.
  \item \textsuperscript{126} Id. at 1065–66.
  \item \textsuperscript{128} Stuart P. Green, \textit{We Should Consider Prosecuting Catholic Church}, \textit{HOUS. CHRON.} (April 19, 2002), http://www.chron.com/opinion/outlook/article/We-should-consider-prosecuting-Catholic-Church-2093707.php (citing N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494 (1909)).
  \item \textsuperscript{129} Lederman, \textit{supra} note 127, at 642–43.
\end{itemize}
institutions are artificial entities that lack the capacity to engage in wrongful conduct.\textsuperscript{130} “Instead, the common law of torts applied... [either] ‘vicarious’ liability or \textit{respondeat superior}.”\textsuperscript{131} By pursuing claims against entities, the justice system and society acknowledge “that a corporation is not merely the sum of its individual parts, but has an existence that transcends such parts—a fact that helps explain[] why we accord such entities a separate legal identity in the first place.”\textsuperscript{132} Ultimately, the United States Supreme Court held that public policy reasons warrant the supervision of the behavior of an agent “by imputing his act to his employer and imposing penalties upon the corporation for which he is acting.”\textsuperscript{133}

Courts have extended the theory of vicarious liability so far as to hold corporations accountable for the acts of an employee if the corporation ratifies or adopts the employee’s conduct. An employee’s criminal acts that are outside the scope of employment and do not benefit the corporation when they are committed may be imputed to the corporation if the corporation, expressly or impliedly, condones the employee’s criminal conduct.\textsuperscript{134}

For example, in \textit{Continental Baking Co. v. United States},\textsuperscript{135} the government prosecuted a corporation for conspiring to fix prices.\textsuperscript{136} The Sixth Circuit held that the corporation adopted and ratified the acts of its employees because the employees’ supervisors had knowledge of the employees’ acts and failed to do anything.\textsuperscript{137} Thus, the court deemed the corporation accountable for its employees’ illegal conduct because its upper-level managers adopted and ratified the conduct.\textsuperscript{138}

\begin{footnotes}
\item[131] \textit{Id.} at 729.
\item[132] Green, \textit{supra} note 128.
\item[133] \textit{N.Y. Cent. \& Hudson River R.R. Co.}, 212 U.S. at 494.
\item[135] 281 F.2d 137 (6th Cir. 1960).
\item[136] \textit{Id.} at 141.
\item[137] \textit{Id.} at 149.
\item[138] \textit{Id.}
\end{footnotes}
There are many policy reasons to hold institutions responsible for the acts of their employees. First, imposing liability on an institution encourages that institution to adopt its own policies and mechanisms to deter future bad behavior.\textsuperscript{139} Accordingly, the institution itself is in the best position to ensure that these crimes do not happen again.\textsuperscript{140} Second, prosecuting the institution ensures that law enforcement does not have to determine—difficultly—which individuals within the institution are responsible.\textsuperscript{141} Third, the institution should bear the burden of loss because it is in the best position to absorb the costs and compensate victims.\textsuperscript{142} Fourth, vicarious liability gives the institution a greater incentive to be cautious in supervising its employees.\textsuperscript{143}

Vicarious liability, however, has not been the most successful route to pursue claims against the institution in the case of sexual offenses against minors.\textsuperscript{144} As evidenced in \textit{Doe v. Norwich Roman Catholic Diocese},\textsuperscript{145} many judges are uncomfortable with finding the institution liable for these types of crimes because they believe the employee’s conduct is wholly outside the scope of employment.\textsuperscript{146} Yet, “[t]he modern [theory behind] respondeat superior is that employers should bear all the costs that result from the risks of their [businesses].”\textsuperscript{147} Due to the fact that the institution selects the employees, controls the work, and reaps the profits, the institution ultimately serves its own interests regardless of the employee’s intent concerning the business itself.\textsuperscript{148}

\section*{2. Direct Liability}

The restrictions that affect the scope of the vicarious liability doctrine within traditional methods of corporate culpability led to the development

\begin{footnotesize}
\begin{enumerate}
\item Lacovara & Nicoli, \textit{supra} note 130, at 730–31.
\item See \textit{id.}
\item See \textit{id.}
\item \textit{Id.}
\item \textit{Id.}
\item See Hoatson v. N.Y. Archdiocese, No. 05 Civ. 10467(PAC), 2007 WL 431098, at *10 (S.D.N.Y. Feb. 8, 2007).
\item 909 A.2d 983 (Conn. Super. Ct. 2006).
\item \textit{Id.} at 985.
\item \textit{Id.} at 1519.
\end{enumerate}
\end{footnotesize}
of direct liability for entities. The direct liability doctrine relies on the concept of “personification of the legal body.” This theory recognizes actions and thought patterns of individuals within the corporation—sometimes known as corporate organs—as the conduct of the legal entity. Some refer to this as the “alter ego” doctrine because they view the acts of individuals as the embodiment of the organization. This allows for corporations to be criminally liable for the actual perpetration of the offense, which resembles the liability imposed on a human perpetrator, subject to certain limitations.

This theory places greater emphasis on a broader assessment of the institution’s dynamics instead of focusing on singling out an individual for committing a culpable act. This approach—also called the self-identity approach—holds that courts may impose liability on an institution when there is organizational support for the underlying crime that an employee of the institution perpetrated. This model properly affords for the evolution of the large modern corporation, which some characterize as having “a complex structure, a tendency to grant autonomy to sub-units, and a decentralized process of decision-making.”

Unlike the fault underlying the vicarious liability approach, the personification in the direct liability theory allows for a legal definition much closer to mirroring reality. In the absence of a corporation’s ability to actually act, the corporation acts through its human counterparts. Corporations generally restrict those representatives to a small group of individuals (such as the board of directors or president) who decide institutional policies. Therefore, it is more appropriate to hold these persons responsible for the corporation’s actions because of their rank and behavior.

149 Lederman, supra note 127, at 655.
150 Id.
151 Id.
152 Id.
153 Id. at 655–56.
154 Id. at 694–95.
155 Id. at 695.
156 Id. at 701.
157 Id. at 656.
158 Id.
159 Id.
160 Id. at 659.
3. **Strict Liability**

“Strict liability is . . . imposed without regard to the defendant’s negligence or intent to cause harm. In a strict-liability case, the plaintiff need not prove the defendant's negligence or intent, and the defendant cannot escape liability by proving a lack of negligence or intent.”

Lawmakers often create this liability to help the prosecution handle a situation where intent or knowledge is hard to prove, making a conviction more difficult. Legislators may also decide to enact strict liability statutes when particularly harmful conduct must be eradicated, “even at the cost of convicting innocent-minded and blameless people.”

**B. Conclusions—Culpability of the Institution**

Although the law has evolved to deal with the criminal behavior of corporations and institutions, it has not yet caught up entirely. Following a sexual abuse scandal, Massachusetts Attorney General Tom Reilly indicated, in 2003, that he wanted to prosecute church leaders, but there was not an appropriate criminal statute under which he could charge them. Charges such as child endangerment and the failure to make mandatory reports of child abuse are usually time-barred by the statute of limitations by the time victims come forward or are not broad enough to apply to the actor, as was the problem with the Lynn conviction. Currently, a limited amount of federal law relates to child sexual abuse.

If one wanted to pursue an institution for indictment, that person would likely need to bring a fraud claim as a basis for a RICO violation.

Additionally, failings exist in the theory underlying current notions of corporate liability. First, under the theory of vicarious liability, the agent of the corporation must commit the underlying crime within the scope of employment. This leaves a hole in prosecution because crimes, such as sexual offenses against children, are often far removed from the traditional

---

161 *Restatement (Third) of Torts: Liab. for Physical & Emotional Harm* ch. 4, scope note (2010).
163 Id. at 382.
165 Id. at 1067.
166 Eckholm & Yaccino, *supra* note 69, at A16.
168 Id.
nature of the offender’s employment. These crimes are inconsistent with the nature of employment even if the crime itself has a connection to the corporation—for example, if the employee committed it on corporate-owned premises or if the offender came into contact with the child because of the connection of the institution.

Another failing in the doctrine of vicarious liability is that the employee must commit the underlying crime in furtherance of the corporation’s business interests.170 This creates an obstacle in prosecuting the institution because a crime of sexual nature is wholly unrelated to the underlying business of the entity.171 Therefore, prosecution under a statute such as RICO is incompatible with the prosecution of these types of crimes.172

Direct liability under this “corporate organ” doctrine also has its own shortcomings when applied to sex offenses against minors. In particular, this theory only holds the institution responsible for the actions of individuals involved in the upper echelons of the corporation—the “high managerial agent.”173 Thus, in institutions such as dioceses or universities, the doctrine imputes a small percentage of individuals’ actions to the institution, while the doctrine does not consider relevant a comparatively large number of lower-level employees. This may be appropriate if the employee’s actions are remote from the institution itself; but, in situations where, for example, Jerry Sandusky’s position enabled him to commit his crimes, the law must adapt to address a situation where the institution still plays a role in the commission of the crime. The concept of strict liability comes in during this situation.

Strict liability is the most attractive theory under which officials could prosecute Penn State and its various officials. Strict liability will not allow the defendants to escape liability by showing a lack of intent because, under these circumstances, officials would find it difficult to prove, particularly in the case of Penn State itself. Further, strict liability places the burden of responsibility on the defendant to conform its conduct to the law, which is appropriate when a particularly deviant harm, such as the sexual abuse of minors, is at issue. Finally, the choice by the legislature

170 Id. at 654–55.
171 Id. at 667.
172 See supra Part III.C.
173 See Model Penal Code § 2.07(4) (“High managerial agent’ means an officer . . . or any other agent of a corporation . . . having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.”); Lederman, supra note 127, at 656.
to make a criminal act subject to strict liability is one that fosters an environment under which the victims feel empowered to pursue their claims and the perpetrators understand that the law will not tolerate their behavior. As it is now, the law does not send a message to institutional perpetrators that their conduct is deplorable because there is not a regulatory scheme under which their conduct clearly violates the law. Rather, the piecemeal means under which persons must prosecute—as seen in the civil lawsuits made against Penn State—foster an impression that the institution is not, in fact, culpable and that victims may not receive suitable justice.

V. THE PENNSYLVANIA STATE UNIVERSITY SCANDAL

The Jerry Sandusky child abuse scandal quickly ushered the problem of the institutional cover-up into the public eye. Penn State, and its football program, is a nationally recognized business force. In 2010–2011, the Penn State football program was the second most profitable college athletics program in the United States, earning over $50 million. Penn State’s yearly operating budget is roughly $4.1 billion and it estimates its endowment at roughly $1.35 billion. The release of the Freeh Report and the very public trial of Sandusky served to illuminate the failures of the law itself in the legal system’s inability to adequately prosecute crimes of this magnitude.

---

174 Michael O’Keeffe, Penn State Sexual Abuse Scandal Involving Jerry Sandusky Opens American Eyes to Our Often-Unhealthy Relationship with Sports, N.Y. DAILY NEWS (Nov. 24, 2012, 4:15 PM), http://www.nydailynews.com/sports/college/score-scandal-changed-sports-article-1.1207425#ixzz2LY34AYmT (“The Penn State case grabbed our attention in a way that the Catholic Church crisis, with its thousands of victims and perpetrators, never did.”).
176 Id. at 7–8.
178 FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (July 12, 2012), http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf [hereinafter FREEH REPORT].
A. The Trial of Jerry Sandusky

On November 4, 2011, a grand jury indicted Jerry Sandusky for multiple counts of involuntary deviate sexual intercourse, aggravated indecent assault, corruption of minors, unlawful contact with minors, and endangering the welfare of minors. Many of the offenses detailed occurred while Sandusky was either the defensive coordinator for the Penn State football team or a professor emeritus with unlimited privileges to Penn State’s facilities. The jury found Sandusky guilty of forty-five counts of sexual abuse on June 22, 2012. The judge sentenced Sandusky to thirty to sixty years in prison.

The trial court held a hearing for a new trial in Sandusky’s case on January 10, 2013. His lawyers contended, among various arguments, the statute of limitations expired on some of the claims, “[p]rosecutors failed to show enough evidence to convict Sandusky[,] and the charges were not specific enough” to support conviction.

B. University Reactions to the Sandusky Scandal

Penn State’s Board of Trustees fired Joe Paterno, the head football coach throughout Sandusky’s time at the university. The board also fired the college president at the time, Graham Spanier. Most

---

179 Id. at 13.
180 Id.
181 Id.
185 FREEH REPORT, supra note 178, at 30. According to John Surma Jr., vice chairman of the university’s Board of Trustees, Penn State fired Paterno in the wake of the Sandusky scandal in an effort to “make a change in the leadership to set a course for a new direction.” Mark Viera, Paterno Ousted with President by Penn State, N.Y. TIMES, Nov. 10, 2011, at A1.
186 FREEH REPORT, supra note 178, at 30. The university fired Spanier under similar circumstances as Coach Paterno in an effort by the university to do damage control following Sandusky’s arrest. Viera, supra note 185, at A1. The Freeh Report later found that Spanier and Paterno were made aware of Sandusky’s crimes and were unwilling to stop him. Id.
importantly, the board formed the Special Investigations Task Force of the Board of Trustees of the Pennsylvania State University. That task force engaged the former director of the FBI, Louis J. Freeh, and his team as special investigative counsel to examine the criminal charges of sexual abuse of minors on Penn State’s campus, the response of the university, and the failure to report. Penn State also expected the special counsel “to provide recommendations regarding university governance, oversight, and administrative policies and procedures that will enable the university to prevent and more effectively respond to incidents of sexual abuse of minors in the future.”

1. Freeh Report Findings

Following a seven-month investigation, the Freeh Report concluded that Penn State’s leaders—most prominently Spanier, Paterno, former Penn State University Vice President Gary Schultz, and Athletic Director Tim Curley—deliberately disregarded the welfare of Sandusky’s victims.

In 1977, Sandusky founded the Second Mile, a charity allegedly devoted to helping boys with troubled home lives. Through the charity, Sandusky had access to hundreds of boys, many of whom were vulnerable due to their situations at home. Sandusky used his position within the charity and as a Penn State football coach to give the boys gifts and to be alone with them for long periods of time. The earliest reported sexual abuse incident spanned back to 1998. Most disturbingly, Freeh’s investigators uncovered handwritten notes in which former University Vice President Schultz wondered if the 1998 allegation against Sandusky was an indication of a “Pandora’s box” and if “other children” were involved. While the Sandusky scandal involved many child victims, the most well-known incident occurred in 2001.

---

188 Id. at 8.
189 Id.
190 Id. at 14–15.
191 Id. at 107.
192 Id. at 17.
193 Id. at 15, 104.
194 Id. at 39.
195 Id.
196 See id. at 62.
In 2001, a graduate assistant, Mike McQueary, saw Sandusky sexually assault a ten-year-old boy in the Penn State showers. He reported what he saw to Coach Paterno the next day. In a meeting roughly 1.5 weeks after the incident, McQueary reported to Curley and Schultz what he saw. Following the meeting, no one contacted outside law enforcement. Since then, Penn State fired McQueary from his position with the university, and he is suing Penn State, alleging whistleblower violations and defamation.

Curley did not report the incident to the Penn State police, the police agency for University Park, or any other police agency. Curley and Schultz reported to Spanier but made no indication that a crime occurred because McQueary merely described Sandusky as “horsing around” to Curley and Schultz. Sandusky’s only sanction following this incident came when the Second Mile executive director told Sandusky he could not bring youths onto the Penn State campus. Curley testified to the grand jury that this ban was unenforceable and had no practical effect on Sandusky’s access to the facilities.

No one ever made any attempt to formally investigate, identify the victim, or protect that child or others from similar conduct. During an interview, a journalist asked Paterno if he considered calling the police. “To be honest with you, I didn’t,” Paterno said. “I didn’t know what to do. I had not seen anything...I didn’t have anything to do with [Sandusky]. I tried to look through the Penn State guidelines to see what I was supposed to do. It said I was supposed to call Tim [Curley]. So I called him.” As the facts came to light, it became clear that no one at Penn State had done enough.

---

197 Id. at 66.
198 Id. at 67.
199 Id. at 71–72.
200 Id. at 75.
202 FREEH REPORT, supra note 178, at 75.
203 Id. at 70, Ex. 2J.
204 Id. at 78, Ex. 2J.
205 Id. at 79.
206 Id. at 14.
207 JOE POSNANSKI, PATERNO 272 (2012).
208 Id.
209 Id. (second alteration in original).
Sandusky used his prowess at Penn State to groom his victims by building a trust relationship with his victims through means of his position. 210 Sandusky retained unfettered access to the football facilities until late 2011. 211 Sandusky persuaded his victims using gifts and opportunities to attend sporting events. 212 Sandusky even guaranteed a victim that he could be a walk-on player at Penn State. 213 The mother of a child, “Victim 6,” reported an incident to the university police department after she found out her son showered with Sandusky at the university and inappropriate conduct occurred. 214 A lengthy investigation occurred, and the university police department closed the investigation after the district attorney decided not to file charges against Sandusky. 215 The university police detective involved testified that the director of campus police told him to close the investigation. 216 After Sandusky admitted to the police that he showered naked with and hugged the victim while in the shower, the detective simply advised him not to shower with any children again. 217

C. NCAA Sanctions Against Penn State

The National Collegiate Athletic Association (NCAA) issued sanctions against Penn State that were unprecedented: the NCAA levied a $60 million fine to the university; the NCAA banned the football team from bowl games for four years; and the NCAA vacated all of the football team’s wins from 1998 to 2001. 218 “What we can do is impose sanctions that both reflect the magnitude of these terrible acts and that also ensure Penn State will rebuild an athletic culture that went horribly awry,” said NCAA President Mark Emmert. 219 “Our goal [was] not to be just punitive,

---

210 See FREEH REPORT, supra note 178, at 17.
211 Id.
212 Id. at 104.
214 FREEH REPORT, supra note 178, at 42.
215 Id. at 20.
216 Id. at 46–47.
217 Id. at 46.
but to make sure the university establishes an athletic culture and daily mindset in which football will never again be placed ahead of educating, nurturing, and protecting young people.\footnote{Id.}

The NCAA did not punish Penn State under a particular NCAA bylaw.\footnote{Id.} Instead, the NCAA cited Penn State under the general guise of unethical conduct.\footnote{Id.} Emmert further explained that the spirit of the bylaws do not condone behavior that “endangers young people.”\footnote{Id.} Importantly, the NCAA questioned the exercise of institutional control over the football program.\footnote{Id.}

The Governor of Pennsylvania, Tom Corbett, brought suit in January 2013 to lift the penalties the NCAA imposed on the university.\footnote{Id.} Many perceived this to be a plainly political move for Corbett, as many also had criticized him for his handling of the Sandusky investigation when he was attorney general.\footnote{Id.} Randy Feathers, who supervised the Sandusky investigation, indicated that it took so long to arrest Sandusky because the state “felt like [it] had no shot” winning a case against Sandusky, who “walked on water” due to his association with the Penn State football program.\footnote{Id.} However, U.S. District Judge Yvette Kane dismissed Governor Corbett’s lawsuit against the NCAA in June 2013, referring to it as “a Hail Mary pass” in her ruling.\footnote{Id.}

\textbf{D. Civil Suits Against Penn State}

After facing multiple civil damage suits from more than thirty of Sandusky’s victims, Penn State is now paying $59.7 million to twenty-six
young men who claimed that Sandusky sexually abused them. The university signed twenty-three deals and three agreements in principle; however, six claims remain unresolved. A victim, known as “Victim 1,” filed a civil damages suit in Philadelphia state court. Interestingly, Victim 1’s complaint predicated the claims against Penn State as stemming from a special relationship that “conferred upon Sandusky significant privileges and economic benefits that enhanced his public stature.” Victim 1’s legal claims included negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, aiding and abetting, and civil conspiracy. The complaint sweepingly condemned Penn State’s actions as part of a large-scale cover-up:

Defendant’s continued and deliberate concealment of Sandusky’s known dangerous propensities was a function of its recognition that the University’s stature, reputation, and economic interests would be adversely affected by any public disclosure regarding the sociopathic character of an individual associated with the school’s legendary and financially lucrative football program.

Victim 1’s complaint sought damages in excess of $50,000, as well as compensatory and punitive damages in order to pay for future medical and psychological care.

In addition, “Victim 6” filed an action in federal court against Penn State, alleging counts of childhood sexual abuse and vicarious liability, negligence, negligent supervision, premises liability, intentional infliction

---


230 Id.


232 Id. at 19.

233 See id. at 34–44.

234 Id. at 23.

235 Id. at 36.

236 Id. at 32.
of emotional distress, and civil conspiracy to endanger children.\textsuperscript{237} This complaint sought damages in excess of $75,000.\textsuperscript{238}

Many victims reached settlements with Penn State, including Sandusky’s adopted son, Matt.\textsuperscript{239} Men known as Victims 3, 7, and 10 released statements, saying that they were relieved the settlement process was over.\textsuperscript{240} However, Victim 3 said, “‘Penn State [was] not great for settling something that could have been stopped years ago.’ . . . ‘What makes a school great is stopping these things no matter what negative effect it has on [its] reputation or what bad press it might bring.’”\textsuperscript{241} Victim 10 said that, although the settlement would help make amends, “[i]t’s not about the money. It’s about holding people accountable for the things that they have done.”\textsuperscript{242}

\textit{E. Suits Against Penn State Officials}

On November 4, 2011, a grand jury indicted Athletic Director Timothy Curley and Senior Vice President for Finance and Business Gary Schultz for their failure to report allegations of child abuse against Sandusky to law enforcement or child protection authorities in 2002 and for committing perjury during their testimony to the grand jury in January 2011.\textsuperscript{243} These charges specifically stem from the 2001 sexual attack that Graduate Assistant Mike McQueary reported.\textsuperscript{244} This case is still pending and is scheduled for trial in spring 2014.\textsuperscript{245}

Pennsylvania Attorney General Linda Kelly said Spanier, Schultz, and Curley “engaged in a ‘conspiracy of silence’ to ‘actively conceal the


\textsuperscript{238} Id. at 41.


\textsuperscript{241} Id.

\textsuperscript{242} Id.

\textsuperscript{243} Freeh Report, supra note 178, at 13.

\textsuperscript{244} Id. at 13, 62–64.

\textsuperscript{245} Kate Giammarise, Penn State’s Spanier, Curley and Schultz to Stand Trial on All Charges in Sandusky Case, PITTSBURGH POST-GAZETTE (July 30, 2013, 7:30 PM), http://www.post-gazette.com/state/2013/07/30/Penn-State-s-Spanier-Curley-and-Schultz-to-stand-trial-on-all-charges-in-Sandusky-case/stories/201307300204.
“If these men had done what they were supposed to do and legally required to do, several young men may not have been attacked by a serial predator,” Kelly said. While these men maintained their innocence, the Freeh Report shows abundant evidence that their furtherance of Sandusky’s crimes was not a mistake, but a tactical cover-up.

F. Summary of the Charges Brought

Below is a table illustrating the various crimes under which authorities charged Penn State and its officials with, as well as civil claims that persons have made against Penn State as an entity.

Table 2. Charges Brought Against Penn State and Its Officials

<table>
<thead>
<tr>
<th>Source of Law</th>
<th>Crime</th>
<th>Substance of Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 PA. CONS. STAT. ANN. § 4304(a)(1)</td>
<td>Endangering the welfare of children</td>
<td>“A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.”</td>
</tr>
<tr>
<td>18 PA. CONS. STAT. ANN. § 903(a)</td>
<td>Criminal conspiracy</td>
<td>“A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person</td>
</tr>
</tbody>
</table>

247 Id.
248 Giammarise, supra note 245.
| 23 PA. CONS. STAT. ANN. § 6311(a) (West 2010) | Persons required to report suspected child abuse | “A person who, in the course of employment, occupation or practice of a profession, comes into contact with children shall report or cause a report to be made . . . when the person has reasonable cause to suspect, on the basis of medical, professional or other training and experience, that a child under the care, supervision, guidance or training of that person or of an agency, institution, organization or other entity with which that person is affiliated is a victim of child abuse, including child abuse by an individual who is not a perpetrator.” |
| 18 PA. CONS. STAT. ANN. § 5101 (West 1983) | Obstructing administration of law or other governmental function | “A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act . . . .” |

Pennsylvania typically prosecutes this as just a violation of the reporting statute. 23 PA. CONS. STAT. ANN. § 6319 (West 2010).
<table>
<thead>
<tr>
<th>18 PA. CONS. STAT. ANN. § 4902(a) (West 1983)</th>
<th>Perjury</th>
<th>“A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.”</th>
</tr>
</thead>
<tbody>
<tr>
<td>68 PA. STAT. ANN. § 477-6 (West 2004)</td>
<td>Liability not limited (premises liability)</td>
<td>“Nothing in this act limits in any way any liability which otherwise exists: (1) For will[ful] failure to guard or warn against a dangerous condition, use, structure, or activity.”</td>
</tr>
<tr>
<td>Common Law Doctrine</td>
<td>Intentional infliction of emotional distress</td>
<td>“Liability [for the tort of intentional infliction of emotional distress arises] where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”</td>
</tr>
<tr>
<td>18 PA. CONS. STAT. ANN. § 5105(a) (West 1983 &amp; Supp. 2013)</td>
<td>Hindering apprehension or prosecution (aiding and abetting)</td>
<td>“A person commits an offense if, with intent to hinder the apprehension, prosecution, conviction or punishment of another for crime or violation of the terms of probation, parole, intermediate punishment or Accelerated Rehabilitative Disposition, he: . . . (2) provides or aids in providing a weapon, transportation, disguise or other</td>
</tr>
</tbody>
</table>

means of avoiding apprehension or effecting escape; (3) conceals or destroys evidence of the crime, or tampers with a witness, informant, document or other source of information, regardless of its admissibility in evidence; . . . or (5) provides false information to a law enforcement officer.”

<table>
<thead>
<tr>
<th>Common Law Doctrine</th>
<th>Negligent supervision</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;[A]n employer may be liable for negligent supervision of an employee where the employer fails to exercise ordinary care to prevent an intentional harm to a third-party which 1) is committed on employer's premises by an employee acting outside the scope of his employment, and 2) is reasonably foreseeable.&quot;</td>
<td></td>
</tr>
</tbody>
</table>

---

The piecemeal manner the State of Pennsylvania, the NCAA, and the victims and their families are currently able to hold responsible those who were culpable for their actions exposes the shortcomings of the law. While authorities have brought charges against a few leaders at Penn State,\(^{254}\) the sole remedy to make the victims whole is in civil damages actions sounding in negligence or fraud. As evidenced by victims’ allegations in their civil suits against Penn State, a cause of action in negligence does not seem appropriate where university officials made \textit{deliberate decisions} to conceal crimes against children to save Penn State’s reputation and serve its economic interests.\(^{255}\) Therefore, this institutionalized crime requires its own cause of action tailored to the unique challenges presented by an institutional defendant like Penn State or the Catholic Church.

VI. THE \textsc{John Doe} Statute: Preventing Child Sexual Abuse Through Institutional Accountability

\textbf{A. Context}

In recent years, through the scandals involving the Catholic Church and Penn State, the “institutional crime” has become prominent.\(^{256}\) Institutions such as Penn State and the Catholic Church systematically enabled sexual crimes against minors by actively concealing the crimes of their employees in order to keep their businesses and reputations intact.\(^{257}\)

Currently, officials cannot properly punish these crimes because the law has yet to develop to match the societal notion that the institution should be liable for its involvement in the cover-up of sex crimes against

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|}
\hline
Common Law Doctrine & Vicarious liability & “\[A\]n employer is held vicariously liable for the negligent acts of his employee which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of the employment.”\(^{253}\) \\
\hline
\end{tabular}
\end{table}


\(^{256}\) See \textit{supra} Parts II, V.

\(^{257}\) See \textit{supra} Parts II, V.
children. Authorities have recently attempted to prosecute institutions such as the Catholic Church using current laws regulating their behavior, such as the RICO statute.\textsuperscript{258} These attempts, however, have not been successful, mainly because the law lacks specificity to sex crimes and the employee’s crime has a tenuous connection to the underlying business of the institution.\textsuperscript{259} A new form of accountability is necessary to properly handle the modern problem of institutional involvement with sex crimes against minors. Traditional theories of institutional culpability are not precise enough to hold the institution responsible for its role in this deviant crime.

The proposed solution to the institutionalization of sex crimes against minors comes in the form of the John Doe Statute, which imposes strict liability upon the institution for its employees’ sexual crimes against minors, while also incentivizing plaintiffs to prosecute the institution for its involvement in their victimization.\textsuperscript{260}

B. Introduction

“The National Crime Victimization Survey . . . finds that violent crimes against juveniles are less likely to be [reported] to authorities than . . . crimes against adults, and they are [much more] unlikely to be [reported] to the police.”\textsuperscript{261} The frequency of child sexual abuse is hard to ascertain because victims do not often report the abuse.\textsuperscript{262} However, experts agree that the prevalence is far greater than what victims actually report to law enforcement.\textsuperscript{263}

An alarming number of childhood sexual abuse scandals involving institutional cover-ups have come to light in the late twentieth and early twenty-first centuries. However, officials prosecuting the crimes institutions or its members have committed has been sporadic at best. Institutions would likely be more alert to preventing and detecting sexual abuse by employees if the possibility of civil and criminal accountability

\textsuperscript{258} See supra Part III.B.
\textsuperscript{259} See supra Part III.B.
\textsuperscript{260} See infra Part VI.
\textsuperscript{262} Id. at 1.
\textsuperscript{263} Id. at 1–2.
were more certain.\textsuperscript{264} Thus, a vicarious liability standard, which would assess liability without fault against an institution when such a crime occurs, is logical from a public policy standpoint.\textsuperscript{265}

Many reasons exist as to why it is fair from a legal standpoint to hold an institution accountable for the crimes of its employees. First,

\begin{quote}

an [institution] should pay for the harm caused by people acting [on] its behalf in return for the benefits the [institution] receives when its agents act properly. Second, . . . the rule fosters safety; an employer is more likely to be careful when hiring and supervising employees if it knows that it may be liable in money damages if the employee . . . injures a third party.\textsuperscript{266}
\end{quote}

Third, the institution has a strong motive to act in favor of its own economic and reputational interests rather than in the interests of protecting minor victims because the institution is better suited to absorb losses.\textsuperscript{267} “Finally, the principle of respondeat superior provides the [institution] with an incentive to obtain insurance, . . . which can be paid from its business revenues.”\textsuperscript{268}

\textbf{C. Features of the John Doe Statute}\textsuperscript{269}

\textit{First}, the John Doe Statute establishes a vicarious liability standard, assessing liability without fault against an institution whenever an employee of an institution commits a sexual offense against a minor. This strict liability standard will force institutions to become more vigilant in detecting and preventing sexual abuse by their employees, thereby taking away the incentive for the institution to cover up these heinous crimes to protect the institution’s economic and reputational interests.

\textit{Second}, the John Doe Statute establishes both civil and criminal liability for the institution if the institution covers up a sexual offense its employee commits against a child. This serves to make the possibility of civil and criminal accountability of the institution more certain, thereby

\textsuperscript{265} Id.
\textsuperscript{266} Id. at 579.
\textsuperscript{267} See Lacovara & Nicoli, supra note 130, at 730.
\textsuperscript{268} Fossey & DeMitchell, supra note 264, at 579.
\textsuperscript{269} See \textit{infra} Part VI.D for the proposed John Doe Statute.
putting the institution on notice of what charges and claims can be made against it and providing a concrete cause of action for the victims of such crimes to pursue against the institution.

Third, the John Doe Statute establishes a mandatory reporting requirement for institutions and their employees in situations where employees know or have reason to suspect that another person is committing a sexual offense against a child, as well as monetary sanctions against the institution for failure to report. There is also a whistleblower provision so that the institution cannot discipline an employee who reports a sexual offense against a child.

Fourth, the John Doe Statute enumerates two instances in which the statute of limitations may be tolled in causes of actions against the institution for its role in the sexual offenses its employee commits against a minor: a tolling for fraudulent concealment and a tolling for the discovery rule.

Finally, the John Doe Statute authorizes remedies in the form of civil damages suits, as well as the possibility of punitive damages, treble damages, and attorney fees against the institution. The institution should bear the burden of loss because the institution is in the best position to absorb the costs and compensate victims. Such monetary penalties will act as an effective means of deterrence of future crimes.

D. The John Doe Statute

§ 1 – Institutional Accountability

Vicarious Liability

An institution shall be held strictly vicariously liable for the crimes and malfeasances of its employees involving the sexual abuse of a child that occur (1) during the scope of employment or (2) when the employee is acting outside the scope of employment, but is aided in accomplishing the criminal conduct by the existence of the employment relationship.

270 See Restatement (Second) of Agency § 219 (1958) (providing a generic example of vicarious liability).

271 See Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1559 (11th Cir. 1987) (citing Restatement (Second) of Agency § 219 (1958)).
Premises Liability\textsuperscript{272}  
An institution shall be held strictly liable to its invitees for acts of sexual abuse of children occurring on its premises, when such a crime has been committed by an employee of that institution.

Rebuttable Presumption that an Employee Is Acting on Behalf of the Institution  
In making a decision regarding the malfeasance of an employee, there is a rebuttable presumption that the upper-echelon employees of an institution acted for the best interests of the institution’s reputation and business.\textsuperscript{273}  
That presumption can be rebutted if the defendant shows that it complied with the mandatory reporting laws.

§ 2 – Criminal Liability

Endangering the Welfare of Children\textsuperscript{274}  
An institution will be held criminally liable if that institution or an employee of that institution is in the position to supervise a child less than 18 years of age if that institution or that employee knowingly or recklessly endangers the welfare of the child by violating a duty of care, protection, or support.

Corruption of Minors\textsuperscript{275}  
An institution, by and through an employee of that institution, that (i) willfully contributes to, encourages, or causes any act, omission, or condition that renders a child delinquent, in need of services, in need of supervision, or abused or neglected, or (ii) engages in consensual or non-consensual sexual intercourse with a child 15 or older not the employee’s spouse shall be guilty of corrupting a minor.

\textsuperscript{272} See Restatement (Second) of Torts § 314A (1965) (providing a generic example of premises liability).

\textsuperscript{273} See In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006) (discussing the business judgment rule).


Aiding and Abetting the Sexual Abuse of a Child\textsuperscript{276}
An institution, by and through an employee or employees, will be guilty of an offense if, with intent to hinder the apprehension, prosecution, conviction, or punishment of another for a crime involving the sexual abuse of a child, it:

(1) provides or aids in providing a disguise or other means of avoiding apprehension or effecting escape;

(2) conceals or destroys evidence of the crime, or tampers with a witness, informant, document, or other source of information; or

(3) provides false information to a law enforcement officer.

Conspiracy to Commit a Sexual Offense Against a Child\textsuperscript{277}
An institution is guilty of conspiracy to commit a crime involving the sexual abuse of a child if, with the intent of facilitating its commission, an employee of the institution:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

§ 3 – Civil Liability

Negligent Supervision of a Perpetrator of a Sex Crime Against a Child\textsuperscript{278}
An institution shall be strictly liable for negligent supervision of an employee where the employer fails to exercise ordinary care to prevent the sexual abuse or neglect of a child, which is committed on employer's premises by employee.

\textsuperscript{276} See 18 PA. CONS. STAT. ANN. § 5105(a) (providing a generic example of a provision for aiding and abetting).

\textsuperscript{277} See id. § 903(a) (providing a generic example of a provision for conspiracy).

Negligent Retention of a Perpetrator of a Sex Crime Against a Child

An institution is strictly liable for the tort of negligent retention when a sexual offense against a child is committed by an employee, and the institution has retained that employee despite employer's knowledge of employee's propensities.

§ 4 – Reporting

Mandated Reporting of Sexual Abuse of a Child

(1) Any employee of an institution who knows or has reason to suspect that a sexual offense is being committed against a child shall notify law enforcement officers or other assistance personnel.

(2) Any person who, in good faith, reports or provides other reasonable assistance under this section is immune from civil liability for his or her acts or omissions in providing the assistance.

(3) No employee of an institution shall be discharged, disciplined, or otherwise penalized because the employee has made a report of suspected child sexual abuse to a public body, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

Failure to Report

If an employee of an institution fails to comply with the mandated reporting requirement when the employee has reasonable cause to suspect that a child under the care, supervision, guidance, or training of that person or of an agency, institution, organization, or other entity with which that person is affiliated is a victim of child abuse, the institution shall be subject to monetary sanctions at the discretion of the governing judiciary body.

---

279 See Restatement (Third) of Agency § 7.05(1) (2006) (providing a generic example of a provision for negligent retention).


§ 5 – Tolling of the Statute of Limitations

**Fraudulent Concealment Toll**

Where, through fraud or concealment, the defendant causes the minor victim of a sexual offense to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the statute of limitations.

**Discovery Rule Toll**

The statute of limitations period shall be tolled until a plaintiff discovers or reasonably should have discovered the facts forming the basis for his or her cause of action arising under this Statute.

§ 6 – Remedies

**Civil Remedies**

Whenever a child shall suffer any injury to his or her person by reason of a sexual assault, he or she may recover his or her damages for the injury in a civil action against the offender, and it shall not be any defense to such action that no criminal complaint for the crime or offense has been made.

**Punitive Damages**

Punitive damages may be awarded in an action brought pursuant to this statute in which it is proven that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or entire want of care which would raise the presumption of conscious indifference to consequences. Punitive damages shall be awarded not as compensation to a plaintiff, but solely to punish, penalize, or deter a defendant employee or institution from committing, fostering, or failing to stop the commission of a sexual offense against a child.

---


Attorney Fees and Treble Damages

Any person injured by reason of a violation of this Statute may sue in any appropriate court and shall recover threefold the damages the person sustains and the cost of the suit, including a reasonable attorney's fee.

VII. APPLICATION OF THE JOHN DOE STATUTE TO THE PENN STATE PROBLEM

A. Strict Liability for the Institution

A standard of strict liability is necessary—as well as logical from a public policy standpoint—to hold an institution such as Penn State accountable for the actions of its employees who commit sex crimes against children. The institution itself is in the best position to ensure that these crimes do not happen again. However, loyalty to that institution guides the actions of employees or officials of an institution. If a person accuses a priest or employee of an institution of a heinous crime like child abuse, the institution and those within it are more likely to have trust in that employee than the victim. Those in a position to report a crime may allow their sense of duty to protect the institution’s business and


289 It is not unheard of for employers to be held accountable for sexual assaults committed by employees. See, e.g., Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 344 (Alaska 1990) (counseling center held vicariously liable for therapist’s sexual misconduct toward patient); Stropes v. Heritage House Children’s Ctr., 547 N.E.2d 244, 244 (Ind. 1989) (vicarious liability for sexual assault of child by nursing aide); Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306, 306 (Minn. 1982) (vicarious liability for psychiatric clinic for doctor’s sexual improprieties with patients). These courts focused more on whether the criminal conduct is the kind that is foreseeable by an employer rather than focusing on the employee’s motives in relation to the business interests of the employer. See Marston, 329 N.W.2d at 311. Further, a few cases held higher-education institutions vicariously liable for a sexual assault committed by an employee. See, e.g., Harrington v. La. State Bd. of Elementary & Secondary Educ., 714 So. 2d 845, 845–46 (La. Ct. App. 1998); Dismuke v. Quaynor, 637 So. 2d 555, 555 (La. Ct. App. 1994).


291 See Mark Oppenheimer, No Religious Exemption When It Comes to Abuse, N.Y. TIMES, Jan. 5, 2013, at A13 (Religious institutions and loyalists to Penn State favored their own members and reputations over the victims, choosing to “let the perpetrators ‘go quietly.’”).

292 Id.
reputation to trump their obligation to protect child victims.\textsuperscript{293} Thus, the John Doe Statute addresses this phenomenon of institutional support by creating a rebuttable presumption that upper-echelon employees are acting in the best interests of the institution’s business and reputation when making decisions regarding an employee’s wrongful acts.\textsuperscript{294}

There are many benefits to imposing a strict liability standard on the institution. The most effective means of prevention and deterrence of a crime is to impose strict liability because “an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of [the employer’s] servants, and to take every precaution to see that the [institution] is conducted safely.”\textsuperscript{295} Imposing strict liability is the best way to ensure institutions very seriously supervise their employees, as well as take seriously the reports made against their employees, because institutions have great incentive not to expose the crimes committed by their employees. Therefore, imposing strict liability on an institution forces them to adopt internal policies to deter future wrongdoing.\textsuperscript{296}

Simple vicarious liability is not the best means to pursue claims against the institution in the case of sex offenses against minors because judges are reluctant to impose liability when the conduct may be outside the scope of employment.\textsuperscript{297} Thus, the John Doe Statute eradicates that issue by imposing liability either when the conduct is within the scope of employment or when the employment relationship aids the employee in accomplishing the employee’s criminal conduct.\textsuperscript{298} This is also an extension to the self-identity approach, which imposes institutional liability when there is organizational support for the crime an employee commits.\textsuperscript{299} This Statute keeps in mind the self-identity approach because it contains the most modern perception of today’s institutions. With the growth of large institutions, it is unjust to permit an institution to profit from its

\textsuperscript{293} Id.
\textsuperscript{294} See supra Part VI.D.
\textsuperscript{296} See Lacovara & Nicoli, supra note 130, at 730–31.
\textsuperscript{297} Snyder, supra note 134, at 28.
\textsuperscript{298} See supra Part VI.D. Some courts started imposing a similar standard of strict liability upon employers in the context of sexual harassment cases. See, e.g., Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1558 (11th Cir. 1987).
\textsuperscript{299} Lederman, supra note 127, at 695.
employee’s work while shirking responsibility for its employee’s mistakes.\textsuperscript{300}

Jerry Sandusky used his position as a Penn State football coach to give his victims gifts and be alone with them for long periods of time using Penn State’s facilities.\textsuperscript{301} The Freeh Report found that Penn State’s leaders disregarded the welfare of Sandusky’s victims.\textsuperscript{302} They also disregarded reports of abuse and failed to notify proper authorities.\textsuperscript{303} Officials such as Spanier, Curley, and Schultz continuously and deliberately concealed Jerry Sandusky’s known dangerous propensities toward children for fear of the impact it would have on the university and its football program:

Sandusky’s ongoing affiliation with Penn State, defendant’s many public declarations of support for him, the financial and material support of [t]he Second Mile provided by Penn State, Sandusky’s celebrity status as the architect of the Penn State football team’s vaunted defenses, and the continued concealment by defendant of Sandusky’s sociopathic behavior, contributed substantially to his ability to meet, groom, and otherwise interact with plaintiff.\textsuperscript{304}

The John Doe Statute recognizes that, in situations like Penn State, the institutional cover-up bases itself on protecting the interests of the institution. That connection is far from remote and warrants the imposition of strict liability.

\section*{B. Criminal Liability and Civil Liability}

Specifically enumerated theories of criminal and civil liability of the institution foster legitimacy for the claims victims make and the ensuing judgments. Currently, many have attacked the Freeh Report and the NCAA’s penalties as a noncredible and illegitimate means of punishment.\textsuperscript{305} Thus, particularly defined causes of action give society a

\begin{flushright}
\textsuperscript{300} \textsc{Restatement (Second) of Agency} § 219 cmt. 1 (1958).
\textsuperscript{301} \textit{Freeh Report}, supra note 178, at 15, 104.
\textsuperscript{302} \textit{Id.} at 14.
\textsuperscript{303} \textit{Id.}
\textsuperscript{304} Complaint, supra note 231, at 26–27.
\textsuperscript{305} “In recent months, the [NCAA] has faced mounting criticism and broad challenges to its authority, with concerns raised about how it has conducted high-profile investigations.” Steve Eder, \textit{Top Enforcement Officer of N.C.A.A. Is Ousted}, \textsc{N.Y. Times} (continued)
supportable duty to punish the wrongdoer. The John Doe Statute makes the possibility of civil and criminal accountability of the institution more certain, thereby putting the institution on notice of what charges and claims authorities can make against it and providing a concrete cause of action for the victims of such crimes to pursue against the institution.

According to Immanuel Kant, in order for punishment to have any effect, there must be a proper designation of the crime. Espousing specific causes of action sounding in both civil and criminal liability provides a precise theory under which authorities may appropriately charge institutions like Penn State. There is a limited amount of federal law that currently relates to sexual abuse. Presently, if authorities or victims attempted to hold the institution liable, they would likely have to do so as a RICO violation. However, when an institution internally covers up a crime to protect an institution’s business and reputational interests, prosecution likely will be unsuccessful because Congress did not specifically tailor RICO to a situation like Penn State. Criminal offenses such as endangering the welfare of children, corruption of minors, aiding and abetting, and conspiracy are all applicable to the conduct that occurred at Penn State. Thus, the John Doe Statute tailors those general crimes to be specifically applicable to institutions fostering sex crimes against children by putting their business interests ahead of the interests of victims. Civil causes of action such as negligent supervision and negligent retention are also appropriate in these situations. By again specifically tailoring these causes of action to be sexual crimes against minors, institutions will be on notice of their responsibilities concerning their employees’ conduct.

C. Mandatory Reporting

There are certain people, for instance teachers and doctors, who, by way of their position, have an affirmative duty to report suspected child

Feb. 19, 2013, at B13 [hereinafter Eder, Top Officer Ousted]. This scrutiny led to the NCAA ousting Julie Roe Lach, who led the enforcement division. Id.

306 See JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80–82 (1883).


308 Baker, supra note 124, at 1068.

309 Id. at 1068–69.

310 See supra Part III.C.

311 See supra Part VI.D.

312 See supra Part VI.D.
abuse.313 However, state laws vary regarding who is under a duty to report, which leads to confusion about who is able or under the duty to report.314 Many people may lack the awareness or training necessary to recognize when these crimes occur. Others may be unwilling to report prominent figures such as Sandusky for fear of repercussion.

Michael McQueary’s civil lawsuit against Penn State alleged that the university did not provide “any instruction, guidance[, or training” on how to deal with criminal acts occurring on campus or how to comply with reporting requirements under the Clery Act.315 In fact, the Freeh Report found that most Penn State football employees had never heard of the Clery Act.316 Thus, as the John Doe Statute incorporates mandatory reporting and penalties for violating that duty,317 it is an appropriate means to prevent the continued sexual abuse of children in situations similar to Penn State because it eliminates any vagueness about the duty to report. This Statute also provides the institution with the incentive to train its employees about the duty to report by imposing monetary sanctions for failure to comply.318 Incorporating a whistleblower provision is also practical because it retracts any fear an employee might have that would stop the employee from making a report.

D. Tolling of the Statute of Limitations

By the time victims come forward, the statute of limitations usually time-bars charges such as child endangerment and failure to make mandatory reports of child abuse.319 Children often do not know that the abuse is wrong or a crime.320 This happens because the child does not have the maturity to understand the situation, lacks education about sexual crimes, or learns from the abuser that the abuse is okay.321

313 See, e.g., OHIO REV. CODE ANN. § 2151.421(A)(1)(a)-(b) (West 2005); 23 PA. CONS. STAT. ANN. § 6311(a)-(b).
315 Complaint, supra note 201, at 3.
316 FREEH REPORT, supra note 178, at 17.
317 See supra Part V.L.D.
318 See supra Part V.L.D.
319 See Baker, supra note 124, at 1067.
320 Bruni, supra note 1, at A23.
321 See Eric V. Copage, In Close Relationship Between Player and Coach, Potential for Sexual Abuse, N.Y. TIMES, Nov. 19, 2012, at D8 (The article discusses the “grooming (continued)
However, an emerging problem in the case of the institutional crime is that witnesses are also hesitant to make reports, thus further prolonging the ability of the victim to prosecute. On the day that Louis Freeh announced the publication of the Freeh Report, he stated, in part:

From 1998–2011, Penn State's “Tone at the Top” for transparency, compliance, police reporting[,] and child protection was completely wrong, as shown by the inaction and concealment on the part of its most senior leaders, and followed by those at the bottom of the University's pyramid of power. This is best reflected by the janitors' decision not to report Sandusky's horrific 2000 sexual assault of a young boy in the Lasch Building shower. The janitors were afraid of being fired for reporting a powerful football coach.322

Due to these problems with transparency, the often-termed conspiracy of silence323 has the effect of concealing a potential cause of action under the John Doe Statute. Therefore, procedural safeguards such as the discovery rule and fraudulent concealment tolls will protect the causes of action under this Statute from expiration.324

E. Monetary Remedies

Financially sanctioning Penn State is a more-than-appropriate punishment when the university profited by suppressing Sandusky’s crimes; Penn State ultimately served its own financial and reputational interests by covering up its employees’ crimes.325 Knowledge that

---


324 See supra Part VI.D.

325 “The avoidance of consequences of bad publicity is the most significant, but not the only, cause for this failure to protect child victims and report to authorities.” FREEH REPORT, supra note 178, at 16.
punishment will follow when persons commit a crime deters people from committing that crime, thus making future violations less likely. When the justice system punishes an entity for committing a wrong, its punishment may result in the general deterrence of others. In order to effectively deter, the penalty should be harsh enough to outweigh the potential benefits of the crime.

Imposing heavy financial penalties on large institutions like Penn State also warns other institutions attempting to further their business interests that covering up employee crimes is no longer in their best interests. “In 2010–2011, Penn State football was the second most profitable collegiate athletics program in the nation, earning over $50 million . . . .” Penn State is the party in the best position financially to compensate Jerry Sandusky’s victims, and it can absorb and distribute the losses. While the media backlash condemned the university’s role in Sandusky’s crimes, the penalties imposed have yet to personify that disapproval. Although there are many civil lawsuits against the university, thus far the most effective sanction came from the NCAA’s penalties. Some have criticized these sanctions, as well as the Freeh Report, as lacking credibility. Therefore, imposing monetary penalties, including the possibility for punitive damages, treble damages, and attorney fees, through a proper legal channel will serve as both a condemnation of the university’s action and a penalty against the business interests that motivated the university’s abrogation of the law in the first place.

VIII. CONCLUSION

At the forefront of issues confronting lawmakers today is what child abuse protections are adequate to ensure safety. As instances of abuse

326 JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 35 (5th ed. 2009).
327 Id.
328 Id.
329 Complaint, supra note 175, at 7.
331 O’Keeffe, supra note 174.
332 See supra Part V.D.
333 See Eder, Top Officer Ousted, supra note 305, at B13.
334 See supra Part VLD.
335 See Timothy Williams, CHILD ABUSE AT RESERVATION IS TOPIC FOR 3 LAWMAKERS, N.Y. TIMES, Feb. 16, 2013, at A15 (Federal lawmakers held a town hall meeting to discuss the Spirit Lake Indian Reservation problem with child sexual abuse, which reached “epidemic” (continued)
continue to come to light, it is obvious that there are more culpable parties involved, and they deserve to be held accountable. The institution itself deserves to be held accountable for the choice to suppress the crimes of its employees in order to serve its economic and reputational interests first. The law must clarify the expectations of what society expects institutions to maintain accountability for, by enacting strict liability for the institution for the sexual crimes committed by its employees that are furthered through the employment relationship.

Penn State and the Catholic Church have a lot to teach in terms of the development of the law. With the recent conviction of one high-ranking individual within an institution—and a near miss—these entities, and those who control them, are no longer invincible. However, the law has not properly and appropriately punished institutions because the law has yet to develop to match the societal notion that the institution should be liable for its involvement in the cover-up of sex crimes against children. This is an obstacle in the effective prosecution of crimes against minors and the ability of victims to obtain justice. It also fundamentally prioritizes the interests of large-scale institutions over the interests of the good of society, which the law should not condone.

The Penn State Problem epitomizes the piecemeal nature of justice available to those victimized through institutional crimes. Jerry Sandusky’s victims, after being put through a criminal trial with their accuser, must now pursue separate civil actions sounding in negligence and conspiracy, which do not offer concrete causes of action or certainty of success. A standard of strict liability and harsh penalties against the institution responsible would offer the child victims of sex crimes a more certain path to justice and ensure that the Penn State Problem is permanently resolved.

levels sufficient to warrant the federal government’s takeover of the tribe’s social services program in 2012."

336 Editorial, The Archbishop Rebukes the Cardinal, N.Y. TIMES, Feb. 9, 2013, at A18 ("[T]here was an] appalling lack of accountability among church officials who for years contrived to cover up crimes by priests while denying their own roles in allowing the abuse to happen.").

337 See FREEH REPORT, supra note 178, at 16.

338 See supra Part II.