The Law Can't Stop at the Church Door
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"If the bishops don't manage the problem, the government will," attorney Robert Bennett said late last month at a news conference of the U.S. Conference of Catholic Bishops' National Review Board, which the bishops set up to advise them on the church's clerical sexual abuse scandal. Bennett was expressing a fear that many Catholics no doubt share.

Yet as a Catholic parent whose family has spent a great deal of time in churches and with priests, I regard appropriate government intervention not with fear but with hope.

I have no desire to criticize Bob Bennett. As a prominent member of and de facto spokesman for the board, he deserves credit for speaking the truth, for calling an epidemic an epidemic, and for calling upon shepherds who have betrayed their flock to resign. Public rebuke is exactly what scripture prescribes in this situation -- I Timothy 5:20: "If any [elder] is at fault, reprimand him publicly, as a warning to the rest" -- and Bennett is the first one on behalf of the church to deliver it.

Still, with all due respect to the board, we parents and other interested parties are entitled to ask the question the board did not touch: How did the American legal system allow this epidemic to encompass more than 10,000 victims and more than 4,000 perpetrators without bringing the crimes to a halt long ago? As an attorney who has been involved in many church-state issues over the past 25 years, I suspect that the failure of the legal system in this instance is a matter of selective non-application of justice -- one based on false notions of what protects religious liberty -- rather than a matter of deficiencies in our laws.

This is not a question of government intruding upon religious matters. Sexual abuse of minors is a serious crime in every state and, in certain contexts, under federal law as well. If an epidemic of larcenies, bombings or robberies broke out in parishes across the country, we would not expect law enforcement to stand back and see how bishops handled the situation. Catholic victims, like other victims, are entitled to the protection of the law.

Yet the law has stood back too long, waiting to see how churches would deal with crimes committed by clergy. Judges have expressed their reasons for this diffidence -- mostly in civil cases, rather than criminal cases where the prerogative to investigate and prosecute can be declined without explanation.

Churches have taken refuge, particularly since the '70s, in a judicial doctrine often called "church autonomy." At its most expansive, the church autonomy doctrine protects a broad swath of church-related matters from review and judgment in the courts -- including deficient supervision of clergy that results in harm to others.

Church lawyers have repeatedly raised church autonomy as a defense in cases targeting failures to supervise clergy who are known sexual abusers. The Supreme Judicial Court of Maine bought this defense and stated flatly: "Pastoral supervision is an ecclesiastical prerogative." Likewise, the Supreme Court of Missouri rejected a victim's claim against the negligent supervisors of a sexual predator, so as to preserve "the autonomy and freedom of religious bodies." Some courts have rejected the broad reading of church autonomy, but victims have still been forced to contend with the doctrine -- whether in responding to motions, appealing from initial adverse rulings, or fighting limitations on discovery.

A federal appeals court in 1985 recoiled from the prospect of a "protracted legal process pitting church and state as adversaries." This attitude affects both civil and criminal proceedings. It can be seen in prosecutors who are reluctant to indict church officials, in judges who soften pre-trial discovery requirements for churches, and in court decisions that order church documents produced in discovery to be

sealed and kept secret. There is a further reluctance to see cases proceed to judgment against, and payment by, a church. As a federal judge in New York opined in 1991, "Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination."

I have worked and argued for religious liberty as hard as anyone -- as a legal policy adviser in the Reagan White House and as senior special assistant to Ed Meese when he was U.S. attorney general, as a staff attorney with the Christian Legal Society in the 1980s, and as general counsel of the Catholic League for Religious and Civil Rights in the early '90s. And yet it is agonizingly clear to me that something has gone awry.

The expanded church autonomy doctrine has offered wrongdoers a law-free zone within churches. Within that zone, victims had diminished protection and no clear legal recourse. Perpetrators, by contrast, found an attractive place to commit and conceal their crimes -- more attractive than what they could find in a typical non-religious institution. Law-free zones, it should not surprise us, tend to become lawless places.

Too many church autonomy decisions have focused narrowly on the rights of church leaders. Courts need to reassess this distortion. Freedoms that count for church members can be preserved without buying into a broad version of church autonomy that protects leaders at the expense of members. Nor should church documents be treated as though they have magical immunity; the same privileges should apply as in any other litigation. Priest-penitent privilege is extremely important within its proper sphere, as a protection for the free exercise of religion by church members. But the privilege does not apply to managerial or operational documents. Indeed, confession in our church does not result in the creation of any documents.

Real protections of religious liberty need not and should not be discarded in addressing this crisis. The Supreme Court has held consistently since the 1870s that government may not intervene in the definition of church doctrine and organizational structure. The court stated in the 1920s, and has reaffirmed since, that it is the prerogative of churches to choose their clergy without judicial review or second-

guessing. These decisions are the bedrock of our first freedoms. On the other hand, if church leaders choose to keep in place clergy who have demonstrated criminal and dangerous propensities, the clergy and their superiors alike should be subject to the customary rules of civil and criminal accountability. The expansive "church autonomy" decisions by lower courts, mentioned above, have never been endorsed by the Supreme Court, which should reject them decisively at the first opportunity.

What about criminal accountability? Only a small minority of abuse cases came to the attention of prosecutors between the 1960s and 1990s. But it was a sufficient number to point to a growing epidemic, had they been investigated aggressively.

While on President Reagan's staff, I was privileged to work on the Child Protection Act of 1984. The FBI's experts on child sexual abuse knew well then that predators tend to network with each other -- to share information and photos of their victims and to boast of their crimes. No law enforcement agency yet, as far as I can determine, has made use of this knowledge to identify and prosecute sexual predators within a church.

Prosecutors in Massachusetts won plaudits for throwing the book at John Geoghan, the late defrocked priest who was convicted of molesting a minor. They might have accomplished far more had they offered a lesser sentence in exchange for Geoghan's knowledge of other predators and the methods used to protect them.

What about bishops who have harbored or enabled predators? No prosecutor has proceeded to trial in such a case. The few who concluded they had grounds to indict settled instead for agreements by bishops to submit to government supervision. From a First Amendment standpoint, supervisory agreements are highly problematic. Criminal prosecutions, if warranted by the facts, are not.

Until now, prosecutors have been loath to find *mens rea*, or criminal intent, in any bishop or church leader for aiding and abetting. No matter how serious their malfeasance, surely they did not intend that minors be

harmed. But bad has now gone to worse. If a bishop himself has sexually abused minors -- as has been alleged in Springfield, Mass., and a number of other places -- then one can no longer presume an absence of mens rea when such a bishop harbors or protects other predators.

If sexual abuse is systemic within a diocese, and the harboring of predators follows a pattern from the top, there are laws that can apply, namely the RICO (or racketeer-influenced and corrupt organization) laws, which have been on the books for more than 30 years. Until now, it was hard to conceive of applying them to a church. But consider Springfield again. If a group of clergy actually operated on the understanding that sex with boys was okay -- as one of their colleagues recently stated -- and if they acted in concert, protecting each other and destroying records as has been alleged by another of their colleagues, and if members of such a network committed two or more offenses such as sexual exploitation, fraud or obstruction of justice, then criminal RICO laws would indeed apply to that network of clerics and persons collaborating with them.

One might cringe at that prospect. But let us be clear about what is anti-Catholic and what is not. Abusers preying on children of the church are anti-Catholic.

Prosecutors and judges who have given a break to the church through the years have done us greater harm than we or they ever imagined possible.

I hold no malice toward any leader of my church, and have no agenda for changing Catholic teaching. If we bring an end to the vestiges of clerical immunity in America, we will serve the interests of many good priests, of my 10 children and all other children, and of the rule of law.

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