Ius Ecclesiae, 7 (1995), p. 741-749

THE CHURCH AND THE EXPLOSION OF CLERICAL SEXUAL ABUSE LITIGATION IN AMERICA

We have had it on the highest authority for two thousand years that the gates of hell shall not prevail against the Church. American Catholics find the promise the Lord made in that regard especially reassuring these days because the present flood of civil litigation involving allegations of clerical sexual abuse might otherwise portend the destruction of the Church in America. And there is no hyperbole in that perception of the threat: A recent lawsuit accusing the diocesan hierarchy of Camden, New Jersey, of conspiring to encourage clerical sexual abuse seeks, in addition to millions of dollars in damages and the removal of the bishop, the outright dissolution of the Camden diocese.

One obvious question is just how large is the flood of clerical sexual-abuse litigation in America. And there is a second, and separate, question about the real extent of the problem of sexual abuse among American clergy. In America, there is no necessary connection between the incidence of civil litigation and the incidence of the problem that ostensibly gives rise to the litigation. America is a litigious society, and that must be kept in mind when one tries to assess where the truth lies on the prevalence of any problem that spawns lawsuits. That caveat is all the more important in this instance because alleged sexual misconduct by the clergy is a subject obviously ripe for media sensationalism.

Because there are so many separate jurisdictions and court systems in America, it is difficult to obtain an exact count of the number of recent civil suits in which clergy have been accused of sexual abuse. It seems safe to say that over 500 such civil actions have been filed in recent years, the lion's share of them involving Roman Catholic priests and allegations of pedophilia. There is no telling how many additional civil lawsuits were avoided by negotiated settlements reached in the face of threatened litigation. The costs — emotional, financial and political — to American Catholic dioceses and religious orders have been enormous.

In part, the present flood of litigation is a wave, previously dammed, finally reaching shore. As implied by the recent reforms in several dioceses in the procedures for investigating allegations of sexual misconduct by priests and disciplining the guilty, the Church's prior practices in this area left a lot to be desired. Especially unfortunate was the practice of simply transferring a suspect priest from one diocese to another, or from one assignment to another, often with no real change in his responsibilities or in the age of persons entrusted to him. That practice guaranteed not only disgruntled complainants, who saw no justice, but also new complainants against recidivist priests. In America, complainants usually turn up eventually as plaintiffs in lawsuits.

But the explosion of litigation, especially as trumpeted in the media, may greatly overstate the incidence of real clerical sexual abuse. Recently, the chairman of the Ad Hoc Committee on Sexual Abuse of the U.S. National Conference of Bishops estimated that one to two percent of priests, or about the same percentage as would apply to individuals in the general population, may be guilty of child sexual abuse. Sexual-abuse victims' advocacy groups, however, say that up to six percent of priests are guilty of pedophilia, and the impression one gets from the media is that even the six percent figure is low.

The problem in America is that legitimate lawsuits easily beget illegitimate lawsuits, and some of the most illegitimate lawsuits are the ones most loudly publicized in the media. The clearest recent example was the suit against Chicago's Joseph Cardinal Bernardin, which was dismissed by the plaintiff after its utter lack of merit became manifest. It is impossible to say how much an episode involving highly publicized allegations, even ones later revealed as unfounded, affects the public's perception of the seriousness of the problem addressed by the allegations. Suffice it to note, however, that many studies show that media sensationalism about another social problem in America — crime — has led the average American greatly to overestimate the odds that he will be a crime victim; indeed, in America, public policy on crime is now dictated not by reliable crime statistics but by media-driven public impressions about the dimensions and character of our crime problem.

There is no mystery, however, about the aspects of America's system of civil litigation that give rise to the proliferation of lawsuits and, indeed, to the generation of meritless litigation. Some

comparisons between America's criminal and civil systems may help illuminate the matter for those not versed in American law.

There have been dozens of recent criminal prosecutions of alleged clergy/pedophiles throughout the United States. The criminal cases are typically brought in state, rather than federal, court because the crimes charged are offenses that fall within the ambit of what is called each state's « police power », or the power by which the state protects its citizens' persons and property. In a clerical sexual-abuse prosecution, the defendant might be charged with rape, or with sodomy, or with criminal sexual assault, or with criminal sexual abuse. In other words, the defendant is charged under one or more of the general statutes by which the state protects either all its citizens or its young in particular. *Federal* prosecutions would occur where federal law stands in the stead of state law — as, for instance, in Washington, D.C. — or where there are special « federal » circumstances, as for example where a defendant is accused of transporting his victim across a state line as part of his sexual offense.

There are several aspects of all criminal prosecutions in America that need to be emphasized. These greatly affect the general merit of formal criminal charges.

First, before accusations are converted into actual criminal charges, they are sifted by persons who are not connected to the accusers. Usually, a « grand jury » of citizens hears an accusation and the available evidence and decides whether or not there is « probable cause » to believe the accused is guilty — and therefore merits a felony indictment. In some states, a public prosecutor receives the accusation, reviews the evidence and decides whether there is sufficient credible evidence to show « probable cause ». (In either instance, « probable cause » is evidence sufficient to support the conclusion of a reasonable, experienced person that an identified person has probably committed a specific criminal offense.) Moreover, in the states that require grand jury indictment, the prosecutor also exercises her independent judgment on the merits of an accusation because she controls what accusations are brought to the grand jury and how vigorously they are pursued, and in the states that allow charges to be commenced by a prosecutor's complaint or « information », there is independent judicial review, soon after the charge is filed, of the prosecutor's assessment of the existence of « probable cause ». One hallmark of the American

criminal system is thus its repeated testing of allegations incident to the bringing of formal criminal charges.

The multiple layers of formal sifting of criminal accusations occur within the framework of an informal sifting process dictated by efficiency considerations. Police agencies and prosecution offices have limited budgets, and there are always more criminal accusations vying for attention than can possibly be serviced. The result is that the police and the prosecutors are unlikely to expend resoruces on flimsy accusations or on cases in which there is little promise of acquiring reliable evidence of guilt. One obvious casualty of the efficiency calculus is the one-on-one case, where there is only the accuser's word against the denial by the accused. That sort of case is very unattractive to a policeman and to a prosecutor.

Another key aspect of the American criminal justice system also tends to guarantee that there is some real substance to a formal criminal indictment or complaint. To win a criminal prosecution, the state or the government must convince a jury or a judge that the defendant is guilty « beyond a reasonable doubt ». Although the law does not precisely define the quantum of evidence needed to meet the « beyond a reasonable doubt » test, the standard is a high one, and in practice doubts are almost always resolved in favor of the defendant's innocence. American law presumes the defendant's innocence unless and until the prosecution proves guilt « beyond a reasonable doubt », so the burden of proof is clearly on the state or the government. Most importantly, the prosecutors of course know at the outset what the standard of proof at trial will be, and that deters them from bringing charges that have little hope of success. Indeed, the high risk of very public failure more than counterbalances what some see as an elected state prosecutor's propensity to cater to the electorate with sensationalist criminal charges. In any event, the criminal burden of proof tends to produce prosecutions only where there is significant evidence supporting the criminal charge.

Finally, statutes of limitation are strictly enforced in American criminal law. This means that, except in truly rare circumstances, criminal charges simply cannot be pursued after a certain number of years — typically, five — have passed since the commission of the alleged criminal act. Although sometimes disparagingly regarded as a « technicality », a criminal statute of limitations reflects very substantive concerns. Put bluntly, American criminal law is

suspicious of memories that have been given too much time to fade, or to flower, and the criminal law wonders about the *bona fides* of allegations of injury that were not promptly made. Also, the criminal law weighs heavily the unfairness inherent in requiring a person to defend himself against something that may derive from what was essentially his former life.

In the clergy sexual-abuse area, the noted aspects of the American criminal law system combine to produce criminal prosecutions in which, typically, a priest is accused of more-or-less recent multiple acts of abuse by multiple victims, or in which the accusations of a single victim are supported either by « similar acts » testimony by several others or by « hard evidence » in the form of incriminating photographs, films, or even surreptitiously (but legally) recorded admissions by the defendant. In other words, criminal cases charging clerical sexual abuse are usually strong cases. Nevertheless, of course, some celebrated criminal cases have fallen apart at trial because what previously appeared to be well-founded accusations turned out to be unprovable, or because false or exaggerated prior testimony was finally exposed.

On the civil side of American law, however, it is, as we say, a whole different ballgame, and not simply because a civil suit may be won by just a « preponderance of the evidence », that is, by evidence showing a 51% or greater probability of truth. The fact is that neither our civil law nor our system of legal ethics does much to restrain plaintiffs and their lawyers from bringing ill-founded private claims that are more damaging to a civil defendant than most criminal charges against him would be.

First, there is no built-in, initial independent review of a civil plaintiff's allegations prior to his filing his lawsuit. The suit can be filed by the plaintiff himself — proceeding, as it is called, « pro se ». But even where, as is more likely, the plaintiff obtains the services of an attorney, the attorney's role is as an advocate for his client and his client's interests, and the attorney has no incentive to restrain his client. The tie of the attorney exclusively to his client's cause is then further strengthened by the fact that plaintiffs' lawyers in sexual-abuse and other personal-injury cases are usually paid on a contingency fee basis, which means the lawyers are paid a percentage — 15% to 33% is typical — of the monetary recovery obtained in a successful lawsuit. Thus, unlike the criminal prosecutor, the civil lawyer is a creature of the accuser, and the

accusation in a civil suit is simply an unsifted allegation spread of record in a public filing.

In theory, the fact that sexual-abuse plaintiffs usually must seek the services of contingency-fee attorneys should deter frivolous lawsuits because lawyers presumably will sift through proposed suits and take on only those with some real merit and thus some real possibility of success. But that theory ignores the fact that there are « loss leaders » in law just as in retailing, so that there will always be lawyers willing to take on hopeless causes just for their publicity — and, therefore, their future client generating — value.

Moreover, civil suits can be commenced in America at very low cost. For instance, the filing fee for the $ 10 million lawsuit against Cardinal Bernardin was only $ 120. And that was the fee for filing the suit in a *federal* court, which had jurisdiction because the plaintiff and the defendants hailed from different states; filing fees in the state courts are even lower. Also, civil suits can be commenced by rather bare-bones complaints, which may literally be only two or three pages in length. Little more than identification of the parties and a statement of the basis of the claim is required, and there is no obligation that the plaintiff set out the evidence he expects to put forward on trial of the suit. In all, the total out-of pocket costs of commencing civil litigation in America are low and do not deter the filing of marginal lawsuits.

Further, because of the so-called « American Rule », a sexual-abuse plaintiff need not fear being saddled with the attorneys' fees of the accused if the plaintiff loses the suit, or if the suit is dismissed by the court. American courts have rejected the alternative British practice, under which a lawsuit winner's attorneys' fees are shifted to the loser. The « American Rule » against fee shifting is justified on the ground that the British system puts too much of a burden on plaintiffs acting to vindicate their rights, in effect threatening them with punishment if they happen to lose on claims brought in good faith. It is difficult, however, to see why there should not be fee shifting in the area of private tort and similar suits so that there is an obvious incentive to commence or continue litigation only when one's claim has some real merit. As it is, calculations as to attorneys' fees and who pays them do not deter meritless lawsuits.

On the federal level and in some states, there are statutes that threaten court sanctions — including monetary penalties and awards

of attorneys' fees and costs — against parties and lawyers who file meritless suits or press frivolous legal positions, but such statutes are paper tigers. The statutes are often written so that the requirements imposed on lawyers before the filing of a suit are lax. For instance, the statute may require only that the lawyer make « reasonable » inquiry into the basis for his client's allegations, or the statute may define « frivolous » to mean a lawsuit's factual claims are « *completely* without merit ». On the federal level, the sanctions statute now allows a lawyer to sue if his client's factual claims are « likely » to find evidentiary support in the process of « discovery » that occurs after the filing of the suit. In other words, the federal sanctions statute allows a lawyer to file his client's suit on the hope that the exchange of information that occurs, by legal compulsion, at the beginning of litigation may yield evidence in support of the plaintiff's claim. And that invitation to a legal fishing expedition is duplicated because the statute also allows a grace period of 21 days in which a plaintiff may drop a suit revealed to be groundless, without incurring any sanctions at all. Thus, under the federal sanctions statute, a plaintiff and his attorney can bring a suit on flimsy facts, hope that favorable facts develop pretrial, and then escape sanctions altogether by dropping the suit if their hopes for supporting facts (or for a settlement offer) are dashed.

To complete the picture on the civil side of the American court docket, statutes of limitation often do not bar the bringing of old claims. For instance, state legislation or a state-court decision might allow a complainant to bring a claim of child sexual-abuse up until the plaintiff is 21 years old, regardless of when the abuse allegedly occurred. Or perhaps a sexual-abuse plaintiff might be allowed to sue within three years of his *discovering* that he was abused. That latter type of limitations statute is what sometimes produces the phenomenon of the sexual-abuse lawsuit based on hypnosis induced recent « recoveries » of « repressed memories » of sexual abuse that allegedly occurred even twenty years earlier. A prosecutor would blanch at the thought of prosecuting someone on such a claim, but it is not unthinkable, witness again the Cardinal Bernardin case, for a civil lawyer to proceed aggressively while leaning on such a weak reed.

In theory, there is one additional potential source of restraint of meritless lawsuits in the American system. Lawyers are licensed professionals in each state, and they are subject to administrative

discipline, including disbarment, for filing frivolous lawsuits or for pressing claims they have reason to believe are false. One would think that American lawyers might thus draw the distinctions and make the judgment calls that the sensitive matter of sexual-abuse litigation demands. But this is precisely where the American system most fails.

Despite soothing words here and there, in lawyers' codes of professional conduct and responsibility, about attorneys' being officers of the court and having special responsibilities to the public and for the quality of justice, the fact is that lawyers in the field and on professional disciplinary boards are all too ready to accept the notion that an attorney's *only* allegiance is to his client and to his client's wishes and interests. Never mind the implications of the fact that the lawyer's own narrow self interest also weds him to his client's cause, and we are supposed to overlook the fact that many lawyers are rather cavalier about serving conflicting client interests when the lawyers' own interests so dictate. Our system of legal ethics nevertheless insists that the adversary system, in which each lawyer looks out only for his own client, is the most practical path to mostly just results.

The Cardinal Bernardin case shows why that particular argument for the adversary system is so unpersuasive. The Cardinal was sued despite the fact that the plaintiff's lawyer knew that there was a substantial question whether the suit met the requirements of the applicable statute of limitations and, more importantly, that his only « evidence » would be his client's « repressed memories », recently « recovered » in hypnosis sessions with a new therapist. The attorney also knew that his client had not previously « recovered » memories of abuse by the Cardinal and that the new therapist was an unlicensed part-time practitioner of her « art ».

In short, one could not imagine a more glaring case of irresponsible lawyering, and the only suit that one could imagine that would be more frivolous than the one filed against Cardinal Bernardin is one in which the defendant priest's name was picked out of a priests' directory at random. And, yet, the one certainty is that the lawyer in the case will never be called to answer before his state bar authorities, let alone be disbarred or disciplined. In America, lawyer « self-regulation » means no regulation.

In sum, the present circumstance in America as to clerical sexual-abuse litigation is morally indefensible and is very dangerous

for the Church. Essentially, we have reached the point where church officials and priests can be extorted just by the threat of a sexual-abuse lawsuit and the bad publicity that follows upon it. Perhaps the best we can do is to pray for improvement of the situation. It is the measure of our predicament that prayers will more wisely seek not reform of the American civil law system, which is practically impossible, but a swinging of the popular pendulum back against those excesses have produced the mess we are in.

T.J. Scorza