

**Reflections on the Philadelphia
Grand Jury Report**

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For a while, it seemed as if the Philadelphia Archdiocese had escaped relatively unscathed from the sexual abuse scandals that had devastated the Archdiocese of Boston and many other dioceses. To be sure, there had been several private lawsuits, and the *Philadelphia Inquirer* had provided maximum coverage to the abuse survivors who had come forward in litigation or simply to tell their stories, but the number of suits was small, and they were mostly unsuccessful. Many local Catholics were encouraged that the Philadelphia district attorney and grand jury had been investigating allegations of sexual abuse in the Archdiocese since 2002 without producing any criminal indictments. Philadelphia Catholics thus had reason to believe the Archdiocese's claim that the number of priests accused of sexual abuse had been few, and that those cases had been handled sensitively, promptly and responsibly by Cardinals Krol and Bevilacqua and senior Chancery officials.

Those hopes were dashed, to say the least, by the release on September 15, 2005 of the grand jury's report. This massive report contained the most detailed examination and the fullest documentation of sexual abuse allegations in a single diocese yet produced by any grand jury. It reported allegations against 169 priests in the Philadelphia Archdiocese since 1967, and claimed full substantiation of the allegations against 63 priests through witness testimony and Archdiocese documents. The report is largely a collection of case studies, analyzing in detail what those priests allegedly did to the children and youth entrusted to their care. The abuse cut across generations, class and ethnic distinctions, city and suburb. The narrative spells out not just the types of abuse already painfully familiar, but examples of truly appalling perversity. The report's tone, not surprisingly, is one of rancor and outrage.

The report is most rancorous, however, in its criticism of the Archdiocese's leadership for its handling

of allegations of sexual abuse, and for what it regarded as its evasive and dishonest responses to its inquiries. The report explicitly, and often sarcastically, dismisses the Archdiocese's claims that it took all credible allegations of sexual abuse seriously, that it acted responsibly in sending accused priests to professional therapeutic rehabilitation, and that it removed from ministry the most serious offenders and sent others to service in nursing homes, hospitals and other settings in which they could not pose a threat to children. While the report's tone and dismissive argumentation raises troubling questions about bias, the Archdiocese's own documents contained in the report's voluminous exhibits leave little doubt that even when well-intentioned, the leadership of the Archdiocese failed far too often to eliminate the threat posed by its own priests to the most vulnerable members of its flock.

Grand jury reports such as Philadelphia's produce predictable reactions among Catholics and everyone else: shock, indignation, demands for explanations and calls for atonement and reform. Reaction in Philadelphia took a somewhat different turn. The Archdiocese responded immediately to the report with an unsparing attack on the district attorney and the grand jury. Cardinal Rigali was defiant. The Archdiocese's formal response described the report as the product of a "discriminatory investigation," and insisted that the "grand jury was used as a sword to attack the Church and build support for insidious pre-judgments." Describing the report's charges as "mean-spirited and unfounded," as well as "sensationalized," the Archdiocese's response took the report to task for failing to acknowledge the Archdiocese's "very encouraging" results in its systematic attempts to eliminate sexual abuse. Spokesmen for the Archdiocese did not hesitate to describe the report as motivated by anti-Catholicism.

Immediately, controversy erupted both in Philadelphia and elsewhere not about the report itself, but about the Archdiocese's reaction to the report and, in particular, to the allegation of anti-Catholic motivation. For many Philadelphia Catholics, that reaction seemed yet another manifestation of the obduracy and self-protective clericalism that prevented the Archdiocese from dealing effectively with sexual abuse in the first place. For the Archdiocese's defenders, it was a brave response to a biased investigation determined to embarrass the Church even though it could not produce a single criminal

indictment. The controversy is likely to play itself out without anyone on either side being convinced of the other point of view.

That controversy reveals, however, the most important fact about the Philadelphia grand jury report. After 40 months of assiduous investigation, the grand jury could not produce even one indictment of anyone for any crime. The grand jury could not bring an indictment against a single abusive priest or against a single official of the Archdiocese. Why did that happen? What, if anything, can or should be done about it? These are questions of great practical concern, not just for the Philadelphia Archdiocese, but for the entire American Church.

The grand jury found plenty of evidence that would have supported indictments of abusive priests for the crimes of rape, statutory sexual assault, involuntary deviate sexual intercourse, indecent assault, endangering the welfare of children, and corruption of minors. The grand jury could not issue such indictments, however, because the expiration of the statute of limitations precluded prosecution in every case it found. The statute of limitations defines the period of time in which an indictment must be brought after the offense. The statutory limitations period in Pennsylvania for sexual crimes has been lengthened several times since 1982, but the prosecutor is stuck with the statute that was in effect at the time of the offense. Pennsylvania law also does not allow the limitations period to begin to run from the time a victim recovers a repressed memory, but only from the time of the original act. Because all of the acts of abuse uncovered by the grand jury took place years ago, all of the abusive priests identified in the report escaped prosecution.

Frustrated as they were by the inability to indict the abusive priests, the district attorney and the grand jury seemed even more frustrated by their inability to indict Archdiocesan individuals for what it believed to be a policy of cover-up that perpetuated the pattern of abuse. There was a statute of limitations problem here as well, but the more serious problem was that the grand jury could not establish that what it described as "enablers" or "facilitators" actually committed any crimes. It considered three principal possibilities: conspiracy; endangering the welfare of children; and obstruction of justice. The crime

of conspiracy requires proof of specific intent that the underlying crime occur. For example, to indict an Archdiocesan official for conspiracy to rape, the grand jury would have needed evidence that he shared the goal that a rape occur, even if he did not participate in the physical act. It had no such evidence. The Pennsylvania statute that created criminal liability for endangering the welfare of a child applies only to those directly responsible for supervising the welfare of a child. While the archbishops and Chancery officials may have been responsible for supervising those priests who were responsible for supervising the welfare of children, they were too distant from the children to be prosecuted as supervisors themselves. Similarly, the grand jury could not find obstruction of justice in any of its various forms, largely because the narrow definition of those crimes under Pennsylvania law.

Particularly galling to the district attorney and the grand jury was a quirky legal impediment to prosecution of the Archdiocese itself for what they regarded as a "policy of protecting abusive priests over children." Pennsylvania law allows criminal prosecution of incorporated entities such as business corporations, but not unincorporated associations such as the Philadelphia Archdiocese. The report expressed the belief that the Archdiocese would have been subject to prosecution had it been a corporation, "because it clearly tolerated sexual assaults and consciously disregarded a substantial, unjustifiable and unreasonable risk that additional abuse would occur." The report may, however, be making too much of that possibility. Establishing criminal "enterprise" liability would have required a showing of intentional wrongdoing, which would have been quite difficult to do.

The question of what to do about those limitations of the criminal law is a difficult one. The grand jury recommended that the legislature eliminate the statute of limitations altogether for criminal prosecution of sexual abuse of children. This has been proposed elsewhere as a response to the problem of such abuse generally, and not just the problem of clerical abuse. The United States Supreme Court has held, however, that eliminating the limitations period could operate only prospectively, not retroactively, so it would be of no use in prosecuting past abuse. The grand jury also wished to see unincorporated associations made subject to criminal prosecution, which

would also have only prospective effect, and would still leave prosecutors with the difficulty of establishing enterprise liability. Similarly, a statutory amendment making the supervisors of supervisors of children liable for endangering children's welfare would create practical problems of figuring out how direct or indirect that supervision would have to be before criminal liability could be found. Changes in the criminal law, therefore, are not likely to produce different results for grand jury investigations of past clerical abuse in Pennsylvania or elsewhere.

Does the grand jury's failure to indict mean that its 40-month investigation will be without legal consequences? Probably not. Its vast compilation of information will be very valuable to the lawyers for the survivors eager to bring civil suits against the Archdiocese, principally for the torts of negligence, negligent supervision and negligent hiring. The report is a road map that will make such cases easier to prove. Private plaintiffs, however, also will run up against the statute of limitations problem. The relevant civil limitations periods are two to five years from the offense, time-barring most potential suits against the archdiocese. Plaintiffs in Pennsylvania (and elsewhere) have tried to convince courts that the statute should be "tolled" or suspended because a diocese has fraudulently concealed its wrongdoing until after the limitations period has expired, but with little success. Survivors' lawyers will be able to exploit the grand jury report only if the Pennsylvania legislature decides to suspend the statute of limitations altogether for a year, as the California legislature did in 2003. This would be permissible constitutionally for civil suits. There are also instances of such suspensions in other mass tort situations, even when the change de facto targets a single defendant, as it would here. There is some public support for such a move, and some legislative interest, but it is too soon to tell whether it will happen.

The consequences of taking that step, however, should be weighed carefully. The California suspension produced over 700 law suits and massive settlements that eventually may total in excess of \$1.5 billion. The Philadelphia Archdiocese's settlements would be smaller, but proportionately severe. No one would argue the justice of compensating the survivors, but it is important to ask

whether liability on that scale, which would devastate the beneficiaries of the Archdiocese's charitable, educational and pastoral functions, is justifiable. If that kind of liability arises in Philadelphia, the grand jury's failure to indict anyone will seem of little importance whatsoever.