

James T. O'Reilly & Margaret S.P. Chalmers

The Clergy
Sex Abuse Crisis
and the
Legal Responses



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Margaret S. P. Chalmers

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This work is dedicated to the memory of

Joseph Cardinal Bernardin

A source of inspired leadership, and a moral apostle
of prudence and forgiveness on this complex topic,

And to all of the innocent, faithful priests
who have continued to serve the people of God
throughout this time of great hardship and suffering,
As well as to all those clergy, religious, and laypersons
who have dedicated years of their lives
to cleaning up the mess that is this scandal.

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PREFACE

Two explorers entered the same large old attic by opposite stairs. This dusty attic of the ancient edifice had expanded in recent decades and was quite cluttered with packages not seen up in that attic in the past. One of the seekers was an older criminal law teacher with decades of experience as a church volunteer; his flashlight in the attic did not quite illuminate enough. At the other end, one of the best and brightest young canon lawyers flashed her light on the modern version of older rules and norms. Some of the attic's contents had been widely seen outside; others were buried deep in dust to avoid detection. Each recognized the other would see things differently; together, they could catalog the contents and report their findings to those below. Along the way they saw some things that are best left in the attic, while others very much needed to be cleaned out.

The reader is welcomed into the attic with us, as we study the legal aspects of the Roman Catholic Church experience with clergy sexual abuse in the United States. Like an attic, the Church has some memories that are put away, unpleasant to deal with, hopefully not to be seen again. Like explorers of that attic, we study, analyze, and synthesize for the reader so that these lessons are not to be forgotten in the Church of 2020 and beyond. The strength we can draw from learning about the process is actually enhancing the future of the Roman Catholic Church in its ability to deal more forthrightly with sexual abuse reports when they arise in the future, as they inevitably will.

There is a risk that we acknowledge. As three former advisors to the U.S. bishops wrote in a 2006 book: "Men and Women who have spoken up and questioned bishops have been accused of a catalogue of sins—from arrogance, misunderstanding, and disloyalty, to heresy."¹ We recognize that the subject matter of this text may result in our being accused of some or all of these.

As scholars and active participants in our Catholic Church, we offer you a series of informed insights into what our Church has learned and will continue to learn from the problem of clergy sexual abuse of minors. Writing a careful and well-reasoned book on this topic was not possible while the first wave of abuse cases was flooding the American Church in scandalous events. Writing a boringly deep treatise filled with minutiae is not possible as the legal issues have been changing as quickly as the news headlines change. Universal Church problems with clergy sexual abuse in

1. Thomas Doyle, A.W.R. Sipe & Patrick Wall, *Sex, Priests and Secret Codes* 289 (2006).

many nations, exposed and hotly debated in 2010, were the impetus for us to assemble this more readable yet more authoritative text.

We encourage readers to provide feedback so that we may share in your insights about this complex problem. No single answer can be given *ex cathedra* by laypersons, even with our backgrounds, and no law author has ever claimed to be infallible. With a spirit of humility and faith, we ask you to consider these lessons and consider how they may illuminate the events of the recent decades in the Catholic Church for future readers and for its future leaders.

Special thanks are due to veteran journalist William Burleigh, whose service on the National Review Board gave him an excellent perspective, and whose willingness to share time and concepts was a great help, though the ideas expressed in this text are those of the authors alone.

Professor O'Reilly thanks his family and his remarkably gifted coauthor, Dr. Chalmers, and greatly appreciates his student research assistants Charlotte Eichman, Andrew Cleves, and Meaghan Fitzgerald, for their months of assistance on this project. Professional law librarian Lauren Morrison provided excellent assistance for the sources and citations of this text, and her help is greatly appreciated.

Dr. Chalmers thanks Professor O'Reilly for inviting her to be a part of this project. Special thanks to all those canonists who took the time to share their wisdom, expertise, and resources, particularly Dr. Michael Ritty; Rev. John Paul Kimes; Rev. Paul Golden, C.M.; Rev. Patrick Lagges; and Rev. Gregory Bittner. Thanks to her husband, Jon; children David and Thomas; and her parents for supporting her during the duration of this project.

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PART ONE



Context and Background

CHAPTER 1



Introduction to a Complex Problem

1:1 UNDERSTANDING THE COMPLEX DYNAMIC UNDERLYING THE LEGAL ISSUES

The legal issues addressed in this text involve nuances of civil law, canon law, and external relations for the Roman Catholic Church in the United States and elsewhere. But we begin with the triggering event: the reality that a child was harmed, long before the particular case reached the trial court. This reality will keep our study of this tragedy in its proper perspective. At the base of our inquiry into that institution's experience has been a series of tragedies for individual children, the crime of sexual abuse with minors under the age of consent, with the tragic figures being not only the child victim but also the good priests of the worldwide institutional Roman Catholic Church.

American Catholics have experienced shock and a loss of trust as the 30-year, nationally publicized story of clergy sexual abuse has unfolded around them, and around their trusted pastors and bishops. This dismay has caused deep institutional damage to an important social institution: the Roman Catholic Church in the United States. The legal aspects of this damage are described and analyzed in this text. For those reading this work decades after the events depicted, we cannot do justice to the passions that this topic has evoked in the years 1980–2012, but the future reader can understand from some of the accounts of personal anguish and frustration, provided in the bibliography, that affected the contemporary Church as the problems were addressed in various stages.

The center of this tragedy is the child or teenager, and the complex dynamic of legal rights and responsibilities is built around the victimization of that central figure. Justice for the children and their families, as well as justice for the public and especially parents of other children, demands that the systemic reasons for the existence of clergy sexual abuse, the official responses of the dioceses and of the Vatican, and its aftermath be understood. Once the need for justice has been understood, the

Church as an institution needs to put effective systems in place at all 195¹ dioceses, to safeguard against further episodes that would be as painful as these incidents have been. Because only the Vatican can impose such requirements, the U.S. Conference of Catholic Bishops lacks the authority to compel Nebraska or Oregon bishops to comply with these standards.²

There was also an information gap, maintained by many bishops who wished to contain the public's awareness of the scandal. Readers of the world press in 2014 were shocked to learn that 400 priests had been defrocked in 2011–2012; these had been closely guarded secrets of the Curia before Pope Francis opened up more of the internal processes in 2013.³

Although most Americans today have heard of these efforts to limit the coverage and fallout, few understand how widespread these efforts had been. One diocese looked back 50 years and found credible accusations against 30 of its 372 priests over that time frame.⁴ Though most abuse situations were not uncovered and the actors were not sent to treatment or into the criminal law system, a total of 1,624 U.S. Catholic priests received treatment between 1950 and 2002 for sexually abusing minors,⁵ and more have been treated in the decade since; further, almost 3,400 incidents were reported in the peak year of sexual abuse reporting, 2002, when international negative publicity was drawn to the sexual abuse problem within the American branch of the Roman Catholic Church. In 2010, 505 credible allegations relating to 345 accused clergy were reported.⁶ Experts estimate the average number of victims per priest-offender was about eight.⁷

As evidence of another far-reaching practice of containment, bishops were challenged by federal bankruptcy judges for hiding assets from creditors in clergy abuse cases.⁸ Since 2004, \$2,700,000,000 has been paid by U.S. dioceses due to clergy sexual abuse, largely on settlements and attorney fees.⁹

1. There are a total of 210 entities but 195 are dioceses. www.officialcatholicdirectory.com.

2. Dan Morris-Young, "Do Lawsuit Allegations Touch Diocese's Noncompliance Issues?," *Nat'l Cath. Rptr.* (Apr. 29, 2011).

3. John Heilprin, "Pope Defrocked 400 Priests in 2 years," *Associated Press* (Jan. 23, 2014) (260 in 2011, 124 in 2012, and 171 in the two years 2008 and 2009).

4. And 158 allegations were made against these 30 priests. Covington KY diocese, "A Report on the History of Sexual Abuse of Minors in the Diocese of Covington" (Aug. 18, 2003), on Web at covingtondiocese.org.

5. John Jay College Report to U.S. Conference of Catholic Bishops, *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950–2010*, at 80 (May 2011) (hereinafter "John Jay College Report").

6. Nancy O'Brien, "New Sex Abuse Allegations Down Slightly in 2010; Costs Continue to Rise," *Cath. News Serv.* (Apr. 11, 2011).

7. Thomas Plante, in *Sin Against the Innocents* 186 (2004).

8. "Chaos reigns, and given the deterioration in San Diego, threatens to exponentially accelerate." David Gregory, "Some Reflections on Labor & Employment Ramifications of Diocesan Bankruptcy Filings," 47 *J. Cath. Legal Stud.* 97, 116 (2008).

9. O'Brien, *supra*.

Because it asserts that it is the “universal Church,” Roman Catholics in nations such as Ireland,¹⁰ Belgium¹¹ and around the world must also recognize that they too will likely be confronting this problem, and they must develop effective prevention and remedial systems. Canada in 1989,¹² Belgium in 2010,¹³ and Ireland in 2010–2011¹⁴ showed that the consequences of the sexual abuse in one area could harm the reputation of the nationwide church.¹⁵ As Pope Benedict told the news media in May 2010, “the greatest persecution of the Church comes not from her enemies without, but arises from sin within the Church, and that the Church thus has a deep need to relearn penance, to accept purification, to learn forgiveness on the one hand, but also the need for justice. Forgiveness does not replace justice.”¹⁶

1:2 THE U.S. LEGAL SYSTEM HAS NO PERFECT ANSWERS

Child sexual abuse cases are not easily established beyond the reasonable doubt standard required in criminal law. Popular U.S. television dramas involving forensic experts and their crime-solving laboratories have filled the minds of the modern American jury pool with unrealistic expectations. Crime-solving by science seems to be much more feasible than the real standard that law enforcement officers must meet in the average prosecution of the average crime. And that impression is true, as the rise of rapid DNA sequencing and sample matching has irrevocably changed the centuries-old expectation that jury trials will be dependent on eyewitness testimony by credible witnesses.

That paradigm shift of proofs occurred in the 1990s; DNA from the Monica Lewinsky blue dress was a historical example of the scientific proof that can override denials in the classic “he said/she said” dispute. However, from the law enforcement perspective, the child sexual abuse claim that arrives in the police inbox as an offense from 10, 20, or 30 years before is the ultimate unprovable cold case.

There are no perfect legal answers for establishing the truth of clergy sexual abuse claims that occurred in years past—sometimes decades ago. Historically, the priest has been a respected source of informal authority within the community.

10. John Thavis & Sarah Delaney, “Irish-Vatican Summit on Sex Abuse Ends with Call for Courage, Honesty,” *Natl Catholic Rptr* (Feb. 16, 2010); Tom Roberts, “Truth Must Be Told, Says Archbishop,” *Nat’l Cath. Rptr.* 12 (Apr. 15, 2011).

11. Doreen Carvajal & Stephen Castle, “Abuse Took Years to Ignite Belgian Clergy Inquiry,” *N.Y. Times* (July 12, 2010).

12. Stephen Rossetti, *A Tragic Grace: The Catholic Church and Child Sexual Abuse* 7 (1996).

13. Belgian Catholic Church “in Crisis,” *Irish Independent* (Sept. 13 2010).

14. *Id.*

15. See e.g., “Priest Profoundly Sorry for Abusing Girl from Age of 11,” *Irish Independent* at 1 (July 2, 2011).

16. Vatican Release, “Interview of the Holy Father with Journalists during the Flight to Portugal” (May 11, 2010), on Web at http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/may/documents/hf_ben-xvi_spe_20100511_portogallo-interview_en.html.

If he denied under oath that the incident occurred, that denial would have had a determinative effect in previous decades. Today, the tarnished image of the priesthood that has emerged from decades of televised scandal reports makes it much less likely that the word of a priest would override that of an individual giving testimony about a past event of abuse. Cynicism about the credibility of Church leadership has reached a remarkable level in popular discourse. A Catholic legal scholar who is now a federal judge once warned bishops that juries and judges have been “poisoned” by the media coverage of the scandal.¹⁷ An exhaustive study paid for by the American bishops¹⁸ found that only 4 percent of priests had been accused of sexual misconduct, But this is not a matter of pride, but instead like a fire department whose members include 4 percent arsonists.

Innocence is a concept that cannot be determined in conventional criminal cases. The standard is that the prosecution has failed to prove its case “beyond a reasonable doubt,” so acquittal does not mean that the crime did not occur. The same set of proofs about the same event can be tried to an acquittal in a criminal case and yet a victory for the injured person in a civil case, as the O.J. Simpson cases have demonstrated. The reputation of the Catholic Church in the United States has suffered adverse consequences stemming from at least four sources as a result of the abuse cases:

- from the fallout of the criminal prosecutions of priests and dioceses;
- from the fiscal wreckage of bankruptcy and massive settlements;
- from the public criticism of its defense strategy by respected journalists; and
- from the dislocation of past patterns of lay Catholics’ allegiance and donations.

The Church continues to be powerful and still capable of providing religious and social benefits, according to its mission; however, the legal system’s response to the abuse cases has shown that the Church is not “above the law” in any sense of the term.

Will other abuse claims arise after 2011? In August 2010, a prominent plaintiff’s lawyer dismissed a potentially important case against the Vatican, because no other plaintiffs had come forward to join his clients’ action. The plaintiff’s lawyer told the media that “Virtually every child who was abused and will come forward as an adult has come forward and sued a bishop and collected money, and once that happens, it’s over.”¹⁹ That attorney had represented more than 240 abuse victims who settled with the Louisville Catholic archdiocese for \$25 million in 2003. His assessment reflects a general mood among plaintiffs’ counsel that the most egregious cases have been identified and that there are relatively few remaining instances of past sexual abuse claims not yet asserted.

17. Patrick Schiltz, “The Future of Sexual Abuse Litigation,” 189 *America Magazine* 8 (2003).

18. John Jay College Report, *supra*.

19. Dylan Lovan, “Plaintiffs Give Up Sex Abuse Case against Vatican,” *Associated Press* (Aug. 10, 2010).

A report by John Jay College in 2011 made a similar assessment, but noted that the incidence of reports of cases is not a basis on which to conclude that these issues have been all exhausted.²⁰ The head of the largest Catholic diocese insurance pool predicted in 2011 that most of the claims that could be asserted from prior decades have, by 2011, already been made, and that as a result of the VIRTUS and other preventive programs against sexual misconduct, few of the persons who might engage in sexual misconduct in the Church or misconduct in today's parishes would avoid some degree of community awareness of their conduct. VIRTUS is a program training the adults who work with young people to avoid situations of possible sexual impropriety.

The question of whether a particular priest will reoffend with sexual contact after receiving discipline was studied by the bishops after 2002. Monitoring of the assignments and conduct of the offender priests was recommended, but in practice very few have been monitored (and of course, those who are dismissed have no further ties to, and cannot be tracked by, the Church).²¹

1:3 THE CHURCH'S CANON LAW SYSTEM HAS NO PERFECT ANSWERS

Responding to the abuse of power is never easy. The two levels of power at work in these abuse situations make it especially difficult to respond. The individual sexual predator who was a priest used his individual powers of persuasion to obtain sexual gratification from lewd acts with a child under the age of legal consent. This abuse of power violated Church law, civil law, and moral norms, standards about which that priest was considered a steward of God's law.

After the extent of the sexual abuse events became apparent, some number of bishops misused their special authority over the abuser priests to suppress general knowledge of the problem and to avoid dealing with the public scandal.²² By doing so, they have damaged the foundation of trust built among the laity, the vast number of innocent priests, and their bishops.

Archbishop Diarmuid Martin of Dublin, Ireland, told a U.S. law school symposium that leaders of the Church had failed: "Were there factors of a clerical culture which somehow facilitated disastrous abusive behavior to continue for so long? Was it just through bad decisions by bishops or superiors? Was there knowledge of behavior which should have given rise to concern and that went unaddressed?"²³

The Catholic Church has its own code of laws worldwide. Those laws are found in the Code of Canon Law as well as in the particular laws created by internal, local, and national Church legislation. While church entities are bound to follow the laws of the civil jurisdiction, where these exist, all members of the Catholic Church,

20. John Jay College Report, *supra*.

21. "Few Abuser Priests Monitored," Nat'l Cath. Rptr. 3 (July 23, 2010).

22. John Jay College Report, *supra*.

23. Archbishop d. Martin, Nat'l Cath. Rptr. (Apr. 15, 2011).

including laity and clergy, are also bound to follow the laws of the Church, or face internal penalties. This has caused added complications and much misunderstanding in the Church's dealing with this issue.

Chapters 19 through 26 discuss the canon law issues in clergy sexual abuse cases. The reader will note that the separate canonical or Church internal system, which provides for the priest's accountability to the bishop or religious superior and the accountability of some bishops to the pope, did not function well to deter and then to isolate and then expel the abuser. The canon law system endures and is constantly being improved, but it has not fully answered the call for discipline and justice in recent decades.

1:4 THE CLERGY SEXUAL ABUSE LESSONS ARE USEFUL IN OTHER U.S. FAITH COMMUNITIES

The loss of trust and sense of alienation experienced within the U.S. Roman Catholic Church is seen in a lesser extent among other faith communities, including the Protestant and Jewish ones. Chapter 29 discusses the experiences of these other religious communities with their abuse incidents and how they are choosing to address the problem.

Other religious entities have a stake in the outcome of the cases and legislation that has been created to deal with the legal issues surrounding the abuse in the Roman Catholic Church, as well as any legal precedents set. To the extent that First Amendment constitutional protection aids all churches,²⁴ non-Catholic denominations may lose some of their constitutional protections against state interference if the Catholic sexual abuse cases yield precedents about remedies that override prior case law. There is also a new current of precedent in bankruptcy law that can have negative consequences for other denominations. In addition, the civil tort precedents concerning Catholic bishops' inadequate supervision or insufficient discipline may make some other religious institutions more vulnerable to damage awards.²⁵

24. As to the limits of First Amendment protection for intra-church disputes, see e.g., *Jones v. Wolf*, 443 U.S. 595, 609 (1979); *Gen. Council on Fin. & Admin., United Methodist Church v. Cal. Super. Ct.*, 439 U.S. 1369, 1372 (1978); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

25. The most articulate critic of those church abuse defenses that claim First Amendment privilege has been prolific in her warnings that others will be disadvantaged by the overuse of this defense. Marci Hamilton, "The Rules against Scandal and What They Mean for the First Amendment's Religion Clauses," 69 *Maryland L. Rev.* 115 (2009); Marci Hamilton, "The 'Licentiousness' in Religious Organizations and Why It Is Not Protected under Religious Liberty Constitutional Provisions," 18 *William & Mary Bill of Rights J.* 953 (2010).

1:5 THE CLERGY SEXUAL ABUSE LESSONS ARE USEFUL IN OTHER U.S. INSTITUTIONS

Sexual misconduct is an unfortunate aspect of the spectrum of human weakness. Failings in the disciplinary oversight of “predator priests” by Catholic officials are discussed throughout this book, and more poignantly in the dramatic and empathetic sources listed in our bibliography.

A Catholic psychologist writing on the abuse cases commented that “the stabilized power of the Catholic Church is more evident to many people than is its sensitivity to human pain.”²⁶

The John Jay College Report on the clergy sexual abuse experiences likened the Roman Catholic Church to other hierarchical authoritarian entities, such as a police force.²⁷ The Report states that the existence of corruption at the lowest levels needs to be addressed and those responsible need to be removed swiftly; the failure to do both can damage the institution in the eyes of those from whom it must have respect. Priest or police candidates and trainees need to be selected out if they exhibit behavior patterns that show corruption would be tolerated or accepted. Once the higher officers or officials begin to tolerate illegal activity, the entire organization, whether it be the police force or the church, would now be in jeopardy of losing its moral authority to compel obedience.

One could argue more broadly that primary and secondary educational institutions and large youth organizations need to learn lessons from the bad experiences of the Church. However, as their arrangements are contractual, hierarchical allegiance is low, and there is an absence of both a solemn vow and strict adherence to a particular morality, those teachers differ greatly from the clergy. One lesson from the Church is nevertheless beneficial: it is clear that educational institutions whose leaders confront child sexual abuse, teach firmly against it, oversee protections for children, and prosecute each case quickly and decisively will have much less negative effects over the long-term than the repercussions felt by portions of the U.S. Catholic Church.

One could also argue that repeated failures by the American bishops to compel adherence to their collectively established norms of behavior, or to enact more stringent norms, can be compared to weaknesses inside a business conglomerate. If no central force or body pays close attention, multiple subsidiaries could react in divergent ways. A central headquarters that is slow and haphazard in its response to failures in its subsidiaries does a disservice to its owners and increases the risks of criminal prosecution of the entire entity and perhaps its senior management, including the potential for imposition of fines and imprisonment.

26. Dr. Margaret Miles, in A.W. Sipe, *Sex, Priests and Power: Anatomy of a Crisis*, at ix (1995).

27. John Jay College Report, *supra*.

1:6 THE U.S. LESSONS ARE USEFUL TO THE ROMAN CATHOLIC CHURCHES IN OTHER NATIONS

This book will demonstrate to other Catholic entities outside of the United States that they must study and benefit from the serious mistakes made by the U.S. Church leadership. Of the approximately 3,000 dioceses in the world, the Roman Catholic Church in the United States contains 195. The devastating effects on the public posture of the Church has had negative spillover effects in other nations as well. Italy,²⁸ Canada,²⁹ Belgium,³⁰ and other countries have had related problems of abuse. As the 2009–2011 visibility of sexual abuse claims in European churches has expanded,³¹ these lessons gain in relevance.

For several years, extensive news coverage of the U.S. clergy sexual abuse events created the impression in the media that the misconduct of U.S. priests was in sharp contrast to the activities of priests in other nations. This also became the internal belief of priests and bishops in non-English-speaking countries. In retrospect, many dioceses in other nations had a comparable set of sexual misconduct events that were less visible and were mishandled, and that were deemed a “taboo” subject for public discourse;³² these came to public attention long after the news stories of the U.S. experience. This comparability of errors has certainly not held good news for any parties involved. But it does suggest that for the future, decisions regarding the comparable issue by bishops in other nations in similar positions would be more productive if the Church leaders moved immediately to apologize, offer counseling, correct the flaws in supervision, expedite the investigation, and take other steps appropriate for their culture and in cooperation with their local law enforcement. There is much to be learned from the many mistakes made by the U.S. bishops.

28. Luca Bruni, “Italy Grapples with Priest Sex Abuse,” Associated Press (Sept. 13, 2009) (late bishop who is being considered for beatification also alleged to have sodomized deaf student with a banana).

29. “Priest Charged with Multiple Sex-Assault Charges Back in Court in January,” Quebec Post Media (Nov. 8, 2010).

30. Steven Erlanger, “Belgian Catholics Remain Anguished by Abuse,” N.Y. Times (Sept. 19, 2010).

31. See e.g., Shawn Pogatchnik, “Abuse Charges Shake Europe’s Catholic Balance,” Associated Press (Mar. 14, 2010).

32. Bruni, *supra*.

CHAPTER 2



Understanding the Patterns of Clergy Abuse Litigation

2:1 INTRODUCTION

To orient the reader to the chapters that follow, we offer in this one an abbreviated synopsis of the typical processes, events, and civil law steps that are likely to be taken when a clergy sexual abuse case arises prior to any ensuing litigation. Chapter 3 examines the civil litigation process, and later chapters address the canon law process. Generalizations about complex cases are inherently vulnerable to change, of course, but the reader will be better able to comprehend and navigate the remaining chapters with an understanding of a “typical” scenario of the ways in which these events, allegations, and liabilities evolve.

2:2 THE EVENT

We begin with an action: a priest’s alleged sexual abuse of a minor occurs. This can be any kind of sexual contact, from touching, kissing, oral sexual contact, or intercourse. Sometimes there is physical pain or damage inflicted on the child or teen, but more often the damage is psychological and emotional. It has been estimated that several thousand young people were victimized; one study found it “reasonable to estimate that over fifty thousand young people were abused by priests” during the 1950–2002 period.¹

What is considered sexual abuse? In 2002, the bishops defined the term to include “sexual molestation or sexual exploitation of a minor and other behavior by which an adult uses a minor as an object of sexual gratification,” but this “need not be a complete act of intercourse” and it does not “need to involve force, physical

1. Mary Gail Frawley O’Dea, *Perversion of Power: Sexual Abuse in the Catholic Church* 6 (2007).

contact, or a discernible harmful outcome.”² In this book we use this definition for sexual abuse, rather than the divergent terms used in state criminal law statutory language, which can vary widely.

The patterns in clergy sexual abuse cases are well understood by psychologists, sociologists, and others who study the reports, listen to the victims, and understand narratives in articles, video clips, interviews, books, etc. Our bibliography is replete with examples and personal narratives. The typical victim has been a male between 11 and 17 years of age, although girls and younger children of both genders have also been targeted.³ The young person meets the clergy member in a church-related activity, as an altar server, recreational program user, or participant in a teen program or educational activity.

Millions of these interactions between priests and children occur each year, in the context of the priest’s ministerial duties. In the overwhelming majority of these interactions, the meeting and involvement with the clergy member is positive, healthy, appropriate, and beneficial to the young people. As we focus our study on the number of sexual abuse cases, it is important to acknowledge at the outset that most clergy are good, stable, well-meaning, and even holy people. They are horrified by the acts of a small minority of priests. Most priests have entered the ministry to worship God and serve their communities; for these good men, the scandal has made their vocation much more difficult. One bishop has said: “It is particularly despicable and horrendous when such abuse is perpetrated by a person of trust, such as a priest.”⁴ This perspective is easy to overlook when dealing with the sad and terrible instances of abuse.

The exceptionally bad cases have involved intentional and deliberate predatory sexual behaviors. Oftentimes, these sexual interactions manifest themselves due to serious physiological flaws, sometimes coupled with substance abuse by the priest. Eight years after Boston’s archbishop assigned a known pedophile priest to parish work, he sexually molested many children, and more than 30 filed claims against him.⁵ When the parents of abused boys and their lawyer confronted a Louisiana diocese, they learned that the diocese had known of the priest’s “problem for some time but thought it had been resolved.”⁶ These exceptional cases often begin with

2. U.S. Conference of Catholic Bishops, “Preamble, Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons” (Dec. 8, 2002), on Web at <http://old.usccb.org/bishops/norms.shtml> (hereinafter “Essential Norms”).

3. John Jay College, Report to U.S. Conference of Catholic Bishops, *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950–2010*, at 9–10 (May 2011), on Web at <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Causes-and-Context-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-in-the-United-States-1950-2010.pdf> (hereinafter “John Jay College Report”).

4. Bishop Thomas Paprocki, “As the Pendulum Swings from Charitable Immunity to Bankruptcy, Bringing It to Rest with Charitable Viability,” 48 *J. Cath. Legal Stud.* 1, 5 (2009).

5. Boston Globe, “Betrayal: Crisis in the Catholic Church” 35 (2003).

6. *Id.* at 37. (Father Gilbert Gauthe was sentenced to 20 years in prison.)

preparatory friendly steps that bring the young person into the priest's circle of friends. The priest intentionally lures ("grooms") the young person into a relationship of trust.⁷

As a National Association of District Attorneys project on child sexual abusers has noted:

Through the grooming process, the child molester seeks out, befriends and manipulates a targeted victim. Similar to the adult courting process, the child molester "seduces" the child victim with attention, affection and gifts. Grooming is a gradual process and a skilled child molester takes care in laying a foundation of trust, love and friendship before escalating the relationship to a sexual one. Ultimately, the seemingly healthy relationship is only a farce used to take sexual advantage of a vulnerable child.⁸

In extreme cases, some priests used the religious factor as a cover for misconduct, such as the Connecticut priest who told victims "that performing oral sex on him was a special way of receiving Holy Communion from a priest."⁹

As the child continues to interact with the priest, gradual trust or emotional dependence evolves over months or years. Parents of the child support and endorse the priest's interaction with the child. Trust and dependency are fostered. In some cases, the child is introduced to alcohol, drugs, or pornography by the priest to lessen the child's natural resistance. Many of the books in our bibliography offer firsthand and interview examples of these patterns of sexual manipulation of the young person.

The interpersonal trust is then violated by the adult's sexualized conduct, including masturbation and intercourse. Along with the physical act, the priest's continued insistence upon secrecy in order to conceal the illicit actions builds up over time. Although some of the incidents were said to have been sudden events and resisted by the child, accounts of many other circumstances have shown a more nuanced acceptance by the confused child of the actions as the asserted physical manifestation of "closeness" or a showing of affection by the clergy member. Adult affection (and in some cases, alcohol, drugs, or pornography) eases the child or teen in their nonresistance to gradually accepting and participating in the sexual acts. The priest's authority of being the agent of God to the child makes these events especially reprehensible as the priest "can do no wrong." State laws regard the contact as criminal when actions by the priest trigger the state statutes for child abuse, battery, sexual abuse, or statutory rape.

7. See e.g., *Doe v. Catholic Bishop for the Diocese of Memphis*, 306 S.W.2d 712 (Tenn. App. 2008).

8. Candace Kim, "From Fantasy to Reality: The Link between Viewing Child Pornography and Molesting Children," American Prosecutors Research Institute Update 1, no. 3 (2004), http://www.ndaa.org/pdf/Update_gr_vol1_no3.pdf.

9. Frawley O'Dea, *supra*, 4.

A sexual event after some “grooming” of the youth is usually accompanied by an imperative order or plea for the child not to disclose what has happened. The clergy member’s insistence on the child’s acceptance of secrecy for the physical contact is used in court as a perverse indicator of the defendant priest’s recognition that his use of the child for sexual gratification is wrong. Jurors hearing the child’s testimony about the insistence on secrecy are likely to infer guilt and to convict the abuser. His oral or touching contact with the child may leave emotional or psychological issues, but the “secret” can be maintained if the child remains unwilling to disclose the event to a parent or adult friend. Exceptional cases would involve anal or vaginal bleeding from the physical effects of penile penetration, which are likely to be more difficult to conceal from parents, and so there is a greater risk to the abuser of detection through family questioning of the victim.

When the young person accepts the priest’s claim that sexual contact is “our little secret that others wouldn’t understand,” or some other similar sentiment, the mental stress on the young person begins and, with continued patterns of sexual contact, is deepened. Further events of repeated sexual contact, in some cases, may occur in the church, in the rectory residence, in the school, in a car, at a youth camp, etc. The one-sided nature of the relationship extends to the abuser priest’s ability to stage the sexual encounters with children in places with no witnesses. In numerous actual cases, the child’s attempt to report the abuse is rebuffed; in one instance, the grandmother of a Minnesota boy slapped the child after he reported a priest’s sexual advances, because of her belief that this could not have happened and the child must have been lying.¹⁰ The pastor of an English church told a boy reporting oral sex with an associate pastor that the boy was “being silly” and that the pastor would tell his mother that the boy was acting up. After the pastor told the abuser, that priest threatened the boy into silence.¹¹

Other resources demonstrate that for a child, physical attention and emotional empathy’s grooming of the child’s acceptance of an adult¹² can build a bond of trust with that adult. Playing with and touching the child might seem natural, up to a point. The fun aspects of being tickled and touched and wrestled may cause a child not to attach any significance at all to the contact. In some cases, the adult will be using this grooming to move that physical relationship, at a certain stage, on to oral, genital, or anal gratification of the adult, an act that surprises and confuses the naïve young person. These incidents of sexual conduct are not uniform events, and the amount of grooming by the adult may be reflected in the lack of alarm by the victim. The more intense or invasive the physical contact becomes, the more likely

10. *Eller v. Diocese of St. Cloud*, 2006 Westlaw 163526 (Minn. App. 2006). (The victim “told his grandmother what had happened, and his grandmother slapped him and instructed him to never again speak that way about a priest.”)

11. *Maga v. Birmingham Archdiocese* (2010) 1 WLR 1441 and (2009) EWHC 780, cited in Laura Hoyano, “Ecclesiastical Responsibility for Clerical Wrongdoing,” 18 *Tort L. Rev.* 154 (2010).

12. *Dengler v. Doe*, 2007 Westlaw 4183032, 1 (Cal. App. 2007). (“The perpetrator sexually groomed, abused and molested Dengler from 1978 or 1979 until approximately 1981.”)

the child will protest to others about having been abused. It also becomes more likely that the child would recognize the unusual nature of that physical contact, and might disclose that it was uncomfortable to have the physical contact with the penis or anus as part of the interaction. Again, the bibliography offers first-person recollected stories of events from the perspective of the victim.

An aspect of clergy sexual abuse that is especially damaging to the child's sensibilities is the confusion between this priest's association with God and the very bad acts that the priest is doing to the child. The confusion that results, along with the demand for no disclosure of what has occurred, is psychologically impactful on the child's mind. Foreign courts have weighed heavily the nature of the abuser's status as representative of God to the child who is being molested.¹³

2:3 TYPICAL POST-EVENT RESULTS

Sexual gratification for the clergy person is the endpoint of the "use" of that young person. Secrecy from the child is a promise, made more serious by the role of the priest as the spiritual arbiter of God's commandments. The event ends, and the child returns home, or to camp or school. Or, a pattern may develop with hundreds of sexual incidents that can span over years. In one extreme example, the Illinois Supreme Court considered the liability of a religious brother who was charged with 900 sexual events.¹⁴ Some victims immediately report the abuse, but most do not. The abuser may subsequently meet with the child and encourage the victim to remain quiet. The young victim's shame about the sexual nature of the act, confusion on the part of the victim about the attention and caring of the abuser, and other psychological factors that suppress the willingness to report the offense, all result in a strong deterrent effect against disclosure.

This book is not a medical or psychological treatment of the fallout from sexual contact, but we have listed many sources in the bibliography. We can generalize that secrecy, shame, and embarrassment play some role in the years of delay, as the child avoids pain by declining to make any disclosure of the abuse.

Gradually, manifestations of mistrust of authority and alienation by the young person become noticeable—he or she becomes withdrawn, secretive, frustrated—as the pattern of abuse continues. In many of the reported cases, physical changes will accompany the deepening depression or anxiety. Distancing the young person from the clergy member by means of family-related transfers or moves may occur, and this can inadvertently end the sexual opportunity for the priest. These location changes, such as the end of a summer camp season, typically end the sexual relationship, but the promise of secrecy drawn from the child by the priest can continue. The clergy person grows apart, perhaps to initiate a series of other relationships with other victims. Serial pedophile behavior could continue in this manner for years.

13. Hoyano, *supra*.

14. Clay v. Kuhl, 727 N.E.2d 217 (Ill. 2000).

Chapter 5 discusses the delay in victim reporting. Delayed reporting of past sexual abuse events may occur years or decades later, when events with certain mental triggers reduce the repressed shame and bring up discussion of the subject, including news media publicity about the similar offenses that are exposed nationally, or the arrest of the abusing priest amid revelations of similar offenses. The news accounts of clergy sexual abuse in the 1980s and 1990s prompted many past victims to break their silence. These inducements were highlighted by public notices in eight cities that the local Catholic diocese has declared bankruptcy and any claim must be made by a particular date, or be time-barred. Many different sets of incentives for belated reporting will affect the different situations of the abuse victims.

At a later point in time, the young person may disclose to adults that he or she was violated and feels affected by this past sexual event or pattern. The friend or counselor to whom this contact is disclosed then brings this to the attention of another adult, such as the child's parent or guardian. Some emotional response is to be expected; often this manifests itself as anger and distrust of the abusive relationship that has just been revealed.

In rare cases, there can be a violent response against the abuser that makes headlines and exposes the abuse.¹⁵ If the victim is now an adult, the long-suppressed event can be revealed to a family member or counselor.

Prior to about 1985, when publicity about the serial pedophile priest Gilbert Gauthier in Louisiana exposed the situation, claims of abuse by a priest would have been discounted immediately by most of the Catholic adults who interacted with the child.¹⁶ "It's your imagination, Father Ed is our friend, you must be making this up to get more attention!" The belated discovery by parents that the child had actually been abused is a shock. The realization can have a traumatic effect on the family group, especially if there had been a very religious household that welcomed the personal attention from the priest for their son. For the parents of boys, this attention by a priest for their son was often seen as promoting a religious vocation to the priesthood, and this twist on expectations by the predator priest made the abuse of trust seem even more egregious.

2:4 INITIAL REPORTS

Events such as these sexual contacts with a priest appear to carry a shame and trauma that can remain secret for years. A few cases involving intensely physical intercourse have been reported immediately as a cry for help, but the majority are not revealed readily. So the timing of the exposure of sexual assault is delayed; if it is revealed, an external event draws it out as a past recollection. For example, when the national publicity was at its most intense in 2002, more than 3,300 reports of past sexual abuse were received by dioceses, far more than in years before or after.¹⁷

15. "Judge Orders Trial for Alleged Priest Attacker," Associated Press (Feb. 10, 2011).

16. *Eller v. Diocese of St. Cloud*, 2006 Westlaw 163526 (Minn. App. 2006). (Child was slapped for lying about the good priest).

17. John Jay College Report, *supra*, 75.

2:5 RESPONSES BY DIOCESES

At some point, the past act of abuse is reported to the diocese, or the superior of the religious order. The diocese will issue some response, hopefully in a beneficial and positive way to deal with the concerns of the person making the report. After 2002, national standards existed for how dioceses should respond to such disclosures, but not all dioceses followed them. Delay and hostility toward victims drove some dioceses' responses, while others were just not listening well. Damage control and "no immediate comment" would not counteract the community rumors when a priest was suddenly moved out of his parish. When cardinals' and bishops' internal documents have been disclosed in later lawsuits, the public following the story in the news media has been appalled by some of the Episcopal attitudes that appear so dismissive or so very defensive of the accused priests.¹⁸

Experts have observed that the past handling of sexual abuse allegations was "at best remarkably naïve."¹⁹ Disclosure of the allegation of clergy sexual abuse to the diocese was, at a time before the mid-1980s, a shocking surprise. In the typical pre-1980s' instance: "The offending priest was remonstrated, sometimes given time to make a retreat (repent), and usually transferred to a different parish or parochial assignment."²⁰ In 2011, the head of the U.S. Conference of Catholic Bishops told the press: "We remain especially firm in our commitment to remove permanently from public ministry any priest who committed such an intolerable offense."²¹ Today a one-strike-you're-out policy is on the books nationally as part of the Essential Norms, or Dallas norms, adopted in 2002 by the U.S. Conference of Catholic Bishops,²² but it is not always followed in local dioceses. By the end of 2004, this Zero-Tolerance policy led to the removal of more than 700 priests from the ministry.²³

Sexual abuse allegations were handled very differently in the years before the 2002 Dallas norms. Back then, it was more likely that the allegations would be treated with skepticism, and as a matter of intra-diocese "fraternal correction." After being told the news of a child's complaint, the accused priest would have been likely to issue an immediate denial of the sexual contact. Inquiries would avoid scandal by avoiding notification to police and other outside investigators. The bishop would be notified by diocesan staff, and as whenever abuse is reported, the vicar for clergy and the bishop would discuss their options. A scholar commented that the bishops of that era "demonstrated excessive generosity or credulity in

18. See e.g., Manya Brachear Pashman, "Papers Detail Decades of Sex Abuse by Priests," *Chi. Trib.* A1 (Jan. 22, 2014) (former Cardinal Cody wrote in a 1970 letter to an accused priest, which was disclosed in 2014: "I feel that this whole matter should be forgotten by you as it has been forgotten by me.... No good can come of trying to prove or disprove the allegations, and I think that you will understand this.").

19. Philip Jenkins, *Pedophiles & Priests: Anatomy of a Contemporary Crisis* 91 (1996).

20. A.W. Richard Sipe, *Sex, Priests and Power: Anatomy of a Crisis* 41 (1995).

21. Maryclaire Dale, "US Bishops Renew Vow to Oust Predator Priests," *Associated Press* (Mar. 24, 2011).

22. U.S. Conference of Catholic Bishops, *supra*.

23. Frawley O'Dea, *supra*, 139.

permitting an individual to reoffend repeatedly before taking decisive action.”²⁴ The Chicago documents revealed in 2014 the letter of Cardinal Cody in 1970 that expressed a desire for no inquiries to be made: “No good can come of trying to prove or disprove the allegations, and I think that you will understand this.”

Prior to the adoption of the Dallas norms²⁵ in 2002, the bishop could choose to send the alleged offender to a retreat or for psychological rehabilitation or other forms of separation from the parish in which the abuse allegation had occurred. The 2011 John Jay College report found that: “Bishops who held positions through the early 1990s pointed to the actions they had attempted but that did not succeed as causes of the 2002 crisis; such attempted actions included ineffective psychological treatment, inadequate processes to help priests leave the priesthood, and complex canon law processes for suspension.”²⁶

Times have certainly changed the way dioceses react. In most dioceses today, an accusation of sexual misconduct against a priest brings immediate investigation and a rapid suspension from the parish ministry until a definitive answer is found to the allegations. The diocese’s risk management staff and lawyer(s) are notified. The case would then be referred to the members of the diocesan review board. Any case that the board deems to be a credible allegation²⁷ will result in suspension of the priest pending further investigation.

Once a report, such as an abuse victim’s lawyer’s “demand letter” has been received, the internal response by dioceses has changed even with regards to the accused priest. We speculate that for many years, individuals who alleged that a priest’s inappropriate or illegal physical contact was undesired would have complained to the diocesan hierarchy of the church in writing or in person. Many of these informal reports were true, and many of the true reports were of criminal acts under canon law and state law. The person lodging the report would be told that the bishop would take care that the abuse would not occur again. The pre-2002 response employed remedies toward the priest such as reconciliation, admonition, and “fraternal correction” to deal with the incoming allegations. Some allegations resulted in admissions of guilt. Others were disputed in part, or categorically denied. The long-standing tradition of handling such conflicts internally within the Church’s disciplinary process was flexible, whether or not it was successful in dealing with these sexual touching events. Increasingly, during the 1960s and 1970s, priests with known issues or problems (often left out of the records of the time) were sent to specific treatment centers in an attempt to fix the problem. (This pattern will be discussed in a later chapter.)

Today, these events would be called “credible allegations” and the suspension of the priest would result. A credible allegation is not a finding of guilt, but the conclusion of an initial review that shows the accusation “at least seems true.”²⁸ The

24. Jenkins, *supra*, 91.

25. U.S. Conference of Catholic Bishops, *supra*.

26. John Jay College Report, *supra*, 76.

27. Zoe Ryan, “Pinning Down a Vague Term,” *Nat’l Cath. Rptr.* (Apr. 29, 2011), 10.

28. *Id.*

effects of the finding about an allegation will be devastating to the priest, who loses his position, his home in the parish rectory, his local reputation, and his ability to expect other assignments. A prudent bishop has established a process to allow the priest who is under investigation to “respond to false allegations so that good priests inaccurately accused would not feel abandoned or forced into an isolated corner.”²⁹ From 1993 to 2006, “over two dozen clergy suicides have been linked to the sexual abuse of minors.”³⁰

2:6 CONTRASTING EXTERNAL LEGAL AND INTERNAL CHURCH REMEDIES

The internal remedies available to the Church stopped cold when the criminal and civil law remedy processes commenced. Lawyers for dioceses counseled that records created for internal Church discipline, if there was any discipline, would have to be turned over to prosecutors and plaintiffs and could disclose damaging information. Improper physical contact between a priest and a young person is wrong in many dimensions, but many dioceses failed to provide the merciful and apologetic behavior that one might expect to be the response of Christians to a wounded child. Once the diocese engaged outside lawyers for the defense of high-stakes litigation, the possibilities for internal remedies and healing were shelved. As the 2004 National Review Board advised the U.S. bishops, “many dioceses and orders made disastrous pastoral decisions relying on attorneys who failed to adapt their tactics to account for the unique role and responsibilities of the Church.”³¹

There are three human interactions to be considered with internal remedies: priest-victim, victim-bishop, and bishop-priest. Of these, the victim-bishop interaction seemed to have been the least pastoral, the least merciful, the most troublesome, and the most provocative of hostility, when viewed in hindsight.

To the classic Catholic view, when harm is done to a child by an adult, the ideal response toward the victim is pastoral—not a lengthy lawsuit, but a faith-filled process of counseling, forgiveness, and positive healing. Therapeutic, pastoral, healing interactions are very desirable when a grave breach of faith has occurred.³² Redemptive healing from the consequences of sinful behavior begins with reconciliation and apology, and then through counseling and the sharing of views progresses to a healthier accommodation and forgiveness. “Fraternal correction” is one of the terms used in Catholic traditions for chastising a sinner; all religions have

29. Frawley O’Dea, *supra*, 142.

30. *Id.* at 140.

31. National Review Board for the Protection of Children and Young People, A Report on the Crisis in the Catholic Church in the United States, United States Conference of Catholic Bishops (Feb. 27, 2004), 120, on Web at <http://old.usccb.org/nrb/nrbstudy/nrbreport.htm>.

32. Several texts in our bibliography deal explicitly with these issues.

some form of mutual healing through discussion and shared forgiveness. But the legal system interrupts mutuality because it is adversarial by nature; the “healing” is only in the form of a cash payment in belated compensation.

Also to be considered is the relationship of the bishop with “his” priest, as the bishop is both father and brother to his priests. While the bishop could use “fraternal correction” with his brother priest, the bishop also must assure that natural justice is served and harm is remedied. By following proper procedure, the bishop is to assure that bad behavior is punished with penalties that both punish and attempt to reform the errant priest. The bishop should not put the priest in a situation that tempts him to reoffend, once there has been a credible allegation made by or for a child. And the bishop has an important responsibility to all the members of the diocese, not only to the priests. Although these are classic means of achieving mercy and justice for the Church, bishops often closed the door on the possibility of Christian interactions that would have brought mercy and mutuality. The Chicago documents released in 2014 showed one cardinal’s insistence that no inquiry would be made of sexual abuse allegations, and that priest continued to be accused in later years of similar abuse patterns.³³

The Vatican’s letter to Irish bishops in 1997 told them not to adopt a policy of reporting child sexual abuse to the police.³⁴ For both “moral and canonical” reasons, the Congregation for the Clergy announced that all accusations must flow through internal channels of the Church. “Bishops who disobeyed, the letter said, may face repercussions when their abuse cases were heard in Rome. ‘The results could be highly embarrassing and detrimental to those same Diocesan authorities.’” The Vatican subsequently shifted responsibility for abuse cases away from the author of that letter to another office, so in 2011 Vatican officials downplayed the significance of that 1997 letter. But the damage has been done: the appearance of a cover-up has deepened, and the beneficial opportunities for reconciliation were wasted.

Insiders who worked within the system have expressed great frustration: “The exposure of a myriad of cases in Boston and Los Angeles (more than five hundred) refines and demonstrates the extent to which the church bypasses and ignores its own guidelines, directives, law and wisdom.”³⁵ The result of the bishops’ actions was to leave the criminal law and civil law systems of harsh remedies as the only options for the victim of clergy sexual abuse, and his or her family. These remedies are adversarial by nature, with the predominant form of “healing” in civil cases a cash payment as compensation. The relations between the American bishops and the victims of clergy sexual abuse are going to be studied on other continents, in other religious denominations, and in future decades, as examples of how a faith community should not have responded.

33. Pashman, *supra*.

34. Laurie Goodstein, “Vatican Letter Warned Bishops on Abuse Policy,” *N.Y. Times* (Jan. 18, 2011).

35. Thomas Doyle, A.W.R. Sipe & Patrick Wall, *Sex, Priests & Secret Codes* 202 (2006).

2:7 NEWS MEDIA

Although journalists did not create the clergy sexual abuse scandal, they did uncover its nuances and broadcast them unmercifully, to the harm of the American bishops. The story often begins very locally. The sudden removal and suspension of a local priest triggers wide discussion in the parish community: Why did Father suddenly leave us? Rumors of the alleged abuse may reach the local news media from various sources, after the priest is removed from a parish or school assignment and local rumors begin to unwind. Before the 2002 Dallas norms were adopted, and in some cases thereafter, the diocese would have historically gone into damage control mode with “no immediate comment.”

The reporters then expand upon the few details of the current local story with background, perhaps including reports of other cases within the diocese (there often had been stories and rumors floating around about this priest), and cases of similar abuse in nearby dioceses and on the national level. Sex, money, court cases, power, hypocritical statements on morality by immoral priests, etc. are recurrent themes in the reporting of the clergy sexual abuse scandal. Attorneys seeking damages for victims have enabled remarkable insights into the actual words used by cardinals and bishops as the sex abuse reports were received but then discounted or disregarded.³⁶

The diocese would respond that it has no comment “in order to protect the privacy rights of all parties.” Reporters covering the criminal indictments of priests and an administrator in Philadelphia described Catholic parishioners’ attitudes as discouraged and “caught in a wave of anxiety” that “sent the church reeling in the latest and one of the most damning episodes in the American church” in decades.³⁷ One Philadelphia victim said there are families who “don’t know monsters live among them” because the archdiocese had “shielded the pedophiles.”³⁸

Step back from the harsh rhetoric and ask: What institution would wish for such a public image, when it must depend on that community’s families to voluntarily send in the next generation of priests and voluntarily fill the next week’s collection basket? There are lessons to be learned here.

2:8 SIGNIFICANCE OF PRIOR ABUSE ALLEGATIONS

Lawyers would spot what others would not: any proof of diocesan knowledge of prior sexual abuse will empower the plaintiff to sue the diocese independently of suits against the priest. For example: the diocese that had known of Father Doe’s unusual ways of showing affection for young altar boys in the rectory could be sued for the negligent assignment of Doe to the post that led him to molest this young

36. Pashman, *supra*.

37. Katharine Q. Seelye, “In Philadelphia, New Cases Loom in Priest Scandal,” *N.Y. Times* (Mar. 4, 2011).

38. “3rd Suit Filed against Philly Archdiocese Heads,” *Associated Press* (Mar. 16, 2011).

plaintiff. For a plaintiff's lawyer representing the abused child, this knowing act of negligence in assignments, made by the diocese, offers a cause of action that is much easier to prove than the claim of employer accountability for the priest's misconduct.

Reports of several past suppressed cases against the priest may be rumored to exist. Reporters will unsuccessfully ask the diocese for the personnel record of the accused priest. These requests are denied because canon law recognizes the right of the priest to privacy and the protection of his reputation. Later, in pretrial discovery of a civil case, the records may be revealed when they are officially found in the diocesan files or when the reports about cases are turned over to the plaintiff. Some cases of past allegations are received from various sources, and these are pursued by the attorneys retained by the aggrieved family.

Some of the past cases had been allegedly denied, suppressed, or settled by past diocesan administrators, resulting in suppression of the case and no action taken. Mishandling may have occurred through coercion to drop the complaint or by a small payment with a confidentiality promise in the settlement. Silencing the critic in the short term often rebounds in the longer term against the diocesan official who had insisted that the abuse be kept secret in return for the payment.

2:9 FOLLOW-UP MEDIA COVERAGE

Viewers and readers of the news media have short memories. So the follow-up story is a frequently utilized device during the many months that no action is being taken on pending criminal charges or civil lawsuits. The form of that follow-up may often take the "local angle." A diocesan bishop or administrators' recent actions handling alleged abuse cases, after the public dissemination of the Church's 2002 "Dallas norms," are more closely scrutinized in comparison to those national criteria. The diocese may be forced to respond to a wave of media inquiries: Why isn't the bishop acting like Cardinal X did in his archdiocese? Why isn't the bishop doing what the Vatican press release says will be done? Some non-actions by the local church leaders are found deficient by news media, with heavy comparison to other dioceses' responses toward similar allegations. This is especially devastating if the accused priest came from another diocese, where inquiries turn up other charges against that same priest. It is also a more serious problem when a number of similar abuse claims against the same priest arose after his transfer to a new venue.

2:10 RESPONSE BY LOCAL LAW ENFORCEMENT

In a small minority of abuse cases, local police are notified soon after the event, or immediately if a forcible rape has occurred, and the police will usually open a preliminary inquiry with interviews of the victim. Police and prosecutors had historically avoided charging priests with sex crimes unless the proof was overwhelming,

but that is no longer the case. After an inquiry and an interview with the accused priest, who typically denies the charge and casts aspersions on the credibility of the alleged victim, the prosecutor makes a choice. Many past reports were filed away as unsubstantiated, and prosecutors would:

- (1) decline to prosecute the case on basis of inadequate proof;
- (2) decline because the delay in reporting exceeded the state statute of limitations (delay between action and report), as had been argued by the lawyers for the diocese; or
- (3) arrest the priest on the basis of the victim's credible allegation.

If option (3) occurs, the allegation hits the news media before diocesan involvement in many cases. Cameras may show the monsignor outside the jail in handcuffs, or the local priest "doing the perp walk" into the courthouse for arraignment. The bishop is then asked for comment on the sexual abuse and is stuck in a lose/lose position with the news media speculating about "who knew what and when."

Reporters and police officers have a symbiotic relationship, as each shares intriguing information with the other. Priest arrests are rare and newsworthy events. The Church's delay in going to police in a particular case was typical; a priest who shot gay pornographic videos in his rectory with local boys was not reported to police for three months after the diocese acquired the video collection.³⁹

Prosecutors' decisions in the past to shield the Church from harmful publicity are unlikely to remain secret today, as individual investigators recognize the news value of these abuse incidents.⁴⁰ As a scholar noted, the mid-1980s' change of direction was significant; "traditional qualms about embarrassing church authorities were increasingly questionable, and restraint that once seemed politically wise would now be legally dangerous."⁴¹ It is probable that files about a now-"closed" inquiry, that relates to an abuse that had been too old to prosecute under state statutes of limitations, will "leak" to the press, condemning the accused priest and waving a red flag of negligence about the diocese to which that priest had voluntarily moved.

News about a priest who sought a voluntary transfer or reassignment, and then offended again, is particularly interesting to plaintiffs' counsel for victims in that later assignment. The negligence of the sending and receiving dioceses concerning this priest's character flaws or crimes will embolden the plaintiff's attorneys. A cluster of allegations about a priest who had been the alleged abuser of multiple children can result in a class action lawsuit or a series of coordinated trials by related groups of plaintiffs' counsel. The same number of sexual assaults in multiple dioceses aids the plaintiff's counsel in negotiating one diocese's defense team against another.

39. Jenkins, *supra*, 45.

40. *Id.*

41. *Id.* at 46.

2:11 DIOCESAN REVIEW BOARDS

The 2002 Essential Norms adopted for U.S. dioceses included the use of a review board to examine the available information and to make recommendations to the bishop, after the board had reviewed the records of that priest and of the alleged abuse. Members should have the professional backgrounds that enable them to make useful recommendations to the bishop. However, the board “is only as good as the cases a bishop puts before them,” as an eminent Catholic legal scholar observed in 2011.⁴² In several cases, diocesan boards were not given the full information or not told at all about reports about a problem priest. These omissions were not very well received by members of the involved boards, prompting some to resign as a result.⁴³ When a priest allegedly touched the genitals of a young man through his underwear, and the claim was made decades later, a New Jersey church review board drew criticism when that board dismissed the claim as not meeting the definition of sexual abuse, although the touching was “inappropriate.”⁴⁴

2:12 COSTS OF INVESTIGATING AND DEFENDING OLDER ABUSE CLAIMS

For a large institution of its size and scope, the Roman Catholic Church employs relatively few trained security officials. The cost to the Church to bring in outside contractors to investigate and defend old, “stale claims” of clergy abuse are significant. In a hypothetical example of a typical case, a credible report of elementary school students’ sexual contact with a parish priest during the period 1966–1974 is received in 2011 from an adult among that group of victims, who demands compensation for psychological counseling to deal with the past traumatic events. Proof must be assembled to show that this accused priest had the capability and location assignment that makes the charge sound plausible. The priest may be dead, retired, or unwilling to be interviewed about the allegations. To reconstruct the 1966 parish school attendance list or the list of children going to sleep-away camp in 1973 may be nearly impossible.

The diocesan attorney will engage the services of an investigator. The results can be withheld from public disclosure under attorney “work product” privileges, because the investigator’s findings were requested by the lawyer who is defending the diocese. Of course, withholding for pretrial advantages has the indirect consequence of stoking resentment of “just another church cover-up of scandals.” When claims are paid in pretrial settlement, secrecy pledges are often used to prevent the

42. Joshua McElwee, “What’s a Review Board to Do?”, *Nat’l Cath. Rptr.* (June 10, 2011), 7.

43. *Id.*

44. Alan Cooperman, “Catholics Question Gray Areas of Abuse; Critics Say Some Priests’ Misconduct Goes Unpunished under New Guidelines,” *Wash. Post* (Nov. 30, 2002), A2.

victim from talking with others about the facts of the settlement. These have been widely criticized as indicative of a desire for a cover-up.

The settlement of claims poses an additional quandary. Too loose an acceptance of claims is seen as making the diocese an easy mark for demands for payment, while too tight a level of scrutiny of long-past events may sound like a cover-up and will lead to a lengthy trial. Refusing to settle may not be the best option for a diocese, even if it has some doubts about the belated reports, as news media have criticized dioceses for dismissing reports of sexual abuse because of time discrepancies in recall of those long-past events.

2:13 FISCAL EFFECTS ON LIABILITIES OF THE DIOCESE

Abuse case revelations may be the worst possible combination of factors for a diocese to face: an increase of large contingent liabilities, to be litigated without insurance, while receipts from donors are down and costs of investigation of older cases increase substantially. Chapter 16 covers these issues in more detail. The additional workload and payouts will strain the diocesan reserves, and in some cases, the size of the contingent liability exceeds the ability to pay even with all reserves and all current cash on hand. Facing these costs and liabilities, the decision regarding the sale of properties or the filing of bankruptcy may be intense.

2:14 FINANCIAL IMPACTS ON INCOME FOR THE DIOCESE

There is no clear comprehensive data available on the charitable gifts to dioceses, outside the confidentiality of the diocesan offices and the tax deduction monitoring by the IRS. If that data were available, it would likely reveal trends with selected dioceses showing a reduction in donations. These trends may roughly correlate to an index of trustworthiness or respect for the diocese that receives the funds. One might also look to the trends of actual Mass attendance, which is counted every October in every parish. A diocese that handles sexual abuse claims poorly may suffer, as compared to other dioceses with no similar problems. Chapter 16 addresses these issues in detail.

In the absence of definitive data either way, it is reasonable to accept the claims of other reviewers who speculate that clergy sexual abuse charges and a news media claim of a bishop's cover-up of "rogue priests" will lead to a reduction in the free-will charitable donations taken in by the diocese from Catholic donors. One donor may want to punish the Church as an institution. Another may insist on better diocesan disclosures of the actual facts as a prerequisite to stronger support. Donors who read about the controversy may begin to show wariness regarding contributions to the good works of the diocesan offices, aware that their gifts may be diverted from strictly charitable endeavors to the payments of settlements or other clean-up of prior problems. Europeans have a much more specific barometer of donor intent regarding church sexual abuse. As some European nations allow citizens to

designate their church to receive a share of government aid, the scandals over clergy sexual abuse have led a certain percentage of taxpayers to remove their designation of the Roman Catholic Church as the recipient of the per-capita government payments. If a person resigns from the Church, by filling out a government form, the Church will receive less money. The U.S. Constitution prevents the government from “establishing” a particular religion, but in these European venues, we can more directly discern that the Church will be economically harmed by the resignations.

2:15 INSURER RESPONSES

Insurers who wrote liability coverage for the Church are inevitably asked to pay the costs of defense and settlements in these cases. But many carriers will deny coverage (1) post-1987 under the ISO’s “abuse or molestation” exclusion discussed in Chapter 7, or (2) pre-1987 as outside the scope of coverage of agent/employee actions (intentional rogue acts contrary to employer norms are usually not covered). Chapters 7 and 16 discusses fiscal and insurance issues in further detail.

2:16 LIABILITIES VERSUS ASSETS

To those outside, the Roman Catholic Church appears to have fabulous wealth. To those on the inside, including the author who once chaired an archdiocesan pastoral council, the facade of wealth is a misperception, and the diocese does not usually have pockets as deep as a plaintiff’s trial lawyer would anticipate. The assets of a diocese (including cash reserves, funds, surplus land, and saleable buildings) may be inadequate to cover the size of the contingent liabilities. As we have dug into the literature about the Church’s response to these issues, we were perplexed by the very unusual accounting used in some dioceses. Some properties are valuable, yet some could not draw a worthwhile bid when put up for sale. Civil plaintiffs will certainly need the services of a skilled forensic accountant to discern the funds available within a diocese that claims it cannot afford to pay the settlement demanded or the verdict that is sought.

2:17 VULNERABILITY OF THE FUNDS OF PARISHES

In the majority of states, Catholic dioceses own parishes, schools, and other property as a “corporation sole” in which the bishop is the sole shareholder and hence the sole decision-maker. Parish fund accounts that appear to be held in an informal trust for purposes of that parish can be deemed part of the diocesan funds. Excellent studies on this issue provide great depth in this complex field.⁴⁵

45. Nicholas Cafardi, “The Availability of Parish Assets for Diocesan Debts,” 29 *Seton Hall Legis. J.* 361 (2005); Comment, “Separation of Church and Estate: On Excluding Parish Assets from the Bankruptcy Estate of a Diocese Organized as a Corporation Sole,” 55 *Cath. U. L. Rev.* 583 (2006).

Because the parish assets or reserves are, in many dioceses, comingled with other diocesan accounts, they could be seized by a future bankruptcy trustee if the diocese declares bankruptcy. Shifting assets within a period of time before bankruptcy filings occur can be negated as fraudulent transfers; federal prosecutors dislike such shifts from the bankrupt estate when notified by creditors of the diocese that money has been hidden. Donors to the parish's weekly collection basket would be startled to know that their funds are taken away to settle sexual abuse claims in a distant part of the diocese. Donors might react by halting donations to the parish, which worsens the situation.

2:18 CONSIDERATIONS OF BANKRUPTCY

Bankruptcy has been filed by nine dioceses, and the effects have been harsh. The court orders the trustee to solicit all claimants to file their financial compensation claims. The trustee receives notice of past abuse claims, including the date(s) and the priests who are accused. The discovery of internal records may be much more intrusive than the bishop of the bankrupt diocese would prefer. Chapter 9 addresses these vulnerabilities of the diocese.

If a claim of past sexual abuse by clergy is not made within the time set by the bankruptcy court order, the claim may be precluded from any recovery. Chapter 9 discusses bankruptcy issues in further detail.

The trustee of the estate of the diocese will work with accountants to determine a plan for the liquidation of diocesan and parish reserve funds and for the sale of land and assets that may be required. Layoffs and the closure of some ministries may occur.

Even if we assume that a bankruptcy moves ahead smoothly on paper, the news media will jump on the shortcomings of the payment schedule that the trustee of the diocese has announced. The victims and their lawyers are bound to react that the diocese is "backing out of their responsibilities," hiding more documents, seeking to deny large verdicts to plaintiffs, etc.

2:19 LEGISLATORS' ROLES ON LIMITATIONS PERIODS

Criminal and civil laws often include a period of years during which the particular case can be brought in the courts. These statutes of limitations are intended for the more reliable and clear preservation of accurate memories by witnesses concerning facts and events that occurred in the past. When viewed in a more hostile light, however, a defendant's use of these time limits as a defense can appear to be a tool to shield those who raped or molested children as the accused can be protected from legal accountability as a result of the intended suppression of a child's report of abuse. Upset by news of church administrators' apparent suppression or mishandling of some older allegations, some state lawmakers have pushed for legislation to reopen the limitations period for certain crimes.

This state-by-state effort of plaintiffs and abuse survivor groups to create a look-back or “window” for older “suppressed” claims is debated, as well as opposed by lobbyists for the Church,⁴⁶ but may be passed into state legislation. These lobbying efforts result in attendant publicity, bringing in more claims of past abuse as news media in the state examines the multiple stories. In rare cases, the publicity may draw out the details of a predator who manipulated children into silence, leaving a case that can’t be pursued because of the limitation period. This creates outraged complaints from news media and the voters, and outrage brings votes for changes in the statutes. For a more in-depth discussion of the issues surrounding statutes of limitation, see Chapter 5.

2:20 REMOVAL OF THE ACCUSED ABUSER PRIEST

The internal Church disciplinary process is discussed in Chapter 25. The process to “laicize” a priest is complex, so the decision to initiate the removal of the offender from his ministry is not made rapidly. Charges of sexual abuse may or may not remove an abuser from his status as a priest. If the case goes public, the priest is very likely to be removed from any ministry assignment related to children. As the removal of priestly status is a lengthy process, by the time these decisions are finalized, some of the accused may be dead or retired. The egregious offenders are likely to have been already laicized, even over their refusal to consent. The only priests left hanging in limbo with the Church are ones whose case has not been proven, or where there is some question about the veracity of the allegations. One way or another, given the current climate, it is unlikely that accused priest will ever function as a priest again, even if he is exonerated.

46. Patrick Schiltz, “The Future of Sexual Abuse Litigation,” *America Magazine* (July 7, 2003), 8.