

“IN GOD WE TRUST”

A Legal History of the Emergence, Development and Influence of the Sexual Abuse Scandal within America’s Catholic Clergy

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ABSTRACT

The position of the Catholic Church within American civic culture has been irreparably altered by the emergence of widespread allegations of sexual abuse by Church officials between 1960 and 2005. This thesis examines the role of the law in the development of this scandal: how the legal position of the Church contributed to its creation, how civil litigation produced its exposure and how the secular legal system answered its demand for legal reform. In doing so, it will argue that, contrary to traditional legal assumptions, private lawsuits were the defining influence on the public crisis that confronted the Church. The allegations of abuse and their expression through this litigation debunked the regulatory autonomy of the Church and thereby caused a powerful rupture in the historical relationship of Church and State.

A NOTE ON SOURCES

This thesis examines the issue of clergy sexual abuse by studying documents presented as evidence in legal proceedings throughout the 1990s and 2000s. Although these sources only became publicly available through these lawsuits, most of the documents themselves are dated between 1960 and 1980.

The documentary evidence of legal proceedings is available as part of the physical court record and documentary archive. However, the majority of the sources utilized in this study have also been digitized. The digital copies of these documents have been uploaded for public interest either by media groups, such as the *Boston Globe* and *Commercial Appeal*, or by advocacy organizations, such as *Bishop Accountability* and *Catholica*.

As such, both the legal and internet citation for these sources has been provided.

‘You are the light of the World.

A city that is set on a hill cannot be hid’.

Matthew, 5:14¹

¹ *The Holy Bible*, King James trans., (San Diego: Thunder Bay Press, 2000) p. 649

INTRODUCTION

In July 1983, Willie Williams beat and stabbed Charles Dean for having allegedly raped his ten-year-old daughter. Community donors paid for Mr. Williams' bail and a City Councilman bankrolled his defence. The Mayor of Buffalo, New York, where the attack occurred, released a statement in support of the defendant: 'if a guy raped my daughter, he would have got the same thing from me'.² Decades later, the subject of this community retaliation and endorsed retribution is the Catholic Church. The sexual abuse scandal within the Catholic clergy consumes the pages of America's largest newspapers with stories emerging virtually every day.³ It occupies the legal system with lawsuits costing each of the 195 American Catholic Dioceses an average of \$300,000 annually.⁴ It is perhaps 'the greatest scandal in the history of religion in America'.⁵ Yet at the time of Willie William's extolled vigilantism, concern for misconduct within the Catholic Church could not have been more absent from public discourse.

² Michael Winerips, 'Rape Case: Vengeance and Furur' *New York Times*, 1 August 1983, p. B1-2.

³ For example, the *New York Times* ran 230 articles referring to 'Catholic clergy abuse' in 1998, 820 articles in 2002 and 260 articles in 2005.

⁴ United Conference of Catholic Bishops, *2006 Report: Findings and Recommendations* (Washington: United States Conference of Catholic Bishops, 2007) p. 16.

⁵ Andrew M. Greeley, 'Foreword' in Jason Berry, *Lead Us Not Into Temptation: Catholic Priests and the Sexual Abuse of Children* (Urbana & Chicago: University of Illinois Press, 2000), p. xx.

As a culturally visible issue, clergy sexual abuse did not exist prior to 1985.⁶ Legal doctrines separating the Church and State had engendered trust in and respect for the Church's internal means of self-management. The result of this was a reluctance to examine and a refusal to override the Church's decisions on priestly appointments and discipline.⁷ Consequently and even in spite of the punitive impulse that animated community responses to sex offenders elsewhere, less than six percent of priests with credible abuse allegations against them were subject to criminal punishment.⁸ Acceptance of the Church's legal autonomy debilitated secular legal intervention and obscured the usual public vigilance in punishing those responsible for child abuse.⁹ The phenomenon that altered the course of this history was the onslaught of civil lawsuits initiated by victims, beginning notably in 1985. The scandal of clergy abuse that emerged from this litigation and the media coverage thereof irreparably changed the social and legal status of the Catholic Church. Victim lawsuits transformed a string of allegations into a crisis impeaching the moral legitimacy of the whole institution of Catholicism. Accusations of institutionalised abuse and negligence

⁶ Philip Jenkins, 'Creating a Culture of Clergy Deviance' in Anson Schupe, ed., *Wolves Within the Fold: Religious Leadership and Abuses of Power* (New Brunswick: Rutgers University Press, 1998) p. 119.

⁷ *Gonzalez v Roman Catholic Archbishop of Manila* 280 U.S. 1 (1929) Opinion of the Court, United States Supreme Court, p. 16.

⁸ John Jay College of Criminal Justice Research Team, *The Nature and Scope of Sexual Abuse of Minors By Catholic Priests and Deacons in the United States 1950-2002* (Washington: United States Conference of Catholic Bishops, 2004) p. 61.

⁹ For a discussion of community attitudes to the punishment of sex offenders generally see: Michael Petrunik, 'Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada', *Canadian Journal of Criminology and Criminal Justice*, 45 (2003) pp.43-72; Mick Ryan, 'Engaging with Punitive Attitudes towards Crime and Punishment' in John Pratt et. al., eds., *The New Punitiveness: Trends, Theories, Perspectives* (Devon: William Publishing, 2005) pp. 139-166.

within 188 Diocese challenged both the willingness and the capacity of the secular legal system to hold the once revered institution to account.¹⁰ The scandal both provoked and witnessed the evolution of the State's relationship with the Church from one of polite acquiescence to one of antagonistic and vindictive condemnation. The history of sexual abuse within America's Catholic clergy is therefore a critical juncture in legal history.

This thesis considers the immediate responses to the occurrence of abuse prior to 1985 and the ways in which the public revelation of that abuse changed those responses after that date. The written history of clergy sexual abuse in America is currently, understandably small.¹¹ Yet the issue exists at the nexus of three expansive and well-developed bodies of literature in American history: those relating to the social position of Catholicism, the evolving nature of the Church-State relationship and the role of the law in American society.¹² The study of clergy sexual abuse and the importance of private lawsuits in shaping that scandal revises traditional histories of crime by acknowledging that seemingly disempowered victims can access an alternative justice through civil litigation: for historians of Catholicism, it

¹⁰ John Jay College of Criminal Justice Research Team, *The Nature and Scope of Sexual Abuse*, p. 26.

¹¹ For an early explanation of why, see: Thomas Plante, 'Catholic Priests Who Sexually Abuse Minors: Why Do We Hear So Much Yet Know So Little?', *Pastoral Psychology*, 44, no. 5 (1996) pp. 305-11.

¹² On the history of Catholicism see: Leslie Woodcock Tentler, 'On the Margins: The State of American Catholic History', *American Quarterly*, 45, no. 1 (1993) pp. 104-127; On the history of the Church-State relationship see: John Wilson, *Church and State in America: A Bibliographic Guide – The Civil War to Present Day* (Connecticut: Greenwood Publishing Group, 1987); On the history of litigation and the law see: Thomas Burke, *Lawyers, Lawsuits and Legal Rights: The Battle Over Litigation in America* (Berkeley: University of California, 2004), especially pp. 22-27; Sean Farhand, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (New Jersey: Princeton University Press, 2010), especially pp. 4-5.

demonstrates the theological and philosophical aberrations of Canon Law that limit its acceptability in modern American and: for scholars of American political history, it reveals that private individuals may use litigation as a catch-all means to protest and critique the position of the State and the content of the law. In engaging with each of these fields of study, this thesis hopes to contribute to history's understanding of the behaviour of the law and its ability to respond to the demands of emergent social scandals.

The pluralistic relationship that historically existed between the Church and State in America was 'an attribute of a social field and not of a law or of a legal system.'¹³ The society that once respected religious institutions as integral participants in social organisation has now become fascinated with the scandal of clergy sexual abuse. This much is plainly evident from the universalisation of the narrative of clergy abuse and Church "cover up" in popular culture.¹⁴ Society's response to the abuse allegations may well have been misinformed and disproportionate. Abusive priests represent less than one percent of clergymen within the Church and yet nearly half of Americans characterize clergy sexual abuse as a widespread problem.¹⁵ This thesis will not contest the appropriateness or the proportionately of society's response, as this has

¹³ John Griffiths, 'What is Legal Pluralism?', *Journal of Legal Pluralism and Unofficial Law*, 24 (1986), p. 38.

¹⁴ For example: Andrew Greeley's best-selling novel *Fall From Grace* (New York: Jove Books, 1993) fictionalized the cover-up of abuse within the Diocese of California. Patrick Shanley's screenplay in the movie *Doubt* (2008) examined ambiguous relationships between priests and minors and was nominated for 5 Oscars in 2009.

¹⁵ George Gallup, *The Gallup Poll: Public Opinion 2002* (Wilmington: The Gallup Organisation, 2003) p. 125.

already been questioned in the works of cultural historians.¹⁶ Irrespective of the content of their opinion, society and particularly social crisis are constituent parts of the law. In evolving to meet the demands for accountability within the Church, legal norms existed in a multidirectional relationship with changing social norms.¹⁷ The determined attempts of the secular legal system to punish the misconduct of clergymen authenticate the role of societal opinion as the co-author of the law's operation.

The alternative conception of the law as a codified, 'singular, closed system' lacking the flexibility to accommodate victim experiences has often limited histories of crime generally and specific accounts of clergy sexual abuse.¹⁸ Historical literature has tended to focus on formal legal outcomes, asking 'whether people comply with the laws, whether arrests are made and whether convictions occur'.¹⁹ This approach, when applied to the history of clergy sexual abuse, prioritises accounts of Church impunity and the rarity of criminal punishment, thereby producing a narrative of failed legal interventions. As a result the 'betrayal and abuse inflict[ed] on victims'

¹⁶ For example: Philip Jenkins, *Paedophiles and Priests: Anatomy of a Contemporary Crisis* (New York & London: Oxford University Press, 2001), especially p.169.

¹⁷ The law's relationship to society has been the subject of profound and thorough debate in the schools of American jurisprudence. Legal realists argue that legal decisions are more dependent on the factual demands of each case than on codified or strict legal reasoning. Legal positivists argue that the question of what the law is and what society thinks it should be are separate – legality is therefore demarcated from social morality. A realist approach is preferred here. See generally: Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (London & New York: Oxford University Press, 2007).

¹⁸ Stephen Robertson, 'What's Law Got to do with it? Legal Records and Sexual History', *Journal of the History of Sexuality*, vol. 14, (2005) p. 163.

¹⁹ Ryan Goodman, 'Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics', *California Law Review*, 89 (2001), pp. 650.

and ‘the utter failure... [to] provide succor to the children’ has been the primary focus of much of this literature.²⁰ Among the earliest secondary accounts of the crisis was *Lead Us Not Into Temptation*, compiled by former journalist, Jason Berry. Berry’s main contention is that ‘the rungs of ecclesiastical governance’ allowed the Church to become a ‘safe house for men who had committed sexual crimes’ and ensured they were ‘never criminally prosecuted’.²¹ With these characteristics in mind, some scholars have argued that instances of clergy sexual abuse were inevitable.²² This thesis does not intend to impose or outline culpability within the Church. It is only concerned with the conduct of the Church to the extent that it provoked and created the changes in legal culture that are the central focus of this study. The portrayal of victims as impotent due to the secrecy of the Church and the passivity of law enforcement is only a partial representation of the scandal’s history and the law’s response to it.

Recognizing that the law can be flexible and even capricious when responding to a social crisis expands legal history beyond the study of the law’s textual incarnation and intended operation. This thesis foremost seeks to challenge the assumption that criminal conduct must necessarily be vindicated through the criminal law. In advocating the importance of civil litigation as a response to crime, it will examine the multiple legal access points available to victims. Suing for civil damages as compensation for criminal injury is a relatively modern legal phenomenon but an

²⁰ Thomas Doyle, A.W.R. Sipe & Patrick Wall, *Sex, Priests and Secret Codes: The Catholic Church’s 2000 Year Paper Trial of Sexual Abuse* (Los Angeles: Volt Press, 2006) p. ix.

²¹ Berry, *Lead Us Not Into Temptation*, p xi.

²² Elinor Burkett & Frank Bruni, *A Gospel of Shame: Children, Sexual Abuse and the Catholic Church* (New York: Viking Penguin Books, 1993) p. 49.

extremely significant one. Lawsuits for sexual battery or employer negligence in allowing that battery have functioned as a particularly valuable avenue for victims of sexual assault. The outrage attached to the Catholic Church's conduct and the State's inaction has tended to characterise this litigation as a lesser form of justice for sufferers of clergy abuse. Their lawsuits have been recognised as a device for private financial revenge but have been underestimated in their ability to aggrandize a wider public influence.²³ The discrete process and unique nature of the complaints facilitated by civil litigation empowered victims to amass sufficient legal and public pressure to reverse the orthodoxy on the revered position of the Church within legal structures. These cases suggest that the criminal law does not hold a monopoly on the opportunities to effectively avenge criminal malfeasance.

Although most incidents of clergy abuse occurred between 1960 and 1980, the study of their legal treatment has only recently become possible. Documents, previously classified as confidential for reasons of Church or victim privacy, were released by court order in the 1990s and 2000s following repeated applications by media organizations, like the *Boston Globe* or *Commercial Appeal*, and legal advocacy groups, like *Bishop Accountability*.²⁴ The range of sources to be examined as part of

²³ For a discussion of the extent and seriousness of the financial damages imposed upon the Church see: Allison Walsh Smith, 'Chapter 11 Bankruptcy: A New Battleground in the Ongoing Conflict Between Catholic Diocese and Sex-Abuse Claimants', *North Carolina Law Review* 84 (2005-6) pp. 282-332. For a critique of litigation as a tool of public policy, see: Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (Chicago: Chicago University Press, 1991) p. 12.

²⁴ For example: 'Order Granting Motion to Intervene and Unseal', 28 April 2009 in *John R. Doe (Plaintiff) v. The Catholic Bishop for the Diocese of Memphis, The Dominican Order, Father Juan Carlos Duran et. al (Defendants)*, No. CT 004452-04 (2008) Thirtieth Judicial District of Memphis (hereafter '*Doe (Plaintiff) v Diocese of Memphis et al. (Defendant)*'), available online at: *Commercial*

this body of documents includes: internal correspondence of the Church, letters of complaint by victims, doctors' reports, records of Church Disciplinary Tribunals, depositions taken in civil proceedings, legal statements of complaint and petitions for damages. Prior to the release of these documents, secondary works in this area were usually written by former journalists or legal advisers, who had been personally involved in the proceedings and could therefore rely on their own experiences.²⁵ Beyond their personal involvement, these scholars used media coverage to produce a cultural history of community reactions to the scandal.²⁶ Yet there was a significant disjuncture between the popular understanding and the legal understanding of clergy sexual abuse. This thesis hopes to contribute to the current body of literature by examining the changing use of legal processes and the way this influenced the development and outcome of the scandal. Rather than concluding that the perceived crisis of sexual abuse in the Church was a 'social construction', it will be argued that the public scandal was predominately a legal phenomenon.²⁷

Due to the sheer volume of documents available – 11,000 documents relating to the Archdiocese of Boston alone – the argument proposed by this thesis will be

Appeal <<http://www.commercialappeal.com/church-secrets-records/judge-grants-newspapers-motion-to-lift-seal/>>, created 12 April 2010, viewed 3 March 2011.

²⁵ For an example of a secondary work authored by a former journalist see: Berry, *Lead Us Not Into Temptation*; Investigative Staff Boston Globe, *Betrayal: The Crisis in the Catholic Church* (Boston: Little, Brown and Company, 2002); For an example of an account written by a Canonical lawyer see: Thomas Doyle, et al, *Sex, Priests and Secret Codes: The Catholic Church's 2000 Year Paper Trial of Sexual Abuse* (Los Angeles: Volt Press, 2006).

²⁶ David France, *Our Fathers: The Secret Life of the Catholic Church in an Age of Scandal* (New York: Broadway Books, 2005) p. 599; Berry, *Lead Us Not Into Temptation*, pp. ix, xxii, 47; Boston Globe, *Betrayal*, p. x.

²⁷ Jenkins, *Pedophiles and Priests*, p. 8.

substantiated with specific reference to four cases.²⁸ The first case considered is that of Father Gilbert Gauthé in the Diocese of Lafayette, Louisiana. This was the seminal civil lawsuit in 1984 that alleged negligence against the Church and it was one of the first cases to be displayed on public record.²⁹ The cases of Father Shanley and Reverend Geoghan will then be examined as part of the allegations of negligence lodged against the Archdiocese of Boston in the 1990s, which constituted the most expansive complaint of any diocese and provoked one of the most severe responses.³⁰ Both Shanley and Geoghan had extensively documented histories of abuse but regular involvement in Church ‘treatment’ allowed them to stay in ministry. The final lawsuit to be examined is that of *Doe (Plaintiff) v. The Diocese of Memphis et al. (Defendants)* (2008). This lawsuit involved the release of evidence relating to five repeatedly abusive priests within the Memphis Diocese. The allegations of institutional negligence facilitated public examination of the Church’s personnel files, records and assessments that documented this abuse. By examining the ways in which these four cases developed, it is hoped that the progressive changes in the law’s treatment of abusive clergymen will become clear.

The placement of the “sexual abuse crisis” within a legal narrative requires examination of the competing responses taken by the Church, the secular law and individual victims. The Church, in continuing to assert its ‘supreme and full power of

²⁸ Boston Globe, *Betrayal*, p. ix.

²⁹ Jason Berry, ‘Tragedy of Gilbert Gauthé: Part II’, *Times of Acadiana*, 30 May 1985: Although 27 civil suits named Gauthé as a defendant, the case examined here will be the first of these: *Glenn Gastal et al. v Archbishop Hannan, Roman Catholic Church et. al.* 459 So. 2d 526 (1984) Supreme Court of Louisiana.

³⁰ Jesse Belcher-Timme, ‘Unholy Acts: The Clergy Sex Scandal in Massachusetts and the Legislative Response’, *New England Journal on Criminal and Civil Confinement*, 30 (2004) p. 245.

jurisdiction' over internal discipline, responded to the abuse as a moral failure that required the therapeutic responses of treatment and psychotherapy.³¹ The secular legal system viewed the abuse as a dilemma in Church-State separation, initially choosing to defer to the Church's authority in managing its relationship with the clergy. Within this context, victims of abuse chose to define their injury through civil suits demanding compensation for the sexual battery of individual priests and the institutional negligence of the Church.

Structurally, this thesis will plot the legal management of clergy sexual abuse by each of these actors between 1960 and 2005. The trajectory of this chronology is the transfer of legal power from a once virtually exclusive Church jurisdiction to an ultimately interventionist State oversight of that same Church. Chapter One will examine the once privileged legal position of the Catholic Church. Prior to 1985, Canon Law was viewed by the Church and was respected by secular law enforcement, not as an ancillary source of law, but as a managerial authority that invalidated external interference.³² The legal position of the Church at this time is a significant element of this history considering that the Church functioned as the sole arbiter of sexual abuse before the 1980s. Moreover, the circumstances of Church regulation dictated and influenced the manner in which the criminal law responded or declined to respond to these allegations. Chapter Two will discuss Church-administered treatment programs as a response to clergy misconduct. The use of treatment programs, as opposed to punitive incarceration under the secular law, is a

³¹ 'Canon 218' in Edward Peters, *The 1917 Pio-Benedictine Code of Canon Law: In English Translation* (San Francisco: Ignatius Press, 2001) p. 94.

³² 'Canon 22' in Canon Law Society of Great Britain and Ireland, *The Canon Law: Letter and Spirit* (London: The Canon Law Trust, 1995) p. 21.

manifestation of insurmountable philosophical difference between the Church and State on issues of forgiveness and retribution. In light of these divergent approaches, it becomes even more striking that respect for the Church on these matters was maintained for so long. Chapters One and Two will therefore examine the Church's role and influence in the management of allegations prior to 1985.

In a socio-legal framework that was characterized by the separation of Church and State, victims of clergy sexual abuse began to agitate for their interaction. Chapters Three and Four will outline the difficulties the secular legal system encountered in addressing the scandal within the Church and the often unconventional manner in which the allegations came to be accommodated. Civil litigation emerged as the primary mechanism for victims to pursue their claims against the Church. Recourse to private lawsuits will be understood both as a product of the failure of the Church and State to act against abusive clergymen prior to the 1980s and as a result of a desire by victims to avail themselves of a flexible and progressive form of legal justice.

Chapter Three will analyse this litigation and will argue that these private lawsuits defined the public crisis as it is understood today. Contrary to the traditional assessment of civil lawsuits as having little impact on public policy, the civil claims against the Catholic Church between 1985 and 2005 subverted the historical consensus surrounding the Church's legal autonomy. Chapter Four will outline the consequences of displacing the respect for the Church and the attempts by the secular legal system to fill the void left by the now bankrupt system of Canon Law regulation. The actions of secular law enforcement, in particular through the empanelling of Special Grand Juries and the lengthening of statutes of limitation, represented a fundamental shift in Church-State relations in America. Not only had social regard for

the Church dissipated but the State was now willing to implement unorthodox and at times antagonistic legal provisions to specifically target and condemn the Church.

The characteristics of congruent doctrines and stable frameworks that scholars use to imagine the law do not reflect the vagaries of the legal system's operation. The law adopts flexible, overlapping and at times contradictory meanings so as to reflect and engage with changeable societal expectations.³³ The history of sexual abuse allegations within the Catholic Church reveals the capacity of the law to evolve in response to the pressing demands of a 'moral panic'.³⁴ This scandal is not a story of the law's failure but rather a story of the empowerment of private individuals in utilising alternative and unconventional avenues for legal redress. Irrespective of their private origins, victim lawsuits became the defining issue of the relationship between the American State and the Catholic Church in the late twentieth century.

Undoubtedly, this was not the way the law was intended to operate when responding to allegations of institutionalized abuse. Yet, as a consequence of this, the history of sexual abuse within America's Catholic clergy is an exemplary illustration of the unexpected outcomes of legal developments and the flexible contours of legal justice.

³³ Patricia Ewick & Susan Silbey, *The Common Place of Law: Stories from Everyday Life*, (Chicago & London: University of Chicago Press, 1998) pp. 17, 19.

³⁴ Jenkins, *Paedophiles and Priests*, p. 1.

PART I – BEFORE THE SCANDAL

CHAPTER ONE - THE RESPECTED CHURCH

Prior to the public emergence of the abuse scandal in the 1980s, respect for the institutional autonomy of the Church in managing its own affairs was of general legal consensus. This position was asserted by the Church, accepted by victims and respected by the State. The historical role of the Catholic Church is therefore not solely that of a religious institution. The Church must also be understood as a legal entity that claims exclusive jurisdiction:

Over the universal Church both in those things that pertain to faith and morals and in those things that affect the discipline and government of the Church throughout the whole world. This power is truly Episcopal, ordinary and immediate both over each and every church and over each and every pastor and faithful, independent from any human authority.¹

Allegations of abuse eventually displaced the acceptance of this as the Church's legitimate legal role. Still, throughout the decades of most frequent abuse – the 1960s and 1970s – American legal culture granted the Church the position of sole investigator and arbiter of allegations.² This Chapter will examine the way Canon Law operated and was treated during this period when allegations of abuse were frequent but not yet public knowledge. The managerial paradigm of the Church produced a system for internally sanctioning abusive clergymen rather than reporting them to secular authorities. In order to understand this response and why complaints evaded the attention of the State for so long, it is necessary to first examine the

¹ 'Canon 218' in Peters, *The 1917 Pio-Benedictine Code of Canon Law*, p. 94.

² John Jay College of Criminal Justice, *The Nature and Scope of Sexual Abuse*, p. 5.

privileged position of the Church before the scandal and its historical legacy as a sanctuary from the criminal law.³

Acknowledging that the Catholic Church's legal position contributed to the difficulty of dealing with allegations of clergy sexual abuse is not to say that the Catholic Church bares blame for the abuse. Some scholars have argued that abuse within the Catholic Church was 'inevitable'.⁴ Their argument is that the culture of secrecy and obedience, as well as the necessary suppression of sexuality in the priesthood, meant that Catholicism 'produced and will continue to produce at a relatively stable rate, priests who sexually abuse minors'.⁵ That is not the contention of this chapter. Even in spite of the particularities of the Catholic Church, it is certainly not the only religious institution to have experienced scandals of sexual misconduct.⁶ However, the study of the Catholic Church as an institution remains an important aspect of the history of this scandal. This is because the legal entity of the Catholic Church is unique in its development of a pseudo-legal disciplinary framework that is sustained by the hierarchical structure of Catholicism that is not replicated by other religions. Moreover, the allegations of abuse, even as they arose within individual Dioceses, evolved into a general 'crisis of confidence' in the management of the Church as a

³ Wayne Logan, 'Criminal Law Sanctuaries', *Harvard Civil Rights, Civil Liberties Law Review*, 38 (2003) pp. 321-2.

⁴ Burkett et al., *A Gospel of Shame*, p. 49.

⁵ A.W. Richard Sipe, *Sex, Priests and Power: Anatomy of a Crisis* (London: Cassell Publishing, 1995) p. 27.

⁶ Surveys of the Church of England and Southern Baptist Church show that the proportion of ministers known by their colleagues to have engaged in sexual misconduct is between 67% and 77%. See: Thaddeus Birchard, 'Clergy Sexual Misconduct: Frequency and Causation', *Sexual and Relationship Therapy*, 15 (2000) p. 135; Gayle White, 'Sexual Misconduct, Keeping Vigil: How Various Faiths Protect the Innocent in their Flock', *Atlanta Journal Constitution*, 14 September 2002, p. B1.

whole.⁷ The moral and legal crisis that confronted the Church represents a significant historical phenomenon when considered in light of the previously sanctimonious position of the Church that will be examined in this chapter.

The written history of American Catholicism has too often adhered to a philosophy of secularism and accordingly studied religion as something distinct from popular or public culture.⁸ This approach requires acceptance of the logic that it is possible to legally divide the matters of the Church from the interests of the State. Relegating religion to the private sphere alone neglects the expansive and over-arching regulatory power asserted by the Catholic Church in Canon Law. Much has been written about the constitutional line that separates the Church and State.⁹ This chapter is concerned less with that division than with the tensions that arise in their overlap. In order to maintain its legal position as the exclusive arbiter of internal affairs, the Catholic Church could not ‘invoke the judicial arm of civil society to settle ecclesiastical controversies’.¹⁰ This necessarily begs the question of how far the espoused legal

⁷ James O’Toole, *The Faithful: A History of Catholics in America* (Massachusetts & London: The Belknap Press of Harvard University Press, 2008) p. 268.

⁸ R Laurence Moore, *Selling God: American Religion in the Marketplace of Culture* (Oxford & New York: Oxford University Press 1994) pp. 8-9.

⁹ For example: Noah Feldman, *Divided By God: America’s Church-State Problem and What we should do about it* (New York: Farrar, Straus and Giroux, 2005); Hugh Hecllo & Wilfred McClay, eds., *Religion Returns to the Public Square: Faith and Policy in America* (Baltimore & London: John Hopkins University Press, 2003); Stephen Fledman, *Please Don’t Wish Me a Merry Christmas: A Critical History of the Separation between Church and State* (New York & London: New York University Press, 1997); Edwin Gaustad, *Church and State in America* (Oxford: Oxford University Press, 2003).

¹⁰ Rev. Thomas Donovan, *The Status of the Church in American Civil Law and Canon Law: A Dissertation* (Washington: Catholic University of America Press, 1966) p. 30.

sovereignty of the Church extended in influencing, preventing or distorting the operation of the secular legal system.

The Role of Church Authority in the Secular Legal System

A consistent separation between Church and State has been the dominant legal ideology in America since the 1960s. Formally, the First Amendment of the Constitution enshrines two protections: ‘freedom to believe and freedom to act – the first is absolute but the second cannot be’.¹¹ To uphold this, the general test applied is whether the State can prove that ‘the unbending application of its regulation to the religious objector is essential to accomplish an overriding government interest’.¹² Thus, the Church acts as an intermediary between secular law enforcement and clergymen. Respect for the Catholic Church’s authority as a self-governing body was strongly upheld on issues of clergy discipline as the relationship between the Church and the clergy was deemed to be of great importance.¹³ The appropriateness of this was broadly unquestioned by the Catholic congregation, the mainstream media and the secular authorities prior to the sexual abuse scandal. The respect that the Church commanded facilitated a level of sustained confidentiality around the issue of clergy sexual abuse and seemed to render the operation of the secular law unnecessary, if not illegitimate.

¹¹ *Cantwell v. Connecticut*, 310 U.S. 296 (1940), Opinion of the Court, pp. 303-4.

¹² *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), Opinion of the Court, p. 910.

¹³ *McClure v Salvation Army*, 460 F.2d 553 (1972), Opinion of 5th Circuit Court of Appeals: Judge Coleman, pp. 558-560.

Recognizing the jurisdiction of Canon Law in adjudicating Church affairs produced a system of tribunals within Catholic Dioceses that operated as a religious parallel to secular courts. An almost exclusive and uninhibited jurisdiction was exercised by these Church mechanisms over clergy misconduct prior to the 1980s. When confronted with a claim of sexual abuse, Diocesan leaders were statistically more likely to use internal means of investigation, evaluation and judgment than they were to refer the allegation to law enforcement external to the Church.¹⁴ According to the nine thousand victims surveyed in the 2004 study by the John Jay College of Criminal Justice, seventy-two percent of allegations levied against the Church were investigated internally.¹⁵ Later inquiries into the Church's conduct found that victims had been counselled against reporting allegations to secular authorities and that generally victims had heeded this advice.¹⁶ From the outset of these complaints, it is clear that victims preferred to rely on the Church to intervene against their abusers.

That victims initially refrained from reporting abuse to authorities external to the Church attests to the Catholic belief that clerics are worthy of exceptional treatment.¹⁷

¹⁴ John Jay College of Criminal Justice Research Team, *The Causes and Context of Sexual Abuse of Minors By Catholic Priests in the United States, 1950-2010* (Washington: United States Conference of Catholic Bishops, 2011) p. 4.

¹⁵ John Jay College of Criminal Justice, *The Nature and Scope of Sexual Abuse*, p. 94.

¹⁶ Westchester County Grand Jury, 'Report of the April 'E' 2002 Westchester Country Grand Jury Concerning Complaints of Sexual Abuse and Misconduct against Minors by Members of the Clergy', 18 June, 2002 (Report presented to Justice James R. Cowhey, Supreme Court Of New York), available online at *Bishop Accountability*, <<http://www.bishop-accountability.org/resources/resource-files/reports/WestchesterGrandJuryReport.pdf>>, created 19 June 2002, viewed 27 June 2011, pp. 6-7.

¹⁷ Thomas Doyle & Stephen Rubino, 'Catholic Clergy Sexual Abuse Meets the Civil Law', *Fordham Urban Law Journal*, 31 (2003-4) p. 597; Russell Shaw, *To Shoot, To Hunt To Entertain: Clericalism and the Catholic Laity* (Michigan: Ignatius Press, 1993) p. 1-37.

According to Catholic scripture, a Catholic cleric, who receives the sacrament of the Holy Order, is bestowed with an indelible character that cannot be invalidated after their ordination.¹⁸ Thus, only the Church may judge a cleric once they are a member of the Holy Order.¹⁹ The revered position of clerics rendered victims initially reluctant to publicly expose their abusers wrongdoing by airing their grievances outside of Church structures. For example, the Gastal family, acting as the plaintiff in the first lawsuit against Gauthé in 1985, have spoken of their internal conflict in suing the institution that represented their faith and the disapproval that their lawsuit attracted from members of their congregation for that reason.²⁰ This aversion to making public complaints against Catholic clergymen may be understood with reference to general trends in the history of American Catholicism. At the time when these complaints would have brought to Church into disrepute, Catholicism was finally starting to enjoy the acceptance of mainstream America. By the 1960s, American society had turned away from its longstanding Protestant antagonism and had developed a cultural sensitivity when discussing issues within the Catholic Church. This change was the result of the moderating and liberalizing reforms of Catholicism undertaken by the Second Vatican Council that had made its beliefs more tenable to most Americans.²¹ It may also be attributed to the leadership of the first Catholic President, John F.

¹⁸ ‘Canon 290’ in Canon Law Society of Great Britain and Ireland, *The Canon Law*, p. 166; Rev. John Coughlin, *Canon Law: A Comparative Study with Anglo-American Legal Theory* (New York; Oxford University Press, 2011) p. 90.

¹⁹ ‘Canon 1405’ in Canon Law Society of Great Britain and Ireland, *The Canon Law*, p. 813.

²⁰ Jon Nordheimer, ‘Sex Charges Against Priest Embroil Louisiana Parents’, *New York Times*, 20 June 1985.

²¹ Melissa Wilde, *Vatican II: A Sociological Analysis of Religious Change* (Princeton & Oxford: Princeton University Press, 2007) pp. 1-2.

Kennedy.²² The product of these changes was a social hesitation when targeting, questioning or criticising the manner in which the Catholic Church was exercising its religious authority.²³

The newfound respect for the Catholic Church extended not only to formal legal doctrine and the Church's congregants, but also to the American media. Acceptance of and sensitivity to the Catholic Church's freedom to act contributed to the 'news blackout' regarding the rare allegations brought to the attention of the media prior to 1985.²⁴ Jason Berry, the investigative journalist partly responsible for breaking this media taboo, commented that he was 'concerned that reports might trigger a backlash ... [or that] the spectre of scandal among Catholics [would] arouse a long memory of bigotry towards the faith'.²⁵ These concerns were not wholly unfounded. When the allegations of abuse did become public the Church and social commentators alike accused the media of engaging in 'unrestrained frontal attacks on the clergy'.²⁶ Jenkins termed it 'the new anti-Catholicism'.²⁷ In their early attempts to avoid this charge of anti-Catholicism, the media chose not to report on the accusations or to be euphemistic in their coverage where verifiable complaints had been filed. For

²² Michael McConnell, 'The Influence of Cultural Conflict on Jurisprudence of the Religion Clause of the First Amendment' in Peter Cane et al., eds., *Law and Religion in Theoretical and Historical Context* (New York: Cambridge University Press, 2008) p. 117.

²³ Michael Carroll, *American Catholics in the Protestant Imagination: Rethinking the Academic Study of Religion* (Baltimore: John Hopkins University Press, 2007) p. 153.

²⁴ Jenkins, 'Creating a Culture of Clergy Deviance', p. 119.

²⁵ Berry, *Lead Us Not Into Temptation*, p. 103.

²⁶ Philip Jenkins, *The New Anti-Catholicism: The Last Acceptable Prejudice* (Oxford: Oxford University Press, 2003) p. 134.

²⁷ Jenkins, *The New Anti-Catholicism*, p. 1.

example, the *Chicago Tribune*, when reporting on a 1982 allegation of sexual abuse, described the charge as one of ‘moral misconduct’.²⁸ The privileged position of the Church and its trusted legal role served to mitigate scrutiny of its actions in managing allegations of abuse.

The lack of media and social will to hold the Church accountable for disciplining its clergymen is perhaps why secular law enforcement was also content to yield to the Church’s decisions at this time. An unwillingness to investigate the Church was evident at every stage of the criminal justice process. There are documented instances of San Diego police dropping investigations against clergymen in the 1960s where the Church agreed to transfer and monitor the offending individual.²⁹ Attorneys General also were unwilling to undertake difficult, sensitive and politically-charged prosecutions against the Catholic Church.³⁰ Where cases did proceed to court, the earlier decisions of Church disciplinary tribunals were treated with a pseudo-legal status. In *Gonzalez v. Archbishop of Manila* (1929), it was established that ‘decision[s] of proper church tribunals ... [even where] affecting civil rights, are accepted in litigation before secular courts as conclusive’.³¹ The extent of this acceptance was shown in May 1987, when Reverend Gustavo Benson, a Catholic

²⁸ Thomas Schling & Charles Mount, ‘Suit Charges Moral Misconduct by Arlington Heights Priests’, *Chicago Tribune*, 24 December 1982, p. B1.

²⁹ Letter from Rev. Charles F Buddy (Bishop of San Diego) to Rev. Alberto Uribe Urdaneta (Bishop of Cali), 15 August 1963, available online at: *Bishop Accountability*, <http://www.bishop-accountability.org/docs/san_diego/De_Francisco_Rev_Luis_E/De_Francisco_RCBSD_0018.pdf>, viewed at 17 May 2011.

³⁰ Berry, *Lead Us Not Into Temptation*, pp. 294-7; Jeanne Miller, ‘The Moral Bankruptcy of Institutionalised Religion’ in Shupe, ed., *Wolves Within the Fold*, p. 155.

³¹ *Gonzalez v the Archbishop of Manila*, 280 U.S. 1 (1929), Opinion of the Court, p. 16. See also: *Watson v Jones*, 80 U.S. 679 (1871); *Kedroff v St Nicholas Cathedral* 344 US 94 (1952).

minister, was criminally convicted of molesting a thirteen-year old boy. At the time of the trial, Benson had been admitted to the Servants of the Paraclette – a Church-administered, treatment program for sex offenders. Although Benson’s conduct would ordinarily have required the offender to serve time in prison, the judge substituted gaol time for the decision already made by the Church in requiring Benson to undergo treatment. In explaining his reasons for not sentencing Benson to gaol, the Judge commented ‘the program you are now in is in a great sense confinement. You cannot leave there until the Church determines you are ready to return to society’.³² Unlike today, there was no jurisdictional contest. The Church’s unfettered discretion in adjudicating the appropriate punishment for Benson’s crime was upheld.

The legal system’s trust in and deference to the discernment of the Church assumes even greater historical significance when considered in light of the strict and severe treatment of all other transgressors of the criminal law during the 1970s and 80s. Paradoxically, the State’s tolerance for the jurisdiction of the Church coincided with a significant trend towards proactive and punitive legal intervention in society at large.³³ This suggests that exercising oversight over a religious institution represents a unique challenge in legal history. Moreover, understanding the Church’s managerial prerogative at this time heightens the significance of the State’s later attempts to undermine the Church’s autonomy, as will be discussed in Part II. Nonetheless, prior to public scandal, the Church asserted an expansive legal authority and was granted it by both the theory and practice of the secular legal system. This phenomenon speaks

³² Chuck Mueller, ‘Priest Gets Probation in Molest Case’, *The Sun* (California), 5 May 1987.

³³ Loic Wacquant, ‘The Great Penal Leap Backward: Incarceration in America from Nixon to Clinton’ in Pratt et. al., eds., *The New Punitiveness*, p. 5.

to the importance of Canon Law in the development of the secular legal responses to clergy sexual abuse.

Of course, deference to the authority of the Church would have been neither remarkable nor scandalous had the Church's actions not diverged from societal expectations. At a foundational level, the philosophies of legal authority within the Church and State are, at least in part, incompatible. Canon Law is strongly metaphysical, which empowers antinomian tendencies.³⁴ Conversely, the Anglo-American legal tradition 'is almost inherently anti-metaphysical'.³⁵ The Church's claim to have 'relied first of all on Almighty God ... in the discernment of the right course to take' could not sit comfortably with secular jurisprudence that recognizes only discoverable and stable law as legitimate.³⁶ Political philosophers have often argued that 'a plurality of reasonable yet incompatible moral doctrines is the normal result' of attempts to manage a liberalist society.³⁷ Yet the resolution of these incompatibilities when they give rise to contradictory courses of action is profoundly strained, even if a natural, societal process.

³⁴ Coughlin, *Canon Law*, p. 14.

³⁵ Marek Zirk-Sadowski, 'Legal Epistemology and the Transformation of Legal Cultures' in Mark Van Hoecke, ed., *Epistemology & Methodology of Comparative Law* (Oxford & Portland: Hart Publishing 2004) p. 21.

³⁶ United States Conference of Catholic Bishops, *Promise to Protect, Pledge to Heal: Charter for the Protection of Child and Young People, Essential Norms, Statement of Episcopal Commitment* (Washington: United States Conference of Catholic Bishops, 2005) p. 5.

³⁷ John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), p. xvi.

The Exercise of Legal Authority by the Church

Given that the Church's authority to act was expansive, the manner in which that authority was exercised must then be examined. Although the Church's Canon Law was often interpreted as an equivalent or substitute to the secular law, it did not serve to compliment the priorities of the secular legal system. Consequently, the examination of the Church's exercise of its legal authority begins to illustrate the reasons why victims and the State significantly altered their opinions of the once revered institution. Indeed, had the Church not acted in such a way as to attract secular disapproval, it is doubtful whether the allegations of abuse would have assumed historical significance. The textual provisions of Canon Law empowered the Church to impose strict restrictions upon priests with credible complaints against them. Yet these disciplinary mechanisms were rarely used.

Sexual misconduct can be penalized within Church structures as one of the most egregious infringements of Canon Law. Indeed, sexual contact between a cleric and a minor is among the few offences for which a penalty of suspension or permanent removal from the clerical state may be imposed.³⁸ This holds it to be analogous to acts of hearsay.³⁹ The Church's understanding of abuse was not constructed in reference to the secular crime of sexual assault. The Canonical offence is defined as a violation against the Sixth Commandment of the Decalogue, which can embrace incidents with a sexual overtone that did not even involve physical contact.⁴⁰ This is a more expansive definition than that of most secular Criminal Codes that require

³⁸ 'Canon 1395' in Canon Law Society of Britain and Ireland, *Code of Canon Law*, p. 805.

³⁹ 'Cannon 741' in Canon Law Society of Britain and Ireland, *Code of Canon Law*, p. 418.

⁴⁰ United States Conference of Catholic Bishops, *Promise to Protect, Pledge To Heal*, p. 20.

penetration, forcible contact or sexually motivated touching of some kind.⁴¹ The text of Canon Law alone suggests that the Church, in exercising its legal authority, could have accurately reflected the seriousness with which the secular law regarded allegations of abuse against children.

In practice, the response of the Catholic Church was characterized by institutional inertia. Church officials have sought to explain the lack of urgency in their management of allegations by pointing to failures in the textual construction of Canon Law.⁴² This argument relies upon a very limited analysis of the legal powers open to the Church. As secular courts have found when subsequently when assessing the Church's conduct, disciplining offending clergymen 'would not have violated any doctrine, practice or law of the Roman Catholic Church'.⁴³ The alleged difficulty in enforcing the Church's legal provisions is said to stem from two aspects of the procedural Canon Law: the statute of limitation and the standard of proof being moral certainty.⁴⁴ The statute of limitation within the Church requires that the offence be

⁴¹ For the purposes of the federal offence of 'sexual abuse of a minor' in 18 USC sec. 2243, a 'sexual act' is limited to: genital to genital contact, genital to mouth contact, genital penetration of any kind or touching with the intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person (18 USC sec. 2246[2])

⁴² Sharon Euart, 'Canon Law and Clergy Sexual Abuse Crisis: An Overview of the U.S. Experience', (Report Presented to United States Council of Catholic Bishops, 25 May 2010) available online at: National Council of Catholic Bishops, <<http://nccbuscc.org/canonlawseminar/documents/CanonLawandSexualAbuse-Euart.pdf>>, viewed 1 August 2011, p. 3.

⁴³ *Smith v. O'Connell*, 986 F. Supp. 73 (1997), Opinion of Florida District: Judge Torres, p. 79.

⁴⁴ Francis Morrissey, 'The Pastoral and Juridical Dimensions of Dismissal from the Clerical State and of Other Penalties for Sexual Misconduct', *Canon Law Society of America Proceedings*, 53 (1991) pp. 221-39; John Beal, 'Doing What One Can: Canon Law and Clerical Sexual Misconduct', *Jurist*, 52 (1992) pp. 642-83.

reported to a Diocese within five years of the abuse.⁴⁵ Most American states impose a limitation on the prosecution of sexual offences that ranges from one to six years for civil cases and one to ten years for criminal cases.⁴⁶ Generally speaking, the statute of limitation in Canon Law was no more restrictive than those experienced in secular jurisdictions. Moreover, documented allegations suggest the Church did have early knowledge of such instances of abuse.⁴⁷ Once an allegation had been reported, the Diocese Tribunals then required that the claim be proven to a level of moral certainty.⁴⁸ The suggestion that ‘moral certainty’ is virtually impossible to substantiate is negated by the almost 40,000 marriage annulments granted annually that satisfied this same standard of proof.⁴⁹ Upon examining the content and process of Canon Law it becomes clear that the Catholic Church possessed the legal capacity to internally handle complaints of sexual abuse in such a way as to reflect with the general values of the secular legal system.

In spite of the capacity to discipline offending clergymen, the Church’s disciplinary Tribunals were ‘virtually non-existent’ in relation to sexual abuse allegations.⁵⁰

Although eighty percent of the alleged incidents investigated by the Church were

⁴⁵ Canon 1362’ in Canon Law Society of Britain and Ireland, *Code of Canon Law*, p. 783.

⁴⁶ For example: *Revised Code of Washington* (2009) s 9A. 04. 080; *California Penal Code* (2009) s 801. 1; *New Hampshire Statutes, Title LXII Criminal Code* (2009) s 625. 8; *New York State Criminal Procedure Law* (2009) s 30.10(3)(e).

⁴⁷ Letter from Margaret Gallant to Cardinal Medeiros, 16 August 1982, reproduced in Boston Globe, *Betrayal*, p. 226.

⁴⁸ ‘Canon 1608’ in Canon Law Society of Britain and Ireland, *Canon Law*, p. 905.

⁴⁹ Pierre Hegy & Joseph Martos, eds., *Catholic Divorce: The Deception of Annulments* (New York: Continuum International Publishing Group, 2006) p. 2; Coughlin, *Canon Law*, p. 63.

⁵⁰ William Woestman, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law* (Ottawa: Faculty of Canon Law Saint Paul University, 2000) p. xv.

substantiated, only twenty-seven percent of accused priests had their ministry restricted.⁵¹ This aversion to utilizing punitive penalties meant that the Church's interpretation of the appropriate response to allegations diverged at a philosophical level from that expected by the State. Canon Law operated at best as a confusing alternative and at worst as a lesser surrogate for the management of what were serious felonies. The respect that had been afforded to the Church placed Church officials and victims in a difficult position when assessing which law to prioritise. In the case of *Jason R. v Diocese of San Bernardino et al.* (1993), a senior member of the clergy admitted to having been 'aware of the State law that if we found out about something we were to report it... [but] confused as to what nature a priest is subject to that law'.⁵² The extent to which Church officials disregarded the provisions of the secular law must lead historians to the question of why the integrity of the Church's narrative of institutional autonomy remained for so long. Contemporary polling showed that sixty-four percent of Americans believed that the Church was seeking to protect its public image by not acting on allegations.⁵³ Although perhaps true, this is a somewhat simplistic view of the complex motivations of the Church that can also be better explained through a contextual preference for spiritual renewal and antinomianism.

⁵¹ John Jay College of Criminal Justice Research Team, *The Nature and Scope of Sexual Abuse*, p. 94.

⁵² Deposition of Rev. Ronald Rockey, 15 January 1993, in *Jason R (Plaintiff) vs Diocese of San Bernardino et al. (Defendants)*, No. 219304 (1993), Superior Court of the State of California, available online at: *Bishop Accountability* <http://www.bishop-accountability.org/docs/san_diego/Jost_Mr_Dennis_R/Jost_TC00087_135.pdf>, viewed 19 February 2011, p. 46.

⁵³ David Moore, 'Catholics: Church Doing Bad Job of Dealing with Sexual Abuse by Priests', *Gallup News*, 27 March 2002, available online at: *Gallup News Service*, <<http://www.gallup.com/poll/5530/Catholics-Church-Doing-Bad-Job-Dealing-Sexual-Abuse-Priests.aspx>>, viewed at 24 July, 2011.

The reasons why Canon Law's disciplinary measures were so inactive during this period are more contextual and philosophical than they are legalistic. The Second Vatican Council of the 1960s marked a significant change in the way the Church approached juridical aspects of the Catholic Doctrine. This was a period of 'collective redefinition' that moved 'the Church [away] from a rigidly hierarchical, authoritarian' approach to the management of Church affairs.⁵⁴ The internal Church culture was therefore one that valued 'interpretative openness'⁵⁵ and spiritualism. An uneasy mixture of legalism and theology has always characterized Canon Law. But the cultural shifts in the wake of the Second Vatican Council empowered trends towards antinomianism.⁵⁶ This is one of the possible reasons why so few of the procedures outlined in Canon Law were utilized at this time.

The philosophical divisions within the Church that were inspired by increasing liberalization also rendered difficult any sort of coordinated response to clergy sexual abuse.⁵⁷ Conservative factions interpreted allegations of abuse as a symptom of the breakdown of the Church's hierarchical and dictatorial power. While advocates of Church liberalization used allegations of abuse to highlight the perceived hypocrisy of preaching sexual modesty and orthodoxies.⁵⁸ The disagreements over the causation of the abuse drew attention away from dealing with abusive priests. In the absence of

⁵⁴ Jose Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994) pp. 71; Michele Dillon, *Catholic Identity: Balancing Reason, Faith and Power*, (Cambridge: Cambridge University Press, 1999) pp. 45-7.

⁵⁵ Dillon, *Catholic Identity*, p. 48.

⁵⁶ Coughlin, *Canon Law*, pp. 4-6.

⁵⁷ Andrew Greeley, *The Catholic Revolution: New Wine, Old Wineskins and the Second Vatican Council* (Los Angeles: University of California Press, 2004) pp. 91-3.

⁵⁸ Jenkins, 'Creating a Culture of Clergy Deviance', p. 129.

public scrutiny on the issue of clergy sexual abuse, yet in the presence of significant changes in virtually all other aspects of Church policy, some Church officials have been forced to admit that sexual misconduct waned in its significance during the 1960s and 1970s.⁵⁹

There were some cases that attracted the attention of Church disciplinary tribunals. Such tribunals were used sporadically after 1960 and more frequently after specialist tribunals were adopted in 2002 to manage complaints of sexual abuse. The specialist tribunals established by the *Charter for the Protection of Young People* altered some of the procedural aspects of Canon Law.⁶⁰ For instance, these tribunals made their findings on the basis of whether it was more likely than not that the abuse had occurred, rather than whether the abuse was proven to a level of moral certainty.⁶¹ However the findings of both tribunal systems were broadly similar.⁶² In general

⁵⁹ Deposition of Cardinal Bernard Law, 7 June, 2002, in *Gregory Ford et al. (Plaintiff), v. Bernard Cardinal Law et al. (Defendant)* (2002), No. 02-04551-T1, Suffolk County Superior Court, available online at: *Boston Globe*, <http://www.boston.com/globe/spotlight/abuse/shanley/law_deposition_day2.htm>, viewed 1 June 2011.

⁶⁰ United States Conference of Catholic Bishops, *Promise to Protect, Pledge to Heal*, pp. 1-20.

⁶¹ Findings and Recommendations of the Review Board of the Diocese of Memphis in Tennessee, Re: Priest 1 (2005) in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)*, No. CT 004452-04 (2008), 'Appendix to Motion in Limine of Defendant Diocese to Exclude Evidence Involving Alleged Child Sexual Abuse By Priests Other than Juan Carlos Duran' (hereafter 'Appendix to Motion') available online at: *Commercial Appeal*, <<http://www.commercialappeal.com/church-secrets-records/letters-by-victims/>>, created 12 April 2010, viewed 2 February, 2011, p.13.

⁶² Philadelphia Grand Jury, *In Re: Country Investigating Grand Jury XXIII*, 21 January 2011 (Court of Common Pleas, First Judicial District of Pennsylvania, Criminal Trial Division, District Attorney Seth Williams) , available online at: Office of District Attorney Philadelphia, <<http://www.phila.gov/districtattorney/PDFs/clergyAbuse2-finalReport.pdf>>, viewed at 28 June 2011, p. 9.

terms, Church Review Boards found it ‘difficult to believe that a priest would have so aggressively sexually assaulted a young person... for no explicable reason’.⁶³ Secular authorities described the Church process of determining a complainant’s credibility as ‘even worse than no decision at all’.⁶⁴ The mismanagement of complaints referred to Church review boards has been the subject of a number of negligence claims.⁶⁵ Although internal reporting appears to have been the preference of victims, the proceedings of the Church tribunals rarely prioritized victims. The documented proceedings of the Review Board of the Diocese of Memphis, released publicly in relation to *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), often dismissed the ‘plausibility’ of allegations on grounds that would be deemed irrelevant or insensitive within secular courts. These grounds included; the sexual history of the victim, the emotional stability of the victim, the temporal proximity of the accusation to media reports of other cases and the likelihood that the victim may fabricate a complaint out of a need for money.⁶⁶ The public disclosure of records from the Memphis Review Board offers one of the few insights into the usually confidential process of penal trials within the Church. Yet, this evidence cannot necessarily be used to generally represent the behaviour of all American Dioceses.

⁶³ ‘Findings and Recommendations of the Review Board of the Diocese of Memphis in Tennessee, Re Priest 1’ (2005) in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), Appendix to Motion, p. 14.

⁶⁴ Philadelphia Grand Jury, *In Re: Country Investigating Grand Jury XXIII*, 21 January 2011, p. 9.

⁶⁵ Third Amended Complaint, 4 February 2008 in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), available online at *Commercial Appeal*.
<<http://www.commercialappeal.com/church-secrets-records/john-doe-suit/>>, created 12 April 2010, viewed 22 February 2011, pp. 8-11.

⁶⁶ Findings and Recommendations of the Review Board of the Diocese of Memphis, Re: Rev. Joseph Nguyen (2007) and Rev. Paul St Charles (2004) in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)*, (2008), Appendix to Motion, pp. 163-169, 201-206.

The ultimate responsibility for determining the gravity of action taken against priests accused of abuse lay with individual Bishops, who at times acted differently from one another.⁶⁷ The tendency to view the Church as a homogenous structure is just one of the many public misunderstandings of the clergy abuse scandal. The Archbishop of Chicago, for example, empowered a proactive Cardinal's Commission to investigate sexual misconduct. Following one of the recommendations of the Commission, the Chicago Archdiocese began in 1992 to publicly name priests with allegations against them.⁶⁸ Although the media and public discourse on the issue focused on the lagging response of the worldwide Catholic institution, local episcopalities were generally autonomous on this issue until the first binding rules guidelines were produced in 2002.⁶⁹ This is why the reactions of the Memphis and Chicago Diocese differed so widely. In acknowledging these differences, it should be noted that it was the conduct of the Chicago Archdiocese that was anomalous. The National Council of Catholic Bishops (NCCB) echoed the general scepticism seen in the Memphis records. In November 1989, the Administrative Committee of the Council described abuse allegations in the following terms:

Since the allegations against the bishop had been made before by the same individuals and on investigation by church authorities been judged to lack substance, the committee's statement is less concerned with the allegations

⁶⁷ 'Canon 1419' in Canon Law Society of Britain and Ireland, *Canon Law*, p. 821.

⁶⁸ See generally: Jimmy Lago, *Ten Year Report on Clerical Sexual Abuse of Minors within the Archdiocese of Chicago, January 1993 – January 2004* (Archdiocese of Chicago, 2003), available online at <http://www.archchicago.org/pdf/ten_year_report.pdf>, viewed 29 June 2011.

⁶⁹ United States Conference of Catholic Bishops, *Promise to Protect, Pledge To Heal – Essential Norms*, pp. 26-36.

than with the opportunity to give public assurance that church officials are regarding the sexual abuse of children with the seriousness it deserves.⁷⁰

The NCCB demonstrated two important aspects of the Church's perspective in this statement: firstly the Church's readiness to dismiss allegations as unsubstantiated and improbable and; secondly the belief that it is unnecessary for Canon Law and the secular law to operate concurrently. The suggestion that a secular investigation would necessarily be fruitless since a Church investigation had already occurred attests to the unwillingness of the Church to view the secular law as a complimentary and mutually applicable system. Similarly, Church review boards considered the 'failure of a complainant... to fully cooperate with the investigation' as 'sufficient reason to find the allegation not credible', even when secular legal proceedings had been substantiated by that victim.⁷¹ From the Church's point of view, it was clear that secular legal mechanisms were not an equal alternative to be chosen by victims. With the Church treating Canon and secular law as mutually exclusive, it is perhaps unsurprising that members of the Church were sceptical of the need to inform secular legal authorities when allegations of abuse arose.

Prior to the public scandal within the Church, it was generally thought to be illegitimate for the American government to intrude upon religious freedom by monitoring, investigating or evaluating Church affairs. This degree of separation has been called into question by allegations of child sexual abuse. In 2002, following the revelations of this abuse, the Church attempted to clarify its legal position by saying:

⁷⁰ Administrative Council, National Conference of Catholic Bishops, 'Statement on Priests and Child Abuse', *Origins*, 19 (1989) pp. 394-5.

⁷¹ 'Findings and Recommendations of the Review Board of the Diocese of Memphis, Re: Rev. Joseph Nguyen (2007) and Rev. Paul St Charles (2004) in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)*, (2008), Appendix to Motion, pp. 163-169, 201-206.

The necessary observance of the canonical norms internal to the Church is not intended ... to hinder the course of any civil action ... At the same time, the Church reaffirms her right to enact legislation binding on all her members concerning the ecclesiastical dimensions of the sexual abuse of minors.⁷²

The choice of which law to call upon where secular regulation and binding ecclesiastical legislation conflicted placed victims in a difficult legal position. The Church was uniquely situated both spiritually and institutionally to accommodate the needs of victims of abuse who, more often than not, sought such a compassionate response from the Church as their first avenue of redress.⁷³ However, an animating purpose of Canon Law is to ‘embody, even if very imperfectly, the justice of God ... and restore relations with the sinner’.⁷⁴ Focus on the redemption of the culprit often neglected the consideration of their victims, who eventually looked to the civil law to vindicate their injury. In the meantime, the legal position of the Church in claiming an equal, if not superior, role in adjudicating their complaints empowered the Church to dictate the consequences of abuse. The Church’s readiness to forgive abusers and to depend upon spiritual treatment to dispel their blameworthiness became the most striking example of the incompatibility between the legal structures of the Church and State during this period.

⁷² United States Conference of Catholic Bishops, *Promise to Protect, Pledge To Heal – Essential Norms*, p. 31.

⁷³ Ruth Jones, ‘The Extrajudicial Resolution of Sexual Abuse Cases: Can the Church be a Resource for Survivors?’, *Suffolk University Law Review*, 38, iss. 2 (2005) p. 358.

⁷⁴ Lesslie Newbigin, ‘Whose Justice?’, *The Ecumenical Review*, 44, iss. 3 (1992) p. 311.

CHAPTER TWO: THE ILL PRIEST

The privileged position of the Church between 1960 and 1985 not only produced a parallel system for reviewing allegations, but also engendered a separate scheme to manage, discipline and supervise abusive clergymen. In exercising its ‘own inherent right to ... [impose] penal sanctions’, the Catholic Church admitted abusive priests to facilities specialising in psychosexual treatment.¹ Catholicism’s understanding of sin and repentance informed the Church’s reliance on spiritual retreat and pastoral care as a response to clergy misconduct. Indeed, subsequent investigations of the Church have found that treatment programs were the ‘only remedial action taken by the religious institution to prevent further abuse’.² Church officials have argued that their dependence on psychological treatment was reasonable since it was reflective of a similar secular trend towards using therapy in the management of sex offenders.³ This Chapter will argue that the similarities between secular and Church-run treatment programs were, at best, superficial. Upon further examination, the comparison between these programs reveals the extent to which theology impeded the Church’s capacity to deal judicially with abusive priests. Acknowledging the divergent prioritises of Canon Law poses a challenge to its ongoing role and acceptability in American society. Some have suggested that the Church’s use of treatment facilities

¹ Canon 1311 in Canon Law of Britain and Ireland, *Canon Law*, p. 749.

² Westchester County Grand Jury, ‘Report of the April ‘E’ 2002’, 18 June 2002, p.10.

³ Kelly Weisberg, ‘The Discovery of Sexual Abuse: Experts’ Role in Legal Policy Formulation’ *University of California Davis Law Review*, 18 (1984) pp. 6-9.

represented the ‘interface of religion and psychiatry’.⁴ In truth, the Church did not embrace psychiatry. It merely adopted ‘therapy as a new confession’.⁵

The Model of Treatment

The Church’s use of treatment facilities was characterised by a consistent pattern: an accused priest would commence a ‘course of residential, therapeutic care’, undergo clinical evaluation and on the basis of that prognosis ‘reintegrate into ministry’, usually resuming priestly duties within a year.⁶ Church officials have described this process of ‘psychological evaluation and treatment’ as their ‘modus operandi’ in responding to allegations of abuse.⁷ Indeed, it is estimated that between 1950 and 2002 approximately two thousand priests at a cost of \$80 million were admitted to such programs.⁸ Although participation in treatment could not be enforced, Church officials encouraged it by placing priests on sick or administrative leave.⁹ The treatment universally involved therapy and spiritual guidance from religious

⁴ Doyle, et al., *Sex, Priests and Secret Codes*, p. 72.

⁵ Berry, *Lead Us Not Into Temptation*, p. 197.

⁶ Rev. Alan Placa, ‘Legal Aspects of the Sexual Abuse of Children’ in Stephen Rossetti, ed., *Slayer of the Soul: Child Sexual Abuse and the Catholic Church* (Connecticut: Twenty-Third Publications, 1991) pp. 166-9.

⁷ ‘Deposition of Archbishop Bernard Law’, 8 May 2002, in *Francis Leary et al. (Plaintiffs) v. Father John Geoghan, Cardinal Barnard Law, Archdiocese of Boston et al. (Defendants)*, No. 99-0371 (2002), Suffolk Superior Court, State of Massachusetts, available online at *Find Law*, <<http://news.findlaw.com/hdocs/docs/religion/law50802amdepo.pdf>>, viewed 5 April 2011, p. 37.

⁸ Doyle et al, *Sex, Priests and Secret Codes*, p. 73.

⁹ Letter from Alberto Rodriguez to Timothy Radcliffe, 1 June 2002, in ‘Deposition of Thomas Doyle’, 11 April, 2008, *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), available online at *Commercial Appeal*, <<http://www.commercialappeal.com/church-secrets-records/doyle/>>, created 12 April, 2010, viewed 10 February, 2011, p. 178.

superiors. For some priests, therapy without residential care was deemed sufficient, whereas others underwent residential hormone treatments of Depo-Provera to reduce testosterone levels.¹⁰ Even still, counselling alone saw Church Review Boards assume that priests would cease their abusive behaviour.¹¹ In general, the Church used the treatment facilities in the absence of secular intervention. The rate of priests assigned to these programs decreased by more than half in the late 1990s when secular law enforcement began to scrutinize the status of accused priests.¹²

The Church's management of Reverend Geoghan provides an appropriate case study for this Chapter. Reverend Geoghan, who was ultimately sued by 150 victims in Boston, underwent medical treatment on three documented occasions – November 1980, April 1989 and August 1996.¹³ Geoghan was advised of his appointment to administrative or sick leave at these times by Cardinal Law, who described upcoming instances of treatment as an 'opportunity for much personal insight and growth and response to God's care and love'.¹⁴ After each period of treatment, the Church was advised that there was 'no psychiatric contradiction to Father Geoghan's pastoral

¹⁰ Berry, 'Tragedy of Gilbert Gauthé: Part I', 23 May 1985; Berry, *Lead Us Not Into Temptation*, p. xi.

¹¹ Review Board Findings Case No. 33, 6 December, 1993, available online at *Bishop Accountability*, <<http://www.bishop-accountability.org/ma-boston/archives/PatternAndPractice/0017-RCAB-00622-00623.pdf>>, viewed 6 May 2011, p. 1.

¹² John Jay College of Criminal Justice Research Team, *Causes and Contexts*, p. 80.

¹³ Letter from Rev. John Geoghan to Cardinal Medeiros, 2 November 1980; Letter from Bishop Banks and Dr. Brennan, 28 April 1989; Letter from Cardinal to Reverend Geoghan, 4 August 1996, reproduced in Boston Globe, *Betrayal*, pp. 219, 235, 238.

¹⁴ Letter from Cardinal Law to Reverend Geoghan, 4 August 1996, reproduced in Boston Globe, *Betrayal*, p. 238.

work'.¹⁵ Accordingly, Geoghan was reassigned to ministry in different parts of Boston. He resumed priestly duties at St Brendan's Parish in 1981 and then St Julia's Parish in 1984.¹⁶ When these reassignments resulted in further accusations of abuse, treatment was resumed. This cycle continued until public revelations and scrutiny of the Boston Diocese emerged in the late 1990s.

Treatment programs are not a recent phenomenon within the Catholic Church. Before instances of sexual abuse became common, therapy programs were established to deal with alcoholism.¹⁷ For example, the Servants of the Paraclete, a spiritual retreat in Jemez Springs New Mexico was opened in 1947.¹⁸ Psychosexual treatment programs truly began to emerge in the 1970s. The National Conference of Catholic Bishops authorized a series of studies that found a majority of the priesthood was emotionally under-developed or immature.¹⁹ It was thought that emotional and sexual immaturity contributed to paedophilic and abusive tendencies. Accordingly, with funding

¹⁵ Letter from Dr. Brennan to Bishop Banks, 7 December 1990, reproduced in Boston Globe, *Betrayal*, p. 235.

¹⁶ Letter from Cardinal Medeiros to Father Geoghan, 13 February 1981, available online at: *Bishop Accountability* <<http://www.bishop-accountability.org/ma-boston/archives/PatternAndPractice/0285-Geoghan-II-01976.pdf>>, viewed 1 May 2011; Letter from Archbishop to Father Geoghan, 31 October 1984, available online at: *Bishop Accountability* <<http://www.bishop-accountability.org/ma-boston/archives/PatternAndPractice/0271-Geoghan-II-01961.pdf>>, viewed 1 May 2011.

¹⁷ Andrew Sorensen, *Alcoholic Priests: A Sociological Study* (New York: Seabury Press, 1976) pp. 143-145.

¹⁸ Doyle et al, *Sex, Priests and Secret Codes*, p. 71.

¹⁹ Eugene Kennedy & Victor Heckler, *The Catholic Priest in the Untied States: Psychological Investigations* (Washington: United States Catholic Conference Publications Office, 1972); Dr. Conrad Baars, 'The Role of the Church in the Causation, Treatment and Prevention of the Crisis in the Priesthood', Report Presented to the National Conference of Catholic Bishops, November 1971, available online at: *Bishop Accountability*, <<http://www.bishop-accountability.org/reports/1971-11-Baars-TheRole.pdf>>, viewed at 5 May 2011.

provided by the Church, treatment regimes for psychosexual disorders and abuse were initiated to focus on assisting the emotional development of priests. The House of Affirmation, for instance, was opened as a ‘therapy centre for emotionally troubled clergy’ in May 1974.²⁰ Similar programs also began in Massachusetts, Montero, California and Missouri.²¹ Father Doyle, who acted as the Apostolic Nunciature of the Vatican Embassy in Washington in the 1970s and 80s,²² has subsequently argued that the proliferation of these treatment facilities should be interpreted as an awareness of the scope of the problem of abuse in the 1970s.²³

Similar secular programs to treat perpetrators of sexual abuse significantly pre-date their adoption by the Church. Attempts by secular correctional facilities to put a ‘medical spin on a criminal justice problem’ begun in the 1930s.²⁴ Specifically designated hospitals for the psychotherapy for sex offenders, like those of St Elizabeth’s Hospital in Washington and Avenel Correctional Hospital in New Jersey, propagated an assessment of these offenders as sexually immature and emotionally primitive.²⁵ This narrative also informed Church treatment in the 1970s. In secular

²⁰ ‘Formal Opening of the House of Affirmation’, *Catholic Free Press*, 31 May 1974, p. 2.

²¹ Doyle et al, *Sex, Priests and Secret Codes*, p. 72.

²² Jonathan Friendly, ‘Roman Catholic Church discusses abuse of children by priests’, *New York Times*, 4 May 1986, p. 26

²³ Doyle et al, *Sex, Priests and Secret Codes*, p. 73.

²⁴ Leone Claudine, ‘New Jersey Assembly Bill 155 – A Bill Allowing the Civil Commitment of Violence Sex Offenders after the Completion of a Criminal Sentence’, *Seton Hall Legislation Journal*, 18, iss. 2 (1994) p. 907.

²⁵ For example, Benjamin Karpman, the Chief Psychotherapist of Saint Elizabeths Hospital, published a series of articles to this end: Benjamin Karpman, ‘The Sexual Psychopath’, *Journal of Criminal Law, Criminology and Police Science*, 42 (1951-2) pp. 184-198; Benjamin Karpman, ‘Considerations Bearing Upon the Problem of Sexual Offenders’, *Journal of Criminal Law, Criminology and Police*

criminology, this psychoanalysis became so popular that twenty-six American states had passed legislation by 1959 requiring psychiatric screening of convicted felons to identify sexual psychopaths for treatment rather than incarceration.²⁶ In defending its conduct from scrutiny, the Church has argued that its actions in relying on treatment facilities was reasonable since both Church and State were struggling equally to isolate the cause of sexually abusive behaviour at this time. To credit this argument, one must accept that the Church's use of treatment was historically analogous to that of the State. These treatment facilities may represent a somewhat awkward and mostly failed attempt by the Church to engage in contemporary medical discourse. But more importantly they demonstrate a fundamental disconnect between the Catholic and State philosophies of justice.

The chronology of the development of Church and State treatment programs for sexual offenders is of the utmost importance to their relationship. In the 1970s, the secular legal system repealed or made voluntary the therapy programs implemented in the previous decades.²⁷ The belief that treatment would slow the rate of recidivism had been dispelled by high profile cases at this time.²⁸ The prosecutor of one such repeat offender reflected popular scepticism when arguing that 'there is no substantial

Science, 43 (1952) pp. 13-28. See also Bertram Pollens, *The Sex Criminal* (New York: The Macaulay Company, 1938).

²⁶ Alan Swanson, 'Sexual Psychopath Statutes: Summary and Analysis', *Journal of Criminal Law, Criminology & Police Science*, 51 (1960) p. 215.

²⁷ Stephen Robertson, *Crimes Against Children: Sexual Violence and Legal Culture in New York City 1880-1960* (Chapel Hill & London: The University of North Carolina Press, 2005) p. 231.

²⁸ For example: Theodore Frank in California underwent medical care between 1974 and 1978. Two months after his release he raped and murdered two year old Amy Sue Seitz, causing great community outcry: Jerry Hicks, 'Torturing of Amy Seitz Recounted at Trial of Killer', *Los Angeles Times*, 30 December, 1986; 'Convicted Killer Theodore Frank', *The Washington Post*, 2 September 2001.

evidence that... the mental conditions can be cured or that mental health professionals can accurately predict that sex offenders will not reoffend'.²⁹ This change of approach was reflective of the wider 'American penal evolution' in the 1970s. The 'new punitiveness' of this era saw the rate of incarceration double between 1971 and 1985.³⁰ In relation to sex offenders, the return to a punitive justice model was shown by the development of social movements advocating sex offender registries and mandatory civil commitment of offenders deemed to be dangerous even after their sentence of incarceration had elapsed.³¹ These legal developments were acknowledgements that sex offenders suffered from a pathology that was unlike that of other criminals: a pathology unable to be rehabilitated and therefore in need of constant monitoring. That the Catholic Church was expanding its use of medical treatment in the 1970s as the secular legal system was beginning to draw these conclusions suggests a very different culture of treatment.

The Church's institutional response to abuse was oddly out of step with a 'nation gripped by an ongoing moral panic over sex offenders marked by draconian' and punitive legal attempts to incapacitate such offenders.³² Moreover, even during their differing periods of operation there were fundamental differences in the way State-run and Church-run treatment centres functioned. Studies of secular programs in the 1960s reveal their preference for so-called 'broader-based approaches' to treatment

²⁹ Irving Prager, 'Sexual Psychopathy and Child Molesters: The Experiment Fails', *Journal of Juvenile Law*, 6 (1982) p. 51.

³⁰ Wacquant, 'The Great Penal Leap Backward', pp. 5-7.

³¹ W.L Marshall & D.R. Laws, 'A Brief History of Behaviour and Cognitive Behavioural Approaches to Sexual Offender Treatment: Part Two, Modern Era', *Sexual Abuse: A Journal of Research and Treatment*, 15 (2003) p. 107.

³² Logan, 'Criminal Law Sanctuaries', p. 322.

that aimed to teach offenders how to develop normal sexual patterns.³³ One such method used to achieve this was ‘orgasmic reconditioning’ that encouraged participants to become sexually aroused through depictions of adult, heterosexual acts.³⁴ Of course, these methods were contrary to the Church’s commitment to celibacy. They also would have represented a complete reversal of the Church’s position on the asexual nature of clerical life.³⁵ It is clear that the Church could not have engaged theologically with many of the psychosexual treatment procedures undertaken at secular facilities. For most of the profession’s history, the Church has looked negatively upon psychology and psychoanalysis.³⁶ The inherent capacity to control the wrongful impulses of sin has always been central to Catholicism. This begs the question of how the Church accommodated the use of any psychological treatment within its theological beliefs.

³³ Marshall & Laws, ‘Approaches to Sexual Offender Treatment’, pp. 96-7.

³⁴ John Marquis, ‘Orgasmic Reconditioning: Changing Sexual Object Choice through Controlling Masturbating Fantasies’, *Journal of Behavior Therapy and Experimental Psychiatry*, 1, no. 4 (December, 1970) pp. 263-271; Marshall & Laws, ‘Approaches to Sexual Offender Treatment’, pp. 96-7.

³⁵ Gerdenio Manuel, ‘Beginning an Intervention in Clergy Sexual Abuse’ in Thomas Plante, ed., *Bless Me Father for I Have Sinned: Perspectives on Sexual Abuse Committed By Roman Catholic Priests* (Connecticut: Praeger, 1999) pp. 22-23.

³⁶ John Turbott, ‘Religion, Spirituality and Psychiatry: Steps Towards Rapprochement’, *Australasian Psychiatry*, 12, no. 2 (2004) pp. 145-147. Berry, *Lead Us Not Into Temptation*, p. 191.

The Theology of Treatment

The Church's use of treatment facilities is a manifestation of Catholicism's philosophical difficulty in reconciling retribution with forgiveness.³⁷ The antinomianism of Canon Law emphasises spiritual growth over the letter of the law.³⁸ Dependence on 'medicinal sanctions' reflects the overlapping of 'law and theology' that is inherent to the Canon Law.³⁹ According to Bishop Adam Maida, who practiced as a Canon lawyer, the severity with which Canon law considered sexual abuse was derailed as soon as an offender expressed remorse.

If he seeks reconciliation, in the Canon Law, we may give him absolution and say 'sin no more'. But every civil lawyer knows that what is between God and his conscience does not satisfy either victims or the civil law.⁴⁰

It may seem curious that a Church so sensitive to sexual orthodoxies as to disallow the ordination of homosexuals, would be forgiving in questions of frank sexual abuse.⁴¹ Yet the Church interpreted sexual abuse as it does other sins: as moralistic failures of conviction that can be redeemed and forgiven through repentance.⁴²

³⁷ See generally: Duncan Forrester, *Christian Justice and Public Policy* (Cambridge: Cambridge University Press, 1997).

³⁸ Coughlin, *Canon Law*, p. 14.

³⁹ Coughlin, *Canon Law*, p. 85.

⁴⁰ Rev. Adam Maida, 'The Selection, Training, and Removal of Diocesan Clergy'. *The Catholic Lawyer* 33, no. 1 (1992) p. 60.

⁴¹ James Robinson, 'Silencing of priest on gays, church hit', *Chicago Tribune*, 22 October 1977, p. A15; Kenneth Briggs, 'Jesuit Priest Urges Church to Reconsider Stand on Homosexuals', *New York Times*, 31 June 1976, p. 22; Sipe, *Sex, Priests and Power*, p. 30.

⁴² Pope Benedict XVI, *Principles of Catholic Theology: Building Stones for a Fundamental Theology* (San Francisco, Ignatius Press, 1987) p. 55.

Given the rarity of priest defrocking or laicization, it is perhaps unsurprising that punitive action was not taken on the scale that the instances of abuse would have required. The most common instances of defrocking between 1960 and 1980 were for political, and in particular communist, dissent.⁴³ Yet these instances were isolated, scandalous and widely reported when they did occur. Because of the elevated and theoretically infallible position of clerics, laicizing is an intentionally difficult process within the Church. Individual Dioceses cannot make a unilateral decision on the matter.⁴⁴ The laicizing of abusive priests is rare even now. In 2006, one of the priests implicated in the Memphis litigation, Reverend St Charles, received his final punishment of a ban from ‘priestly ministry’ and a mandated ‘life of prayer and penance.’⁴⁵ Yet still, he was not defrocked. Some of the most prolifically abusive priests, including Goeghan, were defrocked after attracting public scandal and legal attention.⁴⁶ Nevertheless, prior to secular intervention, the priority placed upon repentance dictated that the Church’s ‘first response should be pastoral and not punitive’.⁴⁷ Because ‘fraternal correction and pastoral solicitude’⁴⁸ were central to the belief structure of Catholicism, the secular law was willing during this period to accept that ‘a bishop may determine that a wayward priest [is] sufficiently

⁴³ ‘Pope defrocks ‘Red priest’’, *Chicago Tribune*, 5 August 1976, p. 9; ‘Synod Defrocks 3 Cyprus Bishops’, *New York Times*, 15 July 1973, p. 10.

⁴⁴ Maida, ‘The Selection, Training, and Removal of Diocesan Clergy’, p. 60.

⁴⁵ Letter from Congregation for the Doctrine of the Faith, 10 July 2006, in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), ‘Appendix to Motion’, p. 200.

⁴⁶ Archdiocese of Boston Memorandum from Monsignor Lennon to Reverend McCarthy, 8 May 1998, reproduced in Boston Globe, *Betrayal*, p 241.

⁴⁷ Nicholas Cafardi, *Before Dallas: The U.S. Bishop’s Response to Clergy Sexual Abuse of Children* (New Jersey: Paulist Press, 2008) p. 21.

⁴⁸ Cafardi, *Before Dallas*, p. 21.

reprimanded through counselling and prayer’ - to do otherwise would have ‘directly entangled [the Court] in religious doctrines of faith, responsibility and obedience’.⁴⁹

Internally, the Church interpreted sexual abuse as a moral illness that could be treated by empowering and educating an individual’s willpower. The Archbishop of Boston, Bernard Law, described his approach to sexual abuse as that of ‘an illness... It was objectively speaking a gravely sinful act. And that’s something that one deals with in one’s life, in one’s relationship to God’.⁵⁰ This attitude was further indicated by the Church’s description of Geoghan’s career upon his resignation as ‘an effective life of ministry, sadly impaired by illness’.⁵¹ The internal narrative of sin as a temporary state of illness excluded the punitive impulses that characterise the secular law and empowered a paradigm of absolution. In addressing American Cardinals on the issue of clergy sexual abuse in April 2002, Pope John Paul II extolled ‘the power of Christian conversion: that radical decision to turn away from sin and back to God, which reaches to the depths of a person’s soul and can work extraordinary change’.⁵² With an understanding of how the theology of forgiveness influenced the Church’s

⁴⁹ In *L.L.N v Clauder* 563 N.W2d 434 (1997), court accepted this argument of James O’Reilly & Joan Strasser, ‘Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues’, *St Thomas Law Review* 7 (1994) pp. 31, 43-46.

⁵⁰ Deposition of Archbishop Bernard Law, 8 May 2002, in *Francis Leary et al. (Plaintiffs) v. Father John Geoghan, Cardinal Barnard Law, Archdiocese of Boston et al. (Defendants)* (2002), p. 37.

⁵¹ Letter from Cardinal Law to Geoghan, 12 December 1996, reproduced in Boston Globe, *Betrayal*, p. 240.

⁵² Pope John Paul II, ‘Final Communique’, Speech delivered at the Extraordinary Meeting Between the Cardinals of the United States, 23 April 2002, available online at: *Vatican: Holy See*, <http://www.vatican.va/roman_curia/cardinals/documents/rc_cardinals_20020424_final-communiqué_en.html>, viewed 12 May 2011,

conduct, it is unsurprising that ‘treatment’ was the primary action taken against abusive priests.

Faith in the power of an individual’s repentance not only necessitated non-punitive consequences but it also led it to a significant overestimation of the effectiveness of treatment programs for sexual offenders. The American Psychiatric Association describes the sexual molestation of children as a ‘chronic condition’ with the highest rate of recidivism among men who are not married and are predisposed to male victims unrelated to them.⁵³ Conversely, Reverend Alan Placa, who produced Church guidelines on how to pursue treatment, hypothesised ‘that most people who have engaged in the sort of inappropriate behaviour we are describing here can successfully be reintegrated in some useful and fulfilling Church ministry’.⁵⁴ This disproportionate faith in the success of treatment saw the reintegration and reappointment of abusive priests become, not simply an acceptable outcome, but a pastoral priority. In September 1989, the Saint Luke Institute collated data on fifty-five priests previously treated there. Thirty-two had been returned to active ministry.⁵⁵ This rate of treatment success, if accurate, would have represented the lowest percentage of recidivism among any group of sexual offenders in any published literature.⁵⁶ The John Jay

⁵³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Washington: American Psychiatric Publication, 1994) p. 291; V. L. Quinsey, et al. ‘Predicting sexual offenses’, in J.C. Campbell, ed., *Assessing Dangerousness: Violence by Sexual Offenders* (California: Sage Publications, 1995) pp. 114-137.

⁵⁴ Rev. Placa, ‘Legal Aspects of the Sexual Abuse of Children’, pp. 166-9.

⁵⁵ Frank Valcour, ‘The Treatment of Child Sex Abusers in the Church’ in Rossetti, *Slayer of the Soul*, pp. 45-6.

⁵⁶ Stephen Rossetti, ‘The Mark of Cain: Reintegrating Paedophiles’, *America*, 173, no. 6 (1995) pp. 9-13.

College surveys revealed that, in fact, priests admitted to treatment and then reassigned to ministry victimized an average of six minors.⁵⁷ Still, the reassignment of abusive priests was described by advocates of treatment as the Church giving ‘prophetic witness’ to Christian redemption.⁵⁸

This represents a further and foundational disjuncture between secular treatment programs and Church treatment programs. Needless to say, the issue of child abuse outside of clerical culture was not one of sin but one of crime and conduct requiring punishment.⁵⁹ This is why secular psychiatric hospitals in the 1950s and 60s were used almost exclusively for ‘petty sex offenders who seemed likely to escalate their crimes’, such as those charged with pornography offences or public exposure.⁶⁰ Serious sex offenders remained under the control of the criminal justice system. That the punitive impulse of secular justice was not entirely forgotten in favour of medical treatment can be attributed to the need for that system to respond to the concerns of victims. Theologians admit that ‘Catholic moral thinking habitually understood sin in relation to sinners more than in relation to victims of sin’.⁶¹ Many settlements with victims required priests to receive ongoing treatment.⁶² But with sixty percent of

⁵⁷ John Jay College of Criminal Justice Research Team, *Causes and Contexts*, p. 8.

⁵⁸ Valcour, ‘The Treatment of Child Sex Abusers in the Church’, p. 65.

⁵⁹ Berry, *Lead Us Not Into Temptation*, p. xi.

⁶⁰ Simon Cole, ‘From the Sexual Psychopathy Statute to Megan’s Law: Psychiatric Knowledge in the Diagnosis, Treatment and Adjudication of Sex Criminals in New Jersey, 1949-1999’, *Journal of the History of Medicine and Allied Sciences*, 55, iss. 3 (2000) p. 298; Robertson, *Crimes Against Children*, p. 206.

⁶¹ Berry, *Lead Us Not Into Temptation*, p. 192.

⁶² Settlement Agreement Archdiocese of Boston, Paul Shanley and Parties, 18 February 1996, available online at *Bishop Accountability*, <<http://www.bishop-accountability.org/maboston/archives/PatternAndPractice/0011-RCAB-00183-00193.pdf>>, viewed 22 May, 2001, s [5].

priests treated being reintegrated into full ministry, this treatment was neither incapacitating nor punitive.⁶³ Indeed, when responding to allegations made against Geoghan, the Church implored one of his victims to ‘invoke the mercy of God and share in that mercy in the knowledge that God forgives sins and that sinners indeed can be forgiven’.⁶⁴ The approach adopted by the Church in prioritising an unsuccessful treatment regime for priests illustrates one of the motivations for victims later reporting their complaints to secular law enforcement, as will be discussed in Chapter Three. Dr. Lothstein, the leading psychologist at the Institute of the Living facility, was correct to summarise the major difference between Church and secular treatment as: ‘if they were not clerics, they would probably be in jail today’.⁶⁵

The Motivation of Treatment

The Church’s treatment of abusive priests should not be interpreted as an attempt to find a medical solution to the problem of abuse. Indeed, a great deal of evidence points to the Church disregarding the advice of medical professionals or deliberately misconstruing it. Many Church-employed psychologists, such as Dr. Lothstein, as well as forensic therapists who examined priests during legal proceedings, emphasised that the pathology of sex offenders predisposes them to recidivism and

⁶³ Leslie Lothstein, ‘Can a sexually addicted priest return to ministry after treatment? Psychological Issues and Possible Forensic Solutions’, *The Catholic Lawyer*, 34, no. 1 (1993) p. 110.

⁶⁴ Letter from Cardinal Medeiros to Margaret Gallant, 20 August, 1982, reproduced in *Boston Globe, Betrayal*, p. 228.

⁶⁵ ‘Church in Crisis: Interview of Dr. Leslie Lothstein by Katherine DiGiulio’, *National Catholic Reporter*, 17 June 2002, available online at: *National Catholic Reporter*, <http://www.natcath.org/NCR_Online/archives/081602/lothstein.htm>, viewed 2 August, 2011.

makes them inappropriate for public ministry.⁶⁶ Church treatment programs generally ignored the pathological aspect of sexual abuse. They relied on assessments that contradicted the contemporary medical orthodoxies by diagnosing priests as ‘atypical pedophile[s] in remission’.⁶⁷ These medical evaluations were often provided either by doctors with no expertise in psychotherapy, as was the case with Geoghan,⁶⁸ or by psychiatrists who were misinformed about their patient’s history, as was the case with Father Shanley in Massachusetts. Shanley’s therapist, Dr. Edwin Cassem, provided evidence in *Gregory Ford et. al. (Plaintiffs) v Bernard Law et. al. (Defendants)* (2003) and was questioned on the extent of information he had been provided:

Q – You at that point were not provided with any information about allegations either of sexual misconduct by Paul Shanley or statements that he may have made about the propriety of man-boy love: is that correct?

A- Correct.

Q - Would it have altered your opinion in anyway?

A- Yes

Q – In what way?

A – That he’s so personally damaged that he ought to be in gaol ...

Q – And you certainly don’t recall being informed that this man had admitted to raping someone do you?

A – No Sir.⁶⁹

⁶⁶ Kevin Diaz, ‘James Porter: Trying to Define the Monster Inside’, *Star Tribune* (Massachusetts), 11 April 2004.

⁶⁷ Letter from Bishop Banks to Dr. Stephens, 30 November 1989, available online at: *Bishop Accountability*, <<http://www.bishop-accountability.org/ma-boston/archives/PatternAndPractice/0328-Banks-Exhibit-44.pdf>>, viewed 13 April 2011.

⁶⁸ Michael Rezendes & Matt Carroll, ‘Doctors Who Ok’d Geoghan Lacked Expertise, Review Shows’, *Boston Globe*, 16 January 2002.

⁶⁹ Deposition of Dr Edwin Cassem, 20 May 2003, in *Gregory Ford et al. (Plaintiff), v. Bernard Cardinal Law et al. (Defendant)* (2002), available online at: *Bishop Accountability*, <<http://www.bishop-accountability.org/ma-boston/archives/PatternAndPractice/0037-CassemDepoExcerpts.pdf>>, viewed 1 June 2011.

Catholicism demanded that an individual's volition to resist sin be stronger than the pathological urge to commit it. As such, the Church's genuine engagement with negative medical advice barely extended beyond its façade.

Notwithstanding the Church's desire to facilitate individual repentance and betterment, the failure of these programs to actually treat or assist abusive clergymen suggests that the adoption of this medical paradigm must have been important for other reasons as well. Using individual illness as the explanation for clergy sexual abuse removed the institutional culture of the Church as a consideration in public discussion.⁷⁰ This is one of the reasons why the National Council of Catholic Bishops preferred to describe the crime of sexual abuse as being 'caused by a disorder for which treatment is essential.'⁷¹ Furthermore where the treatment failed, the Church was able to place fault on the Doctor whose advice it followed.⁷² Prolonged treatment both encouraged and facilitated the clandestine management of abusive priests. As correspondence from the Diocese of Memphis shows, the reasons for treatment were deliberately concealed from congregants. In one case, it was described as a necessary 'private retreat... [due to] the strain brought partly from the responsibility of caring

⁷⁰ Andrew Guidon, 'The Need To Move from a Personal Troubles' to a Public Issues' Perspective,' Report presented to the Catholic Theological Society of America (1993), quoted in Arthur Jones, 'Ecumenism, Sex Abuse Top CTSA Agenda', *National Catholic Reporter*, 2 July, 1993; Berry, *Lead Us Not Into Temptation*, p. 206.

⁷¹ United States Council of Catholic Bishops, 'Painful Pastoral Question: Sexual Abuse of Minors,' *Origins* 22 (1992) pp. 177-78.

⁷² Robert O'Neill, 'Law Says He Took Doctoros' Advise in Geoghan Transfer', *The Commercial Appeal*, 9 May 2002.

for the students in residence and renovation of the Church'.⁷³ Whilst removing the priest from their position and reassuring the victims of their trust in the Church, abusive priests were confined to the 'exclusive and secret atmosphere' of medical treatment.⁷⁴

The desire to avoid institutional blame manifested itself in other areas of the Church's conduct as well. As the viability of treatment programs was debunked, the Church adopted a new narrative on the causation of abusive behaviour within the Church. The 2011 John Jay College Report that was commissioned by the Church, reversed the Church's position on the possibility of treating abusive priests. It argued that 'priests who engaged in the abuse of minors were not found on the basis of ... their psychological characteristics to be statistically distinguishable from other priests.'⁷⁵ Instead, the 2011 report suggested that 'social indicators', in particular, divorce, drugs and crime, generated a disregard for morality that caused the increase in child abuse.⁷⁶ This explanation appears to have been influenced by lawsuits that allege the Church could have screened its priests for the psychological traits that predisposed them to abuse and facilitated their prior treatment.⁷⁷ Where the 1970s reports relied upon individual emotional development to explain the cause of abuse, the most recent reports point to social trends. Notwithstanding these different theories of causation,

⁷³ Letter from Rev. Charles Williams (Chancellor) to Priest 1, 24 November 1964, in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), 'Appendix to Motion', p. 19.

⁷⁴ Doyle et al., *Sex, Priests and Secret Codes*, p. 73.

⁷⁵ John Jay College of Criminal Justice Research Team, *Causes and Contexts*, p. 2.

⁷⁶ John Jay College of Criminal Justice Research Team, *Causes and Contexts*, p. 37.

⁷⁷ *Juanita Spann (Plaintiff) v Father Vance Thorne et al. (Defendants)*, No. J87-0114 B] (1987), District Court, Southern District Mississippi.

there is a thematic consistency within these reports: reliance on explanations that are external to the Church.

Of course, the Church should not be said to have caused the abuse. As has been discussed, unsuccessful and regrettable reliance on treatment programs has previously been characteristic of secular correctional facilities as well. However, the Church's commitment to treatment as the mechanism for managing abusive priests did result in the exclusion of problematic Church policies from the discussion of how to respond to allegations of abuse. It was quite common for psychologists to request that priests be granted a dispensation from celibacy to allow them 'the chance to develop normal male/female relationships as [the] present problems, stem from an unhealthy suppression of sexuality'.⁷⁸ Celibacy and the anti-sexual culture of the Church were identified by therapists as factors that might explain why abusive priests were 'psychosexually immature... [without] a depth of understanding of relationships'.⁷⁹ Yet the Church was able to avoid scrutiny on these issues by employing a medicalised perspective on clergy sexual abuse that isolated the problem to factors afflicting individuals rather than the institution of the Church. Faced with an institution unwilling to examine or accept its role in the problem, victims became increasingly disillusioned with the Church's management of abusive priests. In the victim litigation that will be discussed in Chapter Three, it is clear that victims prioritised the negligence of the Church as a large component of their complaint, suggesting that

⁷⁸ Letter from Archbishop of Denver to Bishop Buechlein of Memphis, 20 May 1987, in Deposition of Thomas Doyle, 11 April 2008, *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), p. 268.

⁷⁹ 'Interview with Dr. Leslie Lothstein', *National Catholic Reporter*. 17 June 2002.

dissatisfaction with the attitude of the Church was truly one of the motivating factors in their turn to the secular legal system.

That the Catholic Church did not seek out the explanatory framework of the criminal law to regulate blameworthy behavior is not to say that they engaged in no attempts to rationalize a solution to the abuse. The Church endeavoured ‘to graft psychological concepts onto spiritually religious beliefs’ by sending abusive priests to treatment programs.⁸⁰ Yet the importance of these spiritual beliefs in ultimately determining the Church’s conduct should not be underestimated. Not only did the theological concepts of redemption and forgiveness prevent ‘Church officials from summarily taking action to punish priests’, they also undermined any genuine treatment of the pathological conditions associated with sexual abusers.⁸¹ It is true that the Church adopted the medical paradigm of treatment when handling allegations of abuse. However these treatment programs were animated by an ungrounded faith in the effectiveness of spiritual repentance and a desire to individualise both the cause and the solution to abuse.

⁸⁰ Berry, *Lead Us Not Into Temptation*, p. 197.

⁸¹ *Smith v. O'Connell*, 986 F. Supp. 73 (1997), Opinion of Florida District: Judge Torres, p. 79.

PART II – THE SCANDAL

CHAPTER THREE: THE EMPOWERED VICTIM

As has now been discussed, the respect granted to the Church prevented alternative and external actors from recognising and managing the issue of clergy sexual abuse. The Church neglected the concerns of victims in favour of treating their abusers and criminal law enforcement deferred to the Church in the rare number of cases reported to them.¹ Being unable to turn to the Church or the criminal law, victims came forward themselves to ‘unmask their abusers and demand justice from the Church’.² They did this by filing private lawsuits in civil law against the Church. Between 1983 and 1985, this form of litigation was pursued against approximately forty priests throughout the whole United States.³ By 2002, in the Archdiocese of Boston alone, more than 550 victims had filed such claims.⁴ Private law suits launched by victims became the mechanism to address the ‘organizational tension between Church and State’.⁵ Civil law has often been excluded from histories of public policy as private lawsuits are usually interpreted as a manifestation of private interests. However, it was precisely these lawsuits that, in the case of clergy sexual abuse, galvanized public

¹ Berry, *Lead Us Not Into Temptation*, p. 294-7

² Burkett & Bruni, *A Gospel of Shame*, p. 36.

³ Jonathan Friendly, ‘Roman Catholic Church discusses abuse of children by priests’, *New York Times*, 4 May 1986, p. 26.

⁴ Barbara Balboni, ‘Through the Lens of the Organizational Culture Perspective: American Catholic Bishops’ Understanding of Clergy Sexual Molestation and Abuse of Children and Adolescents’, Dissertation presented to Law, Policy and Society Program, Northeastern University, Boston, Massachusetts, September 1998, available online at: *Bishop Accountability*, <<http://www.bishop-accountability.org/resources/resource-files/reports/BalboniLensTitle.htm>>, viewed 23 May 2011, p. 133.

⁵ Jo Renee Formicola, ‘The Further Legal Consequences of Catholic Clerical Sexual Abuse’, *Journal of Church and State*, 49 (2007) p. 463.

concern and dismantled the virtually inviolable respect for the Catholic Church. The significance of this has been both concealed and misconstrued by literature focusing on the inaction of the Church and the criminal law, which is only the first part of this legal history. This chapter will argue that, although sexual abuse is indeed a crime, its history is not contained within the operation of the criminal law alone. To accept the coherence of such legal categories is to neglect the law's flexibility and the empowerment of victims to seek redress through other avenues. Private litigation was the most influential factor in shaping the public's understanding of the problem of clergy sexual abuse and in reinterpreting the relationship between Church and State.

The civil lawsuits launched by victims against the Church utilized the law of torts. Tort law and tortuous litigation is designed to provide relief, usually financial, to individuals who have suffered from a wrongful or negligent act on behalf of another.⁶ To this end, most litigation relating to clergy sexual abuse consisted of two complaints; firstly, the tort of battery against the individual priest for non-consensual and unlawful physical contact and; secondly, an act of negligence, such as negligent supervision, retention or transfer of priests by the Church.⁷ Negligence claims against third parties, such as the Church, for failing to prevent sexual abuse is a form of liability unique to the civil law. In considering duties of care, the civil law imposes responsibility beyond that of an individual perpetrator. To illustrate how the crime of sexual assault was represented in civil litigation, we may examine the statement of

⁶ Arthur Best & David Barnes, *Basic Tort Law: Cases, Statutes and Problems* (New York: Aspen Publishers, 2007) p. 1.

⁷ Issues of institutional negligence and vicarious liability were accepted by *Mary Doe SD v. Salvation Army*, No. 4:07CV362NKN (2007) Opinion of the Court, Eastern District Court of Missouri, p. 10: 'Religious entities remain subject to generally applicable, neutral employment law'.

claim in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008).⁸ In this suit, the plaintiff alleged that: an individual priest ‘engaged in unpermitted, harmful and offensive sexual contact’ that amounted to battery; that the Defendant Bishop ‘negligently recruited, hired, granted faculties and retained’ the abusive priest and that the Church ‘failed to appoint and notify in writing a competent person as a delegate to lead a thorough investigation’.⁹ On all of these accounts, financial damages were claimed for ‘loss of faith in God and the Catholic Church, severe and permanent emotional distress ... loss of self-esteem and other psychological injuries’.¹⁰

Legal theory separates civil and criminal wrongs into different realms. The former is conduct that inflicts harm upon an individual, whereas the latter is of such a magnitude that it constitutes an offence against society and the State. In the late nineteenth century however, the law acknowledged that a perpetrator may be held accountable for the same wrongful conduct through both criminal prosecution initiated by the State and civil action launched by the victim in a private lawsuit.¹¹ The law allows overlap between civil and criminal wrongs and as such establishes somewhat ambiguous categories to ensure a degree of flexibility.¹² Legal history has too rarely acknowledged this flexibility. Often legal history will limit itself to the

⁸ *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* No. CT 004452-04 (2008) Thirtieth Judicial District of Memphis.

⁹ Third Amended Complaint, 4 February 2008, *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), pp. 8-11.

¹⁰ Third Amended Complaint, 4 February 2008, *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), p. 9.

¹¹ ‘The right of action of any person injured by any felony shall not in any case be merged in such felony’: *Koenig v Nott* 2 Hilt. 323 (1859), Opinion of the Court, Supreme Court of New York, p. 327.

¹² Ewick & Silbey, *The Common Place of Law*, p. 17.

development of a particular offence, area of law, defence or case. Studied structurally like this, the law emerges as a conservative restraint on society that applies arbitrary categories with little capacity to accommodate the complexity of real experiences. Accepting the formal framework of the law narrows historical vision by ‘implicitly assuming that the law’s categorization of acts ... was like a process of chemical separation’.¹³ The purpose of acknowledging that crimes of sexual assault may also merge into areas of civil law is to recognize that the relationship between legal definitions and those who use them are multidirectional.¹⁴ This enables the examination of the ‘extra legal empowerment’ sought by victims outside of the criminal law.¹⁵ Expanding our study of sexual abuse beyond that prosecuted or considered in criminal law significantly broadens our understanding of sexual abuse and how the legal system treats it.¹⁶

The Development of Civil Remedies for Sexual Crimes

General causes of action in civil law, such as battery and negligence, have facilitated legal outcomes that are more progressive than those of criminal courts.¹⁷ For example, civil courts recognized marital rape as a legal wrong more than a decade

¹³ Robertson, ‘What’s Law Got to Do with It?’, p. 171.

¹⁴ James Kloppenberg, ‘Review: The Theory and Practice of American Legal History’, *Harvard Law Review*, 106, no. 6 (April 1993) p. 1339.

¹⁵ Nora West, ‘Rape in Criminal Law and the Victim’s Tort Alternative: A Feminist Analysis’, *University of Toronto Faculty of Law Review*, 50, iss. 1 (1992) p. 98.

¹⁶ Robertson, ‘What’s Law Got to Do With It?’ p. 174.

¹⁷ Bruce Feldthusen, ‘The Civil Action for Sexual Battery: Therapeutic Jurisprudence?’, *Ottawa Law Review*, 25 (1993) p. 206.

before marital rape or spousal abuse was criminalized.¹⁸ Although it was not possible for a married man to be criminally guilty of raping his wife at this time, a civil court in *Good v. Martinis* (1961) found that matrimony could be flexibly defined for the purpose of financially compensating a wife for the battery she had experienced.

Where there was ‘no domestic harmony left to be disrupted or destroyed’, as would be the case in many instances of abuse, a husband could not then rely on the privileges of marriage to protect himself from a civil lawsuit.¹⁹ The possibility of utilizing the civil law where the criminal law was too restrictive speaks to an important flexibility and interchangeability in the legal choices presented to victims. Furthermore, advancement of the legal agenda in recognising marital rape as wrongful through the use of civil lawsuits suggests that these alternative proceedings do play an important role in the pursuit of social change.

Providing aggrieved parties with a more flexible and favourable legal proceeding has not been uncommon to the operation of the civil law. The potential to manipulate legal categories and definitions is of particular importance to victims of sexual crimes. Historically, the crime of rape was limited by a number of definitional exclusions. For example, rape was deemed not to have occurred if the accuser and the victim had a prior relationship, if the victim was not physically restrained or if the act was of such a length that the victim was thought to have necessarily acquiesced.²⁰ The difficulty

¹⁸ Marital Rape was first recognized as a crime in 1981: *Commonwealth v. Chretien* 383 Mass 123 (1981), Massachusetts Supreme Judicial Court; *New Jersey State v. Smith* 85 NJ 193 (1981), New Jersey Supreme Court.

¹⁹ *Goode v. Martinis* 58 Wash 2.d 229 (1961) Opinion of the Court, Washington Supreme Court, p. 233.

²⁰ Laura Gowing, *Common Bodies, Women Touch and Power in Seventeenth Century England* (New Haven: Yale University Press, 2003) p. 96.

of proving rape inspired many victims to turn to the civil law and lesser criminal charges. The use of seduction charges as a ‘stand-in for rape legislation’ is one such example that has received some scholarly attention.²¹ Seduction, as it was legally constructed, referred to a consensual act of sexual intercourse that was induced by a fraudulent promise marriage.²² Studies suggest that seduction legislation was also utilised by women who were the victims of involuntary assault but were unable to prove rape or were precluded from proving it as a result of the aforementioned exclusions.²³ Thus, where a woman could not discharge the burden of substantiating a lack of consent, she was still able to avenge her attack under seduction laws because the issue of consent was irrelevant to that charge.²⁴ As seduction was functioning as a legal substitute for rape, its prevalence and frequency significantly declined as the definition of rape became more compassionate throughout the twentieth century.²⁵ In circumstances where the responses of the criminal law have lagged or where its provisions have been overly conservative, victims have relied upon the flexibility of alternative legal proceedings to achieve justice. If an historian assumes that the law’s response to the crime of rape will necessarily be found in a criminal prosecution for rape, it could be quickly concluded that many victims are failed by the legal system.

²¹ Brian Donovan, ‘Gender Inequality and Criminal Seduction: Prosecuting Sexual Coercion in the Early-20th Century’, *Law & Social Inquiry*, 30 (2005) p. 64.

²² Stephen Robertson ‘Seduction, Sexual Violence and Marriage in New York City, 1886-1995’, *Law and History Review*, 24, no. 2 (2006) p. 333.

²³ Robertson, ‘Seduction, Sexual Violence and Marriage’, p. 336.

²⁴ Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* (New York: Cornell University Press, 1999) p. 5

²⁵ Robertson, ‘Seduction, Sexual Violence and Marriage’, p. 370; Constance Backhouse, ‘The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada’, *Dalhousie Law Journal*, 10 (1986-7) p. 45.

Yet the law is anticipatory of its own failure to incorporate all wrongful conduct within singular categories. No doubt, the law proclaims stagnate legal definitions but it also offers choice and flexibility in the legal avenues left open to its users. Through this process of choosing how to define its experience, society becomes the co-author of how the law operates.

In scholarly literature on clergy sexual abuse, there is a significant disjuncture between the use of civil lawsuits and an awareness of their importance.²⁶ More than three thousand civil cases relating to clergy sexual abuse have been launched since 1984.²⁷ Even this figure is misleadingly low, as those who begun civil proceedings but settled out of court are not included, given their settlement agreement usually required confidentiality.²⁸ Still most scholarly work to date has focused on the ‘moral myopia’ surrounding the Church that made it difficult for victims to attract a sympathetic response from law enforcement.²⁹ Contrary to this, the emergence of civil litigation revealed that Church and the criminal law did not have a monopoly on legal avenues for recourse. Prior to 1985, society believed that the Church would assist victims of abuse internally. Beyond this self-regulation, it was assumed that the crime of sexual assault would be managed through criminal prosecution. Although both of these beliefs were generally accepted at the time, their perpetuation in scholarship is

²⁶ Ellen Bublick, ‘Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies’, *Southern Methodist University Law Review*, 59 (2006) p. 56.

²⁷ Doyle & Rubino, ‘Catholic Clergy Sexual Abuse Meets the Civil Law’, p. 551.

²⁸ Westchester County Grand Jury, ‘Report of the April ‘E’ 2002’, 18 June 2002, p. 11.

²⁹ Theresa Krebs, ‘Church Structures That Facilitate Paedophilia among Roman Catholic Clergy’ in Shupe, *Wolves Within the Fold*, pp. 15-32; Berry, *Lead Us Not Into Temptation*, pp. 298-9. Doyle et al., *Sex, Priests and Secret Codes*, pp. 192-202.

problematic as civil litigation has been the most used and relied upon avenue of redress.

To say that victims of clergy abuse were able to rely on civil lawsuits as a mechanism for justice is not to ignore the legal barriers and difficulties that still affected these suits. Early civil cases often failed to attract the sympathy of courts that were still unwilling to second-guess the reasonableness of the Church's actions. For this reason, some suits in the early 1980s were disallowed on the grounds that the Catholic Church enjoyed charitable immunity from suit, meaning that its position as a charity made it ineligible to pay financial damages.³⁰ In upholding this immunity in one such case, the majority of the New Jersey Supreme Court commented that 'the arguments of the dissent are not without appeal but are based upon the premise that we can modify the law to our own views of public policy.'³¹ The pressure to overhaul public policy in this area increased throughout the 1980s as the number of similar cases expanded exponentially. Following *Gastal v. Hannan* (1984), the civil claims of victims gained both a public and legal momentum that altered the nature of how the law was responding to clergy sexual abuse.

The Watershed: Gastal v Hannan (1984)

The case brought against Father Gilbert Gauthé by the Gastal family in Louisiana in 1984 marks the turning point of this legal history. Historians of American Catholicism

³⁰ Catherine Pierce Wells, 'Churches, Charities and Corrective Justice: Making Churches Pay for the Sins of their Clergy', *Boston College Law Review*, 44 (2003) p. 1204; Carey, *Catholics in America*, p. 147.

³¹ *Schultz v Roman Catholic Archdiocese of Newark* 95 NJ 530 (1984) Opinion of the Court, New Jersey Supreme Court, p. 539.

have pointed to a gradual decline in respect for the Church, as a result on the unyielding positions adopted on issues like artificial birth control since the 1960s.³² Still, few events within this process provoked the sharp and immediate impact of the public revelation of Father Gauthé's abuse. The Church had settled complaints about Gauthé privately and directly with his victims since 1980.³³ In 1984, Gastal refused to settle confidentially.³⁴ In fact, the family applied to have the bar on the release of the case's details lifted. Notwithstanding the involvement of a minor, the Court ruled in December 1984 that, on the basis of the Gastal application, the order to have 'sealed and confidential proceedings.... [could be] set aside'.³⁵ *Gastal v Hannan* (1984) was exceptional due firstly to its public availability and secondly to the expansive complaint it made against the Church.³⁶ This suit named the Bishop, the Archbishop, the Diocese, the Church's insurers and the Roman Catholic Church, as a whole, as defendants.³⁷ In doing so, the litigation brought into question the general nature of the

³² Berry, *Lead Us Not Into Temptation*, p. 110; Carey, *Catholics in America*, p. 123.

³³ Jason Berry, 'Tragedy of Gilbert Gauthé: Part I', *Times of Acadiana*, 23 May 1985.

³⁴ Jury Awards Boys Molested by Priest \$1 Million, *Houston Chronicle: Associated Press*, 8 February 1986.

³⁵ *In Re: Gastal, Applying for Writ of Certiorari*, 7 December 1984, in *Glenn Gastal et al. v Archbishop Hannan, the Archdiocese of New Orleans d/b/a the Roman Catholic Church, the Roman Catholic Church for the Diocese of Lafayette, the Roman Catholic Church et. al.* 459 So. 2d 526 (1984) Supreme Court of Louisiana, p. 526.

³⁶ Jason Berry, 'Tragedy of Gilbert Gauthé: Part II', *Times of Acadiana*, 30 May 1985.

³⁷ The full parties to this suit were: *Glen Gastal et al (Individually and On Behalf of Minor) v. Archbishop Philip Hannan, Bishop Gerald Frey, Vicar General Richard Von Puhl Mouton, Monsignor Harry E Benefiel, Monsignor H.A. Larroque, The Archdiocese of New Orleans D/B/A The Roman Catholic Church, The Roman Catholic Church for the Diocese of Lafayette, The Roman Catholic Church, St John Parish, Representing the Communities of Esther and Henry, Vermilion Parish, Louisiana, Certain Underwriters at Lloyd's of London, Interstate Insurance Company and Father Gilbert Gauthé* 459 So. 2d (1984) Supreme Court of Louisiana (hereafter '*Gastal v Hannan*').

Church's conduct. It gained full access to the records of the Church and the depositions of Church officials implicated by the accusation of general institutional negligence.³⁸ Individually, the lawsuit was not hugely successful: of the \$12 million in damages sought, the jury granted only \$1 million.³⁹ However, the influence of the lawsuit more generally is undeniable. Most commentators agreed that *Gastal v. Hannan* (1984) was the beginning of the public crisis.⁴⁰

In upholding the allegations against Gauthé, the secular courts finally accepted the argument of legal scholars that sexual misconduct does not fall within the immunity attached to religious practice and should therefore be punishable in tort law.⁴¹ The legal culpability of the Church gradually became less contentious. The majority of State and Federal jurisdictions had accepted by 2002 that there was no First Amendment barrier to civil litigation on clergy sexual abuse.⁴² Moreover, as awareness of abuse increased, the standard of vigilance expected from the Church

³⁸ 'Relator is to be granted full access to the records... for the purposes of discovery', *In re Gastal Applying for Writ of Certiorari*, 27 February 1985 in *Gastal v Hannan* 463 So. 2d 593 (1985), p. 593; 'Motion to compel Msgr. Larroque to answer deposition questions', *On Application for Writs of Certiorari* 12 April 1985 in *Gastal v Hannan* 466 So. 2d 450 (1985) p. 450.

³⁹ 'Jury Awards Boys Molested by Priest \$1 Million', *Houston Chronicle*, 8 February 1986.

⁴⁰ Boston Globe, *Betrayal*, p. 5; Berry, *Lead Us Not Into Temptation*, p. 5; Doyle et al., *Sex, Priests and Secret Codes*, p. 51.

⁴¹ For the articulation of this argument see: Carl Esbeck, 'Tort Claims Against Churches and Ecclesiastical Offices: The First Amendment Considerations', *West Virginia Law Review*, 39 (1986) p. 87.

⁴² Jurisdictions accepting these cases are listed in *Malicki .v Doe* 814 So. 2d 347 (Florida Supreme Court, 2002) at 351. State jurisdictions include: Colorado, Illinois, Indiana, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Texas, Washington. Federal jurisdictions: Second Circuit, Fifth Circuit, Eighth Circuit, District Courts of Rhode Island, Northern Iowa, Northern Texas, Connecticut, Eastern Michigan.

also heightened. In *Doe (Plaintiff) v Diocese of Memphis et al. (Defendants)* (2008), Father Doyle was asked whether ‘a Bishop can presume... that the priests are going to behave properly and not abuse children’. His response was that an appreciation for the possibility of abuse should now be expected. Thus, the Bishop ‘has to have positive evidence that he can live on that presumption’.⁴³ As more lawsuits were initiated, the legal position of the Church was demythologised and the interrogation of its behaviour by the State became more vigorous and more common.

Gastal v Hannan (1984) also ended the information ‘blackout’ on clergy sexual abuse.⁴⁴ With the public release of the proceedings, investigative journalists like Jason Berry and Catholic newspapers, such as the *National Catholic Reporter*, reported extensively on the details of the case, thereby breaking the taboo on discussing misconduct within the Church.⁴⁵ Within six months, the *National Catholic Reporter* had outlined allegations of abuse in seven other States.⁴⁶ Enlivened by the momentum of public interest, the scandal of clergy sexual abuse began to unfold ‘like a grotesque soap opera on the nightly news’.⁴⁷ Although the Church had tried to isolate the problem to internal questions of religion and faith, the onset of civil litigation demanded consideration of questions of legal responsibility and blameworthiness.

⁴³ ‘Deposition of Thomas Doyle’, 11 April, 2008 in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), pp. 129-30.

⁴⁴ Jenkins, ‘Creating a Culture of Clergy Deviance’, p. 119.

⁴⁵ Carey, *Catholics in America*, p. 155.

⁴⁶ Arthur Jones, ‘Legal Actions Against Paedophile Priests Grow as Frustrated and Angry Parents Seek Remedies’, *National Catholic Reporter*, 5 June, 1985, p. 4.

⁴⁷ Burkett & Brunei, *A Gospel of Shame*, p. 36.

Civil Litigation as a Legal Choice

From 1985, civil litigation came to be understood as a viable option for victims of clergy abuse and consequently a large number of lawsuits were initiated. It had taken more than two decades for the Church's internal approach to abuse discussed in Chapters One and Two to be widely exposed and denounced. The interpretation of the motivations characterising these lawsuits is therefore important to understanding this turning point. The fact that victims of clergy abuse defined their complaints against the Church in similar lawsuits of institutional negligence speaks to the type of legal response desired by victims and the particular nature of holding a religious institution legally accountable.

The most significant factor that motivated these lawsuits was the legacy of Church and government inaction. Many victims reported that litigation was not their first choice for redress but was the result of their dissatisfaction with the previous responses to their complaints.⁴⁸ Private lawsuits were less frequent and less definitive in jurisdictions where the government and the Church took a more proactive role in responding to accusations of abuse.⁴⁹ In Canada, for instance, important legislative action was taken to facilitate prosecutions following revelations of abuse at the Catholic Mount Cashel orphanage in the late 1980s.⁵⁰ Criminal charges also sparked

⁴⁸ Miller, 'Moral Bankruptcy of Institutionalized Religion', p. 157.

⁴⁹ David Pilgrim, 'The Child Abuse Crisis in the Catholic Church: International, National and Personal Policy', *Journal of Policy and Politics*, 39, no. 3 (2011) pp. 3-7; Norbet Rigali, 'Church Responses to Paedophilia', *Theological Studies*, 55 (1994) pp. 124-40.

⁵⁰ Nicholas Bala, 'Child Sexual Abuse Prosecutions in Canada: A Measure of Progress', *Annals Health Law*, 1 (1992) p. 178; '17th Priest Held for Abuses in Newfoundland', *The Gazette*, 29 June 1989, p. B.1; Kevin Cox, 'Sex Abuse by Priests stuns Newfoundland', *The Globe*, 13 February 1989, p. A.3;

the greatest amount of interest in Ireland.⁵¹ The Irish Government followed these charges with government inquiries, placing blame on the Vatican and imposing new guidelines for reporting abuse.⁵² A comparison to the jurisdictions of Canada and Ireland suggests that the importance of civil litigation to victims in America was accentuated by the lack of a response from other regulatory bodies. Victims initiated legal action for themselves upon discovering that their concerns had received little attention from Church officials or secular law authorities.

There were also a number of legal advantages to victims choosing to pursue civil lawsuits against the Church. As compared to a criminal trial, they were granted far more autonomy in defining their claim and their statement of damages. This allowed victims greater power to dictate the issues to be explored, whereas in a criminal trial the victim must act merely as a witness to the prosecution's case.⁵³ In criminal proceedings, the victim's interests are only pursued to the extent that they coincide with the prosecution's conception of the public interest. The American Supreme Court has stated that, although steps should be taken to protect victims, the fundamental right of a defendant to a fair criminal trial takes precedence over the trauma that a victim may suffer during the trial proceedings.⁵⁴ The procedural

Patrick Nagle, 'Probe States on Priest Abuse Claims', *The Vancouver Sun*, 11 September, 1989, p. b.10; Lytton, *Holding Bishops Accountable*, p.197.

⁵¹ Chris Moore, *Betrayal of Trust: The Father Brendan Smyth Affair and the Catholic Church* (Dublin, Marino, 1995).

⁵²Conor O'Cleary, 'Calling Out the Vatican: Irish Report Says Catholic Church has not Helped Stop Sex Abuse', *Global Post*, 15 July 2011.

⁵³ West, 'Rape in Criminal Law and the Victim's Tort Alternative', p. 98.

⁵⁴ *Coy v. Iowa* 487 U.S. 1012 (1988) Opinion of the Court, Supreme Court of United States, pp. 1016-1019.

sensitivity offered by civil claims compared to criminal proceedings had led many feminist legal scholars to advocate for the creation of a specific, modern tort of sexual deception and misconduct.⁵⁵ Empowerment of the victim is the ‘fundamental distinction between criminal and civil justice systems’.⁵⁶

In spite of the contextual and legal reasons why victims resorted to civil litigation, the most common motivation attributed to these lawsuits in public discourse was financial. It was common for the Church to answer allegations by charging that ‘the victim is only out for money and the allegation consists of a twenty-year old unsubstantiated complaint’.⁵⁷ This attitude reflected the general ‘monetisation of litigation’ in America, whereby the quantity of damages was thought to be necessarily representative of the importance of the injury.⁵⁸ Accordingly, even though damage amounts were often undisclosed, they featured heavily in the way this litigation was reported.⁵⁹ Reverend Marie Fortune, a well-known advocate of clergy victims within the Church, has commented that she was:

Astonished how hard it is for judicatory people to get this through their heads – people only sue the church when they have to. Nobody wants to sue their

⁵⁵ Jane Larson, ‘Women Understand So Little, They Call My Good Nature Deceit’: A Feminist Rethinking of Seduction’, *Columbia Law Review*, 93 (1993) pp 470-472.

⁵⁶ Feldthusen, ‘The Civil Action for Sexual Battery’, p. 213.

⁵⁷ Westchester County Grand Jury, ‘Report of the April ‘E’ 2002’, p. 9.

⁵⁸ David Luban, ‘Settlements and the Erosion of the Public Realm’, *Georgetown Law Journal*, 83 (1994-5) p. 2646.

⁵⁹ For example: ‘\$10.25 million awarded in Church Sex-Abuse Suit’, *San Antonio Express-News*, 18 April 1992, p. 7; Shannon Tangonan, ‘Church to Pay \$30M in Priest Sex Abuse Case’, *USA Today*, 17 July 1998, p. 3.A; James Bone, ‘Altar Boy Abuse Costs Church \$30m’, *The Times*, 11 July 1998, p. 16. ‘Record Abuse Damages’, *Macleans*, 110, iss. 31, 4 August 1997, p. 37; ‘Millions in Damages for Abuse by Priest’, *Toronto Star*, 25 July 1997, p. A.15.

Church ... But they will when the institution hasn't given them what they deserve.⁶⁰

Surveys of plaintiffs confirmed Reverend Fortune's view that for most, monetary damages was not a driving factor in their claim. Balboni conducted a study of twenty-two clergy abuse victims and thirteen of their attorneys. Within this sample-group, none identified financial compensation as the goal of their lawsuit, with most citing feelings of alienation and betrayal as their decisive reason for suing.⁶¹

In hindsight and when considered as an accumulative phenomenon it may appear that civil litigation inflicted a mercenary revenge upon the Church. However, the extent of individual pay-outs was always uncertain and often limited.⁶² Of course, the proliferation of lawsuits specifically targeting the Catholic Church was not unrelated to the fact that it was capable of financing large court settlements.⁶³ The hierarchical structure of the Church also made it possible for a diocese to be held liable for the actions of an individual priest.⁶⁴ The financial assets of the Catholic Church certainly removed one of the primary reasons why victims of crime might be reluctant to sue as few perpetrators would ordinarily have the liquidity to pay both damages and legal

⁶⁰ Marie Fortune, 'Interview with Reverend Marie Fortune', 8 August 1990, *Pastoral Psychology*, 39, iss. 5 (1991) p. 307.

⁶¹ Jennifer Balboni & Donna Bishop, 'Transformative Justice: Survivor Perspectives on Clergy Sexual Abuse Litigation' *Contemporary Justice Review*, 13, no. 2 (2010) pp. 138-9.

⁶² *Berger v. Southern Pacific Corporation* 144 Cal. App. 2d. 1 (1956) California Court of Appeal: Justice Agee, p. 11; Balboni & Bishop, 'Transformative Justice', p. 133.

⁶³ Jenkins, *The New Anti-Catholicism*, p. 143

⁶⁴ Coughlin, *Canon Law*, p. 83

fees.⁶⁵ Yet the discursive focus on the financial motivations behind civil litigation against the Church is an example of the perception that these lawsuits only serviced individuals. Damages are, of course, an individual benefit accrued to the complainant in civil suits. Still, the public exposure and condemnation of injurious conduct should be neither neglected nor underestimated as a broader purpose of civil litigation.

Private Lawsuits with Public Significance?

History has often been unwilling to grant a significant role to private litigation in pursuing public agendas. Political historians have emphasised that the influence of even iconic, constitutional litigation, such as *Brown v. Board of Education* (1954), only extends as far as the individual characteristics of the originating case allow or as far as the decision achieves societal and political acceptance.⁶⁶ Particularly, vehement critics of civil lawsuits argue that litigation is like ‘fly paper for social reformers ... with a naïve and romantic belief in the triumph of rights over politics’.⁶⁷ Still, there has recently been a growing recognition that tort litigation may serve at least an educative function in public policy.⁶⁸ The exposure and evaluation of sensitive information through litigation is itself of significant public benefit. Claims for

⁶⁵ Mary Lou Lowder, ‘Civil Action for Rape: A Viable Alternative for the Rape Victim’, *Southern Illinois University Law Journal*, 3, iss. 3 (1978) p. 420.

⁶⁶ For a critique of *Brown v Board of Education* 347 U.S. 483 (1954) on racial segregation see: Michael Klarman, *From Jim Crow to Civil Rights; The Supreme Court and the Struggle for Racial Quality* (New York: Oxford University Press, 2004) pp. 354-6, 366-7. For a critique of *Roe v. Wade* 410 U.S. 133 (1973) on reproductive rights see: Rickie Solinger, *Pregnancy and Power: A Short History of Reproductive Politics in America* (New York: New York University Press, 2005) p. 218.

⁶⁷ Rosenberg, *The Hollow Hope*, pp. 427-9.

⁶⁸ See for example: John Wade, ‘Tort Law As Ombudsman’, *Oregon Law Review*, 65 (1986) p. 309.

corporate negligence of the 1980s, involving environmental disasters, *Benedictin*, Agent Orange and breast implants offer compelling examples of this.⁶⁹ These lawsuits should be considered as ‘social policy torts’ or as litigation motivated by a desire to influence the behaviour of public or corporate entities ‘in the absence of any legislative or judicial ruling that such behaviour is required’.⁷⁰

A further illustration of this is New York Attorney General Eliot Spitzer’s aggressive use of civil lawsuits to extract policy change from Wall Street. In 2002, Spitzer sued numerous investment banks for providing biased advice and achieved a compensation package of \$1.4 billion from companies like Bear Stearns, Merrill Lynch, Goldman Sachs and Morgan Stanley.⁷¹ Through his strategic use of civil lawsuits, Spitzer became ‘the most feared man on Wall Street without arresting a single executive and without so much as indicting one investment bank’.⁷² The scandals that disparaged the business practices of corporate America were certainly influenced by these lawsuits. The misconduct of Wall Street and the Catholic Church was unravelled during a similar period. It is curious then that the public importance of lawsuits against corporate America was so readily acknowledged, when the individual gain motivating

⁶⁹ See generally: Joseph Sanders, *Benedictin on Trial: A study of Mass Tort Litigation* (Ann Harbor: University of Michigan Press, 1998); Michael Green, *Benedictin and Birth Defects: The Challenges of Mass Toxic Substances Litigation* (Philadelphia: University of Pennsylvania Press, 1996); Marcia Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case* (London: W.W. Norton & Co, 1997); Peter Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (New York: Harvard University Press, 1987).

⁷⁰ Deborah Hensler, ‘The New Social Policy Torts: Litigation as a Legislative Strategy, Some Preliminary Thoughts on a New Research Project’, *DePaul Law Review*, 51 (2001-2) p. 502.

⁷¹ John Cassidy, The Investigation: How Eliot Spitzer Humbled Wall Street, *The New Yorker*, 7 April, 2003, p. 54.

⁷² Mark Gimein, ‘Eliot Spitzer: The Enforcer’, *Fortune*, 146, iss. 5, 16 September 2002.

similar lawsuits preoccupied the explanation of the Church scandal. Viewing clergy sexual abuse within its historical context of the trend towards using civil litigation to advance societal and policy considerations is an important addition to the historical understanding of these lawsuits. It enables an examination of their influence on American political history, rather than an appreciation of them solely as an individualistic manifestation of legal justice.

Civil litigation of clergy sexual abuse disseminated and entrenched the hegemonic understanding of the Catholic Church as an irresponsible and negligent exerciser of legal authority.⁷³ The event-centred nature of news reporting allowed very little awareness of the complexities and particularities of the civil litigation process.⁷⁴ Consequently, the public understanding of the complaints against the Church was skewed in two ways attributable to the atypical manner in which the media reports legal information: firstly, a prioritisation of victims and secondly, a preoccupation with salacious details of institutionalised evasion of legal consequences.⁷⁵ By shaping the media's presentation of the clergy sexual abuse "problem", litigation also dictated the corresponding response from the State.

The dual asymmetry of information, whereby the media depended upon legal documents for their reporting and the public depended upon the media for their information, exaggerated the importance of civil litigation to the general

⁷³ Carmella, Angela, 'The Protection of Child and Young People: Catholic and Constitutional Visions of Responsible Freedom', *Boston College Law Review*, 44 (2003) p. 1031.

⁷⁴ L. Wilkins & P. Patterson, 'Risk Analysis and the Construction of News', 37, *Journal of Communication* (1987) pp. 80-92.

⁷⁵ M. Galanter, 'News from Nowhere: The Debase Debate on Civil Justice', *Denver University Law Review*, 71 (1993) p. 77.

consciousness of clergy sexual abuse as a public problem. Contemporary reporters and secondary scholars alike identify ‘court documents and records, a database and interviews with attorneys and other sources involved in the cases’ as the primary sources from which their conclusions were drawn.⁷⁶ This is perhaps unsurprising given the lack of knowledge and documentation available before the onset of legal proceedings. Moreover, the lawsuits against the Church accord with most of the key factors that media analysts identify as important to audience appeal.⁷⁷ It seems almost intuitive that stories of Catholic initiation rites involving sexual abuse and paedophile rings within the Church would be successful media stories.⁷⁸ Indeed, studies on the wealth of news stories concerning clergy sexual abuse at this time suggest that there was a strong incentive for the media to focus on these complaints.⁷⁹ Of particular importance here is the perverse incentive for plaintiffs in tort claims to also emphasize the extent of their injury and the blameworthiness of the respondent.⁸⁰ For instance, in asserting institutional negligence in *Doe (Plaintiff) v Diocese of Memphis et al. (Defendants)* (2008) the plaintiff alleged that ‘in excess of five hundred other individuals... [were] sexually abused’ with the allegations ‘documented and

⁷⁶ Boston Globe, *Betrayal*, p. x; Berry, *Lead Us Not Into Temptation*, pp. ix, xxii, 47; France, *Our Fathers*, p. 599; Lytton, ‘Clergy Sexual Abuse Litigation’, p. 836.

⁷⁷ D. S. Bailis and R. J. MacCoun, ‘Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation’, *Journal of Law and Human Behaviour*, 20 (1996) pp. 419-29.

⁷⁸ ‘Jury Awards Boys Molested by Priest \$1 Million’, *Houston Chronicle: Associated Press*, 8 February 1986; ‘New suit accuses Geoghan of Sex Ring’, *Patriot Leader* (Massachusetts), 26 July 2002.

⁷⁹ Lytton, ‘Clergy Sexual Abuse Litigation’, pp. 814-848.

⁸⁰ Lytton, ‘Clergy Sexual Abuse Litigation’, p. 820.

maintained in *sub secreto* files' by the Church.⁸¹ Historians have regularly acknowledged that legal sources possess many of the qualities of fictional works in that they shape the 'events of a crime into a story... forming, shaping and moulding elements: the crafting of a narrative'.⁸² These characteristics are true of legal documents when they are presented in the news media as well. The emotive, dramatised and at times sensationalised complaints against the Church as they appeared in civil litigation formed the dominant basis for how clergy sexual abuse was presented in public discourse.

The product of garnering knowledge from legal documents attendant to civil lawsuits is that the nature of these sources will tend to emphasis the narrative developed by the plaintiff. When initiating a civil lawsuit, the plaintiff develops a full 'Statement of Complaint' that begins the litigation and defines the conduct to be evaluated. The contributions of the defendant are responsive. Defendant depositions, for example, interrogate questions regarding the complainant's claims and the issues relevant to that allegation as it was presented. Consequently, defendants may have little opportunity to present their own coherent story.⁸³ Of course, the nature of their

⁸¹ 'Third Amended Complaint' in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), p.7; 'Amended Complaint' in *John Doe No.s 30-68 and Mary Roe No.s 6-8 (Plaintiffs) v. The Roman Catholic Archbishop of Boston, Bernard Law, James Porter, Paul Shanley et al.*, No. 05-0006F, (2007), available online at *Bishop Accountability*: <http://www.bishop-accountability.org/complaints/2007_12_31_Boston_John_Doe_30_68_Complaint_RR.pdf>, viewed 13 March 2011.

⁸² Natalie Zemon Davis, *Fiction in the Archives: Pardon Tales and Their Tellers in Sixteenth Century France* (Stanford: Stanford University Press, 1987) p. 3; Robertson, 'What's Law Got To Do With It?', p. 166.

⁸³ Garthine Walker 'Rereading Rape and Sexual Violence in Early Modern England', *Gender and History*, 10, no. 1 (1998) p. 5; Davis, *Fiction In the Archives*, pp. 5-6; This phenomenon was accentuated in the case of clergy sexual abuse as the Church was reluctant to respond publicly to

complaints contributed to the media's sympathy for victims of clergy sexual abuse. Nonetheless, the particular process of civil litigation also offers explanation for why the tide of public opinion turned so sharply against the once revered institution of the Catholic Church.

Civil litigation was responsible for establishing the 'deadeningly repetitive paradigm of perpetration and cover-up' that gave rise to the belief that clergy sexual abuse was a systemic and unforgiveable deficiency in the Church as a whole.⁸⁴ The civil law conceives of culpability differently to the individual deviance considered by criminal law. In cases of sexual abuse, the civil law assumes that third parties bear some responsibility to prevent that abuse.⁸⁵ This is why employers are partly responsible for the crimes of an employee that was hired in spite of a history of abusive behaviour.⁸⁶ The choice of victims to use civil litigation as their mechanism of legal redress is therefore important because it allowed for the culpability of the Church as an institution to be interrogated. Indeed, the statements of complaint by victims coupled the moral responsibility of the Church with that of their abuser by alleging that the Church conspired to hide the abuse, allowed the abuse or enabled the abuse.⁸⁷

allegations. See for example, the recommendation that clergymen refuse to speak of allegations in Richard Neuhaus, 'Bloody Minded Compassion – Verdict First', *First Things: A Monthly Journal of Religion and Public Life*, 40 (February 1994) pp. 53-54.

⁸⁴ Mary Gail Frawley-O'Dea, 'The History and Consequences of the Sexual-Abuse Crisis in the Catholic Church', *Studies in Gender and Sexuality*, 5, no. 1 (2004), p. 12.

⁸⁵ Bublick, 'Torts Suit Files by Rape and Sexual Assault Victims', pp. 61-2.

⁸⁶ *Kodiak Island Borough v. Joan Roe* 63 P. 3d 1009 (2003) Supreme Court of Alaska: Justice Eastaught, p. 1011.

⁸⁷ Kristen Lombardi, 'Cardinal Sin and Geoghan', *Boston Phoenix*, 23 March 2001; Michael Rezendes et al., 'Church Enabled Geoghan', *Boston Globe*, 6 January 2002, 'Church Allowed Abuse by Priest for Years', *Boston Globe*, 6 January 2002.

Generally speaking, media stories will seek to accentuate threats to traditionally perceived moral values or sacred cultural institutions.⁸⁸ For this reason, a fascination with the revealed hypocrisy of the Church in allegedly covering up abuse was evident in both the manner and frequency of reporting on litigation.⁸⁹ The *Boston Globe* reported prolifically on the civil suits against the Archdiocese of Boston that impeached Cardinal Bernard Law in publishing three hundred such articles during the first four months of 2002.⁹⁰ Jenkins has argued that this institutional focus was the product of an anti-Catholic bias.⁹¹ Yet this neglects the effectiveness of civil litigation in popularising the idea that the Church engaged in a ‘civil conspiracy’ and ‘was aware of the large numbers of sexual abuse cases ... for over fifty years’.⁹² It would have been difficult for the media to report these cases without adopting a similar institutional focus. The concept of ‘media framing’ has become an important tool for many cultural historians in understanding why issues assume social prominence at any given time.⁹³ When applied here, it is clear that civil litigation against the Church succeeded in framing the issue of clergy sexual abuse as a failure that inculpated the very institution and structure of the Church.⁹⁴

⁸⁸ Peter Grabosky & Paul Wilson, *Journalism and Justice* (Sydney: Pluto Press, 1989) p. 13.

⁸⁹ Lytton, *Holding Bishops Accountable*, p. 135.

⁹⁰ Boston Globe, *Betrayal*, p. viii.

⁹¹ Jenkins, *The New Anti-Catholicism*, p. 134-8.

⁹² Third Amended Complaint’ in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), pp. 6, 13.

⁹³ James Tankard, ‘Empirical Approach to the Study of Media Framing’ in Stephen Reese, Oscar Gandy & August Grant, eds., *Framing Public Life: Perspectives on Media and Our Understanding of the Social World* (New Jersey: Taylor & Francis, 2008) pp. 95-6.

⁹⁴ Lytton, *Holding Bishops Accountable*, p. 135.

Consequently, victim litigation brought both indirect and direct scrutiny upon the Church. By seeking to evaluate the Church's duty of care, these lawsuits produced direct legal consequences, such as the requirement that the Church screen its priests for a history of abusive behaviour.⁹⁵ With the sharp jump in media and public scrutiny, the Church also began to manage abusive priests far more cautiously. In response to the investigation of the *Boston Globe*, for example, the Archdiocese of Boston recalled from assignment 176 priests with complaints against them in 2002.⁹⁶ The repercussions of these civil suits for the Church were neither small nor isolated to individual cases. Five America Dioceses have been declared bankrupt as a result of the financial penalties imposed by these claims since 1985.⁹⁷ Lytton, a defender of the legal effectiveness of mass tort litigation in other areas,⁹⁸ has argued that the gravity of this financial cost and legal scrutiny rendered the courtroom 'a policy venue' for the Catholic Church as it reformed its behaviour in order to avoid future lawsuits.⁹⁹ The Church has, of course, altered some of its policies for managing abuse,

⁹⁵ *Juanita Spann (Plaintiff) v Father Vance Thorne et al. (Defendants)*, No. J87-0114 B] (1987), District Court, Southern District Mississippi. See generally, Mark Chopko, 'Ascending Liability of Religious Entities for the Actions of Others', *American Journal of Trial Advocates*, 17 (1993-4) pp. 289-350.

⁹⁶ *Boston Globe*, *Betrayal*, p. 4.

⁹⁷ Stephanie Innis, 'Diocese of Tucson weighs bankruptcy', *Arizona Daily Star*, 16 June, 2004; 'Claims of Sexual Abuse Bankrupt Catholic Diocese', *The Windsor Star*, 8 July 2004, p. D.10; Tony Perry, 'San Diego Diocese Files for Bankruptcy', *Los Angeles Times*, 28 February, 2007 p. A.1; 'Iowa Diocese Bankrupt After Sex-Abuse Lawsuit', *The Grand Rapids Press*, 10 February 2007 p. D.7; Formicola, 'Further Legal Consequences', p. 457.

⁹⁸ Timothy Lytton, 'Using Litigation to Make Public Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco and Gun Litigation', *Journal of Law, Medicine and Ethics*, 32, iss. 4 (2004) pp. 556-564; Timothy Lytton, *Suing the Gun Industry: The Battle at the Crossroads of Gun Control and Mass Torts* (Michigan: University of Michigan, 2005).

⁹⁹ Timothy Lytton, 'Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law', *Connecticut Law Review*, 39, no. 3 (February 2007), p. 814.

including a reduction in the use of treatment facilities and the introduction of specialist tribunals, as was discussed in earlier chapters.¹⁰⁰ These changes in Church behaviour, however, are not the ‘poster child for the policymaking benefits of tort litigation’ that Lytton concludes they are.¹⁰¹

The public pressure for reform that litigation certainly generated was not particularly successful where applied to the Catholic Church. Indeed, Pope John Paul II explicitly discounted the ceding of any Church power on the basis of external agitation: ‘the legitimate pastors, in the exercise of their office, must never be considered simply executors of decisions based on majority opinions that emerge’.¹⁰² The 2011 Church reports that argue the cause of clergy abuse was societal also demonstrate that the Church was disinclined to view their institutional policies as problematic.¹⁰³ As a result, the investigations carried out by the Philadelphia Attorney General in 2011 have concluded that the Church’s interaction with abuse victims has not genuinely altered since the 1980s.¹⁰⁴ Indeed, the Church’s conduct, even after these policy changes, has been the subject of successful negligence claims.¹⁰⁵

¹⁰⁰ John Jay College of Criminal Justice, *Causes and Context*, p. 80; United States Conference of Catholic Bishops, *Promise to Protect, Pledge To Heal – Essential Norms*, pp. 26-36.

¹⁰¹ Timothy Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Cambridge & Massachusetts: Harvard University Press, 2008). p. 203.

¹⁰² Speech by Pope John Paul II to Congregation of Clergy, 10 January 2004 in John Allen, ‘The Word From Rome: The Pope’s State of the World Survey’, *National Catholic Reporter*, 16 January 2004.

¹⁰³ John Jay College of Criminal Justice Research Team, *Causes and Contexts*, p. 37.

¹⁰⁴ Philadelphia Grand Jury, ‘*In re: Country Investigating Grand Jury XXIII*’, 21 January 2011, pp. 6-8.

¹⁰⁵ ‘Third Amended Complaint’ in *Doe (Plaintiff) v. Diocese of Memphis et al. (Defendants)* (2008), p. 12.

For these reasons, the most important influence of the litigation against clergymen was not in facilitating the Church confronting the abuse but in forcing the State to confront the Church. The importance of litigating complaints of clergy sexual abuse was greater than its instrumentalist value in provoking policy change.¹⁰⁶ Victim lawsuits against the Church also sought to revise the symbolic content and political composition of the law itself by challenging the extent to which the State could cede authority to other social institutions. The State's subsequent redrawing of the boundaries of legitimate religious autonomy will be explored in the following Chapter. Those sceptical of the value of civil litigation argue that it is unlikely to produce either public or legislative change because its 'complexity and technical nature ... furnishes an ineffective peg around which to build a mass movement'.¹⁰⁷ The opposite was proven to be true of litigation alleging clergy sexual abuse.

From the mid-1980s, civil lawsuits became the heuristic device of choice for victims of clergy sexual abuse. This was significant, not only because of the mere possibility of recourse it enabled, but also because of the particular nature of this legal justice. Civil lawsuits, as discrete legal proceedings, allowed victims to portray the issue of their abuse through individually formulated narratives of complaint that foregrounded their lack of confidence in the institutional integrity and competency of the Church. In emphasising the injuries of victims and the failings of the Church, this litigation generated a moral crisis and galvanized support for structural change in the relationship between the Church and State.

¹⁰⁶ John Griffiths, 'Is Law Important?', *New York University Law Review*, 54 (1979) p. 341.

¹⁰⁷ Jack Walter Peltason, *Fifty-eight Lonely Men: Southern Federal Judges and School Desegregation* (Illinois: University of Illinois Press, 1971) p. 103.

CHAPTER FOUR: THE VINDICTIVE STATE

Before the onset of civil litigation, the position of the Catholic Church as a private, self-regulating community was accepted with unanimity from the Church, its congregants and the State. The realization that the autonomy of the Church had allowed the abuse of children to continue without legal intervention dismantled this consensus. Secular investigations into the Church's conduct concluded that:

Such a comprehensive strategy of self-protection by the religious institution leads the Grand Jury to conclude that permitting a religious institution to decide for itself how to handle complaints of this kind is ineffective, inappropriate and self-serving.¹

The secular legal system attempted to fill the void left by the demonstrably defunct and discredited system of Canon Law regulation. Yet the formal legal orthodoxy of Church-State separation was not automatically removed by the tide of public opinion turning against the Church. 'Unintended or unwise' limitations on secular law enforcement's ability to intervene in Church matters regularly thwarted the early attempts of a dismayed public to hold abusers to account.² Cases of clergy sexual abuse soon became synonymous with a 'travesty of justice: a multitude of crimes for which no one can be held criminally accountable.'³ Yet the passive failure of the State does not characterize the entire legal history of the crisis. Civil litigation did not merely force the State to react. It provoked a legal response that was antithetical to the institutional relationship between Church and State that existed prior to the 1980s. The State 'aggressively used and abused' its authority in an effort to investigate and

¹ Westchester County Grand Jury, 'Report of the April 'E' 2002', 18 June 2002, p. 8.

² Philadelphia Grand Jury, 'In Re: County Investigating Grand Jury of September 17, 2003', p. 6.

³ Philadelphia Grand Jury, 'In Re: County Investigating Grand Jury of September 17, 2003', p. 7.

publicly condemn the Church, even where the misconduct fell beyond the strict capacity of the criminal law.⁴ These legal developments, particularly in changing the structure of Grand Juries and the length of statutes of limitation, represented the overhaul of both the perceived and the structural role of the Church in the American legal framework. In studying the determined legal attempts to facilitate the prosecution and punishment of clergymen and Bishops, it should not easily be forgotten that the same Church once played a far from submissive role in this landscape.

The ‘lynch-mob mentality’ that inspired the legal developments to specifically target the Church was a product of the steady release of information and incessant media reporting of the abuse allegations.⁵ The paradigm of institutionalised abuse and negligence that was discussed in the previous chapter became so thoroughly established that by 2002, 72% of Americans disapproved of the Church’s leadership.⁶ The information procured through civil litigation galvanized opposition to the Church and rendered ‘Catholicism itself ... contested terrain’ in the 1990s.⁷ The Church was denounced even from within its own congregation.⁸ The most notable Catholic opposition group was the Voice of the Faithful Movement, which emerged in the

⁴ Formicola, ‘The Further Legal Consequences of Catholic Clerical Sexual Abuse’, p. 446.

⁵ John Baker, ‘Prosecuting Diocese and Bishops’, *Boston College Law Review*, 44, iss. 4-5 (2003) p. 1087.

⁶ Moore, ‘Catholics: Church Doing Bad Job of Dealing with Sexual Abuse by Priests’, *Gallup Poll*, 27 March 2002.

⁷ Laura Leming, ‘Church as Contested Terrain: Voice of the Faithful and Religious Agency’, *Review of Religious Research*, 48, no. 1 (2006) pp. 56-71.

⁸ Marian Ronan, ‘The Clergy Sex Abuse Crisis and the Mourning of American Catholic Innocence’, *Pastoral Psychology*, 56 (2008) p. 322.

wake of the expansive allegations against the Archdiocese of Boston.⁹ The movement attracted more than thirty thousand Catholics to its cause under the slogan ‘Keep the Faith, Change the Church’.¹⁰ Equally as important was the organization of victim networks, such as Victims of Clergy Abuse Link-Up (VOCAL) and Survivors Network for those Abused by Priests (SNAP). Both VOCAL and SNAP were formed in the early 1990s. Combined, these networks supported six thousand members.¹¹ These social movements are evidence of the cultural transition towards publicly criticizing the Church. Popular pressure began to demand that the secular legal system take action against the once revered and almost infallible institution. After the onset of civil litigation and the outrage it provoked, deference to the Church’s legal authority was no longer an option for the secular law.

Of course, public pressure to respond strongly and harshly to sexual offences is not unique to the scandal of clergy sexual abuse. Throughout this period, high profile cases of abuse were used to agitate for measures to protect society more vigilantly against sexual predators. For example, in Washington in 1989, the case of Eric Shriner, released from goal twice only to rape, mutilate and kill children on each occasion, justified the implementation of civil commitment for sexual offenders.¹²

⁹ Tricia Bruce, *Faithful Revolution: How Voice of the Faithful is Changing the Church* (Washington: Oxford University Press, 2011), p. 5.

¹⁰ James Muller & Charles Kenney, *Keep the Faith, Change the Church: The Battle by Catholics for the Soul of Their Church* (Pennsylvania: Rodale, 2004); William V. D’Antonio & Anthony Pogorelc, *Voices of the Faithful: Modern Catholics Striving for Change* (Virginia: Crossroads Publishing Co., 2007).

¹¹ Berry, *Lead Us Not Into Temptation*, p. xi.

¹² Jennifer Ann Smulin, ‘Protecting Life and Liberty: The Constitutionality and Necessity of Civil Commitment of Sexual Predators’, *DePaul Law Review*, 52 (2002-3) p. 1245.

This empowered courts to order the indefinite custody of an offender deemed to be a threat to society. The rape and murder of Megan Kanka in 1994 inspired further reform that mandated community notification of released sex offenders.¹³ Indeed, the question of how to deal with sex offenders was an integral part of the new period of ‘democratized law and order’ in the 1980s and 90s, whereby direct public pressure for increased community protection defined the State’s policy position on increasingly harsh criminal penalties.¹⁴ Indulging the punitive impulse of the public when dealing with sex offenders has stretched the expectations of the law to the point of redrawing the balance between criminal punishment and individual freedom. There is no doubt that community zeal for punishing sexual predators has regularly demanded the expansion of State legal powers. In the case of abuse by the Catholic clergy, this sentiment was even stronger as a result of the system’s failure to uncover the abuse for many decades.

Secular investigations that revealed an ‘orchestrated effort to protect abusing clergy members from investigation, arrest and prosecution’¹⁵ spoke as much to the State’s failure to enforce the law as to the Church’s avoidance of it. Although the Church may well have been negligent in handling abusive priests, it also appeared that the State had been negligent in handling the Church. The State did not escape reproach. The Philadelphia Grand Jury commented critically that ‘there is no other class of crime where we expect victims to rely on their assailants for resolution’.¹⁶ However,

¹³ Cole, ‘From the Sexual Psychopath Statute to Megan’s Law’, p. 313; Daniel Filler, ‘Making the Case for Megan’s Law: A Study in Legislative Rhetoric’, *Indianan Law Journal*, 76 (2001) pp. 315-365.

¹⁴ Ryan, ‘Engaging with Punitive Attitudes towards Crime and Punishment’, p. 144.

¹⁵ Westchester County Grand Jury, ‘Report of the April ‘E’ 2002’, p. 7.

¹⁶ Philadelphia Grand Jury, ‘*In re: Country Investigating Grand Jury XXIII*’, 21 January 2011, p. 11.

moral panics are often sparked by society's own guilt in producing or allowing the deviance that is then used as a 'cultural scapegoat'.¹⁷ The State's previous commitment to upholding policies that allowed abuse to remain hidden certainly contributed to the fervor with which the legal management of the Church after 1985 was approached. Thus, the period of State inactivity on the issue of clergy sexual abuse cannot be said to have weakened the eventual response. Indeed, the Church's evasion of the law animated the secular legal system with a 'retributive impulse' that justified imaginative attempts to hold the Church to account.¹⁸

At first instance, demands for State intervention only served to demonstrate the limitations of the criminal law in assigning meaningful culpability to the Catholic Church. The overwhelming majority of criminal investigations were unable to issue indictments. It is true generally that a very small fraction of sex offences are prosecuted.¹⁹ However, the potential cases against Catholic priests were particularly problematic because most allegations surfaced in the 1980s, a number of years after the actual occurrence of abuse. As a result many claims were barred by the statutes of limitation that required the claim to be brought within a timely period after the offence.²⁰ Conversely, other claims were fruitless because there was not sufficient

¹⁷ David Garland, 'On the Concept of Moral Panic', *Crime Media Culture*, 4, no. 9 (2008) p. 15.

¹⁸ Logan, 'Criminal Law Sanctuaries', p. 389.

¹⁹ David Bryden & Sonja Lengnick, 'Rape in the Criminal Justice System', *Journal of Criminal Law and Criminology*, 87 (1997) pp. 1194, 1244-52.

²⁰ For a representative sample of legislation on statutes of limitation for sexual abuse see: *Revised Code of Washington* (2009) s 9A. 04. 080; *California Penal Code* (2009) s 801. 1; *New Hampshire Statutes, Title LXII Criminal Code* (2009) s 625. 8; *New York State Criminal Procedure Law* (2009) s 30.10(3)(e).

causal evidence to substantiate a prosecution.²¹ As a result, very few priests were found criminally liable and no criminal action against a Bishop or Diocese reached a court hearing.²²

In instances where the criminal law was able to operate, concerns have been raised that the law was stretched beyond its original intention. In 2002, the Attorney General of New Hampshire successfully threatened the New Hampshire Catholic Diocese with a criminal indictment. The threat alone was sufficient to persuade the Diocese to settle an agreement with the Attorney General that forfeited oversight of auditing, personnel training, allegation management and clergy discipline to the prosecutor's office.²³ Even the prosecutors in this case admitted that this indictment would have relied on so-called 'novel theories' of the law.²⁴ Their theory of legal fault was described by some legal commentators as requiring 'mens rea [to be] virtually emptied of its meaning'.²⁵ In examining the agreement between the New Hampshire Diocese and Attorney General, it is quite clear that legislation had to be manipulated and in parts misused to apply to the conduct of the Church.²⁶ Similar concerns were voiced in

²¹ Philadelphia Grand Jury, 'In re: Country Investigating Grand Jury XXIII', 21 January 2011, p. 6.

²² Laura Russell, 'Pursuing Criminal Liability for the Church and Its Decision Makers for their Role in Priest Sexual Abuse', *Washington University Law Quarterly*, 81, iss. 3 (2003) p. 893.

²³ The State of New Hampshire, Attorney General Philip McLaughlin, 'In Re: Grand Jury Proceedings, No. 02-S-1154, Agreement', 12 October 2002, Hillborough County Superior Court, available online at: New Hampshire Department of Justice, <<http://doj.nh.gov/criminal/diocese-reports/documents/2006-report-exhibit-a-agreement.pdf>>, created October 2002, viewed 19 May 2011.

²⁴ Interview with William Delker, Senior Assistant AG and James Rosenberg, Assistant AG (New Hampshire, March 20, 2003) quoted in Baker, 'Prosecuting Diocese and Bishops', p. 1062.

²⁵ Baker, 'Prosecuting Diocese and Bishops', pp. 1073-4.

²⁶ Peter Heed – New Hampshire Attorney General, 'Report on the Investigation of the Diocese of Manchester', 3 March 2003 (Concord, New Hampshire: Office of the Attorney General), available

relation to the credibility of the few criminal prosecutions undertaken. Knowledge of the problem of abuse was so common that there was a risk of creating an atmosphere of ‘guilt by allegation’.²⁷ Paul Shanley, for instance, was convicted without eyewitnesses, physical evidence or contemporaneous corroboration.²⁸ Due to a long history of non-interference, the genuine provisions of the criminal law in 1985 were ill equipped to respond to allegations made against the Catholic Church. This presented the secular legal system with two choices: accept that the Church’s conduct had fallen beyond the scope of legal scrutiny or manipulate and alter legal mechanisms to bring the Church within its jurisdiction.

Amidst the growing public and legal pressure of the 1990s, imaginative applications of the current criminal law and determined attempts to reform the law came to define the State’s relationship with the Church. The evaluation of the State in the existing literature on clergy sexual abuse can be understood in two ways: either as the work of legal scholars that hypothesizes possible applications of the current law so as to hold the Church accountable or as the work of historians of religion that internalizes the issue of crime within latent Church structures.²⁹ Both of these approaches are limited

online at *Bishop Accountability*, <<http://www.bishop-accountability.org/resources/resource-files/reports/NewHampshireAGReport.pdf>>, viewed 29 July 2011, pp. 3-10.

²⁷ Jack Doppelt, *Guilt by Allegation: Lessons from the Cardinal Bernardin Case* (Washington: Northwestern University Press, 1994).

²⁸ Jonathan Raun, ‘If Paul Shanley is a Monster, the State Didn’t Prove It’, *National Journal* (New Hampshire, Washington), 12 March 2005.

²⁹ Social historian Anson Shupe and Canonical historian Thomas Doyle have developed religious paradigms to explain the history of clergy sexual abuse. Shupe’s theory of ‘clergy malfeasance’ and Doyle’s theory of ‘religious duress’ both internalize the issue of crime within the Church and thereby limit the role of external legal intervention (Anson Shupe, *Wolves Within the Fold*, pp. 1-2; Doyle et al. *Sex, Priests and Secret Codes*, pp. 229-232). Nugent and Russell offer extensive discussion of the

by the fallacy that the secular law must necessarily remain static or irrelevant in its regulation of the Church. Despite the protestations of legal positivists, the use of the law is not always bound to its textual incarnation.³⁰ In responding to changing societal expectations, the law may often be used flexibly, applied generously and revised swiftly in order to ensure its operation. Many victims of clergy abuse were forced to use civil litigation to draw attention to their claims. Yet regardless of earlier inaction, secular law enforcement cannot be said to have remained rigidly insensitive towards these victims. In fact, the secular legal system became so animated by the public demands to punish abusive clergymen that it began to act outside of its own means. Thus, the history of the State's treatment of clergy sexual abuse is not merely a narrative of limited success. It is also one of legal reform and change manifested through increasingly targeted and aggressive attempts to intervene in the internal affairs of the Church. Two such interventions will be specifically examined here: efforts to extend statutes of limitations and the use of Grand Juries to investigate and publicly condemn the Church.

Statute of Limitations

A threshold barrier to the use of secular criminal law in prosecuting clergy abuse was the statute of limitation placed on sexual abuse. Most states require that allegations of

viability of legal actions against the Church (Jana Satz Hugent, 'A Higher Authority: The Viability of Third Part Tort Actions Against A Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy', *Florida State University Law Review*, 30 (2003) pp. 957-987; Laura Russell, 'Pursuing Criminal Liability for the Church and Its Decision Makers for their Role in Priest Sexual Abuse', *Washington University Law Quarterly*, 81 (2003) pp. 885-208).

³⁰ Ronald Dworkin, *Law's Empire* (Massachusetts: Belknap Press of Harvard University Press, 1986) p. 143.

abuse be brought within five to ten years of the incident.³¹ As clergy sexual abuse occurred most frequently in the 1960s and 70s, but the claims were often only brought to the attention of secular officials in the 1980s, the limitation had elapsed for many complaints. Failure to bring an allegation within the period of limitation, bars prosecution on the basis of that allegation. The legal debate over the fairness of statutes of limitation was well-developed before clergy sexual abuse emerged as an issue.³² Still, outrage at the operation of these provisions ensued from both the public and secular legal bodies in the late 1990s. The Westchester County Grand Jury commented that no offender should be permitted to ‘avoid prosecution and punishment by the mere passage of time’.³³ The frequency with which these provisions prevented the prosecution of clergymen meant that this legislation became the first area of law in which the State attempted to gain power back from the Church.

Legislation to extend statutes of limitation retrospectively and enable findings of criminal liability against abusive priests was proposed in many states. The Senate Bill 1779 in California was designed to open a ‘window’ for victims who had only

³¹ Kristin Rodgers, ‘Childhood Sexual Abuse: Perceptions on Tolling the Statute of Limitations’, *Journal of Contemporary Health Law and Policy*, 8 (1992) p. 309; Jessica Mindlin, ‘Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform’, *Washington Law Review*, 64 (1990) pp. 195-7.

³² ‘Longer Statute of Limitations for Child Sex Crimes Debated: Prosecutors Hail it, Defenders Decry It’, *Colorado Springs Gazette*, 12 December 1989, p. B.3; Michael Booth, ‘Senate Panel Advances Bill Relaxing Sexual Abuse Statute of Limitations’, *New Jersey Law Journal*, 13 December 2010; Jane Hide, ‘Civil Remedies for Childhood Sexual Abuse: Finding Ways Round the Statute of Limitations and *Stubbings v. Webb*’, *Feminist Legal Studies*, 1, iss. 2 (1993) pp. 197-202.; Ralph Slovenko, ‘The Revival of Memory of Childhood Sexual Abuse: Is the Tolling of the Statute of Limitations Justified?’, *Journal of Psychiatry & Law*, 21, iss. 1 (1993) p. 7.

³³ Westchester County Grand Jury, ‘Report of the April ‘E’ 2002’, 18 June 2002, p. 6.

recently turned to secular law enforcement.³⁴ Section 340.1 (b) of the Bill outlined that ‘any claim for damages... that would otherwise be barred as of January 1, 2001, solely because the applicable statute of limitations has or had expired is revived.’³⁵ This provision effectively disregarded the statute of limitations for any victim that sued for sexual abuse in the year of 2003. The Bill also contained two important legal amendments that specifically targeted the Catholic Church. Firstly, the legislation was formulated in such a way as to facilitate expansive liability against the Church as a third party. This blunt provision outlined that charges could be brought against an ‘entity [that] knew or had reason to know or was otherwise on notice of any unlawful sexual conduct ... [but] failed to take reasonable steps and to implement reasonable safeguards’.³⁶ Moreover, in seeking to criminalise the behaviour of the Church described in Chapter Two, this section very specifically stated that the mere counselling of a person against abusive conduct was insufficient. Such legislation was not unique to the State of California.³⁷ However, as a legal provision formulated to categorically target and scrutinize misconduct within the Catholic Church, the legislation was unique within the history of the legal relationship between the Church and State.

The attempts to extend or disregard the statutes of limitation further revealed a significant point of disagreement between the Church and the State. In its Amicus

³⁴ Marci Hamilton, *Justice Denied: What America Must Do to Protect its Children* (Cambridge & New York: Cambridge University Press 2008, p. 41.

³⁵ Senate Bill No. 1779, 2002 (State of California) s. 340.1 (b) (1).

³⁶ Senate Bill No. 1779, 2002 (State of California) s. 340.1 (b) (2).

³⁷ For example: Child Victims Act of New York, Assembly Bill A2596B/Senate Bill S5893 (New York State Assembly, 2008); House Child Protection Bill, Assembly Bill 1011/Senate Bill 143 (State of Colorado, 2008).

Brief recommending the Californian Senate Bill 1779 be disallowed, the United States Conference of Catholic Bishops ‘questioned whether open-ended liability in the courts, potentially handing over untold millions more to victims and their lawyers does anything for healing and reconciliation’.³⁸ It was suggested that these claims would undermine the ‘counselling [of] abused and abuser alike as a means of healing and human compassion’.³⁹ This again revealed the extent to which the Church belief in individual rejuvenation stood in opposition to the State’s desire to exact a punitive form of justice. Victims clearly identified strongly with the secular interpretation of justice at this time as more than ten thousand allegations of abuse were brought under Senate Bill 1779.⁴⁰ Since its introduction, the Californian legislation has been disputed for its constitutionality in violating the provision of equal treatment for religious groups.⁴¹ As a result, no criminal conviction was, in actuality, sustained under the legislation.

Legal initiatives to extend statutes of limitation were both criticized by the Church and praised by victims for, what the United States Conference of Catholic Bishops described as, an ‘attempt to scrutinize decades-old conduct on the part of former

³⁸ United States Conference of Catholic Bishops (USCCB) & California Catholic Conference, (CCC), ‘Brief of Amici Curiae in Support of Counterclaimant’s Motion for Summary Judgment’ in *Melanie H v Defendants Doe 1, Doe 2 through 1000 inclusive*, 17 June 2005, United States District Court for the Southern District of California, available online at *United States Conference of Catholic Bishops*: <<http://old.usccb.org/ogc/Melanie.pdf>>, viewed 28 April, 2011, p. 6.

³⁹ USCCB & CCC, ‘Brief of Amici Curiae in Support of Counterclaimant’, p. 19.

⁴⁰ Michael Webb, ‘California Lawsuit Experiment Results: Chaos, Injustice and Burdened Innocent Families’, *Denver Catholic Register*, 15 March 2006, pp. 1-2.

⁴¹ *Melanie H. v. Doe 1, Doe 2 etc. & The Sisters of Precious Blood*, No. 04 CV 1596 WQH (2005) United States District Court for the Southern District of California.

diocesan leadership and personnel'.⁴² That the statutes of limitation had elapsed on most claims of abuse was a significant issue in Church-State relations as it was a product of the complaints having evaded law enforcement for so long. Attempts to overlook and disregard the statutes of limitation as it applied to abuse allegations can therefore be seen to represent a retrospective attempt by the secular legal system to remedy its past inaction.

Grand Jury Investigations

Barred from bringing prosecutions due to the statutes of limitation, District Attorneys employed the investigative function of Grand Juries to examine claims of abuse, assign blame for that abuse and publicly condemn the Church. In the early 2000s, Grand Juries were impanelled in Long Island, Phoenix, Cincinnati, Manchester, Boston and Philadelphia under the Investigating Grand Jury legislation of the respective states.⁴³ It is interesting that the location of these Grand Juries coincided with large Catholic congregations. For instance, Catholics account for the largest religious affiliation of Pennsylvania and for almost half of the residents of metropolitan Boston.⁴⁴ That these populations accepted the exceptional legal response of employing a grand jury to scrutinize their Church attests to the alienation felt by many Catholics throughout the duration of the clergy abuse scandal. The assignment of these Grand Juries was to investigate 'how dozens of priests sexually abused hundreds of children; how Archdiocese officials... excused the abuse and how the

⁴² USCCB & CCC, 'Brief of Amici Curiae in Support of Counterclaimant', p. 8.

⁴³ For example: *Investigating Grand Jury Act* 42 Pa. C.S.A s 4541 (Pennsylvania).

⁴⁴ Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey* (Washington: Pew Research Centre, 2008) p. 100.

law must be changed so it doesn't happen again'.⁴⁵ This investigatory mandate extended well beyond the jury's ability to issue indictments as the window for prosecution was known to have elapsed in at least the majority of circumstances. Although there was little prospect of criminal consequence, the findings of the Grand Juries were universally damning. The Philadelphia Grand Jury held that the Church 'manipulated treatment efforts in order to create a false impression of action... (and) did many of these things in a conscious effort simply to avoid civil liability'.⁴⁶ The Westchester Grand Jury found that the 'congregants where the abuser was employed were lied to' and the Church 'used the media to lie... thereby misleading the public'.⁴⁷ The investigations undertaken by these Grand Juries were less a product of their strict legal function of issuing criminal indictments than they were an attempt to publicly record and expose the speculated wrongdoing of the Church.

In order to understand just how exceptional this use of grand juries was, it is necessary to examine the historical development of their use. Grand juries were designed as a device to protect against judicial harassment and hasty or politically motivated prosecutions.⁴⁸ Interestingly, the grand jury structure was initially developed in the twelfth century through the Constitution of Clarendon and the Assize of Clarendon as an 'attempt to wrest judicial jurisdiction from the church'.⁴⁹ At that

⁴⁵ Philadelphia Grand Jury, '*In Re: County Investigating Grand Jury of September 17, 2003*', p. 1.

⁴⁶ Philadelphia Grand Jury, '*In Re: County Investigating Grand Jury of September 17, 2003*', p. 4.

⁴⁷ Westchester County Grand Jury, 'Report of the April 'E' 2002', 18 June 2002, p. 9.

⁴⁸ Richard Alexander & Sheldon Portman, 'Grand Jury Indictment Versus Prosecution by Information: An Equal Protection Due Process Issue', *Hastings Law Journal*, 25 (1973-4) p.998.

⁴⁹ Helene Schwartz, 'Demythologizing the Historic Role of the Grand Jury', *American Criminal Law Review*, 10 (1971-2) p. 704.

time, a general freedom existed to exempt clergy from the rule of the common law. This had resulted in a great deal of violence being perpetrated by members of the ecclesiastical order.⁵⁰ As a reassurance of recognizing each other's jurisdiction, the State and Church agreed that there would always be a jury to confirm the accusation before an individual was tried.⁵¹ In the modern legal system, grand juries operate more as a 'law enforcement agency'.⁵² Their power to compel evidence is wide-ranging. Confidentiality agreements and protective orders are insufficient to invalidate a grand jury subpoena.⁵³ In order to utilize these powers, an Investigating Grand Jury may be convened to investigate crime that does not lend itself, in scope or complexity to ordinary mechanisms of criminal investigation.⁵⁴ Historically, Investigating Grand Juries have been used to examine widespread criminal enterprises, including drug trafficking syndicates, white-collar crime and governmental corruption.⁵⁵ These Grand Juries were not limited to investigating a specific defendant or offence but they were still convened for the purpose of issuing indictments that would be pursued in a public trial. On account of these subsequent trials, the proceedings of grand juries are strictly confidential with no one outside of

⁵⁰ George Burton Adams, *The History of England: From the Norman Conquest to the Death of John (1066-1216)* (London: Longmans, 1905) p. 280.

⁵¹ Schwartz, 'Demythologizing the Historic Role the Grand Jury', p. 708.

⁵² *United States v. Cleary* 265 F 2d 459 461 (2nd Cir, 1959); Abraham Goldstein, 'The State and the Accused: Balance of Advantage in Criminal Procedure', *Yale Law Journal*, 69 (1960) p. 1171.

⁵³ 'In Re: Grand Jury Subpoena Under Seal' 836 F 2d 1468 p. 1476 in *United States v Davis* 702 F 2d 418 (1983).

⁵⁴ David N Savitt & Brian P Gottlieb, *Pennsylvania Grand Jury Practice* (Cleveland: Banks-Baldwin Law Publishing Co., 1983) pp. 5-6.

⁵⁵ David Toomey, 'Discretionary Power in the Judiciary to Organize a Special Investigating Grand Jury', *University of Pennsylvania Law Review*, 111 (1962-3) p 954-973.

the jurors, prosecutor, court recorder and subpoenaed witnesses granted access to the proceedings.⁵⁶

The use of grand juries to investigate clergy sexual abuse was significantly different for two reasons. Firstly, the expansive powers of the grand juries to compel testimonies and the disclosure of documents was employed consciously as a tool to pry open the records of the Catholic Church. Grand jury subpoenas are not legally intended for the sole purpose of discovering information.⁵⁷ Yet, excluding evidence obtained in civil litigation, documents released in Grand Jury reports have been the largest source of information regarding the Church's management of allegations of abuse. The Boston Attorney General, for example, gained access to over 30,000 pages of personnel records for the duration of an eighteen-month Grand Jury proceeding.⁵⁸ Secondly and perhaps more importantly, the investigations and findings of the Grand Juries were used to publicly condemn the wrongdoing of the Church. Notwithstanding the conventional secrecy of Grand Juries, almost all of those juries impanelled to investigate the Catholic Church publicly reported on their findings by court order.⁵⁹ In this regard, the use of Grand Juries to investigate the Catholic Church represented a significant rupture in the history of these bodies. The Philadelphia Grand Jury publicly named and described allegations against sixty-three priests within the

⁵⁶ *Federal Rules of Criminal Procedure* (2010), Rule 6 (e) (2) (Grand Jury – Secrecy).

⁵⁷ United States Department of Justice, *United States Attorney Manual* (USAM) (1997) Chapter 9-11. 120.

⁵⁸ Formicola, 'Further Legal Consequences', p. 447.

⁵⁹ For example: 'Joint Motion to Release Pleadings and Court Orders' in *In Re: Grand Jury Proceedings*, No. 02-S-1154 (December 2002), Hillsbrough Superior Court, available online at *Bishop Accountability*: <<http://www.bishop-accountability.org/NH-Manchester/archives/Motions-1.pdf>>, viewed 29 July 2011, pp. 1-5.

Archdiocese of Philadelphia.⁶⁰ In doing so, the Jury commented, ‘we surely would have charged them if we could have done so’.⁶¹ Although they were barred from imposing a criminal indictment, the Grand Juries facilitated a somewhat crude naming and shaming of those responsible for clergy abuse. Grand Juries therefore acted as a lesser surrogate for the punitive, vindictive justice that often characterised the criminal justice process.

The response to clergy sexual abuse became ‘the critical linchpin between civil and religious authority.’⁶² At first, demands to punish the Church represented a profound and often insurmountable legal challenge. But the need to develop this accountability justified a significant shift in the secular law’s treatment of the Catholic Church and its responsiveness to claims of sexual abuse. These changes were of instrumental importance, in extracting information from the Church and exposing the Church to financial costs.⁶³ Legal developments are also important as a symbolic marker of public affirmation or denouncement of social norms.⁶⁴ Rejecting the authority of the Church to keep private what was now a very public problem was therefore a significant demarcation of the extent to which the Church had lost respect as a social institution.

⁶⁰ Philadelphia Grand Jury, ‘*In Re: County Investigating Grand Jury of September 17, 2003*’, p. 2.

⁶¹ Philadelphia Grand Jury, ‘*In Re: County Investigating Grand Jury of September 17, 2003*’, p. 1.

⁶² Formicola, ‘Further Legal Consequences’, p. 456.

⁶³ For a discussion of the practical implications and consequences of financial damages on the Church see: Formicola, ‘Further Legal Consequences’, pp. 449, 459.

⁶⁴ Joseph Gusfield, ‘Moral Passage: The Symbolic Process in Public Designation of Deviance’, *Societal Problems*, 15 (1967) p. 175.

In this way, the increase in legal scrutiny of the Church is not dissimilar to the evolution of the State's relationship with the family. For some time both the Church and the family were treated as forms of 'legal sanctuary', beyond the scope of criminal law regulation and subject only to their internal self-management.⁶⁵ As late as the nineteenth century, the American government refused to enforce laws that would require evaluating relationships within the family unit.⁶⁶ This legal orthodoxy remained stable until the 1960s when the awareness of domestic abuse destroyed the legitimacy of privacy as an excuse for legal impunity.⁶⁷ In 1962, Kempe concluded his study, 'The Battered-Child Syndrome', that uncovered evidence of widespread and ongoing child abuse.⁶⁸ The revelation of this previously unreported abuse served as the impetus for mandatory reporting provisions for child abuse.⁶⁹ With an emergent feminist movement and a new openness for public discussion of "private issues" in the 1970s, a legal reform agenda to intervene in the family to prevent both spousal and child abuse was implemented.⁷⁰ The case-study of domestic abuse reveals that the law responds to shifting perceptions of what should be considered public problems.⁷¹

⁶⁵ Logan, 'Criminal Law Sanctuaries', p. 323.

⁶⁶ *State v Rhodes* 61 N.C. Phil. Law 453 (1868) Opinion of the Court, Supreme Court North Carolina: Justice Reade, pp. 457-59.

⁶⁷ Elizabeth Schneider, 'The Violence of Privacy', *Connecticut Law Review*, 23 (1991) p. 973.

⁶⁸ Henry Kempe et al, 'The Battered-Child Syndrome', *Journal of American Medical Association*, 181 (1962) p. 17-24.

⁶⁹ Seth Kalichman, *Mandated Reporting of Suspected Child Abuse: Ethics, Law and Policy* (Washington, American Psychological Association, 1999) pp. 11-42.

⁷⁰ Kristen Kelly, *Domestic Violence and the Politics of Privacy* (Ithaca & London: Cornell University Press, 2003) p. 68; Joan Zorza, 'The Criminal Law of Misdemeanor Domestic Violence 1970-1990', *Journal Criminal Law and Criminology*, 83 (1992) p. 62; Katharine Baker, 'Dialectics and Domestic Abuse', *Yale Law Journal*, 110 (2002) p. 1462.

⁷¹ Kelly, *Domestic Violence and the Politics of Privacy*, p. 113.

In a process mirroring that undergone by the family unit,⁷² victim activism and media reporting on the issue of clergy sexual abuse was sparked by litigation in the 1980s and this, in turn, provoked the State to undertake legal interventions into matters previously considered the private domain of the Church.

The contemporary distrust for the Church has marked a turning point in the State's conceptualization of its role in regulating the exercise of religious freedoms.

Revelations of abuse and criminal activity within the historically protected structures of the Church and the family provoked quick and populist legal responses that have empowered secular authorities to regulate their private conduct. The evolution of our understanding of the legal autonomy of both the Church and family suggest that the 'law varies inversely with other social control'; it reacts swiftly and strongly where trusted social institutions have failed to adequately self-regulate.⁷³ This process reveals to legal historians that the operation of the law in society can be strongly vindictive when overturning longstanding legal privileges.

Following the emergence of clergy sexual abuse as a public crisis in the 1980s, the State has engaged in aggressive and interventionist legal actions to target the Church and condemn the misuse of their prior religious freedom. The nature of the legal developments in changing the statutes of limitations and the structures of Grand Juries, as well as the historical lessons learnt from the legal positioning of the family, suggest that the status of the Catholic Church has now changed both significantly and irreversibly. The traditional legal doctrine that saw the secular law and Canon Law

⁷² Logan, 'Criminal Law Sanctuaries', p. 322.

⁷³ Donald Black, *The Behaviour of Law* (Bingley: Emerald Group, 2010) p. 8.

operate laterally without oversight or intersection was dismantled by the pressure exerted upon the State to respond to allegations of abuse within the Church. In light of this, it seems unlikely that the Church-State relationship in America will ever again be characterized by the respect, separation and neutrality that existed prior to the litigation of the clerical abuse scandal.

CONCLUSION

America's approach to religion has been previously defined by two historical periods: the dominance of Protestant Christianity followed by a stubbornly entrenched institutional separation between Church and State.¹ The crisis of sexual abuse within America's Catholic Church appears to have marked the beginning of a new period. This epoch is one in which the State has assumed a regulatory and ascendant role in its relationship with an institution it once accepted as an equal participant in public culture. The process by which the august institution of the Church came to be pursued by the coercive authority of the State is of significance to the historical study of the dynamic, institutional relationships in American politics: the freedom and importance enjoyed by religious institutions within those relationships and: the influence afforded to individuals in changing that framework through private lawsuits.

Examining the relationship between Church and State through the prism of clergy sexual abuse reveals that their separation was neither as neat nor as satisfactory as the legal consensus prior to 1985 suggested. Not only did their jurisdictions overlap in regards to the management of abusive clergymen but they were also in fundamental tension with one another due to the philosophical differences between Canon Law and secular law. These differences were animated by the competition between legalism and antinomianism that was most readily exposed in the use of treatment programs for accused priests. That the respect for the privileged legal position of the Church was

¹ George Marsden, *The Soul of the American University: From Protestant Establishment to Established Unbelief* (New York: Oxford University Press, 1994) p. 1.

maintained in spite of these incompatibilities attests to the importance of the clergy sexual abuse litigation as a cultural circuit breaker. The institutional distance of the Church and State between 1960 and 1985 is said by some scholars to have entrenched ‘double standards’ that perpetuated ‘sin against the innocents’ and reinforced the silence of victims.² And yet it was the victims of clergy sexual abuse that first navigated the cultural and legal chasm between the Church and State. These victims were empowered by their use of civil litigation that generated widespread public awareness of clergy sexual abuse and, more importantly, dictated that the public understood that abuse as a crisis requiring the overhaul of the Church’s position in society. The success and influence of this litigation saw the State shed its concerns for intruding upon Church privacy and its fear of being accused of an anti-Catholic prejudice. The State’s response to the scandal during the 1990s targeted and condemned the Church, thereby structurally altering the conception of Catholicism’s role within America’s public culture. No longer was the State in a respectful and harmonious legal coexistence with the Church. Rather it was in antagonistic opposition to the legal autonomy exercised by the Church.

This thesis has challenged the specific conclusion that the history of clergy sexual abuse is a blight on the record of the American legal system and the more general assumption that the criminal law is the appropriate and superior response to instances of crime. The use of civil law alternatives as a discrete and influential process for vindicating injuries caused by criminal conduct requires further attention in legal history. Historians have often accepted the formality, logic and consistency of the

² Thomas Plante, ed., *Sin Against the Innocents: Sexual Abuse By Priests and the Role of the Catholic Church* (Westport: Greenwood Publishing Group, 2004).

law's categorizations of acts as either criminal or civil wrongs. The argument presented here concedes that the law is not coherent. While this conclusion makes legal history more expansive and ambiguous, a lack of coherency is not a weakness in the law. Acknowledging a breadth of legal regulation empowers society as not merely the subjects of the law, but also as the users of the law.³ Where history continues to treat the importance of private lawsuits sceptically, it will continue to underestimate the influence of private individuals. Perhaps more significantly, it will continue to perpetuate the disempowerment of victims, who – within this traditional history - remain helplessly bound to the pre-determined and arbitrary whims of a stagnate law.

The public and media hysteria surrounding the episodic legal battle against the Catholic Church may seem ephemeral. Yet, its accumulative momentum has rewritten the social status of Catholicism and revised the content of the relationship between the State and one of the most important means of social organization; religion. Civil litigation against the Catholic Church saw victims use the law for themselves as powerful ammunition in supplanting an entrenched legal consensus and provoking a profound institutional introspection. Private individuals may indeed be ghost-writers to the legal system.

³ Roberston, 'What's Law Got to Do with It?', p. 163.

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