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Institutional Responses to #MeToo Claims: #VaticanToo, #KavanaughToo, and the Stumbling Block of Scandal

Mary Anne Case†

INTRODUCTION

The #MeToo movement has led institutions of all sorts to take more seriously than heretofore claims that powerful men, in time frames ranging from decades ago to very recently, have engaged in sexual imposition ranging from rape to crude suggestiveness. What the movement has not resolved is what is to be done going forward with the men against whom such claims are credibly asserted. The hope that they would voluntarily and permanently step aside was, of course, overoptimistic. Even those men whose advanced age would suggest the possibility of a graceful step into retirement, such as TV personality Charlie Rose, have already attempted a comeback.1 Yet, the possibility that no avenue for redemption seems open may have led many of the accused to make the rational calculation that anything short of categorical denial would be career ending.

The calculation for the institutions involved is also difficult, as an analogy might help illustrate. After World War II, the victorious Allies ultimately refrained from imposing widespread de-Nazification on Germany, and Germany rapidly became one of the world’s most stable constitutional democracies. After invading Iraq, the United States

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promptly dissolved both the Ba’ath Party and the Iraqi Army, resulting in continuing horrendous violence and instability. Among those interested in applying the tools of transitional justice in the #MeToo context, some have suggested that the approach of truth and reconciliation, pioneered in Latin America but most famously applied in post-apartheid South Africa, could be a fruitful one because it offers a path to the reintegration of offenders; others have looked to the example of lustration in recommending a “career death penalty” for particularly egregious, high-profile offenders.

This paper will center on another kind of institutional response, actually though disastrously used by the Catholic Church in its response over time to allegations of clerical sexual abuse, a response the Church saw as dictated by the canon law doctrine of scandal. As the Catholic Church saw it, even worse than the sexual sins committed by its clergy would be public acknowledgement of them in such a way as to present a stumbling block (“σκάνδαλον” or “skandalon” in Greek) to the faith of believers. Thus, secrecy to the point of cover-up could be seen, not as a problem, but as an imperative, a contribution to the greater good. The hierarchy’s response to sexual abuse by clergy was for decades focused first and foremost on reputation management.

Though the specifics of the Catholic response are rooted in its canon law and theological commitments, as this paper will show, the general approach of above all avoiding scandal so as to preserve institutional reputation has many diverse parallels in the #MeToo era. The paper will briefly consider two of them. The first, closely analogous, concerns the mobilization of halachic (Jewish law) equivalents of the doctrine of scandal to respond to sex abuse allegations in the Haredi, or ultra-orthodox, Jewish community. The second, less directly analogous but also potentially instructive, concerns the interplay of institutional reputational concerns in the procedures and the rhetoric used to deal with

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2 For an overview and comparison of the processes in post-war Germany and Iraq, see generally Aysegul Keskin Zeren, From De-Nazification of Germany to De-Baathification of Iraq, 132 POL. SCI. Q. 259 (2017).

3 For a discussion of these and other transitional and restorative justice strategies as applied in the #MeToo context, see generally Lesley Wexler, Jennifer K. Robbenolt, & Colleen Murphy, #MeToo, Time’s Up, and Theories of Justice, 19 U. ILL. L. REV. 47 (2019).


5 Although, as this paper will show, specifics of Catholic doctrine and structure shaped much of the response, it might be worth noting that each of the recent popes most directly confronted by the problem had experience in his country of origin with institutional responses to those involved in systemic institutional evil—Francis lived through the Argentine junta and its aftermath, Benedict through Nazi Germany and de-Nazification, John Paul II through both the Nazi and the Soviet Communist regimes in his native Poland.
sexual assault allegations against Supreme Court nominee Brett Kavanaugh.

Many have argued that the doctrine of scandal, inasmuch as it prioritizes a concern for institutional reputation, is per se misguided and should be abandoned in favor of a more victim-centered approach. This paper will take a different tack: conceding that there is validity to the idea behind the doctrine of scandal, to wit that the effect of allegations of wrongdoing by those in power on the people’s faith in institutions needs to be an important consideration in responding to those allegations, it will argue that the doctrine itself needs to be reformed because it is the conventional operation of the doctrine, as it motivates and justifies cover up of wrongdoing, that has become a stumbling block to faith in the institutions affected.

This revisionist point of view, that avoidance of scandal requires not secrecy, but openness and disclosure, has gradually seeped into the rhetoric of the Catholic Church. After decades of being told it was their duty to keep silent, sex abuse survivors finally heard Pope Francis say to his bishops in 2015 that “the crimes and sins of sexual abuse of minors cannot be kept secret any longer” and heard him acknowledge that the Church “owe[s] each of [the survivors of abuse] and their families gratitude for their immense courage in making Christ’s light to shine upon the evil of sexual abuse of children.” Nearly three years later, in a June 5, 2018 letter to the Chilean people, Francis spoke for the first time and repeatedly of “a culture of abuse and cover up” and acknowledged with “shame . . . that we did not know how to listen and react in time.” He declared it “urgent to create spaces where the culture of abuse and cover up is not the dominant scheme, where a critical and questioning attitude is not confused with betrayal” and to “promote communities capable of fighting against abusive situations, communities where exchanges, debate and confrontation are welcome.”

As the paper will discuss, the evolution of Pope Francis’s rhetoric and his position in the intervening years, like that of the Catholic


9 Id. at ¶ 4.

10 Id. at ¶ 5.
Church more generally, is not a straightforward progress narrative, but rather each step forward is in turn provoked by and then regretfully followed by a step back. Among the latest attempts at a step forward was an extraordinary meeting of the heads of bishops’ conferences called in late February 2019 at the Vatican on “The Protection of Minors in the Church.” Francis’s explanation of the reason for this summit already exemplified the shift in the discourse of scandal. “As you know,” he said,

the issue of the sexual abuse of minors by members of the clergy has for some time given rise to a serious scandal in the Church and in public opinion, both for the tragic suffering of the victims and due to the unjustifiable lack of attention given to them and to covering for the guilty by people with responsibility in the Church.\footnote{Pope Francis, Angelus in Saint Peter’s Square (Feb. 24, 2019), http://w2.vatican.va/content/francesco/en/angelus/2019/documents/papa-francesco_angelus_20190224.html [https://perma.cc/2A43-C4MW].}

The three days of the summit were dedicated respectively to three overarching themes, responsibility, accountability, and transparency, which in themselves are indicative of a desire to shift the terms of the discourse. What concrete changes in laws, policies, or attitudes will follow remain to be seen.\footnote{A few, and the absence to date of others, are discussed below.} But it is noteworthy that among the best received speakers at the summit were the three women: Nigerian Sister Veronika Openibo, who asked, “Is it possible for us to move from fear of scandal to truth?” and answered that “openness to the world” and “transparency should be the hallmark of mission as followers of Jesus Christ;”\footnote{Sr. Veronica Openibo, Society of the Holy Child Jesus, Openness to the World as a Consequence of the Ecclesial Mission, Presentation at “The Protection of Minors in the Church” Meeting (Feb. 23, 2019), http://www.vatican.va/resources/resources_suopenibo-protezioneminori_20190223_en.html [https://perma.cc/CFW9-L32Z].} Mexican journalist Valentina Alazraki, who warned that, “the more you cover up, the more you play ostrich, fail to inform the mass media and thus, the faithful and public opinion, the greater the scandal will be;”\footnote{Journalist Valentina Alazraki Urges Bishops to Reject Secrecy, ZENIT (Feb. 23, 2019), https://zenit.org/articles/journalist-valentina-alazraki-urges-bishops-to-reject-secrecy/ [https://perma.cc/7R6Z-PQXB].} and Italian canon lawyer Linda Ghisoni, who called for the active participation of lay people in diocesan supervisory commissions and for changes in the “current legislation on pontifical secrecy. . . .”\footnote{Gerard O’Connell, Vatican Official Urges Revision on Pontifical Secret and Role of Laity in Abuse Crisis, AMERICA MAGAZINE (Feb. 22, 2019), https://www.americamagazine.org/faith/2019/02/22/vatican-official-urges-revision-pontifical-secret-and-role-lay-abuse-crisis [https://perma.cc/FFS6-PYJM]. In addition to Alazraki, powerful cardinals Reinhard Marx of Germany and Blase Cupich of Chicago also called for revision of pontifical secrecy mandates. See, e.g., John L. Allen,
I. “SCANDAL” AS A TERM OF ART

“In Biblical language, scandal signifies a trap, that which causes a fall, therefore something which causes one to falter, which endangers faith.”16 Thomas Aquinas, who crystallized the doctrine already developed by Peter the Chanter and his followers around 1200, defined scandal as “something less rightly done or said, that occasions another’s spiritual downfall.”17 The early theorists of scandal had already been careful to subordinate the need to avoid scandal to concern for the threefold “truth of life, doctrine, [and] justice,”18 taking their cue from Gregory the Great, who had declared:

As much as we can without sin, we ought to avoid scandal to our neighbors. But if scandal is taken from truth, it is better that scandal be allowed to arise than that truth be relinquished.19

In recent years, the doctrine’s use has not been limited to questions of covering up clergy sex abuse, it has more generally been used to ground something approximating an all-purpose don’t-ask-don’t-tell approach to violations of Church norms on sexual conduct. Thus, for example, both in vitro fertilization and same-sex marriage have led to firings of Catholic school teachers at the point that conduct previously tolerated by Catholic institutional employers became widely known and was therefore seen as giving rise to scandal.20 As explained in one of the earliest archdiocesan reports on clergy sex abuse, the 1990 Winter report from St. John’s Newfoundland,

The traditional cultural and ecclesiastical concern for avoiding the spread of scandal is based on the view that if people see their leaders and those they admire doing evil things the tendency

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17 3 Thomas Aquinas, Summa Theologia, § 2.2 Q. 12, A. 43 (Benziger Bros. ed., 1947); see also 3 The Catechism of the Catholic Church § 2.2 A. 5,2284-87 (“Scandal is an attitude or behavior which leads another to do evil . . . the person who gives scandal . . . damages virtue and integrity; he may even draw his brother into spiritual death”).
19 Id. (quoting Gregory’s Homiliarum in Ezechiel, lib. I, Horn. VII, PL 76, col. 842).
will be “to stumble” either by direct imitation of those evil actions or by being shocked into turning away from the good that may be associated even with those who do evil.21

Two scriptural references to scandal are particularly important in the context of clergy sex abuse. The first, Romans 14:13, enjoins, “Let us not therefore judge one another any more. But judge this rather, that you put not a stumbling block or a scandal in your brother’s way.”22 The second, which appears with slight variants in the gospels of Matthew and Mark, reads in Matthew:

Whoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened around his neck and to be drowned in the depth of the sea. Woe to the world because of scandals! For it is necessary that scandals come, but woe to the man by whom the scandal comes!23

Many commentators on the clergy sex abuse scandals have interpreted this passage literally, seeing “little ones” as the young children on whom clergy have imposed themselves sexually.24 But, in his recent controversial intervention into the sex abuse debate, emeritus Pope Benedict XVI insists that “[t]he modern use of the sentence is not in itself wrong, but it must not obscure the original meaning.”25 According to Benedict XVI, “the little ones’ in the language of Jesus means the common believers who can be confounded in their faith” and Jesus in this passage “protects the deposit of the faith with an emphatic threat

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22 Romans 14:3 (Douay-Rheims).
of punishment to those who do it harm.”\(^{26}\) Benedict sees it as “an alarming situation” that in “the general awareness of the law, the Faith no longer appears to have the rank of a good requiring protection.”\(^{27}\)

Catholic theologian and law professor Cathleen Kaveny is scandalized by the fact that Benedict here “presents the major victim as the Faith itself—not the children whose integrity was violated.”\(^{28}\) I share Kaveny’s distaste for Benedict’s general tendency to focus on lofty theological abstractions at the expense of vulnerable human beings. In other work, I have observed that his theological anthropology resembles what Carol Gilligan has called “doing math problems with humans.”\(^{29}\) But, in this particular context, I think there is much to be said for Benedict’s approach. Consider the one concrete abuse victim Benedict does discuss in his essay, a former altar server whose abuser regularly used the words of consecration, “This is my body which will be given up for you,” in the course of pedophilic abuse. To Benedict, it “is obvious that this woman can no longer hear the very words of consecration without experiencing again all the horrific distress of her abuse.”\(^{30}\) To Kavney, this indicates that Benedict has mistakenly recharacterized the all too human horror of child rape as an abstract sacrilege. But, if one is a believer who values belief, loss of faith and of the ability to derive comfort from the trappings of faith can indeed be the most profound of harms.

Kaveny is also, in my view, wrong about the conclusions she assumes follow ineluctably from Benedict’s tendency to see the “worst consequence of the crisis [a]s the widespread loss of faith in the church’s credibility.”\(^{31}\) It does not necessarily follow that it is therefore “better to handle specific instances quietly, so as not to scandalize the faithful” or that “victims should be encouraged to remain quiet, perhaps with a legally binding confidentiality agreement” and with no monetary damages so as to safeguard the Church.\(^{32}\) While the actions Kaveny criticizes are indeed the ones the Catholic Church historically has taken to avoid scandal from sex abuse, this only reveals that church officials have been mistaken in the means they used to combat this scandal. Their approach to avoiding scandal may have been in practice worse

\(^{26}\) Francis has expressed similar sentiments. See Pope Francis, Homily at the Closing Mass of the Eighth World Meeting of Families (Sep. 27, 2015), https://w2.vatican.va/content/francesco/en/homilies/2015/documents/papa-francesco_20150927_usa-omelia-famiglie.html [https://perma.cc/R63H-TEXV] (“For Jesus, the truly ‘intolerable’ scandal is everything that breaks down and destroys our trust in the working of the Spirit”).

\(^{27}\) Benedict XVI, supra note 25.

\(^{28}\) Kaveny, supra note 6.

\(^{29}\) See Mary Anne Case, The Role of the Popes in the Invention of Complementarity and the Vatican’s Anathematization of Gender, 6 RELIGION AND GENDER 155–172 (2016).

\(^{30}\) Benedict XVI, supra note 25.

\(^{31}\) Kaveny, supra note 6.

\(^{32}\) Id.
than ineffectual, indeed counterproductive, but this does not mean their end is not a valuable one, which should still be pursued if more effective, less damaging means can be identified.

While I realize that the line may often be hard to draw and may be controversial even in principle, I would contend that there is an important difference between attempts at reputation management by institutions acting only in narrow self-interest and those for which a greater good is at stake. Only the latter are concerned in the technical sense with avoiding scandal. Consider a corporate analogy. Cigarette manufacturers who seek to hush up links between smoking and cancer may be protecting nothing more noble or valuable than their sales figures and their corporate profits, but vaccine manufacturers who seek to avoid publicity about rare adverse side effects may in fact be concerned about a greater good—a decline in the use of vaccines has negative externalities that a decline in cigarette consumption does not.\textsuperscript{33} If one believes, as orthodox Catholics do, that “outside the Church there is no salvation,”\textsuperscript{34} an abuse-provoked decline in Church membership means that more people are damned. Even absent this sort of theological commitment, individual victims and their families have convincingly spoken about the loss of their ability to trust in the persons in whom they had previously reposed the greatest trust of all, and of the severe psychological damage they suffered as a result. Publicizing this scandal without a good way of making amends for it or preventing it from recurring in future can spread these adverse consequences.

By contrast to Kaveny, and with Benedict XVI, I am therefore willing to consider the possibility that “the major victim [is] the Faith itself,” but I would insist that secrecy to the point of cover up, far from protecting the faith or having a hope of doing so, is what has injured it. This can consistently be seen in the findings of decades worth of reports from multiple jurisdictions that have examined the Catholic Church’s response to clergy sexual abuse.

\textsuperscript{33} Other public institutions from the U.S. Military to the police have long had comparable reputation management concerns and comparable difficulties addressing them. \textit{See generally Susan Bandes, Patterns of Injustice: Police Brutality in the Courts, 47 BUFFALO L. REV. 1275 (1999) (analyzing the tendency to anecdotalize and to resist seeing systemic patterns in police misconduct).}

\textsuperscript{34} \textit{The Catechism of the Catholic Church, § 2.3 A. 9, ¶ 3, 845, http://www.vatican.va/archive/ENG0015/__P29.HTM [https://perma.cc/P8YR-5Y9C]}. 
II. THE CATHOLIC CHURCH’S FAILED EXERCISE OF REPUTATION MANAGEMENT

If there is a single conclusion common to reports from all corners of the globe examining sex abuse in the Catholic Church, whether produced last month or more than thirty years ago, whether by the Church itself, independent commissions, or law enforcement agencies, it is that a major obstacle to putting an effective stop to the abuse was the Catholic Church’s obsession with protecting its own reputation and avoiding scandal. Consider the numbing sameness of the following representative findings, taken in chronological order.35

As early as 1990, the Winter Commission, examining sex abuse in the Archdiocese of St. John’s Newfoundland, observed that “the need to avoid scandal has played a part in the thinking of senior Archdiocesan administrators. . . . While such a policy may not be always and everywhere inappropriate it can lead to serious abuse.”36 Archbishop Alphon-sus Liguori Penney, who had commissioned the Winter Report and who was blamed in it for tolerating and covering up abuse, resigned on the day the report became public, becoming one of the first bishops in the world to accept responsibility, even though Vatican representatives sent to investigate did not think his resignation was warranted.37 Twenty years later, commission member and pediatrician Sr. Nuala Kenny, insisted, “[W]e understood that there were deeper systemic issues that allowed it to happen . . . . If there’s one thing I want to do, [it] is to help our bishops to understand that head down, avoiding scandal has resulted in the greatest scandal in the modern church.”38

Oklahoma Governor Frank Keating wanted to send a similar message, when, in 2003, as head of a lay National Review Board appointed by the United States Conference of Catholic Bishops (“USCCB”), he declared at a press conference, “To act like La Cosa Nostra and hide and suppress, I think, is very unhealthy, . . . Eventually it will all come out.”39 Although an uproar over his remarks led to his resignation from

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35 That the examples included here are, as a matter of convenience, taken from reports published in English concerning English speaking countries, is no indication that the problem is in any way limited to such countries.

36 WINTER ET AL., supra note 21, at 112.


the USCCB Review Board, its ultimate conclusions in 2004 were in line with his:

Faced with serious and potentially inflammatory abuses, Church leaders placed too great an emphasis on the avoidance of scandal in order to protect the reputation of the Church, which ultimately bred far greater scandal and reputational injury. . . . At heart, this was a failure of Church leadership, which lacked the vision to recognize that, unless nipped in the bud, the problems would only grow until they no longer could be contained, and that then the problems would have an even greater propensity to undermine the faith of the laity.

The impulse to avoid scandal at all costs manifested itself in several ways. First, Church leaders kept information from parishioners and other dioceses that should have been provided to them. Some also pressured victims not to inform the authorities or the public of abuse. . . . Bishops and other Church leaders often did not tell their brethren the full story when a priest took up residence in a new dioceses. . . . This lack of candor—with parishioners, with civil authorities, with fellow bishops—avoided scandal in the short term while sowing seeds for greater upheaval in the long term.41

It took another decade for a principal target of Keating’s criticism, Los Angeles Cardinal Roger Mahony, to be barred by his successor from further public ministry in Los Angeles on account of his failures to protect young people from sexually abusive priests.42 Among Mahony’s


41 ROBERT S. BENNETT ET AL., A REPORT ON THE CRISIS IN THE CATHOLIC CHURCH IN THE UNITED STATES PREPARED BY THE NATIONAL REVIEW BOARD FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 108 (Feb. 27, 2004). Bennett, Keating’s replacement as head of the Review Board, drew an analogy only slightly less devastating to the bishops than Keating’s to the Mafia. Bennett declared the bishops must “start acting like pastors and shepherds of their flock, and stop acting like risk assessment officers of insurance companies.” He went on to explain, “In the church there has been a culture of secrecy, and it has gotten them in a lot of trouble. . . . They must be open, they must be transparent and they must be accountable.” See Laurie Goodstein, Bishops Uneasy on Whom to Protect, N.Y. TIMES (June 13, 2003), https://www.nytimes.com/2003/06/13/us/bishops-uneasy-on-whom-to-protect.html [https://perma.cc/S6L6-HE4F] (quoting Bennett’s reaction to bishops, including Roger Mahony of Los Angeles, who resisted providing information to the Review Board).

failed efforts at cover up was the assertion, ultimately rejected by the courts and having no discernible basis in either canon or secular law, that all of his communications about abuse allegations with affected priests were covered by what he called a “formation privilege,” and thereby shielded from disclosure even in a criminal case. Unfortunately, to this day Keating has yet to be vindicated in the overoptimistic conclusion with which he began his 2003 resignation letter: “Never again will any bishop be able to hide or avoid the scandal of sex abuse in his diocese.”

Five years after the USCCB report, the 2009 Murphy Report into sex abuse in the Dublin archdiocese reached a by now familiar conclusion:

The Dublin Archdiocese’s pre-occupations in dealing with cases of child sexual abuse, at least until the mid 1990s, were the maintenance of secrecy, the avoidance of scandal, the protection of the reputation of the Church, and the preservation of its assets. All other considerations, including the welfare of children and justice for victims, were subordinated to these priorities.

Responding to the Murphy report and the companion Ryan report, which examined abuse in Irish Catholic schools, Benedict XVI, in his 2010 Pastoral Letter to the Catholics of Ireland, agreed that among the factors “that gave rise to the present crisis” were “a misplaced concern for the reputation of the Church and the avoidance of scandal . . . which have had such tragic consequences in the lives of victims and their families, and have obscured the light of the Gospel to a degree that not even centuries of persecution succeeded in doing.”

Nearly a decade after the Irish reports, an Australian government report repeated: “The response of various Catholic Church authorities to complaints and concerns about its priests and religious was remarkably and disturbingly similar. . . . [T]he avoidance of public scandal, the maintenance of the reputation of the Catholic Church and loyalty to


44 See BELIEFNET, supra note 40.


priests and religious largely determined the responses of Catholic Church authorities.”

In 2018, the Grand Jury report on sex abuse and its cover-up in a number of Pennsylvania dioceses began by observing, “While each church district had its idiosyncrasies, the pattern was pretty much the same. The main thing was not to help children, but to avoid ‘scandal.’” Finally, most recently, an investigation into the Archdiocese of Birmingham, England concluded in June 2019, “The sexual abuse perpetrated . . . could have been stopped much earlier if the Archdiocese had not been driven by a determination to protect the reputation of the Church.”

Ironically, even those members of the hierarchy alive to its problems with reputation management seem powerless to improve it. Consider Archbishop Wilton Gregory, who quoted Machiavelli to a reporter to explain the Church’s problems as follows:

If a prince, if a leader is going to give away a thousand ducats, he should do it one ducat at a time because people forget, but if he has to slay a thousand soldiers, he should do it in one night because people forget. The constant revelation, the continual disclosure of bad, criminal behavior keeps this issue alive. And it’s as though it’s a never-ending drama.

Gregory has himself been a major player in this never-ending drama for decades. He was president of the U.S. Conference of Catholic Bishops in 2002 when it prepared its first Charter for the Protection of Children and Young People (the “Dallas Charter”) in response to the scandal caused by the Boston Globe’s Spotlight team’s exposé of priest sexual abuse and episcopal cover-up. During his presidential term, he was held in contempt of an Illinois court for failing to release the files of a suspended predator priest in his diocese. Most recently, in the

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50 The movie Spotlight is an account of the Globe’s work. See generally SPOTLIGHT (Open Road Films 2015).
spring of 2019, he was appointed Archbishop of Washington D.C.,\textsuperscript{52} replacing two immediate predecessors caught up in the abuse scandals after themselves earlier cultivating reputations as leading opponents of abuse: Donald Wuerl, who resigned in 2018 after being described in the Pennsylvania grand jury report as covering up abuse while bishop of Pittsburgh;\textsuperscript{53} and Theodore McCarrick, who was laicized in 2019 after a canonical trial for sex abuse of seminarians.\textsuperscript{54}

III. SOME EXAMPLES OF LEGAL AND POLICY APPROACHES USED BY THE CATHOLIC CHURCH IN ATTEMPTS TO AVOID SCANDAL BY MANAGING REPUTATION

The imperative of avoiding scandal was ingrained in the Church hierarchy at every level from the pastors in the parishes to the cardinals in the Curia. While a systematic exploration of the canon law, secular law, and policy commitments they used to justify and to attempt to implement scandal avoidance through reputation management is well beyond the scope of this paper, a small handful of examples may give a sense of the relevant complexities.\textsuperscript{55}

At one extreme of legal intricacy, consider the interlocking series of canon law mandates now encompassed by the term of art “pontifical secrecy,” which for nearly a century have imposed a requirement of strict confidentiality, enforced through threat of excommunication, on all allegations and proceedings relating to child sexual abuse by clergy.\textsuperscript{56} These mandates begin with the 1922 \textit{Crimen Sollicitationis},

\begin{footnotesize}

\textsuperscript{53} See John L. Allen Jr., \textit{Abuse Scandal Isn’t the Only Chapter in Donald Wuerl’s Story}, CRUX (Oct. 12, 2018), https://cruxnow.com/new-analysis/2018/10/12/abuse-scandal-isnt-the-only-chapter-in-donald-wuerls-story/ [https://perma.cc/86ST-NU8N] (describing Wuerl as a proponent of zero tolerance for abuse who had opposed Vatican leniency with abusive priests since the 1980s).

\textsuperscript{54} See Part IV.A infra for further discussion of McCarrick.

\textsuperscript{55} For some additional details, see generally, Gerald E. Kochansky & Frank Herrmann, \textit{Shame and Scandal: Clinical and Canon Law Perspectives on the Crisis in the Priesthood}, 27 INT. J. OF L. AND PSYCHIATRY 299 (2004); Kieran J. Tapsell, \textit{Potiphar’s Wife: The Vatican’s Secret and Child Sexual Abuse} (2017) (focusing mostly on the pontifical secret, but including much additional historical and legal analysis of the Church’s approach to sex abuse over time).

\textsuperscript{56} A leading expert on the pontifical secret as it applies to clerical sexual abuse is Australian lawyer Kieran J. Tapsell. Among his publications on the subject are, in addition to the book Potiphar’s Wife, cited supra note 55, a detailed submission to the AUSTRALIAN ROYAL COMMISSION into INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, CANON LAW AS A SYSTEMATIC FACTOR in CHILD SEXUAL ABUSE in the CATHOLIC CHURCH (2015). The extremely abbreviated summary of the complexities in text, supra, relies chiefly on his most recent publication: Kieran J. Tapsell, \textit{Civil and Canon Law on Reporting Child Sexual Abuse to the Civil Authorities}, 31 J. OF THE ACADEMIC STUDY OF RELIGION No. 3 (2018).
\end{footnotesize}
itself a secret law to be “kept carefully in the secret archive of the Curia for internal use, not to be published or augmented with commentaries,”57 which bound to permanent silence victims, witnesses, the bishop, and all others involved in canonical inquiries and trials concerning soliciting sex in the confessional, homosexual sex, and the sexual abuse of minors. In a 1974 Instruction, Secreta Continere,58 Pope Paul VI expanded the secrecy requirement by imposing it on the very allegation itself, and not just the information obtained through canonical proceedings. Although the 1983 revision of the canon law threw the status of Crimen Sollicitationis into some doubt, the continuing requirement of secrecy was confirmed by Article 25 of Pope John Paul II’s 2001 motu proprio Sacramentorum Sanctitatis Tutela59 which again imposes the pontifical secret on all allegations and proceedings relating to child sexual abuse by clerics. A dispensation to allow reporting to the police where the local secular law requires it was granted to the United States in 2002 and to the rest of the world in 2010, but where reporting is not required (that is, in most of the world), it is still prohibited. The justifications for this level of secrecy with respect to these crimes was, of course, the prevention of scandal. But, while it might have once been seen as scandalous to turn a priest over to the secular authorities,60 it is now clearly causing scandal when it is observed that officials of the Catholic Church do not do so.61


60 For example, in 2001, the prefect of the Vatican’s Congregation for Clergy wrote a letter, approved by John Paul II and sent to all the bishops of the world, congratulating a French bishop for failing to inform the secular authorities about a pedophile priest in his diocese, for which cover up the bishop had been found criminally guilty and sentenced to a suspended jail sentence by a French court. See, e.g., Kieran Tapsell, Church Laws May Justify Calls for French Cardinal’s Resignation, BISHOPACCOUNTABILITY.ORG (May 4, 2014), http://www.bishop-accountability.org/news2016/05_04/KieranReporter_Church_resignation.htm [https://perma.cc/68JT-72JY].

61 Another fascinating aspect of the evolution of canon law on clerical sexual abuse is the way it de facto reinstates the medieval legal doctrine of benefit of clergy (i.e. the notion that clerics
At the other extreme from these strict legal requirements, consider that, as journalist Celia Wexler put it at a gathering of Catholic women to discuss the abuse crisis, “The American Catholic Church has a ‘bro-culture’ stronger than every fraternity.”

At the U.S. Bishops’ 2018 General Assembly, Cardinal Roger Mahony, sanctioned in 2013 for his role in covering up abuse, sought to reinforce this culture, urging his fellow bishops, as they sought an “effective” response to the crisis “not [to] allow outside groups of any kind, in this country or anywhere else, to interfere with, or attempt to break the bonds of our collegial union.”

Another name for this particular bro-culture is clericalism, a favorite target of Pope Francis, but one whose clutches he has not fully escaped.

When it comes to its substantive treatment of offenders, the Catholic Church has cycled through the trilogy of sin, crime, and disease in its approach to sex abuse, but in each case in a manner that led to leniency—forgiving sin, attempting to cure the disease of pedophilia despite being told as early as the 1980s by its own psychiatric experts that the disease was incurable and demanding “moral certainty,” the canon law equivalent of proof beyond a reasonable doubt, before imposing penal sanctions. What it failed to do was to treat clerics the way secular law treats employees, allowing them to be removed from positions in which they can endanger young people or bring scandal on the institution even if there is merely a preponderance of evidence against them.

IV. Pope Francis as Exemplification of the Problems on the Path to a Solution to the Scandal of Clerical Sex Abuse

Because there has been a widespread tendency on the part of both Catholics and non-Catholics to view Pope Francis as a sort of caped crusader who should not be tried by the secular courts, but only by the Church, whose punishments were often less harsh). As Kieran Tapsell points out, however, medieval clerics found guilty of sex crimes by the Church were defrocked and turned over to the secular authorities for punishment, including execution. But by the late nineteenth century, “the canon law and practice of handing over the cleric for punishment in accordance with the civil law even for the most serious offences was officially abandoned everywhere,” and this, combined with secrecy whose effect was to prevent secular authorities from ever learning of clerical sex crimes and a more lenient approach to dealing with such crimes within the canon law system, effectively protected clergy from any meaningful punishment. See Tapsell, supra note 56, at 70.


sader, swooping in to reform the attitudes and practices of Church officials, it may be instructive to examine the way his own actions and statements exemplify rather than definitively break with the two steps forward, one step back approach that has left the Catholic Church mired in sex abuse scandals for decades. Even with respect only to events in the papacy of Francis, it would be beyond the scope of this paper systematically to set forth all the steps the Catholic Church has taken on the lurching path toward finally dealing with the scandal of sex abuse. Below are just a few bullet points of concern, on which Francis has not yet unequivocally made progress.

A. Acknowledging That “Repairing Scandal” May Now Require Harsher Penalties and Close to Zero Tolerance

Canon 1341 of the Code of Canon Law requires Church officials to “take care to initiate a judicial or administrative process to impose or declare penalties only after . . . ascertain[ing] that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, [or] reform the offender.” For decades this provision has been used as a justification by bishops for the forgiving approach and repeated second chances they gave sex abuser priests. But, in addition to arguing that avoiding scandal now requires transparency, not secrecy, one might also argue that it now requires swift, certain, and harsh imposition of penalties through canonical process, because “fraternal correction” and “other means of pastoral solicitude” have scandalously been revealed systematically to have failed to achieve any one of the three stated objectives.

“Zero tolerance” has been the catch phrase most closely associated with the move toward imposition of penalties and away from fraternal correction. The USCCB sought to adopt what it called a zero-tolerance policy in its 2002 Dallas Charter. Pope John Paul II appeared categorically to endorse such an approach when he declared in a message to the Roman Curia in late 2000:

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65 Even those who do not support him seem to impose such expectations on him. Thus, for example, the Church was roiled over the past year by a series of open letters published by Archbishop Viganò, former Papal Nuncio to the United States and a theological conservative who lost his position in part because of his decision to invite Rowan County clerk and same-sex marriage resister Kim Davis to a reception for the Pope in Washington. See, Jason Horowitz, The Man Who Took on Pope Francis: The Story Behind the Viganò Letter, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/world/europe/archbishop-carlo-maria-vigano-pope-francis.html [https://perma.cc/W9TD-STZL]. In his widely-publicized letters, Viganò accused Francis, inter alia, of knowing about and tolerating the decades long pattern of sexual imposition by now defrocked Cardinal Theodore McCarrick on seminarians whom he forced to share his bed and otherwise molested. For the first of these letters, see Testimony of Carlo Maria Viganò, Archbishop of Ulpiana (Aug. 22, 2018), https://assets.documentcloud.org/documents/4786599/Testimony-by-Archbishop-Carlo-Maria-Vigan%C3%B2.pdf [https://perma.cc/562F-4EQQ].

U.S. Bishops, “People need to know that there is no place in the priesthood and religious life for those who would harm the young.”67 Taken at face value, this would suggest the “career death penalty” of dismissal from the clerical state after even one act by a cleric of sexual imposition on a minor.68 But the USCCB’s attempt at zero tolerance was watered down from the start. The text as finally approved in 2006 read:

When even a single act of sexual abuse of a minor by a priest or deacon is admitted or is established after an appropriate process in accordance with canon law, the offending priest or deacon will be removed permanently from ecclesiastical ministry, not excluding dismissal from the clerical state, if the case so warrants.69

Notably, the provision covers only priests and deacons, not all “clerics,” as originally proposed, and therefore notably not bishops, even though in 1998 Austrian Cardinal Hans Hermann Groer already had to relinquish his archiepiscopal duties as a result of credible allegations that he had molested boys.70 Bishops centrally involved in the drafting had a clear conflict of interest. One, Cardinal Theodore McCarrick, was laicized in early 2019 for his decades of sexual imposition on seminarians and others;71 as early as 2005, allegations about his conduct were sufficiently credible as to have forced the Diocese of Metuchen to enter into financial settlements with priests he had abused.72 Requiring that the abuse be “of a minor” (a limitation now removed) again limited the

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68 Of course, to the extent that a canonical penal trial rather than the administrative laicization of a guilty cleric at his request is necessary, the canon law statute of limitations might make this difficult, given that under canon law it could be as short as five years, albeit Benedict XVI’s 2010 revisions to Sacramentorum Sanctitatis Tutela extended it to twenty years from a victim’s eighteenth birthday. See Benedict, supra note 59. It does often take traumatized victims decades to file a report.


regulatory purview to the benefit of clerics like McCarrick, whose abuse largely targeted young adults, not minors. Additionally, the high level of process required73 meant that few of those credibly accused could be promptly removed.74

Pope Francis himself declared in 2017 that “the Church irrevocably and at all levels intends to apply the zero-tolerance principle against the sexual abuse of minors.”75 He did close a major loophole by issuing a motu proprio, or decree, specifying that bishops could be removed from office if they were “negligent . . . in relation to cases of sexual abuse inflicted on minors.”76 But in dealing with individual cases he has shown far more leniency,77 leading Marie Collins, one of only two survivors of clergy sexual abuse appointed in 2014 to the Pontifical Commission for the Protection of Minors established by Pope Francis, to say in her 2017 resignation letter that Francis “does not appreciate how his actions of clemency undermine everything else he does in this area. . . .”78


76 Apostolic Letter Issued Motu Proprio from Pope Francis, As a Loving Mother (June 4, 2016), http://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20160604_come-una-madre-amorevole.html [https://perma.co/UHX4-VJBE].

77 See, e.g., Nicole Winfield, Pope Quietly Trims Sanctions for Sex Abusers Seeking Mercy, ASSOCIATED PRESS (Feb. 25, 2017), https://www.apnews.com/64e1f6c2312764a24bf1b2d6ec3b4caf [https://perma.co/W7YE-WHC2] (giving examples and explanations). In fact, at no time before or during the papacy of Francis has anything like zero tolerance been achieved, even with respect to credible claims of abuse sent to and adjudicated by the Congregation for the Doctrine of the Faith (“CDF”). See, e.g., Kieran Tapsell, Zero Tolerance! The Facts Don’t Support the Pope’s Claims on Child Abuse, THE GUARDIAN (Jan. 31, 2018), https://www.theguardian.com/commentisfree/2018/jan/31/zero-tolerance-the-facts-dont-support-the-popes-claims-on-child-abuse [https://perma.cc/YG93-JHJ] (analyzing statistics worldwide between 2004 and 2014 and, with respect to Australian referrals to the CDF in 2017, to show that, based on the percentage of priests who were dismissed rather than given lesser penalties, the tolerance rate exceeded 75%).

Of course, to expect zero tolerance from the Catholic Church, and especially from Pope Francis,\textsuperscript{79} is to ignore some basic theological commitments.\textsuperscript{80} More than a crime or a psychological pathology, child sex abuse is for the Catholic Church a sin, and the Church and particularly Pope Francis are in the business of forgiving sin. One of Francis’s favorite metaphors for this forgiving approach is of the church as a field hospital for sinners.\textsuperscript{81} There is no reason to think there isn’t a bed in the field hospital for sex abuser priests, just as Francis has made clear there is for the divorced and remarried, gays and lesbians, and women who have procured abortions. Moreover, the twenty-one reflection points distributed by Francis at the commencement of the summit veered far from zero tolerance, in the direction of rights for the accused, stressing, inter alia, “the right to defen[s]e,” the necessity because of the “presumption of innocence . . . to prevent the lists of the accused being published . . . until after the preliminary investigation and the definitive condemnation,” and the requirement to “[o]bserve the traditional principle of proportionality of punishment with respect to the crime committed.”\textsuperscript{82} Francis ended his recent sex abuse summit speaking no more
of “zero tolerance” but of “the mystery of evil” and of the need “to find a correct equilibrium of all values in play and to provide uniform directives for the Church, avoiding the two extremes of a ‘justicialism’ provoked by guilt for past errors and media pressure, and a defensiveness that fails to confront the causes and effects of these grave crimes.”

It is not clear which is worse, to promise “zero tolerance” and fail to deliver, as the Catholic Church has done up to now, or, having once promised “zero tolerance,” to retreat from that promise, as Francis now seems to be doing. What is clear is that both give rise to scandal.

B. Treating Accusers at Least as Well as the Accused

In no small part because of the reputational harm they can do to both the accused individual and the institution, the Church has long treated false accusations more harshly than proven abuse or cover up, in both the Code of Canon Law and in everyday practice. This attitude has complicated the ability of Pope Francis to deal with the abuse crisis. When Chileans, including victims of abuse, other parishioners, and even bishops, protested the promotion to a bishopric of Juan Barros Madrid, seen as complicit in the crimes of a notorious abuser, Fernando Karadima, Francis initially insisted the accusers were “dumb” and “led by the nose by the leftists who orchestrated all this” and “there is not one single piece of evidence. It is all slander. Is that clear?” Surprised by a firestorm of response, Francis finally met with survivors, as he had initially declined to do, and commissioned a report from Archbishop Charles Scicluna of Malta, formerly the Vatican’s top prosecutor for sex

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83 Francis, supra note 24 (emphasis in original).
84 See SIPE ET AL., supra note 64, at 595 (comparing the canon law penalties for these offenses).
87 Even Cardinal Seán O’Malley of Boston, President of the Pontifical Commission for the Protection of Minors, rebuked Francis for his apparent callousness. See Statement of Cardinal Seán O’Malley, President of the Pontifical Commission for the Protection of Minors (Jan. 20, 2018), https://www.bostoncatholic.org/utility/news-and-press/content.aspx?id=34264 [https://perma.cc/5X8-GBPE] (“Pope Francis’ statements . . . in . . . Chile were a source of great pain for survivors of sexual abuse by clergy . . . . Words that convey the message ‘if you cannot prove your claims then you will not be believed’ abandon those who have suffered reprehensible criminal violations of their human dignity and relegate survivors to discredited exile.”).
abuse crimes, that led to a mass offer of resignation on the part of the Chilean bishops. In a June 5, 2018 letter to the Chilean people, quoted above, Francis spoke for the first time and repeatedly of a “culture of abuse and cover up” which he urged be ended. Nevertheless, he has continued to be less than fully receptive to the demands of victims. Just one day before the beginning of the summit on sex abuse, he insisted, “one cannot live an entire life accusing, accusing, accusing the Church. Whose is the office of the accuser! The devil! And those who spend their life accusing, accusing, accusing, are—I will not say children, because the devil does not have any—but friends, cousins, relatives of the devil.”

After the summit, when asked why he had not accepted the resignation of French Cardinal Barbarin, who had offered it after having been convicted by a French court of the crime of covering up child abuse and whose local diocesan council had voted almost unanimously in favor of his retirement, Francis noted that Barbarin was appealing his criminal conviction and therefore remained entitled to the presumption of innocence; he did not explain why the standards of the secular criminal law should apply to the administrative question of Barbarin’s resignation, other than to say it was “important because it goes against the superficial condemnation of the media.”

C. Ending Mandated Secrecy

Francis has been repeatedly asked by national and international bodies to abolish the pontifical secret with respect to sexual abuse and to mandate reporting by Church officials to state authorities, but has thus far refused to do so in any categorical way. In 2014, early in his papacy, the United Nations committee investigating the failure of the Holy See to live up to its commitments under the U.N. Convention on the Rights of the Child identified as particularly problematic the fact that “[d]ue to a code of silence imposed on all members of the clergy under penalty of excommunication, cases of child sexual abuse have hardly ever been reported to the law enforcement authorities in the countries where the crimes were committed.” The U.N. Committee
Against Torture similarly recommended “that the Holy See take effective measures to ensure that allegations received by its officials concerning violations of the Convention are communicated to the proper civil authorities to facilitate their investigation and prosecution of alleged perpetrators.” The Vatican had responded that its treaty obligations only extended to the territory of Vatican City and to the conduct of its ambassadors, that it did “not have the capacity or legal obligation to impose the abovementioned principles upon the local Catholic churches and institutions present on the territory of other States and whose activities abide with national laws” and that to attempt to impose them “could constitute a violation of the principle of non-interference in the internal affairs of States.”

As a general matter, the Catholic Church’s resort to legalisms has not served its reputational interests well, whether before the U.N. or in national courts; this has in itself been a source of scandal. More specifically, as commentators observed, this particular legalistic response was more than slightly disingenuous given that a) the Pope as a virtual absolute monarch could single-handedly and at will alter the legal obligations under canon law of the clergy throughout the world, and b) no other state prohibits, and all would likely welcome, greater reporting of child sexual abuse by clergy.

The Vatican did grant a dispensation to allow reporting to the police “where the civil law requires to the United States in 2002 and to the rest of the world in 2010, but where there are no such civil laws, the pontifical secret” continued to apply.

At the February 2019 Vatican summit, not only canon lawyer Linda Ghisoni, but Cardinal Reinhard Marx, a member of the C9 Council of Cardinals who are Francis’s closest advisors, called for the abolition of...
the pontifical secret as applied “to the prosecution of criminal offences concerning the abuse of minors.” Archbishop Scicluna, one of the organizers of the summit, suggested in a press conference that legislation might be prepared to accomplish this, but it has not yet clearly emerged.

D. Carrying through on Commitments

Increasingly, the response of the Vatican under Pope Francis to the sex abuse crisis has come to resemble that of a typical business corporation in the throes of crisis management. It issues the equivalent of a press release when particularly bad news hits the headlines, promises action after a committee studies the matter, and then fails to follow through even on explicitly promised reforms. The 2017 resignation letter of abuse survivor Marie Collins from the Pontifical Commission for the Protection of Minors illustrates this problem, describing as “stumbling blocks” what might properly be called scandals, chief of which is the “reluctance of some members of the Vatican Curia to implement the recommendations of the Commission despite their approval by the pope.” Among the papally approved but unimplemented recommendations Collins lists are major structural ones, such as “a tribunal in which negligent bishops could be held accountable,” announced in 2015, but then “found by the Congregation for the Doctrine of the Faith . . . to have unspecified ‘legal’ difficulties” and vetoed. Collins also recounts that despite explicit papal instructions “to ensure all correspondence from victims/survivors receives a response,” some Vatican departments were categorically refusing to comply, a more minor but still meaningful

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98 Gerard O’Connell, The Vatican Summit on the Protection of Minors Is Over. What’s Next?, AMERICA (Mar. 1, 2019), https://www.americamagazine.org/politics-society/2019/03/01/vatican-summit-protection-minors-over-whats-next [https://perma.cc/6HVM-EZR8] (quoting Scicluna as acknowledging “a growing feeling that these cases should not be subjected to the pontifical secret,” and suggesting that after discussions among the relevant congregations in Rome “the vademecum can be finalized”).


100 Collins, supra note 78.

101 Id. When Collins subsequently asked Francis why he had allowed the CDF to block the tribunal, he “told [her] that bishops could not all be held to the same standard. Allowances had to be made for their cultural difference.” She responded that “Canon law is universal—Catholic Doctrine is universal – safeguarding should be universal.” See Press Release, We Are Church Ireland, Marie Collins puts it up to Pope Francis (Jan. 14, 2019), http://wearechurchireland.ie/marie-collins-puts-it-up-to-pope-francis/ [https://perma.cc/AW4F-22X6].
failure. When the 2019 summit was announced, Collins pointed out that a similar meeting with a similar purpose organized by many of the same Church leaders has been held at the Vatican in 2012, and that meeting, titled Towards Healing and Renewal, had yet to yield concrete results.

Rather than marking an end to these failures to follow through, the 2019 Vatican summit simply intensified the scandalous impression that words would not be followed by meaningful and effective action. Even before it began, it was seen as needlessly impeding meaningful progress, when, in November, the Vatican asked the USCCB to delay a vote on proposed standards of episcopal conduct and on the formation of a special commission for review of complaints against bishops for violations of the standards until after the summit. This delay would have been bad enough if, at the summit, comparable proposals on these issues had been presented and made applicable to the worldwide Church. But no concrete proposals of any kind on any issue were put on the table for resolution at the summit, which seemed more of a consciousness raising session than a venue for decision-making, its goal a “change of mentality” more than a change of policy. Instead, of acting, or even being given specific directions for acting, the bishops were sent home to discuss amongst themselves and to await a promised vademecum whose contents and delivery date remained unspecified. In the months since the summit, Francis has issued two relevant pieces of legislation, one establishing reporting requirements within the clerical hierarchy for those with notice of child sex abuse or its cover up, the other governing child sex abuse and related crimes in the territory of Vatican City. Francis has always been clear that “[l]oss of credibility . . . cannot be regained by issuing stern decrees or by simply creating new committees

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102 Collins, supra note 78.
103 See We Are Church Ireland, supra note 101.
105 See Pope Francis, Address at the end of the Eucharistic Concelebration at “The Protection Of Minors In The Church” Meeting (Feb. 24, 2019), http://w2.vatican.va/content/24atican244/en/sp eeches/2019/24atican244/documents/papa-francesco_20190224_incontro-protezionemini280a-richenio-chiusur a.html [https://perma.cc/9CSL-XSG2] (“a change of mentality is needed to combat a defensive and reactive approach to protecting the institution and to pursue, wholeheartedly and decisively, the good of the community by giving priority to the victims of abuse”).
or improving flow charts, as if we were in charge of a department of human resources.” But, at least when it comes to the scandal of clerical sexual abuse, Francis has been no more effective at implementing a “change in [the hierarchy’s] mind-set (metanoia)” than he has been at effecting systemic organizational change.

E. Engaging in Meaningful Atonement

In an August 2018 Letter to the People of God provoked by the release of the extremely graphic and detailed Pennsylvania grand jury report on clergy sex abuse, Pope Francis acknowledged that “no effort to beg pardon and to seek to repair the harm done will ever be sufficient.” He is right about that, but survivors and other critics are also right that there have been to date no meaningful efforts at atonement by responsible persons in the hierarchy of the Church. Later in the same letter, Francis acknowledged that “prayer and penance will help” to achieve “a conversion of heart” but then “invite[d] the entire holy faithful People of God to a penitential exercise of prayer and fasting.” This aroused justifiable indignation among faithful Catholics, who correctly insisted it was not the people, who had been excluded from all relevant decision making, but the hierarchy of the Catholic Church who needed to do penance for the scandal of sex abuse. Since the beginning of the sex abuse crisis, a standard punishment for guilty clerics was to be sentenced to prayer and repentance in seclusion. Before the process against him escalated to his laicization, for example, McCarrick was “ordered last year to a friary in a remote Kansas town to live in seclusion, prayer and penance.”

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111 Id.


from access to further abuse victims, critics view them as still being in too comfortable surroundings supported by the Church. Occasionally, bishops have engaged in symbolic public acts of penance, such as prostrating themselves before the altar or washing the feet of abuse victims as part of the traditional Holy Thursday service commemorating Jesus’s washing of his apostles’ feet at the Last Supper. This latter act may have given victims some comfort and sense of acknowledgment, but, when compared with historical examples of public penance, it is far too easy. King Henry II of England, for example, walked barefoot to Canterbury, where, stripped to the waist, he allowed himself to be scourged by the monks to atone for the public scandal of the murder of Thomas Becket. Public penance by authority figures historically also involved some concessions of money and power. Henry II, for example, as part of his public penance, contributed to a Crusade and to the Church and committed to abolish all customs prejudicial to the Church. Instead of mobilizing expensive lawyers to fight abuse claims in court and to lobby against extensions of the statute of limitations for tort cases involving clergy sex abuse, the Catholic Church might have opened its coffers, if not for prompt and generous payments directly to the victims, then at least to fund, for example, victim-oriented services. To avoid the financial cost of atonement falling on the faithful people, the hierarchy might have begun, not by cutting programs or seeking contributions, but by selling off assets like their rectories and episcopal residences and their precious jewels, living like penitents in sackcloth on the ash heap.

114 Support by the Church in a controlled environment has practical advantages as well as symbolic costs, however, because it makes it less likely that predators will seek secular employment in which they can abuse again.

115 See, e.g., James Martin, S.J., Cardinal and Archbishop Wash the Feet of Abuse Victims, HUFFPOST (May 21, 2011), https://www.huffpost.com/entry/cardinal-and-archbishop-w_b_826083 [https://perma.cc/N8E9-E4EK] (distinguishing between public confession, involuntary punishment, such as imprisonment in a penitentiary, and the sort of penance he sees as necessary in the wake of the sex abuse crisis, in which “it is the layperson who must grant absolution to those clergy who are seeking forgiveness.”).


117 See Mike Ibeji, Becket, the Church and Henry II, BBC (updated Feb. 11, 2017), http://www.bbc.co.uk/history/british/middle_ages/becket_01.shtml [https://perma.cc/ZQ36-HR8U].

118 Id.

Even now, however, offers of compensation from the Church have obviously mixed motives. Consider, for example, New York Cardinal Timothy Dolan’s hiring of Kenneth Feinberg, made famous through his handling of the September 11th Victim Compensation Fund, to apply a similar methodology to an Archdiocesan Independent Reconciliation and Compensation Program, which reviews the claims of abuse victims and offers compensation without resort to formal court process and notwithstanding the statute of limitations.\(^{120}\) Although touted as a model other dioceses might follow, it was clearly developed in the shadow of the New York legislature’s plan to pass a Child Victims Act with an extended statute of limitations and a one year lookback during which victims of any age or time of offense could bring their claims to court, a provision Dolan claimed would be “toxic to the Church.”\(^{121}\)

F. Acknowledging That the Abuse of Minors Is Only a Small Fraction of Clerical Sexual Abuse, Albeit the Only One the Catholic Church Has Thusfar Made Any Serious Effort to Address

One of the many respects in which the summit on the “The Protection of Minors in the Church” can be seen as too little, too late was its narrow focus on the sexual abuse of minors\(^{122}\) in a year in which there was more scandalous publicity than ever before concerning diverse other forms of sexual abuse by members of the clergy. For example, although Theodore McCarrick had been credibly accused of abuse of minors, the bulk of his sexual imposition was on seminarians who were legal adults but subject to his power; his treatment of them played a major role in the canonical proceedings leading to his laicization. And, immediately before the summit, Tom Doyle, an Irish activist on behalf of the children of priests, of which he himself is one, announced to the New York Times that this would be “the next scandal,” revealing that an archbishop had showed him internal Vatican guidelines for how to


\(^{122}\) The emphasis on minors also led to problems in another direction, perhaps exacerbated by Francis’s insistence that it was in families, not in the Church where most abuse occurs. See Francis, supra note 24. Some African and Asian prelates wondered why only sexual abuse was being discussed, when, in their countries child soldiers and child enslavement were also prevalent. See Jamie Manson, *Why the Sex Abuse Summit Accomplished Nothing*, NAT'L CATH. REP. (Mar. 6, 2019), https://www.ncreline.org/news/accountability/grace-margins/why-sex-abuse-summit-accomplished-nothing?fbclid=IwAR0rnjJWTLEvQ-jcSGc2wYX7R0L3_L99MAhWcRGl7qJpdzWyB6FzXj1k8Kg [https://perma.cc/9B3T-GKNU] (quoting Archbishop Mark Coleridge).
deal with priests who father children. Summit organizer Scicluna met with Doyle the next day, and appeared to endorse Doyle’s position, previously endorsed by the Irish bishops, that “the interest of the child should be paramount,” rather than enforced secrecy to protect the Church’s reputation, or even enforced laicization, which might leave the father without the financial means to provide for his child.

The sexual exploitation of nuns by clergy was also prominently in the news, with both breaking news stories and investigative journalism bringing it to Pope Francis’s direct attention immediately before the summit on minors. Among the breaking news stories were the resignation of a CDF official for alleged sexual imposition on a German nun in the confessional and protests in India following accusations by a nun in Kerala that a bishop had repeatedly raped her. The supplement Woman Church World in the Vatican’s own newspaper, L’Osservatore Romano, included in February 2019, the month of the summit, an article by editor Lucetta Scaraffia on the sexual abuse of nuns by clergy, following up on an article in the same magazine the previous year on the slave-like conditions under which nuns in Rome and elsewhere were forced to perform menial labor for priests. “If eyes continue to be closed to this scandal—rendered even more serious by the fact that the abuse of women entails procreation and is thus at the root of the scandal of imposed abortions and of the children not recognized by priests,” Scaraffia wrote, “the condition of oppression of women in the Church will never change.”

The hashtag #NunsToo had begun trending in 2018, when Nicole Winfield of the Associated Press reported that

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129 Scaraffia, supra note 127.
“[a]fter decades of silence, nuns talk about abuse by priests.”

Winfield’s article cited both specific very recent examples and a report covering the sexual abuse of nuns in nearly two-dozen countries that had been prepared for the Vatican by Sr. Maura O’Donaghue in 1994 but had only first been publicly acknowledged in 2001. When Winfield took the occasion of Scaraffia’s article to ask Pope Francis himself at a press conference whether the abuse summit would also address “the sexual abuse of consecrated women in the Church,” Pope Francis acknowledged that this was a longstanding, not yet solved problem about which “something more [should] be done.” Describing an instance where John Paul II, presented by the future Benedict XVI with documentary evidence of such sexual abuse, had refused to take action, Francis insisted, “We should not be scandalized by this—it’s part of a process.” He credited Benedict XVI with later bringing the documents out of the archive, and dissolving a particular order of nuns “because a certain slavery of women had crept in, slavery to the point of sexual slavery on the part of clergy.”

After this admission made headlines, the Pope’s spokesman promptly walked it back saying, “When the Holy Father . . . spoke of ‘sexual slavery’ he meant ‘manipulation.” Shortly thereafter, Scaraffia and the bulk of her team tendered their resignations, claiming they felt surrounded by an atmosphere of distrust and progressive delegitimisation.

In recent legislation, the Vatican has expanded its angle of vision to encompass clerical sexual abuse not only of minors but of “vulnerable” persons, but its definition of vulnerability appears to be a narrow

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130 See Nicole Winfield & Rodney Muhumuza, After Decades of Silence, Nuns Talk about Abuse by Priests, ASSOCIATED PRESS (Jul. 27, 2018), https://www.apnews.com/5e7c4d0177740939092929314fd87621 [https://perma.cc/CBA6-T9P3.] Among the recent cases Winfield mentioned were allegations of sexual imposition by confessors (the original target of Crimen Solicitationis), and examples from convents in Chile and Uganda.


134 The reasons for the group resignation were complicated, including claims that changes in the editorial structure of the paper had put the women under greater control by men.
one whereas, when it comes to sexual imposition by clergy, adult seminarians, nuns, even congregants are all vulnerable; the children of priests, whatever the circumstances of their conception, are per se vulnerable; and the Catholic Church itself is most vulnerable to the scandal of all such sexual imposition. To date no legislation, no concrete plans, not even any overarching rhetoric, has emerged to address the sum total of these scandals.

V. CODA: SCANDAL AS STUMBLING BLOCK IN OTHER INSTITUTIONS

In my view, the central problem of scandal at the core of this paper is not limited either to the Catholic Church or to the problem of sex abuse. The need, in the technical sense, to avoid scandal arises any time it is important for the sake of the public good that people have faith in an institution and in the particular persons in charge of running that institution. It should not be surprising that other religions now faced with their own long hidden sex abuse problems have doctrines akin to the Catholic doctrine of scandal to which institutional actors can appeal in calibrating their response. I will briefly discuss one set of such doctrines, those deriving from halakha or Jewish law, as they are applied to concerns about sex abuse of minors among the Haredim, or ultra-orthodox Jews.

Religions are, however, not the only institutions that require faith. So, at least in the United States, do the institutions of government. One recent #MeToo scandal, the process by which Brett Kavanaugh was confirmed to a seat on the Supreme Court, has shaken the faith of many in each of the three main branches of the federal government. This paper will conclude by drawing some very brief analogies between the Kavanaugh hearings and the Catholic Church’s failed approach to the scandal of sex abuse.

A. Child Sex Abuse among the Haredim, or Ultra-Orthodox Jews

Consider the case of Rabbi Nuchem Rosenberg, described as “the lone whistleblower among the Satmar, a powerful Hasidic sect.” After he personally observed the anal rape of a boy in a Jerusalem Mikvah, or ritual bath, in 2005, “he started blogging about sex abuse in his community and opened a New York City hotline to field sex abuse complaints,” concluding from the evidence he gathered that about half of all

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135 See, e.g., Pope Francis, supra note 106, A. I, § 2 (b) (“‘vulnerable person’ means: any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want or otherwise resist the offence”).
young Hasidic males are victims of sex abuse by adults in their community. His reward has been ostracism, as, for example, advertisements taken out by the self-described “great rabbis and rabbinical judges of the city of New York” have denounced him as “a stumbling block for the House of Israel.” As in the Catholic Church, victims’ advocates among the Haredim claim that in their community, the “greatest sin is not the abuse, but talking about the abuse.” The Haredi leadership, like that of the Catholic Church, can invoke religious doctrine and religious law in support of secrecy. The halakhic (Jewish law) equivalent of the doctrine of scandal is the prohibition of “lashon hara” or “evil speech,” a prohibition on the spreading of derogatory albeit true information about another. And, as in the Catholic Church, some religious leaders have been arguing for decades that, not only does the prohibition on such speech not apply when the purpose of speaking is to prevent further harm, but also “a conspiracy to conceal information about abuse will ultimately be made public, creating an even greater hillul Hashem” or desecration.

B. The Kavanaugh Hearings as a Scandal

Like the Congregation for the Doctrine of the Faith (“CDF”), the Senate Judiciary Committee, when it comes to advising and consenting to judicial nomination, sees its chief task as investigation of doctrinal matters, from original intent to stare decisis, even though it may not have as clear a sense as the CDF as to what constitutes orthodoxy or heresy. Like the CDF, it has also long needed to involve itself in at least some examination of the alleged sins and crimes of candidates for office, something it has generally done in executive session, to protect

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136 At least two op-eds, one from a priest, the other from a law professor active in clergy sex abuse cases, apply lessons learned in the clergy sex abuse scandal to the charges against Kavanaugh. See Thomas Reese, Father Brett Kavanaugh Would Be Suspended and Investigated, RELIGION NEWS SERV. (Sep. 21, 2018), https://www.ncronline.org/news/opinion/signs-times/father-brett-kavanaugh-would-be-suspended-and-investigated [https://perma.cc/4WWJ-2CM5] (suggesting that the procedures used by the N.Y. Archdiocese to investigate claims against McCarrick would be a good model for addressing claims against Kavanaugh); Marci A. Hamilton, The Response to the Kavanaugh Allegations Exposes the Lessons We Failed to Learn from the Catholic Clergy’s Abuse, TIME (Oct. 4, 2018), https://time.com/5415241/brett-kavanaugh-catholic-church-abuse/ [https://perma.cc/CNE9-B58P] (noting that, unlike in the Kavanaugh case, with respect to clergy sex abuse, no one any longer agonizes over “the possibility of falsely maligning ‘good men,’” in part because so many allegations initially deemed “not credible” have been proven true). At the other extreme was the criticism that the Pennsylvania grand jury report had failed to accord accused priests the presumption of innocence and ability to defend themselves the nomination process had granted Kavanaugh. See Peter Steinfels, The PA Grand-Jury Report: Not What It Seems, COMMONWEAL (Mar. 21, 2019), https://www.commonwealmagazine.org/pa-grand-jury-report-not-what-it-seems [https://perma.cc/MM7S-3Z5P].

137 Compare the first part of the Clarence Thomas hearings, which focused on his endorsement of natural law, with the second part, which focused on charges of sexual harassment. See, e.g. Senate Judiciary Committee, Justice Thomas on Natural Law, CSPAN (Sept. 13, 1991), https://www.w-c-span.org/video/?c1474100/justice-thomas-natural-law [https://perma.cc/93TG-CREC].
the privacy of the nominee and avoid scandal. Well before any allegations of sexual assault were put on the agenda in connection with Brett Kavanaugh’s nomination, the committee was already investigating everything from whether he had lied in previous testimony before Congress to whether he had a gambling addiction to where he had obtained the funds to pay off his considerable debts.138

Every major institutional and individual actor in the Kavanaugh hearing process seemed to have had a concern with scandal that the Catholic Church would recognize as familiar. In part, this may be related to the very high number of Catholics involved, from White House Counsel Don McGahn, an old friend of Kavanaugh’s who shepherded his nomination through the Senate with an unprecedented level of secrecy when it came to potentially damaging documentary evidence; to Justice Kennedy, who may have resigned with an explicit understanding that his former clerk would be nominated to replace him139 (a sort of nepotism of the spirit rather than the flesh familiar in the Catholic hierarchy); to Kavanaugh himself and his classmates at Georgetown Prep. I could draw a lot of fairly superficial parallels,140 but there are, I would argue, also deeper analogies. Kavanaugh’s classmate and witness Mark Judge includes in his memoir of their days at Georgetown Prep a quote from the Baltimore Catechism he said Republican strategist Pat Buchanan particularly valued: “The Eighth Commandment forbids lies, rash judgment, detraction, calumny, and telling of secrets we are bound to keep. When does a person commit the sin of detraction? A person commits the sin of detraction when, without a good reason, he makes known the hidden faults of another.”141 This quotation sets forth exactly the sort of justification that might lead a Catholic through, for example, the technique of mental reservation, to be less than fully forthcoming when asked about another’s sexual misconduct, as Judge and generations of clerics were.142 It, together with the Catholic bro culture


140 For example, the use of alcohol as a disinhibitor and memory solvent was endemic among pedophile priests, whose retreat houses routinely treated alcoholism together with sexual pathologies. Priests regularly took their victims in groups to beach houses allegedly to combine recreation with spiritual retreat; Mark Judge, Kavanaugh’s drinking buddy, describes the infamous Beach Week as “a perverse Liturgy of the Hours,” the beginning of “something sacred.” See MARK GAUVREAU JUDGE, GOD AND MAN AT GEORGETOWN PREP: HOW I BECAME A CATHOLIC DESPITE 20 YEARS OF CATHOLIC SCHOOLING 70, 75 (2005).

141 Id. at 16.

142 See, e.g., SIPE ET AL., supra note 64, at 3847 (describing this tactic of using misleading words
in which it was applied, grounds Kavanaugh’s central assurance that “What happens at Georgetown Prep, stays at Georgetown Prep. That’s been a good thing for all of us.” Like bed-hopping seminarians, the boys of Georgetown Prep, well into adulthood, could feel free to misbehave secure in the knowledge that a culture of omertà would preserve both personal and institutional reputations from scandal.

The analogies are even stronger when one focuses on the behavior of and arguments made concerning the Judiciary Committee. As with investigations into sex abuse, there were both sincere and somewhat disingenuous expressions of concern about the victim, claims that it was in her best interests that allegations not be made public, either by not being pursued at all or being pursued only in executive session. With respect to both the accuser’s choice to testify and the committee’s choice to hear her, there were claims that this would ruin the glorious future of a good man of hitherto blameless life for whom probity was an essential part of his job description. For the accusers this meant not only that the risk of not being believed was high, but also that they would be blamed for needlessly tarnishing reputations even if they were believed. There was the same feeling that to vindicate the accuser would be to take something infinitely precious from the accused, so that even if we do believe her, we should refrain from punishing him. The question was asked in both cases, do you really want to ruin this man’s life? The judiciary, like the priesthood, was seen as an ontologically transformative status as to which, on the one hand personal rectitude was important, but on the other, depriving of it those who had worked hard to attain it was a loss more devastating than that of an ordinary job. Not just the

but avoiding an outright lie as permissible in Catholic moral theology when telling the full truth would violate an obligation to keep a secret or otherwise cause a greater harm).


Forensic psychologist Lisa Rocchio characterized this as “the institutional response of protection” for the “young men [who] have their lives ahead of them” and “[l]ike in the Catholic Church . . . for the institution itself” with the result of “sacrificing the victim to their priorities and goals.” See Susan Zalkin, Kavanaugh Shows the Disgusting Underbelly of America’s Elite Schools, VICE (Sept. 24, 2018), https://www.vice.com/en_us/article/4383bd/kavanaugh-shows-the-disgusting-underbelly-of-americas-elite-schools [https://perma.cc/HT8W-8ZQN] (describing, inter alia, Georgetown Prep’s cover up of abusive priests on its faculty and a more widespread “deny till you die culture”).

On the other hand, those with knowledge of abusing priests who could “lovingly administer . . . mass on Sunday after having raped . . . the night before” could bring to their evaluation of Kavanaugh the conviction “that people are in fact capable of being more than one type of person.” See Heather Stinson, Inadvertent Lessons from Judge Kavanaugh’s Confirmation Hearing, WAKE FOREST J. OF L. & POL’Y (2018), https://wfulawpolicyjournal.com/2018/09/27/inadvertent-lessons-from-judge-kavannahs-confirmation-hearing/ [https://perma.cc/F37F-FDH3] (drawing on her ex-
individual candidate, but the pipeline was seen to be at risk. As Senator Lindsey Graham put it, “This is going to destroy the ability of good people to come forward.” There was the same argument that, to preserve the accused’s reputation and ability to continue in his noble profession, allegations should be kept secret until proven. And there was the same difficulty with that policy, that others with similar allegations were much more likely to come forward only once they knew they were not alone. For both Clarence Thomas and Brett Kavanaugh, as with so many predator priests, the notion that the initial allegations were uniquely aberrational accusations in an otherwise blameless life, was increasingly undercut the more time went by from the publication of the initial accusation. But, as with investigations into predator priests, the results of the FBI investigation of Kavanaugh were put into a secret archive, with senators only allowed to view it a few at a time over very limited time periods and forbidden from copying or disclosing the contents. For both accused clergy and accused judicial candidates, there was an institutional apparatus behind the accused, but not the accuser. In both cases although the central question was whether the candidate was suitable for a job, not whether he was deserving of a penal sanction, the standard imposed was “moral certainty,” or guilt beyond a reasonable doubt.

Perhaps most devastatingly for institutional reputations in both the Catholic clerical and U.S. judicial sex abuse investigations, there was the sense of déjà vu all over again. Just as each decade from the 1980s to the present has produced a new iteration of the clerical sex abuse scandals, without the sense that anything had been learned, substantively or procedurally, from the last major iteration, so the Senate, the Executive Branch, the Supreme Court, and the nation each found itself facing in the Kavanaugh hearings exactly the same procedural lapses and moral challenges it had faced in the 1991 Clarence Thomas-Anita Hill hearings, without the sense that lessons had been learned or much progress made.

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146 Lindsey Graham, Statement during the Senate Judiciary Committee hearing on the nomination of Brett M. Kavanaugh to be an Associate Justice of The Supreme Court (Wash. Post Transcript Sept. 27, 2018).

147 See Greg Sargent, Opinion: Elizabeth Warren’s New, Tantalizing Claim About Kavanaugh Shows What Utter Madness This Is, S. F. GATE (Oct. 5, 2018), https://www.sfgate.com/opinion/article/Sen-Elizabeth-Warren-s-new-tantalizing-claim-13284601.php [https://perma.cc/FF6W-PHA] (noting that although Senator Warren was correct to say “Senators have been muzzled... Republicans have locked the documents behind closed doors,” the 2009 memorandum of understanding between the Judiciary Committee and the White House counsel concerning the confidentiality of FBI background checks into nominees could be renegotiated).
There is a numbing sameness to the stories, both substantively and procedurally. There is also a grinding disillusionment that comes with the awareness that multiple times over decades an institution has promised it now has recognized the problem and will deal appropriately with it, only to leave compromised actors and flawed procedures in place essentially unchanged. This, in the end, rather than individual bad acts by institutional actors, is what causes scandal that destroys necessary faith in institutions and eventually, can destroy the institutions themselves.