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# THE CLERGY SEXUAL ABUSE CRISIS AND THE SPIRIT OF CANON LAW

REV. JOHN J. COUGHLIN, O.F.M.\*

**Abstract:** Recent revelations of cases in which Catholic priests have sexually abused minors over the course of the last five decades have drawn intense media scrutiny and public outrage. But discipline of the clergy for sexual offenses is not novel in the history of the Catholic Church, and canonical structures have long been in place to address the problem. This Article argues that the recent crisis has resulted in part from a failure to respect and enforce the relevant provisions of canon law. If bishops had fulfilled their duty to abide by the rule of law, especially in the cases involving clergy who are serial child abusers, there probably would have been no crisis. This Article proposes that an important aspect of responding to the present crisis must entail recommitment to the rule of law, thereby allowing injured individuals and communities to heal and forgive.

The discipline of the clergy for sexual offenses is not novel in the history of the Roman Catholic Church (the "Church"), and canonical structures have long been in place to address the problem.<sup>1</sup> In the United States, recent revelations of seemingly endless cases in which Catholic priests have sexually abused minors over the course of the last five decades have drawn intense media scrutiny and public outrage. This attention has often turned to the conduct of Church authorities in allegedly concealing and facilitating the crimes of priests. Although there are many possible explanations for the present crisis in the life of the Church, my focus in this brief Article is limited to canon law. Specifically, I shall suggest that the crisis has resulted in part from a failure to respect and enforce the relevant provisions of canon law. My discussion consists of three parts: (1) the

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<sup>1</sup> See R.H. Helmholz, *Discipline of the Clergy: Medieval and Modern*, 6 *Ecc. L. J.* 189, 191-96 (2002) (presenting examples of prosecution of clergy in the medieval ecclesiastical courts for sexual offenses and other crimes); see also John W. O'Malley, *The Scandal: A Historian's Perspective*, *AMERICA*, May 27, 2002, at 14, 16 (stating that while scandals are not new in Church history, the role of the media in developing the crisis is a new and significant factor).

rule of canon law and antinomian and legalistic approaches;<sup>2</sup> (2) the failure of the rule of canon law and the problem of clergy sexual abuse;<sup>3</sup> and (3) several consequences of the failure of canon law.<sup>4</sup> Although my canonical analysis might be interpreted as critical of ecclesiastical authority, I write as a Franciscan friar of some twenty-five years. Rather than find fault, St. Francis of Assisi rebuilt the thirteenth-century Church. From an entirely more modest perspective, I hope that my analysis is guided by his holy example.

## I. THE RULE OF CANON LAW

In the long historical development of canon law, the balance between law and spirit remains a significant issue.<sup>5</sup> Canon law acts as a limitation upon personal freedom and autonomy. It may also be experienced as the instrument of the powerful within the institution, which can be determined by their will to yield oppressive outcomes. On the other hand, canon law is necessary to maintain the ordered and peaceful life of the ecclesiastical community. Given the reality of the fallen nature of the human situation, it places limitations on others who would harm the individual and common good.<sup>6</sup> Because of its potential to be manipulated by the will of the powerful, the validity of canon law depends on the recognition of normative principles drawn from philosophical and theological sources. The rule of canon law signifies that its coercive power will be used only in accord with normative principles.<sup>7</sup> The rule of canon law also envisions that those vested with authority employ the law to correct injustices that plainly violate the normative principles of natural and divine law.<sup>8</sup>

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<sup>2</sup> See *infra* notes 5-33 and accompanying text.

<sup>3</sup> See *infra* notes 34-76 and accompanying text.

<sup>4</sup> See *infra* notes 77-89 and accompanying text.

<sup>5</sup> It is far beyond my specific topic to trace this significant theme in the historical development of canon law. See generally CHARLES DONAHUE, JR., WHY THE HISTORY OF CANON LAW IS NOT WRITTEN, SELDEN SOCIETY LECTURE, JULY 3, 1984 (1986) (discussing both the importance of, and difficulty in, writing the history of canon law).

<sup>6</sup> See EUGENIO CORECCO, THE THEOLOGY OF CANON LAW 1-3 (Francesco Turvasi trans., 1992) (discussing the "paradoxical" nature of canon law from a phenomenological perspective of personal autonomy and the need for an objective order).

<sup>7</sup> See LADISLAS ÓRSY, THEOLOGY AND CANON LAW 147-48 (1992) (suggesting that the order of reason and not the will of the sovereign legislator must be the guiding force in canon law).

<sup>8</sup> See Walter Kasper, *The Theological Foundations of Human Rights*, 50 JURIST 148, 157-61 (1990) (pointing out that natural law and theological traditions form a solid foundation for the protection of human rights).

As the following story illustrates, the failure to correct the injustice of clergy abuse through the rule of canon law aggravates the injury for all concerned, but especially for the abused minor. After several years of weekly counseling sessions, a woman in her late twenties was finally able to forgive her father, who had sexually abused her when she was a young girl. She nonetheless found it even more difficult to forgive her mother, who had known about the continuing abuse and taken no steps to stop it. All too often, persons abused by clergy report that their complaints to bishops and other diocesan officials were met with varying degrees of denial, arrogance and incompetence.<sup>9</sup> Such attitudes only intensified the psychological damage caused by the abuse. Although some bishops handled cases well, the costs of not observing the rule of canon law are now all too readily apparent.

Even after many months of media scrutiny of sexual abuse of minors by Catholic priests, I find it curious that there seems to be a paucity of accurate statistical information on the actual number of allegations, suspensions, canonical processes and penalties.<sup>10</sup> In the most reliable survey to date, *The New York Times* determined that 1.8 percent of all priests ordained from 1950 to 2001 had been accused of sexually abusing a minor.<sup>11</sup> The study also disclosed that the bulk of accusations concern crimes that allegedly occurred at least twenty years ago. According to the study, the greatest amount of abuse occurred during the 1970s and 1980s, and there has been a significant drop in the number of abuse allegations from 1990 to 2001.<sup>12</sup> A con-

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<sup>9</sup> U.S. Bishops' Dallas Meeting, *Charter for the Protection of Children and Young People*, 32 ORIGINS 102, 102 (2002) (the words of the Preamble acknowledging that "the ways in which we bishops addressed these crimes and sins, have caused enormous pain, anger and confusion.").

<sup>10</sup> See Laurie Goodstein, *Catholic Group Picks Academic Team to Study Problem of Sexual Abuse*, N.Y. TIMES, Mar. 12, 2003, at A19 (reporting that a committee appointed by the U.S. Catholic Bishops selected a research team from the John Jay College of Criminal Justice to assemble statistical data based on the voluntary submissions of the diocese throughout the United States); Peter Steinfelds, *Beliefs, Crucial Data Is Still Needed to Understand the Extent of Sexual Abuse in the Catholic Church*, N.Y. TIMES, May 4, 2002, at B7 (discussing the need for the bishops to provide accurate data).

<sup>11</sup> See Laurie Goodstein, *Decades of Damage, Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, § 1, at 1. Note, however, that the percentage of priest abusers is no greater—and probably somewhat less—than the percentage of abusers among the general population of adult males. See Stephen J. Rossetti, *The Catholic Church and Child Sexual Abuse*, AMERICA, Apr. 22, 2002, at 8, 9–10.

<sup>12</sup> See Goodstein, *supra* note 11, at 1 ("Over all, 256 priests were reported to have abused minors in the 1960's. There were 537 in the 1970's and 510 in the 1980's, before a drop to 211 in the 1990's.").

sistent trend in instances of clergy sexual abuse is that a large percentage of the minors were high school-age males.<sup>13</sup> Accurate data would not relieve the suffering caused by the abuse. Understanding the parameters of the problem, however, seems important to insure that the Church allocates sufficient resources to support its internal investigations and penal processes in responding in accord with the rule of canon law.

Substantively, canon law has, of course, always considered the sexual abuse of a minor to be a grave crime and grievous sin. Canon 1395 of the 1983 *Codex Iuris Canonici* (the "1983 Code") establishes that sexual contact with a minor qualifies as one of four classifications of sexual offenses for which a man may be permanently removed from the clerical state.<sup>14</sup> The other three grounds include any form of coerced sex, a public offense against the sixth commandment of the Decalogue, and continued open concubinage with a woman after an official warning. Permanent removal from the clerical state constitutes one of the most serious penalties contemplated by canon law.<sup>15</sup> Canon 2359 of the 1917 *Codex Iuris Canonici* (the "1917 Code") contained provisions similar to those stipulated in the present statute.<sup>16</sup> The substantive provisions of canon law also envision penalties for ecclesiastical authorities who fail to apply canon law. Canon 1389 of the 1983 Code provides for a penalty, including deprivation of ecclesiastical office, for an official who abuses ecclesiastical power or who omits—through culpable negligence—to perform an act of ecclesiastical governance.<sup>17</sup> A bishop who fails to employ the appropriate provisions of canon law in a case of sexual abuse of a minor is liable to penal sanctions imposed by the Holy See.

Procedurally, the 1983 Code affords both an administrative process for investigating allegations of abuse and an administrative or ju-

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<sup>13</sup> Rossetti, *supra* note 11, at 11 ("[A] significant number of priests who sexually molest minors are involved with post-pubescent adolescent males, about 14 to 17 years of age."); see Goodstein, *supra* note 11, at 21 (stating that eighty percent of priests' sexual abuse of minors involves males, while two-thirds of individuals victimized by nonpriests are female).

<sup>14</sup> See 1983 CODE c.1395.

<sup>15</sup> The penalty is considered of such severity that prior to the 1917 Code, it was the common opinion among canonists that such a penalty was reserved exclusively to the Holy See, except when the common law of the Church attached the penalty, and both of the twentieth century statutes confirm that opinion. See X 5.40.27 (*de verborum significatione*).

<sup>16</sup> See 1917 CODE c.2359. This Code was in effect from 1918 until 1983.

<sup>17</sup> See 1983 CODE c.1389; John M. Huels, *The Correction and Punishment of a Diocesan Bishop*, 49 JURIST 507, 523-26 (1989) (discussing the canonical penalties of removal and deprivation of office). Canon 2404 from the 1917 Code also provided for a penalty when an ecclesiastical authority abused his power of office. 1917 CODE c.2404.

dicial means to determine guilt and impose a penalty.<sup>18</sup> It is the bishop's responsibility, through his delegates, to initiate, pursue and bring closure to the process for dealing with an allegation against a priest of his diocese. Cases that may result in permanent removal from the clerical state normally require a judicial process to protect the rights of the accused cleric given the finality of the penalty that may be imposed.<sup>19</sup> In clear or notorious cases, however, permanent dismissal may be imposed on a guilty cleric through a simple administrative procedure.<sup>20</sup> Again, the 1917 Code afforded procedural provisions similar to those of the 1983 Code.<sup>21</sup> From a purely anecdotal perspective, I am unaware of a single case in the United States during the past several decades in which a priest was dismissed from the clerical state as a result of the diocesan penal process stipulated in canon law.<sup>22</sup> Given the lack of accurate statistical data regarding how the Church in the United States has responded to allegations of abuse, one must be cautious in drawing generalizations.<sup>23</sup> It does

<sup>18</sup> See 1983 CODE cc.1717-1731.

<sup>19</sup> See Thomas P. Doyle, *The Canonical Rights of Priests Accused of Sexual Abuse*, 24 STUDIA CANONICA 335, 337-49 (1990) (outlining the procedural considerations and the rights of the bishop, victim and accused cleric).

<sup>20</sup> See 1983 CODE cc.1341, 1718. In April 1994, the Holy See promulgated special law that refined the penal process in cases of sexual abuse by clergy by clarifying the definition of a minor as one under the age of eighteen and extending the statute of limitations to run ten years from the minor's eighteenth birthday. These provisions were affirmed and the process further refined in 2001 by the Congregation of the Doctrine of the Faith in a letter sent to the bishops throughout the entire Catholic Church. See *Congregatio pro Doctrina Fidei, De delictis gravioribus eidem Congregationi pro Doctrina Fidei reservatis*, 93 ACTA APOSTOLICAE SEDIS 785, 786-87 (2001).

<sup>21</sup> See 1917 CODE cc.1925-1959. In February 2003, officials from the Congregation for the Doctrine of the Faith met in Washington, D.C. with experienced judges from the various diocesan tribunals to review the process and penalties. This represents an important indication that the Holy See and the United States bishops are re-committing to the rule of law in dealing with the clergy sexual abuse of minors.

<sup>22</sup> Unofficial sources suggest that the administrative process of dismissal in exceptional circumstances has been used in about a dozen cases against priests in the United States.

<sup>23</sup> One may only speculate on the variety of complex factors which may account for the absence of canon law in addressing the issue. Rather than resort to a canonical process, bishops routinely relied on psychiatric evaluation and treatment of priest sexual abusers. At the same time that the psychological model supplanted the canonical process, bishops may have viewed ecclesiastical trials as too cumbersome and likely to increase adverse publicity. Perhaps bishops also doubted the ability of the capacity of the diocesan tribunal to handle such sensitive issues. Additionally, the reluctance to employ the canonical process may also have reflected a lack of awareness on the part of some bishops of the Church's penal order. Even if they were familiar with the canonical penal process, some bishops may have feared that the ecclesiastical process would conflict with criminal and civil suits brought in the secular courts. See generally PHILIP JENKINS, PEDOPHILES AND PRIESTS,

seem clear, however, that over the course of several decades, many—and perhaps most—bishops declined to implement and enforce the rule of canon law. This failure violated the normative principles of natural and divine justice.

The gospels record the words of Jesus as indicating that he came "not to abolish but to fulfill" the law.<sup>24</sup> In preaching the good news, St. Paul contrasted the "life of the Spirit" with the slavery to the law.<sup>25</sup> At the same time, Paul recognized the importance of the "law written on the human heart" and of discipline in the life of the Church.<sup>26</sup> Acknowledging the tension, Pope John Paul II has explained that the Code attempts to create a balance in the ecclesial society that recognizes the primacy of love, grace and charisms while setting the conditions for an ordered progress in the life of both the ecclesial society and the individual persons who belong to it.<sup>27</sup> Canon law functions optimally when it facilitates a balance between freedom and responsibility, charism and office, grace and sacrament, spirit and law.<sup>28</sup> From the origins of canon law in the ancient Church through the present day, the tension has sometimes become unbalanced. Typically, the result of the unbalance has been manifested in an approach to law that is either antinomian or legalistic in its focus.

Antinomianism refers to that theological position which so emphasizes faith alone that it excludes the correct function of the moral law in the economy of salvation. It diminishes the rule of canon law in affording an ordered ecclesial life. For example, the thirteenth-century Franciscan spiritualists adopted the thought of Joachim of Fiore calling for a "spirit age," which would abrogate institution, law and sacrament.<sup>29</sup> Their antinomian attitude imperiled the future of

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ANATOMY OF A CONTEMPORARY CRISIS 125-52 (1996) (discussing how the legal system and "litigation explosion" have helped define and shape the clergy-abuse problem).

<sup>24</sup> See *Matthew* 5:17-20; see also J. DUNCAN M. DERRETT, *LAW IN THE NEW TESTAMENT*, at xxvi-xxvii (1970) ("Christ in fact interpreted the *Torah*, the Jewish corpus of law, in ways which were intellectually possible, by methods intellectually viable—if often with inconvenient implications."); JOACHIM JEREMIAS, *NEW TESTAMENT THEOLOGY, THE PROCLAMATION OF JESUS* 206 (1971) (describing how Jesus intended a radical interpretation of the *Torah*).

<sup>25</sup> See *Romans* 7:6.

<sup>26</sup> *Id.* 2:15; see also 1 *Corinthians* 5-6; *Galatians* 5:13-25; *Romans* 13; Douglas Moo, *Paul and the Law in the Last Ten Years*, 40 *SCOT. J. OF THEOLOGY* 287, 287-301 (1987) (reviewing the literature concerning Paul's complex attitudes towards the law).

<sup>27</sup> Ioannis Paulus PP. II, "Constitutio Apostolica *Sacrae Disciplinae Leges*" (Jan. 25, 1983), 75 *ACTA APOSTOLICA SEDES* II, at xi (1983) [hereinafter *Sacrae Disciplinae Leges*].

<sup>28</sup> See CORECCO, *supra* note 6, at 108-12 (describing how Catholic theology has responded to the Protestant critique by positing the unity of law and theology).

<sup>29</sup> See MARJORIE REEVES, *THE INFLUENCE OF PROPHECY IN THE LATER MIDDLE AGES: A STUDY OF JOACHIMISM* 3-228 (1969) (describing the pervasive influence of Joachim's

the Franciscan Order.<sup>30</sup> In contrast, legalism reflects a rigid and formalistic misunderstanding of law that denies the unity of canon law with its inner theological meaning.<sup>31</sup> In annulling marriages, the fifteenth-century ecclesiastical courts frequently recognized legalistic exceptions to the teaching on the indissolubility of marriage.<sup>32</sup> From the Protestant Reformer's perspective, the tribunal practice reinforced the perception of canon law's corruption.<sup>33</sup> Both antinomian and legalistic approaches result in a separation of the law's outer form from its inner spirit. The antinomians reject the validity of law, while the legalists posit law as the end in itself.

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thought from its origins to the fifteenth century); see also JOSEPH RATZINGER, *THE THEOLOGY OF HISTORY IN ST. BONAVENTURE* 104–18 (Zachary Hayes trans., 1971) (stating that Joachim developed a trinitarian scheme in which the final triad or spirit age would follow upon the ages of the Father and Son). The thirteenth-century Franciscan spiritualists advocated a radical form of poverty that permitted little provision for the institutional structures of community life. Based upon Joachim's thought, they understood Saint Francis of Assisi as the eschatological prophet of the end times. See *id.* at 48–55 (discussing the identification of Francis and the Franciscan Order with the eschatological).

<sup>30</sup> As general of the Order, Saint Bonaventure of Bagnoregio found it necessary to respond to the antinomian approach. He challenged the spiritualist to discern the presence of the spirit within the institutional structures of the Order and Church. The Bonaventurian resolution evoked trust and respect for juridical structures even as it called for the institutional to remain *semper reformanda*. In the face of a vibrant antinomian movement, Bonaventure articulated an ecclesiological perspective that sought to restore the balance between spirit and law. See HANS URS VON BALTHASAR, *A THEOLOGICAL ANTHROPOLOGY* 131–35 (1967) (describing Bonaventure's resolution as expressive of the medieval balance which longed to view both the juridical structure and its inner *intellectus* as in harmony).

<sup>31</sup> See ORSY, *supra* note 7, at 145 (contrasting static and dynamic modes of interpretation of canon law).

<sup>32</sup> See BRIAN TIERNEY, *Canon Law and Church Institutions in the Late Middle Ages, in RIGHTS, LAWS AND INFALLIBILITY IN MEDIEVAL THOUGHT*, VII, 66–68 (1997); see also R.H. HELMHOLTZ, *THE SPIRIT OF CLASSICAL CANON LAW* 240–41 (1996); cf. Michael M. Sheehan, C.S.B., *The Formation and Stability of Marriage in Fourteenth-Century England: Evidence of an Ely Register*, in *MARRIAGE, FAMILY, AND LAW IN MEDIEVAL EUROPE* 38, 74–76 (James K. Farge ed., 1996) (concluding that the marriage bond was vulnerable in cases of clandestinity but less so in cases of consanguinity and affinity).

<sup>33</sup> See MARTIN LUTHER, *The Christian in Society II*, in 45 LUTHER'S WORKS 36–37 (Walther I. Brandt ed., 1962) (criticizing the tribunal practice as indicative of the hypocrisy of the Church). In response to the Reformation, the Council of Trent affirmed the theological teaching on marriage as an indissoluble sacramental union. See 2 COUNCIL OF TRENT, *DECREES OF THE ECUMENICAL COUNCIL, TRENT TO VATICAN II* 753–56 (Norman P. Tanner ed., 1990) (teaching that marriage constitutes an indissoluble union intended by Christ and clarifying the juridical requirements for the free consent of the spouses). In restoring the unity of theological teaching with canonical practice, Trent attempted to reanimate the rule of canon law. See *id.*



## II. THE FAILURE OF THE RULE OF CANON LAW AND THE SEXUAL ABUSE CRISIS

It is fair to describe the approach to canon law in the several decades immediately prior to Vatican II as sometimes manifesting characteristics of legalism.<sup>34</sup> In 1959, when Pope John XXIII announced his intention to convoke an Ecumenical Council, the pontiff also called for the revision of the 1917 Code.<sup>35</sup> Pope John had urged a general renewal (*aggiornamento*) in the Church.<sup>36</sup> The desire to revise the 1917 Code stemmed from the realization that the legalism of the pre-conciliar period needed correction in light of recent developments, especially in areas such as theological anthropology and ecclesiology.<sup>37</sup> These developments led the Ecumenical Council to endorse a much needed new habit of mind—"novos mentis habitus"—with regard to Church law and discipline.<sup>38</sup>

The process of revising the 1917 Code commenced at the conclusion of the Council and continued throughout the pontificates of Pope Paul VI and John Paul I with the hope that the new legislation would reflect the theology of Vatican II.<sup>39</sup> Over the course of almost three decades of revision, the 1917 Code, although theoretically still the universal law of the Church, fell into general disuse.<sup>40</sup> It was in many instances abrogated in favor of post-conciliar innovations *ad ex-*

<sup>34</sup> See ÖRSY, *supra* note 7, at 96–100 (discussing the separation between canon law and substantive values from after the Council of Trent until Vatican II).

<sup>35</sup> See 1 HISTORY OF VATICAN II 1 (Giuseppe Alberigo & Joseph A. Komanchak eds., 1995) (describing Pope John XXIII's announcement at the Basilica of St. Paul Outside the Walls on January 25, 1959 of the Ecumenical Council, Synod for the Diocese of Rome, and the "desired and awaited modernization of the Code of Canon Law").

<sup>36</sup> See *id.* at 504–05 (discussing Pope John's "spirit of search for 'aggiornamento'").

<sup>37</sup> See YVES M.J. CONGAR, 2 I BELIEVE IN THE HOLY SPIRIT 66 (David Smith trans., 1983) (recalling his thought at the start of Vatican II that the desired renewal in the life of the Church would flow from a Christian anthropology involving a new understanding of the human person).

<sup>38</sup> Paulus PP. VI, *Allocutio Summi Pontificis, November 20, 1965*, 1 COMMUNICATIONES, June, 1969, at 38, 41.

<sup>39</sup> See Pope Paul VI, *Ad Romanae Rotae Auditores simul cum officialibus et advocates coram admissos, anno forensis incunte*, in 65 ACTA APOSTOLICAE SEDIS 95, 98 (1973) (calling for the revision of the new Code of Canon Law to be guided by the principle of canonical equity); see also John J. Coughlin, O.F.M., *Canonical Equity*, 30 STUDIA CANONICA 403, 421–33 (1996) (comparing the 1917 and 1983 Codes and concluding that the present statute has an enhanced sense of the canonical equity that was already evident in the former statute).

<sup>40</sup> See Andrew Greeley, *Canon Law and Society*, in THE FUTURE OF CANON LAW, 48 CONCILIIUM 130, 131 (Neophytos Edelby et al. eds., 1969) (concluding from a sociological perspective that canon law "in its present form has become largely irrelevant").

*perimentum*.<sup>41</sup> In retrospect, the ecclesial ambiance in the wake of Vatican II represented a swing of the pendulum from the pre-conciliar legalism toward the antinomian. While it would overstate the matter to claim that the juridical structures of the Church disintegrated during the post-conciliar years, it seems accurate to observe that proper function of law in the Church became unbalanced. The legalism of the past was superseded by an openness to the new spirit and perhaps also a tendency to underestimate the need for a healthy ecclesial order. The culture of canon law was reduced and the law was seen as an obstacle to the manifestation of the spirit in the Church.

Following his election as the Successor to St. Peter in 1978, Pope John Paul II was determined to check the antinomianism that had surfaced during the post-conciliar years. When he promulgated the new Code on the first Sunday of Advent in 1983, John Paul II expressly acknowledged that the legislation was a response to the insistent and vehement demands of the bishops throughout the world.<sup>42</sup> Joined with the Successor to Peter, the college of bishops had discerned the pressing need to restore the balance of law and spirit. Referring to the 1983 Code as the final document of Vatican II, the Supreme Legislator intended the revised universal law of the Church to express (in juridical terms) the dynamic theological perspective of the Council.<sup>43</sup> Although the advent of the new Code had the much larger goal of restoring the balance between law and spirit in the life of the universal Church, it also affirmed the significance of the Church's penal order in dealing with cases of the sexual abuse of minors by clergy.

Some twenty years after its promulgation, it is not clear that the new universal law of the Church has yet been entirely successful in fulfilling either the general legislative intent or the more specific need to address clergy child abuse. Several broad areas of legal concern suggest a continuing suspicion of the role of canon law and at times even a denial of its validity. Much criticism, for instance, has been directed toward the function of the diocesan tribunals in the

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<sup>41</sup> See Paul Winninger, *A Pastoral Canon Law*, in *THE FUTURE OF CANON LAW*, 48 CONCILIUM 51, 59 (Neophytos Edelby et al. eds., 1969) (calling for an experimental law to replace the 1917 Code).

<sup>42</sup> See *Sacrae Disciplinae Leges*, *supra* note 27, at xii.

<sup>43</sup> Ioannis Pauli PP. II, *Il Diritto Canonico inserisce il Concilio nella nostra vita*, 15 COMMUNICATIONES 128 (1983).

United States in granting nullity of marriage unions.<sup>44</sup> Although some of the criticism lacks substance, it is true that the tribunals sometimes disregard fundamental procedural and substantive guarantees rooted in natural rights and expressed in canon law.<sup>45</sup> Another troubling example of the imbalance seems present with regard to the administration of ecclesiastical property.<sup>46</sup> Ignoring the requirement for the valid alienation of Church property has resulted in the *de facto* alienation of the legal ownership and control of major Catholic educational and health care institutions from their original and sponsoring corporate entities in the Church.<sup>47</sup> Unfortunately, the negligence of Church authorities in the United States in each of these broad areas of justice seems consistent with the failure to address cases of sexual abuse of minors during the last four decades.

My point here is not to prove a direct nexus between the post-conciliar antinomianism and clergy sexual abuse. For a believer such as me, Vatican II represents an historic and grace-filled moment in the life of the Church. Among its many spiritual fruits were a dissipation of legalism, a call to retrieve the authentic inner meaning of the law, and an openness to developments in the secular realm—especially concerning the protection of human rights.<sup>48</sup> Vatican II, however, was never intended to usher in an antinomian age. Rather, I suggest that the reduction of the culture of canon law was a contributing factor in the failure to employ the juridical structure to check abuse.

First, the bishops opted for a therapeutic approach to the exclusion of correcting the grave injury through the rule of canon law. The available statistical information confirms that it was during this time from the 1970s through the 1980s that the number of allegations of sexual abuse against priests ballooned.<sup>49</sup> It was also during this period that the infamous crimes of priests, such as Boston's John Geoghan

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<sup>44</sup> See, e.g., SHEILA RAUCH KENNEDY, *SHATTERED FAITH* 154–88 (1997) (describing her feelings of anger and betrayal because of the annulment process).

<sup>45</sup> See ROBERT H. VASOLI, *WHAT GOD HAS JOINED TOGETHER, THE ANNULMENT CRISIS IN AMERICAN CATHOLICISM* 83–107 (1998) (criticizing the systemic abuse of psychology by the tribunals in reaching juridical conclusions about the invalidity of marriages).

<sup>46</sup> See ADAM J. MAIDA & NICHOLAS P. CAFARDI, *CHURCH PROPERTY, CHURCH FINANCES, AND CHURCH-RELATED CORPORATIONS* 271–72 (1984).

<sup>47</sup> See, e.g., National Conference of Catholic Bishops Administrative Committee, *The Bishop's Pastoral Role in Catholic Health Care Ministry*, 26 *ORIGINS* 700, 700–04 (1997) (discussing the problems with canonically invalid alienation of Church property).

<sup>48</sup> See Kasper, *supra* note 8, at 152–53 (noting that from the Enlightenment through the nineteenth century, the Church sometimes expressed hostility to the new human rights language).

<sup>49</sup> See Goodstein, *supra* note 11, at 1.

and Paul Shanley, first came to the attention of diocesan officials.<sup>50</sup> In response to these kinds of allegations, bishops routinely sought psychological evaluations and treatment for the offenders. The Church's emphasis on a psychological model reflected a general trend in American society; many mental health professionals believed that a sexual predator could be reformed with proper treatment.<sup>51</sup> Although the psychological and canonical approaches have never been mutually exclusive, the focus shifted from punishment to the rehabilitation of the priest through therapy. It is fair to observe that the bishops were not acting in malice. As pastors of the Church, they believed the psychological approach to be proper. No doubt, lawyers and insurance companies also advised them that placing an accused priest in psychological treatment was necessary to demonstrate an absence of negligence.<sup>52</sup> In hindsight, the psychological approach may have been justified in certain cases involving a single offense with an older age minor. It was not helpful in dealing with cases of true pedophiles who commit serial sexual abuse.<sup>53</sup>

Moreover, reliance on the psychological model tended to mitigate the imputability of the offense on the ground that the priest possessed diminished capacity to control his impulses.<sup>54</sup> This idea of diminished capacity would present serious problems in imposing the penalty pursuant to Canon 1321 section 1.<sup>55</sup> Perhaps more importantly, the bishops continued to forsake canonical measures even after a general societal shift in the 1980s from the psychological to the punitive in sexual abuse cases.<sup>56</sup> As early as 1992, the United States Bish-

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<sup>50</sup> See Pam Belluck, *Depositions Show Cardinal Was Notified Early of Abuse*, N.Y. TIMES, Nov. 20, 2002, at A16 (noting that in depositions given in a civil suit against the Archdiocese of Boston, Cardinal Law acknowledged that he transferred abusive priests on the basis of psychological and medical opinions that the priests had been effectively treated and would not likely repeat their crimes).

<sup>51</sup> See D. Kelly Weisberg, *The "Discovery" of Sexual Abuse: Experts' Role in Legal Policy Formulation*, 18 U.C. DAVIS L. REV. 1, 2-10 (1984) (discussing the shift from criminalization to the psychological approach with regard to pedophilia during the 1970s).

<sup>52</sup> See Adam Liptak, *Religion and the Law*, N.Y. TIMES, Apr. 14, 2002, § 1, at 30 (observing that insurance companies and not bishops often selected lawyers and legal tactics in sexual abuse cases).

<sup>53</sup> See Rossetti, *supra* note 11, at 9.

<sup>54</sup> See THE CANON L. SOC'Y OF GREAT BRITAIN & IRELAND, *THE CANON LAW, LETTER & SPIRIT* 805 (Gerard Sheehy et al. eds., 1995).

<sup>55</sup> See 1983 CODE cc.1323 6ff, 1324 2ff (removing imputability for the complete lack of the "use of reason" and diminishing the prescribed penalty for one whose use of reason is adversely affected by "mental disturbance").

<sup>56</sup> See Weisberg, *supra* note 51, at 53 (identifying the societal shift back to a punitive approach in the 1980s).

ops Conference started to distribute policies from various dioceses as model guidelines for dealing with clergy sexual abuse of minors.<sup>57</sup> During the following year, Pope John Paul II addressed a public letter to the United States Bishops affirming the canonical processes in cases of clergy abuse.<sup>58</sup> That year, the Holy See also issued special norms to facilitate the effectiveness of the canonical process.<sup>59</sup> Despite the various authoritative calls to confront the problem, more than a few bishops failed to afford a just legal process when dealing with accusations. When the psychological model replaced the canonical order, the conditions were set for great damage to individuals and the common good.

Second, the psychological approach blurred the distinction between the internal and external fora.<sup>60</sup> The internal forum pertains to matters of conscience and involves confidentiality in both sacramental and non-sacramental communications. The therapy afforded priests accused of sexual abuse generally falls within the parameters of the non-sacramental internal forum.<sup>61</sup> In contrast, the external forum

<sup>57</sup> See, e.g., Cardinal Bernardin, *Statement Announcing Policy on Clerical Sexual Misconduct with Minors*, 22 ORIGINS 282, 282-83 (1992); U.S. Bishops' Meeting, *Twenty Eight Suggestions on Sexual Abuse Policies*, 24 ORIGINS 443, 443-44 (1994); see also Raymond C. O'Brien, *Pedophilia: The Legal Predicament of the Clergy*, 4 J. CONTEMP. HEALTH L. & POL'Y 91, 151-52 (1988) (calling on churches to develop a procedure for dealing with allegations of child abuse against clergy).

<sup>58</sup> See John Paul II, *Clergy Sexual Misconduct*, Vatican-U.S. Bishops' Committee to Study Applying Canonical Norms, 23 ORIGINS 102, 102-03 (1993) (reminding the bishops, with regard to sexual abuse of a minor by a cleric, that "[t]he canonical penalties which are provided for certain offenses and which give a social expression of disapproval for the evil are fully justified"); cf. Doyle, *supra* note 19, at 337-49 (discussing the canonical process and the rights of those involved in cases of clergy abuse).

<sup>59</sup> The 1983 CODE c.1362, § 1 2ff, had specified a five-year statute of limitations for cases involving the sexual abuse of minors by clergy. In April 1994, the statute of limitations in cases of clergy sexual abuse was extended to run ten years from the victim's eighteenth birthday. This was affirmed in norms issued in 2001. See *Congregatio pro Doctrina Fidei*, *supra* note 20, at 787.

<sup>60</sup> Principle No. 2 for the Revision of the 1983 Code had called for improved harmony between the internal and external fora, especially with regard to the sacraments and ecclesiastical penalties. Acta Commissionis, *Principia Quae Codicis Iuris Canonici Recognitionem Dirigant*, 1 COMMUNICATIONES, JUNE, 1969, at 77, 79 (1969); see Thomas J. Green, *The Future of Penal Law in the Church*, 35 JURIST 212, 220 (1975) (endorsing the fundamental distinction in the 1917 Code, but noting that the confusion of fora contributed to inefficacy which needed to be corrected in the proposed new Code).

<sup>61</sup> The confession and forgiveness of sin belong to the sacramental internal forum, which absolutely safeguards the matter and identity of a penitent in the Sacrament of Penance. In the sacramental forum, a priest-confessor can urge the penitent to disclose the sinful abuse to the ecclesiastical and public authorities, but the confessor remains always bound by the inviolable seal of the sacrament. See 1983 CODE c.983, § 1, c.1388, § 1. The non-sacramental internal forum refers to matters outside the Sacrament, but which are not

signifies an act of governance, which remains public and verifiable. For example, a status of person question, such as that of a cleric who has been suspended or dismissed from the clerical state for the sexual abuse of a minor, belongs to the external forum. A credible accusation of the sexual abuse of a minor officially reported to an ecclesiastical authority clearly belongs to the external forum. The exclusive reliance on the psychological model, however, tended to create the impression of secrecy and cover-up.<sup>62</sup>

Canon law's distinction between the internal and external fora reflects a balance between the common good and the individual's rights of privacy and good reputation.<sup>63</sup> When an act of governance, such as dismissal from the clerical state, is posited for the common good, it concerns the public social relations between persons. Such an act must admit of external proof and verification. Alternatively, the vast majority of sins, including most mortal sins, are not crimes subject to the ecclesiastical penal order.<sup>64</sup> The distinction protects not just clerics but all of the vast mass of baptized persons who constitute the Body of Christ. All are sinners, and all may benefit from the counsel and forgiveness available in the internal forum. The criticism of this traditional distinction on the ground that it enables a clerical culture of secrecy fails to appreciate the ancient wisdom of the Church in protecting individual dignity and privacy. In dealing with cases of sexual abuse, the Church's wisdom was not evident in a policy that focused

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publicly known and best kept in confidence. Although not part of a sacramental confession, the matter revealed by an individual to a counselor, whether priest or lay person, constitutes a matter of conscience. Normally, the counselor bears the obligation of confidentiality. When the law of a civil jurisdiction requires a counselor in the non-sacramental internal forum to report child abuse, the counselor ordinarily may comply. See O'Brien, *supra* note 57, at 138-50.

<sup>62</sup> The clergy sexual abuse issue received little attention from the media until the mid-1980s when it started to become "a major focus of public concern." The media framed the issue as the "pedophile priest problem." See JENKINS, *supra* note 23, at 3. This context conveyed the message that sexually maladjusted Catholic priests were prone to abuse young children and that the Church authority kept a veil of silence and secrecy. See *id.* at 3-10 (summarizing the construction of the problem as follows: many priests are pedophiles who sexually abuse young children, the structure of Catholicism gives rise to pedophile priests, and the Church authorities keep the abuse secret).

<sup>63</sup> See 1983 CODE c.220 ("No one may unlawfully harm the good reputation which a person enjoys, or violate the right of every person to protect his or her privacy.").

<sup>64</sup> Some acts of governance, such as the lifting of non-public censures, may be exercised solely for an individual's own good and remain in the internal forum. See Green, *supra* note 60, at 220 (discussing the need for a clear distinction between the forum of law and the forum of conscience).

on the therapeutic approach and neglected the external forum of the canonical penal sanctions.

Third, confronted with the crisis of the last year, the bishops finally abandoned the psychological model in favor of an absolute rule. Starting in the fall of 2002, the Church, particularly the priesthood, became the focus of months of extraordinary media attention and coverage unequalled in American religious history.<sup>65</sup> Aside from the damage to the public image of the priesthood, the media began to allege a pattern in which Church authorities covered up the abuse. Aware of the need for an effective resolution of the crisis, Pope John Paul II summoned the American Cardinals to the Vatican and urged them to address the problem.<sup>66</sup> Although several of the American Cardinals have impressive backgrounds in canon law, the Rome meeting apparently failed to result in unanimity about the rule of law.<sup>67</sup> When the United States Bishops assembled in Dallas in June 2002, the atmosphere might fairly have been described as one of extreme urgency, if not bordering on the hysterical.<sup>68</sup> Clearly, under enormous pressure from the media and victims groups, the bishops adopted a so-called "zero-tolerance" policy.<sup>69</sup> Pursuant to the Dallas policy, any priest with an admitted or proven act of abuse at any time was to be expelled from the clerical state, from public ministry for life, or both.<sup>70</sup> The bishops elected to correct the decades-long absence of canonical response with a rule of strict criminal liability.

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<sup>65</sup> See Richard J. Neuhaus, *Scandal Time (Continued)*, 124 FIRST THINGS, June/July 2002, at 75, 75-76 (observing the trend but noting that this is not the worst crisis in Church history, contrary to the impression of the media).

<sup>66</sup> See John Paul II, *Clergy Sexual Abuse, Address to Summit of Vatican, U.S. Church Leaders*, 31 ORIGINS 757, 759 (2002) ("[T]here is no place in the priesthood and religious life for those who would harm the young.").

<sup>67</sup> See Adam Liptak, *Scandals in the Church: News Analysis, Damage-Control Mode*, N.Y. TIMES, Apr. 26, 2002, at A1 (stating that the Cardinals' statement following the Vatican meeting exhibited classic signs of damage control by an institution in crisis).

<sup>68</sup> See Bishop Gregory, *U.S. Bishops' Meeting, Presidential Address Opening Dallas Meeting*, 32 ORIGINS 97, 101 (2002) (describing media coverage as sometimes "hysterical and distorted").

<sup>69</sup> See U.S. Bishops' Dallas Meeting, *Essential Norms for Diocesan/Eparchial Policies Dealing With Allegations of Sexual Abuse of Minors by Priests, Deacons or Other Church Personnel: Pending Recognition*, 32 ORIGINS 107, 108 Norm 9A (2002) ("[F]or even a single act of sexual abuse of a minor—past, present or future—the offending priest or deacon will be permanently removed from ministry.").

<sup>70</sup> See *id.* at 104 Art.5 ("If the penalty of dismissal from the clerical state has not been applied (e.g. for reasons of advanced age or infirmity), the offender is to lead a life of prayer and penance. He will not be permitted to celebrate Mass publicly, to wear clerical garb or to present himself publicly as a priest.").

Law hastily framed runs the risk of abrogating any semblance of fundamental fairness and justice. In the months following the formulation of the Dallas policy, it was not uncommon for a priest with a single allegation against him, which was placed in his diocesan personnel file twenty or more years ago, to be summarily dismissed from an active and fruitful ministry. Following years of faithful service, the priest suddenly found himself deprived of his life's work and with his reputation irreparably damaged. Placed on indefinite administrative leave without adequate notice or opportunity to be heard, he received the same penalty as a serial child abuser. The implementation of the zero-tolerance approach in certain instances stunned priests and their parishioners and caused attorneys for the accused to raise questions about a lack of fundamental due process.<sup>71</sup>

The due process concerns for the rights of the accused included, *inter alia*, the following issues: the lack of notice of the precise nature of the allegation; the imposition of indefinite administrative leave with no legal recourse; the vague definition of the offense of sexual abuse in the Dallas policy; the disregard of the statute of limitations which special canon law has established as ten years running from the victim's eighteenth birthday; the denial of the opportunity to be heard and offer a defense; the absence of proportionality in penalties; and the retroactive application of law.<sup>72</sup> Few if any American or canon lawyers would dispute that these issues pertain to the fundamental human rights of an accused person.<sup>73</sup> The lack of concern to frame a fair and just policy that protects the rights of the accused displayed a strange combination of both antinomian and legalistic approaches. On the one hand, the bishops seemed simply to ignore many of the requirements of the natural law expressed in canon law. On the other hand, the bishops adopted an absolute rule that permitted little or no discretion.

The Holy See declined to grant approval (*recognitio*) to the Dallas policy even on an experimental basis.<sup>74</sup> A mixed commission of repre-

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<sup>71</sup> See Laurie Goodstein, *More Priests Are Now Likely to Challenge Dismissals*, N.Y. TIMES, Oct. 20, 2002, § 1, at 22.

<sup>72</sup> See John P. Beal, 'Hiding in the Thickets of Law,' *Canonical Reflections on Some Disturbing Aspects of the Dallas Charter*, AMERICA, Oct. 7, 2002, at 15, 15-19 (identifying and discussing many of the canonical problems with the policy).

<sup>73</sup> See James H. Provost, *Book II, The People of God*, in THE CODE OF CANON LAW, A TEXT AND COMMENTARY 117, 134-37 (James A. Coriden et al. eds., 1985) (discussing the development of a list of fundamental rights for the 1983 Code and the similarities with the Bill of Rights and United Nations' Universal Declaration of Human Rights).

<sup>74</sup> See Cardinal Re, *Letter to Bishop Gregory*, 32 ORIGINS 374, 374 (2002).



sentatives from Rome and the American bishops was formed to suggest revisions. It is perhaps ironic that the Vatican found itself in the position of raising questions about the Dallas policy, which violated quite elementary principles of American justice. These same basic principles, however, are shared by the Church's canon law.<sup>75</sup> In response to the recommendations of the mixed commission, it was necessary for the bishops to reconsider the policy approved at Dallas. Assembled in Washington in November 2002, the bishops affirmed the zero-tolerance approach to be implemented in accord with the procedural requirements of canon law.<sup>76</sup> Given the record of antinomian and legalistic approaches on the part of the United States bishops, there remains understandable concern that the bishops will adhere to the policy in a manner that respects the rights of all the parties.

### III. SEVERAL CONSEQUENCES OF THE FAILURE OF THE RULE OF CANON LAW

In this final Part, I shall identify several of the canonical consequences that have resulted from imbalance between law and spirit. First, the imbalance has caused a lack of confidence in canon law. For at least some of the victims, perhaps no policy will suffice. After decades of antinomianism, a high-ranking bishop invoked canon law to justify his inaction to a group of victims. One member reflected: "Canon law was irrelevant to us. Children were being abused. Sexual predators were being protected. Canon law should have nothing to do with it. But they were determined to keep this problem, and their response to it, within their culture."<sup>77</sup> Given the failure of the rule of canon law to protect them, the victims quite understandably might attach little value to it. Victims of sexual abuse by clergy have every right to expect that the Church will take action to correct the injustice and prevent future harm. The rights of victims, however, are not the only considerations in a policy that restores justice.

The authority to impose penalties stems both from the Church's mission to preach the healing love of Christ as well as the need to

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<sup>75</sup> See Provost, *supra* note 73, at 134-38.

<sup>76</sup> See U.S. Bishops' Meeting, *Charter for the Protection of Children and Young People, Revised*, 32 ORIGINS 409, 412 Art.5 (2002) (the revision contains emphasis on the importance of adhering to Canons 1468-70 of the 1983 Code); see also Frank Bruni, *Vatican Approves Revised Plan on Sexual Abuse by U.S. Priests*, N.Y. TIMES, Dec. 17, 2002, at A28.

<sup>77</sup> INVESTIGATIVE STAFF, BOSTON GLOBE, BETRAYAL, THE CRISIS IN THE CATHOLIC CHURCH 153 (2002).

maintain ecclesiastical order.<sup>78</sup> The origins of this penal theory derive from the centrality of the forgiveness of sins in the Gospels and experience of the early Church. In the Gospels, Jesus appears eating and drinking with sinners, and the *vox Christi* is addressed not to the self-righteous but to those in need of redemption.<sup>79</sup> One of the great theological, pastoral and canonical issues to face the primitive communities of the first several centuries of Christianity was the question of post-baptismal forgiveness of sin.<sup>80</sup> As a result of the controversy in the early Church, the issue was resolved. Any sin—no matter how grave—might be forgiven as long as the sinner manifested repentance.<sup>81</sup>

Consistent with the unity of law and theology, the ecclesiastical penal order depends primarily on medicinal sanctions. Excommunication, interdict and the suspension of a cleric constitute remedial penalties. The goal of such sanctions is to encourage the offender's change of mind and heart. Once conversion with repentance has occurred, the remedial penalty is lifted, and the offender is reintegrated into the full communion of the Church. As an exception to the general theory, canon law provides for certain expiatory or vindictive penalties. Such penalties obviously do not depend on the offender's change of heart, but are intended as a means of retributive justice. Few in number, they are imposed only for the most serious offenses, such as the sexual abuse of a minor by a cleric. The horrendously disordered priest who sexually abuses a child has not only harmed the victim but the entire Mystical Body of Christ. While he may be forgiven his sin no matter how grave, a just ecclesial order may require that he no longer function as a priest. The 1983 Code's focus on me-

<sup>78</sup> See Velasio de Paolis, *Il Libro VI del Codice di Diritto Canonico: Diritto Penale, Disciplina Penitenziale o Cammino Penitenziale?*, 90 PERIODICA 85, 98–106 (2001); Velasio de Paolis, *De Recognoscendo Iure Poenali Canonico*, 63 PERIODICA 37, 39 (1974).

<sup>79</sup> See JEREMIAS, *supra* note 24, at 109 (indicating that Jesus brought the good news to sinners); 3 JOHN P. MEIER, *A MARGINAL JEW* 247 (2001) (Jesus "hobnob[ed]" with sinners).

<sup>80</sup> See BERNHARD POSCHMAN, *PENANCE AND THE ANOINTING OF THE SICK* 34–35 (Francis Courtney trans., 1964) (discussing the doctrine of one penance during a baptized person's lifetime in the post-apostolic Church). Tertulian's early debate with the Montanists, as well as Saint Cyprian's resolution of the lapsed controversy in the aftermath of the Diocetian persecution in Carthage, afford primary examples of the issue and its resolution. See *id.* at 38–61 (describing the significance of Tertulian's and Cyprian's contributions to the issue of forgiveness for grave sin after baptism).

<sup>81</sup> See *id.* at 67–68 (discussing Origen's position that even the gravest of sins may be forgiven). In the thirteenth century, Saint Thomas Aquinas afforded a sacramental analysis for the three parts of penance. See *SUMMA THEOLOGICA*, III, Q. 90, art. 2 (English ed. 1920) (identifying contrition, confession and satisfaction as the parts of penance).

dicinal penalties, with a small number of defined retributive exceptions for particularly grave crimes, thus reflects the unity of law and theology. The law is intended to set the conditions for a just ecclesial order in which the theological doctrine of forgiveness and redemption might flourish. Antinomianism belies the legislative intent in permitting the grave crime to go unpunished, while legalism stifles the spirit in declining to recognize the centrality of the theological doctrine to ecclesiastical order. The restoration of confidence in canon law would now seem to require no meager amount of wisdom in the application of its substantive and procedural provisions.

Second, the imbalance between law and spirit has resulted in a diminished understanding of the proper function of the bishop.<sup>82</sup> Canon law reflects the theological belief that bishops are successors to the Apostles, and as such are vested with sacred responsibility to teach, sanctify and exercise a ministry of governance.<sup>83</sup> The phrase "ministers of governance" distinguishes the office of the bishop from some secular function. The power of the bishop is not worldly but sacred power. In fulfilling his ministry of governance, the words of canon law require the bishop to act in accord with "holiness, charity, humility and simplicity of life."<sup>84</sup> Although many bishops undoubtedly

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<sup>82</sup> See Vatican II, *Dogmatic Constitution on the Church, Lumen Gentium*, in VATICAN COUNCIL II, THE CONCILIAR AND POST CONCILIAR DOCUMENTS 350, 357-58 (Austin Flannery ed., 1992). As envisioned in the 1983 Code, the role of the bishop reflects the ecclesiology of *Lumen Gentium*. The narrative of *Lumen Gentium's* ecclesiology starts with the radical economy of love in the absolute self-gift among each of the three persons in the one God. The relational and donative characteristics of Trinitarian love have implications for membership in the College of Bishops. See *id.* at 371-72 no.20 (indicating that because the "divine mission, which was committed by Christ to the [A]postles, is destined to last until the end of the world, . . . the [A]postles were careful to appoint successors in this hierarchically constituted society."). It means that the bishop is among his people in humble service and kenotic love at the head of the one Body of Christ. See *id.* at 370 no.18 (stating that the Church was hierarchically ordered by Christ in the selection of the Twelve Apostles because "He willed that their successors, the bishops namely, should be the shepherds in his Church until the end of world."). For a discussion of the historical evidence for this theological truth, see generally FRANCIS J. SULLIVAN, S.J., FROM APOSTLES TO BISHOPS, THE DEVELOPMENT OF THE EPISCOPACY IN THE EARLY CHURCH (2001).

<sup>83</sup> 1983 CODE c.375, § 1. This unitary ministry of governance is classified into legislative, executive and judicial functions. See Thomas J. Green, *The Pastoral Governance Role of the Diocesan Bishop: Foundations, Scope and Limitations*, 49 JURIST 472, 483-90 (1989) (discussing the unitary power of governance and its three distinct functions).

<sup>84</sup> See 1983 CODE c.383, § 1 stating in part that "[i]n exercising his pastoral office, the diocesan Bishop is to be solicitous for all Christ's faithful entrusted to his care, whatever their age" and Canon 387, which envisions that the bishop will be "[m]indful that he is bound to give an example of holiness, charity, humility and simplicity of life . . . seek[ing] in every way to promote the holiness of Christ's faithful."

exemplify holiness of life, the bishops as a whole have not conveyed that inner harmony of life as characteristic of their approach to canon law in cases of clergy abuse. Each one of these cases is fact specific. The cases range from the small number of horrendously disordered priests who perpetrated years of unchecked abuses to the priest now in his late seventies with an otherwise-exemplary record of service who in his twenties is alleged to have had a sexual encounter with a seventeen year old. Canon law is designed to permit some flexibility and discretion in the resolution of cases. The protection of individual rights and the common good depends on this kind of intelligent approach. Given their collective failure with regard to the rule of canon law, the bishops have now found it necessary to surrender their discretion for the zero-tolerance rule. This absolutist approach may be necessary to restore faith in the Church, but it belies canon law's image of the bishop who exercises a wise discretion that flows from integrity, compassion and holiness. The restoration of confidence in the rule of canon law will require bishops to implement the new policy in a manner that conveys that the bishop himself is a just, compassionate and holy man.

Third, the imbalance has tended to reduce society's understanding of the Church as a corporate entity dependent on the state. The unity between the theology of conversion and canon law testifies to the way in which the Church understands itself. To start, the Church understands itself as distinct from the state. On the basis of two millennia of its historical development, the Church proclaims itself as an organic reality with juridical manifestations for the purpose of proclaiming salvation.<sup>85</sup> During this long history, its canon law has been shaped by the Church's supreme law, which remains the salvation of souls.<sup>86</sup> The principle of the salvation of souls distinguishes canon law from the secular law of the civil state. The secular order aims to establish a set of societal conditions that maximize the opportunity for material well-being and prosperity. Canon law, however, seeks to create the optimal conditions for salvation through the proclamation of conversion, forgiveness and penance. From an American perspective, it is clear that the Framers of the religious guarantees of the First

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<sup>85</sup> See Vatican II, *supra* note 82, at 357-58 no.8.

<sup>86</sup> See 1983 CODE c.1752 (the salvation of souls is the supreme law of the Church); see also HELMHOLZ, *supra* note 32, at 395 (discussing the significance of the *salus animarum* for the medieval canonists).

Amendment to the Constitution recognized and desired to safeguard the role of religion apart from the state.<sup>87</sup>

Additionally, the Church understands itself as more than a mere corporate structure within the secular state. Unlike a corporation, the Church is not the creature of the state. Nor is its purpose the maximization of financial profits, but rather the proclamation of the salvation offered by Christ. Reducing the role of the Church to a corporate entity dependent on state recognition amounts to a dislocation from the histories of canon law and U.S. constitutional law. The reduction serves neither the purposes of the Church nor the state. The state has the authority to prosecute an alleged abuser pursuant to its regime of criminal law. The fact that the accused happens to be a priest should make no difference in a state prosecution of the crime.<sup>88</sup> The state, however, ought not to interfere with the Church's decisions concerning fitness for ministry. With regard to its own governance, the Church rightly claims an independence from secular authority.<sup>89</sup> In the present crisis, bishops and government officials need to exercise caution not to enter into agreements that violate the legitimate separation of church and state. An antinomian approach to ecclesiastical governance only reinforces the perception that Church authorities lack the resolve to protect children. Legalism, in contrast, communicates to priests and all the baptized that the internal order of the Church lacks justice as a result of the disrespect of fundamental rights. A balanced approach to the rule of canon law would help reinforce the understanding of the Church as an organic reality with its own system of law distinct from the state.

### CONCLUSION

When canon law functions properly, it balances law and spirit in the life of the Church. The present crisis in the life of the Church may be attributed at least in part to a failure on the part of the bishops to

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<sup>87</sup> See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 23-24 (2002) (discussing the commonly accepted distinction between civil and ecclesiastical jurisdictions at the time of the framing of the First Amendment); cf. STEVEN D. SMITH, GETTING OVER EQUALITY, A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 45-52 (2001) (suggesting that the most severe harm to religious freedom occurs when the government destroys a necessary basis for religion).

<sup>88</sup> See O'Brien, *supra* note 57, at 140.

<sup>89</sup> See Helmholz, *supra* note 1, at 196 (noting that in fifteenth-century England, the case of a priest accused of a sexual crime would be tried in an ecclesiastical court, and in practice, laypersons, not only bishops, were often able to initiate the proceedings).

observe the rule of canon law. My point is that the bishops' response to the problem of clergy sexual abuse of minors has combined anti-nomian and legalistic trends that defeat the balance of law and spirit in the life of the Church. If bishops had fulfilled their duty to abide by the rule of law, especially in the cases involving clergy who are serial child abusers, there probably would have been no crisis. To be sure, honoring the rule of law would have communicated to victims, clergy and all concerned that Church authorities were taking appropriate steps to protect children. In hindsight, it is easy to see that the bishops' focus on the psychological approach to the exclusion of the canonical has resulted in great injury. The clarity of hindsight, however, ought not result in blame and negativity but open the way for a more hopeful future. An important aspect of responding to present crisis must entail re-commitment to the rule of law. Despite the negative image of the priesthood generated by the crisis, many people continue to look to the Church for its proclamation that healing and redemption are possible. No law or policy can eradicate sin from the fallen nature of the human situation, including that of the human beings who comprise the priesthood. The proper balance of law and spirit, however, can dispose injured individuals and communities to healing and forgiveness.