“Command and Coercion”: Clerical Immunity, Scandal, and the Sex Abuse Crisis in the Roman Catholic Church

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Abstract: The sex abuse crisis in the Catholic Church has occasioned much scandal, but also much confusion, as trusted institutions and individuals seem to be willfully thwarting criminal investigation and prosecution of terrible crimes. This Article looks at the historical and theological underpinnings of the belief in clerical immunity from secular law, its role in the response to allegations of sexual abuse by clergy, and at the modern effort to engraft clerical immunity into the First Amendment’s Free Exercise Clause under the “Church Autonomy” doctrine.

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Introduction

On December 29, 1170, in the late afternoon (and thus after the main meal of the day but shortly before vespers), four knights entered Canterbury Cathedral.\textsuperscript{1} Impelled, as far as history knows, by the angry words of King Henry II, “Will no one rid me of this turbulent priest,” they had come to confront Archbishop Thomas Becket, and win King Henry’s favor by forcing the long-simmering dispute between Becket and his King to some final resolution.\textsuperscript{2} When the Archbishop refused their conflicting demands, and reacted with scorn to their insults, the knights withdrew, only to arm themselves and follow Becket into the Cathedral for vespers. As the traditional account has it:

The bell for vespers began to sound, and the archbishop, with his cross borne in front of him, made his way in as usual into the cathedral. Hardly had he reached the ascent to the choir than the noise of armed men and the shout of the knights announced that the pursuers were at hand. “Where is the archbishop, where is the traitor?” resounded through the hollow aisles, mingling strangely with the recitation of the psalms in the choir. Becket, hearing this, turned back a few steps, and calmly awaited their approach in the corner of the northern transept before the little altar of S Benedict. “Here,” he cried, “is the archbishop—no traitor, but a priest of God.” Awed by his demeanor, and perhaps by the sanctity of the place, no one dared strike. A parley began. They sought to lash their failing courage into


\textsuperscript{2} While the words attributed to Henry strongly suggest that the knights’ intention was from the start to murder Becket, in fact they made a series of conflicting demands on him, rather than immediately setting upon him. According to W.L. Warren’s synthesis of the contemporary accounts, the knights accused Becket of breaking the peace, of treason, in that he intended to deny Henry’s designated heir the throne, and “insisting one moment that the archbishop should return with them to answer the king, the next that he should depart forthwith into exile,” from which he had only returned a scant 28 days earlier. Warren, supra note 1, at 510 & n. 1 (citing Edward Grim, Vita S. Thomae, Canturariensis Archeepiscopi et Martyris, in J.C. Robertson, ed., M MATERIALS FOR THE LIFE OF THOMAS BECKET at 430, ff. (1876) ) ; id. at 509 & n. 4. An excerpt from Grim’s manuscript describing the murder, translated by Dawn Marie Hayes, is archived online at http://www.fordham.edu/halsall/source/grim-becket.html (visited on November 11, 2010), as part of the Internet Medieval Sourcebook, ed. Paul Halsall.
action by words. A hasty and insulting epithet gave Fitz Urse the opportunity he wanted. A blow aimed at the archbishop’s head only knocked his skull-cap to the ground, but it was enough to lose the bandogs of hell. A stroke from Tracy cut off the tonsured back of [Becket’s] skull, another from Brito brought him to his knees. In a minute all was over. The archbishop lay prone in his blood before the altar step, his brains scattered savagely on the floor, while his murderers slunk back through the dark and silent aisles with the chill of remorse already at their hearts, like Othello from the couch of Desdemona.3

In the more prosaic retelling of modern historians, the story is dramatic enough: Only one witness remained with Becket as the knights tried to forcibly remove him from the Cathedral. As that survivor recounted, Becket resisted. It “was in the ensuing melee that he [Becket] received a blow on the head. As the blood flowed the four knights fell upon him with their swords.”4 When the knights had finished their “butcher’s job” as W.L. Warren aptly calls it, Becket lay dead on the floor of the Cathedral.

The result of this brutal murder in the most hallowed space in the English Church was almost as dramatic as the deed itself. Becket’s courage in the face of death, as well as the personal asceticism he had adopted upon his appointment as Archbishop fused into an idealized vision of Becket as martyr and saint; as Warren phrases it:

The dramatic transition from magnificent courtier to clerical martyr, heightened and fixed in the mind by the discovery on the corpse of a lice-ridden hairshirt, established him as a copybook examplar of the drama of conversion. His courage and steadfastness unto death marked him out as a martyr in an age uncommonly short of martyrs, and swept him on a wave of popular acclaim to an

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3 Henry Offley Wakeman, AN INTRODUCTION TO THE HISTORY OF THE CHURCH IN ENGLAND (7th ed. 1904) at 115-116. A “bandog” is a “dog tied or chained up, either to guard a house or on account of its ferocity; hence generally a mastiff [or] bloodhound.” Sir James Murray, et al., OXFORD ENGLISH DICTIONARY (Compact Ed. 1971) 649. Wakeman’s final touch, a fine piece of melodrama, is unsourced.

4 Warren, supra note 1 at 510.
unusually swift canonization in March 1173.5

So strong was the feeling in favor of Thomas Becket that the King, though denying that he had sought Becket’s death, performed a dramatic penance at his tomb:

The king dismounted outside Canterbury and entered the city barefoot, in plain woolen garments. Prostrate and weeping before the tomb of the murdered archbishop, he received physical punishment from the monks and other clerics, then spent the night there in prayer and fasting. In the morning he heard mass and then went on his way to London.6

The resulting cultus of St. Thomas has lived in literature, stage and film.7 Pilgrimages to Canterbury in honor of St. Thomas form the frame of Chaucer’s Canterbury Tales. But glossed over in most hagiography and popular depictions of the Becket story is the nature of the conflict between Becket and Henry—a conflict which prefigures the crisis in moral authority roiling the Roman Catholic Church at the present day. As Barrett summarizes in very capsule form, there were, essentially, three areas of dispute between Henry and Becket, “quarrels over the property of the church of Canterbury, the details of royal taxation and the extent that clerks could be treated differently from lay people in the law courts.”8 Bartlett’s correct but rather overly discreet phrasing may mislead the reader; what he, Warren and Wakeman accept as the most serious dispute between Becket and Henry II was Becket’s attempted creation of a parallel court system, in which individuals who had often only minimal connection to the

5 Warren, supra note 1, at 518.
6 Bartlett, supra note 1, at 456; Warren, supra note 1 at 135. The King’s reaction to the murder of his erstwhile friend was to “burst into loud lamentations and exchanged his royal robes for sackcloth and ashes, behaving more like the friend than the sovereign of the dead man.” Warren at 520.
7 On the early years of cultus of St. Thomas, see Poole, supra note 1, at 215. Modern invocations of St. Thomas include T.S. Eliot, MURDER IN THE CATHEDRAL (1935); Jean Anouilh, BECKET; OR, THE HONOR OF GOD (1959); BECKET, Paramount, (dir. Hal Wallis 1964) (based on Anouilh’s play).
8 Barrett, supra note 1, at 403. See also Wakeman, supra note 3, at 110-112 (summarizing issues between Becket and the King).
Church could nonetheless claim exemption from the secular law, and be subject to the milder (and originally minimal) punishments applicable under canon law. Such individuals could be accused of crimes ranging from theft to rape and, frequently, even murder.

Becket’s cause, seeking to regularize a practice that had evolved during the weaker (and rather chaotic) reign of Henry’s predecessor King Stephen, was essentially successful, and canon law for many years ran along a parallel track to the secular law. Becket’s view of ecclesiastical sovereignty prevailed in another way, too. From his time into the Twentieth Century, the relationship between Church and State changed from a united Christendom, to a divided and Reformed Christian Europe, to what many now call post-Christian Europe. Throughout that time, the Catholic Church defended its own separate canon law courts, and created an ideological-cum-theological justification for such courts being the principal, and, ideally the only, forum to take cognizance of criminal complaints against the clergy. In the sexual abuse scandals from the second half of the Twentieth Century into the present, defenders of the Church routinely take as a

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given the notion that such matters should be diverted to private adjudication in private, absent the secular authorities’ awareness of the underlying crime.

Throughout the succeeding centuries, even where such parallel courts were forced to give way to secular jurisdiction, the Roman Catholic Church continued to hold out ecclesiastical sovereignty as a model to be preserved, applied and, where limited, restored to the maximum extent possible. Only in the Twentieth Century did the Church grudgingly begin to come to terms with democratic theory; only in the years leading up to, and especially in the wake of, Vatican II did the Church begin to find some value in democratic society.\(^\text{11}\) That half-accomplished rapprochement did not extend to acceptance of secular government’s right to protect its citizenry against predation by clergy. Seeking to understand why this is the case, and the costs to the Church of this theological understanding, is critical in determining what steps secular government can take and ought to take, with respect to the crisis.

One salient factor in this continued existence of a parallel jurisdiction, not recognized by the secular government as having cognizance of criminal misconduct, is the tradition of ecclesiastical sovereignty championed by Becket, and justified in the Nineteenth Century by Cardinal John Henry Newman. Becket’s struggle for, and Newman’s defense of ecclesiastical sovereignty echo not just the tactics but the very language employed by the Church’s defenders in the sexual abuse scandal. The newly beatified convert from Anglicanism and the murdered Archbishop have never been more relevant.

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I. The Honor of God: Thomas Becket, Henry II, and the Case of the Criminous Clergy

When Henry II succeeded to the throne in 1154, after fighting a civil war against King Stephen to a draw, he inherited a governmental apparatus, including a justice system, which had become profoundly enfeebled, and the edicts of which were treated as empty threats. The “restoration of law and order seemed indeed the most notable feature of the accession to power of Henry FitzEmpress.” The conflict between Henry and Becket must be viewed in this context, as “part of the wider problem of how to master prevalent crime.”

Moreover, members of the clergy were a significant portion of the population, “perhaps as much as one in six.” The scope of the group eligible to claim clerical status and thus immunity from punishments in the King’s courts was increased “by the easy way in which the bishops were in the habit of conferring the tonsure”:

To have received the tonsure was sufficient to give a man his benefit of clergy; and every one who could read or write, whether his profession was that of a lawyer, a secretary, a government official, or a clerk, received the tonsure. There thus grew up in the lower ranks of the clergy a numerous body of needy, turbulent and lawless men who discharged no clerical functions, were subject to no clerical discipline, but were protected from the just punishment of their deeds by clerical privilege.

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12 Warren, supra note 1, at 258; see also George Burton Adams & Robert L. Schuyler, ADAMS’ CONSTITUTIONAL HISTORY OF ENGLAND (Revd. Ed. 1934) at 92-93. A somewhat more nuanced view of Stephen’s reign is taken by Joseph Biancalana, For Want of Justice: Legal Reforms of Henry II, 84 Colum L. Rev. 433, 434 (1988) (“For Want of Justice”), who credits Stephen’s predecessor Henry I with “first pursu[ing] the new style of administrative kingship,” while “Stephen’s more traditional and passive style of kingship resulted in a loss of central, royal power.”

13 Warren, supra note 1, at 259; see id. 262-300.

14 Warren, supra note 1, at 461, 460-461; Wakeman, supra note 3, at 110.

15 Warren, supra note 1, at 460.

16 Wakeman, supra note 3 at 110-111; Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 186. See also Poole, supra note 1, at 224-226; Warren, supra note 1, at 460-461; Bartlett, supra note 1, at 377-378.
Add to this the fact that, by the time of Henry’s reign, priestly marriage, long upheld in England by custom, had been declared first by ecclesiastical authority, then by common law, to be void, reducing all such relationships to concubinage and the children to bastardy. With no real training or supervision, their means straitened, and their family’s futures in peril, “it is not surprising that in an age of violence clerks too should often be guilty of violent crime.”

The extent of the problem is unclear, but when Henry returned to England in 1163, he “was told that since his coronation [in 1154] more than a hundred murders had been committed by clerks, as well as innumerable cases of theft and robbery with violence which had escaped the rigors of secular justice.” Several of the most notorious cases came to Henry’s attention, one involving a canon, who was accused of murdering a knight, and another involving a cleric who was accused of seducing a girl and killing her father. In each of these cases, the king had little trust in the ecclesiastical courts.

This lack of trust was not without reason; for one thing, trial in the ecclesiastical courts were most often conducted by “wager of law,” also known as compurgation, which sought to determine the verdict by “the swearing of oaths with the assistance of oath-helpers.” In compurgation, the principal could establish his innocence by his own

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17 Bartlett, supra note 1, at 384-386. Both Bartlett and Warren quote the memorable summary of Gerald of Wales of the situation: “the houses and huts of our parish priests are lorded over by their mistresses, and full of creaking cradles, new-born babies and squalling children.” Bartlett at 385 (quoting Gerald, Spec Eccl. 4.22 at 313); Warren at 460.
18 Warren, supra note 1, at 460; see also Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 186.
20 Warren, supra note 1, at 465; Poole, supra note 1, at 202. For more details of the individual cases, see Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 185-187.
21 Warren, supra note 1, at 464; see also Bartlett, supra note 1, at 408. R.H. Helmholtz points out that the picture is in fact a little more complicated. As he writes, compurgation “was never the only way of proceeding legitimately in criminal matters, but it was the most commonly employed in the English ecclesiastical courts.” THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 THROUGH THE
oath, or with a designated number of oath-helpers, who were not swearing to their own knowledge of the facts in dispute, but merely that they believed their principal was telling the truth.22 According to R.H. Helmholtz, “[c]areful samples have been made, and they show that between two-thirds and three-quarters of those who attempted canonical purgation succeeded.”23 Helmholtz notes that “compurgation enjoyed no better a reputation among the jurists of the ius commune than it has among modern historians.”24 “Criticism,” he explains, “was all but universal. Compurgation was an inducement to perjury; it was inconsistent with the usual rule that the burden of proof rested upon the

1640s (2004) (1 OXFORD HISTORY OF THE LAWS OF ENGLAND) (“THE CANON LAW”) at 604. Helmholtz points out three other means of prosecuting criminal cases before the ecclesiastical courts, each of which posed its own hazards: the accusatio, the denuciatio, and the inquisitio. The accusatio, an early form of the private prosecution, put the accuser at the risk of whatever penalty he (women could only bring such cases for injuries to themselves or to near relatives) sought against the defendant in the event the prosecution failed. Id. at 605-606. The denunciatio, a brotherly admonition prior to initiating formal charges followed by a formal denunciation in the event that the admonition did not lead to reformation on the part of the offender, was generally resolved through compurgation. Id. at 606. The inquisitio, which was later formalized into the Inquisition, seized upon those widely depicted as heretics per se, and, involved judicial questioning, commonly under torture, by judges “who were instructed that it was among their functions to ‘strike terror’ into the hearts of criminals in the interest of the public suppression of crime.” Id. at 607. The Inquisition, with its “deservedly bad reputation in modern times” did not arrive in England, and thus did not play a role in the English ecclesiastical court system. Id. at 607-608. In England, the inquisitio denoted judicial interrogation which led to resolution through, unsurprisingly, compurgation. Id.


prosecuting party; and it was contrary to the church’s position that the *vanae voces populi* [vain or empty voice of the people] was unworthy of being taken seriously."  

The other commonly used methods of trial—ordeal or battle, were not available in ecclesiastical courts. Thus, where a cleric and a layman were accused of committing a crime in concert, the differing results could be most stark:

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25 R.H. Helmhotz, *The Canon Law* at 617. Helmhotz suggests that compurgation was effectively limited to those believed to be innocent, and “was meant to be an *ostensio innocentiae* [show or display of innocence] more than it was a means of ascertaining facts” and thus not the pantomime some historians have depicted it as. *Id.* at 616.

26 Helmhotz, *The Canon Law*, at 604; see also Bartlett, supra note 1, at 408; 180-184; Warren, supra note 1, at 464.

In view of the crudity of fact finding and procedure generally in the system of justice at the time of Henry II’s accession, the profoundly reformative nature of his reign should be noted. Thus, Henry II’s assizes introduced new procedures of *morte d’ancestor* and *novel disseisin*, which began the “routine judicial employment” of juries to determine the facts of a case, and the evolution away from the theocratic folk-methods of determining facts through ordeal or battle. Bartlett, supra note 1, at 192; *Id.*, 190-193; Warren, supra note 1, at 320-361. Henry’s civil legal reforms are comprehensively examined in Biancalana, *For Want of Justice*, supra; see also Paul Brand, *Henry II and the Common Law*, in *Henry II: New Interpretations* (Christopher Harper-Bill & Nicholas Vincent, eds.) (2007) at 215-240.

In criminal law, reform was considerably slower, but at the same time Henry’s conflict with Becket was brewing. Henry was also began to wrestle with the difficulties of proof; as Warren recounts, “In the late 1160s, Henry standardized it [the machinery for making public accusations of crime] and required those who were to be accused of more serious crimes to be brought before the royal justices itinerant. Juries “of presentment” were to be elected . . . who were put under oath to declare what crimes had been committed in their localities.” Warren at 354; see Poole supra note 1, at 397-401. According to Glanvill, the royal justices did not merely order ordeal lightly; rather, “[t]he truth of the fact then shall be inquired into, by means of many and various inquisitions and interrogatories, made in the presence of the Justices, and that, by taking into consideration the probable circumstances of the facts, and weighing each conjecture that tends in favor of the accused, or makes against him; because he must purge himself by the Ordeal, or entirely absolve himself from the Crime imputed to him.” “Ranulph de Glanvill,” *A Treatise on the Laws and Customs of the Realm of England* (John Beames, ed. & trans. 1812) (Reprinted 1990) Bk. XIV, ch. 1 at 346; Poole, op cit. Beames’ translation was reissued in 1900 with additional notes and introduction by Joseph Beale; in that reissue, the cited passage appears at page 279.

G.D.G. Hall translates the passage in a slightly different way, reading “[t]he truth of the matter shall be investigated by many and varied inquests and interrogations, and by considering the probable facts and possible conjectures, both for and against the accused, who must as a result in consequence be either absolved entirely or made to purge himself by the ordeal.” *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (G.D.G. Hall, ed. & trans. 1964) XIV, ch. 1, at 171. (“TREATISE COMMONLY CALLED GLANVILL”). W.L. Warren relies on Hall’s translation. Warren, supra note 1, at 356 (quoting Glanvill, XIV.1.171).

The attribution of the Treatise to Henry II’s Chief Justiciar Ranulph de Glanvill (or Glanville) is traditional, and very open to question. See Beale, “Introduction” in *Treatise*, (Beames tr.) *op cit.* at iii-xiii (assessing the evidence of Glanvill’s authorship, and concluding that “[t]here is, then, nothing against the early and persistent tradition that Glanvill wrote the treatise, and much in its favor; though most of the actual composition may have been the work of Hubert Walter,” his secretary and counselor. G.D.G. Hall
In 1202 two Lincolnshire men, William and Robert, were accused of burglary before the royal justices. William was tried and convicted by the ordeal of water, but Robert’s fate was different: “Robert is a clerk and a deacon and hence is handed over to the Official to clear himself in a Court Christian.” Since the method of clearing oneself in the church courts was by taking an oath, Robert’s clerical status had given him a valuable privilege.\(^{27}\)

Moreover, the procedural law of the ecclesiastical courts posed significant problems as to even obtaining a verdict, even in cases where institutionally, obtaining a result would be deemed important. For example, proceedings against Archdeacon Osbert for poisoning his archbishop, William Fitzherbert, were commenced in Stephen’s reign, and permitted by Henry at the beginning of his reign to be heard by the ecclesiastical courts.\(^{28}\) The result was not edifying:

After more than a year of delays and forensic debate, the accusation was neither proved nor disproved, and the attempt to test Osbert’s innocence finally by requiring him to support his oath with the oaths of three archdeacons and four deacons was frustrated by the appeal of the accused to Rome. Eventually he was deprived of his archdeaconry and reduced to the status of layman, but twenty years later he was still claiming that this was improper and that Pope Adrian IV had acquitted him of the charges.

. . . As Archbishop Theobald [Becket’s predecessor] himself admitted, the case against Archdeacon Osbert faltered “owing to the subtleties of the laws and the canons.”\(^{29}\)

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\(^{27}\) Bartlett, supra note 1, at 408, quoting Earliest Linconshire Assize Rolls (1206) at p. 104.


\(^{29}\) Warren, supra note 1, at 464. According to William of Newburgh (who believed in his innocence), Osbert, although stripped of his archdeaconry, “remained a wealthy Yorkshire landowner, a lay lord retaining the style archdeacon,” and was still alive in 1184, and “probably survived into the 1190s.” John Gillingham, Two Medieval Historians Compared, Roger of Howden and William of Newburgh. 12 Haskins Society Journ. 15, 33 (2003); see id. 27-34. A similar example is provided by Hill, in which Foliot, then an
A third factor contributing to the king’s dissatisfaction with the ecclesiastical courts was the differing nature of the penalties exacted for the same conduct by the ecclesiastical courts and the royal or seigniorial courts. The secular courts imposed capital punishment, mutilation and other forms of physical chastisement on a routine basis.\(^{30}\) By contrast, ecclesiastical courts did not; while Becket began to import some physical punishment into the ecclesiastical court, in an effort to blunt Henry’s criticism of the inefficacy of ecclesiastical courts in deterring wrongdoing, these innovations were themselves seen as problematic, as usurping the prerogatives of secular tribunals and as skirting the edge of the prohibition against the clergy shedding blood.\(^{31}\) While it is

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Abbot, intervened with a bishop who charged one of Foliot’s own clerks who had taken a man’s wife into custody as a surety for a debt, and then continued to hold her after the debtor’s death, allegedly “taking payment in the form of illicit relations with the woman.” Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 102. Foliot protested that the requirement that the clerk clear himself by compurgation supported by seven witnesses was excessive, and that, in any event, the bishop, who had initiated the charges, was thereby disqualified from hearing the case.

The use of appeals to Rome to prevent judgment being rendered at all bedeviled Archbishop Theobald, who found it vexing because it both removed even the initial decision as to a matter from local authorities and could be timed to take place at the end of the presentation of the evidence by a defendant who saw that the case was going against him, and who could thus essentially restart the process from the very beginning before a fresh tribunal. Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 135-138.\(^{30}\) Bartlett, supra note 1, at 184-187. See also Poole, supra note 1, at 403-405. Poole notes that the punishment was generally intended “to fit the crime; the aim was a just retribution for the wrong done. So hanging was the natural penalty for homicide, burning for arson, castration for rape, and the cutting out of the tongue for uttering slander or false accusation.” Id. at 403-404. In addition to these punishments, “crimes that were viewed as especially heinous might have special punishments. The mad cleric who killed the infant son of earl David of Huntingdon (later David I of Scotland) was tied to the tails of four horses and pulled apart.” Bartlett, at 184.

\(^{30}\) Bartlett, supra note 1, at 184-187. See also Poole, supra note 1, at 403-405. Poole notes that the remedy [degradation from holy orders] was available to the bishops; under the law of the church, the blood sanctions of the common law were not 618 (noting that whipping and other corporal punishments were of dubious validity, as potentially transgressing canon law forbidding the “issuance of sentences of blood”, which was strongly reinforced by the Fourth Lateran Council in 1215, but which was not “read a la lettre by the canonists or the English church”); see also Bartlett, supra note 1, at 408; Warren, supra note 1, at 467 (citing Herbert of Bosham as stating the king’s argument turned on the fact that “secular authority alone had the authority to impose condign punishments, the ecclesiastical authority being confined to anathema, suspension from office, and banishment from the altar”). See also Poole, supra note 1, at 201, noting that while the ecclesiastical courts “could not pronounce a sentence of blood; they could imprison, but seldom did so due to the expense of maintaining prisons; more commonly they inflicted a sentence of penance or at most degradation” from clerical status; Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 33, 83-85.

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impossible to sympathize with the notion of extending the applicability of these frankly brutal punishments, the elevation of the clergy as a privileged class above the laity presented an invidious hierarchy apparent to the laity, and to the king himself.\textsuperscript{32}

One final, and major, reason Henry opposed allowing these cases to be heard by the ecclesiastical courts was simply that the practice threatened to render permanent what Henry saw, with some justification, as an aberration of the chaotic reign of Stephen.\textsuperscript{33} Stephen’s predecessors’ practice, while ambiguous, nonetheless allowed Henry to “look back to a time when the clergy in England had, despite their claims to immunity, been amenable to secular jurisdiction for at least serious crimes.”\textsuperscript{34} Henry, whose goal was to “restore ancient times” by “restoring the county to what it had been in the last days of Henry I,” applied this approach to all aspects of law and property, insofar as he could.\textsuperscript{35} From his perspective, the king was erasing the consequences of the usurpation of Stephen, those unintended by him as well as those intended.\textsuperscript{36}

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\footnote{For Becket’s efforts to impose more severe punishments, and their resultant difficulties, see Warren at 465 ("Becket overreached himself in having [a clerical murderer] banished and the clerk who stole the chalice branded, for not only were these sentences unknown to canon law, they were a flagrant usurpation of the authority committed only to the royal justices") (citing sources); Hill, Gilbert Foliot and the Two Swords, at 186-187; see also Bartlett at 408.}

\setcounter{footnote}{33}
\footnote{Wakeman, supra note 3, at 111; see also Hill, Gilbert Foliot and the Two Swords, at 187.}

\setcounter{footnote}{34}
\footnote{Poole, supra note 1, at 206-207.}

\setcounter{footnote}{35}
\footnote{Warren, supra note 1, at 463; see generally id., at 461-464 (detailing varying levels of clerical misconduct).}

\setcounter{footnote}{36}
\footnote{Schuyler, Adams’ Constitutional History of England, at 92-94. It is, however, less than pellucid which side had the better of the argument as to whether custom or canon law. As described by Poole and Warren, op cit, Henry could argue from specific cases that custom supported his position. However, King Stephen’s fluctuating practice and Henry’s own concession that the ecclesiastical courts could try Archdeacon Osbert were in tension with these precedents, and render the argument from custom less than decisive. For example, Stephen had argued that when a crime touched upon “the king’s peace,” as had the murder of Bishop William Fitzherbert, allegedly by Osbert, jurisdiction lay in the royal courts. Fraher, The Becket Dispute, 4 Journ. Medieval Hist. at 357-358. Similarly, the secular punishment meted out upon the cleric who murdered the son of King David I of Scotland (Bartlett, supra note 1 at 184) would have been known to Henry II, as David was an early and significant supporter of both his mother, the Empress Matilda’s, and subsequently Henry’s own claim to the throne of England. See Bartlett, supra note 1 at 79;
Moreover, the conflicting jurisdiction of the various fora which were empowered
to hear legal claims was not limited to Church and State:

Competing and overlapping jurisdictions were a source of serious trouble in the twelfth century. The strife between Henry II and the Church over the competence of the ecclesiastical courts is merely the most notorious example of a struggle that went on daily between almost all courts. Jurisdictional disputes, indeed, frequently impeded the operation of the courts, and astute litigants could indefinitely protract the prosecution of suits by pleading now here, now there, or by contesting the competence of

Warren, supra note 1, at 23, et seq. (For a capsule sketch of David’s life and reign see Poole, supra note 1, at 269-275). Moreover, in some cases the practice of having the accused cleric tried in the first instance before the ecclesiastical court, degraded to the lay state, and then punished by the secular court was resorted to, consistent with the mid-point of the Bolognese canonists’ writings. Fraher, The Becket Dispute, 4 Journ. Medieval Hist. at 358-359.

However, Bruce O’Brien argues that legal treatises from the days of the reign of Henry I are in fact more supportive of Becket’s claims to clerical immunity, and suggest that Henry was diverging from the customs of that time. Bruce O’Brien, The Becket Conflict and the Myth of Lex Non Scripta, in Jonathan A. Bush & Alain A. Wijffels, eds. LEARNING THE LAW: TEACHING AND TRANSMISSION OF LAW IN ENGLAND, 1150-1900 (1997), at 1-16. For O’Brien, Glanvill’s dismissal and distortion of these earlier treatises “shows the use of texts to subvert texts.” Id. at 16. A more nuanced position is that the overall arc depicted by Warren—that Henry was vigorously seeking to restore the customs of the time of his grandfather’s death—which is admitted by Anne J. Duggan, who nonetheless emphasizes just how those customs were in tension with the rise of canon law. See Anne J. Duggan, Henry II, The English Church and the Papacy, 1154-1176, in HENRY II: NEW INTERPRETATIONS (Christopher Harper-Bill & Nicholas Vincent, eds.) (2007) 154, 161-174. See also Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 88-91 (canvassing sources).

Astute legal historians have disagreed as to canon law’s content on this issue, from F.W. Maitland to Charles Dugan on opposite extremes (Maitland contending Becket’s arguments “were unfounded either in English custom or canon law”; Duggan that “no ex professo canonical scholar would now seriously challenge the judgment Becket had a far stronger case in canon law than did his opponents”). Fraher, The Becket Dispute, 4 Journ. Medieval Hist. at 348 (paraphrasing Maitland; quoting Duggan); see F.W. Maitland, Henry II and the Criminous Clerks, in ROMAN CATHOLIC LAW IN THE CHURCH OF ENGLAND (1898); Charles Dugan, The Becket Dispute and the Criminous Clerks, 35 Bull. of the Inst. of Hist. Research 1 (1962). Poole supports Maitland’s interpretation, citing two of the canonists of the time, Rufinus and Stephen of Tornai. Poole, supra note 1, at 206-207.

Fraher’s resort to primary texts both in and outside of Britain has suggested a middle ground between Maitland and Duggan, with a period in which both Anglo-Norman and University of Bologna canonists (also known as “decretists” based on their use as a foundational text Gratian’s DECRETUM), the initial effort to consolidate an set out the Church’s law in a systematic manner lacked a coherent (or, more accurately, in the Anglo-Norman case, a discernible position) position (approximately 1100 through 1140), followed by one in which the dominant position was that argued for by Henry (approximately 1140 through Becket’s murder in 1170 among the Bolognese canonists, and through approximately 1190 among the Anglo-Norman), and the post-martyrdom embrace of Becket’s previously extreme position, which was enacted into canon law by the previously more moderate Pope Alexander III in 1178. Fraher, The Becket Dispute, at 349-356 (summarizing evolution of the Bolognese canonists); 356-361 (evolution of the Anglo-Norman canonists).
the tribunal before which their opponents had brought them.  

In short, “an important part of Henry II’s renewal of royal government was a series of legal reforms which, by virtue of their routine nature and wide applicability, were the origins of the common law.” And jurisdiction was at the heart of the problem:

The working ideas of kingship in the Anglo-Norman empire governed the relationship of the king to lords differently in different spheres. It was acceptable for Henry to assert royal control of castles, to reorganize the coinage and the royal revenue, and to reform the administration of the law of crimes. These were matters over which Anglo-Norman kings of England and dukes of Normandy, drawing on older Frankish ideas, had long asserted their authority. It was a different matter for Henry to invent new legal machinery by means of which royal justices heard civil pleas. Since the collapse of public courts in the tenth century on the continent, jurisdiction over civil disputes had become the power and responsibility of lords rather than of central government.

In this sphere an accepted political or constitutional principle articulated a limited opportunity for the king to assert jurisdiction over civil pleas: the king did not have jurisdiction unless a lord had failed to hear a plaintiff’s claim.

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The jurisdictional principle guided Henry's officials in shaping their legal innovations within the political and social circumstances of his reign. The major legal reforms of the writ of right, the petty assizes of novel disseisin and mort d’ancestor, and the praecipe writ of dower were fashioned to fit under the principle of jurisdiction. These new assertions of royal power thus rested on traditional grounds. Not all of Henry II’s legal reforms can be explained as defining and implementing the principle of jurisdiction. But viewing some of the more important reforms in relation to the principle which justified royal jurisdiction helps to explain how Henry II accommodated the interest of lords, how his officials acted consistently

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37 Warren, supra, note 1, at 319; see also Poole, supra note 1, at 386-414, for an overview of Henry II’s legal reforms.

38 Biancalana, For Want of Justice, 84 Colum L. Rev. at 434.
from principle in devising new remedies, and why some of
the new writs of Henry’s reign took the particular forms
they did.39

To give one example of the effect of the overlapping jurisdictions of the various
courts which is somewhat counterintuitive to those who only know the broad strokes of
the conflict between Becket and Henry, Archbishop Becket was able in 1164 to invoke an
oath procedure for removal of cases from seigniorial court created by royal ordinance to
retain jurisdiction in his own court of a claim against him by one of Henry’s barons.40

Indeed, the tangle of Church and State at the accession of Henry to the throne was
untenable, an adventitious result of the power vacuum regarding institutions during
Stephen’s reign coinciding with developments within the wider Western Church:

At the moment when William I made his conquest of
England and brought the Saxon church under a more strict
state control than ever before, a great reformation in the
Latin church of the West was just reaching its culmination.
The reform movement, which had started in the monastery
of Cluny in the tenth century, had for its ultimate object a
constitutional advance by which the government of the
Roman church should be made an absolute and highly
centralized monarchy under the pope. The success of the
movement was complete. At the end of the eleventh
century a powerful imperial government, with all of the
machinery of a state, based on the union of all state
churches and subjecting them all to itself, took its place
beside the state governments of Europe.41

39 Biancalana, For Want of Justice, 88 Colum. L. Rev. at 436-438. Briefly stated, the writ of mort
d’ancestor involved cases in which the plaintiff sought to establish that he was the rightful heir to the
property at issue, and novel disseisin addressed the situation in which a plaintiff asserted that he had been
recently expelled from a property of which he had been in peaceful possession. Id.; see also Paul Brand,
Henry II and the Creation of the Common Law, in HENRY II: NEW INTERPRETATIONS (Christopher Harper-
40 Biancalana, For Want of Justice, 88 Colum. L. Rev. at 460-462.
41 Schuyler, ADAMS’ CONSTITUTIONAL HISTORY OF ENGLAND at 93-94; see also Bartlett, supra note 1, at
410-412. As to Wakeman’s characterization of the monastic movements, see Bartlett, supra note 1, at 417-
441. However, Poole agrees that monasticism was dynamic and expansive in Stephen’s reign, but contends
that the age of Henry II marked a decline in monasticism, and would wholly reject Adams and Schuyler’s
suggestion that the movement represented a formidable force in that reign. Poole, supra note 1, at 188-190;
226-230.
As Adams notes, “conflict was in the nature of the situation inevitable.”

Moreover, the jurisdictional overlap was further tangled, in that the sources of ecclesiastical power overlapped as much as did the subject matter of jurisdiction:

The Church organization of England was in many ways a part of the state government. Extensive fields of law, marriage, divorce, inheritance, belonged wholly to its courts. Service from its fiefs was essential to army, legislature and courts. The bishop as a baron, better educated and of broader outlook than the lay baron, was indispensable to the efficient working of feudal government. On the other hand, if there was to be a universal monarchical church, the case for it was just as clear. The church of every state was an essential portion of just such a monarchy, without which it could not be, and must be obedient to it and serve it primarily. The double position of the bishop, as an essential working officer of feudal government, as an essential working officer of the ecclesiastical monarchy, . . . [raised] [t]he question, which should appoint the bishop, church or state, from which should be derived his authority and to which should he be primarily responsible, was fought out in the early years of Henry I, between the king and Anselm, the archbishop of Canterbury, and the compromise by which it was terminated was the same as that later made between the emperor and the pope. The church should select the bishop. The king should then receive his fealty and confer upon him the fiefs belonging to his see, and then he should be consecrated bishop. The king thus obtained a virtual veto power…

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42 Schuyler, ADAMS’ CONSTITUTIONAL HISTORY OF ENGLAND at 94; see Warren, supra note 1, at 404-421.  
43 Schuyler, ADAMS’ CONSTITUTIONAL HISTORY OF ENGLAND at 94. On the allegiance of bishops as vassals to the king, and involvement of ecclesiastics in secular justice and government, see also Bartlett, supra note 1, at 407-409. As to elections, see Bartlett, supra note 1, at 406-407 (agreeing as to the form of independent elections of bishops but contending that the king’s veto was more effective than suggested by Adams, and was exercised through the reign of Henry II’s son John. Poole, similarly, contends that Henry and John both could be overbearing in such elections; he quotes a memorandum from Henry (mischievously sent to the Pope by his son Henry the Young King) in which Henry writes baldly to the monks of Winchester about to select their abbot: “Henry, king of the English &c. to his faithful monks of the church of Westminster, greeting. I order you to hold a free election, but, nevertheless, I forbid you to elect anyone except Richard my clerk, the archdeacon of Poitiers.” Poole at 220; see id. at 219-222.  
While Bartlett and Poole suggest that the elections by the local clergy were essentially forms, Adams and Warren paint a more complex portrait, acknowledging the imperfection and ad hoc nature of papal and royal control over the church. While Warren notes the royal ability to interfere with elections through the reign of Henry II (a fact which itself brought about the election of Thomas Becket at Henry’s own instance), he also notes that the increasingly active role of the pope describes a trajectory toward papal
In short, the bishop’s two roles—vassal to the king and vassal to the pope, exercising power in the name of both, but receiving property from the king, placed the bishop in an inherently conflicted relationship, should the bishops two feudal lords drift into conflict. While this could have resulted in a roughly equal loyalty to both, the effect of Stephen’s reign was to create some precedent by which ecclesiastical authority could assert primacy. As a result of this shift, the church was no longer, as it had been traditionally, the obedient servant of the state. It had come up along side of the government of the king as an independent and rival power. It received its law and its judicial decisions from an outside sovereign, and it garrisoned the land with the devoted bands of the new religious orders.44

Against this backdrop, Thomas Becket became Archbishop of Canterbury.

That the relationship between Henry and his former friend would sour was predictable, and indeed the souring began after Becket’s appointment as Archbishop was confirmed, and he swiftly resigned as Chancellor, and then quarreled with the King over the issue of a customary payment by landowners, including the Church, to sheriffs.45

control and away from royal. Warren, supra note 1, at 404-420. Bartlett, it is fair to say, concurs with this overall trajectory. Bartlett, supra note 1, at 411-412.

Ironically, Henry expected to achieve his own goal of mutual accommodation within the customs of his grandfather’s times by obtaining Becket’s appointment as Archbishop. Warren, at 449-453

44 Schuyler, ADAMS’ CONSTITUTIONAL HISTORY OF ENGLAND at 95; see also Bartlett, supra note 1, at 411-412.

45 Warren, supra note 1, at 453, 456-457; 458-459; Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 183-184. Becket also demanded homage from Roger of Clare for his Honor (property holding) of Tonbridge, which he sought to compel in his ecclesiastical character, even though it was owed to him in his role as baron. Id. at 457. Becket further refused to comply with his predecessor Theobald’s custom of consulting with the King before excommunicating his vassals, a controversy which arose in turn because Becket, rather than resolve a dispute with one of Henry’s vassals through either the secular or ecclesiastical courts, unilaterally excommunicated him. Id. at 457-458; Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 181-183.

Because in part of the popularity of Anouilh’s play and its film adaptation, the misconception that Becket was, as Warren puts it, “the mastermind and impresario of the achievements of Henry II’s early years” persists, originating in some of Becket’s medieval biographers, especially William FitzStephen. See
Henry summoned a royal council to meet at Westminster on October 1, 1163, at which he raised the question of clerical criminals. According to Herbert of Bosham, he “demanded that clerks seized or convicted of great crimes should be deprived of the protection of the Church and handed over to his officers, adding that they would be more prone to do evil unless after incurring a spiritual punishment they were subjected to physical punishment.”

The king “advanced arguments first from common sense:”

Warren at 79. Warren places this exaggerated estimate of the Chancellor in perspective, noting that indeed Becket was entrusted with duties beyond those normally entrusted to a chancellor, but also that Henry’s own career subsequent to the breach with Becket demonstrated greater diplomatic and legal subtlety, and greater results. Id., at 80, 399-402. While not explicitly adverted to by Warren in this regard, Henry’s own success at winning the throne in his campaign against Stephen argues a fair degree of competence entirely unattributable to Becket. See Poole, supra note 1 at 163-168; see also id. at 318-325 (estimate of Henry’s character and success as a diplomat).

Subsequently, as Becket left the Great Council, he repented his oath, did penance for his sin in agreeing to them. Poole, at 207. This led Henry to use Becket’s failure to appear in a judicial proceeding to, in turn, arraign Becket before the royal council in Northampton for contempt, and sentence him to forfeiture of all his goods and movables, in October 1164. (Warren, 484-485). Henry subsequently charged Becket with embezzlement of funds during his chancellorship, leading Becket to, rather impressively, denounce the barons for daring to sit in judgment upon him, and cowing them with his spiritual authority, sweep magnificently out of the chamber. Id. at 486-488; Poole, 207-208 (noting that Foliot, unimpressed, commented, that Becket “was always a fool, and always will be”). Becket, understandably, fled to Rome, where he denounced the Constitutions and resigned his archbishopric to the Pope, who restored it on the spot. (Warren at 490-491).

Warren opines that neither Becket nor Henry comes out particularly well from the Council of Northampton. Warren singles out Becket’s precipitating the dispute by his contempt of court, and the
As Henry’s demand was formalized in the third clause of the Constitutions of
Clarendon:

All clerks accused of serious crimes, not specifically ecclesiastical, but crimes like robbery and murder which are breaches of the king's peace as well as God’s law, should first be summoned before a royal justice to answer the charge; sent from there without trial to the court of the Church, where they should be tried, deposed, in the presence of the royal officer after condemnation; and finally sent back to the royal court, to be punished as laymen would be. 48

Becket, in response, rejected the King’s demands in their entirety:

First, the archbishop rejected the king’s claim to secular initiative in the initial stages of procedure against criminous clergy. Second, Becket argued that since secular judges held no jurisdiction over clerics, no secular punishment should follow the deposition of a criminous clergyman. A deposed cleric therefore faced secular prosecution only for further felonies committed after his deposition. Finally, Becket maintained that deposition itself constituted the penalty for crimes committed by a cleric, and that any further secular penalty would involve the double punishment forbidden by Scripture. 49

Becket’s reasons for rejecting the King’s position—one which conceded to the Church the prerogative of determining the guilt or innocence of the accused, and only permitted

conflicted position into which he threw the bishops by ordering them not to sit in judgment of him, as their superior, as well as his insistence on his own dignity. Henry he faults for the drastic sentence he sought, and the “mean and tyrannous” way in which he pursued Becket’s friends and servants after the Archbishop’s flight and reinstatement as archbishop. Id. at 488-489, 492. These conclusions seem eminently reasonable, and are similar to those of Poole. Id. at 203-207.


49 Fraher, The Becket Dispute, 4 Journ. Medieval Hist. at 349-350; Warren, supra note 1, at 467 (citing St. Jerome’s commentary on the prophet Nahum as Becket’s authority). Poole states that it “was against this ‘double punishment’ that Becket so violently protested.” Poole, supra note 1, at 206.
the royal courts to determine the punishment--went beyond his concern with “double punishment.” As Herbert of Bosham reported Becket’s reply, it turned in large part on the special status of the clergy who:

by reason of their orders and distinctive office, have Christ alone as king. . . And since they are not under secular kings, but under their own king, under the King of Heaven, they should be ruled by their own law, and if they are transgressors, they should be punished by their own law, which has its own means of coercion.  

Two subsequent letters of Becket himself state his view at greater length:

It is certain that kings receive their power from the Church and the Church not from them, but from Christ. . . . You have no power to give rules to bishops, nor to absolve or to excommunicate anyone, to draw clerks before secular tribunals, to judge concerning breach of faith or oath, and many other things of this sort which are written among your customs which you call ancient. . . .

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God wishes that the administration of ecclesiastical affairs should belong to his priests, not to secular rulers, who, if they are of the faith, he wishes to be subject to the priests of his Church.

…God Almighty has willed that the clergy of the Christian religion should be governed and judged, not according to public laws and by secular authorities, but by bishops and priests.

Christian kings ought to submit their administration to ecclesiastical prelates, not impose it on them. . . Christian princes should be obedient to the dictates of the Church, rather than prefer their own authority; princes should bow their head to bishops rather than judge them…

Becket’s justification for his refusal to abide by the Constitutions of Clarendon, with its theocratic rationale, could not have been worse selected to antagonize Henry.

Where he had previously asserted his obedience in “all things save his order,” a phrase

50 Warren, supra note 1 at 467, quoting Herbert, Vita at 266-267.
51 Warren, supra note 1, at 513-514 (quoting V MATERIALS (EPISTOLAE) at 281; 274-275).
which Henry was, after his initial rage, even prepared to accept, as evidenced by their
adoption in the Constitutions of Clarendon, he subsequently asserted his right to
unilaterally delineate the appropriate boundaries of Church and State authority, a claim of
clerical supremacy as extreme as many made by Gregory VII during the Investiture
Controversy.  

Poole, supra note 1, at 211-212. Becket’s rhetoric is consistent with (and indeed, almost reasonable in
contrast with) that of Pope Gregory VII. In a situation not dissimilar to that of Henry and Becket (Emperor
Henry IV sought to reestablish the rights of the monarchy lost during his minority, including the right to
invest, that is, consecrate, bishops, Gregory claimed supremacy, both spiritual and political, and forced the
Emperor to submit to him at Canossa. Paul Johnson, A HISTORY OF CHRISTIANITY (1976) at 194;
Helmholtz, THE CANON LAW at 89-90; see generally Fritz Kern, KINGSHIP AND LAW IN THE MIDDLE AGES
(S.B. Chrimes, trans.1939) at 92-97, 107-123. As Kern aptly summarizes, “[f]or him, there were no
intermediate grades between laity and clergy; the monarch, like every layman, was below the priest and
was subject to priestly authority, and in the Church of God no layman might rule.” Id. at 54.

Gregory’s principles are recorded in a document called the Dictatus Papae, reading, in pertinent part:

1. That the Roman church was founded by God alone.
2. That the Roman pontiff alone can with right be called universal.
3. That he alone can depose or reinstate bishops.
4. That, in a council his legate, even if a lower grade, is above all
   bishops, and can pass sentence of deposition against them.
   *****
5. That he alone may use the imperial insignia.
6. That of the pope alone all princes shall kiss the feet.
7. That his name alone shall be spoken in the churches.
8. That this is the only name in the world.
9. That it may be permitted to him to depose emperors.
   *****
10. That no chapter and no book shall be considered canonical
    without his authority.
11. That a sentence passed by him may be retracted by no one; and
    that he himself, alone of all, may retract it.
12. That he himself may be judged by no one.
13. That no one shall dare to condemn one who appeals to the
    apostolic chair.
14. That to the latter should be referred the more important cases of
    every church.
15. That the Roman church has never erred; nor will it err to all
    eternity, the Scripture bearing witness.
16. That, by his command and consent, it may be lawful for
    subordinates to bring accusations.
17. That he may depose and reinstate bishops without assembling a
    synod.
18. That he who is not at peace with the Roman church shall not be
    considered catholic.
19. That he may absolve subjects from their fealty to wicked men
    [rulers].

While custom was not clear as to the historicity of Henry’s proposed means of dealing with criminous clerks, canon law does not provide an easy answer either.

Richard M. Fraher’s investigation of the primary texts suggests that:

Henry and Becket clashed over a point of law which was becoming disputed ground during the 1150s. There was an element of the conservative and of the innovator both in king and in archbishop. Henry, trying to standardize legal practice according to the “ancestral” customs of England, innovated by the very act of systematizing and standardizing the law. Becket clung stubbornly to a concept of regnum et sacerdotium which echoed the high Gregorian arguments of the Investiture Controversy, but the archbishop also employed the latest teachings of the theological schools and lent a new direction to canonical thinking regarding the privilegium fori. With regard specifically to the Becket controversy and the canon lawyers, the following conclusions appear to be in order: that Henry’s position, or something very like it, received majority support among the Bolognese canonists from about 1140 to 1170, and among the Anglo-Norman decretists from about 1160 to 1190; that Becket’s principles, although he did not invent them, became a majority opinion among the Bolognese decretists only from the time of Becket’s martyrdom and among the Anglo-Norman only after 1190; and that the Becket controversy,

See Halsall, ed., MEDIEVAL SOURCEBOOK, supra, http://www.fordham.edu/halsall/source/g7-dictpap.html. See also Arthur Cushman McGiffert, 2 A HISTORY OF CHRISTIAN THOUGHT (1933) at 339; Johson, op cit at 197.

In the midst of his largely successful efforts to end lay investiture of bishops, Gregory VII demanded in 1080, Gregory VII demanded that William the Conqueror offer him fealty, a demand which William first ignored, and then, when repeated, bluntly refused. David C. Douglas, WILLIAM THE CONQUEROR (1964) at 340; Bartlett, supra note 1, at 410. Douglas paints a remarkably sympathetic portrait of both William and Gregory. Douglas, at 317-345. Douglas points out that William was sufficiently skilled at mediating conflict between himself and Gregory that the “papal decree against lay-investiture which was published in Rome in 1074 did not enter England before the end of the eleventh century, despite the fact that every bishop appointed in Normandy and England between 1070 and 1087, except only [two], received his pastoral staff from the king. There was never an ‘investitures contest’ in the Anglo-Norman kingdom during the reign of William the Conqueror.” Id. at 342. Henry I did not fare so well, as Archbishop Anselm of Canterbury had “a fixed resolve to enforce the Gregorian programme, and especially in the matter of investiture.” Poole, supra note 1, at 177. Henry I yielded on this point to Anselm in a formal concordat. Id., at 177-180. Interestingly, Henry’s daughter, the Empress Matilda whom he had designated her heir, but was displaced by Stephen, and who was briefly triumphant in the civil war with Stephen, “in total disregard of her father’s concordat with Anselm, agreed to bestow the ring and staff upon [] a candidate for the bishopric of Durham.” Id. at 191.
along with the papal legislation promulgated in the wake of the dispute, prompted the sudden shift in decretist thinking toward a theory of clerical immunity which extended to protecting clerics against secular punishment for secular crimes.  

Becket’s martyrdom ensured that, as part of the price of his reconciliation with Rome, Henry had to accept the Archbishop’s version of *privilegium fori*, “benefit of clergy.”  

Henry’s was not the only such reversal:  

[POPE] Alexander III, who under his earlier name of Magister Rolandus had espoused double punishment in criminal cases, in 1178 promulgated the decretal *At si clericis*. This papal decision denied secular jurisdiction over criminous clerks, restricted the grounds for accusations against clerics, limited ecclesiastical punishments to suspension and degradation, and prohibited the imposition of secular punishment for any crimes committed by the clergy. Given this papal initiative, it was not unnatural that the subsequent decrétists followed Johannes Faventinus and restricted secular jurisdiction over criminous clerics solely to those cases in which the ecclesiastical court had ruled the miscreant to be incorrigible. Simon of Bisignano explicitly stated that a secular judge might punish a clerical offender only if ecclesiastical authorities found themselves unable to restrain the cleric.  

In the context of the undeniable failure of the Courts Christian to adequately address criminal misbehavior by clergy, it would be all too easy to say, with the contemporary William, canon of Newburgh, that Becket and his supporters brought the crisis on themselves, “since they were more intent on defending the liberties and rights of

53 Fraher, *The Becket Dispute*, supra at 362. See also Anne J. Duggan, *Henry II, the English Church and the Papacy, 1154-1176*, in *Henry II: New Interpretations* (Christopher Harper-Bill & Nicholas Vincent, eds.) (2007) at 181-184; Poole, supra note 1, at 206.  
54 Helmholz, *The Canon Law*, at 508  
the clergy than on correcting and restraining their vices.” Such a dismissive attitude toward Becket’s behavior leaves unanswered the question of why Becket, who prior to his appointment as Archbishop was the companion of Henry’s revels as well as his chancellor, should take so high-handed and, ultimately, self-destructive position on the roles of Church and State.

Part of the answer no doubt lies in Becket’s documented feeling that his appointment, compelled by the King’s influence, was tainted by illegitimacy, instilling in Becket a need to show his worthiness, and from a natural desire to show himself more than a creature of Henry. This may in part explain what has been called “that rapid transition from the gay, splendidly dressed courtier who romped with the king to the proud and austere priest who mortified his flesh by abstinence and flagellation and excelled in ostentatious acts of charity and humility.” W.L. Warren suggests that Becket’s studies in exile were a quest “not . . . for enlightenment, but for justification for the stand he had taken on clerical immunity, which itself was based at least on his need to

56 Poole, supra note 1, at 203. Helmholtz notes that as applied, “benefit of clergy” as practiced within England fairly swiftly diverted from the requirements of canon law, and the secular courts were able to exercise initial jurisdiction to ascertain clerical status by the Fourteenth Century. Id. at 511. Helmholtz further allows that “[b]enefit of clergy has never enjoyed a good press among English historians,” a consensus he does not try to rebut. Id. at 511 (citing F.W. Maitland, I Pollock & Maitland, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d Ed. 1898) at 443 (describing the trial of clerics before ecclesiastical courts as “little better than a farce”); Leona Gabel, BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES (1928-1929) at 115 (concluding that the ordinary ecclesiastical trial of a cleric accused of a crime was “a mockery of justice”)). Helmholtz questions these verdicts, while acknowledging they are permissible if harsh readings of the evidence. Id. at 513. He softens the picture slightly, however, pointing out that the ecclesiastical trials did allow the bishop considerable discretion to impose punishments, including imprisonment, as to which the Church was a “pioneer” which were far from negligible, and that such discretion was in fact so exercised. Id. at 512-513. Helmholtz also suggests that the English system’s application of benefit of clergy “amounted to a public recognition of the freedom of the church,” concluding that “if fidelity to the spirit of canon law is a virtue, the officers of the English church could perhaps have laid claim to that.” Id. at 514.

57 Warren, supra note 1, at 491; see id. at 453-456.

58 Poole, supra note 1, at 198. Poole argues that Becket was “a great actor superbly living the parts he was called upon to play.” Id. That judgment of Becket has been delivered as well by Z.N. Brooke, THE ENGLISH CHURCH AND THE PAPACY (1931) at 193; see Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 20-21 (describing Becket as seen by Brooke as “a consummate natural actor who could visualize a role to play and then become the role itself”).
prove himself a worthy archbishop as on deep conviction." However, the source of Becket’s deep conviction may perhaps be explained by the phrase he used so often to describe what it was he saw himself defending: “the honor of God.”

The centrality of the phrase “the honor of God” to Becket’s thinking may be rooted in the explanation of the atonement by his undeniably saintly predecessor, Anselm of Canterbury, in the work Cur Deus Homo. In explaining the atonement of Christ for the sins of humankind, Anselm states that if God simply forgave sin without either punishment of the sin or satisfaction (that is, recompense by or on behalf of the sinner) “something inordinate is allowed to pass,” and that “it is not seemly for God to let pass something inordinate in His kingdom.” Such offenses are violations of the honor of God, and can only be recompensed by restitution and honor to the person whose honor has been violated—in the case of sin, God’s honor. Because humanity cannot give more to God than what we already owe Him, Anselm reasons, only God Himself, in the person of Christ, can make satisfaction on our behalf.

The grounding of the human relationship with God in God’s honor, equates God to a king. And the honor of a king was more complex in medieval thought than the modern conception of honor as personal integrity or adherence to a code of ethics. So

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59 Warren, supra note 1, at 513.
60 See, e.g., Poole, supra note 1, at 211-212, describing the breakdown of mediation between Becket and Henry, where Becket was “prepared to agree to any and every proposal, but with the exasperating evasive qualification, salvo honore Dei [saving the honor of God] and salvo ordine suo [saving his order].” See also Warren, supra note 1, at 469 (the same formulae advanced at the Council of Westminster). Notably, in an effort to accommodate Becket, the Constitutions of Clarendon allow for a prelate to qualify his fealty to the king by the phrase “saving his order.” Const. Clarend., cl. 12; see Warren at 477.
62 Id. at Bk. I, ch. 12, p. 85.
63 Id. at Bk. I, ch 11, pp. 84-85.
64 Id. at Bk. I, chs. 20-25, pp. 106-118.
indeed was the nature of lordship in the time of Henry and Becket, as evidenced by the requirement that:

seignorial jurisdiction track immediate tenurial relationships. Royal administration thus insisted that lordship be tenurial and that great lords not develop areas of territorial allegiance in competition with the crown. Henry's reforms thus imposed royal conceptions of lordship and of tenurial relationships upon the actual relationships of lords to their men and thus shaped the feudal framework.  

In other words, the relationship of lord and vassal was defined by a direct relationship centering on land and service. The grant of property, in these feudal tenurial relationships, were made in exchange for homage, that is, acknowledgement of a vassal relationship between the grantee and the grantor. Indeed, some of the properties were themselves known as “Honors,” such as the Honor of Lancaster, held by Stephen of Blois prior to his kingship, and then by his son William during the reign of Henry II. The principal distinction between church and secular property in this regime was that church property could not inherited.

Kingship, too, was defined in terms of interlocking relationships with nobles and other vassals, and the subordinate vassals were bound to the king through their lords, who were themselves vassals to the king. However, a king’s “honor” also “often stood for the public authority or for those powers of the prince which were deemed necessary for

65 Biancalana, For Want of Justice, 88 Colum. L. Rev. at 439.
66 Biancalana, For Want of Justice, 88 Colum. L. Rev. at 522-524.
67 Bartlett, supra note 1, at 162; 219-222.
68 Biancalana, For Want of Justice, 88 Colum. L. Rev. at 497-498.
69 Bartlett, supra note 1, at 121-130, 163-164 (status of the king as king and lord); 202-218 (hierarchical structure and status of the aristocracy) 316-325 (role and status of peasants). A more holistic view of the cosmology underpinning this view is given in E.M.W. Tillyard, THE ELIZABETHAN WORLD PICTURE (1943), which relates the social order to the cosmic order in in medieval literature, theology and law. The same approach is taken by C.S. Lewis, THE DISCARDED IMAGE (1964). Henry II was himself both a king and, as Duke of Normandy, Anjou, and Aquitane, vassal to the king of France. Bartlett, at 17-25.
the maintenance of the status of the realm.”

That honor, or the Royal State (\textit{Status Regis}) was composed not only of the kingly prerogatives, but, in part, of the means to exercise them so—the public fisc, “the manors, rents and revenues” which support the duty and authority of the king in his Royal State. \footnote{Gaines Post, \textit{Studies in Medieval Legal Thought: Public Law and the State} 1100-1322 at 382 (1964) at 382 (noting that “status, honor and dignitas” were often used as described in the text).} A certain amount of pomp and splendor was required of a king, to support his dignity and royalty. \footnote{Post, supra, at 370-371 (quoting Shakespeare, \textit{Richard II}, Act IV, sc. 1); \textit{see generally id.} at 368-414.}

In short, Becket could quite reasonably have believed that defending the land, prerogatives, possessions and dignity of the Church were all implicated in defending God’s honor. Any yielding on his part regarding any of these would be a sin, which would not be made right unless restitution and something more, to erase the derogation of God’s honor, were done. Hence his penance after the Council of Clarendon, his dramatic resignation of the archbishopric into the hands of the Pope; histrionic Becket may have been, but there is no reason to doubt that he held his views sincerely. \footnote{See Bartlett, supra note 1, at 232, 235-251. A specific instance of this aspect of medieval life may be seen in one of the charges in the 1327 Articles of Deposition of Edward II, accusing the king of being given “to unseemly works and occupations,” by which was meant his “preference for the company of humble craftsmen, his patronage of ‘theatricals’, his passion for music, his love of such hobbies as woodwork and metal work, his skill at thatching, hedging and ditching” which “disgusted contemporary and monkish critics.” Harold F. Hutchison, \textit{Edward II}, at 148-149 (1971).} After all, such views would merely have transposed the duties he owed his king as Chancellor to those he owed God as Archbishop.

Becket’s seeming reverse-face upon becoming Chancellor is perfectly understandable, therefore. His role had changed, and with it his responsibilities. He had shifted, as canonists would say up until the present day, from one perfect sovereign to another.

\footnote{Notably, even during his friendship with the King, Becket’s personal piety was notable, and not questioned. Warren, supra note 1, at 449.}
II. Two Perfect Sovereignties: The Canonists on Church and State, and Clerical Privilege

A. From the Early Church to the Medieval Era

The understanding of the proper relationship between Church and State that existed at the time of Becket is radically different from that enunciated in the early years of Christianity, which is hardly surprising in view of the early church’s status as a disenfranchised, highly suspect and often-persecuted minority.74 In those early years, the Church taught obedience to secular authorities as a duty, and cited Jesus’s words “give to the emperor the things that are the emperor’s and to God the things that are God’s.”75 Similarly, another evangelist depicts Jesus as explicitly stating “My kingdom is not of this world.”76 These canonical statements present an image of the Christian tradition as consistent with good citizenship, non-threatening to the Roman political order.77 Apart from its theological dimension, it was extremely good sense from a purely pragmatic perspective.

After the Church’s adoption under Constantine in 313 AD, and especially as the Western Roman Empire began to crumble, the picture begins to change. St. Ambrose of Milan, with heady optimism expressed in his Oration on the Death of Theodosius, “that

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75 Matt. 22:22 (New Revised Standard Version) (1989) (“NRSV”); see also Luke 20:20-26. Matthew’s Gospel depicts Jesus and Peter paying the temple tax, “so that we do not give offense to others.” Id. at 18:24-27. Paul, in Romans 13:1-7 similarly enjoins obedience to secular authorities, including, but not limited to, payment of taxes. See also 1 Cor. 7:17-24; Eph. 6:5; 1 Tim. 6:1-3.
76 Jn. 18:36 (Authorized Version) (1611, revised 1881). The NRSV renders this passage in a slightly different way, as “My kingdom is not from this world.” That the meanings are substantially the same is borne out by the following lines: If my kingdom were from this world, my followers would be fighting to keep me from being handed over [for execution]. But as it is, my kingdom is not from this world.”
77 See Kern, KINGSHIP AND LAW, at 27, 109.
the Roman Empire, because of the piety of its rulers, might ever reign in the world, together with the Church, in a partnership of two sovereignties, each with special power and authority from God, each serving to guarantee the safety and well-being of the other.”

In 410, fifteen years after Theodosius’s death, Rome was sacked by Alaric, a fact which influenced Ambrose’s more famous disciple, St. Augustine, in the far more pessimistic, but enduring, *City of God.*

In *The City of God,* Augustine postulates a division between the “celestial city” and “the temporal city” (also called by Augustine the “City of God” and the “City of Man,” and on occasion, the “City of the Devil”). In initially juxtaposing them, Augustine does not lay out the boundaries of each, other than to define the latter as “longing after domination, though it hold all the other nations under it, yet in itself is overruled by the one lust after sovereignty.”

Augustine makes clear, however, that the City of God as discussed is not concomitant with the true Heavenly City, nor is it utterly lacking in common interests with the Earthly City:

> The faithless “worldly city” aims at earthly peace, and settles the self therein, only to have an uniformity of the

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79 St. Augustine, *THE CITY OF GOD* (trans. John Healy; ed. F.N. Bussell) (1903) (reprinted 1931) at 4. In the Healey translation quoted, known as the “Temple Classics Edition,” and originally published in three volumes, certain sections of the work considered to be interpolations, are omitted. The result is to vary the book and chapter numbers for certain passages of the work from the standard editions. However, for ease of reference, where these citations vary from the traditional, the traditional reference in Arabic numerals are in brackets following the citation of the Temple Classics Edition in Roman numerals. The passages cited here can be found in any complete edition of *THE CITY OF GOD,* and many may also be found by Book and Chapter in as reprinted in Augustine, *POLITICAL WRITINGS* (trans & ed. M.W. Tkacz & D.Kries) (1994). While those sections are also reprinted in Paolucci’s edition of *THE POLITICAL WRITINGS,* supra note 77, that volume’s topical organization complicates locating a section by Book and chapter.

80 1 *CITY OF GOD,* Bk. I, ch. 1 at 4. See also 2 *CITY OF GOD,* Bk. XII [14], ch. xvi [28], which distinguishes the loves, glory and wisdom of the two cities, with the Earthly firmly centered on self, the Heavenly firmly centered on God.
citizens wills in matters only pertaining to morality. And the “Heavenly City,” or rather that part thereof, which is as yet a pilgrim on earth and lives by faith, uses this peace also: as it should, it leaves this mortal life, wherein such peace is requisite, and therefore lives (while it is here on earth) as if it were in captivity, and having received the promise of redemption, and divers spiritual gifts as seals thereof, it willingly obeys such laws of the “temporal city” as order the things pertaining to the sustenance of this mortal life, to the end that both the cities might observe a peace in such things as are pertinent hereunto.81

However, this peace is not without its limits; the City of God cannot accept the religious belief of the City of Man, which “has some members whom the Holy Scriptures utterly disallow, and, who standing either too well affected to the devils or being deluded by them.” 82 As a result, “the two hierarchies could not be combined in one religion, but must needs dissent herein, so that the good part was fain to bear the pride and persecution of the bad, had not their own multitude sometimes, and the providence of God continually stood for their protection.”83

This dissent causes not only persecution from the Earthly City, but also dissension from the City of God:

This “celestial society” while it is here on earth, increases itself out of all languages, never respecting the temporal laws that are made against so good and religious a practice: yet not breaking, but observing their [temporal laws’] diversity in diverse nations, all which do tend to the preservation of earthly peace, if they oppose not the adoration of one only God. So that you see, the “Heavenly City” observes and respects this temporal peace here on earth, and the coherence of men’s wills in honest morality, as far as it may with a safe conscience; yea and so far

81 3 CITY OF GOD, Bk. XV [19], ch. xvii, at 152-153.
82 3 CITY OF GOD, Bk. XV [19] at 153.
83 3 CITY OF GOD, Bk. XV [19] at 153.
desires it, making use of it for the attainment of the peace eternal . . . . 84

This view is subtly but critically different from that of the Early Church, in which the duty of obedience to secular authority was more stressed than the right of Christians to stand in judgment over secular society, and to disregard laws that were not consistent with their religious obligations. The distinction is one of emphasis, rather than of content; the Early Church did confront and critique the Roman Empire while remaining obedient to its rule, and Augustine is broadly consistent with this. 85 However, the scriptural texts highlight the consistency of Christian faith with good citizenship, and not the judgment of secular society’s laws by Christians.

Notably, the air of sufferance Augustine expresses toward non-Christians living in the same State as Christians as co-citizens does not bode well for non-Christians, and indeed, Augustine’s other writings illuminate the hardening of his thinking over time on this issue, fraught with implications for the relationship of Church and State generally. Thus, after at first flatly describing persecution, whether of or by Christians as “the work

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85 Kern, KINGSHIP AND LAW, at 97-99. For more current historians’ treatment in greater depth, see, e.g., Christopher Bryan, RENDER TO CAESAR: JESUS, THE EARLY CHURCH AND THE ROMAN SUPERPOWER (2005). Bryan’s conclusions are acutely critiqued and qualified by Lloyd K. Pietersen, who points out that Bryan assumes a greater amount of homogeneity among early Christians than is supported by the texts, arguing that, for example, “the rhetoric of Revelation does suggest resistance to Roman rule, and that the option of non-violent rejection of Roman rule was a live one amongst the early Christians.” Lloyd K. Pietersen, Review, J. Theol. Studies, No. 2, 638, at 640 (2006); see generally, Crossan, THE BIRTH OF CHRISTIANITY.

Augustine’s broad consistency with this view is demonstrated by his own gloss on the scriptural passages cited at nn. 74 and 75, supra: “For thus hath God ordained His Church, that every power ordained in the world may have honour, and sometimes from those who are better than those in power . . . How much do the rich owe to Christ, who orders their house for them!” St. Augustine, THE POLITICAL WRITINGS (Paolucci, ed.), at 307-308 (excerpting EXPOSITIONS ON THE BOOK OF PSALMS, CXXIV (Lat.) 7-8); generally, id. at 292-305; 305-317.
of bad men,” Augustine came to defend forcible conversion and persecution of heretics, in terms which are, even now, rather breathtaking:

[Those who have understanding may perceive rather that it is rather the Catholic Church which suffers persecution through the pride and impiety of those carnal men whom it endeavors to correct by afflictions and terrors of a temporal kind. Whatever therefore the true and rightful Mother does, even when something severe and bitter is felt by her children at her hands, she is not rendering evil for evil, but is applying the benefit of discipline to counteract the evil of sin, not with the hatred which seeks to harm, but with the love which seeks to heal.]

This enthusiastic defense of coercion, which Augustine himself had previously firmly condemned, is disconcerting, especially as it ranges one of the great saints of the Church, a man of profound insight into humanity as evidenced by his Confessions, behind the cruelties of centuries of religious persecution typified by the Inquisition.

With one important qualification, however: Augustine did not favor capital punishment for those he deemed heretics.

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86 Augustine, The Political Writings (Paolucci, ed.) at 189, 185-190 (excerpting Letters, XLIV, at 1-2, 7-11).
87 Augustine, The Political Writings (Paolucci, ed.) at 195 (excerpting Letters XCIII, at 5-10); see generally id. 190-240 (letters and treatise to the same effect).
88 For a history of persecution by Christians during the time of the Roman Empire (and thus through Augustine’s day) see Gaddis, There is No Crime, at chs. 2, et seq. For an accessible history of one facet of religious persecution by Christians, that against Jews, see James Carroll, Constantine’s Sword: The Church and the Jews (2001). An in-depth study of the Thirteenth Century persecution of the Cathars is René Weis, The Yellow Cross: The History of the Last Cathars (2000). The Inquisition has occasioned enormous scholarship, myth and controversy. The traditionalist view of it is exemplified by H.C. Lea, A History of the Inquisition of the Middle Ages (1887). A less harsh, but not fully apologetic, account is Henry Kamen’s The Spanish Inquisition: A Revision (revised ed. 1998). Although beyond the scope of this Article, it should be noted that persecution of fellow Christians was hardly confined to Roman Catholics; as the history of the Reformation and of the witch hunts in Massachusetts exemplify, the persecutorial instinct seems to arise whenever secular power and religious authority are combined—a fact which should blunt the desire of religious institutions for such power, but all too often does not. See, e.g., H. Daniel-Rops, The Protestant Reformation (1958) (trans. Audrey Butler 1961); Marion L. Starkey, The Evil in Massachusetts (1949).
89 Augustine, The Political Writings (Paolucci, ed.) at 241-252 (excerpting Letters C, CXXXIII, and CXXXIX). One should note that this differentiates Augustine from many; St. Thomas Aquinas, for example, states that heretics “deserve not only to be separated from the Church by excommunication, but from the world by death.” 2 Thomas Aquinas, Summa Theologica (1265-1274) (trans. Fathers of the
Augustine’s view of the ecclesiastical right of resistance to secular authority when it irreconcilably conflicts with religious duties was transmuted, over the centuries of Christian rule, to a more holistic right of resistance on the part of the Church to the State, which grew out of the doctrine that an oath sworn to a king who fell into heresy was void, and eventually extended to failures to perform duties in what the Church deemed a reasonable manner:

The older tendency, in which the tradition of the martyrs was continued, denied that force and coercion were permissible against the possessor of authority. Even for a Nero it exacted the recognition due to the lawfully authorized magistracy. It permitted resistance against the tyrant in matters of conscience, but in these alone, and even then only passive resistance. All else was left to the intervention of God. “‘Mine is the vengeance, I will repay,’ saith the Lord.”

But the other view, which steadily gained ground, and which represented the true current of medieval thought, built up, on the basis of a common responsibility for the establishment of a Christian commonwealth, the duty of preventing the tyrant, who was an intruder into God’s community, from doing harm. It established the duty of depriving him by positive law of the right to rule which he had forfeited by natural law, and ignoring the secondary question of his personal fate, it preached the duty of helping to build the Civitas Dei under the leadership of a true rex Christus with a reformed authority.  

With this new paradigm, some kind of understanding of the roles of Church and King had to be arrived at. Near the end of the Fifth Century, Pope Gelasius I formulated such an understanding in his On the Penalty of Anathema:

Wishing then to save those that believed in Him by the medicine of humility, instead of exposing them anew to the danger of perdition by the seductions of pride, [God] has

English Dominican Province) (1947) Pt. II-II, Q. 11 Art. 3 at 1226, id. at 1226-1227 (“Aquinas, SUMMA THEOLOGICA”).  

90 Kern, KINGSHIP AND LAW, at 102; see generally id. at 103-117.
divided the functions of the two powers, assigning to each one its proper task and dignity. The spiritual power keeps itself detached from the snares of this world and, fighting for God, does not become entangled in secular affairs, while the secular power, for its part, refrains from exercising any authority over Divine affairs. *By thus remaining modestly within its own sphere, each power avoids the danger of pride which would be implicit in the possession of all authority and acquires a greater competence in the functions which are properly its own.*\(^9\)

Gelasius himself did not hew completely to this line, writing also that:

> There are two powers, august Emperor, by which this world is chiefly ruled, namely, the sacred authority of the priests and the royal power. Of these that of the priests is the more weighty, since they have to render an account for even the kings of men in the divine judgment. You are also aware, dear son, that while you are permitted honorably to rule over human kind, yet in things divine you bow your head humbly before the leaders of the clergy and await from their hands the means of your salvation. In the reception and proper disposition of the heavenly mysteries you recognize that you should be subordinate rather than superior to the religious order, and that in these matters you depend on their judgment rather than wish to force them to follow your will.

> If the ministers of religion, recognizing the supremacy granted you from heaven in matters affecting the public order, obey your laws, lest otherwise they might obstruct the course of secular affairs by irrelevant considerations, with what readiness should you not yield them obedience to whom is assigned the dispensing of the sacred mysteries of religion. Accordingly, just as there is no slight danger in the case of the priests if they refrain from speaking when the service of the divinity requires, so there is no little risk for those who disdain—which God forbid—when they should obey. And if it is fitting that the hearts of the faithful should submit to all priests in general who properly

administer divine affairs, how much the more is obedience due to the bishop of that see which the Most High ordained to be above all others, and which is consequently dutifully honored by the devotion of the whole Church.92

This ambiguity of the Gelasian depiction of the relationship between Church and State was not resolved unequivocally in favor of the Church for over half a millennium, and even then did not hold steady.93 Rather, by the time of the Becket dispute, the balance of power fluctuated between the more extreme and pro-clerical articulation of the Gelasian position adopted by John of Sailsbury, and one adopted by the then-Bishop of London, and unflinching critic of the martyred Archbishop, Gilbert Foliot, each of whom drew starkly different conclusions from their teacher, Cardinal Robert Pullen.94

As his views have been summarized, Pullen used the now-famous metaphor of the two swords brought by the disciples when they went with Jesus to the Garden of Gethsemane:

Besides the word of God, there are in the Church two swords respectively symbolizing spiritual and temporal power. The hilt of a sword is in the form of a cross. . . . One of these swords belongs to the clergy, the other to the laity. If both swords were entrusted to either one or the other of the two powers, neither would be fittingly used. The temporal power rules the body; the spiritual power, the soul. . . .

A king should obey a priest where the commandments of God are concerned; a prelate should be subject to the king


93 The tug-of-war between historians who assert that the “two powers” referred to by Gelasius were understood in the centuries after Gelasius, as On the Penalty of Anathema suggests, co-equal within their own spheres, and those who ground thoroughgoing papal supremacy within Gelasius’ writings, is ably summarized in Hill, GILBERT FOLIOT AND THE TWO SWORDS, at 28-37.

94 Hill notes that Pullen taught both John of Salisbury and Foliot. GILBERT FOLIOT AND THE TWO SWORDS at 37, 44. A description of the fluctuating reception of the clericalist view on the continent may be found in Kern, KINGSHIP AND LAW at 103-123. Ecclesial thought of the Middle Ages and into the Reformation is traced in John Tonkin, THE CHURCH AND THE SECULAR ORDER (1971) at 5-36.
where worldly matters are concerned . . .

Pullen’s doctrine of the relation of the two authorities spiritual and temporal is very moderate. He is very far from suggesting that both swords belong to the Church, even though with Hugh of St. Victor he maintains that spiritual power is as superior to temporal power as the soul is to the body. We are as yet far from the exaggerated interpretations of the passage (in Luke xx, 38), here are two swords, which polemical writers on one side or the other were later to make in the interest of Church or State respectively.95

Foliot followed Pullen in his moderate view; John of Salisbury took a sharply Gregorian view.96

This period of flux, as Fraher demonstrates, came to an end in the wake of Becket’s martyrdom. This flux, and the hardening view of the Church, can be shown in the text and glosses of subsequent scholars on Gratian’s Decretum.97 In the text, Gratian

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97 Gratian, TREATISE OF LAWS. The more correct formal title of the entire work would be cited in English as THE HARMONY OF DISCORDANT CANONS. The text of the first part, THE TREATISE OF LAWS is divided into main sections called Distinctions, divided into parts and subdivided into chapters (each called a “capitula”), and further divided into sections. The text was heavily annotated by scholars in the medieval period, and those notes—commentaries, supplemental sources, clarifications, or even criticism—are collectively known as the Gloss, with each individual comment referred to as a “gloss,” and the authors referred to as “glossators.” In the edition cited, the traditional glosses are printed in the margin of the text (as they were originally written by hand) and are designated by chapter citation, as well as being separated by superscript letters, or denoted as a case citation (prefaced by CASE). Thus, a citation to the text of Distinction 10, chapter 1, section 3 would be rendered TREATISE OF LAWS, D. 10 c. 1 § 3. A citation to the gloss of that section would add “gloss e”.

The DECRETUM as a whole has not been translated into English; the translation cited is only of the first part, with the Gloss. The entire DECRETUM is composed of three very different parts. The first, known as the TREATISE OF LAWS, presents a synthetic account of what constitutes a law, what bodies may enact and enforce laws relating to the Catholic Church, and what sources of law take precedence. The second part, the CAUSAES, consists of a series of “fictive legal cases (causae), each causa to illustrate a theme. After describing the legal case, Gratian posed a series of questions that the case raised. He then provided the
is fairly emphatic in stating that “[e]nactments of princes do not stand above ecclesiastical enactments but rather are subordinate to them.” In explicating this principle, Gratian states that “[i]mperial ordinances are not to be followed in any ecclesiastical disputes. . . Imperial ordinances are not above the ordinance of God, but blow it. Ecclesiastical laws may not be abrogated by an imperial judgment.” Gratian continued that imperial ordinances “may not be applied to the prejudice of evangelical, apostolic, or canonical decrees (to which they should be subordinate).” One of the glosses to this chapter takes the principle one step further, stating flatly that “[t]he Church is not bound by worldly ordinances. Nor may the emperor make ordinances concerning ecclesiastical matters.”

relevant texts after each question. In his *dicta*, Gratian resolved the contradictions in the sources and provided an answer to each question.” Peter Landau, *Gratian and the Decretum Gratiani*, in *The History of Medieval Canon Law in the Classical Period, 1140-1234* (Wilfred Hartmann & Kenneth Pennington, eds.) (2008) at 35. The third section, another series of Distinctions, provides additional texts and supplements to themes already treated” and was described by Gratian as an Epilogue to the first part. *Id.* Additional background on Gratian and the *Decretum* may be found in Helmholtz, *The Canon Law*, at 74-79.

Prior to the enactment of the 1917 Code of Canon Law Gratian’s work was considered to be a part of the *Corpus Iuris Canonici*, and was, unless contradicted by subsequent papal or conciliar edict, applied in the Roman Catholic Church. Katherine Christensen, *Introduction*, in Gratian, *TREATISE OF LAWS*, at ix, n. 2, xvi-xvii. As the Preface to the Latin Edition of the 1983 Code of Canon Law explains, “[b]esides the Decree of Gratian, in which the earlier norms were contained, the *Corpus [Iuris Canonici]* consists of the *Liber Extra* of Gregory XI, the *Liber Sextus* of Boniface VIII, the *Clemintinae*, i.e., the collection of Clement V promulgated by John XXII, to which are added the *Extravagantes* of this pope and the *Extravagantes communes*, decretals of various Roman pontiffs never gathered in an authentic collection.” *Preface to the Latin Edition, Code of Canon Law: Latin-English Edition* (1983) (trans. Canon Law Society of America 1983) at vii (cited herein as “*1983 Code*”). The “ecclesiastical law which this corpus embraces constitutes the classical law of the Catholic Church and is commonly called by this name.” *Id.* However, as pointed out by Pietro Cardinal Gasparri, the primary author of the 1917 Code, Gratian’s treatise, while amended and published by the Holy See, was never explicitly declared to be officially binding. See Gasparri, *Preface to the 1917 Code*, in *The 1917 Or Pio-Benedictine Code of Canon Law in English Translation with Extensive Scholarly Apparatus* (Curator & trans. Edward N. Peters 2001) at 3; id. at 1-10 (summarizing sources of canon law). Dr. Peters’ edition, cited here as “*The 1917 Code*”, is the first translation into English of the 1917 Code of Canon Law.

98 *TREATISE OF LAWS*, D. 10 Pt. 1, at 32.
99 *Gratian, TREATISE OF LAWS*, D. 10 Pt. 1 C. 1 §§ 1-2, at 33.
100 *Id.* at § 3.
101 *Gratian, TREATISE OF LAWS*, D. 10 Pt. 1 C. 1 § 2, gloss b, at 33. A similar gloss decries a case in which the “emperor wanted to control ecclesiastical affairs. He refused to obey the prelates of the Church.
However, a later gloss, to another chapter to the same effect, strikes a different note:

Is it then true that canons always deprive ordinances of force? This is true only in spiritual cases, . . . . The nature of secular cases is different from that of divine ones, as may be argued from D. 10 c. 1. Each of them is constituted in its own way according to its own nature . . . . Nor may the pope abrogate ordinances except in his own sphere. The empire and the priesthood are said to proceed from the same principle.”

Indeed, Gratian himself quotes a letter from Pope Nicholas I to the Emperor Michael III, which essentially paraphrases Gelasius’s more modest statement of the roles of Church and State from *On the Penalty of Anathema*. The gloss on this chapter adverts to the “two swords” metaphor, and the argument between the commenters fluctuates between the two positions:

As, therefore, these powers are distinct, it may be argued that the empire is not held from the pope and that the pope does not possess both swords. For the army makes the emperor. And the empire is held only of God. Otherwise if it were held of the pope, one could appeal to him in temporal matters, something prohibited by [Pope] Alexander III, who says that such matters do not belong to his jurisdiction. Again, the Church pays tribute to the emperor. But, to the contrary, rights as to both the celestial and the worldly empire are conceded to the pope. Again, the emperor swears an oath to the pope. The pope deposes the emperor. Again, the pope transferred the empire from the East to the West. I believe that these powers are distinct, although the pope may sometimes assume both powers, as when he confers legitimacy on children in both spiritual and temporal matters. But this was at the request of a king who could have done it himself, as is said there. Nor is it an objection that there may be an appeal from a secular judge to the pope. This occurs in the absence of a

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102 Gratian, *TREATISE OF LAWS*, D. 10 Pt. 1 C. 4, gloss g, at 34.
103 Gratian, *TREATISE OF LAWS*, D. 10 Pt. 2 C. 8, at 34-35.
secular judge...and it is done at the request of the king.
For, indeed, when the imperial throne is vacant, the pope
may fill the vacancy.  

The remainder of the Distinction consists of a series of papal pronouncements
expressing obedience to secular laws, including two quotations from Gelasius, one asking
“Who would declare contemptible, then, the ordinances of princes...except the one who
thinks that in his case an act committed should go unpunished?” The second, quoted to
make the point that “all must obey ordinances of the...princes,” is glossed to state “that
if ordinances are to be obeyed in lay affairs, they are even more to be obeyed in clerical
affairs.”

Gratian’s text, and the Gloss, accurately reflect the conflicting canonical
authorities on the larger question of the relationship between the Church and State.
However, as to the specific subject of clerical liability for violations of secular law,
Gratian came down, essentially, on the side of Becket. After the Archbishop was
murdered, of course, so did the Pope.

In the Thirteenth Century, Thomas Aquinas, whose work was officially deemed
authoritative at the Council of Trent, and later by the Code of Canon Law, further
solidified the argument for ecclesiastical supremacy and for clerical immunity. In his

104 Gratian, TREATISE OF LAWS, D. 10 Pt. 2 C. 8, gloss j, at 35-36.
105 Gratian, TREATISE OF LAWS, D. 10 Pt. 2 C. 11, at 36. The gloss to this chapter, gloss f, at 36-37,
distinguishes between disobeying an ordinance and holding it in contempt, arguing that only the latter is a
sin.
107 Helmholtz, THE CANON LAW, at 508, 514. More detail on Gratian’s view is provided by Stanley
Chodorow, CHRISTIAN POLITICAL THEORY AND CHURCH POLITICS IN THE MID-TWELFTH CENTURY at 219-
223 (1972). Chodorow’s discussion of Causa 11, q. 1, dict. post c 31, 47 of the DECRETUM, part of the
second part of the Gratian’s work, known as the Causae, and which falls outside of the TREATISE OF LAWS
translated into English by Thompson, is consistent with other discussions of the causa. See generally,
Anders Winroth, THE MAKING OF GRATIAN’S DECRETUM (2000) at 77, id., at 77-120 (discussing Causa 11
in general).
108 As noted by Rev. Ferrer M. Smith, at “the Council of Trent, the Summa of St. Thomas shared a place
of honor with the Holy Bible as one of the two books on whose authority the decisions of the Council could
Summa Theologica, as well as in his other writings, Aquinas articulated three plinths upon which the argument would rest, up until the present.

First, Aquinas reaffirmed the notion of “two sovereignties,” in the form dating back to Augustine and Gelasius. He draws the line in by now familiar terms, stating that:

Just as it belongs to the secular authority to make legal precepts which apply the natural law to matters of common weal in temporal affairs, so it belongs to ecclesiastical superiors to prescribe by statute those things that concern the common weal of the faithful in spiritual goods.  

Indeed, in defining the essence of law, he described the State, like the Church, in Aristotle’s phrase as “a perfect community.”

Second, between those two perfect communities, each has its own jurisdiction, and is legitimate only within that jurisdiction arises. Aquinas explains that

As the regulated is subject to the regulator: and, in this way, whoever is subject to a power is subject to the laws framed by that power. But it may happen in two ways that

be based.” F.M. Smith, The Position of the Summa in the Hierarchy of Theology and Catholic Authority, in Thomas Aquinas, 3 SUMMA THEOLOGICA 3072, at 3083; see also Encyclical Letter of Pope Leo XIII on the Restoration of Christian Philosophy According to the Mind of St. Thomas Aquinas, The Angelic Doctor (1879) in Aquinas, 1 SUMMA THEOLOGICA at vii-xvi. Father Smith’s essay helpfully enumerates various papal pronouncements and other citations attesting to the authoritative nature of Aquinas’s work in, at any rate, the pre-Vatican II Roman Catholic Church. See also McCool, The Evolution of Catholic Social Thought in the Last Two Centuries, in Grasso & Hunt, A MORAL ENTERPRISE, at 96-97, 104 (noting continuity of linkage between Thomistic thought and Catholic social teaching, but also that John Paul II “no longer desires to give St. Thomas the almost exclusive role in structuring Catholic theology that Leo XIII had given him.”).

According to Canon 1366 of the 1917 Code of Canon Law, the “study of philosophy and theology and the teaching of these sciences must be accurately carried out by Professors (in seminaries, etc.) according to the arguments, doctrines, and principles of S. Thomas which they are inviolately to hold.” Id. at § 2 (reprinted at 1 SUMMA THEOLOGICA at xvi). Similarly, Canon 589 requires members of religious orders to “devote themselves for at least two years to philosophy and for four years to theology, following the teaching of S. Thomas (cf. Canon 1366, § 2).” Id. (reprinted at 1 SUMMA THEOLOGICA at xvi).


See, e.g., Aquinas, 1 SUMMA THEOLOGICA, I-II, Q. 90, Arts. 2, 3, at 994, 995. On the Church’s like status, see, e.g., II-II Q. 147, Art. 4, 2 SUMMA THEOLOGICA at 1788; Suppl., Q. 40, art. 6, 3 SUMMA THEOLOGICA at 2705. For the influence of this term, taken by Aquinas from Aristotle’s POLITICS i. 1, on Catholic doctrine relating to the relationship of Church and State, see generally Lecler, THE TWO SOVEREIGNTIES, supra note 86.
one is not subject to a power. In one way, by being altogether free from its authority: hence the subjects of one city or kingdom are not bound by the laws of the sovereign of another city or kingdom, since they are not subject to his authority. In another way, by being under a yet higher law; thus the subjects of a proconsul should be ruled by his command, but not in those matters in which the subject receives his orders from the emperor: for in these matters, he is not bound by the mandate of the lower authority, since he is directed by that of a higher. In this way, one who is simply subject to a law, may not be subject thereto in certain matters, in respect of which he is ruled by a higher law.\textsuperscript{111}

In particular, a lawmaker is only entitled to legislate, a judge to judge, within the designated area of competence afforded that legislator or judge by law.\textsuperscript{112} Aquinas flatly states that “when a man makes a law that goes beyond the power committed to him” that “such are acts of violence rather than laws,” and “do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right.”\textsuperscript{113} However, when such a law is “contrary to the Divine good,” or “contrary to the commandments of God,” such laws “must nowise be observed.”\textsuperscript{114}

The third pillar Aquinas sets up is that of prepotency—the dominance of the Church over the State when conflict arises. Aquinas squarely confronts the problem that, although “spiritual power is distinct from temporal, [] prelates having spiritual power

\textsuperscript{111} Aquinas, \textit{Summa Theologica} I-II Q. 96, Art. 5, at 1020.
\textsuperscript{112} See Aquinas, \textit{Summa Theologica} II-II Q. 67, Art. 1, at 1483 (equating a judge’s sentence to “a particular law regarding some particular fact,” and noting that, as in the case of a general law, “it is evident that no man can judge others than his subjects and this in virtue of delegated or ordinary authority”).
\textsuperscript{113} Aquinas, \textit{Summa Theologica}, I-II Q. 96, Art. 4, at 1020. Aquinas elsewhere reaffirms that “Man is obliged to obey secular princes in so far as this is required by the order of justice. Wherefore if the prince’s authority is not just but usurped, or commands what is unjust, his subjects are not bound to obey him, except perhaps accidentally, in order to avoid scandal or danger.” \textit{Summa Theologica}, II-II Q. 104, Art. 6, at 1646.
\textsuperscript{114} Aquinas, \textit{Summa Theologica}, I-II Q. 96, Art. 4, at 1020.
sometimes interfere in matters concerning the secular power,” asking if this fact means that “usurped judgment is not unlawful.”

The answer is pure Gregorianism:

The secular power is subject to the spiritual, even as the body is subject to the soul. Consequently, the judgment is not usurped if the spiritual authority interferes in those temporal matters that are subject to the spiritual authority or which have been committed to the spiritual by the temporal.

As a specific example of this precept, Aquinas finds an exception to the notion that in secular matters, “one should obey the secular rather than the spiritual power.”

After announcing this general precept, Aquinas continues, “[u]nless, perchance, the secular power is joined to the spiritual power, as in the case of the Pope, who holds the supremacy of both powers from the disposition of Him Who is both priest and king.”

Another example of Aquinas’ support for papal supremacy is shown in his treatment of rulers who fall into political contention with the Church—such as Henry II of England, or Emperor Henry IV. While agreeable to the notion that pre-existing secular rule by non-Christians over Christians could be tolerable, in view of the inherently different roles of played by State and Church, Aquinas declares that “dominion or authority of unbelievers over the faithful as . . . a thing to be established for the first time . . . . ought by no means to be allowed, since it would provoke scandal and endanger the faith, for subjects are easily influenced by their superiors...” Even such pre-existent “right of dominion can be justly done away with by the sentence or ordination of the

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115 Aquinas, 2 SUMMA THEOLOGICA, II-II, Q. 60, Art. 6, Obj. 3, at 1450.
117 Aquinas, Commentaries on the Sentences II, in Baumgarth & Regan, supra note 109, at 260.
118 Aquinas, Commentaries on the Sentences II, in Baumgarth & Regan, supra note 109, at 260.
119 Aquinas, 2 SUMMA THEOLOGICA, II – II, Q. 10, Art. 10, at 1221.
Church, who has the authority of God.”

As to Christian leaders, in the event the Church declares that the secular ruler is an apostate, and excommunicates him, his subjects “are absolved from his authority and from the oath of allegiance whereby they were bound to him.”

For the laity this means a kind of divided loyalty—as witnessed by the release from civic and feudal duties of obedience and adhesion in the event of excommunication. The loyalty to the secular State is, in Aquinas, conditional and limited as to scope. The loyalty owed to God, and the Church, is neither.

Finally, the special nature of the clergy in Aquinas’ thought must be considered.

For Aquinas, sacrilege, “irreverence for sacred things” is, as Thomas Becket would have agreed, “an injury to God.” And, Aquinas, notes, “holiness is ascribed . . . to sacred persons, namely, those who are consecrated to the divine worship.”

The “greater the holiness ascribed to the sacred thing that is sinned against, the more grievous the sacrilege.” Thus, “sacrilege committed against a sacred person is a graver sin than that which is committed against a sacred place.” Moreover, within each kind of sacrilege, “there are various degrees of sacrilege according to differences of sacred persons and places.”

In short, judges who presumed to pass sentence upon clerics could quite easily be deemed, in Aquinas’ reasoning, to have exceeded their jurisdiction, and thus to have

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120 Aquinas, 2 SUMMA THEOLOGICA, II – II, Q. 10, Art. 10, at 1221.
121 Aquinas, 2 SUMMA THEOLOGICA, II-II, Q. 12, Art. 2, at 1229.
122 As the histories of Louis the Pious, Henry IV, and King John, among others, make clear, this was no idle threat. See Kern, KINGSHIP AND LAW at 105-110 (Louis and Henry); Poole, supra note 1, at 443-458 (John).
123 Aquinas, 2 SUMMA THEOLOGICA, II-II, Q. 99, Art. 1, at 1620.
125 Aquinas, 2 SUMMA THEOLOGICA, II-II, O. 99, Art. 3, at 1621.
127 Aquinas, 2 SUMMA THEOLOGICA, II-II, O. 99, Art. 3, at 1621. Aquinas addresses the varying levels of holiness of varying ranks of priests and religious, as well as the unity of the Church, in Supplement, QQ. 33-40, 3 SUMMA THEOLOGICA, at 2679-2707. See, e.g., Suppl., Q. 40, art. 6, 3 SUMMA THEOLOGICA at 2705.
acted not in law but in violence, and to be guilty of sacrilege. These arguments support, if they do not compel, adherence to the Becket position on clerical immunity codified by Alexander III.

B. Command and Coercion in the Thought of John Henry Newman

In the centuries between Aquinas and the current day, the Church has clung to, with some modifications, its vision of Church and State as two “perfect sovereignties,” and has asserted, also with some modifications, the ultimate primacy of the spiritual over the temporal. In post-Reformation times, however, the Church has had to justify its exercise of authority, and to confront a citizenry composed of both adherents and non-adherents. In his writings, the recently beatified Cardinal John Henry Newman

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128 See Lecler, THE TWO SOVEREIGNITIES, at 80, 64-84 (canvassing Church authorities from the Thirteenth Century through the 1930s; contending that the Church’s action “is juridic in character for it does not consist solely in giving enlightenment and advice: indeed, when necessary, the Church commands or forbids under the sanction of canonical censures. Yet her action remains spiritual, she only employs spiritual weapons . . . only spiritual verdicts are pronounced,” which Lecler asserts do not directly impact the civil community, although he admits that there is “no doubt” that indirect effects will take place. Id. at 80. Lecler also reserves to the Church the authority to “condemn as null and void, so far as the moral law is concerned, certain decrees and treaties drawn up by governments; [to] excommunicate those public authorities who violate the rights of God and the Church.” Id.

More recently, Fr. Gerald McCool has praised John Paul II’s contribution to Vatican II’s teaching on the nature of the relation to the modern world as “richer, deeper, and more complex” than the Eighteenth Century view which it superseded. Fr. McCool credits this depth to the “recovery of the older notion of Church and state as two distinct societies, each autonomous in its own order, yet both in the order of grace and nature subject in their own way to the authority of Christ.” McCool, The Evolution of Catholic Social Thought in the Last Two Centuries, in Grasso & Hunt, A MORAL ENTERPRISE, at 103. Likewise, the current Pope, Benedict XVI (at the time Cardinal Josef Ratzinger) stated in 1999 on receiving a honorary degree in jurisprudence that “Christian faith respects the nature of the State itself, especially of the State of a pluralist society, but it also feels its co-responsibility, in order that the fundamentals of law continue to remain visible and the State is not deprived of direction and simply at the mercy of changing currents. Since, in this sense, even with all the distinctions between reason and faith, between statutory law -- necessarily drawn up with the help of reason --, and the vital structure of the Church, nevertheless, the ordering between them is in a reciprocal relation and they have a responsibility one for the other.” Cardinal Josef Ratzinger, The Contemporary Crisis of Law, November 10, 1999, archived at http://www.ufppc.org/us-a-world-news-mainmenu-35/2637-news-a-background-cardinal-ratzinger-is-pope-benedict-xvi.html

129 See, e.g., Joseph Koterski, S.J., Defending Authority in a Cynical Age, in Grasso & Hunt, A MORAL ENTERPRISE, at 107-125, in which the very idea of authority is defended at some length.
provides a window into the Church’s moral understanding supporting its response to the
sex abuse crisis in the Twentieth Century.

Newman was no stranger to controversy; he had, as a priest of the Church of
England, led a reforming, movement, which emphasized the Catholic tradition and
heritage of the Church of England, and was highly political; as Newman himself
declared, “my battle was with liberalism” which included the governing Liberal Party in
its regulation of the established Church of England as well as theological liberalism.130

Prior to his conversion, Newman, who had been as he himself described to be
“open, not unfairly, to the charge of fierceness,” as a controversialist, had filled his
writings with stringent denunciations of the Roman Catholic Church.131 After his
conversion to Roman Catholicism, he engaged with his own earlier writing, republishing
some of his earlier work with lengthy commentary rebutting those portions of the works

130 Newman (1801-1890) described his own spiritual journey in his APOLOGIA PRO VITA SUA (1864). The
language quoted is from id. (New Edition 1892) at 48; see generally id. at 56-58. A helpful account of the
Tractarian movement (also known as the Oxford Movement, or even the First Oxford Movement, to
distinguish it from the more liberal Catholic revival within Anglicanism led by Charles Gore and his co-
authors of LUX MUNDI (1889)) and its genesis in resistance to church reforms pioneered by the Liberal
Government of the 1830s may be found in C.P.S. Clark, Genesis of the Oxford Movement, 1833-1845, in
N.P. Williams & Charles Harris, NORTHERN CATHOLICISM: CENTENARY STUDIES IN THE OXFORD AND
PARALLEL MOVEMENTS at 1-35 (1933).

131 Newman, APOLOGIA PRO VITA SUA, at 46. Newman gives some fairly convincing examples of his
fierceness at id., 46-48. As one example of his attacks on the Roman Catholic Church, he acknowledges
that “I thought the Pope to be Antichrist. At Christmas 1824-1825, I preached a sermon to that effect.” Id.
at 52. Newman acknowledged that his view softened to considering the Pope to be “one of many
antichrists” and that he publicly refined his position. Id. 52-53. Further, his two volume work, THE VIA
MEDIA OF THE ANGLICAN CHURCH (1837-1840) (“VIA MEDIA”), is replete with anti-Catholic attacks in both
the Lectures comprising volume 1, and the tracts, sermons and articles comprising volume 2. Citations to
the work are to Longmans reprint of 1911, which includes the additional notes and Preface added by
Newman in 1877.

Simple justice requires noting that Newman’s role as a controversialist does not show him at his best. The
anti-Catholic broadsides aside, The Via Media is an effort to articulate a subtle position as to the Church of
England’s role in the “Church Catholic”—that is, the universal fellowship of Christians—and what that
universal Church consists of, in an era where no one visible ecclesial body unites Christians. Likewise, the
Apologia is often painfully honest in its examination of Newman’s own faults (although his admitted
fierceness does not seem to have been much abated in his conversion). It has been compared, justly, to
Augustine’s Confessions. Many of his other works, such as The Idea of a University (1852) and An Essay
Toward a Grammar of Assent (1870) show a much more appealing side of Newman than is addressed in
this Article.
as were hostile to the Roman Catholic Church. In republishing his essay on Anglicanism, *The Via Media*, Newman mounted defenses of the Church’s behavior countering his own previous indictment against it. These defenses sound notes which resonate in the defenses made by the Church and its apologists in the context of the sex abuse crisis.

In the Preface to *The Via Media*, Newman provides an explanation of how the various institutional roles of the Roman Catholic Church require it to, on occasion, engage in *realpolitik*, and coercive behavior, which seems to be immoral:

> When our Lord went up on high, He left His representative behind Him. This was Holy Church, His mystical Body and Bride, a Divine Institution, and the shrine and organ of the Paraclete, who speaks through her till the end comes. She, to use an Anglican poet’s words, is “His very self below,” as far as men on earth are equal to the discharge and fulfillment of high offices, which primarily and supremely are His.

> These offices, which specially belong to Him as Mediator, are commonly considered to be three; He is Prophet, Priest, and King; and after His pattern, and in human measure, Holy Church has a triple office too; not the Prophetical alone and in isolation, as these Lectures [comprising volume 1 of *The Via Media*] virtually teach, but three offices, which are indivisible, though diverse, *viz.* teaching, rule, and sacred ministry.  

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132 As Newman explained in the “Prefatory Note” to *The Via Media*, he added these notes and additional materials “in order to anticipate the chance of [his earlier work’s] being “used to advance the cause which it was intended to support, in spite of his later disavowal of it.” *Prefatory Note*, in *The Via Media* at x. Newman reasoned that by “without altering the original text, to accompany it with additions calculated to explain why it had ceased to approve itself to his own judgment “ either forestall later editions, or “that the reprint of his first thoughts will in fairness be allowed to carry with it a reprint of his second.” Id.

Newman continues to explain that:

Christianity, then, is at once a philosophy, a political power, and a religious rite: as a religion, it is Holy; as a philosophy, it is Apostolic; as a political power, it is imperial, that is, One and Catholic. As a religion, its special centre of action is pastor and flock; as a philosophy, the Schools; as a rule, the Papacy and its Curia. . . .

Truth is the guiding principle of theology and theological inquiries; devotion and edification, of worship; and of government, expedience. The instrument of theology is reasoning; of worship, our emotional nature; of rule, command and coercion. Further, in man as he is, reasoning tends to rationalism; devotion to superstition and enthusiasm; and power to ambition and tyranny.

Arduous as are the duties involved in these three offices, to discharge one by one, much more arduous are they to administer, when taken in combination. Each of the three has its separate scope and direction; each has its own interests to promote and further; each has to find room for the claims of the other two; and each will find its own line of action influenced and modified by the others, nay, sometimes in a particular case the necessity of the others converted into a rule of duty for itself.  

Newman goes on to give the example of scientific truth and Galileo:

Galileo's truth is said to have shocked and scared the Italy of his day. It revolutionized the received system of belief as regards heaven, purgatory, and hell, to say that the earth went round the sun, and it forcibly imposed upon categorical statements of Scripture, a figurative interpretation. Heaven was no longer above, and earth below; the heavens no longer literally opened and shut; purgatory and hell were not for certain under the earth. The catalogue of theological truths was seriously curtailed. Whither did our Lord go on His ascension? If there is to be a plurality of worlds, what is the special importance of this
one? and is the whole visible universe with its infinite spaces, one day to pass away? We are used to these questions now, and reconciled to them; and on that account are no fit judges of the disorder and dismay, which the Galilean hypothesis would cause to good Catholics, as far as they became cognizant of it, or how necessary it was in charity, especially then, to delay the formal reception of a new interpretation of Scripture, till their imaginations should gradually get accustomed to it.

As to the particular measures taken at the time with this end, I neither know them accurately, nor have I any anxiety to know them. They do not fall within the scope of my argument; I am only concerned with the principle by which they were conducted. All I say is, that not all knowledge is suited to all minds; a proposition may be ever so true, yet at a particular time and place may be “temerarious, offensive to pious ears, and scandalous,” though not “heretical” nor “erroneous.” . . .

Now, while saying this, I know well that “all things have their season,” and that there is not only “a time to keep silence,” but “a time to speak,” and that, in some states of society, such as our own, it is the worst charity, and the most provoking, irritating rule of action, and the most unhappy policy, not to speak out, not to suffer to be spoken out, all that there is to say. Such speaking out is under such circumstances the triumph of religion, whereas concealment, accommodation, and evasion is to co-operate with the spirit of error;—but it is not always so. There are times and places, on the contrary, when it is the duty of a teacher, when asked, to answer frankly as well as truly, though not even then to say more than he need, because learners will but misunderstand him if he attempts more, and therefore it is wiser and kinder to let well alone, than to attempt what is better.135

From here, Newman then goes on to explain that the use of command and coercion, as with suppression of information, can extend into other areas:

Apostolicity of doctrine and Sanctity of worship, as attributes of the Church, are differently circumstanced from her regal autocracy. Tradition in good measure is sufficient for doctrine, and popular custom and conscience for

worship, but tradition and custom cannot of themselves secure independence and self-government. The Greek Church shows this, which has lost its political life, while its doctrine, and its ritual and devotional system, have little that can be excepted against. If the Church is to be regal, a witness for Heaven, unchangeable amid secular changes, if in every age she is to hold her own, and proclaim as well as profess the truth, if she is to thrive without or against the civil power, if she is to be resourceful and self-recuperative under all fortunes, she must be more than Holy and Apostolic; she must be Catholic. Hence it is that, first, she has ever from her beginning onwards had a hierarchy and a head, with a strict unity of polity, the claim of an exclusive divine authority and blessing, the trusteeship of the gospel gifts, and the exercise over her members of an absolute and almost despotic rule. And next, as to her work, it is her special duty, as a sovereign State, to Consolidate her several portions, to enlarge her territory, to keep up and to increase her various populations in this ever-dying, ever-nascent world, in which to be stationary is to lose ground, and to repose is to fail. It is her duty to strengthen and facilitate the intercourse of city with city, and race with race, so that an injury done to one is felt to be an injury to all, and the act of individuals has the energy and momentum of the whole body. It is her duty to have her eyes upon the movements of all classes in her wide dominion, on ecclesiastics and laymen, on the regular clergy and secular, on civil society, and political movements. She must be on the watchtower, discerning in the distance and providing against all dangers; she has to protect the ignorant and weak, to remove scandals, to see to the education of the young, to administer temporalities, to initiate, or at least to direct all Christian work, and all with a view to the life, health, and strength of Christianity, and the salvation of souls.

It is easy to understand how from time to time such serious interests and duties involve, as regards the parties who have the responsibility of them, the risk, perhaps the certainty, at least the imputation, of ambition or other selfish motive, and still more frequently of error in judgment, or violent action, or injustice.¹³⁶

Newman noted the respect for individual conscience, which marked the early church, including St. Augustine in his earlier writings, only to be replaced with a belief in forced conversion in Augustine's later works. Finally, Newman reaches the culmination of this long train of reasoning:

Again: with a view to the Church's greater unity and strength, Popes, from the time of St. Gregory I., down to the present, have been earnest in superseding and putting away the diversified traditional forms of ritual in various parts of the Church. In this policy ecclesiastical expedience has acted in the subject-matter of theology and worship.

Again: Acts simply unjustifiable, such as real betrayals of the truth on the part of Liberius and Honorius, become intelligible, and cease to be shocking, if we consider that those Popes felt themselves to be head rulers of Christendom and their first duty, as such, to be that of securing its peace, union and consolidation. The personal want of firmness or of clear-sightedness in the matter of doctrine, which each of them in his own day evidenced, may have arisen out of his keen sense of being the Ecumenical Bishop and one Pastor of Christ's flock, of the scandal caused by its internal dissensions, and of his responsibility, should it retrograde in health and strength in his day... The principle, on which these two Popes may be supposed to have acted, not unsound in itself, though by them wrongly applied, I conceive to be this,—that no act could be theologically an error, which was absolutely and undeniably necessary for the unity, sanctity, and peace of the Church; for falsehood never could be necessary for those blessings, and truth alone can be.

138 Newman, Preface to the Third Edition, THE VIA MEDIA at lxxxiii-lxxxiii (emphasis added). Pope Liberius (352-366 AD) has been accused of, after years of exile and harassment, having signed a document which was insufficiently explicit in condemning the Arian heresy (which taught that God the Father pre-existed and created the Son as the first act of creation, but that the Son is not God in the same sense as God the Father), thus purchasing peace with the Roman Emperor. Philip Schaff, 3 HISTORY OF THE CHRISTIAN CHURCH, § 121, at 636 & n. 2 (3d Ed., revised 1889)(reprinted 1996); see also Fr. Francisco Radecki & Fr. Dominic Radecki, TUMULTUOUS TIMES: TWENTY GENERAL COUNCILS OF THE CATHOLIC CHURCH & VATICAN II AND ITS AFTERMATH (2004) at 23-24; for a more careful and nuanced definition of Arianism’s thinking, see Rowan Williams, ARIUS: HERESY AND TRADITION (2d Ed. 2001) at 97-105. Honorius I (625-638) issued two letters in support of the Monothletic heresy (teaching that Christ had only one will, a Divine will, and not a human will), a view that was rejected by the Church as heretical, as denying his complete humanity. Philip Schaff, 4 HISTORY OF THE CHRISTIAN CHURCH: MEDIEVAL CHRISTIANITY (2d
Cardinal Newman adds two dimensions to the relationship between the Church and State, relevant to the question of the Church’s exclusive jurisdiction over clergy. First, he provides a theological rationale upon which the Church can ground its decision to take action in vindicating its prerogatives which can savor of realpolitik—the “regal function” requires such actions, to preserve its prerogatives—which are part of the Honor of God, in Becket’s terms, or of the exclusive jurisdiction of the Celestial City, in Augustine’s. Second, he provides the missing rationalization—the notion that whatever establishes the betterment of the Church must be, in a real sense, the truth (or at any rate, the good situationally speaking), because it resulted in betterment for the church.

Newman also explains and contextualizes the papal dread of scandal, and the Church’s function to conceal facts which, although undeniably true, would erode the belief and trust of the faithful, a motivating factor which contributed to the current crisis. Add to this volatile mixture Aquinas’ firm assurance that laws which infringe on the Church’s preserves are not in fact laws, but acts of violence, and therefore not worthy of respect, and much in the way of tactics becomes clear.

C. The 1917 Code of Canon Law

Prior to the First Vatican Council, the Church began to see the need for a systematic and comprehensive organization of the loosely arranged, sprawling body of materials making up the Corpus Iuris Canonici.139 As H. Daniel-Rops explains, canon law “was represented at that date by a tangle web of laws, decrees, and decisions heaped together in the course of centuries, and in volumes which were often inaccessible,

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139 Revised Ed. 1885) (reprinted 1996) § 113, at 500-507. The failings of both Popes were used as arguments against papal infallibility at the First Vatican Council. Id. at 501.

without any attempt to eliminate their contradictions or adapt them to new
circumstances.”

Pope Pius X, “at the very beginning of his pontificate, . . . proposed to
collect and reform all ecclesiastical laws.” The change from the Corpus would be
dramatic in form, but would stress continuity in content:

It was decided to forego the method of compilation of laws
whereby individual laws would have been expressed in the
extensiveness of the original text; rather the modern
method of codification was chosen. Hence texts containing
and proposing a precept were expressed in new and
different form. However, all of the material was organized
in five books which substantially imitated the system of
Roman Law institutes on persons, things, and actions. The
work took twelve years with the collaboration of experts,
consultors [sic] and bishops throughout the Church. The
character of the new Code was clearly enunciated in the
beginning of canon 6: “The Code generally retains the
existing discipline although it introduces appropriate
changes. Therefore, it was not a case of enacting a new
law, but rather a matter of arranging in a new fashion the
operative legislation at that time.” After the death of Pius
X, this universal, exclusive, and authentic collection was
promulgated on May 27, 1917, by his successor Benedict
XV; it took effect on May 19, 1918.

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leading up to the enactment of the Pio-Benedictine Code are given in his Preface to the 1917 Code in THE
142 Preface to the Latin Edition, 1983 CODE at xviii; see also H. Daniel-Rops, A FIGHT FOR GOD at 58-59
(describing Pius X’s involvement in the drafting of the Pio-Benedictine Code). As the tension between this
rendering of the language of canon 6 and the overly simple, though generally accurate, characterization of
its import suggests, the Pio-Benedictine Code did make changes to the substance of canon law—
eliminating contradictions, modernizing provisions, etc. Dr. Peters’ translation of the same canon is
substantially the same, stating that “[t]he Code for the most part retains the discipline now [i.e., prior to
promulgation] in force, although it brings about opportune changes.” Canon 6, THE 1917 CODE, at 31. All
quotations from the 1917 Code are taken from Dr. Peters’ edition, which is, to date, the only full translation
in English. As Peters explains, “[d]uring its sixty-five years enforcement period, the 2,414 canons of the
1917 Code were never translated from the original Latin and published as an entire work. Indeed,
translations of the 1917 Code were forbidden, at least in part to assure that disputes about the application of
what was, for the Church, a revolutionary legal structure would be resolved in the language of the
Legislator, and not according to the scores of languages amid which the 1917 Code operated.” Edward N.

For a more detailed and nuanced analysis of the relationship between the Pio-Benedictine Code and the
Corpus, see Rev. Stanislaus Woywod, 1 A PRACTICAL COMMENTARY ON THE CODE OF CANON LAW (1925)
(Revised Ed., ed. Rev. Callistus Smith 1943) at 3-5 (“PRACTICAL COMMENTARY”). Dr. Peters, the editor
This Code, known as the Pio-Benedictine Code, for the two popes who were involved in its promulgation, or simply as the 1917 Code, remained in effect until superseded by the 1983 Code.

Under the 1917 Code, the traditional belief in the primacy of the Church over the secular power is reaffirmed, and any concession toward the secular viewed as tactical in nature:

Every Christian is necessarily subject to both the temporal or civil and the spiritual or ecclesiastical power. Exercising authority over the same subjects under different aspects, the two powers naturally come into contact with each other in many matters. Both authorities are instituted by God, and in that respect are alike competent and independent of each other, each in the proper sphere of its jurisdiction. If the two powers are compared in rank and importance, it is evident that the purpose for which God ordained the spiritual power is far above the purpose of the civil power. The spiritual power should, therefore, get the preference in a conflict of jurisdiction. However, frequently the rights of the spiritual power have been disregarded by the civil power, not only in heathen nations, but also in Christian and Catholic nations. For the sake of peace, the Church has been obliged to allow the civil power certain rights in ecclesiastical affairs to obtain assurance from the civil power of the free exercise of her most essential rights.  

\[143\] Woywod, 1 PRACTICAL COMMENTARY, at 2. See also Lecler, THE TWO SOVEREIGNITIES, at 72-82; 113-115. Woywod contends that a concession of authority within the Church’s legitimate jurisdiction may be tactical in nature, why Lecler asserts that such a concession in method of exercising its legitimate jurisdiction constitutes a recognition of the different times and circumstances within which the Church operates. See, e.g., Lecler, supra at 82-83.
Under the Pio-Benedictine Code, the Church held firmly to the tradition of the "Corpus" regarding clerical immunity: "Clerics shall in all cases, whether contentious or criminal, be brought before an ecclesiastical judge, unless it has been legitimately provided otherwise in certain places."\footnote{Canon 120, § 1, THE 1917 CODE at 64; see Woywod, 1 PRACTICAL COMMENTARY, at 52 (summarizing Canon 120 §1 as providing that “[a]ll lawsuits against clerics, both civil and criminal, must be brought into the ecclesiastical court, unless other provisions have legitimately been made for some countries.”). As to the origin of this privilege, Fr. Woywod explicitly states that: The rights and privileges of the clergy enumerated here by the Code are but a restatement of the ancient law of the Church. The origin of these laws may be traced to the early centuries when the Church christianized the nations of Europe. The demand of the Church on the Christian nations to respect the rights and privileges of the clergy, is certainly reasonable and proper. The civil power of the State and the Church stand side by side, both having been instituted by the will of God; one power has charge over the temporal, and the other over the spiritual affairs of men, and each is independent of the other in its own sphere. . . However, there are few, if any, Christian states today which recognize that the Church has her power and constitution by the will of God; and that in a comparison between the two powers, the Church is the superior, inasmuch as the purpose for which God instituted her is far superior to the purpose for which He instituted the civil power. Owing to this unbelief and disregard of sound principles, the Church and her clergy have to suffer indignities at the hands of the State in many countries. Woywod, 1 PRACTICAL COMMENTARY, at 53.} Such provisions are normally made through "written agreements between the Holy See and the civil power [] usually called \textit{concordants}."\footnote{Woywod, 1 PRACTICAL COMMENTARY, at 3.} As Father Woywod notes, "[h]ere in the United States, there have never been any permanent diplomatic relations between the Church and the civil power, and therefore we have no concordats with the Holy See."\footnote{Woywod, 1 PRACTICAL COMMENTARY, at 3 (citing Coronata, JUS PUBLICUM ECCLESIASTICUM (1924)). A chronological list of nations having entered into concordats with the Vatican, with translations of many of them, may be found at http://www.concordatwatch.eu/. However, Concordat Watch, while thorough and informative, is also strongly influenced by its strong belief that concordats are inherently a threat to secular law, and is at points inflammatory in its commentary. A more nuanced scholarly appraisal of concordats in the post-Vatican II era is Peter Petkoff, \textit{Legal Perspectives and Religious Perspectives of}}
other nations that have not entered into concordats with the Holy See specifically authorizing the exercise of jurisdiction by secular courts over priests, the Pio-Benedictine Code would forbid the exercise of such jurisdiction.¹⁴⁷

On this question of jurisdiction or, in Thomistic terms, “competence,” one commenter puts the position under the Pio-Benedictine Code strongly:

The most manifest case of incompetence is that of a secular judge arrogating to himself the right of pronouncement in ecclesiastical causes, or citing before his court an exempt cleric in matters civil or criminal. Not only does he render verdicts completely invalid but he sins against justice and religion; he may in determined cases even incur the penalty of excommunication. . . . Where there is no such accord between Church and State, a secular judge should according to the case obtain permission of the Holy See or the Bishop of the place before summoning before his tribunal the Ordinary of the place [that is, the bishop] or a simple cleric respectively. A secular judge who neglects to fortify his position with the required permission should be censured by his Bishop as demanded by the [1917] Code with penalties according to the gravity of the fault. The fault is objectively grave.¹⁴⁸

The Pio-Benedictine Code does not merely deplore such acts; it punishes them quite stringently:

They are struck with an automatic excommunication specially reserved to the Apostolic See, who:

1.° Issue laws, mandates, or decrees contrary to the liberty or rights of the Church;

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¹⁴⁷ Under canon 1552 of the 1917 Code, the Church has the “inherent and exclusive right to judge . . . all civil and criminal cases of persons who enjoy the privilege of the ecclesiastical forum” as defined in canons 120 and the related canons. Woywod, 2 PRACTICAL COMMENTARY at 198; THE 1917 CODE at 519.

¹⁴⁸ Rev. Michael Hastings, True Justice in Courts of Law According to St. Thomas and Approved Moral Teaching of the Church, in 3 SUMMA THEOLOGICA at 3346, see id., 3345-3356.
2.° Impede directly or indirectly the exercise of ecclesiastical jurisdiction, whether in the internal or external forum, having recourse in this to any lay power.\textsuperscript{149}

This Canon “punishes the civil authorities who abuse their power against the Church and those who request the civil authorities to interfere with the jurisdiction of the Church.” \textsuperscript{150} Additionally, punishment is prescribed for the specific offense of seeking a lay forum against a cleric:

If anyone dares, against the prescription of Canon 120, to drag before a lay judge a Cardinal of the HRC or a Legate of the Apostolic See, or a major Official of the Roman Curia for matters pertaining to their duties, or their own Ordinary, he contracts upon that fact excommunication specially reserved to the Apostolic See; if it concerns another Bishop, even merely titular, or an Abbot or Prelate of no one or another supreme Superior of a religious institute of pontifical right, he contracts automatic excommunication simply reserved to the Holy See; and finally, if not having obtained permission from the local Ordinary, one does likewise with another person enjoying the privilege of the forum, then, if a cleric, he incurs upon that fact suspension from office reserved to the Ordinary, while a layman shall be punished with an appropriate penalty for the gravity of the fault by his own Ordinary.\textsuperscript{151}

\textsuperscript{149} Canon 2234, in \textit{The 1917 Code}, at 740. See also Woywod, 2 PRACTICAL COMMENTARY, at 483. The consequences of the penalty of excommunication—including forbidding the excommunicated party to receive the Sacraments, indulgences, public prayers, or exercise any authority within the Church—are detailed at Canons 2257 through 2267. \textit{The 1917 Code} at 718-721; 2 Woywod, 2 PRACTICAL COMMENTARY at 439-443. Excommunication is often described as “reserved” to a forum, meaning that absolution, and a return to good standing in the Church, can only be granted to the entity to whom jurisdiction over the crime (or “delict”) is reserved. Woywod, 1 PRACTICAL COMMENTARY at 437-439. Either a case, or remission of a penalty, may be reserved to a forum. The concept of reservation in this sense is set forth in Canon 893, in \textit{The 1917 Code}, at 315-316.

\textsuperscript{150} Woywod, 2 PRACTICAL COMMENTARY, at 483. Additionally, if the party who seeks civil intervention is a cleric, there are additional penalties including “suspension from or even deprivation of any benefice, office, dignity, pension, or position which they may hold in the Church.” \textit{Id.} at 486; Canon 2236 § 1, in \textit{The 1917 Code}, at 740-741.

\textsuperscript{151} Canon 2341, \textit{The 1917 Code} at 742 (emphasis in original; editing marks omitted); Woywod, 2 PRACTICAL COMMENTARY at 491-493. Leaving aside the technical distinctions between the kinds of excommunication, Fr. Woywod notes that the severity of the punishment (here predicated on how high in the ecclesiastical hierarchy the offender must go to seek absolution, as well as whether any process is required prior to its taking effect) varies based upon the rank of the cleric whose privilege is violated, and the state of the offender—whether clerical or lay. Woywod further explains that “[t]hough the Code punishes with censures those only who sue clerics before laical judges without the permission of the authorities of the Church, it is nevertheless sinful to force them to appear as witnesses without obtaining the
The 1917 Code does leave open the prospect of clerics being summoned before lay judges with the permission of the clerical superior of the prospective defendant. At least in the case of lower level clergy, with respect to whom the permission of the appropriate local bishop, known as the “Ordinary”, is required, that bishop “should not refuse such permission without a just and serious reason, especially where the plaintiff is a lay person—all the more so, when the bishop has vainly endeavored to effect a friendly settlement between the parties.”

It should be noted that Fr. Woywod points out again that “[i]n the United States the government has never recognized the exemption of clerics from being sued in its courts” and cites the decree of the Third Council of Baltimore (1884) which “says that, in order to uphold ecclesiastical immunity as much as possible among us, the priests are strictly forbidden to sue another priest or cleric, even in temporal affairs, in the secular courts without previous written permission of the bishop.” 2 PRACTICAL COMMENTARY at 492-493. Fr. Woywod relies upon Henry Amans Ayrinhac’s construction of this explicit statement of the Council, combined with the lack of a similar proscription toward lay persons, and suggests that “lay persons are implicitly granted permission to sue clerics in the secular courts.”  Id. Fr. Ayrinhac suggests that the 1917 Code does not repeal what he characterizes as the implicit permission granted by the Third Plenary Council of Baltimore, and that the privilege must exist (that is, be recognized) in a nation for the Code to apply it, and that therefore “laymen may be considered as having the Ordinary’s necessary permission by custom and implicit general concession.”  H. A. Ayrinhac, V PENAL LEGISLATION IN THE NEW CODE OF CANON LAW at n. 279, pp. 262-263 (1920). This argument from implication by two well-respected canonists is worth consideration. It establishes (1) the Church’s desire to preserve the immunity to the maximum degree within the United States; (2) the possible tactical concession that such a goal is best served by granting permission (at least by implication) as to suits by laypersons, who are thus acting within the ambit of the Church’s permission; and (3) that such permission could be withdrawn at the Church’s decision. While this argument may be correct, whether the Code was in fact so applied within the United States with respect to suits against clergy by the laity is unclear. Both Woywod and Ayrinhac argue from the Council’s statements without providing any instances in which the possible implication was so understood and applied. However, the question as to whether suits in secular courts in ordinary civil or criminal cases were treated by the Church as having been authorized and is in any event beyond the scope of this Article, as it is clear that such was not the case as to sexual abuse claims.
In the specific context of sexual misconduct of priests, the Pio-Benedictine Code creates an inherently perilous situation for the victim; on the one hand, the 1917 Code requires any individual solicited by a priest in confession to “within one month denounce to the local Ordinary or to the Sacred Congregation of the H[oly] Office a priest accused of the delict of solicitation in confession.”154 However, the Code also provides that “[t]he only sin reserved to the Holy See by reason of being what it is, is false denunciation by which an innocent priest is accused of the crime of solicitation before ecclesiastical judges.”155

Similarly, in the context of confession:

Whoever personally or through others falsely denounces to Superiors a confessor of the crime of solicitation by that fact incurs excommunication reserved specially to the Apostolic See, from which case he cannot be absolved until the false denunciation is retracted formally and the damages that might have flowed therefrom are repaired to the best of one’s ability, and grave and long-lasting penances are also imposed. . .156

The priest who commits the crime of solicitation, by contrast, “shall be suspended from the celebration of Mass and from hearing sacramental confessions, and, if the gravity of his offense demands, shall be disqualified from the hearing of confessions. He shall also be deprived of all benefices and dignities, and of a passive and active vote, and be declared disqualifies for all of these, and in more serious cases he shall be punished

154 Canon 904, THE 1917 CODE at 318. See also Woywod, 1 PRACTICAL COMMENTARY at 449. As Father Woywod writes, and the text of the Canon itself states, the obligation to denounce a priest embodies prior law on the subject at least as far back as the constitution Sacramentum Poenitentiae issued by Pope Benedict XIV in 1741. Id. Pursuant to Canon 2368 § 2, “the faithful who knowingly fail to denounce him by whom they were solicited within one month . . . incur automatic excommunication . . .and shall not be absolved until after satisfying the obligation or seriously promising to satisfy it.” Id., THE 1917 CODE at 751; see also Woywod, 2 PRACTICAL COMMENTARY at 509 (same; discussing sources).
155 Canon 894, in THE 1917 CODE, at 316.
156 Canon 2363 in THE 1917 CODE, at 750. In the 1983 Code, this provision has been retained, albeit divided into different canons. 1983 CODE Canon 982; Canon1390 § 1.
with degradation.”\textsuperscript{157} Clerics who have “committed an offense against the sixth commandment with minors under sixteen years of age . . . shall be suspended, declared infamous, deprived of every office, benefice, dignity, or position that they may hold, and in more grievous cases, they shall be deposed.”\textsuperscript{158}

D. Decree Absolute: The Implementation of the Code

Two additional juridical documents need to be addressed to understand the canonical process regarding allegations of sexual abuse by priests under the 1917 Code.

1. \textit{Instructio}

The first, issued in 1922, is \textit{Instructio de Modo Procendi in Causis Sollicitacionis} (“\textit{Instructio}”).\textsuperscript{159} The \textit{Instructio}, authored by Cardinal Merry del Val, and approved by Pope Pius XI, is, quite literally, a secret document; its preamble states that it is “to be diligently stored in the secret archives of the Curia as strictly confidential. Nor is it to be published nor added to with any commentaries.”\textsuperscript{160} In it, the definition of the delict, or crime, of solicitation is somewhat clarified:

\begin{itemize}
  \item \textsuperscript{157} Woywod, 2 PRACTICAL COMMENTARY at 509 (summarizing Canon 2368 § 1); see also Canon 2368, in THE 1917 CODE at 751.
  \item \textsuperscript{158} Woywod, 2 PRACTICAL COMMENTARY at 503 (summarizing Canon 2359 § 1); see also Canon 2359 § 1 in THE 1917 CODE, at 748-749.
  \item \textsuperscript{159} The original Latin text is archived in pdf form at \url{http://www.bishop-accountability.org/archives/Wall/1922_06_09_Solicitation_Instruction_Latin.pdf}. An English translation, quoted here, is archived at \url{http://www.bishop-accountability.org/archives/Wall/1922_06_09_Solicitation_Instruction_English.htm}. The existence and authenticity vouched for in Rev. Thomas P. Doyle, O.P., A.W. Sipe, & Patrick J. Wall, SEX, PRIESTS & SACRED CODES: THE CATHOLIC CHURCH'S 2,000-YEAR PAPER TRAIL OF SEXUAL ABUSE (2006) at 247-48, 98, 329 n. 160 (citing Juan Ortego-Uhink, DE DELICTO SOLlicitationis (1954)); \textit{id.} at 328, n.158 (describing bishop-accountability.org as “a competent and reliable source of facts and data about the sexual abuse crisis” posting “the most complete library of documentation so far assembled”). Comparison between the Latin version and the English translation reveals two errors in the translation, referring to earlier Church decrees which are dated in the original to the 18\textsuperscript{th} and 19\textsuperscript{th} Centuries, but which are erroneously rendered as dating from the 20\textsuperscript{th} Century—1941 for 1741 (Id., tit. 1 § 16, citing Constitution of Benedict XIV \textit{Sacramentum Poenitentiae}) and 1967 for 1867 (Id., § 19, citing Instruction of the Holy Office). Because these errors could be assumed to reflect emendations to the document or even the possibility that the document is inauthentic, reference to the original is important.
  \item \textsuperscript{160} \textit{Instructio}, Preamble.
\end{itemize}
The crime of solicitation takes place when a priest tempts a penitent, whoever that person is, either in the act of sacramental confession, whether before or immediately afterwards, whether on the occasion or the pretext of confession, whether even outside the times for confession in the confessional or in a place other than that usually designated for the hearing of confessions or in a place chosen for the simulated purpose of hearing a confession. The object of this temptation is to solicit or provoke the penitent toward impure and obscene matters, whether by words or signs or nods of the head, whether by touch or by writing whether then or after the note has been read or whether he has had with that penitent prohibited and improper speech or activity with reckless daring.\footnote{Instructio, ¶ 1 (editing marks omitted).}

Under the Instructio, original jurisdiction over such cases lies with the Ordinary, although the case may be deferred to the Holy Office in Rome, or the Holy See may choose to exercise jurisdiction itself.\footnote{Id. ¶¶ 2-3.} In the event that the superiors of a cleric discover misconduct, unless the Ordinary forbids it having already accepted a denunciation, “there is nothing to prevent superiors themselves. . ., after additionally having administered salutary penances, to admonish and correct, and, if the case demands it, to remove him from some ministry. They will also be able to transfer him to another assignment.”\footnote{Id. ¶ 4.}

In accordance with the 1917 Code, the prosecutor (canonically termed the “promoter of justice”) and the defender, as well as the judges are all to be priests.\footnote{Id. ¶ 7, 5-7, citing Canon 1589, in THE 1917 CODE, at 531; see also Canon 1573 § 2, 4, id. at 525 (“officialis” and their assistants (“vice-officialis”) entrusted with the “ordinary power of judging” “must be priests, of intact reputation, doctors or otherwise experts in canon law, and not be less than thirty years of age”).} The Instructio provides for a heightened degree of secrecy than that which applies to ordinary cases:

Because, however, what is treated in these cases has to have a greater degree of care and observance so that those same matters be pursued in a most secretive way, and, after
they have been defined and given over to execution, they are to be restrained by a perpetual silence (Instruction of the Holy Office, February 20, 1867, n. 14), each and every person pertaining to the tribunal in any way or admitted to knowledge of the matters because of their office is to observe the strictest secret, which is commonly regarded as a secret of the Holy Office, in all matters and with all persons, under the penalty of excommunication *latae sententiae, ipso facto* [i.e., summary excommunication] and without any declaration [of such a penalty] having been incurred and reserved to the sole person of the Supreme Pontiff, even to the exclusion of the Sacred Penitentiary, are bound to observe [this secrecy] inviolably. Indeed by this law the Ordinaries are bound *ipso jure* or by the force of their own proper duty; the other helpers from the power of their oath [*ex iuramento*] which they must always take before they undertake their duties. And finally, [also] those who are delegated, interpolated, and informed in their absence by means of the precept [*ex praecepto*] in the letters of delegation, interpellation, [or of] information, imposing upon them with express mention of the secret of the Holy Office and of the aforementioned censure.

Accusers or denouncers and witnesses alike must always give the oath of secrecy in cases like these. Nevertheless, they are subject to no censure, unless by chance some censure has been threatened expressly against them in the very act of accusation, deposition, or interrogation. The accused, however, should be most seriously warned that he must maintain secrecy with all others, except with his own defender, under the penalty of suspension *a divinis* in case of a transgression to be incurred *ipso facto*.

While the procedural aspects of the *Instructio* are not precisely germane, two aspects are worth noting. First, the investigatory process under the *Instructio* involves a searching investigation of not just the accused, but of the accuser:

>[A]s soon as the Ordinary has accepted any denunciation of the crime of solicitation, either personally or through a specially delegated priest, he will summon two witnesses (of course, separately and with appropriate

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165 *Instructio*, at ¶¶ 11, 13 (brackets in and bracketed material in original). However, paragraph 23 of the *Instructio* states that upon signing the sworn denunciation, the accuser is “is to be administered the oath to maintain confidentiality, if necessary under pain of excommunication.”
circumspection), in so far as it is possible, from the ranks of the ecclesiastics. But it is far better, above any exception, to summon persons who are familiar with both the one denounced and the one denouncing. These persons, with the notary present (cf. n. 9) to put the interrogations and responses in writing, [the Ordinary] will interrogate them (Formula G) under the sanctity of an oath to tell the truth and to observe its secret nature, accompanied by the threat, if it seems necessary, of excommunication reserved to the Ordinary of the place or to the Holy See (cf. n. 13) concerning the life, morals and public reputation both of the one denounced and of the one denouncing. [They will be asked] whether they think that the one denouncing is worthy of credence; or whether, on the other hand, that person is capable of lying, of calumniating and of perjuring himself; and whether these persons know whether there has ever been any case of hatred, grudge or reason for enmity between the one denouncing and the denounced person.\textsuperscript{166}

The second procedural aspect of note deals with the questioning of the accused:

There should be a procedure to present the accusation to the person accused, according to formula P, having cautiously and most diligently made sure that the persons of the accused and especially of those denouncing him are not to be revealed, and, on the part of the accused, that he in no way violate the sacramental seal. Now if something in the heat of conversation slips out which seems to savor of either a direct or indirect violation of the seal, the judge should not permit this to be referred to in the Acts by the notary; and if, by chance, it has been inconsiderately [put into the Acts], he should order, as soon as he notices it, to be completely deleted. In every way the judge is to remember that it is never right for him to bind the accused by an oath to tell the truth (cf. Canon 1744).\textsuperscript{167}

\textsuperscript{166} \textit{Instructio}, tit. 2, ch. 1, ¶ 33. This procedure, while the equivalent of a grand jury determination of probable cause in its effect—that is, it allows the case to move on from investigation to adjudication—is reminiscent of the earliest form of jury determinations, in which the jurors were selected for their familiarity with the individuals and transaction, and were to use their own knowledge in determining the result. See Hall, ed. \textit{TREATISE COMMONLY CALLED GLANVILLE}, Bk. II ch. 10-18, at 31-35; Beames ed., \textit{A TRANSLATION OF GLANVILLE}, at 58-66. For a short, accessible account of the evolution of the jury from this voice of the community’s knowledge to its current role as an impartial finder of facts based solely on the evidence, see Leonard W. Levy, \textit{PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY} (1999).

\textsuperscript{167} \textit{Instructio}, tit. 3, ch. 3 ¶ 52.
In terms of penalties, in addition to those specified in Canon 2368, the *Instructio* also specifies that the severity of the penalty should be “based upon the gravity of the crime,” measured in light of:

[T]he number of persons solicited and their condition, as, for example, if they are minors in age or especially consecrated through religious vows to God; the form of solicitation, if perhaps, especially, it is joined with false teaching or false mysticism; the turpitude of the acts not only formal but also material and especially the connection of solicitation with other delicts; the length of the obscene conversation [between the parties involved]; the repetition of the crime, the recidivism after his admonition, and the obstinate malice of the solicitor.168

That reduction to the lay state is viewed as an extreme penalty is suggested by the prescription with respect to members of religious orders who are priests, whose degradation to the status of lay brothers “is only then imposed when, having weighed everything, it manifestly appears that the accused, immersed in the depths of malice in the abuse of his sacred ministry, combined with the grave scandal that is harmful to the faithful and their souls, exists to such a degree of foolhardiness and habit, so that there is not hope, humanly speaking, or almost no hope, of his amendment…”169 Additionally, “supplementary sanctions,” such as penances, spiritual exercises, a public acknowledgement of fault (“abjuration”) where the accused has confessed, special vigilance, and, where appropriate, it seems necessary for the amendment of the delinquent, for the removal of the near occasion [of soliciting in the future], or for the prevention of scandal or reparation for it, there should be added a prescription for a prohibition of remaining a certain place.”170

168 *Instructio*, tit. 3, ¶ 62 (editing marks and bracketed material in original).
169 *Instructio*, tit. 3, ¶ 63.
170 *Instructio*, tit. 3, ¶ 64 (a)-(d).
In such cases, the *Instructio* provides that “If any priest condemned of the crime of solicitation, or even only admonished, should transfer his residence to another territory, the Ordinary *a quo* [i.e., from whom the priest is leaving] should immediately warn the Ordinary *ad quem* [i.e., to whom the priest is taking residence] of the things that preceded that person and of his juridical status.”  

A bishop who accepts a denunciation should communicate that fact to the Holy Office, and to the Ordinary of the diocese in which the accused is resident, and should inform the Holy Office and the ecclesiastical superior of the accused of the outcome of the case.

This title of the *Instructio* concludes with an admonition that “[a]ll these official communications shall always be made under the secret of the Holy Office; and, since they concern the common good of the church to the greatest degree, the precept of doing these things obliges under serious sin [*sub gravi*].”

Finally, the *Instructio* deals with what it terms “the worst crime,” defined as “any obscene external deed, gravely sinful, perpetrated or attempted in any way by a cleric with a person of his own sex.” The *Instructio* provides that “[t]hose things that have been stated concerning the crime of solicitation up to this point are also valid for the worst crime, changing only those things necessary to be changed according to the nature of the matter.”

One such difference is that “the obligation of denunciation [is] exempted based on the positive law of the Church, unless perhaps it [the offense] has

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171 *Instructio*, tit. 4, ¶ 67 (editing marks and bracketed material in original). Similarly, “[i]f any priest suspended in a case of solicitation from hearing sacramental confessions but not from sacred preaching happens to go to another territory to preach, the Ordinary of this territory should be reminded by the prelate of the accused, whether secular or religious, that he cannot be utilized for hearing sacramental confessions.” Id. ¶ 69.

172 *Instructio*, tit. 4, ¶¶ 68-69.

173 *Instructio*, tit. 4, ¶ 70 (editing marks and bracketed material in original).

174 *Instructio*, tit. 5, ¶ 71.

175 *Instructio*, tit. 5, ¶ 72.
been joined with the crime of solicitation in sacramental confession.” The *Instructio* deems as “equivalent to the ‘worst crime’ as far as the penal effects: any obscene, external act, gravely sinful, perpetrated in any way by a cleric or attempted by him with youths of either sex or with brute animals (bestiality).” It is unclear whether the procedural exemption from the duty to denounce applies to these offenses, even absent a confessional setting.

2. *Crimen Sollicitationis*

In 1962, Pope John XXIII issued an Instruction of the Supreme Sacred Congregation of the Holy Office, entitled “On the Manner of Proceeding in Causes Involving the Crime of Solicitation,” which has become known by an abbreviated version of its Latin title, *Crimen Sollicitationis* (“Crimen”). The existence and contents of *Crumen* became known outside of bishops and others in the Roman Catholic hierarchy in 2003, after a copy of “it was leaked to lawyers for victims of sexual abuse by priests interested in bringing action against the Vatican.”

According to the so-called Murphy Report, the report of an Irish government commission chaired by Judge Yvonne Murphy, investigating handling by Church and State of allegations and suspicions of abuse by priests within the Archdiocese of Dublin, the *Instructio* and *Crumen*, each of which they parsed in terms of language and as applied

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176 *Instructio*, tit. 5, ¶ 72.
177 *Instructio*, tit. 5, ¶ 73. Regarding the appropriate penalties, see Canon 2359 § 2, in THE 1917 CODE, at 749, applicable both by its own express terms and incorporated by reference by *Instructio*, tit. 5, ¶ 72.
179 Robertson’s work is well researched, and his factual premises are reliable as far as they go; however, the breadth of his argument and the scope of the ground he covers is such that he paints with a broad brush, and occasionally falls into a polemical tone which is unhelpful, if understandable.
179 Robertson, THE CASE OF THE POPE, at 48 ¶ 65.
in the Archdiocese, “[t]he instructions contained in the two documents appear to be identical.”

Against the notion that the *Instructio* and *Crimen* were intended to implement a deliberate cover-up of such offenses, Professor the Rev. John Coughlin of Notre Dame School of Law points out that the Code, the *Instructio*, and *Crimen* “expressly required anyone who knew about the abuse of the child to make a denunciation of the cleric to the appropriate church official under pain of excommunication.”

Fr. Coughlin’s defense of the canon law’s—and the *Instructio’s* and *Crimen’s*—confidentiality requirements is somewhat less convincing:

> [A]lthough canon law stipulates confidentiality in the process, the penalty of removal from the clerical state is not a confidential matter in canon law but an external and verifiable act. Moreover, the obligation of confidentiality referred only to the canonical process of the case, and in my view, it would not have prohibited reporting a crime to civil authorities. In addition to all the above problems with the assertion of international cover-up on the part of Church hierarchy, it also questionable as to whether the Instruction ever enjoyed force of law in the Church due to it lack of promulgation. Certainly, the Instruction fails to prove that the Holy See intended to cover-up cases of clergy abuse.

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180 Commission of Investigation’s Report Into the Catholic Archdiocese of Dublin, July 2009 (“Murphy Report”), archived at [http://www.justice.ie/en/JELR/Pages/PB09000504](http://www.justice.ie/en/JELR/Pages/PB09000504) (visited in March 5, 2011), at ¶¶ 4.20, 4.18-4.20. What few differences may be discerned by a comparison between the two documents as cited here are extremely minor, and may plausibly be attributed to different translators working with the respective documents. According to the Murphy Report, “[t]he main difference between the 1922 and the 1962 documents is that the latter extended the instructions contained in the 1922 document to members of religious orders.” Id. at ¶ 4.20. As quoted above, however, *Instructio* may reasonably be read as applying to religious—a discrepancy which may result from the fact that the Murphy Commission had yet a different set of translations. Id. at ¶ 4.19.

Fr. Coughlin’s reading of the obligation of confidentiality as not prohibiting recourse to the civil authorities is a permissible reading—like Woywod’s contention that the Council of Baltimore implicitly granted permission to seek recourse against priests in secular courts—that can be put forward as a theory by a learned canonist. But it is far from certain, and Fr. Coughlin does not, to his credit, try to advance the theory as the only reading of the *Instructio* and *Crimen*.

His conclusion that *Crimen* and its predecessor does not establish a cover up is at variance with the reading of it by non-Catholic scholars, such as Geoffrey Robertson and Marci Hamilton. Roberston in particular rejects Coughlin’s more benign reading of *Crimen* (and thus of the *Instructio*), pointing out that by its terms, the accuser, after he signs the denunciation under oath, “is to be administered the oath to maintain confidentiality, of necessity under pain of excommunication;” Robertson notes that “a child or teenager, brought up as a Catholic, is not going to risk excommunication by taking his story to the police, let alone to the press.” Hamilton cites multiple grand jury reports, the express terms of *Crimen* and other scholarly writings to support her

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184 Robertson, THE CASE OF THE POPE, at 52 (quoting *Crimen* at ¶ 23, reproduced at id., 190-191). However, the text of Crimen reproduced in Robertson’s appendix states that the oath is to be administered “if necessary under pain of excommunication,” (id. at 192; emphasis added) an error in Robertson’s quotation in the main text that somewhat weakens his point. The text quoted in the Appendix is consistent with the *Instructio* and *Crimen*. That said, it should be noted that the case of Cardinal Sean Brady of Ireland, as reported in the press, provides a specific instance supporting the contention that complainants “were required to sign affidavits swearing that they would not talk to anybody except priests given special permission by the tribunal hearings, known in church parlance as “ecclesiastical proceedings.” Justine McCarthy, Cardinal Sean Brady in “Sex Abuse Cover-up,” *THE TIMES* (LONDON), March 14, 2010, archived at http://www.timesonline.co.uk/tol/news/world/ireland/article7061133.ece (visited April 23, 2011). Cardinal Brady’s spokesman confirmed that, in 1975, acting in his capacity as secretary to the diocese of Kilmore, he complainants signed undertakings on oath to respect the confidentiality of the information-gathering process.” *Id.* Similar requirements of confidentiality can be seen in the United States, see, e.g., Affidavit of Maurice J. Dingman, Chancellor of the Diocese of Davenport, In re Rev. James Janssen, sworn to October 3, 1958, archived at http://www.bishop-accountability.org/ia-davenport/archives/jnw-ex-19-J-57.pdf
contention that the Catholic Church—like other religious bodies—is guilty of “not going to authorities when abuse is reported to the institution” and of “imposing secrecy requirements on clergy and victims.”  

These decrees, and the provisions of the Code governing clerical offenses against the laity discipline establish an alternative legal system, which, at least based on the text of the law, has exclusive jurisdiction over such offenses. Moreover, although the text of the Code presents an especially harsh set of alternatives for a penitent who has been abused in a confessional setting, the Code and the decrees promulgated during its effective duration, place the victim at risk of significant and humiliating sanctions in the event the accusation is not believed. At the time the Code was enacted, far more so than today, the prospect of denouncing a priest, even absent the fear of formal expulsion from the Church resulted in significant social costs, especially in majority Catholic communities. The victim of sexual abuse, in addition to all the other social disincentives to come forward, was further threatened with a “cruel trilemma” of excommunication (only privately known to the victim) for failure to report his or her own victimization within a month, public excommunication for false denunciation if disbelieved, or the threat of excommunication for bringing the case before a secular forum.

185 Hamilton, Clergy Abuse and Cover-Up, 29 Card. L. Rev. at 227. For further evidence and reports establishing this point, see infra note 189.
186 See Doyle, et al., SEX, PRIESTS AND SECRET CODES, at 230-249.
187 The phrase “cruel trilemma” originated in the Supreme Court’s opinion in Murphy v. Waterfront Commn., of New York Harbor, 378 U.S. 52, 55 (1964), “where it was used to explain the importance of a suspect’s Fifth Amendment right to remain silent when subpoenaed to testify in an official inquiry. Without that right, the opinion said, he would be exposed ‘to the cruel trilemma of self-accusation, perjury or contempt.’” Brogan v. United States, 522 U.S. 398, 404 (1998) (summarizing and quoting Murphy).
E. The 1983 Code and its Implementation

While the 1983 Code does not expressly enshrine clerical immunity as did the 1917 Code, and while its procedures were in some ways different, the Murphy Report concluded that under the 1983 Code, and the subsequent Vatican addenda, secrecy remained paramount:

There is no doubt that the code of canon law places a very high value on the secrecy of the canonical process. This obligation of secrecy was described as a “secret of the Holy Office” in the 1922/1962 documents, the penalty for breach of which was excommunication and which breach was a sin which could only be absolved by a bishop. In hearings before the Commission, it was notable that Church officials preferred to refer to it now as a duty of confidentiality. Whichever it be, it is in stark contrast to the civil law which requires the public administration of justice. Moreover, an obligation to secrecy/confidentiality on the part of participants in a canonical process could undoubtedly constitute an inhibition on reporting child sexual abuse to the civil authorities or others.

It is not clear from the evidence or the documents available to the Commission whether the obligation of confidentiality relates only to what takes place during the canonical process or whether it extends to the underlying details of complaint.

A number of complainants, however, spoke of being urged, when making a complaint outside the canonical process, to keep it confidential. According to the evidence of Monsignor Dolan, which the Commission regards as truthful and helpful, a number of complainants wished to make complaints to the church authorities only because, ironically, they did not trust the confidentiality of the civil authorities.

Another aspect of the emphasis on the secrecy of the canonical process is it was very definitely a process in which the complainant (like the accused) was subjected to questioning but no information was given to the complainant. This is illustrated graphically in a handwritten note made by Fr. Dolan (before he became chancellor)
while attending a lecture by another canon lawyer entitled “Preliminary Investigation, Canonical responses and Processes in Cases of sexual misconduct by Church personnel with minors”. Fr. Dolan’s handwritten note records in relation to the examination of the witness: “gain his knowledge/tell him nothing. It is important to emphasise that this statement may not be as sinister as it might be made to appear but it does indicate that the mode of procedure was to extract from the complainant what he knew without in any way informing him as to the process, the other evidence available, the standing of the accused or other matters. 188

The Murphy Report’s conclusions are consistent with the findings of investigators in the United States, and elsewhere; the process in place under both the 1917 Code and the 1983 Code stressed confidentiality both on the part of the victims and of the canonical authorities investigating allegations of abuse, and consciously avoided cooperation with law enforcement.189

188 Murphy Report, at ¶ 4.82-4.85 (emphasis in original).
189 In addition to the Murphy Report, similar conclusions were reached by the Attorney General of Massachusetts, see Thomas F. Reilly, et al., THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON: A REPORT BY THE ATTORNEY GENERAL (2003), archived at http://www.bishop-accountability.org/downloads/archdiocese.pdf (visited March 5, 2011) at 53, 30-54; see also Lynne Abraham, et al., REPORT OF THE GRAND JURY, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, No. 03-00-239 archived at http://www.bishop-accountability.org/pa_philadelphia/Philly_GJ_report.htm (visited March 5, 2011), at 38-45 (2005); R. Seth Williams, et al., IN RE COUNTY INVESTIGATING GRAND JURY XXIII: REPORT OF THE GRAND JURY, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, No. 0009901-2008, archived at http://www.bishop-accountability.org/reports/2011_01_21_Philadelphia_Grand_Jury_Final_Report_Clergy_Abuse_2.pdf, visited March 7, 2011, at 1, et seq. (describing circumstances since prior report, concluding “[t]he rapist priests we accuse were well known to the Secretary of Clergy, but he cloaked their conduct and put them in place to do it again. The procedures implemented by the Archdiocese to help victims are in fact designed to help the abusers, and the Archdiocese itself”). These reports are consistent with earlier cases in which similar insistence on confidentiality combined with an unwillingness to report such crimes to secular authorities. See, e.g., Jason Berry, LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN (1992) at 5-147; Investigative Staff of the Boston Globe, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (2002), at 34-53, (Boston Geoghan case), 98-139 (summarizing cases nationwide). Similarly, the Vatican, as recently as May 2011, has promulgated non-enforceable guidelines which “note that the sexual abuse of minors by clerics is not only an offense punishable under church law, but also ‘a crime prosecuted by civil law.’” Rachel Donadio, “Vatican Tells Bishops to Set Clear Strategy Against Abuse,” THE NEW YORK TIMES, May 17, 2011, at A 4, col. 1. Despite this, the guidelines do not require that even credible allegations of abuse be reported to civil authorities. As the Times states, citing Vatican spokesman, Rev. Frederico Lombardi, “the Vatican could not issue universal requirements for mandatory reporting to civil authorities because it also operated in countries with repressive governments. Each reality is different, culturally and from the point of each countries’ laws,’ he said.” Id.
Defenders of canon law in the context of the sex abuse crisis have propounded an alternate thesis: that the sex abuse crisis was exacerbated by not the application of canon law, but rather the failure to apply it. As Rev. John J. Coughlin has concluded, “it does seem clear that over the course of several decades, many bishops and religious superiors declined to implement and enforce the rule of canon law. This failure violated not only the positive law of the church, but also the normative principles of natural and divine justice.”

This view is not without support; in addition to Fr. Coughlin’s own analysis (predicated on an empirical study commissioned by the Church to be performed by researchers at the John Jay College of Criminal Justice in 2004), the Murphy Report states that “[t]he main problem with these procedural rules was that virtually no one appears to have known anything about them – including the people who were supposed to implement them. It appears that both documents were circulated only to bishops and

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190 Coughlin, THE FAILURE OF THE RULE OF LAW at 9. Coughlin cites as the overriding reason for this failure to apply canon law three causes: (1) “First and most important, the years following Vatican II witnessed a decreased emphasis on the traditional spiritual discipline of Christian life” (id. at 25-26); (2) “canonists advised bishops in the United States to adopt a pastoral approach rather than to utilize the canonical process” (id. at 26); and (3) “the bishops opted for a therapeutic approach to the exclusion of correcting the grave injury through the rule of law” (id. at 27). Father Coughlin states further that “the ecclesial ambiance in the wake of Vatican II represented a swing of the pendulum from the pre-conciliar legalism toward the antinomian.” Id. at 25. By contrast, he describes the response of the United States bishops to the crisis in the first years of this century as “a legalistic response,” creating a “strict liability” regime which failed due process both as to the adjudicative process and failure to be sufficiently discriminating as to penalty in individual cases. Id. at 30-32. He credits the Holy See with vindicating the principles, deeply embedded in both canon and American constitutional law, of due process and individualized sentencing. Fr. Coughlin concludes that “Antinomianism stifled the rule of law in permitting the grave crime to go unpunished, while legalism undermined confidence in canon law by creating the impression of a lack of justice for victims and accused alike.” Id. at 33. One problem with Fr. Coughlin’s analysis, and his assumption that post-Vatican II antinomianism is the root cause of the failure of canon law is the clear paper trail of similar failures going back at least a decade before Vatican II. See, e.g., the correspondence of Father Gerald M.C. Fitzgerald and Church authorities commencing in 1952, and reaching the Vatican itself in 1963—the year of Vatican II. Laurie Goodstein, “Early Alarm for Church on Abusers,” THE NEW YORK TIMES, April 2, 2009, archived at http://www.nytimes.com/2009/04/03/us/03church.html?adxnnl=1&adxnnlx=1303572547-Go1062XZmUasnOit Ouowd7w (visited April 23, 2011). The correspondence itself is also available on the Times’ website: http://documents.nytimes.com/father-gerald-fitzgerald-correspondence-priest-sex-abuse#p=1 (visited April 23, 2011).
under terms of secrecy. Each document stated that it was to be kept in the secret archive to which only the bishop had access.\textsuperscript{191}

To his credit, Father Coughlin asks one of the hard questions:

When Cardinal Law, then the Archbishop of Boston, claimed that canon law prevented him from protecting the victims, they responded clearly: “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.” Given the failure of the rule of canon law to protect them, the victims quite understandably might attach little value to it.\textsuperscript{192}

\textsuperscript{191} Murphy Report at ¶ 4.21.

\textsuperscript{192} Coughlin, THE FAILURE OF CANON LAW, at 33-34, quoting BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH at 153. The remainder of this section of Coughlin’s work addresses questions not germane to the instant inquiry. He addresses the question of mandatory celibacy in the Catholic priesthood, questioning the extent to which empirical evidence supports claims that celibacy plays a role in drawing aspirants to the priesthood who are prone to abusive behavior, and indeed whether Catholic priests were more disposed to such behavior than other groups. \textit{Id.} at 34-42. Coughlin acknowledges that some of the data tends to support critics of the Church, and, in any event, this Article addresses not the merits of mandatory celibacy, but rather the Church’s response to the problem on hand. Moreover, as Coughlin notes, the arguments of the defenders of mandatory celibacy are disputed in Doyle, et al, SEX, PRIESTS AND SECRET CODES, at 58-64.

Coughlin also examines Phillip Jenkins’ claim that the crisis in the 1980s led to the media’s “constructing a new social reality” which revived Nineteenth Century anti-Catholic stereotypes. \textit{Id.} at 43-45 (discussing Jenkins, PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS (1996)). Although this argument, like that surrounding celibacy plays no role in this analysis, and Coughlin does not endorse Jenkins’ thesis, any fair-minded reader of the literature—of Berry, Doyle, of the Boston Globe and of the Murphy Report, to name but a few, cannot but deem this contention absurd. The volumes are united by the comfortable expectation each of the authors and the victims’ families are depicted as having when first going to the Church authorities that they will do justice to the victims. Indeed, many of the most stringent critics of the Church authorities in the crisis are themselves Catholic—Doyle, Sipe, Wall, Berry, each identifies as Catholic. Moreover, the international scope of the problem is now much more clear than when Jenkins wrote, and his thesis has been irretrievably damaged by the similarity of patterns of abuse and protection of the abusers in Ireland, England, Belgium, Germany, Austria, and Latin America. (\textit{See}, e.g., Robertson, THE CASE OF THE POPE, at 24-37 (¶¶ 30-47)); Brian Whitmore & Charles M. Sennott, Around the World, Clerical Sex Abuse Takes a Toll, THE BOSTON GLOBE, Dec. 14, 2002, archived at: http://www.boston.com/globe/spotlight/abuse/stories3/121402_failings.htm (visited April 23, 2011). As Fr. Coughlin readily admits, “[i]t remains the proper role of the media in a democratic society to expose such a problem to public scrutiny.” THE FAILURE OF CANON LAW, at 44.

Finally, Fr. Coughlin addresses the theological dimensions of canon law, its nature as “law” within the Catholic community, and the harms done to its functioning as law by either the extreme of antinomianism or legalism, drawing on secular jurisprudential scholars from Kelsen to Dworkin to illustrate the need for both the reliable functioning of the rule of law and its need to provide due process and individualized determinations as to penalty, whether “medicinal” (reconciling the offender to God and the community or “vindictive” (seeking to provide retributive justice). \textit{Id.} at 45-60.
However, he does not address the implication of this question: the role of the secular state in view of the fact that “canon law’s limitation does not excuse the injury caused by a priest to a victim of sexual abuse or by church authorities in covering-up the crime.” Rather, Father Coughlin’s solution, however, is indicative; he desires a re-commitment to the proper application of canon law, and argues such a re-commitment “can dispose injured individuals and communities to retrieve a sense of justice that facilitates healing and forgiveness.”

III. **School for Scandal: The Constitutionalization of Canon Law**

In 1993, Pope John Paul II issued a letter to the American bishops in which he, for the first time, addressed the sex abuse crisis. The letter opens with an epigraph: “Woe to the world because of scandals!” The 1993 Letter continues:

> During these last months I have become aware of how much you, the Pastors of the Church in the United States, together with all the faithful, are suffering because of certain cases of scandal given by members of the clergy. During the *ad Limina* visits many times the conversation has turned to this problem of how the sins of clerics have shocked the moral sensibilities of many and become an occasion of sin for others. The Gospel word “woe” has a special meaning, especially when Christ applies it to cases of scandal, and first of all to the scandal “of the little ones”

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193 Coughlin, *The Failure of Canon Law* at 45.
194 Coughlin, *The Failure of Canon Law* at 60. Similarly, the release of the second study performed by researched at John Jay College of Criminal Justice commissioned by the Church, released May 17, 2011, seems to presuppose that reporting to law enforcement was not a response by the church hierarchy, as revealed by an interesting gap in the questions posed to church authorities in the survey: No questions were asked to elicit whether or not the diocese or religious community had brought the allegations of abuse to the attention of law enforcement. See Appendix A1.1.2 (Diocesan Profile) archived at [http://www.usccb.org/nrb/johnjaystudy/dio.pdf](http://www.usccb.org/nrb/johnjaystudy/dio.pdf) (visited May 24, 2011); Appendix A1.1.3 (Religious Order Profile), archived at [http://www.usccb.org/nrb/johnjaystudy/order.pdf](http://www.usccb.org/nrb/johnjaystudy/order.pdf) (visited May 24, 2011); Appendix A1.1.4 (“Clergy Survey”), archived at [http://www.usccb.org/nrb/johnjaystudy/cleric.pdf](http://www.usccb.org/nrb/johnjaystudy/cleric.pdf) (visited May 24, 2011). Rather extraordinarily, the John Jay 2011 Study, which measured, inter alia, ecclesiastical responses to the crisis, did not include bringing in secular law enforcement as one of the potential responses.
(Cf. ibid. 18:6). How severe are Christ’s words when he speaks of such scandal, how great must be that evil if “for him who gives scandal it would be better to have a great millstone hung around his neck and to be drowned in the depths of the sea” (cf. ibid.).

The vast majority of Bishops and priests are devoted followers of Christ, ardent workers in his vineyard, and men who are deeply sensitive to the needs of their brothers and sisters. That is why I am deeply pained, like you, when it seems that the words of Christ can be applied to some ministers of the altar. Since Christ calls them his “friends” (Jn. 15:15), their sin – the sin of giving scandal to the innocent – must pain his heart indeed. Therefore, I fully share your sorrow and your concern, especially your concern for the victims so seriously hurt by these misdeeds.

Every sinner who follows the way of repentance, conversion and pardon can call on the mercy of God, and you in particular must encourage and assist those who stray to be reconciled and find peace of conscience. There is also the question of the human means for responding to this evil. The canonical penalties which are provided for certain offenses and which give a social expression of disapproval for the evil are fully justified . . .

I would also draw your attention to another aspect of the whole question. While acknowledging the right to due freedom of information, one cannot acquiesce in treating moral evil as an occasion for sensationalism. Public opinion often feeds on sensationalism and the mass media play a particular role therein. In fact, the search for sensationalism leads to the loss of something which is essential to the morality of society. Harm is done to the fundamental right of individuals not to be easily exposed to the ridicule of public opinion; even more, a distorted image of human life is created. Moreover, by making a moral offense the object of sensationalism, without reference to the dignity of human conscience, one acts in a direction which is in fact opposed to the pursuit of the moral good. There is already sufficient proof that the prevalence of violence and impropriety in the mass media has become a source of scandal. Evil can indeed be sensational, but the sensationalism surrounding it is always dangerous for morality.
Therefore, the words of Christ about scandal apply also to all those persons and institutions, often anonymous, that through sensationalism in various ways open the door to evil in the conscience and behavior of vast sectors of society, especially among the young who are particularly vulnerable. “Woe to the world because of scandals!” Woe to societies where scandal becomes an everyday event.

So then, Venerable Brothers, you are faced with two levels of serious responsibility: in relation to the clerics through whom scandal comes and their innocent victims, but also in relation to the whole of society systematically threatened by scandal and responsible for it. A great effort is needed to halt the trivializing of the great things of God and man.

I ask you to reflect together with the priests, who are your co-workers, and with the laity, and to respond with all the means at your disposal. Among these means, the first and most important is prayer: ardent, humble, confident prayer. This whole sad question must be placed in a context which is not exclusively human; it must be freed from being considered commonplace. Prayer makes us aware that everything—even evil—finds its principal and definitive reference point in God. In him every sinner can be raised up again. In this way sin will not become an unfortunate cause of sensationalism, but rather the occasion for an interior call, as Christ has said: “Repent” (Mt. 4:17). “The Lord is near” (Phil. 4:5).

Yes, dear Brothers, America needs much prayer—lest it lose its soul. We are one in this prayer, remembering the words of the Redeemer: “Watch and pray, that you may not enter into temptation” (Mk. 14:38) . . . . 196

So long an extract from the 1993 Letter is required to demonstrate several aspects of the Pope’s response. First, the Pope spends two of the eight paragraphs of the 1993 Letter addressing the sexual abuse itself—one pointing out the severity of the offense in terms of the Gospel, and one praising the “vast majority” of bishops and priests, and noting “[t]hat is why I am deeply pained, like you,” at the applicability of Jesus’s

196 Id. (emphasis in original).
condemnation to “some ministers of the altar,” which must pain His heart. He then adds, at the end of the paragraph, that he shares the American bishops’ sorrow and concern, especially that for the victims. In the third paragraph, John Paul speaks of the need for reconciliation of those offending priests, and endorses the employment of canonical penalties.

From there, the 1993 Letter shifts to the harm threatened to the Church and society posed by sensationalism, and by scandal arising from these offenses. Two paragraphs delineate this concern, and the America bishops are charged with the avoidance of scandal as a co-ordinate responsibility in addressing the crisis. Notably, the remainder of the 1993 Letter lays more stress on the avoidance of scandal than on addressing abuse, and no discussion at all is afforded the question of duties to secular authority. Additionally, of course, the problem is posed as a purely American one, with no acknowledgment that the Church in other nations had similar issues, and that, in fact, similar complaints had been posed in other nations. It is America which is in danger of losing its soul, not the Catholic faithful throughout the world, let alone the Church or its hierarchy.

The emphasis on scandal, though, hearkens back to Cardinal Newman’s Preface to *The Via Media*, and Newman’s analysis helps contextualize the hierarchy’s response to

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each of the three waves of reportage which constitute the crisis—the 1980s wave,
addressed in the 1993 Letter, the 2000 wave which gave rise to new Vatican procedures,
and the current (2010-present) wave which contextualized the American experience in
light of other countries’ experience, and shattered the oft-proffered rationale that
American society was causative, and not the Church’s personnel.

The 1993 Letter prefigured the response of Church authorities in many ways.

First, the persistent denigration of the media and those who react with anger to the crimes
as bearers of “scandal” or even “petty gossip” has marked the reaction to the present.198

198 On Palm Sunday, 2010, Pope Benedict, celebrating the 25th World Youth Day, pointedly stated in his
address that Jesus leads Christians to “life in accordance with the truth; to courage that does not let itself be
intimidated by the gossip of prevalent opinions; to patience that bears with and sustains the other.” Homily
of His Holiness, Pope Benedict XVI, archived at http://www.vatican.va/holy_father/benedict_xvi/homilies/2010/documents/hf_ben-
xvi_hom_20100328_palm-sunday_en.html (visited April 30, 2011). Rightly or wrongly, this statement was
widely perceived as a jab at the then-mounting media pressure on the Pope to address concerns regarding
his own handling of abuse allegations “both when he was archbishop of Munich and when he headed the
Vatican's doctrinal office.” Mark Tran, “Pope Benedict Condemns ‘Petty Gossip’ Over Child Sexual
(visited April 30, 2011); see also Robertson, THE CASE OF THE POPE, at 40.

Regardless of the Pope’s intention in the Palm Sunday homily, the Vatican and the hierarchy have been
quick to blame the media for covering these stories. On Good Friday, 2010, Father Raneiro Cantalamessa,
preacher of the papal household, stated in his homily before the Pope that Jews, who “know from
experience what it means to be victims of collective violence, and also because of this they are quick to
recognize the recurring symptoms,” could understand the climate in which the Church found itself as a
result of the scandal, quoting a letter from an unnamed Jewish friend, stating that the author was “following
the violent and concentric attacks against the church, the pope and all the faithful by the whole world, . . .
The use of stereotypes, the passing from personal responsibility and guilt to a collective guilt, remind me of
the more shameful aspects of anti-Semitism.” Daniel J. Wakin & Rachel Donadio, “Vatican Priest Likens
Criticism Over Abuse to Anti-Semitism,” THE NEW YORK TIMES, April 2, 2010, archived at
article quotes Vatican officials as having described criticisms of Pope Benedict’s handling of abuse
allegations in Munich and as prefect of the CDF as variously described the reports as “‘deceitful,’ an effort
to undermine the church and a ‘defamatory campaign.’” Id. Also in 2010, the Dean of the College of
Cardinals, Cardinal Angelo Sodano, “praised the Pope to his face for standing up to chiacciericco (‘petty
gossip’) and, almost blasphemously, likened his trials to those of Christ when He was repeatedly
York Timothy Dolan described the reportage in similar terms, stating that the press as seeming “frenzied to
implicate the man who, perhaps more than anyone else has been the leader in purification, reform, and
renewal that the Church so needs,” and as marred by “inaccuracy, bias and hyperbole,” none of which he
specified. Abp. Dolan described the Pope as “our earthly shepherd now suffering some of the same unjust
accusations, shouts of the mob, and scourging at the pillar, as did Jesus.” Abp. Timothy Dolan, Remarks at
Second, the search for causes outside the Church—American society, or the sexual revolution, before the international scope of the problem was as clear as it is today,\(^{199}\) homosexuality in the current wave—continues.\(^{200}\) These efforts to divert, or at any rate, dilute, the moral blame could reasonably be viewed as an exercise in preserving the Church’s moral authority, or, at any rate, changing the subject to one in which the institutional Church can speak not as a penitent, but in its more comfortable and familiar role of teacher.

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\(^{199}\) Most recently, the five year study conducted by researchers at the John Jay College of Criminal Justice has been described as stating that “the abuse occurred because priests who were poorly prepared and monitored, and were under stress, landed amid the social and sexual turmoil of the 1960s and ‘70s.” Laurie Goodstein, “1960s Culture Cited as Cause of Priest Abuse,” THE NEW YORK TIMES, May 18, 2011 at A 1, col. 1. The Times article goes on to state that “the blame Woodstock’ explanation has been floated by bishops since the church was engulfed by scandal in 2002, and by Pope Benedict XVI after it erupted in Europe in 2010.” Id. The complete 2011 John Jay Report is available at the United States Conference of Catholic Bishops website, at [http://www.usccb.org/nrb/johnjaystudy/](http://www.usccb.org/nrb/johnjaystudy/) (visited May 24, 2011).


\(^{200}\) Ruth Gledhill & Richard Owen, “Top Cardinal Tarcisio Bertone Blames Paedophile Crisis on Homosexuals,” THE TIMES (LONDON), April 14, 2010, archived at [http://www.timesonline.co.uk/tol/comment/faith/article7096149.ece](http://www.timesonline.co.uk/tol/comment/faith/article7096149.ece) (visited on April 23, 2011) (quoting Vatican Secretary of State Bertone as saying that “[m]any psychologists and psychiatrists have demonstrated that there is no relationship between celibacy and paedophilia. But many others have demonstrated, I have been told recently, that there is a relationship between homosexuality and paedophilia. That is true. That is the problem.”)
Similarly, Pope Benedict in his letter to the bishops of Ireland sounded a note not of personal penitence, but criticized the Irish prelates for their response to the crisis as though the rest of the Church’s had been somehow different:

it is with great concern that I write to you as Pastor of the universal Church. Like yourselves, I have been deeply disturbed by the information which has come to light regarding the abuse of children and vulnerable young people by members of the Church in Ireland, particularly by priests and religious. I can only share in the dismay and the sense of betrayal that so many of you have experienced on learning of these sinful and criminal acts and the way Church authorities in Ireland dealt with them.

The Pastoral Letter further states:

On several occasions since my election to the See of Peter, I have met with victims of sexual abuse, as indeed I am ready to do in the future. I have sat with them, I have listened to their stories, I have acknowledged their suffering, and I have prayed with them and for them. Earlier in my pontificate, in my concern to address this matter, I asked the bishops of Ireland, “to establish the truth of what happened in the past, to take whatever steps are necessary to prevent it from occurring again, to ensure that the principles of justice are fully respected, and above all, to bring healing to the victims and to all those affected by these egregious crimes”

With this Letter, I wish to exhort all of you, as God’s people in Ireland, to reflect on the wounds inflicted on Christ’s body, the sometimes painful remedies needed to bind and heal them, and the need for unity, charity and mutual support in the long-term process of restoration and ecclesial renewal.

In the Pastoral Letter, it is fair to say, the Pope is speaking as with an undiminished and unsullied moral authority and as if he were almost an outsider to the

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202 *Id.* (citation omitted) (emphasis in original).
situation, despite the fact that the Pastoral Letter was issued nearly a full decade since his predecessor John Paul II invested full authority over investigating and remediating allegations of sexual abuse by clergy in the CDF, and thus in then-Cardinal Ratzinger.\footnote{See Pope John Paul II, \textit{Sacramentum Sanctitatis Tutela}, April 30, 2001 at Art. IV § 1, archived at http://www.bishop-accountability.org/resources/resource-files/churchdocs/SacramentorumAndNormaeEnglish.htm (visited on May 7, 2011). The original Latin text is posted on the Vatican website, but without English translation, at http://www.vatican.va/holy_father/john_paul_ii/motu_proprio/documents/hf_jp-ii_motu-proprio_20020110_sacramentorum-sanctitatis-tutela_lt.html (visited May 7, 2011).}

It should be noted that even before 2001, the CDF and Cardinal Ratzinger had canonical cognizance of at least some delicts involving sexual abuse of minors, and appears to have exercised in at least some cases jurisdiction beyond those strictly mandated by the Code.\footnote{See, e.g., Laurie Goodstein & Michael Luo, “Pope Put Off Punishing Abusive Priest,” \textit{The New York Times}, April 9, 2010, archived at http://www.nytimes.com/2010/04/10/world/europe/10pope.html (visited May 7, 2011). The case of Fr. Stephen Kiesle, whose laicization was requested from the CDF and Cardinal Ratzinger in the first instance in 1981, and, after repeated requests was denied, in part because of the abusive priest’s youth in a letter signed by the then-Cardinal in 1985 did not appear to be canonically before the CDF, but nonetheless was slowed by Ratzinger’s letter. \textit{Id.}} The boldness of the hierarchy’s assumption that its moral authority remains pristine is reminiscent of Cardinal Newman’s description of the Church’s acting to preserve its ability to govern and its legitimacy in the eyes of the faithful.

Two phenomena, both ably chronicled by Marci A. Hamilton, are more explicable in light of the Church’s internal jurisprudence and history examined here. These are first, what Hamilton calls the “rule against scandal,” present in many religions, but named for the Roman Catholic articulation,\footnote{See Marci A. Hamilton, \textit{The Rule Against Scandal}, Paper Prepared for Constitutional Law Schmooze, Feb. 27-28, 2009, at 5-8, archived at http://digitalcommons.law.umd.edu/cgi/viewcontent.cgi?article=1105&context=schmooze_papers (visited May 7, 2011).} and second, the church autonomy doctrine, which deploys the First Amendment’s Free Exercise Clause to argue for immunity from civil or
criminal consequences flowing under even neutral secular laws in the context of church internal decision making.  

The former, of course, is quite obvious: the prevention of scandal, as enjoined by Pope John Paul II in his 1993 Pastoral Encyclical, is entirely consistent with Newman’s defense of the Church’s “regal function”, and the use of methods which might otherwise be deemed ethically improper or, at a minimum, dubious, can seem justified in the service of this function. So the pressuring of victims and families to remain silent, to settle claims with confidentiality provisions; the use of aggressive questioning of victims at depositions; the search for villains outside the Church and the scapegoating of media by clergy and surrogates, all these tactics should be understood as ploys justified by the service of a higher purpose.

More fundamental, however, is the Church autonomy doctrine. More than a mere deflection of blame, in an effort to avoid the corresponding loss of moral authority, the church autonomy doctrine is nothing less than an effort to, in the United States, constitutionalize as much as possible of the clerical immunity from secular law and secular jurisdiction won for the Church by the blood of the martyr Becket. This is best shown in the work of Mark E. Chopko, General Counsel of the United States Conference of Catholic Bishops. Chopko argues for a broad immunity from civil (and,  

\[207\] See, e.g., Mark E. Chopko & Michael F. Moses, *Freedom to Be A Church: Confronting Challenges to the Right of Church Autonomy*, 3 Geo. J. Law & Pol’y 387 (2005) (“Freedom to Be a Church”). Michael Moses was, as of the time of the publication, Associate General Counsel to the U.S. Conference of Catholic Bishops. See also, Mark E. Chopko, “Constitutional Protection for Church Autonomy: A Practitioner’s View,” in *CHURCH AUTONOMY: A COMPARATIVE SURVEY* (Gerhard Robbers, ed.) 2002.

Chopko’s and Moses’ 2005 article is particularly noteworthy in two ways. First, although the article contains the disclaimer that the “views expressed here are not necessarily those of the Conference or any of its member Bishops,” the authors’ acknowledged positions as litigators on behalf of the USCCB affords
inferentially, criminal) liability for churches on several theories which would be directly relevant to the sex abuse crisis: (a) breach of fiduciary duty;\textsuperscript{208} negligent hire of clergy;\textsuperscript{209} and negligent supervision claims\textsuperscript{210} asserting clerical superiors’ liability for the foreseeable bad acts of clergy deployed under their authority are all constitutionally barred, Chopko declares, by a confluence of the Free Exercise Clause, the Establishment Clause (barring excessive government entanglement with religion), and the Free Speech and Free Association Clauses.\textsuperscript{211} 

their work heightened importance, as the views expressed clearly help shape the litigation strategy of the Roman Catholic Church. (Interestingly, the copyright of the article is in the name, not of the authors, but of the USCCB itself). Second, the article addresses the sex abuse crisis far more explicitly than do many other defenses of church autonomy (including Chopko’s own 1999 article). Whatever one may think of the authors’ conclusions, they do not lack the courage of their convictions.

A more nuanced approach to church autonomy is taken by Paul Horwitz in \textit{Churches as First Amendment Institutions}, 44 Harv. Civ. R-Civ Lib. L. Rev. (2009), which seeks to ground the concept in what is called First Amendment institutionalism—a view taken in recent years of the Free Speech and Press clauses of the First Amendment which urges courts to “be more willing to openly acknowledge that particular speech institutions—universities, the press, religious associations, libraries, and perhaps others—play a fundamental role in our system of free speech.” They would understand that some speech institutions are key contributors to our system of public discourse and that “the freedom of expression is not only enjoyed by and through, but also depends on the existence and flourishing of,” these institutions.” Id, at 87. The principal problem with this approach is that is completely divorced from the text, history and judicial reasoning which makes up the core of First Amendment jurisprudence, which is often been built on and defined by cases involving not these specially honorable institutions, but rather the speech of marginal participants in the civic dialogue. From Jehovah’s Witnesses, to socialists, and even inclusive of bigots whose toxic speech has been subjected to censorship in the name of protecting against offense and promoting civil institutions, freedom has been defined not by those we honor, but those whom our society struggles to tolerate. \textit{See generally}, John F. Wirenius, \textit{FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH} (2d Ed. 2004) “FIRST AMENDMENT, FIRST PRINCIPLES”\textsuperscript{208}; Lee C. Bollinger, \textit{THE TOLERANT SOCIETY} (1987); Edward de Grazia, \textit{GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS} (1992). First Amendment institutionalism in general, let alone as applied to the sphere of creating preferential treatment \textit{vis à vis} neutral law, imperils the very values it purports to promote by further strengthening voices within the social mainstream, and affording them preferential treatment to the marginal speakers who have in historical fact created the broad contours of freedom of speech in American jurisprudence.

\textsuperscript{208} Chopko & Moses, \textit{Freedom To Be A Church}, 3 Geo. J. of Law & Pol’y, at 427-435. 
\textsuperscript{209} Chopko & Moses, \textit{Freedom To Be A Church}, 3 Geo. J. of Law & Pol’y, at 435-441. 
\textsuperscript{211} Chopko and Moses repeatedly state that “we are not arguing for absolute immunity”, but from their line of argumentation it is fairly clear that as to clergy performing clerical functions (as opposed to secular counseling) in the context of a hierarchical church, they are. They do acknowledge that employees who perform purely secular functions—janitors, for examples, or other non-ministerial (clergy or lay) roles.
The breadth of the immunity for which Chopko and Moses argue is best illustrated by their argument against liability on a fiduciary duty theory. They select as an exemplar to demonstrate the inappropriateness of such liability *Martinelli v. Bridgeport Roman Catholic Diocese Corp.* As Chopko and Moses summarize the facts supporting liability:

- The plaintiff attended a diocesan high school where he was taught by priests employed by the diocese.
- The plaintiff had been among a “small group of boys interested in liturgical reform in the Catholic Church,” a group to which [the abusive priest] had acted as “mentor and spiritual advisor,” and thus had a “special and privileged relationship” with [him].
- Plaintiff “was taught in grade school catechism classes and there-after to trust and respect the bishop of the diocese; he considered the bishop his caretaker and moral authority.”
- Plaintiff’s parents allowed him to participate with Brett “in church sponsored and extracurricular activities because they trusted [the priest] inasmuch as he was a priest.”
- Brett spent “more time” with the group of boys of which plaintiff was apart than with others, and this group and Brett went for “dinners, ice cream, and on walks, and rode around in his car together.” These contacts, the court said, were known to the diocese.
- The diocese encouraged Brett to work with youth. His responsibility for “conducting the activities of the Diocese’s Catholic Youth Organization, which sponsored weekly social and educational activities for high school parishioners, was widely known.”
- The diocese knew Brett escorted boys on church field trips.
- The diocese received report of abuse involving other young victims which, upon investigation, it learned to be true.

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212 196 F.3d 409 (2d Cir. 1999), discussed in Chopko & Moses, *Freedom To Be A Church*, 3 Geotwn J. Law & Pol’y at 432-433.
Chopko and Moses note, with evident disapproval, that the Second Circuit Court of Appeals “rejected the diocese’s First Amendment objection because the jury had not been asked to consider the validity of any religious teaching or to enforce church law.”

They explain that

Martinelli’s claim appears to suffer from a more serious defect, as suggested by the evidence upon which the appeals court relied. The plaintiff (a) attended a Catholic high school, (b) had been part of a group of young persons interested in liturgical reform, a group headed by the alleged abuser, (c) had been taught to trust his bishop, and (d) had participated in church-sponsored social activities. In essence, the plaintiff did what many of his co-religionists do: he participated seriously in the religious and social life of his church. In other words, though the appeals court claimed to avoid the question of whether the diocese owed a fiduciary duty to Catholics within its ecclesial borders, the court’s finding of a fiduciary duty depended on the plaintiff’s participation as an ordinary congregant in the life of his church. The unremarkable facts upon which the court relied suggest that nothing more than the usual pastoral solicitude a church shows its members will create a fiduciary duty. If, however, the trust and confidence that church members place in their religious institutions by virtue of attending and participating in church services and activities were civilly enforceable, then courts could do what no branch of government can do, namely, turn moral, ecclesial and religious duties into civil ones.

This constitutional analysis, if accepted, would lead to diocesan immunity in essentially all cases of clerical sexual abuse, which historically have arisen under just such facts—a priest misusing the authority and trust reposed in him by local families, and the diocesan authorities essentially protecting the priest and transferring him to another parish, without taking steps to protect the parishioners in the new parish. The very

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216 This recurring pattern is depicted in excruciating detail in, e.g., BERTY, *LEAD US INTO TEMPTATION*, supra; BETRAYAL, *supra*, and is discussed in capsule form in Robertson, *THE CASE OF THE POPE* at 16-24.
paradigm case which has emerged throughout the American cases would be one in which Church authorities could claim, under this analysis, complete immunity to civil liability.

The argument is breathtaking in its bland denial of any recourse against any person other than the offending priest himself; as Marci Hamilton has written

The first time that I read a brief filed by the Roman Catholic Church hierarchy in a clergy abuse case alleging hierarchical cover up of egregious child abuse, I literally could not believe what I was reading. The abuse was grotesque in individual cases and en masse, and the orchestrated cover up was patently offensive. Waving the American Constitution’s First Amendment seemed like the last appropriate response.\textsuperscript{217}

As this Article has argued, what seems to the outsider to the Roman Catholic tradition as a blatant cover-up analogous to corporate misdeed is best understood as \textit{in part} an effort to suppress information in order to preserve the moral authority of the Church and its hierarchy (what Hamilton calls the “anti-scandal rule”, the existence of which Cardinal Newman acknowledged and defended). However, the Church’s overall actions are best understood as not only that, but even more so as an effort to resist secular jurisdiction over the Church and its clergy.

Hamilton’s visceral reaction to the application of the church autonomy theory is especially understandable in view of the flimsy jurisprudential structure on which church autonomy advocates base this unprecedentedly broad claim of immunity. In brief, as even Chopko and Moses acknowledge, acceptance of their arguments would require a wholesale reversal of precedents from the Supreme Court from the earliest cases to address the rights of religious bodies and their members through to the present day.\textsuperscript{218}

\textsuperscript{217} Hamilton, Waterloo, 29 Card. L. Rev. at 232.
\textsuperscript{218} See Chopko & Moses, \textit{Freedom To Be A Church}, 3 Geo. J. Law & Pol’y at 390, 394-399 (Establishment Clause); 399-404 (Free Exercise Clause). Chopko and Moses contend, in particular, that
Moreover, the wholesale overruling of these prior decisions would create not one but two imbalances in the law, requiring the applicability neutral, generally applicable laws to religious bodies to serve a compelling state interest, while the same law must only comport with a lesser standard as applied to either individual religiously-motivated conduct, or any expressive conduct, protected, as is freedom of religion, by the First Amendment.

the Free Exercise Clause rulings prior to the Supreme Court’s decision in Employment Div. v. Smith, 494 U.S. 872, 882-889 (1990), applied at least in name the “compelling state interest” test to determine if a facially neutral, non-discriminatory law which incidentally burdens religion can be constitutionally valid in that context. Chopko & Moses, Freedom to be a Church, 3 Geo. L. Law & Pol’y at 403-404 & n. 106. Thus, in their telling, the Supreme Court in Smith impermissibly weakened church autonomy by disregarding nearly a half-century worth of precedent.

This claim is made to seem plausible by their decision to begin the analysis in 1940, when, in their reading, the Supreme Court in Cantwell v. Connecticut, 310 U.S. 296 (1940) “prefigured” the applicability of the compelling state interest test, which became “settled” in Sherbert v. Verner, 374 U.S. 398 (1963). Chopko & Moses, Freedom to be a Church, 3 Geo. J. Law & Pol’y at 400-401. Cantwell simply does not fit this characterization, and cannot fairly be read to support it. See, e.g., 310 U.S. at 306-307. Rather, the Supreme Court had before it religious speech and analyzed the conviction for “breach of the peace” under the classic First Amendment speech “clear and present danger” rubric. 310 U.S. at 309-311. Indeed, to the extent Cantwell has had precedential vitality, it is primarily known as a progenitor of the “low value” speech categorical approach which has allowed for regulation of certain classes of speech on a mere rational basis showing. See, e.g., Wirenius, FIRST AMENDMENT FIRST PRINCIPLES at 292-293.

Chopko and Moses make a fair point regarding Sherbert and its progeny, but, as Hamilton equally fairly points out, the Court’s pre-1963 opinions, dating all the way back to Reynolds v. United States, 98 U.S. 145 (1879), are consistent with the view taken in Smith, which she calls the “dominant doctrine”. See Hamilton, GOD VS THE GAVEL at 207-237. Moreover, in Gonzales v. O Centro Espirita Beneficent Uniao Do Vegetal, 546 U.S. 418, 439 (2006), the Court, in applying the Religious Freedom Restoration Act of 1993 (which requires that federal statutes which substantially burden a person’s exercise of religion serve a compelling governmental interest, and be the least restrictive means of furthering that interest), nodded to the continuing validity of Smith. Hamilton also compellingly argues that the notion that religious behaviors violative of neutral, non-discriminatory laws are presumptively—almost irrefutably presumptively—immune from such laws is contrary to the Framers’ intentions, the legal culture of the Early Republic, and the enactments passed in that generation protecting Free Exercise. Id. at 254-272. For Hamilton’s response to Chopko’s writings, as well as those of Douglas Laycock (whom she credits with creating what she terms the “pernicious church autonomy doctrine”) and Michael W. McConnell, see Hamilton, Waterloo, 29 Card. L. Rev. at 232-235; GOD VS. THE GAVEL, at 223, et seq. 

A complete response to the constitutional claims advanced by Chopko and Moses is out of place here; however, several brief points can be made with respect to their argument. Chopko and Moses acknowledge and even quote Smith’s reliance on older decisions which consistently held that “[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability.’” Freedom To Be A Church, 3 Geo. J. Law & Pol’y at 404, n. 114 (quoting Smith, 494 U.S. at 878-879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)). Even Cantwell v. Connecticut, relied upon by them, explicitly rejects the argument made by Chopko and Moses: “Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury.
Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the
community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his
authority to act for the cause which he purports to represent.” 310 U.S. at 306-307.

Chopko and Moses actually cite this line of cases as is favorable to church autonomy claims because
such claims are those of institutions not individuals, and the most favorable cases selected by Chopko and
Moses should be read as creating a right on the part of the institutional church which is more fundamental
than that of the individual, as an individual case-based determination can be made more readily for the
individual than for the institution. Freedom To Be A Church, 3 Geo. J. Law & Pol’y at 404. This
bifurcation of the constitutional protection into a stronger protection for institutions and a weaker one for
individuals is, simply, contrary to the language of the constitution, and cannot fairly be teased out of the
jurisprudence.

That their eagerness to overrule precedent would create an imbalance between the Religion Clauses and
the Speech Clauses of the First Amendment strongly suggests that Chopko and Moses are simply wrong as
to the permissibility of their reading of the constitutional text. Under the Speech Clauses, as under the
current reading of the Religion Clauses, a valid and generally applicable law directed at conduct which has
an expressive component is valid if “the governmental interest is unrelated to the suppression of free
expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is
essential to the furtherance of that interest. Wirenius, FIRST AMENDMENT, FIRST PRINCIPLES, at 150
(quoting United States v. O’Brien, 391 U.S. 367, 376 (1968); id. at 147-156 (discussing cases); Wirenius,
Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts, 28
Whitt. L. Rev. 905, 954-956 (citing, inter alia, City of Los Angeles v. Alameda Books, Inc., 525 U.S. 425,
440-441 (2002). Thus, Chopko and Moses would have neutral and generally applicable laws fare worse
under a more stringent test than that applicable under the Free Speech and Free Press Clauses of the First
Amendment.

Their argument that neutral and generally applicable laws be held to the strictest possible standard while
a less exacting rule applies to speech is a less than plausible reading of the text, as it does not “fit”—it
creates a tension between seemingly parallel clauses of the same constitutional amendment. Id. at 276
(noting constitutional criterion of “fit” as phrased by Ronald M. Dworkin; citing R.M. Dworkin, The
Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve, 65 Ford. L. Rev. 1249, 1254-1256

Chopko and Moses’s constitutional analysis disregards the extent to which the First Amendment robustly
protects belief and its communication, while drawing the line at action—the implementation of those
protected ideas and beliefs. Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940) (“Thus, the [First]
Amendment embraces two concepts, --freedom to believe and freedom to act. The first is absolute, but, in
the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of
society”); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 420, 124 L.Ed.2d 472, 473
(1993) (same; context of animal sacrifice). For an extended discussion of the same principle in Free
Speech jurisprudence, see FIRST AMENDMENT, FIRST PRINCIPLES at 17-71. A good example of the
convention between the First Amendment’s Free Speech and Religion Clauses is presented by the Court’s
analysis of the “public forum” free speech claim presented by a student religious group denied recognition
and funding by a public university and Justice Stevens’s rebuttal of the dissent’s claim that the Court’s
upholding of the denial constituted impermissible viewpoint discrimination against religious speakers in
even efforts to seek justice against the priests themselves. Christian Legal Society, Chapter of Univ. of
Cal., Hastings v.Martinez, 561 U.S. ___ (2010), Slip. Op. No. 08-1371 (June 28, 2010). In short, it is more
than canons of construction which support a likeness between the Religion Clauses and the Speech Clauses;
the approach which Chopko and Moses would privilege actions conducted by a religious body over
expressive actions, despite the common dividing line applicable to both—the moment when idea or belief
is transformed into action which violates a non-discriminatory, generally applicable law.

Finally, even under the compelling state interest test applied under Sherbert and its progeny, it is hard to
imagine a more compelling state interest than the protection of society’s most vulnerable citizens—
While the position taken by Chopko and Moses—among others, it should be noted—is poorly reasoned under many of the traditional criteria employed to evaluate readings of the constitutional text, it would have the effect, they urge, of permitting liability of the primary bad actor—the offending priest. However, the amply documented role of ecclesiastical superiors in assisting abusive clerics to wait out statutes of limitation, and to avoid criminal or civil sanctions, as well as in pressuring the press, victims and their advocates makes clear that the superiors are well positioned to frustrate underlying abuse itself, implicate the functions performed by secular law, both civil and criminal. In civil liability, that purpose is effectively to place the duty of repairing damage resulting from wrongful conduct to the responsible party.\(^\text{220}\) In criminal law, those purposes are multifarious, but related: retribution; to deter similar wrongdoing, both by the individual wrongdoer and others similarly situated; to rehabilitate the offender, and reintegrate him into the entire community; to incapacitate the wrongdoer from reoffending; to announce the judgment of society—the entirety of pluralistic society, not any one segment, however important, thereof—on the culpability of the offense.\(^\text{221}\) These functions are different from those performed by canon law, which are to reconcile the offender to God, to the victim were possible, and to Christian community through the children—from the most appalling and destructive forms of abuse, especially when that abuse is performed by those whom they and their parents would reasonably trust, and when there is an entire supervisory structure which holds itself out as one entity—a church—united in not only belief, but in an ecclesiastical polity which is hierarchical in nature. To revive a decade-old quip, one cannot accept the benefice without also bearing the burden. John F. Wirenius, The Last Word: Status, Autonomy and Free Speech, 23 Ham. L. Rev. 394, 405 (2000).


\(^{221}\) Herbert Packer, The LIMIT OF THE CRIMINAL SANCTION (1968) at 37-58; Francis Wharton, 1 A TREATISE ON CRIMINAL LAW (11\(^{th}\) Ed. 1912) (James Kerr, ed.) at 1-16.
Roman Catholic Church. Simply put, the interests do not conflict, but they are not identical, and the assertion of exclusive jurisdiction on the part of the Church would frustrate the legitimate interests of the State.

And Church Autonomy thinking is, however it may try to cloak itself in the language of the Constitution, trending toward an exclusivity doctrine. Noting that “[t]he First Amendment has been a particularly fruitful source of metaphoric argument, Paul Horwitz offers a “new metaphor” to displace the long-standing “wall of separation” which has informed much of the jurisprudence of the Religion Clauses. His metaphor, drawn from the writings of Dutch neo-Calvinist Abraham Kuyper, is in fact an old one, which will be familiar here:

The metaphor derives from Kuyper’s signature intellectual contribution to the study of religion and politics—his doctrine of “Souvereiniteit in Eigen Kring,” or “sphere sovereignty.”

Sphere sovereignty is the view that human life is “differentiated into distinct spheres,” each featuring “institutions with authority structures specific to those spheres.” Under this theory, these institutions are literally sovereign within their own spheres. Each of these spheres, which include religious entities but embrace others besides, has its “own God-given authority. None is subordinate to the other.” These institutions serve as a counterweight to the state, ensuring that it “may never become an octopus, which stifles the whole of life.” At the same time, they are themselves limited to the proper scope of their authority. Kuyper’s sphere sovereignty approach thus does not treat church and state as antagonists. Rather, it sees a profusion of organically developed institutions and associations, including both church and state, operating within their own authority structures and barred from intruding into one

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222 An interesting—and to many non-Roman Catholic readers, rather startling—facet of the 1917 Code, which has been preserved in the 1983 Code, is its assertion of universal jurisdiction over all baptized Christians, and, concomitantly, its ability to reconcile offenders with the Universal Church. 

another’s realms. Although this appears to be a theory of a limited state, it is also a theory of the limits of religious entities. Within this framework, the state plays a central role in maintaining boundaries and mediating between the various spheres.\(^{224}\)

Gelasius himself would approve of this articulation of his “two swords” concept. Indeed, the principal addition made by Kuyper is his addition of a third sovereign sphere, “society”:

This dominating principle [offered by Calvinism] was not, soteriologically, justification by faith, but, in the widest sense cosmologically, the Sovereignty of the Triune God over the whole Cosmos, in all its spheres and kingdoms, visible and invisible. A primordial Sovereignty which eradicates in mankind in a threefold deduced supremacy, viz., 1. The Sovereignty in the State; 2. The Sovereignty in Society; and 3. The Sovereignty in the Church.\(^{225}\)

\(^{224}\) Horwitz, Of Sovereignties and Spheres, 44 Harv. Civ. R-Civ. L. L. Rev. at 83-84

\(^{225}\) Abraham Kuyper, LECTURES ON CALVINISM 96 (photo. reprint 2007) (1931), quoted in Horwitz, Of Sovereignties and Spheres, 44 Harv. Civ. R-Civ. L. L. Rev. at 94 (emphasis in original). Although the other terms employed by Kuyper are consistent with the usage of Gelasius through Lecler, the term “Society” is an addition; by it Kuyper denotes “that the family, the business, science, art and so forth are all social spheres, which do not owe their existence to the state, and which do not derive the law of their life from the superiority of the state, but obey a high authority within their own bosom; an authority which rules, by the grace of God, just as the sovereignty of the State does. Id. at 90 (quoted in Horwitz, at 95). As Horwitz helpfully summarizes:

The picture is thus one of a set of “distinct social spheres of activity” centered around various commonly recognized social roles and activities. This resembles Max Weber’s description of modern existence as involving the differentiation of various spheres of activity, although the animating spirit of Kuyper’s vision is strongly different from Weber’s own. These activities are mostly distinct, although obviously there may be overlapping and blurring between them. They are all social and communal activities, from the smallest unit, the family, up to churches, “universities, guilds, and associations.” They may be functional in nature, and thus geographically widespread—a professional guild or social association, for instance—or geographically and sometimes politically distinct.

Horwitz, at 95 (citations and editing marks omitted; emphasis in original).
Thus, for Kuyper, and for Horwitz, “[a]utonomy is vital to this theory. Kuyper does not simply describe the existence of these spheres; he argues that they are truly sovereign spheres, which may not lightly be interfered with by any other sovereign. They are coordinate with the state, not subordinate to it.”

Indeed, in one very important way, the State is lesser than either the Church or the Social spheres; where the other two “social spheres arise from the order of creation, the state is an artifact, albeit an essential one, of human sinfulness.” The State’s essential role is to adjudicate disputes between the two natural spheres (“interspherical” disputes), within either of the other two spheres (intraspherical” disputes), and to act for “transpherical purposes”, that is the provision of common goods such as “infrastructure, military protection and so on.”

Horwitz’s effort to link Kuyper’s thought with the thought of the Founding Generation is not particularly persuasive—in part because Horwitz himself acknowledges that such links as exist are tenuous at best. Moreover, the fact that under the Constitution prior to the Reconstruction-era Amendments the State (or, to be more precise, the states), were in fact legally free to establish or otherwise regulate faith in whatever manner they saw fit, consistent only with their own constitutions, sufficiently rebuts Horwitz’s claim that Kuyper’s notion of “Sphere sovereignty” was somehow “immanent in the American social and constitutional order,” as well as undermining his

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227 *Id.* (citation and quotation marks omitted).
228 *Id.* at 97.
229 Horwitz, *Of Sovereignties and Spheres*, 44 Harv. Civ. R-Civ. L. L. Rev. at 99-102. Horwitz argues that “the ideas underlying sphere sovereignty are not alien but immanent in the American social and constitutional order,” and leans on authors advocating the notion that the roles and interests of ecclesiastical and social institutions should be considered in determining answers to constitutional questions, as well as those exploring the Roman Catholic notion of subsidiarity. *Id.* at 107,104-106.
claim that it is consistent with or draws from the same impetus which supports constitutional federalism.\textsuperscript{230}

Interestingly, though, Horwitz describes Kuyper as acknowledging that the State “must not leave the members of various social spheres to fend for themselves, but may intervene to protect them from abusive treatment within a particular sphere.”\textsuperscript{231} Horwitz provides an example; “The Church may not be forced to tolerate as a member one whom she feels obliged to expel from her circle; but on the other hand no citizen of the State must be compelled to remain in a church which his conscience forces him to leave.”\textsuperscript{232} This aspect of Kuyper’s thought, as interpreted by Horwitz, leads him to a conclusion starkly different from that of Chopko and Moses; he supports diocesan or other civil liability for clergy sexual abuse, albeit only to the extent “adapting the test of ‘actual malice’” standard applied to defamation in \textit{New York Times v. Sullivan} and suggesting “that religious officials should not be liable for abuse committed by an individual clergy member unless the institution ‘had actual knowledge of its employees’ propensity to

\textsuperscript{230} Horwitz, \textit{Of Sovereignties and Spheres}, 44 Harv. Civ. R-Civ. L. L. Rev. at 102, 109. For the plenary authority of states to regulate and/or establish religion under the Founders’ Constitution, see \textit{Permoli v. First Municipality, No. 1, City of New Orleans}, 44 U.S. (3 How.) 589 (1845) (discussed in Wirenius, \textit{FIRST AMENDMENT, FIRST PRINCIPLES}, at 21). Horwitz does not assist his argument by describing “the substantive due process rights for families in directing the upbringing of children” as “the only remnants of the \textit{Lochner} era to survive into the present day,” and arguing for such reasoning as a tenable basis for his institutional approach. Horwitz, \textit{supra}, at 109. Where \textit{Lochner v. New York}, 198 U.S. 45 (1905), created a substantive due process right to “liberty of contract” imported from, as Justice Oliver Wendell Holmes weringly put it, “Mr. Herbert Spencer’s Social Statics,” \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923), and \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925), clearly implicate Free Speech and Association and Free Exercise rights, as well as, quite probably, viable Equal Protection claims, all of which, in conjunction with the Ninth Amendment, are far closer to the enumerated rights said to create “penumbras” of related substantive rights in \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965), than the utterly discredited opinion in \textit{Lochner}. See William O. Douglas, \textit{THE RIGHT OF THE PEOPLE} (1958) at 87-90; see also \textit{id.} at 138-144 (sketching contours of such rights affecting religious belief and observance); Charles L. Black, “On Reading and Using the Ninth Amendment,” in \textit{THE HUMANE IMAGINATION} at 186-201.


commit misconduct.”233 However, while certainly an improvement on the position taken by Chopko and Moses, Horwitz’s position is still quite deferential to church authorities. The standard he endorses, which provides, essentially, for absolute immunity despite clear negligence (and, possibly, even gross negligence) equates such acts with core constitutional activity under the Free Speech and Free Press Clauses. This is done on the basis not of text, but on, essentially, a pragmatic understanding of church authorities’ institutional role in society, creating a protected class under the First Amendment based on status, not the protected activity in question.234

More fundamentally, wherever Horwitz might draw the line in a specific case is of less importance than the fact that he has revived an explicitly religious metaphor, one which is the basis of the canon law concept of clerical immunity from secular jurisdiction, and reintroduced it as a constitutional metaphor, suggesting that it is co-terminous with the constitutional protection afforded to church authorities under the Free Exercise Clause to the First Amendment. The constitutionalization of canon law is the

233 Horwitz, Of Sovereignties and Spheres, 44 Harv. Civ. R-Civ. L. L. Rev. at 123 (quoting and approvingly describing Ira C. Lupu & Robert W. Tuttle, Sexual Misconduct and Ecclesiastical Immunity, 2004 BYU L. REV. 1789, 1816 (2004)). Horwitz goes on to state that “Lupu’s and Tuttle’s proposal is consistent with my general approach toward religious entities as First Amendment institutions, or sovereign spheres. It treats these entities as lying largely beyond the jurisdiction of the state, and seeks to craft the law affecting them in ways that give them the utmost freedom to shape and regulate themselves.” Id. at 124.

234 Oddly, Horwitz does not seem aware that his position is more nuanced than that of many who support the church autonomy doctrine’s being engrafted into the First Amendment; he accuses Marci Hamilton of “advance[ing] a “straw man argument” by distorting the doctrine, even though her concern correctly reflects the position taken by the General Counsel of the United States Conference of Catholic Bishops. Horwitz, Of Sovereignties and Spheres, 44 Harv. Civ. R-Civ. L. L. Rev. at 122. Moreover, the Holy See itself has argued that the First Amendment should be construed to bar claims of breach of fiduciary duty, negligence, infliction of emotional distress and misrepresentation against the Holy See itself (and, by extrapolation, the Church’s hierarchy arising from the “deliberate failure of the Holy See to take effective action to protect childhood sexual abuse” by clergy. O’Bryan v. Holy See, 471 F. Supp. 2d 784, 786, 794 (W.D. Ky. 2007), aff’d, 556 F.3d 361 (6th Cir. 2009), cert. den., ___ U.S. ___, 120 S.Ct. 361, 175 L.Ed.2d 27 (2009) (rejecting First Amendment defense on grounds that “[f]oreign sovereigns do not enjoy rights derived from the United States Constitution. . . Defendant Holy See cannot simultaneously seek the protection of the F[oreign] S[overign] I[munity Act”); Doe v. Holy See, 557 F.3d 1066, 1096-1097 (9th Cir. 2009), cert. den., 130 S.Ct. 3497, 177 L.Ed.2d 1089 (2010) (Berzon, J., concurring in part and dissenting in part) (same). Notably, Hamilton represented plaintiff in the appeal in Doe. 557 F.3d at 1068.
next step in the church autonomy movement (as Horwitz suggests it be viewed, stating that “Movements need metaphors”). The use of theological arguments from an avowedly religious source to justify the constitutionalization of canon law suggests further that, in the end, the original clerical supremacy will be the movement’s position, offered, no doubt, as necessary deference to protect the institutions, along much the same lines advocated by Chopko and Moses. The metaphor proffered is one under which the religious interest is inherently favored, and the bare prospect of any kind of secular justice is only likely in the most outrageous and well-documented, by the clerical authorities, cases.

**Conclusion**

The genesis of this Article was the dissonance between the experience of a Catholic upbringing and education during the first decade in which the sexual abuse crisis made the headlines and the undisputed actions taken by the Church and its defenders in response to not only that “first wave” of cases, but the second wave in the late 1990s to the beginning of the current century, and then yet again in the third and international wave which broke in the last years of that decade. By the time these three waves had struck the Church, it was clear that the institutional Church, the hierarchy, had, time and again, taken the side of the powerful against the powerless, the oppressor against the victim. By the end of 2010, the paradox of a Church whose priests, nuns, and other religious—along with a veritable army of devoted and devout laity—who taught with sincerity the exact opposite of the pattern enacted over half a century by its administrators and hierarchy was global, and therefore more baffling than ever.

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236 Indeed, this is, essentially, the position argued by the Holy See in *O’Bryan v. Holy See*, 471 F. Supp.2d 784 and *Doe v. Holy See*, 557 F.3d 1066, as discussed supra at note.
The obvious answer, that the tactics were adopted to control exposure and limit liability, did not fit all of the facts; while it accounted for the efforts to silence victims, or to reduce their credibility, the keeping of abusive priests in orders and transferring them from parish to parish, diocese to diocese, actually increased the likelihood of civil and criminal liability against dioceses, bishops and even the Vatican. Moreover, the persistence in these tactics over decades, despite repeated opportunities to address the problem head on, poses all the more naggingly the question: What goals did these actions serve?

The level of emotion invested in the resistance to secular jurisdiction is indicative as well; to take one example:

In 2001, the Vatican actually congratulated Bishop Pierre Pican of Bayeux for refusing to inform police about a pedophile priest and for giving him parish work despite his confession of guilt. “I congratulate you for not denouncing a priest to the civil administration,” wrote Cardinal Castrillon Hojos, with the personal approval of John Paul II and other senior cardinals, including the head of the CDF, Cardinal Ratzinger. This came to light after the priest had been sentenced to eighteen years for repeated rapes and assaults on ten boys, and the bishop received a three-month suspended sentence for not reporting the abuse, contrary to French law. The Papal commendation had been copied to all bishops, as an encouragement to them to defy such laws. . . . Castrillon Hojos, then the Vatican cardinal responsible for the priesthood, was applauded by senior churchmen—in March 2010—when he said at a conference that “after consulting the Pope. . . .I wrote a letter to the bishop congratulating him as a model Father who does not hand over his own sons. . . the Holy Father authorized me to send this letter to all bishops. . .”

237 Robertson, THE CASE OF THE POPE at 42. Robertson points out that the confession did not arise in the context of sacramental confession, which would have been a protected disclosure under French law. Id. Robertson also refers to other instances of such statements that “[w]hen the subject of a bishop reporting a priest to police is broached in the Vatican, it is analogized to the anguish of a father betraying a child—‘it’s so hard,’ said a CDF official, ‘for a father to betray his son.’” Id. at 59.
A similar level of emotional investment in the Church’s unaccountability was displayed by the Vatican’s outrage to the execution of a search warrant by Belgian police on June 24, 2010 “on the home of the country’s archbishop and the offices of a church-backed commission investigating clerical abuse.” The Vatican’s response to the raid was splenetic: “Pope Benedict XVI called the raids ‘surprising and deplorable,’ and Vatican Secretary of State Cardinal Tarcisio Bertone described the raids as unprecedented ‘even under communist regimes.’” Probable cause for the raids stemmed from “accusations of hidden documents made by the commission's chairwoman, Godelieve Halsberghe, [a], retired magistrate [who] presented police with around 30 case files she had handled between 2000 and 2008.” In view of this fact, and the fact that the longest-serving bishop in Belgium, Archbishop Roger Vangelhuwe, had resigned only two months earlier, having previously confessed to having himself been guilty of molesting a boy for years, and the search warrant and its execution seem eminently reasonable. The Vatican’s response savors of thwarted privilege, consistent only with a worldview of immunity from secular law enforcement.

Finally, the peregrinations of the Vatican with respect to the reporting of credible allegations of sexual abuse to civil authorities evinces the hierarchy’s extreme reluctance to make any concessions toward acknowledging the proper role for secular jurisdiction over clergy. As Geoffrey Roberston records, after years of resisting calls for a mandatory requirement to civil authorities of credible allegations of sexual abuse, the Vatican

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239 Id.

240 Id.

seemed to suddenly take a half-step forward. On its website, as part of an unofficial “Guide to Understanding Basic CDF Procedure Concerning Sexual Abuse Allegations,” the website stated that “Civil law concerning reporting of crimes to the appropriate authorities should always be followed.” However, when, three months later, the Vatican released the “‘New Norms’ of Canon Law—de gravioribus delictus”:

It made no mention of any duty on bishops or anyone else to report cases of child sex abuse to civil authorities. Only when it was published did the Vatican spokesman, Father Lombardi, confess that a reporting requirement had been discussed but rejected—it was deliberately decided not to impose it as a new rule of Canon Law.

Since then, of course, the notion of canon law requiring ecclesiastical compliance with secular laws containing a mandatory reporting requirement has been effectively repudiated; as reported in the New York Times on May 16, 2011, “Father Lombardi said the Vatican could not issue universal requirements for mandatory reporting to civil authorities because it also operated in countries with repressive governments. ‘Each reality is different, culturally and from the point of view of different countries’ laws,’ he said.”

242 Roberston, The Case of the Pope, at 57.
243 Robertson, The Case of the Pope, at 57-58. As Roberston quite accurately points out, this change would have been, in any event, only a half step, as in nations without a specific reporting requirement, no duty would adhere; the website addressed only compliance with the minimum requirements of civil law. Id. As reported by the Catholic News Service, Father Lombardi’s explanation of the state of the earlier advice was rather opaque: Lombardi “said that while the Vatican norms do not directly address the reporting of sex abuse to civil authorities, it remains the Vatican's policy to encourage bishops to report such crimes wherever required by civil law. These norms are part of canon law; that is, they exclusively concern the church. For this reason they do not deal with the subject of reporting offenders to the civil authorities. It should be noted, however, that compliance with civil law is contained in the instructions issued by the Congregation for the Doctrine of the Faith as part of the preliminary procedures to be followed in abuse cases.” John Thavis, “Vatican Says New Norms Will Strengthen Efforts Against Abusive Priests,” Catholic News Service, July 19, 2010, archived at http://www.catholicnews.com/data/stories/cns/1002901.htm (visited May 28, 2011).
Clearly, the emotional investment in, and strong desire to retain independence from even the obligations of positive law in this area show a powerful attachment to the principle of clerical immunity from secular law as articulated in the 1917 Code of Canon Law, and won by the death of Thomas Becket. That victory, however, has proven to be truly Pyrrhic—the entire hierarchy presents an appearance of being, in William of Newburgh’s famous reproach, the “bishops, however, while anxious rather to maintain the liberties or rights of the clergy than to correct and root out their vices, suppose that they do God service,” while thwarting civil justice.\textsuperscript{245} The institutional cost to the Roman Catholic Church has been far more than money spent on lawyers and damages paid. The cost has been paid primarily in squandered moral authority, as excuse after excuse has been proven untrue, and the obloquy that should have belonged only to the scattered few offenders has come to rest, with justification, not only on the leadership which prized protecting those offenders over all else, but on priests as a whole.

A vivid example of this loss of credibility was the extemporaneous response of the Archbishop of Canterbury, himself an Anglo-Catholic, and passionately committed to ecumenical dialogue with the Roman Catholic Church, to the revelations in an interview in Easter Week, 2010.\textsuperscript{246} Describing the scandal as a “colossal trauma” in Ireland particularly, Dr. Williams quoted “an Irish friend recently who was saying that it’s quite difficult in some parts of Ireland to go down the street wearing a clerical collar now,” in

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\textsuperscript{246} Archbishop Williams had, on January 25 2010, received the Campion Award for Achievement in Christian Letters from America magazine, the Jesuit publication; tribute was paid to, among his other attributes, his dedicated career as an ecumenist. \textit{See} Maurice Timothy Reidy, “2009 Campion Award: Honoring Archbishop Rowan Williams,” \textit{America: The National Catholic Weekly}, February 15, 2010, archived at \url{http://www.americamagazine.org/content/signs.cfm?signID=336} (visited May 30, 2011).

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an interview on BBC Radio 4, further commenting that “an institution so deeply bound into the life of a society suddenly becoming, suddenly losing all credibility — that’s not just a problem for the Church, it is a problem for everybody in Ireland.” The angry response to the Archbishop’s statement resulted in a prompt apology, but such a perception on the part the highest-ranking clergyman in the Anglican Communion (especially one generally well disposed toward the Roman Catholic Church) speaks volumes regarding the harm done to the institutional Church by the continuing waves of scandal.

The tragedy is that the wound is self-inflicted; the existence of abusive priests is not the direct cause, but rather the Church’s response to the scandal, especially its obduracy in protecting to the offenders and those who protected the offenders. In choosing privilege, and clinging to the prerogatives of what Newman called “the regal power,” the authority of “command and coercion,” the hierarchy has trusted in the realpolitik of worldly leaders and not to the ideals of the Faith it has inculcated in others. A sacrificial response—a frank admission of error from the Vatican on down, combined with a genuine show of repentance, could have modeled Christian humility, while placing the hierarchy back on the side of the victims, the abused and those who suffered with them. Instead, the institutional church strove to maintain the very worldly power which, its own faith teaches will, in the last event, avail nothing. Over eight hundred years after his martyrdom in what the intervening centuries have shown was a dubious cause, it is time to lay the ghost of Thomas Becket to rest.