

CARDINAL SINS: HOW THE CATHOLIC CHURCH SEXUAL ABUSE CRISIS CHANGED PRIVATE LAW

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ABSTRACT

For several decades now, the unfolding of the Catholic Church sexual abuse crisis has been front-page news. It has wreaked havoc on hundreds of thousands of lives, cost the Church billions of dollars, and done irreparable harm to a once-revered institution. Along the way, it has also helped to transform the all-important private law of responsibility. When the crisis began to break in the early 1980s, the few survivors who sought legal redress faced a daunting array of obstacles. Limitations periods alone had the effect of barring almost all child sexual abuse claims. Immunities also helped to shield the Church. Private law itself was generally hostile to institutional liability, particularly where the harm resulted from the criminal act of an individual. All of that has changed.

Among the catalysts for change within private law, the Catholic Church sex abuse crisis looms large. The scale of the crisis and the universal nature of the Church were certainly both important factors, but so too was the Church's response. From the initial impulse to cover up instances of abuse to choices made in the legal and political arenas, it appeared willing to do almost anything to protect itself. Yet the Church had traditionally benefited from special treatment precisely on the ground that it was not an ordinary, self-interested legal actor. The tension between the Church's mission and its approach to covering up abuse began to attract notice. Courts and legislators were prompted to act.

The ongoing litigation did not reflect well on the Church as it continued to aggressively defend itself in court. The troubling continuity between how the Church treated initial allegations of abuse and how it handled the legal claims of survivors suggested an ethos that placed the preservation of the institution above the interests of the child. In this context, a broader idea of institutional liability started to seem important and even necessary. Changes in liability rules followed, and the very idea of responsibility began to shift. Ironically, the Church's determination to protect itself at any cost brought about the very result it most feared. In the process, it also helped to work a dramatic transformation of private law.

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I. INTRODUCTION

A. THE MODERN HISTORY AND FALLOUT OF THE CATHOLIC CHURCH SEXUAL ABUSE SCANDAL

Even by the standards of the scandal-plagued Catholic Church, the past few years have been especially challenging. During his controversial trip to South America in 2018, Pope Francis was forced to apologize for sexual abuse and cover-ups in Chile and to remove several Chilean bishops.¹ Around the same time, Cardinal Pell of Australia—the third-highest official in the Catholic Church—was ordered to stand trial for sexual abuse, the Archbishop of Guam was removed from office for abuse, and a Vatican diplomat to Washington was convicted of child pornography.² Then, the year got much worse.

1. Elisabetta Povoledo & Sharon Otterman, *Cardinal Theodore McCarrick Resigns Amid Sexual Abuse Scandal*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/world/europe/cardinal-theodore-mccarrick-resigns.html>.

2. See Melissa Davey, *Cardinal George Pell: Vatican Treasurer Faces Historical Sexual Offences Trial*, THE GUARDIAN (May 1, 2018), <https://www.theguardian.com/australia-news/2018/may/01/cardinal-george-pell-stand-trial-historical-sexual-offence-charges>; Rod McGuirk, *Cardinal Pell Ordered to Stand Trial*, N.Z. HERALD (May 1, 2018), https://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=12042854; NCR Staff, *Reactions to McCarrick's Withdrawal From the College*

Within the span of three days, Pope Francis accepted the resignations of two high-ranking church officials.³ It began on July 28, with the resignation of Cardinal McCarrick, Archbishop of Washington and Newark and a member of the College of Cardinals, who was accused of a long history of sexual abuse.⁴ Two days later, Archbishop Philip Wilson of Adelaide, who had just been criminally convicted of covering up clergy sexual abuse, also resigned from office.⁵ Then, at the beginning of August, a grand jury in Pennsylvania released a comprehensive report on the Catholic Church, outlining over a thousand cases of abuse and describing the Church's "playbook," including "rules" for concealing abuse claims.⁶ A growing number of federal and state investigations followed in the wake of the report.⁷ The scandal dogged Pope Francis's visit to Ireland, another country rocked by decades of abuse and cover-ups.⁸ Shortly after, the former Papal Ambassador to the United States and a vocal critic of Pope Francis, Archbishop Carlo Maria Vigano, implicated the Pope himself in the McCarrick scandal, prompting open discussion of a "Catholic Civil War" and calls for a Truth Commission.⁹

In September 2018, a leaked report by German Bishops acknowledged thousands of cases of child abuse along with longstanding cover-ups and indications of tampering with church records.¹⁰ In Poland, a movie about Catholic Church abuse touched a nerve and became a controversial hit.¹¹ In November, the Pope himself intervened to prevent U.S. bishops from voting on a plan to address the growing crisis.¹²

of Cardinals, NAT'L CATH. REP. (July 30, 2018), <https://www.nconline.org/news/accountability/reactions-mccarricks-withdrawal-college-cardinals>.

3. See Povoledo & Otterman, *supra* note 1.

4. *Id.*

5. Gaia Painigiani, *Pope Accepts Resignation of Australian Archbishop for Covering Up Sex Abuse*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/2018/07/30/world/australia/vatican-philip-wilson-resignation.html>.

6. See Laurie Goodstein & Sharon Otterman, *Catholic Priests Abused 1,000 Children in Pennsylvania, Report Says*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html>.

7. Laurie Goodstein & Monica Davey, *Catholic Church in Illinois Withheld Names of at Least 500 Priests Accused of Abuse, Attorney General Says*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/19/us/illinois-attorney-general-catholic-church-priest-abuse.html>.

8. Leanna Byrne, *Papal Visit: How Ireland Received Pope Francis*, BBC NEWS (Aug. 26, 2018), <https://www.bbc.com/news/world-europe-45310821>.

9. Jason Horowitz, *Pope Francis' Accuser Turns Up the Pressure with More Accusations*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/world/europe/pope-francis-archbishop-vigano.html>.

10. Katrin Bennhold & Melissa Eddy, *In German Catholic Churches, Child Sex Abuse Survivors Top 3,600, Study Finds*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/world/europe/german-church-sex-abuse-children.html>.

11. Alex Marshall, *Movie About Church Sexual Abuse Is a Contentious Hit in Poland*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/arts/poland-clergy-movie.html>.

12. Julie Zauzmer & Michelle Boorstein, *Vatican Tells U.S. Bishops Not to Vote on Proposals to Tackle Sexual Abuse, Spurns Outside Investigations*, N.Y. TIMES (Nov. 12, 2018), <https://www.washingtonpost.com/religion/2018/11/12/vatican-asks-us-bishops-not-vote-sexual-abuse-proposals-they-planned/>.

Church leaders continue to fall on an almost-daily basis. Witness the once-sacrosanct position of cardinal. In December 2018, two cardinals were removed, amid sexual abuse allegations, from Pope Francis's powerful council of advisors, the C9.¹³ Other recent casualties of the crisis include Cardinal Wuerl, the powerful Archbishop of Washington and an important ally of Pope Francis, who was implicated in both the McCarrick scandal and the Pennsylvania Grand Jury report.¹⁴ After warning against the destruction of documents, in November 2018, U.S. federal officials raided the offices of the president of the U.S. Conference of Catholic Bishops.¹⁵ And by the end of 2018, the Vatican itself faced two new massive lawsuits—one a class action lawsuit against the Vatican and the U.S. Catholic Bishops for their handling of the abuse, the second demanding the release of names of known abusers.¹⁶ The Vatican is also increasingly named as a defendant in other lawsuits, including one recently filed against the Archbishop of Guam.¹⁷

B. THE EXPANSION OF PRIVATE LAW RESPONSIBILITY

The Catholic Church sexual abuse crisis came to public attention in the 1980s, a period characterized by an increasing interest in the “redemptive” role of law.¹⁸ One important result of this interest was the dramatic expansion of private law responsibility. This shift was particularly dramatic in the common law legal regimes that are the focus of this Article.¹⁹ But even in the midst of these changes, the domestic legal systems of such regimes were still relatively insulated from claims for widespread and historic wrongs.²⁰ The most obvious problem facing

13. Josephine McKenna, *Pope Removes Two Cardinals Linked to Sex Abuse Allegations from His Inner Circle*, THE TELEGRAPH (Dec. 12, 2018), <https://www.telegraph.co.uk/news/2018/12/12/pope-removes-two-cardinals-linked-sex-abuse-allegations-inner>.

14. Laurie Goodstein, *Cardinal Wuerl, Archbishop of Washington, Plans to Discuss Resignation with Pope*, N.Y. TIMES (Sept. 11, 2018), <https://www.nytimes.com/2018/09/11/us/cardinal-wuerl-resigns.html>; Michael Warren Davis, *Cardinal Wuerl's Resignation Was Accepted, but He Remains in Place*, CATH. HERALD (Oct. 20, 2018), <https://catholicherald.co.uk/commentandblogs/2018/10/20/cardinal-wuerls-resignation-was-accepted-but-he-remains-in-place>.

15. Laurie Goodstein, *Investigators Raid Offices of President of U.S. Catholic Bishop*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/us/houston-catholic-church-raid.html>.

16. Tom Jackman, *U.S. Catholic Church Hit with Two National Lawsuits by Sex-Abuse Victims*, WASH. POST (Nov. 14, 2018), <https://www.washingtonpost.com/crime-law/2018/11/15/us-catholic-church-hit-with-two-national-lawsuits-by-sex-abuse-victims/>.

17. Haidee Eugenio Gilbert, *Vatican Named As Defendant in Sex Abuse Case Against Apuron*, PACIFIC DAILY NEWS (Jan. 14, 2019), <https://www.guampdn.com/story/news/2019/01/14/vatican-named-defendant-sex-abuse-case-against-apuron/2567869002>.

18. Mayo Moran, *The Problem of the Past: How Historic Wrongs Became Legal Problems*, 69 U. TORONTO L. J. (forthcoming October 2019) [hereinafter Moran, *Problem of the Past*].

19. For a classic discussion of this issue, see GRANT GILMORE, *THE DEATH OF CONTRACT* (Ohio State University Press, 1995). The focus here is on private law responsibility in common law legal regimes because of its especially significant and widespread impact. While civilian legal regimes have also seen an expansion of claims of civil responsibility, that interesting topic is beyond my scope here.

20. Moran, *Problem of the Past*, *supra* note 18.

such claims involved the passage of time and the expiry of limitations periods.²¹ But there were deeper features that ensured that the domestic legal system was inhospitable terrain for most historic redress claims. While there was recognition that individuals within institutions could certainly commit wrongs, institutions themselves were not typically thought of as wrongdoers. The Catholic Church sex abuse crisis changed all of that. It was undoubtedly a major catalyst in shifting the understanding of limitations periods and opening up much longer time horizons to survivors of terrible old wrongs. More profoundly, the crisis gradually made courts see the very idea of wrong in a different and broader way. The realization that the Church across time and place had systematically protected abusive wrongdoers, thereby perpetuating the horrific damage they were able to do to children, began to transform the conception of responsibility. An institution itself, it started to seem—not simply the most errant within it—could indeed act badly and thus be “at fault” in the way that the law used to believe was essentially individual. The resulting willingness to revisit charitable immunities, along with a deeper shift in institutional liability rules, combined with the related opening up of limitations periods to work a profound transformation in the important private law of civil wrongs.

C. THE LEGAL IMPACT OF THE CRISIS

After the past couple of years, it would be difficult not to be aware of the Catholic Church crisis. The *New York Times*' website lists more than 150 articles published in 2018 alone on the subject.²² While the general character of the crisis may be increasingly well known, the same cannot be said of one of its most significant effects—the transformation of the private law of responsibility. Even with increasingly common transnational litigation and liability, the Catholic Church crisis stands out: the number of survivors, the scale of liability for personal injury, the sheer volume of cases and settlements, the range of jurisdictions, the complexity of the legal issues, and the wide array of legal and political responses count among some of its most prominent, distinguishing features. As one former priest and now advocate for abuse survivors put it, “[t]he civil court system, that’s the new way the Holy Spirit moves.”²³ In part because of the magnitude of the litigation, the impact of the crisis on the law itself has been dramatic. Though these effects range from criminal law to insurance and canon law, perhaps its most far-reaching effect is on private law. As we shall see, while the crisis has certainly changed the Church, it has also helped to revolutionize the law of responsibility.

21. Mayo Moran, *The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools*, 64 U. TORONTO L. J. 529, 534-35 (2014) [hereinafter Moran, *Role of Reparative Justice*].

22. *Roman Catholic Church Sex Abuse Cases*, N.Y. TIMES (2019), <https://www.nytimes.com/topic/organization/roman-catholic-church-sex-abuse-cases>.

23. See Campbell Robertson, *Lists of Priests Accused of Sexual Abuse Are Spilling Out Across the Country*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/catholic-priests-sexual-abuse-lists.html>.

II. A BRIEF OVERVIEW OF THE CATHOLIC CHURCH SEX ABUSE CRISIS

Human tragedy is arguably what first comes to mind with the Catholic Church sex abuse crisis, and rightly so. Child survivors of the abuse, estimated to be in the tens of thousands, had their lives damaged—often permanently—in the process.²⁴ The crisis clearly has a gendered dimension: while the survivors include both boys and girls, some studies suggest that boys are more frequently targeted for this abuse.²⁵ Others indicate that the rates of abuse are relatively similar for boys and girls.²⁶ What is clear, however, is that the vast majority of perpetrators are male.²⁷ In fact, recently, reports of the sexual abuse of nuns by priests have also begun to surface.²⁸

Much of the discussion of the crisis revolves around the question of the Church's attitude toward sexuality—including the role of celibacy in the problem.²⁹ In addition to the terrible harms to children and their families, the very foundations of communities were shaken as it gradually became apparent that that most trusted of institutions—the Church—was deeply implicated in horrific wrongdoing.³⁰ This story of trust, abuse, and betrayal attracted the media attention that was such an important catalyst in the crisis. The legal story that is the focus here, by contrast, is less well known. Still, at the outset of its telling, it is important to acknowledge the human tragedy at its heart.

24. *Data on the Crisis: The Human Toll*, BISHOP ACCOUNTABILITY (Sept. 16, 2019), <http://www.bishop-accountability.org/AtAGlance/data.htm>.

25. See IICSA Research Team, *Child Sexual Abuse Within the Catholic and Anglican Churches: A Rapid Evidence Assessment*, IND. INQUIRY INTO CHILD SEXUAL ABUSE, 29-30 (Nov. 2017), <https://www.iicsa.org.uk/key-documents/3361/view/iicsa-rea-child-sexual-abuse-anglican-catholic-churches-nov-2017-.pdf>.

26. For a further discussion on the complexity of gender breakdown, see MARIE KEENAN, *CHILD SEXUAL ABUSE AND THE CATHOLIC CHURCH* (Oxford University Press, 2012), Chapter One.

27. *Id.*

28. Kathleen McPhillips, *The Catholic Church is Headed for Another Sex Abuse Scandal as Nuns Too Speak Up*, THE CONVERSATION (Feb. 16, 2019), <https://theconversation.com/the-catholic-church-is-headed-for-another-sex-abuse-scandal-as-nunstoospeak-up-111539>.

29. IICSA Research Team, *supra* note 25.

30. Though the argument is elaborated throughout this paper, it is worth briefly noting why the focus here is on the Catholic Church. The Catholic Church was by no means the only institution that was implicated in childhood sexual abuse scandals—many others, including other churches, also had their own scandals. And many of them also handled the initial disclosures badly. But even in this landscape, the Catholic Church crisis stands out for a number of reasons. The transnational nature of the Church means that many individual cases and dioceses connect up to a larger institutional story that distinguishes it from most others. Much more importantly, however, the Church's responses—from its reaction to disclosures right up to its litigation and advocacy strategies—suggest, as we will see, an institutional ethos that implicates even the highest levels within the Church in a distinct way. The Pennsylvania Report encapsulated this troubling dimension of the Catholic Church crisis when it described the “playbook” the Church followed to protect itself in abuse cases. See Goodstein & Otterman, *supra* note 6. It is also important to note that there are many strong Catholic voices within the Church that have long advocated a different and more responsive path of reform. But it is also the case that the Church has often responded to criticism—internal or external—with charges of anti-Catholic bias and the argument that it is being unfairly targeted. As this Article argues however, while other institutions have certainly been and continue to be implicated, the issues in the Catholic Church stand out both in terms of their character and in terms of their consequences.

A. THE NATURE OF THE SCANDAL

The abuse was carried out by clergy, teachers, custodians and caregivers. The abusers were in positions not only of trust but also of moral or spiritual power—and the social standing that came with it. They targeted children, and often those who were most vulnerable.³¹ Survivors of childhood sexual abuse are often burdened by guilt; indeed, many never come forward, and those that do typically wait a very long time to report—an estimated thirty-three years.³² The circumstances of this crisis—involving child survivors and acts perpetrated in secret by individuals in positions of moral and spiritual authority—made that guilt especially profound.³³ Unsurprisingly, the wrongs were often decades old when they started to come to light.³⁴ And when they did, survivors faced systematic, widespread efforts to silence the reports and to cover up the abuse.³⁵ Many claims—especially early ones—were settled in secret, and confidentiality was demanded in virtually all of the settlements.³⁶ Events also took place over a daunting array of jurisdictions, even as the Vatican itself was inevitably implicated.³⁷ All of these factors make it impossible to tell the full story of just how many children’s lives were damaged or destroyed as part of the Catholic Church sex abuse crisis. What is clear, however, is that the scale of both the wrongs themselves and the legal and related activity that arose out of those wrongs is vast. With this caveat in mind, I will try to sketch an outline of what happened.

B. THE EMERGENCE OF THE CRISIS

Media coverage was the most important catalyst in bringing the story of Catholic Church sexual abuse to light.³⁸ The movie *Spotlight* and its depiction of the important role of the *Boston Globe* in exposing the abuse and cover-up in the

31. Joanna Berendt, *Catholic Church in Poland Releases Study on Sexual Abuse by Priests*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/world/europe/catholic-church-abuse-poland.html>.

32. Claire Blumer et al., *Child Sex Abuse Royal Commission: Data Reveals Extent of Catholic Allegations*, ABC NEWS (Feb. 7, 2017), <http://www.abc.net.au/news/2017-02-06/child-sex-abuse-royal-commission:-data-reveals-catholic-abuse/8243890>.

33. Harriet Sherwood, *Shame Stops Children Reporting Abuse in Religious Institutions, Inquiry Warns*, THE GUARDIAN (May 30, 2019), <https://www.theguardian.com/uk-news/2019/may/30/shame-stops-children-reporting-abuse-in-religious-institutions>.

34. Matthew Laviates & Jonathan Allen, *As New York Legal Window Opens, Child Sex Abuse Survivors Sue Catholic Church, Others*, REUTERS (Aug. 14, 2019), <https://www.reuters.com/article/us-usa-abuse-lawsuits/as-new-york-legal-window-opens-child-sex-abuse-survivors-sue-catholic-church-others-idUSKCN1V40XH>.

35. Rachel Donadio, *The Spotlight Effect: This Church Scandal Was Revealed by Outsiders*, THE ATLANTIC (Feb. 13, 2019), <https://www.theatlantic.com/international/archive/2019/02/catholic-churchs-sex-abuse-scandal-was-driven-outsiders/583489>.

36. *Sexual Abuse by U.S. Catholic Clergy: Settlements and Monetary Awards in Civil Suits*, BISHOP ACCOUNTABILITY (Sept. 16, 2019), <http://www.bishop-accountability.org/settlements>.

37. Nicole Winfield, *Catholic Church Cardinals Implicated in Sex Abuse, Cover-ups*, CRUX NOW (Mar. 8, 2019), <https://cruxnow.com/vatican/2019/03/08/catholic-church-cardinals-implicated-in-sex-abuse-cover-ups/>.

38. See, e.g., Donadio, *supra* note 35.

Boston Archdiocese highlights the much more general fact that journalists have been at the forefront of exposing this scandal.³⁹ The legal activity that has followed involves jurisdictions all around the globe and has become so vast that it is difficult to summarize. To offer but one example of the global scale of the crisis, the website BishopAccountability.org identifies more than 100 bishops who have been publicly accused of sexual abuse in thirty-three countries around the world.⁴⁰

Though the crisis is undeniably global, its reckoning is most commonly identified as beginning in the United States in the mid-1980s, following the reporting of the case of Father Gilbert Gauthé.⁴¹ A ten-year-old boy's graphic testimony about being sexually assaulted by Father Gauthé, alongside the reporting of Jason Berry exposing a cover-up by the Church, brought the scandal into the national—and eventually the international—spotlight.⁴² In the decades since, the allegations have mushroomed. By 2012, in the United States alone, the U.S. Conference of Catholic Bishops acknowledged that 16,787 people had come forward with “credible allegations” of abuse by priests when they were children.⁴³ As early as 2004, well over 3,000 civil actions had been filed⁴⁴—and this was before the recent surge in federal and state investigations.⁴⁵ While only a partial indicator, the overall costs to the Church through 2015 in addressing these allegations are estimated to have exceeded \$4 billion.⁴⁶

The litigation also spurred other, related activities. In 2002, the U.S. Conference of Catholic Bishops commissioned a research study by the John Jay

39. *Id.*

40. *Bishops Accused of Sexual Abuse and Misconduct: A Global Accounting*, BISHOP ACCOUNTABILITY (June 27, 2019), http://www.bishop-accountability.org/bishops/accused/global_list_of_accused_bishops.htm.

41. See Madeleine Baran, *It All Began in Lafayette*, MINN. PUB. RADIO (July 21, 2014), <http://minnesota.publicradio.org/collections/catholic-church/betrayed-by-silence/ch1/>.

42. *Id.* See also Jason Berry, *The Tragedy of Gilbert Gauthé*, TIMES OF ACADIANA (May 23, 1985), http://www.bishop-accountability.org/news/1985_05_23_Berry_TheTragedy.htm.

43. Sarah Childress, *What's the State of the Church's Child Abuse Crisis?*, PBS FRONTLINE (Feb. 25, 2014), <http://www.pbs.org/wgbh/frontline/article/whats-the-state-of-the-churchs-child-abuse-crisis/>.

44. Thomas Doyle & Stephen Rubino, *Catholic Clergy Sexual Abuse Meets Civil Law*, 31 FORDHAM URB. L.J. 549, 551 (2003); Michael Schaffer, *Sex-Abuse Crisis is a Watershed in the Roman Catholic Church's History in America*, PHILA. INQUIRER (June 24, 2012), http://www.bishop-accountability.org/news/2012/05_06/2012_06_24_Schaffer_SexabuseCrisis.htm.

45. A compilation of articles on the crisis is maintained by bishopaccountability.org. See *Data on the Crisis*, *supra* note 24. See also *Index of Roman Catholic Church Sex Abuse Cases*, N.Y. TIMES, <https://www.nytimes.com/topic/organization/roman-catholic-church-sex-abuse-cases> (last visited Sept. 26, 2019).

46. See Jack Ruhl & Diane Ruhl, *NCR Research: Costs of Sex Abuse Crisis to US Church Underestimated*, NAT'L CATH. REP. (Nov. 2, 2015), <https://www.ncronline.org/news/accountability/ncr-research-costs-sex-abuse-crisis-us-church-underestimated>. This figure is described by the NCR as “almost certainly a low estimate,” and it does not account for the related consequences, such as lost membership and diverted giving, which is estimated to have cost the Church more than \$2.36 billion per year. See Nicolas Bottan & Ricardo Perez-Truglia, *Losing My Religion: The Effects of Religious Scandals on Religious Participation and Charitable Giving*, 129 J. PUB. ECON. 106, 115 (2015).

College of Criminal Justice.⁴⁷ This report was a comprehensive study of child sexual abuse by Catholic clergy; it estimated that nearly 4,400 Catholic clergy between 1950 and 2002 had been plausibly accused of the sexual abuse of a youth.⁴⁸ But the report frankly acknowledged that it was not possible to determine how many actual cases of abuse had in fact occurred in that period.⁴⁹

However elusive the actual numbers may be, it is certainly clear that the scale of the abuse is dramatically higher than anyone could have contemplated in the early 1980s, when the Gauthé affair began to call public attention to it. And though the American experience certainly stands out, the universal nature of the Catholic Church meant that the growing crisis also had dramatic, transnational dimensions.

C. AN INTERNATIONAL PROBLEM

Ireland holds the unfortunate distinction of following the United States with the second-highest number of known abuse cases.⁵⁰ During the 1990s and 2000s, it became increasingly apparent that the Catholic Church scandal breaking in the United States had a significant Irish dimension.⁵¹ Here too, the media uncovered scandal after scandal with the same disturbing pattern of widespread child abuse followed by consistent protection of the pedophiles and the Church rather than the child.⁵² Subsequent inquiries commissioned by the Irish government and other reports reached similar conclusions.⁵³ In 2002, as the scale of the crisis became clear, the Irish Government created a “Redress Board.”⁵⁴ The eventual compensation far exceeded original estimates, and the Irish Government paid out

47. Karen Terry & Jennifer Tallon, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950-2002*, JOHN JAY COLL. OF CRIM. JUST. (2004), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf>.

48. *See id.* at 40.

49. *Id.* at 23-24.

50. Russell Shorto, *The Irish Affliction*, N.Y. TIMES MAG. (Feb. 9, 2011), <https://www.nytimes.com/2011/02/13/magazine/13Irish-t.html>.

51. *Id.*

52. *See generally* Colum Kenney, *Significant Television: Journalism, Sex Abuse and the Catholic Church in Ireland*, 11 IR. COMM. REV. 62 (2009) for an interesting discussion of this issue. As he notes, several documentaries, including *Suffer Little Children* (Ulster Television 1965), *Suing the Pope* (BBC 2 2002) and *States of Fear* (R.T.É. 1999) were pivotal in increasing awareness of the problem.

53. For instance, in 2005, the report of the Ferns Inquiry found that successive bishops had failed to adequately protect children from abuse in the Wexford diocese. That report uncovered more than 100 allegations of sexual abuse made against 21 priests between 1966-2002. *See* FERNS COMM'N, *The Ferns Report* (Oct. 2005), <https://archive.org/details/243711-2-complete-ferns-report-so-ireland>. Similarly, in 2009, the Murphy Report concluded that both the Church and state authorities had covered up allegations of clerical abuse in the Dublin archdiocese, systematically placing the protection of the Church above the protection of children. *See* DUBLIN ARCHDIOCESE COMM'N OF INVESTIGATION, *Report into the Cath. Archdiocese of Dublin* (Nov. 26, 2009), http://www.bishop-accountability.org/reports/2009_11_26_Murphy_Report/#report.

54. Leanna Byrne, *Ireland's Hidden Survivors*, BBC NEWS, https://www.bbc.co.uk/news/extra/BoWIe4x0Lj/Ireland_hidden_survivors.

more than one billion euros in compensation.⁵⁵ A controversial secret indemnity agreement between the Irish Government and the Catholic religious orders originally protected them from liability.⁵⁶ However, when it became public, the negative reaction was so powerful that the orders ended up agreeing to contribute 353 million euros—a commitment they failed to fulfill.⁵⁷

Then in 2010, there were revelations that Cardinal Sean Brady had taken steps to protect notorious pedophile Brendan Smyth, prompting calls for the cardinal to resign.⁵⁸ Other allegations also continued to surface, with more officials coming under fire.⁵⁹ Pope Francis's visit to Ireland in the summer of 2018 was overshadowed by the crisis—newspaper headlines described a “Country Transformed, and a Church in Tatters.”⁶⁰ Though by no means a complete account, even this brief summary reveals why those events have had such a profound effect on Ireland and on the standing of the once-powerful Church in that country.

A couple of examples will serve to illustrate the larger pattern of a crisis that also reached Australia, the United Kingdom, Canada, and elsewhere in Europe, Africa, Latin America, and Asia.⁶¹ In 2013, sparked by a series of Catholic Church sexual abuse scandals, the Australian government appointed a Royal

55. *CORI Chief Backs Calls for More Compensation for Abuse Survivors*, BREAKING NEWS IR. (May 27, 2009), <http://www.breakingnews.ie/ireland/cori-chief-backs-call-for-more-compensation-for-abuse-survivors-412556.html> (discussing how the redress bill amounted to 1.2 billion euros).

56. Pat Leahy, *Abuse Compensation Deal a Get-Out-of-Jail-Free Card for Church*, IR. TIMES (Mar. 11, 2017), <https://www.irishtimes.com/news/politics/abuse-compensation-deal-a-get-out-of-jail-free-card-for-church-1.3005781>.

57. *See id.*

58. *Cardinal Brady Will Not Resign Over Abuse ‘Cover-up’*, BBC NEWS (Mar. 15, 2010), http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8567144.stm.

59. Bishop Magee of Cloyne stepped down in 2009, and a 2011 report investigating clerical abuse in Cloyne found that he had falsely told the Irish government and the health service that his diocese was reporting all new cases of child abuse to the authorities. *See* DUBLIN ARCHDIOCESE COMM’N OF INVESTIGATION, *Report into the Cath. Archdiocese of Cloyne* (2011), http://www.justice.ie/en/JELR/Cloyne_Rpt.pdf/Files/Cloyne_Rpt.pdf. In March 2017, Taoiseach Enda Kenney called for the Church to “reflect on the seriousness of this and measure up to their requirements.” Health Minister Simon Harris also appeared on television that week and said the Church must “pay over and pay up.” Although the Health Minister claimed that the Government would consider each and every legal tool at its disposal, it does not appear that the government has taken any subsequent steps. *See* Christina Finn, *Pressure Mounts on Church to ‘Pay Up’ on Sexual Abuse Redress as Taoiseach Says ‘Get on With It’*, THE JOURNAL.IE (Mar. 13, 2017, 12:55 PM), <http://www.thejournal.ie/redress-scheme-catholic-church-3284437-Mar2017/>.

60. *See* Jason Horowitz, *In Ireland, Pope Francis Finds a Country Transformed and a Church in Tatters*, N.Y. TIMES (Aug. 25, 2018), <https://www.nytimes.com/2018/08/25/world/europe/pope-francis-ireland.html>.

61. *See* Madison Park, *Timeline: A Look at the Catholic Church’s Sex Abuse Scandals*, CNN (June 29, 2017), <https://www.cnn.com/2017/06/29/world/timeline-catholic-church-sexual-abuse-scandals/index.html>, for a discussion regarding the spread of the scandal across the globe. Park details allegations levied against the Catholic Church in several countries including the Dominican Republic, the Netherlands, Austria, Germany, Spain, Switzerland, and Brazil.

Commission into Institutional Responses to Child Sexual Abuse.⁶² The most comprehensive response to clergy sexual abuse to date, much of the work of the Commission—and the majority of the complaints it received—related specifically to the Catholic Church.⁶³ Following the pattern elsewhere, the scale of the responses far exceeded original estimates.⁶⁴ More than 15,000 people contacted the Commission with evidence, and more than 8,000 people spoke to a commissioner during private sessions.⁶⁵ Hundreds more told their stories through public hearings.⁶⁶ The Commission referred many allegations of abuse to police, which to date have resulted in 230 prosecutions.⁶⁷ In December 2017, after five years of work, the Commission delivered its twenty-one-volume report containing 400 recommendations on preventing such widespread harm to children in the future to various governments and organizations.⁶⁸ The Catholic Church in Australia also recently released the results of a survey done in cooperation with the Commission which recorded 4,444 alleged cases—statistics the Church itself called “grim.”⁶⁹ While sound estimates are extremely difficult to come by and are regularly adjusted upwards, the Royal Commission heard that this cost the Australian Catholic Church over \$276 million between 1980 and 2015.⁷⁰ Here too, the crisis continues to unfold. In December 2018, Cardinal George Pell, the

62. DEPT. OF SOC. SERVS., AUSTRALIAN GOV'T, *Royal Commission into Institutional Responses to Child Sexual Abuse* (2018), <https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/royal-commission-to-investigate-institutional-responses-to-child-sexual-abuse>.

63. David Marr, *Grappling with the Catholic Church: David Marr's Lessons from the Royal Commission*, THE GUARDIAN (Dec. 13, 2017), <https://www.theguardian.com/australia-news/2017/dec/13/grappling-with-rome-david-marrs-lessons-from-the-royal-commission>; Timothy Jones, *Royal Commission Recommends Sweeping Reforms for Catholic Church to End Child Abuse*, THE CONVERSATION (Dec. 14, 2017), <https://theconversation.com/royal-commission-recommends-sweeping-reforms-for-catholic-church-to-end-child-abuse-89141>.

64. Christopher Knaus, *Victims Say Catholic Church Data on Child Abuse Underestimates Scale of Offending*, THE GUARDIAN (Feb. 6, 2017), <https://www.theguardian.com/australia-news/2017/feb/06/victims-say-catholic-church-data-on-child-abuse-underestimates-scale-of-offending>.

65. *Australia Child Abuse Inquiry Finds 'Serious Failings'*, BBC NEWS (Dec. 15, 2017), <https://www.bbc.com/news/world-australia-42361874>.

66. *Id.*

67. Melissa Davey, *Catholic Church Dismisses Key Recommendations from Landmark Inquiry Into Child Abuse*, THE GUARDIAN (Dec. 15, 2017), <https://www.theguardian.com/australia-news/2017/dec/15/royal-commission-final-report-australia-child-abuse>.

68. Because of the prominent role of the Catholic Church in the abuse, many of the Commission's recommendations referred specifically to the Church itself and its doctrines. A number of the Commission's Recommendations to the Church were immediately rejected by Church officials, while others are being considered. *See id.*

69. *See Proportion of Priests and Non-Ordained Religious Subject to a Claim of Child Sexual Abuse 1950-2010*, ROYAL COMM'N INTO INST. RESPONSES TO CHILD SEXUAL ABUSE (2017), <http://www.tjhcouncil.org.au/media/130569/170206-Proportion-of-Priests-and-non-ordained-religious-subject-to-a-claim-of-sexual-abuse-1950-2010.pdf>.

70. *Catholic Church Paid Out \$276m Over Child Sexual Abuse Claims, Royal Commission Hears*, ABC NEWS (Feb. 16, 2017), <http://www.abc.net.au/news/2017-02-16/catholic-church-paid-almost-300m-to-survivors-survivors-rc-hears/8276104>. While this figure includes legal fees, it certainly underestimates the true cost to the Church in that it does not include consequences such as lost membership and diverted giving. *See Botta & Perez-Truglia, supra* note 70, at 115.

third-highest official in the Catholic Church and its most senior official in Australia, was found guilty of five counts of sexual abuse.⁷¹ He was later sentenced to six years in prison.⁷² In June 2019, an Australian court began hearing his appeal.⁷³

The Catholic Church of England and Wales has also been faced with a growing number of scandals over the past several decades.⁷⁴ In 2001, the important Nolan Report diagnosed the problem and made recommendations, but change did not follow.⁷⁵ In 2004, the principal of the former St. William's residential school in Middlesbrough, Father James Carragher, was jailed for fourteen years for abusing boys in his care over a twenty-one-year period.⁷⁶ The chaplain was also jailed, and over 200 former pupils have claimed abuse.⁷⁷ In 2010, priest James Robinson received a twenty-one-year prison sentence for child abuse.⁷⁸ In the course of that investigation, it came to light that the Church had paid Robinson up to £800 per month despite knowing of the allegations against him.⁷⁹ In 2012, Father Alexander Bede Walsh was sentenced to twenty-two years in prison for serious sexual offenses against boys.⁸⁰

71. *Cardinal Pell Convicted in Child-Abuse Case*, CHURCH TIMES (Dec. 14, 2018), <https://www.churchtimes.co.uk/articles/2018/21-december/news/world/cardinal-pell-convicted-in-child-abuse-case>.

72. *George Pell: Cardinal's Bid to Overturn Conviction Begins*, BBC NEWS (June 5, 2019), <https://www.bbc.com/news/world-australia-48507583>.

73. *See id.*

74. Richard Scorer, *The English Catholic Church and the Sex Abuse Crisis*, NAT'L SECULAR SOCIETY (May 19, 2014), <http://www.secularism.org.uk/opinion/2014/03/the-english-catholic-church-and-the-sex-abuse-crisis>. The reviews are summarized in the UK Commission's Case Study on the Catholic Church. *Ampleforth and Downside (English Benedictine Congregation Case Study)*, INDEP. INQUIRY INTO CHILD SEXUAL ABUSE (Aug. 2018), <https://www.iicsa.org.uk/key-documents/6583/view/ampleforth-downside-investigation-report-august-2018.pdf>.

75. *See Ampleforth and Downside*, *supra* note 74, at iv.

76. *St. William's Catholic Care Home Child Sex Abusers Jailed*, BBC NEWS (Jan. 4, 2016), <https://www.bbc.com/news/uk-england-humber-35221044>.

77. Riazatt Butt, *Roman Catholic Church Facing £8m Payout Over Child Abuse Cases*, THE GUARDIAN (Oct. 26, 2010), <https://www.theguardian.com/world/2010/oct/26/roman-catholic-diocese-child-abuse>.

78. *Former Priest Jailed for 'Wicked' Sex Abuse of Boys*, BBC NEWS (Oct. 22, 2010), <https://www.bbc.com/news/uk-england-11595092>.

79. *Id.*

80. *Abuse Priest Alexander Bede Walsh Jailed for 22 Years*, BBC NEWS (Mar. 9, 2012), <https://www.bbc.com/news/uk-england-17310911>. Other examples unfortunately abound: In July 2000, the head of the Roman Catholic Church in England and Wales, Archbishop Cormac Murphy-O'Connor (later a cardinal), acknowledged he had made a mistake while he was Bishop of Arundel and Brighton in the 1980s by allowing Father Hill to carry on working as a priest. Father Hill was jailed for abusing nine boys over a 20-year period. DAVID YALLOP, *THE POWER AND THE GLORY: INSIDE THE DARK HEART OF JOHN PAUL II'S VATICAN* 293 (2007). William Manahan, the father prior of Buckfast Abbey Preparatory School in Plymouth, was convicted of molesting boys in his school during the 1970s. That information came to light during the investigation of another monk from Buckfast Abbey who was sentenced to over 10 years for multiple sexual assaults. *See Monk Jailed for Schoolboys Abuse*, BBC NEWS (Nov. 8, 2017), http://news.bbc.co.uk/2/hi/uk_news/england/devon/7085067.stm. In 1998, Father John Lloyd, a parish priest in Cardiff and the bishop's former press secretary, was imprisoned for sexual offenses involving children. *See Catholic Abuse in England and Wales Revealed*, CHANNEL 4 NEWS (Sept. 15, 2010), <https://www.channel4.com/news/articles/world/catholic+abuse+in+england+and+wales+revealed/3767082.html>.

In 2015, the U.K. government announced the Independent Inquiry into Child Sexual Abuse, designed “to consider the growing evidence of institutional failures to protect children from child sexual abuse, and to make recommendations to ensure the best possible protection for children in future.”⁸¹ One of its five investigations focuses on the Catholic Church, because, as the Inquiry noted, the “sexual abuse of children within the Roman Catholic Church has been a matter of national and international concern for many years.”⁸² The release of an Interim Report in April 2018 on the Archdiocese of Birmingham expressed shock at the scale of the child sexual abuse and commented that the Church could have stopped the abuse had it not been so determined to protect its reputation.⁸³ The work of the Independent Inquiry is very much ongoing including, as discussed below, its interactions with the Catholic Church and the Vatican itself.

The crisis has also played out in Canada. In the early 1990s, there were revelations of rampant sexual abuse alongside Church and government cover-ups at Mount Cashel, a Catholic Church-run orphanage in Newfoundland.⁸⁴ Litigation ensued, and eventually the Law Commission of Canada was charged with inquiring into institutional child abuse.⁸⁵ It conducted extensive hearings and produced an influential report.⁸⁶ The report revealed the role of churches in institutionalizing aboriginal children as part of a colonially-inspired program of assimilation.⁸⁷ That program forcefully separated aboriginal children from their families and communities and placed them in “residential schools.”⁸⁸ Once there, children were punished for speaking their own languages and practicing native spiritua-

81. *Background*, IND. INQUIRY INTO CHILD SEXUAL ABUSE (May 18, 2018), <https://www.iicsa.org.uk/background>.

82. *Child Sexual Abuse in the Roman Catholic Church: Summary*, IND. INQUIRY INTO CHILD SEXUAL ABUSE, <https://www.iicsa.org.uk/investigations/investigation-into-failings-by-the-catholic-church> (last visited Oct. 2, 2019).

83. *See Inquiry Publishes Report on Archdiocese of Birmingham Case Study*, IND. INQUIRY INTO CHILD SEXUAL ABUSE (June 20, 2019), <https://www.iicsa.org.uk/news/inquiry-publishes-report-archdiocese-birmingham-case-study>.

84. Peter Gullage, *Mount Cashel: After 30 Years, the Pain Still Has Not Gone Away*, CBC NEWS (Feb. 17, 2019), <https://www.cbc.ca/news/canada/newfoundland-labrador/mount-cashel-anniversary-1.5017182>.

85. In 2016, the Government of Newfoundland settled the lawsuit for \$750,000. Rob Antle, *N.L. Settles Mount Cashel Abuse Claim for \$750K*, CBC NEWS (Nov. 16, 2016), <http://www.cbc.ca/news/canada/newfoundland-labrador/john-doe-mount-cashel-christian-brothers-suit-settled-1.3843286>. The Roman Catholic Church declined to settle and was found not to be liable at trial in March 2018. Sue Bailey, *Judge Rules Roman Catholic Corporation Not Liable for 1950s Abuse at Mount Cashel*, CBC NEWS (Mar. 20, 2018), <http://www.cbc.ca/news/canada/newfoundland-labrador/catholic-corp-not-liable-for-mount-cashel-abuse-1.4585010>. The judge held that the Church could not be found liable because a senior priest likely did not believe the boys who had reported their abuse. *Id.* A lawyer representing many of the more than 80 plaintiffs in the suit has announced plans for an appeal. *Id.*

86. *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, L. COMM’N OF CAN. (2000), http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-7-2000-2E.pdf.

87. *Id.*

88. I outline the background to the residential schools’ agreement in more detail in Mayo Moran & Kent Roach, *Introduction: The Residential Schools Litigation and Settlement*, 64 U. TORONTO L. J. 479,

lity, education was often extremely limited, conditions were hard, and food was frequently scarce.⁸⁹ Abuse—sexual, physical and psychological—was widespread.⁹⁰

As with many cases of historic abuse, it took decades for the litigation to begin—but when it finally did so in the late 1990s, it quickly snowballed.⁹¹ By 2005, tens of thousands of residential-schools cases were threatening to clog the courts.⁹² An ambitious 2006 agreement between more than seventy parties settled the litigation.⁹³ At an estimated cost of nearly six billion, the Residential Schools Agreement created, among other things, a Truth and Reconciliation Commission, a healing foundation, a common experience payment, and a tribunal to award compensation to individuals for serious abuse.⁹⁴ The numbers again greatly exceeded the original estimates of 12,000 to 15,000 claims.⁹⁵ The work of the tribunal is now winding down, with over ninety-nine percent of the 38,000 claims resolved and with average compensation amounting to around \$111,000.⁹⁶

The Truth Commission released a report in 2015, garnering significant publicity.⁹⁷ Though it ran a majority of the residential schools, the Catholic Church is widely viewed to have been the most reluctant partner to the agreement—and it has certainly been the most litigious of the religious orders.⁹⁸ Just as in Ireland, the Church has failed to make the contributions to which it agreed.⁹⁹ And alone among the leaders of implicated churches, Pope Francis has refused to apologize for the harms of the schools.¹⁰⁰ He has maintained that refusal in the face of requests by the Chair of Canada's Truth and Reconciliation Commission, by

479-85 (2014) and discuss some of the dominant features of the agreement, including the compensation model, in Moran, *Problem of the Past*, *supra* note 18.

89. *Restoring Dignity*, *supra* note 86, at 62.

90. Moran, *Role of Reparative Justice*, *supra* note 21, at 531.

91. *Id.*

92. *Id.* at 533.

93. *Id.* at 531-32.

94. *Id.* at 532-33.

95. *Id.* at 533.

96. Figures are as of March 2019 and include legal fees. See *Statistics on the Implementation of the Indian Residential Schools Settlement Agreement*, INDIGENOUS AND N. AFFAIRS CAN. (2019), <https://www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192>.

97. TRUTH AND RECONCILIATION COMM'N OF CAN., *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf.

98. See generally Moran, *Role of Reparative Justice*, *supra* note 21; Moran, *Problem of the Past*, *supra* note 18.

99. Gloria Galloway, *Legal Misstep Lets Catholic Church Off Hook for Residential Schools Compensation*, GLOBE AND MAIL (Apr. 17, 2016), <https://www.theglobeandmail.com/news/politics/legal-misstep-lets-catholics-off-hook-for-residential-schools-compensation/article29657424/>; Rachel Gilmore, *NDP MP Says Catholic Church Owes Money to Residential School Survivors*, IPOLITICS (Mar. 28, 2018), <https://ipolitics.ca/2018/03/28/ndp-mp-says-catholic-church-owes-money-to-residential-school-survivors/>.

100. By 1998, the Anglican Church of Canada, the Presbyterian Church of Canada, and the United Church of Canada had all issued apologies. See Peter G. Bush, *The Canadian Churches' Apologies for Colonialism and Residential Schools, 1986-1998*, 47 PEACE RES. 47, 47 (2015).

Canada's Prime Minister, and by Canada's Parliament.¹⁰¹ As a result of this and other scandals, the reputation of the Church in Canada has been significantly damaged.¹⁰²

D. IMPACT ON THE VATICAN AND POPE FRANCIS

As these cases reveal, the crisis has placed considerable pressure on the Vatican itself—pressures that continue to escalate. For example, in September 2018, a report commissioned by German Bishops was leaked.¹⁰³ It contained evidence of thousands of child abuse cases and of a coordinated church cover-up, prompting a number of criminal investigations.¹⁰⁴ In January 2019, a leading German cardinal in Rome responded, asserting that the Church had been no worse than society as a whole—and blaming homosexuality, not the Church.¹⁰⁵ A vocal critic of Pope Francis, his comments were immediately condemned, but many pointed to this as further evidence of the “Catholic Civil War” that has the sex abuse crisis at its epicenter.¹⁰⁶

Despite his progressive approach to many other issues, *The National Catholic Reporter* states that there is an “overwhelming consensus in the media that Pope Francis ha[s] a blind spot when it c[omes] to sexual abuse.”¹⁰⁷ One such illustration is Pope Francis's appointment of Juan Barros as bishop of Osorno, Chile, despite accusations that Barros had witnessed and covered up abuse by Father

101. Jonathon Gatehouse, *Pope Won't Apologize for Residential Schools Despite Pleas from Survivors*, PM, CBC NEWS (Mar. 28, 2018), <http://www.cbc.ca/news/thenational/national-today-newsletter-pope-aboriginal-school-recycling-1.4593670>; Michael Coren, *Canada's MPs Call for a Residential-School Apology—Exposing a Church in Crisis*, MACLEAN'S (May 2, 2018), <https://www.macleans.ca/opinion/canadas-mps-call-for-a-residential-school-apology-exposing-a-church-in-crisis>. But see Canadian Press, *Bishops Try to Clarify Pope's Refusal to Apologize for Residential Schools*, NAT'L OBSERVER (Apr. 19, 2018), <https://www.nationalobserver.com/2018/04/19/news/bishops-try-clarify-popes-refusal-apologize-residential-schools> (reporting that the Canadian Conference of Catholic Bishops argued “that under the Church's decentralized structure, it's not appropriate for the Pope to apologize, that it's best left to Canadian bishops to pursue engagement and reconciliation with Indigenous Peoples.”).

102. See Coren, *supra* note 101. See also TRACY J. TROTHEN, *SHATTERING THE ILLUSION: CHILD SEXUAL ABUSE AND CANADIAN RELIGIOUS INSTITUTIONS* (2012) (discussing other scandals in Canada and the corresponding decline in the reputation of the Catholic Church over time).

103. See Zita Ballinger Fletcher, *Leaked German Report Shows 3,700 Cases of Abuse of Minors in 68 Years*, NAT'L CATH. REP. (Sept. 12, 2018), <https://www.ncronline.org/news/accountability/leaked-german-report-shows-3700-cases-abuse-minors-68-years>.

104. Zita Ballinger Fletcher, *German Prosecutors Launch Crackdown on Church Sex Abuse*, NAT'L CATH. REP. (Dec. 7, 2018), https://www.ncronline.org/news/accountability/german-prosecutors-launch-crackdown-church-sex-abuse?site_redirect=1.

105. *German Cardinal: Society Hypocritical on Church Sex Abuse*, CRUX NOW (Jan. 4, 2019), <https://cruxnow.com/church-in-europe/2019/01/04/german-cardinal-society-hypocritical-on-church-sex-abuse/>.

106. Mechanisms within the Vatican are sure to be scrutinized closely during the upcoming Vatican trial of Cardinal McCarrick. See Povoledo & Otterman, *supra* note 1.

107. Thomas Reese, *Pope Francis' Blind Spot on Sexual Abuse*, NAT'L CATH. REP. (Jan. 25, 2018), <https://www.ncronline.org/news/opinion/signs-times/pope-francis-blind-spot-sexual-abuse>.

Karadima, who was found guilty by the Vatican of abusing minors in 2011.¹⁰⁸ Pope Francis's defense of Barros's appointment sparked further outrage, eventually prompting him to apologize and to dispatch the top Vatican sex crimes investigator to examine the claims.¹⁰⁹

Several civil actions filed in U.S. courts have also directly implicated the Vatican itself. In October 2018, an action against the Holy See was filed in federal court in California, seeking injunctive relief, including the release of all Vatican documents on abusive clergy.¹¹⁰ A few weeks later, six survivors in the District of Columbia filed a class action against the U.S. Conference of Catholic Bishops and the Holy See, claiming various forms of damages as well as declaratory and injunctive relief, including disclosure and reporting obligations relating to past and future sexual abuse, a broad range of other policy measures—and personal apologies.¹¹¹ Later, in May 2019, five survivors—including three brothers—filed a federal lawsuit in U.S. District Court in Minnesota seeking to make public and report all alleged crimes of sexual abuse.¹¹²

E. INTERNATIONAL LAW RESPONSE

Given the media, legal, and political activity generated in domestic systems, it is hardly surprising that the crisis began to prompt transnational activity as well. In September 2011, a submission was lodged with the International Criminal Court alleging that then-Pope Benedict, Cardinal Angelo Sodano (Dean of the College of Cardinals), Cardinal Tarcisio Bertone (Cardinal Secretary of State), and Cardinal William Levada (then Prefect of the Congregation for the Doctrine of the Faith) had committed crimes against humanity by failing to prevent and punish perpetrators of rape and sexual violence in a “systematic and widespread” concealment, which included failure to cooperate with relevant law enforcement agencies.¹¹³ On May 31, 2012, the prosecutor's office decided against charges on the ground that some of the alleged offenses “do not appear to fall within the

108. *Hundreds in Chile Try to Stop Bishop Barros Installation*, BBC NEWS (Mar. 21, 2015), <https://www.bbc.com/news/world-latin-america-32004240>.

109. Jason Horowitz, *Pope Francis, After Criticism, Sends Sex Crimes Investigator to Chile*, N.Y. TIMES (Jan. 30, 2018), <https://www.nytimes.com/2018/01/30/world/europe/pope-francis-chile-abuse.html>.

110. See Amanda Lee Myers & Nicole Winfield, *California Man Sues Vatican for Names of Abusers Worldwide*, AP (Oct. 4, 2018), <https://www.apnews.com/7811d7ffb8aa4158919df13dad0d94e7>.

111. See Class Action Complaint and Jury Demand at 69, *Lennon v. United States Conference of Catholic Bishops*, No. 18-cv-2618 (D.D.C. Nov. 13, 2018).

112. Rebecca Falconer, *Sexual Abuse Survivors Sue the Vatican Over Predatory U.S. Priests*, AXIOS (May 15, 2019), <https://www.axios.com/catholic-priests-sexual-abuse-survivors-sue-vatican-d092ccc0-731b-4e18-855e-4d9b1c3d0797.html>.

113. See generally Dermot Groome, *The Church Abuse Scandal: Were Crimes Against Humanity Committed?*, 11 CHI. J. INT'L L. 439 (2010) (discussing the viability of this kind of claim in international law).

[court's] jurisdiction."¹¹⁴ But the United Nations took notice. In early 2014, the United Nations Committee on the Rights of the Child issued a report concluding that the Pope and the Roman Catholic Church protected their reputation at the expense of children:

The Holy See has consistently placed the preservation of the reputation of the church and the protection of perpetrators above children's best interest. Another matter was the code of silence that was imposed by the church on children and the fact that reporting to national law enforcement authorities has never been made compulsory.¹¹⁵

The Committee expressed grave concern that the Holy See had not acknowledged the extent of the crimes committed and had not taken the necessary measures either to protect children or to address cases of child sexual abuse.¹¹⁶ It found that it had instead adopted policies and practices which led to the continuation of the abuse and which supported the impunity of the perpetrators.¹¹⁷ Although the Vatican refused to answer a list of questions put to it by the U.N. Committee, Pope Francis did set up a Vatican Committee to fight sexual abuse of children in the Catholic Church.¹¹⁸ However, that Committee was plagued by difficulties and eventually declared inactive, raising new worries about the current pope's commitment to addressing the sexual abuse crisis.¹¹⁹

114. *For Now, Vatican Officials Will Not Face Criminal Charges*, SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS (June 13, 2013), http://www.snapnetwork.org/for_now_vatican_officials_will_not_face_criminal_charges.

115. Patrick Maigua, *Child Rights Precede Reputation of the Catholic Church, Says UN Committee*, U.N. RADIO (Feb. 5, 2014), <http://www.unmultimedia.org/radio/english/2014/02/child-rights-precede-reputation-of-the-catholic-church-says-un-committee/>.

116. *Id.*

117. *Id.*

118. *Pope Francis Sets Up Vatican Child Sex Abuse Committee*, BBC NEWS (Dec. 5, 2013), <https://www.bbc.com/news/world-europe-25235724>. See also THE HOLY SEE, CHIROGRAPH OF HIS HOLINESS POPE FRANCIS FOR THE INSTITUTION OF A PONTIFICAL COMMISSION FOR THE PROTECTION OF MINORS (2014), http://w2.vatican.va/content/francesco/en/letters/2014/documents/papa-francesco_20140322_chirografo-pontificia-commissione-tutela-minori.html; Paul Valley, *Is the Pope Serious About Confronting Child Abuse?*, THE GUARDIAN (Feb. 15, 2016), <https://www.theguardian.com/commentisfree/2016/feb/15/pope-francis-radical-papacy-scandal-sex-abuse-catholic-church> (the Pontifical Commission for the Protection of Minors is made up of clerics, theologians, psychiatrists, therapists and—most significantly—two survivors of priestly sex abuse).

119. See Joshua McElwee, *Lone Survivor on Vatican Abuse Commission Resigns in Frustration*, NAT'L CATH. REP. (Mar. 1, 2017), <https://www.ncronline.org/news/accountability/lone-survivor-vatican-abuse-commission-resigns-frustration> (survivor Marie Collins resigned in 2017; survivor Peter Saunders was placed on leave in 2016); *As It Happens: Why This Survivor Quit the Pope's Sex Abuse Commission in Frustration*, CBC NEWS (Mar. 1, 2017), <http://www.cbc.ca/radio/asithappens/as-it-happens-wednesday-edition-1.4004833/why-this-survivor-quit-the-pope-s-sex-abuse-commission-in-frustration-1.4004838> (reporting that the Commission administration regularly ignored or dismissed recommendations); *Letting Abuse Commission Lapse, Vatican Sends Disappointing Message*, NAT'L CATH. REP. (Dec. 19, 2017), <https://www.ncronline.org/news/accountability/letting-abuse-commission-lapse-vatican-sends-disappointing-message>.

Once again, recent revelations brought with them a new level of organization and advocacy, now at the international level, focused on holding the Church accountable and prompting change. In June 2018, a global network of survivors and advocates announced that they were forming the group, “Ending Clergy Abuse.”¹²⁰ In January 2019, the group wrote to Pope Francis formally requesting that it play a role in the upcoming Bishops’ Conference in February.¹²¹ Twelve survivors, including six from “Ending Clergy Abuse,” met with Pope Francis’s Summit planning committee.¹²²

As this overview indicates, this is very much an ongoing matter and one that implicates a vast array of jurisdictions, only a few of which it has been possible to touch on here. But hopefully, this summary gives a sense of the scale and nature of the issues involved. With this in mind, let us examine how this crisis impacted the law itself, particularly private law.

III. HOW THE CATHOLIC CHURCH CRISIS CHANGED PRIVATE LAW

In the aftermath of World War II, many countries reached for law as a tool to reestablish moral order. The International Military Tribunal at Nuremberg represented, among many other things, a dramatic shift in the moral, political and historical work that law was asked to do.¹²³ This enlarged role took on new and critical salience in the late decades of the 20th century, as authoritarian and oppressive regimes began to fall.¹²⁴ Law had often been a tool to resist those regimes, and now it was increasingly called upon to help manage the transition from an unjust past to a better future. The approach changed from prior decades, as attention focused on repair and responding to both individual and collective injuries.¹²⁵ Alongside these transnational developments, another series of events was unfolding: domestic human rights advocates were increasingly turning away from state-centered processes like criminal and even classical constitutional law and looking instead towards civil remedies.¹²⁶ Until then, civil litigation for historic wrongs was a rare event indeed. Procedural bars to liability for old injustices were formidable, and private law was generally hostile to the idea that an institution could be liable in damages for a grievous criminal wrong carried out by an

120. Joshua McElwee, *New Group Fighting Catholic Clergy Abuse Launches in Geneva*, NAT’L CATH. REP. (June 6, 2018), <https://www.ncronline.org/news/accountability/new-group-fighting-catholic-clergy-abuse-launches-geneva>.

121. *ECA Global Calls for Meeting with Pope Francis at February Summit*, ENDING CLERGY ABUSE (Jan. 16, 2019), <https://www.ecaglobal.org/eca-global-calls-for-meeting-with-pope-francis-at-february-summit>.

122. *ECA in Rome Roundup*, ENDING CLERGY ABUSE, <https://www.ecaglobal.org/eca-rome-2019-roundup> (last visited Sept. 30, 2019).

123. See generally Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 Yale L. J. 1009 (1997).

124. *Id.*

125. *Id.*

126. Moran, *Problem of the Past*, *supra* note 18.

individual.¹²⁷ But those hurdles began to fall as efforts to respond to decades of institutional complicity in the clergy abuse of children unfolded.

Looking at the magnitude of the Catholic Church sex abuse scandal, the crisis may now seem inevitable. When the issues surfaced in the 1980s, however, survivors certainly had compelling moral and emotional arguments—but legally speaking, they faced what must have seemed like insuperable barriers.¹²⁸ While the private law of responsibility had begun to open up to some novel human rights-oriented claims, particularly in critical jurisdictions like the United States, redress for historic wrongs still appeared a distant prospect.¹²⁹ Indeed, as we shall see, the Catholic Church crisis began with isolated, individual actions across many different jurisdictions. Yet, the Catholic Church adopted an aggressive defense strategy, displaying a willingness to litigate almost any issue. This meant that a significant volume of decided cases began to accumulate—a feature that distinguishes the Catholic Church crisis from many other claims for historic redress and that to some degree accounts for its dramatic impact on the shape of the law.

In the early days, individuals bringing a sex abuse claim against the Church faced daunting challenges.¹³⁰ The passage of time meant that statutes of limitations were perhaps the most obvious hurdle for plaintiffs.¹³¹ However, immunities were also challenging to address, because in many places the Catholic Church was protected not only by the doctrine of charitable immunity but also by sovereign immunity arising out of the status of the Vatican in international law.¹³² Moreover, the more powerful the Church was in a jurisdiction, the more likely it was to benefit from additional, special legal protections.¹³³ Even if it were

127. *Id.*

128. See generally L. COUNCIL OF AUSTL., SUBMISSION TO THE ROYAL COMM'N INTO INST. RESPONSES TO CHILD SEXUAL ABUSE (2014), <https://www.childabuseroyalcommission.gov.au/getattachment/e45d706d-f72f-4235-91ef-544c3837f00e/29-Law-Council-of-Australia> (discussing challenges faced by potential claimants, such as the expiry of the limitations periods, restrictive institutional liability rules, immunities for charitable institutions, difficulty identifying the proper defendant, evidentiary issues, personal barriers such as shame and mistrust, and the cost of accessing the civil justice system).

129. The early Catholic Church litigation also predated some of the transformative private law developments, including the Holocaust litigation involving Swiss banks and slave labor. See LEORA BILSKY, UNFINISHED BUSINESS: THE HOLOCAUST, CORPORATIONS AND THE LAW, 1-2 (UNIV. OF MICH. PRESS, 2017).

130. See L. COUNCIL OF AUSTL., *supra* note 128.

131. Moran, *Role of Reparative Justice*, *supra* note 21, at 534-35, 549-50.

132. See Edan Burkett, *Victory for Clergy Sexual Abuse Survivors: The Ninth Circuit Strips the Holy See of Foreign Sovereign Immunity in Doe v. Holy See*, BYU L. REV. 35, 44 (2010) (citing *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009)).

133. For instance, the Irish state offered deference to Church authorities when complaints were made directly to a government department, thereby depriving complainants of any meaningful accountability mechanism. CAROLE HOLOHAN, IN PLAIN SIGHT: RESPONDING TO THE FERNS, RYAN, MURPHY AND CLOYNE REPORTS 31 (2011). In Australia, the Ellis doctrine precluded the Church from being held vicariously liable for the sexual abuse committed against minors by Catholic priests. Andrew Morrison, *The Ellis Defence: How the Catholic Church Evades Liability*, 124 PRECEDENT 15 (2014). Several priests who have been convicted of sexual abuse in the United States have been able to take refuge in

possible to circumvent these procedural barriers, other substantive doctrines made private law inhospitable terrain. These doctrines, such as restricted institutional or vicarious liability rules, as well as limited duties of care and public policy exemptions, all meant that the initial claims for sexual abuse faced very significant legal hurdles.¹³⁴ Add to this the other pragmatic factors associated with the passage of time—the difficulty of obtaining evidence, the challenges of child witnesses, and the unlikelihood of corroboration, among others¹³⁵—and one can begin to wonder how these cases ever managed to gain any traction. This of course does not even take into consideration the personal challenges that such litigation entails: from emotional issues right through to the daunting financial commitment associated with bringing a suit against a legally sophisticated, well-funded transnational entity.¹³⁶

Though there were many more defeats for survivors than victories, Church sex abuse cases did begin to move forward and erode some of those barriers. And as we shall see, while the trans-jurisdictional nature of the Church—and its vast resources—posed many problems for plaintiffs, it also meant that the resulting advocacy movement became transnational as well. This, along with technological changes that facilitated information sharing, meant that progress (or, for that matter, defeat) in one jurisdiction had ramifications for how matters developed elsewhere. As the barriers began to weaken, successful historic sexual abuse actions shifted from extremely improbable to what I have previously referred to as “legally plausible.”¹³⁷

This shift began with the erosion of procedural barriers, including the all-important limitations periods and immunities. Because by their very nature these doctrines barred substantive consideration of the issues, they were understandably the first line of defense the Church raised—and also the first doctrines to be challenged. As their force started to wane and the possibility of liability began to open up, it brought into play an array of other, more substantive doctrines that together made up the dominant picture of responsibility. Let us examine these transformations in turn, beginning with limitations periods.

IV. LIMITATIONS PERIODS

The question of limitations periods is arguably the most challenging threshold problem for any claim involving historic wrongdoing. Statutes of limitations typically require that actions for damages be brought expeditiously, usually within a

South America, where the Church and its officials are shielded by the rigorous and inflexible application of limitations periods. Will Carless, *South America Has Become a Safe Haven for the Catholic Church's Alleged Child Molesters*, AGENCE FRANCE-PRESS (Sept. 17, 2015), <https://www.pri.org/stories/2015-09-17/south-america-has-become-safe-haven-catholic-church-s-alleged-child-molesters>.

134. L. COUNCIL OF AUSTL., *supra* note 128.

135. *Id.*

136. *Id.*

137. Moran & Roach, *supra* note 88, at 483.

few years of the injury.¹³⁸ Over a century ago, Oliver Wendell Holmes Jr. asked, “what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?”¹³⁹ Although the justifications have remained complex and a bit puzzling,¹⁴⁰ fairness to the defendant and the right to repose typically predominate:

The primary consideration underlying such legislation [i.e., statutes of limitations] is one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when ‘evidence has been lost, memories have faded, and witnesses have disappeared.’ Another factor may be an estimate of the effectiveness of the courts, and a desire to relieve them of the burden of adjudicating inconsequential or tenuous claims.¹⁴¹

Whatever their merits, in the context of childhood sexual abuse, it became clear that limitations periods could have devastating effects. Because the claims involving clergy sexual abuse of children involved wrongs that were so individualized, so dispersed, and so long hidden, it was virtually inevitable that they would face serious problems under the traditional approach to limitations periods.¹⁴² Indeed, many survivors of clergy sexual abuse do not make claims until decades after the abuse occurred.¹⁴³ Australian studies indicated that the limitations period had expired in 96.77 percent of cases alleging sexual abuse of a child¹⁴⁴ and that, on average, it took thirty-three years for a survivor to come forward.¹⁴⁵ Commentators have suggested that between eighty and ninety percent of the clergy sexual abuse claims on their face appear barred by statutes of

138. The basic limitations period for an action founded on tort is six years in the United Kingdom. Limitation Act 1980, c. 58, § 2 (Eng.). The basic limitations period ranges from two to six years in the United States and Canada, depending on the state or province where the injury is alleged to have occurred. See Elizabeth Adjin-Tettey & Freya Kodar, *Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence*, 42 OTTAWA L. REV. 95, 100 (2010) (discussing limitations periods across Canada); MATTHIESEN, WICKERT & LEHRER, S.C., STATUTES OF LIMITATIONS FOR ALL 50 STATES (2017), <https://www.mwl-law.com/wp-content/uploads/2013/03/statute-of-limitations-for-all-50-states.pdf> (detailing the basic limitations period in each American state).

139. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

140. See generally Tyler Ochoa & Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453 (1997).

141. Harvard L. Rev. Ass’n, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

142. See L. COUNCIL OF AUSTL., *supra* note 128.

143. TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE* 60 (Harv. Univ. Press 2008), citing Terry & Tallon, *supra* note 47, at 84.

144. Kieran Tapsell, ‘Catastrophic Institutional Failure’ Can Be Fixed, NAT’L CATH. REP. (Jan. 9, 2018), <https://www.ncronline.org/news/accountability/catastrophic-institutional-failure-cataloged-australian-abuse-commission-can-be>.

145. *Id.*

limitations.¹⁴⁶ Thus, it is not surprising that statutes of limitations typically featured as “an overwhelming source of dismissal.”¹⁴⁷ Since the evolution of limitations periods began in the United States, that is where we will begin our discussion.

A. LIMITATIONS PERIODS IN THE UNITED STATES

As noted above, the revelations concerning Gilbert Gauthé and the Diocese of Lafayette marked a pivotal moment in the Catholic Church sex abuse crisis.¹⁴⁸ By all accounts, Gauthé was a voracious predator who for over a decade repeatedly sexually assaulted many young boys.¹⁴⁹ One article described his tactics as follows:

The priest took boys on camping trips and invited them for sleepovers in the rectory. He claimed to hold practices for altar boys every day at 6 a.m. and encouraged parents to let their boys spend the night. His sexual appetite was uncontrollable. He put bars on the windows of a rectory. He kept a gun by the side of his bed, and when children refused to submit he threatened to use it. At night, he raped the boys, forced them to perform sex acts on each other, and took photographs on his Polaroid camera.¹⁵⁰

The *Boston Globe* reported that 130 people claimed to have been sexually abused by Father Gauthé.¹⁵¹ In 1983, one of the survivors told his father, who reported the abuse to the diocese.¹⁵² The bishop sent the priest away for psychological treatment and offered nine families confidential settlements of more than \$4 million.¹⁵³ One of the families refused to settle and took the case to court.¹⁵⁴ In 1986, one of the boys testified in graphic detail, bringing the issue to public consciousness in the United States.¹⁵⁵

In the aftermath of the Lafayette scandal, there was a tremendous amount of legislative reform designed to liberalize statutes of limitations and address the issue of child sexual abuse.¹⁵⁶ Much of the early activity focused on extending

146. LYTTON, *supra* note 143, at 60.

147. *Id.*

148. See Baran, *supra* note 41.

149. *Id.*

150. *Id.*

151. Rachel Martin, *Abuse Scandal Still Echoes Through Catholic Church*, NPR (Jan. 12, 2007), <http://www.npr.org/templates/story/story.php?storyId=6765175>.

152. Baran, *supra* note 41.

153. *Id.*

154. *Id.*

155. *Id.*

156. This activity built upon earlier work that had begun to expose the phenomenon of childhood sexual abuse and its devastating consequences. See, e.g., Judith Alpert et al., *Symptomatic Clients and Memories of Childhood Abuse: What the Trauma and Child Sexual Abuse Literature Tells Us*, 4 PSYCHOL. PUB. POL'Y & L. 941, 944 (1998).

the period of time or “tolling” for those under the age of majority.¹⁵⁷ The National Center for Survivors of Crime reports that nearly every state now has a basic suspension of its statute of limitations for civil actions while a person is a minor.¹⁵⁸ In addition, many states have specific provisions addressing child sexual abuse¹⁵⁹ and several states are eliminating limitations defenses in such cases.¹⁶⁰ Of course, there is no one catalyst that alone accounts for the erosion of the idea that even a powerful claim will be barred if not brought to court expeditiously. However, the Catholic Church sex abuse crisis does stand out for the magnitude of its impact. For example, a perusal of the annotated guide to limitations provided by the National Survivors of Crime in the United States is noteworthy for how often the Catholic Church or related institutions are identified in cases that led to changes either in statutory limitations regimes or in the judicial application of the discoverability rule.¹⁶¹

The link between the Catholic Church sex abuse crisis and limitations liberalization is also apparent from the Church’s own engagement on this issue. Interestingly, by 2010, the Vatican had modified the limitations periods in its own disciplinary processes as a result of the abuse cases.¹⁶² Outside of the Vatican, however, the Catholic Church is heavily involved in lobbying against child sexual abuse survivors who try to persuade lawmakers to open up limitations periods.¹⁶³ *The Guardian* put it bluntly: “The U.S. Catholic church has poured millions of dollars over the past decade into opposing accountability

157. New York and Wyoming amended their statutes in 1985, Virginia did so in 1986, and Nebraska and West Virginia followed in 1988. NAT’L CRIME SURVIVOR BAR ASS’N, STATUTES OF LIMITATION ON CHILD SEXUAL ABUSE (2010), <https://victimsofcrime.org/our-programs/past-programs/dna-resource-center/untested-sexual-assault-kits/sexual-assault-kit-backlog-laws/sexual-assault-statute-of-limitations-resources>.

158. *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, NAT’L CONF. OF STATE LEGISLATORS (May 30, 2017), <http://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx>.

159. *E.g.*, Arizona, California, Delaware, Florida, Hawaii, Illinois, Nevada, New Jersey, New York, Pennsylvania. *Id.*

160. Legislators in Alaska, Maine and Utah have enacted statutory reforms which allow survivors of child sexual abuse to bring a civil action at any time. *See id.* However, it should be noted that some states including California, Delaware, Georgia, Hawaii and Minnesota have also enacted “sunshine” legislation, which allowed claims that were barred by a previous limitations period to be brought, but only during a limited period following the enactment of the legislation. *See* Catalina Sugayan & Peter Horst, *Statutes of Limitations for Civil Actions Based on Childhood Sexual Abuse*, SEDGWICK LLP, (Jan. 23, 2017) <http://waldorfrisksolutions.com/wp-content/uploads/2017/01/Childhood-Sexual-Abuse-Statutes-of-Limitations-2017.pdf>.

161. Even on their face alone, nearly one-third of the cases cited on the National Survivors of Crime website in limitations changes refer specifically to the Catholic Church or related institutions. NAT’L CRIME SURVIVOR BAR ASS’N, STATUTES OF LIMITATION ON CHILD SEXUAL ABUSE (2010), <https://www.survivorsofcrime.org/docs/NCVBA/statutes-of-limitations-guide.pdf?sfvrsn=4>.

162. John Allen Jr., *Vatican Revises Church Law on Sex Abuse*, NAT’L CATH. REP. (July 15, 2010), <https://www.ncronline.org/news/vatican/vatican-revises-church-law-sex-abuse>.

163. *See* JAMES O’REILLY & MARGARET CHALMERS, THE CLERGY SEX ABUSE CRISIS AND THE LEGAL RESPONSES 66 (2014); Kathleen E. Carey, *Bill Extending Statute of Limitations for Sexual Abuse Fails to Pass PA. House*, TIMES HERALD (Oct. 26, 2016), <http://www.timesherald.com/article/JR/20161026/NEWS/161029844>; *Statutes of Limitations Regarding Clergy Sexual Abuse of Minors*, CATH. WHISTLEBLOWERS (Sept. 23, 2014), <http://www.catholicwhistleblowers.com/whistleblower-essays/>

measures for survivors of clergy sex abuse.”¹⁶⁴ It singled out a number of important jurisdictions where the Church paid millions of dollars to lobbyists, including for “issues associated with timelines for commencing certain civil actions related to sex offenses.”¹⁶⁵

The expenditures appear to have been effective: proposed reform of statutes of limitations failed in all of those states.¹⁶⁶ And the efforts to prevent opening up limitations periods for child sexual abuse is not limited to lobbying lawmakers. Even where limitations acts have been liberalized, the Church has challenged amendments in court on the grounds of retroactivity and lobbied for gubernatorial vetoes, often despite withering internal and external criticism.

B. LIMITATIONS REFORM AND THE AMERICAN CATHOLIC CHURCH: ILLUSTRATIVE CASES

Connecticut illustrates some of these larger dynamics and reveals how intertwined the issue of limitations liberalization is with the Catholic Church sex abuse crisis. Until the 1990s in Connecticut, the traditional limitations rules meant that those claiming sexual abuse as children had to file lawsuits within two years of turning eighteen.¹⁶⁷ Then, in 1991, state lawmakers extended the statute of limitations to allow survivors to bring civil sexual abuse claims until they were thirty-five years old.¹⁶⁸ After a rash of claims against the Roman Catholic Diocese of Bridgeport, lawmakers again extended the age limit in 2002, giving potential plaintiffs until age forty-eight to file claims.¹⁶⁹ Since then, Connecticut

statutes-of-limitations-regarding-clergy-sexual-abuse-of-minors; Stephanie Ebbert, *Legislature Postpones Extending Statute of Limitations for Child Sex Abuse*, BOS. GLOBE (Aug. 2, 2012), <http://www.bostonglobe.com/metro/2012/08/01/legislature-postpones-measure-extending-statute-limitations-for-child-sex-abuse-claims/vBYOt8ZuzURvK4tVLJB3OM/story.html>; Marci A. Hamilton, *The Catholic Bishops Lobby Against Legislation to Protect Children*, VERDICT (Apr. 19, 2012), <https://verdict.justia.com/2012/04/19/the-catholic-bishops-lobby-against-legislation-to-protect-children>; Alexis Linkletter, *California is Removing the Statute of Limitations for Rape*, VICE (Oct. 3, 2016), https://www.vice.com/en_ca/article/yvebx7/california-is-removing-the-statute-of-limitations-for-rape.

164. George Joseph, *US Catholic Church Has Spent Millions Fighting Clergy Sex Abuse Accountability*, THE GUARDIAN (May 12, 2016), <https://www.theguardian.com/us-news/2016/may/12/catholic-church-fights-clergy-child-sex-abuse-measures>.

165. *Id.* In Pennsylvania, Maryland and New Jersey, for example, bishops’ conferences spent more than \$5.2 million, \$1.5 million, and \$435,000 respectively lobbying in the state capitols. *Id.*

166. *Id.*

167. 1986 Conn. Acts 240 (amended 1991). See also *Doe v. Hartford Roman Cath. Diocesan Corp.*, 119 A.3d 462, 514-16 (Conn. 2015) for a discussion regarding the public policy rationales motivating the legislative reform in 1991.

168. 1991 Conn. Acts 138 (amended 2002). See *Roberts v. Caton*, 619 A.2d 844, 846-47 (Conn. 1993).

169. 2002 Conn. Acts 138 (applying retroactively). See Dave Altimari, *Church to Seek Reversal of Law That Extended Time Abuse Accusers May Sue*, HARTFORD COURANT (Sept. 21, 2014), <http://www.courant.com/news/connecticut/hc-diocese-lawsuit-overturn-20140919-story.html>.

plaintiffs have brought countless successful claims against the Church, with an estimated value in the tens of millions of dollars.¹⁷⁰

In response, the Archdiocese of Hartford brought a constitutional challenge to the statutes of limitations changes.¹⁷¹ The case involved Rev. Ivan Ferguson, who was found to have repeatedly assaulted 13-year-old “Jacob Doe”.¹⁷² Ferguson had been assigned to lead Jacob’s school even though he had admitted to the Archbishop that he had sexually abused children while a teacher at his previous school.¹⁷³ In 2002, when the statute of limitations on civil lawsuits in sex abuse cases was extended, Jacob Doe sued the archdiocese.¹⁷⁴ A jury found in his favor and ordered the Archdiocese to pay Doe \$1.3 million.¹⁷⁵ The Church then challenged that award, arguing that it was unconstitutional to extend the statute of limitations retroactively.¹⁷⁶ The Supreme Court of Connecticut rejected the challenge and upheld the legislation.¹⁷⁷ It stated as follows:

Given the unique psychological and social factors that often result in delayed reporting of childhood sexual abuse, which frustrated the ability of survivors to bring an action under earlier revisions of the statute of limitations, we cannot say that the legislature acted unreasonably or irrationally.¹⁷⁸

The Church’s decision to challenge the legislation and to expend its resources doing so was the subject of sufficient criticism that the Archdiocese issued a statement after the decision was handed down, saying the case concerned “legal issues and matters of justice.”¹⁷⁹

Connecticut is but one of many examples of how intertwined limitations reform is with the Catholic Church sexual abuse crisis.¹⁸⁰ In addition to the other limitations reforms underway, across the U.S. there has recently been a renewed

170. Christian Nolan, *Catholic Church Tries to Stave Off Priest Abuse Lawsuits*, CONN. L. TRIB. (Sept. 19, 2014, 1:27 PM), <https://www.law.com/ctlawtribune/almID/1202670742146/Catholic-Church-Tries-to-Stave-Off-Priest-Abuse-Lawsuits/>.

171. Mike Krafcik, *Clergy Sex Abuse Victims Speak Out Against Hartford’s Archbishop*, FOX 61 (Sept. 18, 2014), <https://fox61.com/2014/09/18/clergy-sex-abuse-victims-speak-out-against-hartfords-archbishop/>.

172. *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 470 (Conn. 2015).

173. *Id.* at 470-75.

174. *Id.*

175. *See id.* at 470–71.

176. Daniel Tepfer, *Supreme Court Upholds Rights of Abuse Survivors*, CONN. POST (June 26, 2015), <https://www.cpost.com/news/article/Supreme-Court-upholds-rights-of-abuse-survivors-6352088.php>.

177. *Id.*

178. *Id.*

179. Dave Collins, *Connecticut Court Upholds \$1m Verdict in Priest Abuse Case*, BOS. GLOBE (June 27, 2015), <https://www.bostonglobe.com/metro/2015/06/26/connecticut-court-upholds-verdict-priest-abuse-case/a1R6yEOQ3sAhh9EYF2dhDL/story.html>.

180. *See Editorial: Archdiocese of Hartford at Odds with Pope Francis’ Words on Money, Sex Abuse*, MIDDLETOWN PRESS (Sept. 27, 2014), http://www.middletownpress.com/opinion/20140927/editorial-archdiocese-of-hartford-at-odds-with-pope-francis-words-on-money-sex-abuse#disqus_thread.

push to open up “lookback windows,” which provide a time period during which survivors of childhood sexual abuse may sue regardless of the passage of time.¹⁸¹ While the Church is continuing its advocacy against such measures, as one commentator noted, the Pennsylvania Report’s uncovering of the Church’s “play-book” for handling sexual abuse cases has meant that bishops and the Church are no longer given the “benefit of the doubt” they once enjoyed.¹⁸²

New York provides an illustration. In that state, the powerful Catholic Conference—the policy arm of the Church led by Cardinal Dolan—reportedly paid millions to major lobbying firms to work against the *Child Victims Act*.¹⁸³ For some years, the *Child Victims Act* had been before legislators: it proposed extending the age to fifty for civil cases, to twenty-eight for felony criminal cases, and creating a one-year “look-back” period.¹⁸⁴ An explicit part of the retainer paid by the Church concerned work on issues associated with “statutes of limitations” and “timelines for commencing certain civil actions related to sex offenses.”¹⁸⁵ Perhaps it is no surprise, then, that New York’s statute of limitations long remained among the more restrictive in the country, giving survivors only until their twenty-third birthday to initiate civil or criminal cases.¹⁸⁶

However, 2018 proved to be a turning point. New York Governor Andrew Cuomo pledged his support for the elimination of limitations periods for child abuse survivors, and with control of the state senate passing to Democrats, the *Child Victims Act* finally became law in the last days of January 2019.¹⁸⁷ When asked why it took so long, Governor Cuomo bluntly attributed it to “the conservatives in the Senate who were threatened by the Catholic Church.”¹⁸⁸ Cardinal Dolan wrote a blistering opinion piece in the *New York Daily News*, arguing that the Act “pillories” the Church and ignores the Church’s leadership in developing

181. *States Move to Lift Restrictions on Child Sex-Abuse Lawsuits*, CRUX NOW (Jan. 23, 2019), <https://cruxnow.com/church-in-the-usa/2019/01/23/states-move-to-life-restrictions-on-child-sex-abuse-lawsuits>.

182. *Id.*

183. Kenneth Lovett, *Catholic Church Spent \$2M on Major N.Y. Lobbying Firms to Block Child-Sex Law Reform*, N.Y. DAILY NEWS (May 30, 2016), <http://www.nydailynews.com/news/politics/catholic-church-hired-lobby-firms-block-n-y-kid-rape-laws-article-1.2655010> [hereinafter Lovett, *Catholic Church Spent \$2M*].

184. Eric Levenson, *A Unique One-Year Window for Child Sex Abuse Victims to Get Justice Opens This Week in New York*, CNN (Aug. 12, 2019), <https://www.cnn.com/2019/08/12/us/new-york-child-victims-law/index.html>.

185. Lovett, *Catholic Church Spent \$2M*, *supra* note 183.

186. See Kenneth Lovett, *Cuomo Unveils Plan for Child Victims Act that Would Do Away with Statute of Limitation*, N.Y. DAILY NEWS (Jan. 12, 2017), <https://www.nydailynews.com/news/politics/cuomo-unveils-plan-child-victims-act-article-1.2943920?barcprox=true>.

187. See Peter Feuerherd, *New York State Set to Extend Statute of Limitations on Child Sex Abuse*, NAT’L CATH. REP. (Feb. 12, 2019), <https://www.ncronline.org/news/accountability/new-york-state-set-extend-statute-limitations-child-sex-abuse>.

188. ‘*Child Victims Act*’ Passed in New York, Allowing Child Sexual Abuse Victims to Sue Their Abusers, FOX 6 (Jan. 31, 2019), <https://fox6now.com/2019/01/31/child-victims-act-passed-in-new-york-allowing-child-sexual-abuse-victims-to-sue-their-abusers/>.

programs to prevent abuse and voluntarily compensate survivors.¹⁸⁹ Governor Cuomo responded publicly, noting that the Church had opposed the act for years and pulling out press releases over the years to prove his point.¹⁹⁰ The Church eventually dropped its opposition when the bill was amended to allow prosecution of both public and private institutions.¹⁹¹ The *Child Victims Act* came into effect on August 14, 2019, and on that day alone, 427 child abuse claims were filed—the “vast majority” of them against the Catholic Church.¹⁹² That same day, Cardinal Dolan shared a video on Twitter describing it as a “dark time.”¹⁹³

These examples illustrate the close relationship between the Catholic Church sex abuse crisis and the liberalization of limitations periods in the United States. Only a fraction of that vast and complex legal activity can be captured here. But despite those complexities, it seems clear that limitations periods—which for most of our legal history shielded the past from liability—can no longer be counted upon by the Church to perform that function. Remaining states with restrictive limitations regimes are explicitly rethinking them in the wake of the Pennsylvania Report and other reform activity.¹⁹⁴

C. LIMITATIONS PERIODS IN THE COMMONWEALTH

Paralleling the pattern in the United States, increasing reporting and litigation elsewhere concerning childhood sexual abuse, often at the hands of Catholic institutions, has moved legislatures to liberalize limitations periods. In Canada, public revelations in 1989 suggested that there was extensive sexual abuse at the Catholic Church’s Mount Cashel Orphanage.¹⁹⁵ The government and Church investigations that followed uncovered a pattern of widespread physical and sexual abuse over several decades.¹⁹⁶ Here too, the events unleashed a flood of claims against the Catholic Church, bringing the issue of child sexual abuse to national consciousness.¹⁹⁷ In 1992, the Supreme Court of Canada issued an important decision that called the limitations defense into question in the context of familial sexual abuse.¹⁹⁸ Following this decision and an influential report on institutional child abuse prompted, in part, by the Mount Cashel scandal, Canadian

189. See Carl Campanile, *Cuomo Calls Out Church for Opposing Child Victims Act in Feud with Dolan*, N.Y. POST (Jan. 29, 2019), <https://nypost.com/2019/01/29/cuomo-calls-out-church-for-opposing-child-victims-act-in-feud-with-dolan/>.

190. *Id.*

191. See ‘*Child Victims Act*’, *supra* note 188.

192. See Meghan Keneally, *Hundreds of Lawsuits to be Filed for Old Alleged Child Sexual Abuse Cases in NY After Passage of Child Victims Act*, ABC NEWS (Aug. 14, 2019), <https://abcnews.go.com/US/hundreds-lawsuits-filed-york-alleged-child-sexual-abuse/story?id=64956013>; Lavietes & Allen, *supra* note 34.

193. Cardinal Dolan (@CardinalDolan), TWITTER (Aug. 14, 2019, 6:52 AM), <https://twitter.com/CardinalDolan/status/1161636811250311168>.

194. *States Move to Lift Restrictions on Child Sex-Abuse Lawsuits*, *supra* note 181.

195. Gullage, *supra* note 84.

196. *Id.*

197. *Id.*

198. *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, 24 (Can.).

provinces began to amend their limitations legislation to avoid prejudicing survivors of childhood sex abuse.¹⁹⁹ Most provinces in Canada now do not impose time limits on civil actions for sexual assault.²⁰⁰

The Catholic Church crisis is similarly prompting liberalization of limitations rules in Australia and New Zealand. Many of the hearings of the Australian Royal Commission have focused specifically on the Catholic Church, detailing thousands of allegations of abuse.²⁰¹ The Royal Commission's Report on Redress and Civil Litigation recommended that all states and territories remove any limitation periods applying to claims for damages based on personal injury resulting from the sexual abuse of a person in an institutional context when the person was a child.²⁰² Moreover, the Report recommended that limitation periods be removed with retrospective effect.²⁰³ All states except South Australia have now either implemented or committed to implement the recommendations.²⁰⁴

Interestingly, in May 2016, Australia's federal Attorney-General issued a Legal Service Direction instructing Commonwealth agencies "not to plead a defense to a time-barred child abuse claim based on the expiry of an applicable limitation period in relation to that claim" or "oppose an application for an extension of a limitation period in relation to a time-barred child abuse claim."²⁰⁵ Despite increased scrutiny and criticism, the Catholic Church has nonetheless

199. See generally *Restoring Dignity*, *supra* note 86.

200. See Sarah Boesveld, *Ontario and Nova Scotia Loosening Rules on Sex Abuse Cases, Making it Easier for Survivors to Sue Their Attackers*, NAT'L POST (Apr. 7, 2015), <http://nationalpost.com/news/canada/sex-abuse-lawsuits-ontario-nova-scotia-735695/wcm/912386ee-352d-40e5-b164-a979b8ef1790>; Dean Bennett, *Alberta Will End Time Limit on Civil Suits for Sexual Violence*, MACLEAN'S (Mar. 7, 2017), <http://www.macleans.ca/news/alberta-will-end-time-limit-on-civil-suits-for-sexual-violence/>. Quebec is one of the few remaining provinces that retains time limits in child sexual abuse cases, and it recently extended its window from three to 30 years. Jesse Feith, *Ombudsman Backs Call to End Time Limits in Sexual Assault Cases*, MONTREAL GAZETTE (Jan. 15, 2018), <http://montrealgazette.com/news/local-news/ombudsman-backs-call-to-end-time-limits-in-sexual-assault-cases>.

201. Philippa McDonald & Riley Stuart, *Royal Commission into Child Sexual Abuse: 1,880 Alleged Perpetrators Identified in Catholic Church*, ABC NEWS (Feb. 6, 2017), <http://www.abc.net.au/news/2017-02-06/royal-commission-into-child-sexual-abuse-begins-in-sydney/8242600>.

202. L. COUNCIL OF AUSTL, *supra* note 128.

203. *Id.*

204. Michael Owen, *Time Limit on Child Abuse Cases in South Australia "Shameful"*, THE AUSTRALIAN (Jan. 31, 2017), <http://www.theaustralian.com.au/national-affairs/state-politics/time-limit-on-child-abuse-cases-in-south-australia-shameful-news-story/ff32fe0dce648cc8217442b5022ba120>. See also *High Court of Australia Declines to Extend Limitation Period in Claim Concerning Vicarious Liability of Educational and Care Institution in Sexual Abuse Case*, HUM. RTS. L. CTR., (Oct. 5, 2016), <https://www.hrlc.org.au/human-rights-case-summaries/2017/2/17/high-court-of-australia-declines-to-extend-limitation-period-in-claim-concerning-vicarious-liability-of-educational-and-care-institution-in-sexual-abuse-case> (discussing *Prince Alfred Coll. Inc. v ADC* [2016] HCA 37 (Austl.)).

205. Attorney Counsel George Brandis (Cth), *Legal Services Direction – Time-Barred Child Abuse Claims*, 4 May 2016 (Austl.) ("This direction cease[d] to apply 30 April 2019"). Similar developments are also underway in individual Australian states. See, e.g., *Victoria Removes Time Limits on Civil Claims Over Child Sex Abuse*, THE GUARDIAN (Feb. 23, 2015), <http://www.theguardian.com/australia-news/2015/feb/24/victoria-removes-time-limits-on-civil-claims-over-child-sex-abuse>.

continued where possible to vigorously assert limitations defenses in child sexual abuse claims.²⁰⁶

Not all jurisdictions have liberalized their limitations regimes, and in these cases, the Catholic Church crisis is a dominant feature of the discussion. Until relatively recently in England and Wales, the cumulative effect of various limitations rules was that time ran out by age twenty-four for child abuse survivors.²⁰⁷ As early as 2001, the Law Commission had recommended limitations reform, calling particular attention to the problem of childhood sexual abuse.²⁰⁸ In 2008, the House of Lords ruled, on a set of bundled appeals including a Catholic Church case, that courts did have discretion to extend the limitations window if warranted.²⁰⁹ The government then announced that reform was therefore not necessary, because “the courts have remedied some of the most significant difficulties . . . for example, in relation to the limitation aspects of child abuse cases.”²¹⁰

But in the period since 2008, English courts have struggled with how to use their newfound discretion. Indeed, two recent and controversial cases which refused to extend the limitations periods in cases alleging childhood sexual abuse both involved the Catholic Church.²¹¹ These and other developments have prompted commentators to highlight the limitations problem in English law and to call for the Independent Inquiry into Child Sexual Abuse to address the issues.²¹² In its Interim Report, the Inquiry did indicate that limitations reform was an important issue that it would consider further, particularly in light of the fact that other jurisdictions such as Scotland had abolished limitations for child

206. Lorna Knowles, *Catholic Church Releases New Guidelines to Deal with Child Sex Abuse Claims, Critics Label “Disingenuous”*, ABC NEWS (Nov. 23, 2015), <https://www.abc.net.au/news/2015-11-23/new-guidelines-for-catholic-church-child-sex-abuse-claims/6967164>.

207. Meg Henderson and Clare Dyer, *When Time’s Up for Justice*, THE GUARDIAN (June 28, 2005), <https://www.theguardian.com/world/2005/jun/28/law.ukcrime>.

208. *Limitation of Actions: Item 2 of the Seventh Programme of Law Reform*, THE LAW COMM’N 91-92 (2001), http://lawcom.gov.uk/app/uploads/2015/03/lc270_Limitation_of_Actions.pdf.

209. *A v. Hoare* [2008] UKHL 6, [25] (appeal taken from Eng.); *see also* *GH v. Catholic Child Welfare Soc’y* [2016] EWHC (QB) 3337 (Eng.) (citing *Hoare* [2008] UKHL); *Archbishop Bowen v. JL* [2017] EWCA (Civ) 82 (Eng.) (citing *Hoare* [2008] UKHL).

210. *Civil Law Reform Bill*, UK PARLIAMENTARY PUB. & RECS. (Nov. 19, 2009), <https://publications.parliament.uk/pa/cm200910/cmhansrd/cm091119/wmstext/91119m0003.htm#09111944000028>.

211. *GH v. Catholic Child Welfare Soc’y* [2016] EWHC (QB) 3337 (Eng.); *Archbishop Bowen v. JL* [2017] EWCA (Civ) 82 (Eng.). *GH* involves the extensive litigation surrounding the sex abuse scandal in the Roman Catholic Diocese of Middlesbrough concerning the De La Salle Institute, some of whose lay brothers worked as teachers at the school. Most, but not all, of the alleged abusers had been members of the Institute. Approximately 249 former pupils at the school alleged that they had been sexually or physically abused by teachers or members of staff at the school. Issues of vicarious liability eventually went to the Supreme Court. *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others (Respondents)*, [2012] UKSC 56 (Eng.).

212. Tracey Emmott, *The Time Limit Problem in Sexual Abuse Compensation Claims*, EMMOTT SNELL SOLICITORS ABUSE SURVIVORS BLOG (Oct. 10, 2017), <http://www.emmottsnell.co.uk/blog/the-time-limit-problem-in-sexual-abuse-compensation-claims>.

abuse.²¹³ However, the Vatican's refusal to cooperate with the Inquiry has sparked discussions of a "diplomatic row," and the issue of the Catholic Church's singularly aggressive reliance on limitations has been highlighted as a matter of particular concern for the inquiry.²¹⁴

Similar uncertainty remains in Ireland, where limitations reform is also closely bound up with the Catholic Church crisis. The issue was brought to public attention by the case of Father Brendan Smyth, who molested hundreds of children over a forty-year period in Dublin, Belfast and the United States.²¹⁵ After the Irish Attorney General refused to comply with a Northern Irish extradition warrant designed to make Smyth face charges, there was public outrage and civil actions against the Catholic Church.²¹⁶ Eventually, Smyth pleaded guilty to seventy-four counts of sexual abuse.²¹⁷ He died in prison in 1997.²¹⁸ However, the handling of his case has continued to reverberate. In 1999, the Government of Prime Minister Bertie Ahern publicly apologized, set up the Laffroy Commission, and created a compensation scheme.²¹⁹ It also enacted a one-year suspension of the statute of limitations for survivors of clergy sexual abuse, which led to another flood of claims.²²⁰ Although Ireland in general remains relatively restrictive on limitations periods, amendments to the limitations regime in 2000 did also extend latitude to survivors of historic child sexual abuse and were inspired by public outrage in the wake of ongoing revelations regarding the Catholic Church.²²¹

213. *Interim Report of the Independent Inquiry into Child Sexual Abuse*, IND. INQUIRY INTO CHILD SEXUAL ABUSE (Apr. 2018), <https://www.iicsa.org.uk/key-documents/5368/view/full-interim-report-independent-inquiry-into-child-sexual-abuse.pdf>.

214. Jules Gomes, *Sex Abuse Inquiry Risks Diplomatic Flare-up Between Holy See and Britain*, CHURCH MILITANT (May 31, 2019), <https://www.churchmilitant.com/news/article/sex-abuse-inquiry-risks-diplomatic-flare-up-between-holy-see-and-britain>.

215. See LYTTON, *supra* note 143, at 194.

216. Liam Collins, *Brendan Smyth's Evil Deeds Can Never Be Forgotten*, IR. INDEPENDENT (July 23, 2017), <http://www.independent.ie/irish-news/brendan-smyths-evil-deeds-can-never-be-forgotten-35958053.html>; *Fr. Brendan Smyth: A Timeline*, IR. TIMES (June 22, 2015), <https://www.irishtimes.com/news/crime-and-law/fr-brendan-smyth-a-timeline-1.2258975>. In 2010, Cardinal Seán Brady, the Roman Catholic Archbishop of Armagh, faced pressure to resign after admitting that in 1975, he witnessed two teenage boys sign oaths of silence after testifying in a Church inquiry against Smyth. Simon Caldwell & Nick Pisa, *Leader of Roman Catholic Church in Ireland Urged to Quit Over Abuse Survivors' Silence Vow*, DAILY MAIL (Mar. 15, 2010), <http://www.dailymail.co.uk/news/article-1257904/Irelands-Catholic-leader-Sean-Brady-paedophile-priest-cover-up.html>.

217. Patsy McGarry, *End of Brendan Smyth Case Brings Sorry Saga to a Close*, IR. TIMES (Nov. 12, 2015), <https://www.irishtimes.com/news/social-affairs/religion-and-beliefs/end-of-brendan-smyth-case-brings-sorry-saga-to-a-close-1.2427172>.

218. *Id.*

219. Patsy McGarry, *Bertie Ahern: 20 Years on from State Apology to Survivors of Abuse*, IR. TIMES (May 11, 2019), <https://www.irishtimes.com/news/social-affairs/religion-and-beliefs/bertie-ahern-20-years-on-from-state-apology-to-survivors-of-abuse-1.3887856>; Liam Reid, *Laffroy Commission Controversy - Timeline*, IR. TIMES (Sept. 10, 2003), <https://www.irishtimes.com/news/laffroy-commission-controversy-timeline-1.374490>.

220. LYTTON, *supra* note 143, at 195.

221. See, e.g., James Gallen, *Historical Abuse and the Statute of Limitations*. STATUTE L. REV. 103, 109 (2018) (discussing Statute of Limitations (Amendment) Act 2000, s. 2).

As these and many other examples reveal, there is a close link between limitations liberalization and the sexual abuse crisis that has rocked the Catholic Church. When the Lafayette scandal broke in the United States in the early 1980s, the legal landscape was such that limitations periods would have counted almost all sexual abuse claims out of time. But since then, the ongoing revelations about the scope and seriousness of the Catholic Church sex abuse crisis have been one of the most important catalysts in prompting large-scale rethinking of the law's traditional approach to the passage of time. Indeed, though this Article focuses on common law jurisdictions, it is noteworthy that in response to the recent scandal involving the Pope's trip to Chile, that government began limitations reform that, among other changes, removed the time limits for sex abuse crimes against children.²²² And while complexities certainly remain, in the span of a few decades, the status of limitations periods has changed dramatically. Once the primary barrier to liability for historic sex abuse claims—a barrier on which the Church relied heavily—they are now of, at best, uncertain standing. Moreover, as both reporting on the crisis and litigation unfolded, limitations periods have become not only legally uncertain arguments but also morally dangerous ones. As we have seen, in addition to subjecting the Church itself to critical scrutiny, some governments have actually decided that limitations periods can no longer be argued in childhood sex abuse cases, regardless of whether they remain technically viable. Without the Catholic Church sex abuse crisis, it is unlikely that the once all-powerful protections of limitations periods would have been so fatally undermined for some important categories of historic wrongs.

V. THE EMERGENCE OF INSTITUTIONAL LIABILITY

Although it appeared at first blush that limitations changes would be the most enduring legal effect of the Catholic Church sex abuse crisis, that distinction may instead belong to a suite of developments relating to institutional liability. By cementing the decline of immunities and reworking of the concept of responsibility, the Catholic Church sex abuse crisis has played a very important role in the emergence of institutional wrongs. The increasing exposure of institutions to tort liability in particular has wrought shifts both in the law and in institutions themselves—shifts that have enormous implications for both the past and the future.²²³

In addition to temporal barriers like limitations periods, tort law also used to be replete with protections that turned on the nature of the defendant. The most obvious were the immunities that protected certain kinds of publicly oriented

222. *Chile Removes Statute of Limitations on Sex Abuse Crimes*, THE IRISH CATH. (July 18, 2019), https://www.irishcatholic.com/chile-removes-statute-of-limitations-on-sex-abuse-crimes/?fbclid=IwAR3GrmTRncENjdA_fcq3i8h9rVB_aU5LDh0p6eURyWPzAAAtaZrwLzwy6Gs.

223. See generally Mayo Moran, *Reshaping Responsibility: The Emerging Private Law of Institutional Wrongs*, in PRIVATE LAW AND POWER 263 (Kit Barker et al. eds., 2017) [hereinafter *Reshaping Responsibility*] (detailing the recent shifts in institutional liability and exploring implications of these shifts).

institutions such as charities, churches and governments.²²⁴ Weaker but still powerful, institution-specific protections also included the public policy exceptions to the duty of care and special damages rules.²²⁵ Substantive rules also restricted the range of actors and acts to which liability could attach.²²⁶ Underlying all of this was a relatively simple picture of responsibility implicitly committed to the idea of a single wrongdoer—a wrongdoer paradigmatically imagined as an individual.²²⁷ On both the procedural and substantive dimensions, as we shall see, the Catholic Church crisis played a pivotal role in redrawing this picture. Not only was it instrumental in solidifying the elimination of institution-specific immunities, it also helped transform the underlying understanding of liability.

The 20th-century emergence of the general duty of care in negligence began a new and serious engagement between private law and the idea of wrong. But private law had scant resources for this undertaking; so, it is perhaps not surprising that it drew on criminal law's well-developed account of culpability.²²⁸ One result was a predisposition to the idea that wrongs were committed by individuals.²²⁹ In some cases, of course, responsibility for those wrongs could be shifted to or shared with the institutions associated with the individual actors, but those were extraordinary cases.²³⁰ Wrongdoing was essentially understood as a matter of individual, personal responsibility.²³¹

The Catholic Church sex abuse crisis changed that. The picture that gradually emerged showed that problems were not primarily a matter of mistakes or a lack of coordination but rather resulted from a well-coordinated, well-financed, and powerful institution operating with ruthless self-interest. From the initial toleration of the abuse, to the subsequent well-organized cover-ups, to the eventual aggressive litigation and lobbying strategies designed to protect the Church at all costs—the Church's practices challenged the traditional, individual view of responsibility and wrongdoing.²³²

While other institutions faced their own cases involving the abuse of children,²³³ there was a distinct dimension to the Catholic Church crisis. Other institutions often did not handle such situations well, avoiding direct knowledge or failing to put proper systems in place.²³⁴ But as we shall see, the Catholic Church, at both a local and a global level, actively and repeatedly covered up cases, allowing abusers to carry on in their positions of profound trust—and often of great power. Moreover, when stories started to surface and gain traction, the Catholic

224. *Id.* at 267-68.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *See, e.g.,* Goodstein & Otterman, *supra* note 6.

233. *See e.g.,* L. COUNCIL OF AUSTL., *supra* note 128.

234. *Id.*

Church distinguished itself as willing to do almost anything to defend itself. As discussed below, the Church was quick to use its power and resources to suppress or defeat claims and shield its assets. It became obvious that the Church would do almost anything to protect the institution—even at the expense of the children confided to its care.²³⁵

The Church believed it could use the language of care and healing to head off legal claims; but it also thought it could threaten to use—and indeed did use—any strategy, no matter how ruthless, once in the legal arena. Because of the openness of the legal forum, this assumption proved wrong. The Church might have benefited from special legal protections as an altruistic actor and agent of public good. However, as we shall see, those special institutional immunities began to be called into question as the Church ruthlessly pursued its own institutional interest at the expense of the injured.

As the tactics of the Catholic Church came to light in these cases, the implications of a powerful, global institution carrying out a well-coordinated strategy also began to prompt reconsideration of the old, personalized understanding of liability. Traditionally, courts were reluctant to pass on liability to an institution when someone in its employ carried out a crime.²³⁶ But the way that the Catholic Church handled cases of sexual abuse of children radically undermined this view. If such a trusted religious institution was willing to put children at continued risk and to pursue a ruthless, well-coordinated strategy to defeat their subsequent claims for redress, then perhaps institutional liability for the criminal acts of employees was not so untenable. Alongside the fact that the egregious wrongs in cases of historic sexual abuse were beginning to lead courts to reconsider their traditional attitude to limitations and immunities, the institutional malfeasance of the Catholic Church wrought an associated, dramatic change in the private law of responsibility for wrongs.

There are a number of reasons why institutional liability is especially important in cases like the Catholic Church sex abuse claims. The continuing nature of institutions has special significance in cases that involve historic wrongs. As defendants, institutions have a “shelf life” that extends far beyond the natural limits of human life. That means even for acts anchored in the deep past—and even where the individual wrongdoer is long dead—there will still be a defendant to sue—a government or agency, a church, a corporation. Indeed, in the Catholic Church cases, as we shall see, the individual perpetrator had often died by the time that the survivors began to contemplate legal action.²³⁷ Further, as compared to individual wrongdoers, institutions have resources and are thus more likely to be in a position to compensate survivors for the harm they suffered, a position that very

235. Cf. Lavietes & Allen, *supra* note 34.

236. Moran, *Reshaping Responsibility*, *supra* note 223.

237. See *e.g.* the discussion of the Brendan Smyth case, *supra* note 216, and *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009).

few of the individual defendants—even if they were alive—would have maintained.²³⁸

While these pragmatic considerations are certainly important, there are also deeper reasons why institutional liability matters. Some claims involve wrongdoing that has a systemic dimension—the Holocaust, school segregation, the eugenics movement, slavery, and of course, the Catholic Church sex abuse crisis, to name but a few examples.²³⁹ Such wrongs are not and cannot be carried out simply by individuals. The fact that they involve many individuals carrying out coordinated or related wrongs points toward an institutional dimension to such wrongs.²⁴⁰ Sometimes the wrongs take the form of explicit policy or even law, as in the Holocaust, eugenics, school segregation, and slavery examples.²⁴¹ In most cases, it is also a matter of concerted, institutional action and ethos. In such contexts, the old unitary and personal view of responsibility falls short. Attempting to aggregate individual wrongs would almost certainly miss the larger and more troubling narrative of collective malfeasance.²⁴² Ultimately, this is the more important reason behind the shift toward a broader conception of responsibility. The emergence of that broader conception can be traced back in significant measure to the distinctive institutional cast of so many of the Catholic Church sex abuse cases. Reshaping the conception of responsibility in order to capture this form of wrongdoing turned out to implicate both the institutional immunities as well as the deeper background institutional liability rules. Let us examine these in turn.

A. IMMUNITIES AND SPECIAL PROTECTIONS

The Catholic Church, like so many of the institutions threatened with liability for widespread historic wrongs, traditionally benefited from institution-specific blanket protections or immunities. For churches, this took the form of charitable immunity, while governments and public agencies found protection in Crown or sovereign immunity, and foreign governments in foreign sovereign immunity.²⁴³ In the case of the Catholic Church, its unique relationship to the Holy See meant that, for at least some purposes, it was in the unusual position of being protected by both charitable and sovereign immunity.²⁴⁴ So long as these immunities were in place, even lifting the limitations bar would not have enabled private law to reach the wrongdoing in the Catholic Church sex abuse cases. However, alongside the eroding of the limitations barriers, many of the relevant institution-specific immunities were also weakened or entirely removed.²⁴⁵ Aggressively

238. See *e.g.* the discussion of the Mount Cashel litigation involving the Christian Brothers, *infra* note 276.

239. See Moran, *Problem of the Past*, *supra* note 18.

240. BILSKY, *supra* note 129.

241. Moran, *Problem of the Past*, *supra* note 18.

242. Moran, *Reshaping Responsibility*, *supra* note 223.

243. O'REILLY & CHALMERS, *supra* note 163; Moran, *Reshaping Responsibility*, *supra* note 223.

244. O'REILLY & CHALMERS, *supra* note 163, at 160-61.

245. See *id.*

asserting its traditional immunities even in the context of egregious child sex abuse cases ensured that both the Church and the doctrine garnered significant criticism from commentators, courts and legislators. Ironically, the Church's defense of itself at all costs hastened the elimination of the special protections it once enjoyed.

B. THE DECLINE OF CHARITABLE IMMUNITIES

An illustration of how the Church's reliance on charitable immunity to shield itself in child abuse cases helped to ensure the demise of the doctrine can be found in *Schultz v. Roman Catholic Archdiocese*.²⁴⁶ In that case, the New Jersey Supreme Court found that the Church was immune from liability for clergy sexual abuse.²⁴⁷ The survivor was a young boy who attended a school owned by the archdiocese and participated in a parish-sponsored Boy Scout troop.²⁴⁸ Robert Coakley, a Franciscan brother, was both a teacher and scoutmaster.²⁴⁹ He forced sexual contact on the boy at camp and then continued the abuse at school.²⁵⁰ Despite threats from Coakley, the boy eventually told his parents.²⁵¹ Tragically, despite medical and psychological care, the boy committed suicide.²⁵² His parents brought an action against the archdiocese, which responded with a claim of charitable immunity.²⁵³ A majority of the court reluctantly held that the immunity did protect the Church; however, it explicitly stated that it was only ruling on legal responsibility and noted that the question of moral responsibility was for others to answer.²⁵⁴ The dissent voiced even stronger criticism of the Church for invoking the doctrine in a case involving "the sexual exploitation of an innocent child by a perverted employee," and referred to the "tragic and evil setting" and the "heinous character of the conduct" as the kinds of factors that negate the application of the doctrine.²⁵⁵ Eventually, New Jersey amended its legislation to explicitly exclude from immunity the very situation that *Schultz* involved—sexual offenses against minors.²⁵⁶

The Church's aggressive reliance on immunity in troubling cases like *Schultz* helped prompt more and more jurisdictions to repeal the doctrine. Even where the doctrine remained in place, courts began to show their displeasure with the Catholic Church's willingness to invoke it by narrowing its scope. An example is found in *Picher v. Roman Catholic Bishop of Portland*, where the Maine Supreme Court held that the traditional doctrine of charitable immunity did not

246. See 472 A.2d 531, 536 (N.J. 1984).

247. *Id.* at 539.

248. *Id.* at 532.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 533.

254. *Id.* at 539.

255. *Id.* at 543.

256. N.J. STAT ANN. § 2A:53A-7.4 (West 2006)

apply to intentional torts.²⁵⁷ In that case, Picher, who was abused as a child, brought an action against Melville, a priest in the Diocese of Portland, as well as against the Bishop of Portland.²⁵⁸ Picher was awarded damages of more than \$4.2 million against Melville on the basis of assault, battery and other torts.²⁵⁹ The action also alleged that the Bishop knew that Melville had sexually abused another child before he was assigned to Picher's parish, that he failed to report Melville to law enforcement officials, and that he concealed Melville's propensities from parishioners and the public.²⁶⁰ The Bishop moved for summary judgment on the basis that the Church was protected by charitable immunity.²⁶¹ When the case reached the Maine Supreme Court, it described charitable immunity as a "discredited doctrine" that had been largely abrogated in most other states and was never intended to and did not extend to intentional actions such as fraudulent concealment and child abuse.²⁶²

The cumulative result is that, as *Picher* points out, the vast majority of jurisdictions in the United States no longer recognize charitable immunity as a defense to tort claims.²⁶³ Despite the gradual elimination of the doctrine itself, some states have responded to judicial refusals to grant charitable immunity by legislatively enacting limits on the amount that a plaintiff can recover from a charitable entity.²⁶⁴ In the case of Massachusetts, for example, claims relating to charitable activities were subject to a ceiling of \$20,000.²⁶⁵ However, even in such cases, the magnitude of the wrongdoing in some of the Church litigation has prompted courts to refuse to extend such protections in cases where there was an intentional tort, like sexual abuse.²⁶⁶ Moreover, perhaps uneasy with some of the consequences of invoking the doctrine, the Church has sometimes resorted to settlement in amounts far above the cap.²⁶⁷

A similar relationship between the Catholic Church sex abuse crisis and the diminishing salience of charitable immunity is also apparent in other jurisdictions. In Canada, church immunity became an issue in the wake of the Mount Cashel sex abuse scandal. The Christian Brothers wound up their charitable corporation in order to compensate survivors, whose claims were estimated at \$36 million.²⁶⁸ However, the Brothers argued that two British Columbia schools

257. 974 A.2d 286, 289 (Me. 2009).

258. *Id.*

259. *Id.* at 288.

260. *Id.* at 288-89.

261. *Id.* at 290-91.

262. *Id.* at 290.

263. *Picher*, 974 A.2d at 301 n.6; Matthew Cobb, *A Strange Distinction: Charitable Immunity and Clergy Sexual Abuse*, 62 ME. L. REV. 703, 707 (2010) (citing RESTATEMENT (SECOND) OF TORTS § 895E (Am. L. Inst. 1979)).

264. See O'REILLY & CHALMERS, *supra* note 163, at 161.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Re Winding-up of the Christian Brothers of Ireland in Canada*, [2000] 184 D.L.R. 445 (Can. Ont. C.A.).

owned by them, and worth approximately \$38.5 million, should not be sold to satisfy the claims.²⁶⁹ Without the schools, the Brothers' assets amounted to only \$4 million.²⁷⁰ In an attempt to prevent the schools from being sold to satisfy the survivors' claims, the Brothers invoked a number of grounds, including charitable immunity.²⁷¹ The Chambers Judge held that there was no charitable immunity doctrine, but he accepted a related argument made by the Brothers and ordered the assets to be held in a special purpose trust that could only be used to compensate persons for wrongs done in the context of that specific trust.²⁷² On appeal, the Ontario Court of Appeal affirmed the unavailability of charitable immunity and rejected the special purpose trust exemption.²⁷³ The Court noted that if the Church's argument succeeded, the assets available would fall "woefully short" of the tort claims of the survivors.²⁷⁴ It also quoted as relevant the Supreme Court of Canada's landmark decision in *Curry*:

The suggestion that the survivor must remain remediless for the greater good smacks of crass and unsubstantiated utilitarianism. Indeed, it is far from clear to me that the 'net' good produced by non-profit institutions justifies the price placed on the individual survivor, nor that this is a fair way for society to order its resources.²⁷⁵

Despite this judicial censure, the Christian Brothers appealed to the Supreme Court of Canada, which denied leave to appeal.²⁷⁶ As noted above, such judicial bluntness about the lengths to which the Church will go to protect its assets from sexual abuse survivors highlights the fact that the legal strategies of the Church risk more than just defeat in court—they also risk moral damage to the institution and often result in further erosion of the very protections invoked in their defense.

C. THE DECLINE OF OTHER SPECIAL PROTECTIONS

Unfortunately, these examples are anything but isolated, suggesting a much wider institutional strategy undermining the foundations of the special protections that once benefited the Church. Commentators have noted that while in the early days the Church tended to try to quietly settle cases, it eventually shifted

269. *Id.* at para. 3.

270. *Id.* at para. 12.

271. *Id.* at para. 13.

272. *Id.* at para. 20-21.

273. *Id.* at para. 3.

274. *Id.* at para. 84.

275. *Id.* at para. 39 (quoting *Bazley v. Curry*, [1999] 2 S.C.R. 534, 566); see also Rowland v. Vancouver Coll. Ltd. [2001] B.C.J. No. 1901 (Can. B.C. C.A.) (QL).

276. *Supreme Court Refuses Christian Brothers' Appeal*, CBC NEWS (May 23, 2002), <https://www.cbc.ca/news/canada/supreme-court-refuses-christian-brothers-appeal-1.354764>.

tactics and adopted an extremely aggressive litigation strategy.²⁷⁷ This included measures such as countersuits against survivors and their families:

In Boston, archdiocese lawyers countersued a 6-year-old boy and his parents, accusing them of negligence for trusting the Catholic priest, the Rev. Paul R. Shanley, who allegedly molested him. It was a strategy similar to the one followed by lawyers for the Hawaii Archdiocese.²⁷⁸

Indeed, if survivors did not accept settlements, they could expect the Church to use every available legal avenue and defense.²⁷⁹

However, this approach appears to have backfired, and badly, for the Church. The openness of the legal forum, combined with the Church's willingness to raise any possible defense no matter how troubling, brought the Church's "tactics" into public view in a way it almost certainly did not anticipate. In addition to the judicial criticism already noted, commentators from an array of jurisdictions began to expose the Catholic Church's legal strategies. As one journalist noted, "The church has built a ruthless reputation for its range of legal tactics, from stonewalling to counter-attack."²⁸⁰ These tactics, which include attacks on both legislators and judges that the Church perceives as supportive of child abuse survivors, have been compared to "mafia" behavior.²⁸¹ New York Governor Cuomo's references to legislators being "threatened" by the Catholic Church reinforce the sense that the Church is willing to go to almost any lengths to protect itself.²⁸² In fact, under oath at the Australian Royal Commission, a Church representative conceded that some of its tactics were unfair "from a Christian point of view."²⁸³ Beyond the criticism from courts and commentators, many within the Church itself deplore its tactics. A former priest put it well: "The Church cannot shrug off down-and-

277. Michael Powell & Lois Romano, *Roman Catholic Church Shifts Legal Strategy*, WASH. POST (May 15, 2002), https://www.washingtonpost.com/archive/politics/2002/05/13/roman-catholic-church-shifts-legal-strategy/49c1ce20-82e0-41f8-a750-ebb1c05d8ca6/?utm_term=.51c24576a5ab.

278. *Id.*

279. Adam Litpak, *Religion and the Law*, N.Y. TIMES (Apr. 14, 2002), <https://www.nytimes.com/2002/04/14/us/religion-and-the-law.html>.

280. Paul Kennedy, *The Catholic Church's Words Ring Hollow in Light of Merciless Legal Tactics*, ABC NEWS (Aug. 6, 2017), <http://www.abc.net.au/news/2017-08-06/churchs-words-ring-hollow-in-light-of-merciless-legal-tactics/8763302>.

281. Stephanie Kirchaessner, *Catholic Church Accused of Using "Mafia-like" Tactics to Fight Sex Abuse Bill*, THE GUARDIAN (June 17, 2016), <https://www.theguardian.com/us-news/2016/jun/17/pennsylvania-catholic-church-sexual-abuse-bill-mafia-tactics>.

282. Richard Moody, *State Legislature Overwhelmingly Approves Child Victims Act*, N.Y. STATE SENATE (Jan. 29, 2019), <https://www.nysenate.gov/newsroom/in-the-news/daphne-jordan/state-legislature-overwhelmingly-approves-child-victims-act>.

283. Thomas Oriti, *George Pell Tells Sex Abuse Royal Commission Against John Ellis Was Unfair "From a Christian Point of View"*, ABC NEWS (Mar. 26, 2014, 9:54 AM), <https://www.abc.net.au/news/2014-03-26/lawyers-instructed-to-defend-church-to-send-a-message/5346110>.

dirty defense tactics as just the usual legal maneuvering against a tough opponent . . . As I recall, the Church is supposed to be a moral force.”²⁸⁴

Another example of how the Catholic Church’s tactics have backfired can be found in its frequent efforts to get around the demise of charitable immunity by invoking the “special purpose trust” argument.²⁸⁵ As the discussion of the Mount Cashel litigation above indicates, these arguments appear to be widely invoked by the Church—even as they are criticized as a “tactic” to avoid compensating abuse survivors.²⁸⁶ In the Mount Cashel litigation itself, the strong judicial confirmation of the death of charitable immunity by the Ontario Court of Appeal was almost certainly fueled in part by the Church’s attempt to deploy the “alternative” special purpose trust argument. Similarly, in Australia, the Catholic Church was notorious for using the “Ellis defense,” which bears many similarities to the special purpose trust rejected by Canadian courts in the Mount Cashel litigation, to avoid paying the claims of abuse survivors.²⁸⁷ The Church’s continued reliance on what was perceived to be an unjust and immoral “loophole” led to public criticism and numerous calls for legislative abolition both by the Victoria Inquiry and by the Australian Royal Commission.²⁸⁸ In 2018, Victoria became the first jurisdiction in Australia to introduce legislation to abolish the defense.²⁸⁹ New South Wales later followed.²⁹⁰ The legal tactics of the Church have also been the subject of censure by the United Nations Committee on the Rights of this Child, which commented that it “consistently placed the preservation of the reputation of the Church and the protection of perpetrators above the best interest of children.”²⁹¹

Unfortunately, across jurisdictions, the Church often chooses to protect its assets rather than compensate survivors. Public criticism and judicial censure have tended to follow. The result is that courts and legislators are even more

284. Powell & Romano, *supra* note 277.

285. See Christian Brothers, *supra* note 268, at para. 20-21.

286. Powell & Romano, *supra* note 277.

287. Melissa Davey, *Victoria to Abolish “Ellis Defence” That Protects Church Assets From Abuse Survivor Claims*, THE GUARDIAN (Mar. 6, 2018), <https://www.theguardian.com/australia-news/2018/mar/06/victoria-to-abolish-ellis-defence-that-protects-church-assets-from-abuse-victim-claims> [hereinafter Davey, *Victoria to Abolish*].

288. Desmond Cahill & Peter Wilkinson, *Child Sexual Abuse in the Catholic Church: An Interpretive Review of the Literature and Public Inquiry Reports*, CTR. FOR GLOBAL RESEARCH (Aug. 2017), <https://www.rmit.edu.au/content/dam/rmit/documents/news/church-abuse/child-sex-abuse-and-the-catholic-church.pdf>; Michelle Brown, *Catholic Church Ellis Defence Abolished in ‘Momentous’ Day for Abuse Survivors*, ABC NEWS (Dec. 31, 2018), <https://www.abc.net.au/news/2019-01-01/catholic-church-ellis-defence-scraped-from-new-years-day/10675890>; Georgie Moore, *Vic Set to Abolish Compo Loophole*, NEWCASTLE HERALD (Mar. 6, 2018), <https://www.newcastleherald.com.au/story/5266724/vic-set-to-abolish-abuse-compo-loophole/>.

289. See Davey, *Victoria to Abolish*, *supra* note 287.

290. Helen Davidson, *Sex Abuse Survivors Can Finally Sue Churches in NSW as “Ellis Defence” Abolished*, THE GUARDIAN (Dec. 31, 2018, 9:07 PM EST), <https://www.theguardian.com/australia-news/2019/jan/01/sex-abuse-victims-can-finally-sue-churches-in-nsw-as-ellis-defence-abolished>.

291. *United Nations Recommendations for Vatican Accountability for Sexual Violence in the Church*, CTR. FOR CONST. RTS. (Sept. 22, 2015), <https://ccrjustice.org/UnitedNationsRecommendsVaticanAccountability>.

inclined to close the remaining avenues that the Church seeks to use to shield itself from liability, as well as to reconsider other special treatment the Church receives. In one striking and public example in Australia, the Sydney Archdiocese attracted what was certainly unwanted attention when it provided property valuations to the Royal Commission into Child Abuse that relied upon historic acquisition costs.²⁹² The Royal Commission itself questioned this approach and noted that this, along with the exclusion of the value of schools and local parishes, certainly meant that the Archdiocese was understating its true wealth.²⁹³ Subsequent investigations have suggested a vast gulf between what the Church reported to the Royal Commission and the true value of its assets.²⁹⁴ This in turn has led to calls questioning the many other forms of special privileges it enjoys, such as its tax-exempt status.²⁹⁵

The Church's willingness to be a "no-holds barred" legal actor appears to have come at a very high price. Churches have had the benefit of special legal protections—including immunities, damages caps and special trust arrangements—precisely because they have been seen as fundamentally different from ordinary legal actors by virtue of their devotion to the pursuit of public rather than private good.²⁹⁶ Yet much of the Catholic Church's conduct in response to its sexual abuse scandal has eroded the foundations of the very theory that might have protected it. That conduct has exposed an institutional ethos that favors preservation of the Church itself, even when the cost is devastating damage to children confided to its care. The Church is of course entitled to take steps to protect the institution up to and including behaving like any other aggressive legal actor if sued—but it does so at a cost. Not only does this approach damage its reputation, but it repeatedly and publicly demonstrates the overwhelming priority the Church places on self-preservation, thereby fatally undermining the very reason that it was extended so many legal protections in the first place.

D. THE DECLINE OF SOVEREIGN IMMUNITY

In addition to the shield of charitable immunity, the Catholic Church has long enjoyed a uniquely protected position by virtue of its relationship to the Holy See.²⁹⁷ Alone among churches, it has another argument at its disposal—foreign sovereign immunity.²⁹⁸ The Church has not hesitated to invoke this immunity,

292. Royce Millar et al., *Catholic Church's Massive Wealth Revealed*, SYDNEY MORNING HERALD (Feb. 12, 2018), <https://www.smh.com.au/national/catholic-church-s-massive-wealth-revealed-20180209-p4yzus.html>.

293. *Id.*

294. *Id.*

295. *Id.*

296. Harvard Law Rev. Ass'n, *The Quality of Mercy: 'Charitable Torts' and Their Continuing Immunity*, 100 HARV. L. REV. 1382, 1388-89 (1987).

297. See Rachel Zoll, *Supreme Court Says "No" to Vatican, Refuses to Halt Sex-Abuse Suit vs. Holy See*, AP (June 29, 2010), https://www.cleveland.com/nation/2010/06/supreme_court_says_no_to_vatic.html.

298. *Id.*

and until recently, it proved powerful.²⁹⁹ However, as with the other immunities and protections, the Church's zealous use of foreign sovereign immunity to protect itself from the claims of child sexual abuse survivors also began to erode that immunity. *Doe v. Holy See* illustrates this.³⁰⁰

Doe involved a priest named Ronan who began abusing boys in the mid-1950s in Ireland.³⁰¹ He was transferred to Chicago, where he admitted abusing more boys, and then to a parish in Portland, Oregon, where he was accused of abusing the plaintiff Doe.³⁰² In addition to suing the Archbishop of Portland and others, Doe sued the Holy See on the basis of both vicarious and direct liability.³⁰³ The claim against the Holy See was considered a long-shot; indeed, the Holy See claimed immunity under the Foreign Sovereign Immunities Act (FSIA).³⁰⁴ However, the Ninth Circuit Court of Appeals rejected the idea that the Holy See was entirely immune from civil suit.³⁰⁵ Paralleling the approach to the remaining pockets of charitable immunity, the court carved out an exception to immunity for the "tortious act or omission of . . . any official or employee of that foreign state while acting within the scope of his or her employment."³⁰⁶ *Doe* was actually the second child sexual abuse case in 2009 in which the Holy See was "thwarted in trying to preserve sovereign immunity."³⁰⁷ As one commentator has noted, the documented willingness of Catholic Church entities to use bankruptcy, asset-shifting, and other tactics to avoid paying claims has likely played a role in the judicial willingness to shift liability to the Holy See by limiting sovereign immunity.³⁰⁸ Indeed, the Church sought to overturn *Doe* at the United States Supreme Court, but the Court denied certiorari.³⁰⁹ The resultant narrowing of foreign sovereign immunity represents yet another significant step toward institutional accountability—and here too, the Catholic Church sexual abuse crisis and the Church's response was a catalyst for profound legal change.

299. See e.g., *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009). See also Robert Wheeler, *The Shifting Relationship of Law and Ministry*, 22 NEW THEOLOGY REV. 46, 49 (2009). As noted above, the idea that the Vatican enjoys special immunities has also recently been relied upon to avoid cooperation with the UK Inquiry. See, e.g., Sean O'Neill, *Vatican Refuses Request for Child Abuse Inquiry Evidence*, THE TIMES (Sept. 26, 2019), <https://www.thetimes.co.uk/article/vatican-refuses-requests-for-child-abuse-inquiry-evidence-t3rbhfq17>.

300. 557 F.3d 1066 (9th Cir. 2009).

301. *Id.* at 1069.

302. *Id.* at 1070.

303. *Id.* at 1069.

304. *Id.*

305. *Id.*

306. *Id.* at 1072.

307. Burkett, *supra* note 132, at 47.

308. *Id.* at 47-48.

309. Julie Bolcer, *Supreme Court Rejects Vatican Appeal*, ADVOCATE (June 29, 2010), <https://www.advocate.com/news/daily-news/2010/06/29/supreme-court-rejects-vatican-appeal>.

E. THE RISE OF INSTITUTIONAL RESPONSIBILITY

The troubling continuity in how the Church first handled information about child abuse and then subsequently litigated those cases gradually brought the deeply institutional nature of the crisis into clear view. This in turn prompted re-examination of the underlying conception of responsibility—in this context, institutional liability started to seem both necessary and apt. To begin, it is important to recall that even once procedural obstacles are set aside, the path to institutional liability remains far from straightforward. As noted above, traditionally the law imagined wrongs as discrete, personal and unitary.³¹⁰ Many of the claims for clergy sexual abuse concerned institutional as well as individual actions—and hence were not easily encompassed by this traditional view.³¹¹ Once again, the Catholic Church crisis had a dramatic impact, shifting both the doctrines of liability and the underlying theory toward a more complex understanding of responsibility. The growing willingness to countenance multiple, overlapping duties gradually reshaped liability rules as more hospitable to institutional responsibility.³¹² In the process, liability opened up in a new and very different way—perhaps the most profound legal legacy of the Catholic Church sex abuse crisis.

Traditionally, liability rules were quite disinclined to address institutions.³¹³ Both the duty of care itself and the rules for passing on liability to institutions narrowly circumscribed the ambit of responsibility.³¹⁴ The most important doctrine was vicarious liability—the means by which the wrong of an institution’s “servant” can, under certain conditions, be passed on to the institution itself without any proof of wrongdoing on its own part.³¹⁵ Under the traditional view, the more egregious the wrong, the more likely it was to be seen as an individual act and the less likely it was to be attributed to the wrongdoer’s employer.³¹⁶ The result was that the most serious wrongs were the least likely to attract vicarious institutional liability. This was a significant hurdle for claimants in the Catholic Church cases, given that they involved such a serious criminal act—the sexual exploitation of a child. The passage of time inherent in such claims also meant that the direct perpetrator was often deceased by the time the case was brought.³¹⁷ When combined with reluctance to hold institutions vicariously liable for serious intentional torts like sexual abuse, this meant that child abuse survivors would typically go uncompensated. The English Court of Appeal confirmed this as late as 1999, in *ST v. North Yorkshire County Council*, when it reversed a lower court’s finding that a school council was vicariously liable for the acts of a teacher who sexually accosted a student with mental disabilities during a school field trip to the

310. Moran, *Reshaping Responsibility*, *supra* note 223.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

continent.³¹⁸ It reasoned that the sexual tort was the teacher's independent act, outside the scope of his authority, and as such it could not be attributed to the employer.³¹⁹ But this approach underwent a dramatic change, and here too, the Catholic Church cases played a pivotal role.

To understand the significance of this shift, it is useful to recall the deeply institutional nature of the issues in the Catholic Church sex abuse cases. *Doe v. Holy See*, discussed above, provides an example of a very common pattern. The Ninth Circuit summarized the claims in *Doe* in the following terms:

Doe alleged that the Archdiocese and the Order were vicariously liable for Ronan's abuse of Doe, and that the Chicago Bishop and the Order were negligent in failing to warn the Archdiocese and Doe of Ronan's propensities. Doe also alleged that the Holy See was vicariously liable for Ronan's abuse of Doe and for the negligent actions of the Archdiocese, the Order, and the Chicago Bishop, and that the Holy See was itself negligent in its retention and supervision of Ronan and in failing to warn of his propensities.³²⁰

The claims in *Doe* are a useful illustration of the complex institutional character of so many of the Catholic Church claims. While the direct harm is inflicted by an individual, the nature of such claims means that by the time an action is commenced, the wrongdoer is often deceased. Thus, as *Doe* shows, in the absence of the "deep pockets" of the institution, the injured plaintiff is likely to be left without a remedy. Moreover, in *Doe*, the propensities of the direct perpetrator were well known to those in authority—Ronan admitted to abusing multiple boys in Ireland and then in Chicago before being moved to Portland, where he abused Doe.³²¹ Though the Church hierarchy, including the Bishop of Chicago, knew about this, there was no discipline imposed.³²² Instead, a known sexual predator was simply moved to another diocese and again placed in charge of children. The Catholic Church followed similar steps in thousands of cases.³²³

Far from being a mistake, the approach was a policy that reflected the Church's underlying, institutional ethos. When Doe claimed damages in part on the basis of vicarious liability, the Ninth Circuit Court of Appeal found that an intentional tort could be within the scope of employment, and could under certain conditions support the *respondeat superior* liability of the employer:

318. [1998] EWCA (Civ) 1208, [1998] ELR 625 (Eng.).

319. *Id.* at para. 18.

320. *Doe v. Holy See*, 557 F.3d 1066, 1071 (9th Cir. 2009).

321. *Id.* at 1069.

322. *Id.* at 1069-70.

323. See Tom Roberts, *Bishops Were Warned of Abusive Priests*, NAT'L CATH. REP. (Mar. 30, 2009), <https://www.ncronline.org/news/accountability/bishops-were-warned-abusive-priests>.

. . . if conduct that was within the scope of employment was “a necessary precursor to the” intentional tort and the intentional tort was “a direct outgrowth of . . . conduct that was within the scope of . . . employment.”³²⁴

In Doe’s case, the standard was met because he “came to know Ronan as his priest, counselor and spiritual adviser,”³²⁵ and because Ronan used his “position of authority” to abuse Doe in “several places including the monastery.”³²⁶ Under such circumstances, the Court concluded, the Church could not rely on the traditional interpretation of *respondeat superior* to protect itself from liability.³²⁷ Instead, as *Doe* illustrates, that law began to shift as courts were confronted with the institutional dimension of child sexual abuse.

In Canada as well, the law on vicarious liability was shifting in response to the growing recognition of the deeply institutional dimension of the Catholic Church sexual abuse cases. In a case involving a residential treatment facility for children, the Supreme Court had rejected the traditional exclusion of criminal conduct and held that, under certain circumstances, employers could indeed be vicariously liable for sexual assaults committed by employees.³²⁸ A few years later, the Supreme Court was faced with a case involving the Catholic Church. *John Doe v. Bennett* arose out of the actions of Father Bennett, who had sexually abused dozens of boys in the diocese of St. George’s in Newfoundland.³²⁹ Though the abuse was reported to successive bishops of the diocese, they failed to take any action to stop the abuse.³³⁰ Thirty-six survivors of Father Bennett eventually sued him, St. George’s, various bishops, and the Catholic Church.³³¹ Among other holdings, the trial judge found Bennett directly liable and St. George’s and Bishop Lahey (the bishop at the time of the action) vicariously liable.³³² The majority of the Court of Appeal found St. George’s directly but not vicariously liable.³³³ When the case came before the Supreme Court, the main issue was whether St. George’s was liable and if so, on what basis.³³⁴ St. George’s argued that it was neither directly nor vicariously liable.³³⁵ The diocese essentially conceded that successive bishops had been negligent but argued that the episcopal corporation could not be directly liable because it was constituted

324. 557 F.3d at 1082-83 (citing *Fearing v. Butcher*, 977 P.2d 1163, 1168 (Or. 1999)).

325. *Id.* at 1070.

326. *Id.* at 1083.

327. *Id.*

328. *Bazley v. Curry*, [1999] 2 S.C.R. 534, para. 58 (Can.).

329. [2004] 1 S.C.R. 436, para. 1 (Can.).

330. *Id.* at para. 16.

331. *Id.* at para. 1.

332. *Id.* at para. 3 (citing (2000) 190 Nfld. & P.E.I.R. 277).

333. *Id.* at para. 4 (citing (2002 NFCA) 218 D.L.R. 4th 276 NFCA 47).

334. *Id.* at para. 6.

335. *Id.* at para. 9.

solely for the purposes of holding property.³³⁶ The Supreme Court rejected this argument, noting the widely varied activities and purposes undertaken by St. George's.³³⁷ But the more difficult argument before the Supreme Court was the question of vicarious liability.³³⁸ St. George's invoked the traditional conception of vicarious liability, arguing that it could not be liable because Bennett's actions violated the norms of the Church and the charitable nature of the diocese's activities.³³⁹ Though this argument received approval from a majority of the Court of Appeal, the Supreme Court unanimously rejected it.³⁴⁰ The Court noted the close relationship between St. George's and Bennett, the fact that St. George's substantially enhanced the risk which led to the wrongs, and the fact that it provided Bennett both with great power in relation to vulnerable survivors and with the opportunity to abuse that power.³⁴¹ Vicarious liability, it concluded, was justified in such circumstances.³⁴²

Another dramatic example is found in Australia. As noted earlier, the Catholic Church and its legal tactics were a primary focus of the work of the Australian Royal Commission and its Redress and Civil Litigation Report. Many of the recommendations specifically addressed the Church's approach to sexual abuse claims, including its perceived abuse of a number of defenses.³⁴³ And so, in

336. *Id.*

337. *Id.* at paras. 10-16.

338. *Id.* at para. 17.

339. *Id.* at para. 18.

340. *Id.*

341. *Id.* at paras. 17-33.

342. *Id.* The emergence of what is commonly called a "non-delegable duty" is arguably another effect of the crisis. See Moran, *Reshaping Responsibility*, *supra* note 223. There is currently debate about the nature of and justification for a non-delegable duty (as distinct from vicarious liability). In my view, such a duty is best understood as having a conceptual connection to fiduciary duties and hence more apt in matters like institutional child abuse. The primary focus of traditional vicarious liability is on the relationship between the wrongdoer and the institution. In contrast, in most institutional abuse cases, the relationship between the institution and the survivor is at least equally salient. It is the survivor's vulnerability to harm along with the institution's undertaking of responsibility that grounds the enhanced (fiduciary-like) duty that the institution has to protect them—hence, the non-delegability. The relationship to the wrongdoer certainly matters, but that is because of the institution's ability to control the situation and potentially avoid the harm. On my reading, the idea of non-delegability is a way (admittedly rather inelegant) of capturing the primacy and strength of this kind of duty which differs from duties owed to arms-length parties that are capable of taking care of themselves. In the latter cases, vicarious liability is the more apt frame of reference.

343. As one commentator summarized it: "The Catholic Church's words ring hollow in light of merciless legal tactics." Kennedy, *supra* note 280. See also Catherine Armitage, *Church Threatening Sex Abuse Survivors with Court Solicitor*, SYDNEY MORNING HERALD (Sept. 7, 2013), <https://www.smh.com.au/national/church-threatening-sex-abuse-survivors-with-court-solicitor-20130906-2tabk.html>; Barney Zwartz, *Headed to Court, Cardinal Pell Is No Stranger to Controversy*, NAT'L CATH. REP. (July 24, 2017), <https://www.ncronline.org/news/accountability/headed-court-cardinal-pell-no-stranger-controversy>; Paul Kennedy & Conor Duffy, *Flaws in Church's Protocol*, ABC LATELINE (July 15, 2008), <http://netk.net.au/AbuseCases/Abuse68.asp>.

addition to removing the Ellis defense³⁴⁴ and limitations defenses, vicarious liability and related doctrines also figured prominently in the recommendations.³⁴⁵ The report recommended that states and territories introduce a non-delegable duty to make institutions liable for institutional child sexual abuse by any person associated with the institution.³⁴⁶ States in Australia have responded legislatively, closing off one of the most powerful defenses on which the Church had traditionally relied and for which it had been loudly criticized—yet another indication of the extent to which the tactics of the Church backfired in a rather spectacular fashion.³⁴⁷

While a narrow reading of vicarious liability had traditionally protected the Church, this was quickly changing across a wide array of jurisdictions. The Church thus began to supplement the argument with a second line of defense—it insisted that vicarious liability could never apply to priest-Church relationships, which were different in kind than ordinary employment relationships.³⁴⁸ Indeed, in *Doe v. Bennett*, the Church also argued that vicarious liability did not apply to the priest-Church relationships because the unique nature of the relationship between bishop and priest precluded the priest from being treated as an employee for the purposes of vicarious liability.³⁴⁹ However, the Supreme Court of Canada rejected this, too, finding that the Diocese of St. George’s was vicariously liable for the acts of its priests, noting that their “sufficiently close relationship” was “akin to an employment relationship.”³⁵⁰

A similar approach began to take hold in the U.K. as well. In *JGE v. The Trustees of the Portsmouth Roman Catholic Diocesan Trust*, the Church also argued that vicarious liability was inapplicable because the relationship between priest and bishop was not one of employee-employer.³⁵¹ However, the English Court of Appeal disagreed, finding that although there was no contract of service between a priest and the bishop, that relationship was so close in character to the employee-employer relationship that it could be fairly said to be “akin to

344. In *Trustees of the Roman Catholic Church of the Archdiocese of Sydney v. Ellis & Amor*, the court found that the assets of the Catholic Church could not be accessed in sexual abuse cases because it was the crime of an individual. See [2007] NSWCA 117 (Austl.).

345. See Helen Davidson, *Child Sexual Abuse Royal Commission Delivers Final Report – As It Happened*, THE GUARDIAN (Mar. 13, 2018), <https://www.theguardian.com/australia-news/live/2017/dec/15/child-sexual-abuse-royal-commission-delivers-final-report-live>.

346. *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report Recommendations*, DEPT. OF SOC. SERVS., AUSTRALIAN GOV. (2018), https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf.

347. See Davey, *Victoria to Abolish*, *supra* note 287; Helen Davidson, *Sex Abuse Survivors Can Finally Sue Churches in NSW as Ellis Defence Is Abolished*, THE GUARDIAN (Jan. 1, 2019), <https://www.theguardian.com/australia-news/2019/jan/01/sex-abuse-survivors-can-finally-sue-churches-in-nsw-as-ellis-defence-abolished>.

348. See *Doe v. Bennett*, 2004 SCC 17, [2004] 1 S.C.R. 436 (Can.).

349. *Id.* at para. 9.

350. *Id.* at para. 27.

351. *JGE v. Portsmouth Roman Cath. Diocesan Trust* [2012] EWCA (Civ) 938, [2013] 1 Q.B. 722 [5] (Eng.).

employment”³⁵² with the consequence that “it is just and fair to hold the employer vicariously liable.”³⁵³ Shortly thereafter, in a case involving the Christian Brothers, the Supreme Court of the United Kingdom confirmed this, noting that “vicarious liability is on the move” and specifically referencing the significance of cases of childhood sexual abuse, often implicating priests and religious orders.³⁵⁴ Lord Phillips went on to conclude in no uncertain terms that the Christian Brothers Institute was vicariously liable for abuse committed by its members.³⁵⁵ Thus, a growing body of law makes it apparent that courts are increasingly open to applying the doctrines of vicarious liability for criminal child abuse by religious personnel, despite the lack of any formal employment relationship.

In this way, courts gradually began to countenance a more complex picture of responsibility. Unlike the old unitary picture premised on a single wrongdoer, the emerging view implicitly accepts the notion that injury could be occasioned by multiple wrongdoers engaging in different kinds of wrongs or, in the case of vicarious liability, perhaps no wrongs at all. As *Doe v. Holy See* itself illustrates, courts confronted cases where a complex set of wrongs—some criminal, some intentional, some negligent—worked together to cause the terrible injuries of the kind suffered by Doe.³⁵⁶ Moreover, as the Catholic Church crisis unfolded, it became apparent that there was a very significant and very consistent pattern of institutionalized behavior at virtually every level within the Catholic Church.

It may have seemed to the Church that fighting every issue in court was a good strategy, but one outcome of that strategy was the gradual accumulation of a robust record of court judgments documenting and often condemning the behavior of the Church and its officials. The patterns that began to emerge were too clear to be accidental. The very litigation strategy of the Church, in this respect, underscored for the courts that there was an important institutional dimension to the injuries suffered by the survivors. The greater openness to institutional liability in this context was borne in part from a desire to compensate the injured plaintiff, but it was also much deeper than that. The growing body of case law revealed the intentionality of how the Catholic Church approached the child sexual abuse cases and portrayed a deeply troubling picture. It became increasingly clear that the scandal implicated the Church itself at the highest levels. Certainly, individuals could cause grievous harm—but so too, it was becoming apparent, could an institution. To its shame and to its detriment, the Catholic Church sex abuse crisis made that abundantly clear.

352. *Id.* at para. 12.

353. *Id.* at para. 13.

354. *Catholic Child Welfare Soc’y v. Various Claimants (FC)*, *The Institute of the Brothers of the Christian Schools* [2012] UKSC 56 [19] (Eng.).

355. *Id.* at para. 94.

356. *See generally Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009).

VI. CONCLUSION

When issues concerning the sexual abuse of children by Catholic clergy started to come to public attention in the early 1980s, the world was in flux and the sexual abuse crisis was part of the foment. These were the early days of increasing “rights-consciousness” and a related optimism about the power of law in the pursuit of those rights. One result of this was that survivors of child sexual abuse began to turn to the courts. When they did so, the Church reacted with increasingly aggressive defensive tactics. Perhaps this is not surprising, as it would have been hard to fathom in those early days that events would snowball the way that they did. It would have been equally hard for the Church to foresee the consequences of tactics that had long served their institutional interests. Indeed, over the several decades of litigation that began in the 1980s, the Catholic Church has paid out billions of dollars to survivors for its role in their sexual abuse. It is also abundantly clear that there is much more ahead.

The rise of the general duty in negligence certainly implicated corporate and institutional defendants in a new way. But responsibility did not really come home to institutions until the law began to shift its approach to procedural hurdles such as limitations and immunities. As we have seen, the Catholic Church sex abuse crisis was an important catalyst in this shift. However, the closer the law came to liability based on serious wrongdoing, the more likely it was to hang on to the idea of individual responsibility. Here, too, the Catholic Church crisis played a critical role in bringing liability much closer to the institution. The unfolding of the crisis itself and the Church’s handling of it undermined the belief that serious wrongdoing was essentially personal, suggesting instead that an institution could be culpable in a deep sense of the term. In this, the role of the Catholic Church crisis was especially important. It is a sad irony that the strength of the Church’s commitment to protecting itself turned out to be instrumental in bringing about the very catastrophes it was so determined to avoid. And in the process, as we have seen, the law of responsibility itself has undergone a profound shift.