

This article is an abbreviated version of a paper presented at the Boston College Law School in April 2003. The paper will appear in the *Boston College Law Review*.

In the fall of 2001, the Catholic Church and, in particular, the priesthood became the focus of months of extraordinary media attention—coverage unequaled in American religious history. Grave damage occurred to the public image of the priesthood, as the media alleged a pattern of church authorities covering up sexual abuse by members of the clergy. When the United States bishops assembled in Dallas in June 2002, the

atmosphere might fairly have been described as one of extreme urgency, if not bordering on hysteria. Clearly under enormous pressure from the media and victims' groups, the bishops adopted a so-called "zero-tolerance" policy. That policy, which eventually received Vatican approval, mandates that any priest who admits abuse or against whom an act of abuse is proven must be expelled from the priesthood and/or banned from public ministry for life. Thus, the zero-tolerance policy is an absolute rule under which the ultimate penalty of canon law—dismissal—must be applied to every case regardless of the specific facts.

Tracing the path of the American bishops' response to the problem of sexual abuse tells us much about how canon law has functioned in the life of the church. While its proper functioning depends on the balance between law and spirit, the recent scandal over the sexual abuse of minors by clergy exemplifies the damaging consequences of an imbalance.

Specifically, I believe that over the course of the last several decades, the bishops' response exhibited elements of antinomianism and legalism. In each case, the critical balance has

been lost. Antinomianism diminishes the rule of canon law in affording an ordered ecclesial life. In contrast, legalism reflects a rigid and formalistic misunderstanding of law that denies the unity of canon law with its inner theological meaning. Both antinomian and legalistic approaches result in a separation of the law's outer form from its inner spirit. The antinomians underestimate the significance of law, while the legalists posit law as the end in itself. Although my canonical analysis might be interpreted as critical of ecclesiastical authority, I write as a Franciscan friar of some 25 years. Rather than find fault, St. Francis of Assisi rebuilt the thirteenth-century church. From an entirely more modest perspective, I hope that my analysis is guided by his holy example.

The story of the United States bishops' response to clergy sexual abuse corresponds to the antinomian and legalistic trends that have characterized church law since its emergence in the ancient Christian communities. It is fair to describe the approach to canon law in the several decades immediately prior to Vatican II as sometimes manifesting characteristics of legalism. In 1959, when Pope John XXIII announced his intention to convoke the Ecumenical Council, the pontiff also called for revision of the 1917 CODE. The process of revising the 1917 CODE commenced at the conclusion of the Council and continued throughout the pontificates of Pope Paul VI and John Paul I, with the hope that the new legislation would reflect the theology of Vatican II. Over the course of almost three decades



THE CLERGY SEXUAL ABUSE CRISIS AND THE SPIRIT OF CANON LAW



Reverend John J. Coughlin, O.F.M.
Professor of Law

of revision, although theoretically still the universal law of the church, the 1917 CODE fell into general disuse. It was in many instances abrogated in favor of post-conciliar innovations *ad experimentum*.

In retrospect, the ecclesial ambiance in the wake of Vatican II represented a swing of the pendulum from the pre-Vatican II legalism toward the antinomian. While it would overstate the matter to claim that the juridical structures of the church disintegrated during the post-Vatican II years, it seems accurate to observe that the proper function of law in the church became unbalanced. The legalism of the past had been superseded not only by receptivity to the new spirit but also by a tendency to view canon law as an impediment to the manifestation of the spirit. Among the many spiritual fruits of Vatican II were a dissipation of legalism, a call to retrieve the authentic inner meaning of the law, and an openness to developments in the secular realm, especially concerning the protection of human rights. Vatican II, however, was never intended to usher in an antinomian age.

The available statistical information confirms that it was during this time—from the 1970s through the 1980s—that the number of allegations of sexual abuse against priests ballooned. In response to these kinds of allegations, bishops routinely sought psychological evaluations and treatment for the offenders. Both the 1917 and 1983 CODES contain substantive and procedural provisions for dealing with a priest who is charged with sexually abusing a minor. Pursuant to the provisions, the offense constitutes a grave crime and grievous sin, and could result in permanent dismissal from the priesthood. Both CODES envision administrative and judicial phases in the procedure to determine guilt and to impose a penalty, in accord with the requirements of fundamental due process. In general, these substantive and procedural provisions of canon law were ignored by the bishops.

The church's emphasis on a psychological model reflected a larger trend in American society, as many mental health professionals believed at the time that a sexual predator could be reformed with proper treatment. Although the psychological and canonical approaches have never been mutually exclusive, the focus shifted from the protection of children and the common good to the rehabilitation of the priest through therapy. It is fair to observe that the bishops were not acting in malice. As pastors of the church, they believed the psychological approach to be proper. In hindsight, the therapeutic focus may have been justified in certain cases involving a single offense with an older-age minor. As is now painfully evident, it was not helpful in dealing with the small number of priests who were true pedophiles and committed serial sexual abuse.

The United States bishops continued to forsake canonical measures even after a societal shift occurred in the 1980s with regard to sexual abuse from the psychological to the punitive. While Pope John Paul II's promulgation of the 1983 CODE had the much

larger goal of restoring the balance between law and spirit in the life of the universal church, it also affirmed the significance of the church's penal order in dealing with cases of sexual abuse of minors by clergy. Despite the societal shift and new canonical provisions, however, more than a few bishops failed to afford a just legal process in dealing with accusations. They continued to adhere to the psychological model, thereby setting the stage for grave damage to individuals and to the common good—damage that began to be revealed by the media a few years ago.

For at least some of the victims, perhaps no policy will suffice. When Cardinal Law of Boston invoked canon law in an attempt to justify his inaction to a group of victims, one member reflected: "Canon law was irrelevant to us. Children were being abused. Sexual predators were being protected. Canon law should have nothing to do with it. But they were determined to keep this problem, and their response to it, within their culture." Given the failure of the rule of canon law to protect them, the victims quite understandably might attach little value to it. Victims of sexual abuse by clergy have every right to expect that the church will take action to correct the injustice and prevent future harm. The rights of victims, however, are not the only considerations in a policy that restores justice.

The 1983 CODE is intended to set the conditions for a just ecclesial order in which the theological doctrine of forgiveness and redemption might flourish. Antinomianism belies the legislative intent in permitting the grave crime to go unpunished, while legalism stifles the spirit in declining to recognize the centrality of the theological doctrine to ecclesiastical order. The restoration of confidence in canon law would now seem to require no meager amount of wisdom in the application of its substantive and procedural provisions. Each one of these cases is fact-specific. The cases range from the relatively small number of horrendously disordered priests who perpetrated years of unchecked abuse to the priest now in his late seventies with an otherwise exemplary record of service who, in his twenties, is alleged to have had a sexual encounter with a 17-year-old. Canon law is designed to permit some flexibility and discretion in the way cases are resolved. The absolutist approach of the bishops' zero-tolerance policy may be necessary to restore faith in the church, but it belies canon law's image of the bishop who exer-



cises a wise discretion that flows from integrity, compassion, and holiness. An antinomian approach to ecclesiastical governance only reinforces the perception of some victims and state officials that the church authorities lack the resolve to protect children. Legalism, in contrast, communicates to priests and all the baptized that canon law is divorced from the Mystery of the Redemption.

In hindsight, it is easy to see that the bishops' focus on the psychological approach to the exclusion of the canonical has resulted in great injury. The clarity of hindsight, however, ought not to foster a culture of blame but should open the way for a more hopeful future. An important aspect of responding to the present crisis must entail recommitment to the rule of canon law. Despite the negative image of the priesthood generated by the crisis, many people continue to look to the church for its proclamation that healing and redemption are possible. No law or policy can eradicate sin from the fallen nature of the human situation, including that of the human beings who comprise the priesthood. The proper balance of law and spirit, however, can work to bring healing and forgiveness to injured individuals and communities.

The Church Study Committee of the University of Notre Dame

In response to the sexual abuse scandal that has gripped the church, Rev. Edward Malloy, C.S.C., President of the University of Notre Dame, established the Church Study Committee in the spring of 2002. The Committee is composed of 11 administrators and faculty members, including **Professor Carol Ann Mooney**, vice president and associate provost, who chairs the Committee, **Dean Patricia O'Hara**, and **Professor Cathleen Kaveny**.

The Committee's first acts included a special Mass of reconciliation and accompanying campus forum on the issue and the preparation of a detailed document of reflections and recommendations that was sent to all the U.S. bishops prior to their June 2002 Dallas meeting, at which new policies to deal with the crisis were adopted. In October 2002, the Committee presented a second campus forum, titled "Restoring Trust," that included NDLS **Professor Gerard V. Bradley** among its panelists. The following month it brought a number of bishops and their representatives to campus for a series of presentations and discussions on actions needed to address the crisis. The Committee also formulated a new "Policy for the Protection of Children" for the University, and Committee members have met with several victims whose abuse occurred at Notre Dame. An article by John Salvesson, one of these victims, appears in the current issue of *Notre Dame Magazine*. A second Mass of reconciliation was offered on campus in conjunction with this year's Alumni Reunion. In addition to further outreach to victims, the Committee now is engaged in the preparation of a national survey of Catholic opinion in the wake of the crisis and is planning further conferences and additional meetings with bishops.

