

CANON LAW ON CHILD SEXUAL ABUSE THROUGH THE AGES

Kieran Tapsell¹

In 2014 two senior members of the Marist and Christian Brothers in Australia told Justice McLellan, the Chair of the Child Sexual Abuse Royal Commission that in the 1980s the brothers would not have regarded touching a student's genitals as a crime but only a "moral failure".² McLellan asked Br Shanahan.

Q. Can you explain how the Orders would have brought themselves intellectually to that position, describing it only as a moral failure and not a criminal offence? How would they have arrived at that position?

A. No, I can't explain it.³

This paper is an attempt to explain it: how bishops, priests and religious all over the world came to regard the sexual abuse of children, not as crimes punishable by the State, but as moral failures that should be dealt with by treatment, and by dismissal from the priesthood or religious life only as a last resort.⁴ The explanation lies in a gradual but radical change of culture within the Catholic Church that took place in the latter part of the 19th century that can be traced through changes in canon law.

The Concepts of "Canon Law" and "Child Sexual Abuse"

The title of this paper, *Canon Law on Sexual Abuse through the Ages*, is in some senses anachronistic. Despite claims that it is the oldest continuing legal system in the Western world, canon law, in the sense of a volume of laws that applied to the whole Church, only became a reality around 1140 CE when an Italian monk, Gratian compiled and tried to harmonize canon law up until that time.⁵

The term "child sexual abuse" is also partly anachronistic. Until about 1700CE, there was no concept of "childhood" in Western thought. Children were "small adults", and were regarded as "chattels" of

¹ Kieran Tapsell is a retired civil lawyer, has degrees in Theology and Law, and is the author of *Potiphar's Wife: The Vatican's Secret and Child Sexual Abuse* (ATF Press, 2014).

² Br Crowe, provincial of the Marist Brothers, 24 January 2014: http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2014/01/Transcript-RC_IRCSA_Day-036A_24-Jan-2014-2013_Public.pdf (Accessed 5 December 2014), Br Shanahan: <http://www.childabuseroyalcommission.gov.au/case-study/e7ba58da-609c-4854-aa74-c8992ec75d3c/case-study-11,-april-2014,-perth> 5 May 2014, p.2098 (Accessed 5 December 2014)

³ Ibid

⁴ The attitude that the sexual abuse of children was only a moral failure went right to the top of the Vatican. Cardinal Dario Castrillon Hoyos, the Prefect of the Congregation for the Clergy stated it expressly in an interview with Patrice Janiot on CNN Colombia on 2 June 2011, see the author's *Potiphar's Wife: The Vatican Secret and Child Sexual Abuse*, (ATF Press 2014) p.181. See also p.230, 262-264.

⁵ The claim is made by Dr Edward Peters, an American canon lawyer: <http://www.canonlaw.info/> (Accessed 21 June 2013). See also Hartmann & Pennington: *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, (CUA Press, 2008), p.8

their parents. Around 1700 childhood came to be seen as a separate state from adulthood, characterised by innocence and naivety.⁶ Despite that, there were very ancient laws against the sexual abuse of some children. In Ancient Rome, the *Lex Iulia de vi publica* of Caesar Augustus in 18 BC imposed capital punishment on those who ravished a “boy or a woman or anyone through force”, and those who successfully seduced “free” children.⁷ This protection was not extended to slaves, and was motivated more by the impact of sexual relations upon social order rather than controlling sexual behaviour towards children generally.⁸ The age of minority, like the ages for marriage and death, were lower than they are today.

The term “child sexual abuse” is defined more broadly these days in terms of the involvement of immature children in sexual activity with adults.⁹ Nevertheless for the purposes of this discussion it is convenient to apply the term to past practice while bearing in mind that it did not always carry the wider significance that it has today.

Law and Culture

There is a very strong connection between law and culture.¹⁰ Law is a reflection of the dominant culture at the time. Once passed, those laws will reinforce, perpetuate and deepen the culture that gave rise to them in the first place.¹¹ Law shapes culture as much as culture shapes law. It is a two way interactive process, with both influencing each other.¹² Laws can “stay on the books”, and no longer be enforced because the culture has changed. Nevertheless, if there is a succession of laws that provide for substantially the same thing – in this case, severe punishments for the sexual abuse

⁶ Historical review of sexual offence and child sexual abuse legislation in Australia: 1788–2013, 3- 6, 23: Australian Institute of Criminology 2014, research paper for the Australian Royal Commission.

[http://www.childabuseroyalcommission.gov.au/documents/historical-review-of-sexual-offence-and-child-\(1\).pdf](http://www.childabuseroyalcommission.gov.au/documents/historical-review-of-sexual-offence-and-child-(1).pdf) p.4, (Accessed 5 September 2014)

⁷ James A. Brundage: *Law, Sex and Christian Society in Medieval Europe*, (University of Chicago Press, 2009), p. 47

⁸ James A. Brundage: *Law, Sex and Christian Society in Medieval Europe*, (University of Chicago Press, 2009), p. 47 - 49, quoting Dig. 48.6.3.4 (Marcianus); Mestieri Estudo p.12.

⁹ *Historical review of sexual offence and child sexual abuse legislation in Australia: 1788–2013*, 3- 6, 23: Australian Institute of Criminology 2014, research paper for the Australian Royal Commission, 2, quoting Kempe RS & Kempe CH 1978. *Child abuse*. London: Fontana/Open Books, 60 [http://www.childabuseroyalcommission.gov.au/documents/historical-review-of-sexual-offence-and-child-\(1\).pdf](http://www.childabuseroyalcommission.gov.au/documents/historical-review-of-sexual-offence-and-child-(1).pdf) 2, (Accessed 25 Dec 2014)

¹⁰ Naomi Mezey: *Law as Culture: Yale Journal of Law and Humanities*, Vol 13, 35.

<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1310&context=facpub> (Accessed 15 July 2013). Mezey defines culture as: “any set of shared, signifying practices, practices by which meaning is produced, performed, contested, or transformed.” (p.42)

¹¹ Cardinal Francis George: *Law and Culture: Ave Maria Law Review* Volume 1, Issue 1 (2003) p.1

<http://legacy.avemarialaw.edu/lr/assets/articles/v1i1.george.copyright.pdf> (Accessed 7 May 2013)

¹² James L. Nolan jnr: *Legal Accents, Legal Borrowing*, Princeton University Press at p.37. Cardinal Francis George: *Ave Maria Law Review* Volume 1, Issue 1 (2003) p.1, and see generally the author’s *Potiphar’s Wife*, chapter 13.

of children – it is legitimate to conclude that this was continuing Church policy, reflecting the dominant culture of its lawmakers, the popes and Church Councils.¹³

The history of canon law demonstrates that the attitudes expressed by the Australian religious brothers started gaining traction in the Church only in the last 150 years, and became the dominant culture with the promulgation of the first *Code of Canon Law* in 1917. Prior to that time, the dominant Church culture was that the sexual abuse of children required at least some form of imprisonment, and often worse.

Canon Law on Child Sexual Abuse from the 4th to the 11th Centuries

Despite some tolerance of child sexual abuse, particularly of males in the Greek and Roman Empires, the Judaeo-Christian tradition had always condemned it as a sin. The first century handbook for Christians, the *Didache*, expressly prohibited adult men having sex with boys.¹⁴ But it was not long before Church communities came to accept that it was more than a sin punishable in the next life. It was also a crime, punishable in this one. The first Church law against the abuse of boys was passed at the Council of Elvira in 306CE, and required offenders to be excluded from communion “even at the end”, which suggests that they were permanently excommunicated.¹⁵

In the fourth century, Christianity became the official religion of the Roman Empire, and from then on, the Emperor legislated for the Church. The Emperor’s decrees were effectively canon law because the Church regarded the Emperor’s powers as coming from God.¹⁶ Church Councils continued to promulgate their own rules for their local communities, but they generally dealt with ad hoc situations that were additional to the imperial laws. In about 312CE, the Emperor Constantine gave to the Church a number of privileges, including the “privilege of clergy”, the right of clergy to be tried exclusively in the Church courts.¹⁷

St. Basil of Caesarea, the fourth century Church Father, was the main author of monastic rule of the Eastern Church. He wrote that a cleric or monk who sexually molests youths or boys is to be

¹³ A good example of law being “on the books” but not enforced is provided by Michelle Armstrong-Partida in *Priestly Marriage: The Tradition of Clerical Concubinage in the Spanish Church* (Brepols Publishers 2009). She says that the visitation episcopal records in 14th century Catalunya show that clerical concubinage was widespread despite 200 years of condemnation by canon law and synodal decrees: Nevertheless, over time, the culture of celibacy reflected in the law did eventually prevail.

¹⁴ Aaron Milevec: *The Didache, Text, Translation, Analysis and Commentary* (Liturgical Press 2003) p. 54

¹⁵ Council of Elvira, Canons 18 and 7.

http://www.awrsipe.com/patrick_wall/selected_documents/309%20Council%20of%20Elvira.pdf (Accessed 15 February 2014).

¹⁶ Pennington: *A Short History of Canon Law*:

<http://faculty.cua.edu/pennington/Canon%20Law/ShortHistoryCanonLaw.htm> (Accessed 6 January 2014). Constant Van Van de Wiel: *History of Canon law*, par 42 and 43, loc. 418-427. For example, John Skolasticos included 87 of Justinian’s *Novellae* in his collection of canons.

¹⁷ Gibbon: *Decline and Fall of the Roman Empire*, vol 2, p.335

publically whipped, his head shaved, spat upon, and kept in prison for six months in chains on a diet of bread and water, and after release is to be always subject to supervision, and kept out of contact with young people.¹⁸ Leaving out such antiquated punishments as whipping, spitting and head shaving, St. Basil seems remarkably modern in understanding the tendency of abusers to be recidivists and the need for them to be supervised.

The Emperor Justinian's *Digest* of Roman Law of 533CE continued the tradition of the *Lex Iulia de vi publica* of Caesar Augustus, and imposed the death penalty for anyone who abducts or persuades a boy or a woman or girl to engage in an act of indecency.¹⁹ Homosexuality was punished by burning.²⁰ The Church under Justinian also adopted the military's practice of dishonourable discharge or "*degradatio*" to dismiss a priest for misconduct. Even if the priest was not dismissed, the privilege of clergy did not protect him from imprisonment or worse imposed on him by the bishop who, at that time was also a secular judge.²¹

The practice of private confession developed in monasteries in Ireland in the 6th century and quickly spread. The *Penitentials*, books of punishments for certain sins, and used from the 6th to the 12th century for this new form of the sacrament, had a number of authors who came to rank as canonical authorities.²² These books contain quite detailed lists of sexual sins and their punishments, which were more severe for clergy than for laymen. The sexual abuse of children by adults came within the general description of the various sexual sins.²³ The *Penitentials* recognized that many of these sins required imprisonment, and that dismissal from the priesthood or religious life, was insufficient. The word "sodomy" was used from the time of the *Penitentials* to describe any kind of non-reproductive sexual activity whether alone or between people of the same or opposite sex.²⁴

¹⁸ St. Basil of Caesarea, as quoted in St. Peter Damien, *Liber Gomorrhianus*, cols. 174f. Randy Engel: *St. Peter Damian's Book of Gomorrah: A Moral Blueprint for Our Times - Part I*: "Other Church Fathers favoured defrocking the offending cleric and then turning him over to the State for punishment", footnote 5. <http://www.ourladywarriors.org/articles/damian1.htm> (Accessed 6 May 2005). Nicholas Cafardi in *Before Dallas* at p 3 cites Burchard, the bishop of Worms for this decree. Burchard wrote 20 books of Canon Law, and it was quite usual for compilers to incorporate decrees from older sources. The fact that Burchard did so in 1012CE would suggest that he regarded such punishments as still being appropriate almost 700 years later.

¹⁹ Momsen, Krueger and Watson: *Digest of Justinian*, Vol IV, University of Pennsylvania Press, http://www.awrsipe.com/patrick_wall/selected_documents/Digest_of_Justinian.pdf (Accessed 20 Sept 2014). For the *Lex Iulia de vi publica* (18-17BC) see: James A. Brundage: *Law, Sex and Christian Society in Medieval Europe*, (University of Chicago Press, 2009), p. 47.

²⁰ Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.158.

²¹ Gibbon *Decline and Fall of the Roman Empire*, vol 2, p.336, H.A Drake: *Constantine and the Bishops: The Politics of Intolerance*, (JHU Press 2002), 327

²² James A. Brundage: *Law, Sex and Christian Society in Medieval Europe*, (University of Chicago Press, 2009), p.169, Nicholas Cafardi: *Before Dallas* (Paulist Press, 2008), p.2

²³ Cafardi: *Before Dallas*, p158, fn 11.

²⁴ From the time of the *Penitentials*, sodomy was "treated as a fluid and wide-ranging sin made up of a variety of non-reproductive bodily acts which can be, and presumably were performed in groups by men and women.": William E. Burgwinkle in *Sodomy, Masculinity and Law in Medieval Literature: France and England, 1050-1230* (Cambridge Studies in Medieval Literature, Cambridge University Press, August 16, 2004), loc 92. Archbishop Hincmar of Reims's (806-882CE)

The Development of Canon Law in the 11th and 12th Centuries

In the 11th and 12th centuries, canon law as we know it today, a separate set of laws that apply to the Universal Church, started to develop through scholars, such as Burchard, Ivo and Gratian. Burchard, the Bishop of Worms (d.1025CE) wrote 20 books of canon law in which he quotes St. Basil's rule about the proper punishment for monks who have sex with boys, making it part of the Western canon.²⁵

St. Peter Damian in his *Book of Gomorrah* (1051CE) was particularly harsh on clerics who had sex with young boys. The significance of this book from the point of view of canonical history is that it was endorsed by Pope Leo IX, and quotes Burchard's *Decretum* that the appropriate punishment for clergy who sexually abuse boys and adolescents is as set out in St. Basil of Caesarea's rule.²⁶

Ivo of Chartres (d.1115) emphasized the need for cooperation between Church and State, and regarded the decrees of Christian princes as having the force of canon law on the condition that they did not conflict with Church doctrine. He mixed rules of Roman law and laws of the Frankish kings with purely canonical rules.²⁷ Following Burchard, he provided severe penalties for fellatio, bestiality, pederasty and sodomy. The Council of Nablus in 1120 CE, decreed that in the Kingdom of Jerusalem, those guilty of sodomy should be burned.²⁸

In 1140CE, Gratian from the University of Bologna wrote his "*Decrees*", which combined all the previous collections of canon law, and provided the basis for other collections.²⁹ It has many sections dealing with the sexual transgressions of clerics. Punishments for clerics were to be more severe than for laymen, but he goes further than Burchard and Ivo who were content with St. Basil of

even described lesbian activity as "sodomy". When Burchard, Bishop of Worms (d.1025) published his famous *Decretum* – the forerunner of the great collections of canon law of the twelfth and thirteenth centuries – he followed Hincmar in classifying homosexual acts as a variety of fornication: John Boswell in *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (University of Chicago Press 1980) Loc 5263 – 5313.

²⁵ Burchard: *Decretum, Liber Decimus Septimus*, cap 35, in *Patrologiae* ed. J.P. Migne (Paris: Migne 1853) 140:925, referred to in Cafardi, *Before Dallas*, p.159.

²⁶ Cafardi: *Before Dallas* p.4 and Peter Damian: *Book of Gomorrah: An Eleventh Century Treatise against Homosexual Practices* (Wilfrid Laurier Univ. Press, 1982), p.61.

²⁷ Constant Van de Wiel: *History of Canon law* (Peeters Press Louvain 1991), par 126, loc 986

²⁸ Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.166

²⁹ Van de Wiel: *History of Canon law*, par 128, loc 1013. Gratian's *Decrees* were very influential in the teaching of canon law, but it was never recognised as the official version. Gregory IX (1227-1241) commissioned Raymond of Pennafort to prepare a new, uniform and simplified compilation that would contain only the laws in force, but he included in them Gratian's *Decrees*. The *Decretals of Gregory IX* became the first official publication of canon law as a whole and it remained the most important collection until the *1917 Code*: id par 141-143, loc, 1081-1092, and Doyle and Rubino: *Clergy Sexual Abuse Meets the Civil Law*, *Fordham Urban Law Journal* (2003) Vol. 31 Issue 2 p.582, n. 224:

<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1888&context=ulj> (Accessed 18 Jan 2015). There were subsequent attempts at compilations but none of them abrogated the old law of Gratian's *Decrees*: Wiel, *supra* par 161, loc. 1164.

Caesarea's punishments for the sexual abuse of young boys. Gratian adopted the ancient Roman law of *stuprum pueri*, which prescribed the death penalty.³⁰

Church Council and Papal Decrees from the 12th to the 18th Centuries

The Church prohibition on clerics issuing sentences that "shed blood" was formalised at the Fourth Lateran Council under Innocent III in 1215CE. Such punishments henceforth were to be carried out by secular authorities.³¹ A practice then developed requiring clergy sex abusers to be "degraded", and then handed over to the civil authority to be dealt with by the civil law.

The Church still effectively had a veto over a priest being tried by the State for any kind of crime, because unless a priest was "degraded", he still had the benefit of "privilege of clergy" to be tried only by the ecclesiastical courts. It was this veto that was the centre of the dispute Henry II and Thomas A'Becket in 1170.³²

The Third Lateran Council in 1179 under Pope Alexander III decreed that clergy guilty of a "crime against nature" were to be kept indefinitely in a monastery or subjected to "degradation".³³ Once "degraded", the cleric lost the protection of privilege of clergy, and could be subject to civil law punishments, which generally involved the death penalty. Nevertheless even if the decision was made not to "degrade" the priest, the punishment was exile and extreme penance.³⁴

In 1209, Pope Innocent III ruled that the degradation of a cleric should take place in the presence of someone from the secular authority who would then take custody of him.³⁵ The Fourth Lateran Council in 1215 continued the condemnation of "crimes against nature".³⁶ The Council also decreed

³⁰ *Decree of Gratian*, D. 1, de pen., c.15 in *Decretum Magistri Gratiani, editio Lipsiensis Secunda*, editor, A.L. Richter, (Graz, Friedberg, 1879, 1959). Here, Gratian was talking specifically about the sexual abuse of boys and not just homosexuality in general: John Boswell in *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (University of Chicago Press 1980), loc 6232. See also Fr Thomas Doyle: *Affidavit Jane Doe* par 22 <http://reform-network.net/?p=1464> (Accessed 6 May 2013); Cafardi *Before Dallas*, p.4. Gratian also included in his *Decrees* a canon from the 1102 Synod of London stating that clerics found guilty of sodomy, should either be deposed or excommunicated: Doyle and Rubino: *Clergy Sexual Abuse Meets the Civil Law*, p.583. John Boswell in *Christianity, Social Tolerance, and Homosexuality*: loc 7967 says that legal records for the Middle Ages are inadequate to determine the extent to which the death penalty was actually carried out.

³¹ Canons 21 and 18 respectively <http://www.papalencyclicals.net/Councils/ecum12-2.htm> (Accessed 20 September 2014)

³² Spigelman J, *Becket & Henry*, The Becket Lectures, St. Thomas More Society (2004)

³³ Cafardi: *Before Dallas* p.4 and footnote 23.

http://www.awrsipe.com/patrick_wall/selected_documents/1179%20III%20Lateran%20Council.pdf (Accessed 9 February 2014).

³⁴ Mark D. Jordan: *The Silence of Sodom: Homosexuality in Modern Catholicism*, (University of Chicago Press, 2000) p.123

³⁵ Rosamond McKitterick: *New Cambridge Medieval History* pts.1-2.c.1024-c.1198, p. 441

³⁶ Cafardi, *Before Dallas*, p.5. The Fourth Lateran Council also insisted that clergy who are guilty of a second offence of incontinence should be "forever deposed."

http://www.awrsipe.com/patrick_wall/selected_documents/1215%20IV%20Lateran%20Council.pdf (Accessed 9 February 2014).

that bishops who covered up the sexual irregularities of their priests were to be “deposed in perpetuity”.³⁷

At the Fifth Lateran Council in 1514, Pope Leo X decreed that clerics involved in “crimes against nature” are to be punished “respectively according to the sacred canons or with penalties imposed by the civil law.”³⁸

The Council of Trent in 1551 marked a hardening of attitude towards priests who committed serious crimes. Whereas the previous decrees provided for a general discretion as to whether a cleric should be imprisoned in a monastery or “degraded”, the Council of Trent accepted that some crimes were so serious that priests who committed them had to be dismissed, and delivered over to a secular court.³⁹

Ten years later, in 1561, Pope Pius IV continued this stricter policy with his papal bull, *Cum Sicut Nuper*, in which he directed the Spanish Inquisition to “degrade to the secular state”, and to hand over to “a secular judge to be punished” all priests guilty of soliciting sex in the confessional.⁴⁰

In 1566, Pope St Pius V (1566-72) issued his encyclical, *Cum Primum* requiring clerics who committed “an unspeakable crime against nature” to be first “degraded” by a canonical court and be subject to “fitting punishment”.⁴¹ Two years later, the same Pope issued his constitution, *Horrendum Illud Scelus* against clerics who sinned “against nature” and decreed that were to be deterred by “the avenging secular sword of civil laws”. Those degraded by the ecclesiastical judge were to be “immediately delivered to the secular power”.⁴² An example of this was the case of Canon Fontino from the Italian town of Loreto, who was charged in 1570 before a canonical court with sodomy of a choirboy. He was degraded, and then handed over to the secular authority to be beheaded.⁴³

³⁷ Canon 14, *Ibid*:

³⁸ Cafardi, *Before Dallas* p. 5 and footnote 27

³⁹ <http://www.thecounciloftrent.com/ch13.htm> (Accessed 9 February 2014)

⁴⁰ http://www.awrsipe.com/patrick_wall/selected_documents/1561%20Cum%20sicut%20super.pdf (Accessed 20 September 2014)

⁴¹ Pope Pius V, *Cum Primum*, “Romani Pontifices”, 1 April 1566, in P. Gasparri, editor, *Codicem Iuris Canonici Fontes*, Vol. 1, (Vatican, Typis Polyglottis, 1926), p. 200

http://www.awrsipe.com/patrick_wall/selected_documents/1566%20Cum%20primum.pdf (Accessed 21 September 2014.) “Sins against nature” or “sodomy” for the moral theologian, Cardinal Cajetan in 1517 included any form of sexual activity that could not result in conception. So male/female sodomy was sinful, but not as seriously sinful as male/male sodomy: Mark D. Jordan: *The Silence of Sodom: Homosexuality in Modern Catholicism*, (University of Chicago Press, 2000)p. 64. By the time of St. Alphonsus Liguori in 1757, any sexual contact with a person of the same sex is sodomy: *Ibid* p.72

⁴² http://www.eurekaencyclopedia.com/index.php/Category:15th-18th_Centuries_Abuse (Accessed 6 May 2016)

http://www.awrsipe.com/patrick_wall/selected_documents/1568%20Horrendum.pdf (Accessed 4 August 2013)

⁴³ R. Sheer, “A Canon, a Choirboy and Homosexuality in Late Sixteenth Century Italy: a Case Study,” *Journal of Homosexuality* 21(1991): 1-22, Mark D. Jordan: *The Silence of Sodom: Homosexuality in Modern Catholicism*, (University of Chicago Press, 2000)p.122

Between 1570 and 1630, the Spanish Inquisition handled over 1000 cases of “sodomy” in Aragon, and in some tribunals as many as one fifth of the accused were clergy. They were amongst the first to be executed.⁴⁴ In Valencia between 1565 and 1785, most of the priests or religious were accused of committing sexual crimes with adolescents, either novices or students, or boys plying the “street trade”.⁴⁵ A Jesuit chaplain in Seville remarked that Jesuits rarely sin with women because they can so easily find partners amongst their students and novices.⁴⁶ The experience of modern times is that opportunity is a powerful factor in the sexual abuse of children, and there is every reason to think that it operated in the same way in earlier times when schools were attached to monasteries.⁴⁷

In the 1780s, the Inquisition in Valencia and Zaragoza handed over to the civil authorities to be burned at the stake several monks where their sodomy had become public knowledge affecting the credibility and image of the Church.⁴⁸ In some cases where the crime had not become public, the monk was garrotted in prison, rather than being burned at the “so that the faithful did not hear about such a bad monk” and lose their respect for religion.⁴⁹ Depending on the circumstances, priests and monks were burned at the stake, garrotted in prison, whipped, sentenced to long periods in the galleys, imprisoned in monasteries with forced labour and fasting and sent into exile.⁵⁰

In the 17th and 18th centuries, the Church’s stand against these priests seemed to be very close to adopting what we might call these days, “zero tolerance”. In 1635 and again in 1726 the Holy See

⁴⁴ Mark D. Jordan: *The Silence of Sodom*, p 126

⁴⁵ Mark D. Jordan: *The Silence of Sodom*, p. 127, and Carrasco: *Inquisición y represión sexual en Valencia*: pp.175-176

⁴⁶ Mark D Jordan: *The Silence of Sodom*, p.126, citing Mary Elizabeth Perry: “The ‘Nefarious Sin’ in Early Modern Seville”, *Journal of Homosexuality* 16, nos 1-2 (1988); pp.67-89

⁴⁷ Professors Desmond Cahill and Patrick Parkinson explain the significant drop off in complaints of sexual abuse in Australia since the 1980s on a number of factors, including the closure of boarding schools and the collapse of the altar boy system: Patrick Parkinson: *Child Sexual Abuse and the Churches: A Story of Moral Failure?*, *Current Issues in Criminal Justice*, July 2004, Vol. 26 No. 1 <http://www.austlii.edu.au/au/journals/CICrimJust/2014/16.pdf> (Accessed 26 December 2014)

⁴⁸ Carrasco: *Inquisición y represión sexual en Valencia*, p179-181, and cases such as that of Fray Jeronimo Estruch, p.180.

⁴⁹ Id, p.61.

⁵⁰ Mark D. Jordan: *The Silence of Sodom*, p.123. Rafael Carrasco gives examples of lesser sentences for clergy imposed by the Inquisition from the 16th to 18th century in Valencia, such as 4 years imprisonment in a monastery, 3 and 5 years in the galleys and 200 lashes and heavy fines for “touching” or “embracing” boys: Carrasco: *Inquisición y Represión Sexual en Valencia*, p.48. In 1617, a priest named Ferrer was “degraded” and given 10 years on the galleys (p.64). Carrasco says that after about 1630, the Valencia Inquisition was less likely to hand people over to the civil authority to be burned at the stake, and preferred sentencing to the galleys, whipping and exile. In the case of clergy and religious, where they were not “degraded”, they were imprisoned in a monastery designated by the Sacred Congregation of the Inquisition, and had forced labour imposed on them. They were forced to fast, as well as being forbidden to say Mass and preach. (p.82). Carrasco also says that 30% of all males brought before the Inquisition were between 9 and 19 years old, with an average of 15.4 years. Young males were the favourite prey of homosexuals (clerical or otherwise), whose methods of persuasion were perfectly adapted to the misery in which most of the population were living. Sex was a source of social mobility, or provided access to comforts and pleasures reserved to the economic elites. Very few of these young people were punished by the Inquisition, which tends to confirm that the Inquisition accepted that the fault was mainly with the adults who seduced them: (p.222-224). The same inequality in social position between sexual partners is found in studies of the Peruvian Inquisition of the 16th and 17th century, although there were also long standing relationships where there seemed to be more equality: Molina: *Los Sodomitas Virreinales*, p.36

refused to reinstate priests who had served their sentences under the civil law for the sexual abuse of boys.⁵¹

The Beginnings of a Cultural Shift

By 1842, under the reign of Pope Gregory XVI, we start to see a reluctance to hand over priests to the secular authorities in some countries. In that year, the Holy Office issued a decree absolving penitents of their canonical obligation to denounce priests who solicited sex in the confessional in the lands of “schismatics, heretics and Mohammedans”, noting that it was easy for such priests to escape punishment at the hands of schismatic bishops or infidel judges.”⁵²

In 1866, we start to see a change, not only on the question of handing over priests to the civil authorities, but also a reluctance to dismiss priests even for soliciting sex in the confessional. An instruction from Pius IX through the Holy Office imposed absolute secrecy on these proceedings, but it makes no mention of handing over such priests to the secular authority, and states that restraint must be exercised in demoting priests to “the secular branch”.⁵³

On 20 July 1890, the Holy Office, under Pope Leo XIII, issued a further instruction imposing quite detailed procedures for keeping the proceedings for soliciting in the confessional secret. Now we start to see a heightened concern of the scandal that such trials might create.⁵⁴ The procedures outlined in this decree were designed to keep hidden not just the evidence that might be given, but the fact that a trial was being held at all. The trial was not to be conducted in the Chancery. Witnesses were to be called on different days, sworn to secrecy, interviewed alone, and examinations were to take place in sacristies or some other private place.⁵⁵

⁵¹ P. Gasparri, editor, *Codicem Iuris Canonici Fontes*, Vol. 1, p. 763:

http://www.awrsipe.com/patrick_wall/selected_documents/1726%20Lavellana.pdf (Accessed 9 February 2014.) and Nicholas Cafardi, *Before Dallas*, p. 6

⁵² Gasparri, *Codis Iuris Canonici Fontes, Volume IV Curia Romana* N714-2055, 889, SCS Off. Litt 20 maii 1842

http://www.awrsipe.com/patrick_wall/selected_documents/1842%20Augustinian%20dubium.pdf (Accessed 20 September 2014)

⁵³ Gasparri, editor, *Codicem Iuris Canonici Fontes*, Vol. 1, (Vatican, Typis Polyglottis, 1926), par 14

http://www.awrsipe.com/patrick_wall/selected_documents/1866%20Instruction%20on%20sacramentum%20poenitentiae.pdf (Accessed 9 February 2013) The secrecy instructions was repeated in 1897

http://www.awrsipe.com/patrick_wall/selected_documents/1897_instructionis_circa_sacramentum_poenitentiae.pdf

(Accessed 9 February 2013. *S.C.S. Off. Instr., 20 Febr 1866, Instruction under Sacramentum Poenitentiae*, par 12

http://www.awrsipe.com/patrick_wall/selected_documents/1866%20Instruction%20on%20sacramentum%20poenitentiae.pdf (Accessed 20 September 2014)

⁵⁴ Gasparri, editor, *Codicem Iuris Canonici Fontes*, Vol. 1, (Vatican, Typis Polyglottis, 1926) N.714-2055, 1123

http://www.awrsipe.com/patrick_wall/selected_documents/1890%20Denunciations%20of%20confessors.pdf .

⁵⁵ In the revised historical introduction to *Sacramentorum Sanctitatis Tutela*, Pope Benedict XVI said that strict confidentiality was imposed originally because cases of soliciting in the confessional involved the seal of confession. He then said: “Over time and only analogously, these norms were extended to some cases of immoral conduct of priests.” This statement is supported by the documentary record set out above. But it does not answer the question as to why the

The First Code of Canon Law 1917

In 1904, Pope Pius X set up the Pontifical Commission for the Codification of Canon Law under Cardinal Gasparri. His assistant was Monsignor Eugenio Pacelli, the future Pope Pius XII.⁵⁶ The work of creating the first Code of Canon Law involved adopting, modifying or discarding decrees that the Church thought were relevant or irrelevant for the time.⁵⁷ The Commission discarded the decrees of Innocent III, Leo X, Pius IV, St Pius V, the Third, Fourth and Fifth Lateran Councils and the Council of Trent, requiring priests guilty of serious crimes to be degraded and handed over to the civil authorities. The canon law and practice of handing over the priest for punishment in accordance with the civil law was officially abandoned everywhere, and not just for those countries ruled by “schismatics, heretics and Mohammedans”. The Code provided that those who sexually abuse children were only to be dismissed in “more serious cases”.⁵⁸

Crimen Sollicitationis 1922

Five years later, in 1922, Pius XI issued his secret instruction *Crimen Sollicitationis*. On the front page of the document are these words: “To be kept in the secret archive of the Curia for internal use. Not to be published or augmented with commentaries.” The “curia” referred to in this heading is the central office of the bishop’s diocese under the care of the chancellor, who alone was to have the key.⁵⁹ No one was to have access to this safe without the consent of the bishop, the vicar general or the chancellor.⁶⁰ Evidence of these crimes was to be burned on the death of the priest or after ten years, with only a brief summary of the facts and the decree retained.⁶¹

The requirement to dismiss for “more serious cases” had become one where dismissal was available only where there was an impossibility of reforming the priest.⁶² Information about clerics committing child sexual abuse, homosexuality and bestiality, obtained through the Church’s internal

secret of the Holy Office was required for some cases of sexual misconduct where the confessional seal was not an issue. http://www.vatican.va/resources/resources_introd-storica_en.html (Accessed 3 July 2013)

⁵⁶ Edward Peters: http://www.canonlaw.info/canonlaw_menbehindman.htm (Accessed 20 September 2014)

⁵⁷The Apostolic Constitution, *Providentissima Mater Ecclesia* of Pope Benedict XV of 27 May 1917: Edward N Peters: *The 1917 or Pio-Benedictine Code of Canon Law: in English Translation with Extensive Scholarly Apparatus*: Ignatius Press, page 22.

⁵⁸ Canon 2359§2: Edward N. Peters: *The 1917 or Pio Benedictine Code of Canon Law in English Translation* p.749.

⁵⁹ *Code of Canon Law: Latin-English Edition* (Washington: Canon Law Society of America, 1984) Canon 377.

⁶⁰ Id, Canon 377.

⁶¹ Id, Canon 379

⁶² *Crimen Sollicitationis* Art, 63. For the original 1922 Latin document, see http://www.awrsipe.com/patrick_wall/selected_documents/1922%20Instruction.pdf (Accessed 28 December 2014). The 1962 version is in identical terms except that its provisions were extended to priests who were members of religious orders: http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (Accessed 4 August 2013) and <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 16 July 2013).

inquiries and trials, was made subject to the “secret of the Holy Office”, a permanent silence, the breach of which incurred automatic excommunication that could only be lifted by the Pope personally.⁶³ These provisions reflected the twin concerns of the Holy See at the time: the avoidance of “scandal” and treating priests differently because they had been “ontologically changed” when they were anointed by God at ordination. The creation of a de facto privilege of clergy through the back door of secrecy had begun.⁶⁴ If the civil authorities did not know about these allegations, there would be no State trials, and the matter would be dealt with exclusively in the canonical courts where the maximum punishment was dismissal from the priesthood. The effect of this change of policy turned on its head the Church’s previous tradition of seeing child sexual abuse as a crime that demanded at least imprisonment, which by the 19th century, had become an exclusive punishment of the State. There are a number of explanations for why this happened.

The Priest as an Ontologically Changed Being

The theology that a priest is someone special reaches back to before St. Augustine, but it seems to have reached a peak around the early 1900s, and was personified in the 1905 beatification and 1925 canonization by Pope Pius XI of the French priest, John Vianney, who proclaimed, “After God, the priest is everything!”⁶⁵ It seems that the Church had accepted as orthodoxy, Lord Acton’s worst heresy that “the office sanctifies the holder of it.”⁶⁶ This theology was reflected in the Concordats entered into by the Holy See with sympathetic Catholic countries to provide special privileges for priests convicted of State crimes. They would serve their term of imprisonment in a monastery rather than in jails. Concordats providing for these kinds of privilege were entered into with Latvia in

⁶³ Id, *Crimen Sollicitationis* Art 11.

⁶⁴ Fr Thomas Doyle: <http://reform-network.net/?p=3006> par 27 (Accessed 3 July 2013)

⁶⁵ http://www.vatican.va/holy_father/benedict_xvi/letters/2009/documents/hf_ben-xvi_let_20090616_anno-sacerdotale_en.html (Accessed 15 May 2013). The idea, at least as it applies to bishops, can also be traced earlier to St. Ignatius of Antioch: Catholic Catechism par 1549: http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c3a6.htm (Accessed 26 October 2013). Gary Macy argues that this concept of the priest having a special power, rather than being called to perform a particular role in the Christian community only dates from the 12th century. <http://scu.edu/ic/publications/upload/scl-0711-macy.pdf> (Accessed 6 September 2013). But there seems little doubt that this culture of clericalism reached a peak at the beginning of the 20th century. Pope Pius X in a 1906 encyclical insisted that the Church was made up of two divisions, the hierarchy that led and the flock whose only duty was to obey: http://www.vatican.va/holy_father/pius_x/encyclicals/documents/hf_p-x_enc_11021906_vehementer-nos_en.html. (Accessed 1 October 2013) The theology is also expressed in Canon 1008 of the 1983 Code: “By divine institution, some of the Christian faithful are marked with an indelible character and constituted as sacred ministers by the sacrament of holy orders. They are thus consecrated and deputed so that, each according to his own grade, they may serve the People of God by a new and specific title”. See David Timbs: *Clericalism*, OMG! Journal of Religion and Culture 1 April 2015, http://ohmygodjournal.org/?page_id=434 (Accessed 6 April 2015)

⁶⁶ Lord Acton (1834 – 1902) “I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong... There is no worse heresy than that the office sanctifies the holder of it.” Acton is best known for the words that follow in his letter to Bishop Mandel Creighton, ‘Power tends to corrupt and absolute power corrupts absolutely.’ Letter to Bishop Mandell Creighton, April 5, 1887 published in *Historical Essays and Studies*, edited by J. N. Figgis and R. V. Laurence (London: Macmillan, 1907)

1922, Poland in 1925, Italy in 1929, Spain in 1953, the Dominican Republic in 1954 and Colombia in 1887, 1928 and as recently as 1973.⁶⁷

The Rise of Anti-Clericalism

In the 16th century, the Protestant Reformation saw the Church lose influence over large sections of northern Europe. The subsequent religious wars and persecution of Catholics in Protestant countries may have had some effect on Church thinking over the next four hundred years as to what to do with clerics who had breached the criminal laws of those States hostile to the Church. The rising anti-clericalism in Catholic Europe and Latin America may also have been a factor.⁶⁸ The fear that priests might not receive a fair trial may have been justified in Germany prior to 1945 and in the Soviet bloc until 1989, but there was no justification for it in the West, certainly after 1945.⁶⁹ The reimposition of the pontifical secret in 2001, and again by Benedict XVI in 2010, long after this anti-clericalism had disappeared, suggests that the fear of scandal and the protection of priests were the main reasons for the change in culture. But in the 1920s, there was another factor, a radical new development in technology that could ensure that scandals about clerical behaviour could be spread at the speed of light.

⁶⁷ <http://www.worldlii.org/int/other/LNTSer/1923/80.html> (Accessed 13 January 2013)
<http://www.racionalista.pl/kk.php/s.1369/k.2> (Accessed 13 January 2014) Lateran Treaty 1929, Article 8
<http://www.aloha.net/~mikesch/treaty.htm> (Accessed 14 December 2013, Agreement between Holy See and Italy, 3 June 1985, Art. 4(4) <http://original.religlaw.org/template.php?id=578> (Accessed 11 April 2015) The Republican government repudiated the 1851 Concordat between the Holy See and Queen Isabella that incorporated many clergy privileges.
http://www.concordatwatch.eu/showtopic.php?org_id=845&kb_header_id=34511 (Accessed 13 January 2014), Holy See and Spain in 1953: http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19530827_concordato-spagna_sp.html (Accessed 7 May 2013) Art XVI (1) Art XVI (4). The privileges were abolished in 1985: http://www.laicismo.org/data/docs/archivo_678.pdf p. 58 (Accessed 7 May 2013), Dominican Republic Concordat 16 June 1954 http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19540616_concordato-dominicana_sp.html Art XI(2)(Accessed 18 October 2013), Colombia: The immunity of bishops was granted by the Concordat of 1887. It became part of Colombian law by Law No. 34 of 1892: <http://www.banrepultural.org/node/32783> (Accessed 16 March 2015). The immunity was continued in 1928 by the Convention regarding Missions: League of Nations Treaty Series, Art XIV.
<http://www.worldlii.org/int/other/LNTSer/1928/192.html> (Accessed 16 March 2015). It was confirmed again by the Concordat of 1973, Art XIX and XX
http://mre.cancilleria.gov.co/wps/portal/embajada_santasede!/ut/p/c0/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gLUzfLUH9DYwOL4BAnAyMvVyM3lyPTAGNDU_2CbEdFAKVyXgk!/?WCM_PORTLET=PC_7_85F9UO1308STB02JE2F225P3H4_WCM&WCM_GLOBAL_CONTEXT=/wps/wcm/connect/WCM_EMBAJADA_SANTASEDE/embajada/relaciones+bilaterales/concordato+on+la+santa+sede (Accessed 19 October 2013)

⁶⁸ José Mariano Sánchez, *Anticlericalism: a brief history* (University of Notre Dame Press, 1972)

⁶⁹ Cardinal Pell told the Australian Child Abuse Royal Commission that this thinking pervaded the Vatican until 2002 when the American bishops persuaded the Vatican that the people making the complaints were not just the “enemies of the Church”, like the “Nazis and possibly Communists” had done, but were good people.”: Transcript on 14 March 2014 at p.6260

The Invention of Radio and the Spread of Scandal

The first commercial radio licence in the United States was issued to Westinghouse in 1920, and the BBC was established in 1922.⁷⁰ The Holy See itself was not slow to recognise the propaganda benefits of the new invention, and it was the first religious faith to use it for proselytising purposes in 1927. In 1931, Marconi set up the Vatican Radio for Pius XI.⁷¹ Two years after the first commercial radio station started broadcasting, Pius XI imposed “the secret of the Holy Office” on all information about child sex abuse, homosexuality and bestiality by clergy. One solution to the “scandal” problem was to cut off the information at its source.

The Reissue of *Crimen Sollicitationis* 1962

The secret of the Holy Office on all information obtained in the Church’s internal investigations of child sexual abuse was continued by Pope Pius XII. It was confirmed and expanded by Pope John XXIII in 1962 when he extended the procedures under *Crimen Sollicitationis* to priests who were members of religious orders.⁷²

The Instruction *Secreta Continere* 1974

In 1974, by his Instruction, *Secreta Continere*, Pope Paul VI renamed the Church’s highest form of secrecy outside the confessional, the “pontifical secret”, and extended it even to cover the allegation of child sexual abuse itself, and not just the information obtained in the Church’s internal inquiries and trials.⁷³ It had only one exception to the pontifical secret: the accused priest could be told of the allegation if it were necessary for his defence. There was no exception for reporting to the civil

⁷⁰ James Wood: *History of International Broadcasting*, (IET 1993) p.17, 25, 126.

⁷¹ Id, p.126,

⁷² http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (Accessed 4 August 2013). A number of Church personnel have claimed that no one knew about *Crimen Sollicitationis*, but there is strong evidence that it was both known and used at least outside Australia: Fr Thomas Doyle <http://reform-network.net/?p=3006> , par 14 (Accessed 5 December 2013) John P. Beal: *The 1962 Instruction*, pp. 229 – 231: http://www.vatican.va/resources/resources_introdustorica_en.html (Accessed 5 August 2013). In Australia, even if it was not used, it was known and discussed in 1962: <http://www.awrsipe.com/Misc/Ian-Waters-Speech-with-Commentary5.pdf> (Accessed 15 April 2015) <http://www.catholica.com.au/forum/index.php?id=164087> (Accessed 3 November 2014). Any ignorance by current clergy is understandable because *Crimen Sollicitationis* was repealed in 1983.

⁷³ The text is published in *Acta Apostolicae Sedis*, 1974, pages 89–92, see at <http://www.documentcloud.org/documents/243690-10-sacramentorum-sanctitatis-2001-with-2003.html> Footnote (31) (English), http://www.vatican.va/resources/resources_norme_en.html Footnote 41 (Latin)(Accessed 4 August 2013). For an English translation of the whole document, see William Woestman: *Ecclesiastical Sanctions and the Penal Process* (St. Paul University 2003) Appendix VII, p.237. Woestman also confirmed that *Secreta Continere* was not obrogated by the 1983 Code and was ‘ius vigens’, that is, that it had the force of law: Beal: *The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?* (2007) 41 *Studia Canonica* 199, p.232, fn 128 <http://www.vatican.va/resources/Beal-article-studia-canonica-41-2007-pp.199-236.pdf> ,(Accessed 5 August 2013)

authorities. It was a permanent silence and it even applied to those who accidentally come across the information subject to the secret.⁷⁴

The 1983 Code of Canon Law and the Repeal of *Crimen Sollicitationis*

The 1983 Code of Canon Law repealed *Crimen Sollicitationis*.⁷⁵ *Secreta Continere* continued in force after the promulgation of the Code.⁷⁶ These documents governed the treatment of child sexual abuse under canon law from that date.⁷⁷

Sacramentorum Sanctitatis Tutela 2001 & the 2010 Revision

In 2001, Pope John Paul II, by his *Motu Proprio*, *Sacramentorum Sanctitatis Tutela*, introduced some new procedures for child sexual abuse, and confirmed that the pontifical secret applied to them. In 2010, in the revised norms, Pope Benedict XVI extended the secret to cover clerics who sexually abused intellectually disabled adults and to those who possessed child pornography.⁷⁸

In the same year, the Vatican announced that bishops would be instructed to obey civil laws on reporting.⁷⁹ Very few countries have comprehensive reporting laws. All Australian States have laws about reporting children at risk, but only New South Wales and Victoria provide for reporting historical abuse.⁸⁰

⁷⁴ Art 1(4) and II(4): see English translation in William Woestman: *Ecclesiastical Sanctions* p. 235.

⁷⁵ *Potiphar's Wife*, Ch. 9

⁷⁶ William Woestman: *Ecclesiastical Sanctions and the Penal Process* (St. Paul University 2003) Appendix VII, p.237. Woestman also confirmed that *Secreta Continere* was not obrogated by the 1983 Code and was 'ius vigens', that is, that it had the force of law: Beal: *The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?* (2007) 41 *Studia Canonica* 199, p.232, fn 128 <http://www.vatican.va/resources/Beal-article-studia-canonica-41-2007-pp.199-236.pdf> ,(Accessed 5 August 2013)

⁷⁷ Some confusion in canon law arose in the late 1990s by claims made by the Congregation for the Doctrine of the Faith that *Crimen Sollicitationis* had not been repealed: see *Potiphar's Wife*, Ch.9

⁷⁸ <http://www.documentcloud.org/documents/243690-10-sacramentorum-sanctitatis-2001-with-2003.html>, http://www.vatican.va/resources/resources_norme_en.html (Accessed 4 August 2013)

⁷⁹ http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html (Accessed 21 July 2013). In making the announcement, Fr Lombardi created some uncertainty as to the extent of the reporting allowed and implied that once the canonical proceedings started, it was too late to report to the police. This seems to be supported by the recent case where the CDF refused to hand over to Italian magistrates documents from canonical disciplinary proceedings against Fr Mauro Inzoli. <http://www.globalpulsemagazine.com/news/pope-francis-issues-statutes-overseeing-financial-reform/887>, Accessed 7 March 2015. Very few countries have reporting laws for "historical abuse", that is allegations by adults who were abused as children. In Australia only New South Wales and Victoria have them. The Commissioner for the Melbourne Response stated to the Victorian Parliamentary inquiry that he investigated 304 complaints of sexual abuse, and only 2 involved victims who were still children at the time. http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/Right_of_Reply_P._OCallaghan_Part_1.pdf par 7(b) (Accessed 15 July 2013) If the figures can be applied generally, complaints of historical abuse represent 99% of all cases.

⁸⁰ S.316 of the *Crimes Act 1900 (NSW)*. The *Crimes Amendment (Protection of Children) Act 2014 (Vic)* was passed by the Victorian Parliament and assented to on 3 June 2014, and has similar provisions to S.316 of the *NSW Crimes Act* relating to the abuse of vulnerable persons. It was proclaimed to commence on 27 October 2014.

<http://www.gazette.vic.gov.au/gazette/Gazettes2014/GG2014S350.pdf> (Accessed 14 Oct 2014)

See also the author's: *Potiphar's Wife*, p.141-155 for details of various State laws.

Attempts by Bishops Conferences to Change Canon Law

In 1996, the Irish bishops approached the Holy See with a proposal to allow mandatory reporting of all allegations of child sex abuse by priests. The Holy See rejected it, saying that it conflicted with canon law, and it did.⁸¹ In 1996, the Australian bishops in *Towards Healing* required compliance with civil reporting laws, despite the potential conflict with canon law.⁸² The British bishops wanted mandatory reporting in 2001.⁸³ The Americans asked for it in 2002, and this time the Holy See agreed to a compromise whereby reporting was allowed but only where the domestic law required it.⁸⁴ There was a very serious risk of bishops going to jail for breaching reporting laws that existed in some American States. This dispensation was limited to the United States, but it was extended to the whole world in 2010.⁸⁵

The United Nations and the Holy See on Mandatory Reporting

In January 2014, the United Nations Committee for the Rights of the Child required changes to canon law by abolishing the pontifical secret over child sex abuse allegations, and imposing mandatory reporting.⁸⁶ In May 2014, the United Nations Committee against Torture requested the same thing.⁸⁷ In September 2014, Pope Francis said no, with the weak excuse that mandatory reporting would interfere with the sovereignty of independent States.⁸⁸ Mandatory reporting under canon law would only interfere with their sovereignty if their domestic law prohibited reporting of clergy sexual abuse to the police. No such country exists.

⁸¹ Letter from Archbishop Storero 31 January 1997. <http://graphics8.nytimes.com/packages/pdf/world/Ireland-Catholic-Abuse.pdf?ref=europe>
http://www.nytimes.com/2011/01/19/world/europe/19vatican.html?_r=0 (Accessed 9 July 2013). See also *Potiphar's Wife*, p.262-268.

⁸²http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria_Appendix_1_Part_B.pdf Annexure 8 (Accessed 31 March 2013) clause 4.3, page 9. See also *Potiphar's Wife*, p.244.

⁸³ <http://www.cathcom.org/mysharedaccounts/cumberlege/finalnolan2.htm> (Accessed 16 July 2013), and see *Potiphar's Wife*, p.268-270.

⁸⁴ <http://old.usccb.org/ocyp/charter.pdf> Article 4, (Accessed 17 August 2013) See also Thomas Green: *Critique of the Dallas Charter*: http://natcath.org/NCR_Online/documents/Greencritique.htm (Accessed 21 July 2013), Pallone: *Sin, Crime, Arrogance, Betrayal: A psychodynamic Perspective on the Crisis in American Catholicism*, Brief Treatment and Crisis Intervention/2:4 Winter 2002, (2002) Oxford University Press, Jo Renee Formicola: *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church-State Relations*, (Palgrave MacMillan, 2014), and see *Potiphar's Wife* p.270-276.

⁸⁵ http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html (Accessed 17 July 2013). See also *Potiphar's Wife*, p.118-126.

⁸⁶ http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC_C_VAT_CO_2_16302_E.pdf (Accessed 6 February 2014)

⁸⁷ http://ccrjustice.org/files/CAT_C_VAT_CO_1_17271_E.pdf , par 10(e)(Accessed 17 June 2014)

⁸⁸ The Response was entitled "Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child", par 3.
http://en.radiovaticana.va/news/2014/09/26/holy_see_publishes_reply_to_un_committee_/1107343 (accessed 27 September 2014)

The Church's Disciplinary System

The secrecy requirements imposed by canon law since 1922 may not have been so damaging if the Church had a decent disciplinary system for getting rid of these priests. But the *1917 Code* and *Crimen Sollicitationis* introduced the “pastoral approach” to dealing with clergy sexual abuse of children by preventing dismissal except where it was impossible to reform the priest.⁸⁹ So, they were sent off to be “cured”, and reassigned to other parishes.

Within 2 years of his being elected Pope, John Paul II started dismantling the already defective canonical disciplinary system. He made it almost impossible to dismiss a priest for child sexual abuse. In 1980 he abolished the simplified administrative procedure for dismissing a priest.⁹⁰ The *1983 Code* continued the “pastoral approach” of *Crimen Sollicitationis*, and required the bishop to try to cure the priest before even putting him on trial for dismissal.⁹¹ The standard of proof was effectively the criminal standard, of proof of beyond reasonable doubt, instead of the balance of probabilities imposed by civil law in disciplinary matters.⁹² He imposed a Catch 22 defence: a priest cannot be dismissed for paedophilia because he is a paedophile. Full “imputability” was required for dismissal.⁹³ A diagnosis of paedophilia had the same effect as a diagnosis of insanity in civil law.⁹⁴ Two serial paedophiles in Ireland, Fr Tony Walsh and Fr Patrick Maguire had their dismissals by a Dublin canonical court overturned in Rome because they were diagnosed as paedophiles. Under canon law, the more children a priest abuses the less likely can he be dismissed.⁹⁵

⁸⁹ *Crimen Sollicitationis* Art, 63. For the original 1922 Latin document, see http://www.awrsipe.com/patrick_wall/selected_documents/1922%20Instruction.pdf (Accessed 28 December 2014), and 1962 version http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (Accessed 4 August 2013).

⁹⁰ Cafardi: “*Before Dallas*, 62, Congregation for the Doctrine of the Faith, October 14 1980, *Acta Apostolicae Sedis* 72 (1980): 1132-37

⁹¹ Canon 1341

⁹² Beale, Coriden & Greene: *New Commentary on the Code of Canon Law* p. 1716. <http://smithlecture.org/sites/smithlecture.org/files/downloads/lecture/smith-2013-transcript.pdf> p. 11 (Accessed 25 October 2013), Nestor case in the Child Sexual Abuse Royal Commission: <http://childabuseroyalcommission.gov.au/getattachment/e1f91ddb-2ba2-4eb4-b487-c43a0c8989e4/Report-of-Case-Study-no-14> , p.2 (Accessed 19 December 2014).

⁹³ J.A. Alesandro, “*A Study of Canon Law: Dismissal from the Clerical State in Cases of Sexual Misconduct*,” in *The Catholic Lawyer*, 36 (1996), p. 262, quoted in Elizabeth M. Delaney sgs, *Canonical Implications of the Response of the Catholic Church in Australia to Child Sexual in Australia*, a doctoral dissertation submitted to the Faculty of Canon Law, Saint Paul University, Ottawa, Canada, (2004), at 194.

⁹⁴ Canon Law Society of Great Britain and Ireland, *Canon Law: Letter & Spirit: A Practical Guide to the Code of Canon Law* (London: Geoffrey Chapman, (1995), 805, Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.59 (Accessed 25 April 2013)

⁹⁵ Canon 1321, the author's *Potiphar's Wife*, pp.189ff, 216, 223

But the most serious impediment of all was the imposition of a 5 year limitation period for child sex abuse cases. *Crimen Sollicitationis* had no limitation period.⁹⁶ Under the 1983 Code, if a child did not complain within 5 years of the abuse occurring, the canonical crime was “extinguished”.⁹⁷

The end result was that there were virtually no canonical trials for paedophile priests after 1983.⁹⁸ There were some before then in Ireland and the United States, but as far as I know, none in Australia. The American canon lawyer, Fr Thomas Reese, the editor of *America* magazine, in a report to the 1992 United States Catholic Bishops Conference wrote that the 1983 Code of Canon Law makes it “almost impossible for bishops to dismiss priests for sexual abuse.”⁹⁹ At the various inquiries in Australia, Cardinal Pell, Archbishops Hart and Coleridge, Bishop Malone and Fr Brian Lucas agreed with that assessment.¹⁰⁰

In 2001, Pope John Paul II’s *Motu Proprio, Sacramentorum Sanctitatis Tutela* introduced some modified procedures, making dismissal easier.¹⁰¹ The limitation period was extended from 5 years to 10 years from the 18th birthday of the complainant. In 2003, the simpler method of dismissing a priest by “administrative” action was restored by an authorisation to the Congregation for the Doctrine of the Faith.¹⁰² In 2010, Pope Benedict XVI revised the procedures and extended the

⁹⁶ Canon 1362§1, http://www.vatican.va/archive/ENG1104/_P51.HTM (Accessed 29 May 2013)

⁹⁷ Canon 1362§2: Ladislav Orsy SJ, says that the canonical “prescription” is different to civil law statutes of limitation because the former extinguishes the cause of action, but the latter only prevent reliance on it (estoppel). That may be the situation in the United States, but many limitation statutes in Australia provide for extinguishment. http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bclawr/44_4/04_FMS.htm (Accessed 2 October 2013)

⁹⁸ The author’s *Potiphar’s Wife*, ch 9 and 14.

⁹⁹ Id p.36 and *America* (December 5 1992) 443-44 at 444

¹⁰⁰ Cardinal Pell: Victorian Parliamentary Inquiry

http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf page 21.8 (Accessed 3 July 2013),

Bishop Malone: Special Commission of Inquiry into Matters Relating to the Police Investigation of Certain Child Sexual Abuse Allegations in the Catholic Diocese of Maitland-Newcastle,

[http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf/$file/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf), 873.43ff (Accessed 14 July 2013); Archbishop

Hart, Victorian Parliamentary Inquiry

http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf p. 9 (Accessed 18 June 2013); Archbishop Coleridge, Australian Royal

Commission: http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/08/Transcript-RC_IRCSA_Day-026_11-Dec-2013_Public.pdf.p.2733 (Accessed 12 December 2013)

Fr Lucas, Newcastle-Maitland Inquiry

[http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_15_-_TOR_2_-_24_July_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_15_-_TOR_2_-_24_July_2013.pdf/$file/Transcript_Day_15_-_TOR_2_-_24_July_2013.pdf), 1570 (Accessed 18 August 2013).

¹⁰¹at <http://www.documentcloud.org/documents/243690-10-sacramentorum-sanctitatis-2001-with-2003.html> Art. 25 and footnote 31 specifically referring to *Secreta Continere*. (Accessed 4 August 2013).

¹⁰² *Facing the Truth*, p 33:

http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf (Accessed 6 April 2013)

limitation period to 20 years from the 18th birthday of the victim, but he made no changes to the “pastoral approach”, the standard of proof or to the Catch 22 defence.¹⁰³

The Current Situation

In a meeting with the American bishops, in March 2002, Pope John Paul II said "there is no place in the priesthood or religious life for those who would harm the young."¹⁰⁴ It suggests that the Church would be adopting a “zero tolerance” of clergy sexual abuse of children, and that those priests who had been abusing children should be dismissed.¹⁰⁵ On 19 March, 2014, Pope Francis said that Pope Benedict had supported “zero tolerance” for clergy who sexually abused children.¹⁰⁶ On 27 May 2014, he promised that he would apply the same “zero tolerance” standard.¹⁰⁷ But the figures produced by Archbishop Tomasi show less than one third of all priests against whom credible allegations of sexual abuse of children had been made had been dismissed.¹⁰⁸ Despite some improvements to the Vatican disciplinary system since 2001, there are still significant systemic problems with it that can only be cured by changes to canon law.¹⁰⁹

Conclusion

Brothers Crowe and Shanahan told the Royal Commission that during the 1980s the Marist and Christian Brothers would have regarded the sexual abuse of children as only being a “moral failure”.

Cardinal Francis George, one of the Church’s foremost intellectuals has stated, correctly, that law acts as a teacher.¹¹⁰ Canon law from 1917 onwards taught that the first obligation was to try and cure the perpetrator of child sexual abuse. It also taught that such matters were not crimes because in 1922 it prohibited reporting to the police, and continues to prohibit it with one exception that is useless in most countries. It is easy to understand how bishops and others lower down in the Church hierarchy, like the Marist and Christian brothers would come to think that the sexual abuse of children was nothing more than a “moral failure”. That is how the popes, the Vicars of Christ

¹⁰³ http://www.vatican.va/resources/resources_introd-storica_en.html (Accessed 3 July 2013)

¹⁰⁴ <http://old.usccb.org/ocyp/charter.pdf> Article 4, (Accessed 17 August 2013)

¹⁰⁵ See Affidavit of Jennifer Haselberger, <http://www.andersonadvocates.com/Posts/News-or-Event/1855/Affidavit-of-Jennifer-Haselberger.aspx> par 21 (Accessed 17 July 2014)

¹⁰⁶ <http://ncronline.org/blogs/ncr-today/pope-francis-supports-zero-tolerance-child-abuse> (Accessed 25 October 2014)

¹⁰⁷ <https://www.osv.com/OSVNewsweekly/Vatican/Article/TabId/719/ArtMID/13626/ArticleID/14793/Pontiff-to-meet-with-sex-abuse-victims.aspx> (Accessed 25 October 2014)

¹⁰⁸ On 6 May 2014, the Holy See’s envoy to the United Nations, Archbishop Tomasi said that of 3,400 credible allegations referred to the CDF since 2004, only 848 had been dismissed and the others dealt with by some unstated disciplinary measures: <http://vaticaninsider.lastampa.it/en/world-news/detail/articolo/pedofilia-pedophilia-pedofilia-33935/> (Accessed 19 February 2015)

¹⁰⁹ *Potiphar’s Wife*, p.327-332.

¹¹⁰ *Ave Maria Law Review* Volume 1, Issue 1 (2003) p.1

<http://legacy.avemarialaw.edu/lr/assets/articles/v1i1.george.copyright.pdf> (Accessed 7 May 2013)

regarded it when they radically changed canon law from 1917 and continued and expanded it thereafter.

The pontifical secret forms the legal basis for the cover up of child sexual abuse. Cardinal Francis George also said that if you want to change a culture, you have to change the law that embodies it.¹¹¹ That applies equally to canon law as it applies to civil law. The culture of secrecy in the Church over child sexual abuse will never disappear while canon law imposes the pontifical secret on all allegations and information about it.

¹¹¹ Ave Maria Law Review Volume 1, Issue 1 (2003) p.1
<http://legacy.avemarialaw.edu/lr/assets/articles/v1i1.george.copyright.pdf> (Accessed 15 May 2013)