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INSTITUTIONAL CHILD SEXUAL ABUSE—NOT JUST A CATHOLIC THING

Kelly Clark, Esq[†]

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I. INTRODUCTION

Fr. Michael's story¹ shows us the incompetence, foolishness

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1. Fr. Michael O'Connell, Pastor, Church of the Ascension, Minneapolis,

and arrogance of one diocese facing a child abuse problem. Fr. Tom² has shown us that this is but a case study in a larger pattern and practice of the Catholic Church's response to the tragedy of child abuse in its midst. Both of these good priests have shown us how the Church's response to child abuse by its clergy is anchored in and reinforced by the Catholic sense of clericalism,³ that clergy are ontologically different, indeed unique.⁴ One can easily see these attitudes play out in the scandals of the last decade,⁵ where the Church was finally forced to take steps to acknowledge its fault and address the problem.⁶ But sadly, it was forced not by the

MN (2009).

2. Fr. Thomas P. Doyle, OP, a Dominican priest with a doctorate in Canon law and five separate master's degrees. Fr. Doyle is an expert on child abuse within the Catholic Church. See Richard Sipe: Priests, Celibacy, and Sexuality, Biographical Sketch of Rev. Thomas P. Doyle, <http://www.richardsipe.com/doyle/doyle-bio.html> (last visited Nov. 7, 2009).

3. See Thomas P. Doyle, *Clericalism: Enabler of Clergy Sexual Abuse*, 54 PASTORAL PSYCHOL. 189–213 (2006); William A. Donohue, *The Problem with Clericalism*, 40 SOCIETY (TRANSACTION) 41–42 (2003); Thomas P. Doyle, *Roman Catholic Clericalism, Religious Duress, and Clergy Sexual Abuse*, 51 PASTORAL PSYCHOL. 189 (2003); Russell Shaw, *Clericalism and the Sex Abuse Scandal*, 186 AMERICA 15–17 (2002); Bishop Peter Cullinane, *Clericalism: Avoidable Damage to the Church*, AUSTL. CATH. REC. 181–91 (1997).

4. Church leaders at the Second Vatican Council agreed, “*Though they differ from one another in essence and not only in degree, the common priesthood of the faithful and the ministerial or hierarchical priesthood are nonetheless interrelated: each of them in its own special way is a participation in the one priesthood of Christ. The ministerial priest, by the sacred power he enjoys, teaches and rules the priestly people, acting in the person of Christ, he makes present the Eucharistic sacrifice, and offers it to God in the name of all the people.*” THE DOGMATIC CONSTITUTION ON THE CHURCH (LUMEN GENTIUM): DOCUMENTS OF VATICAN II 27 (Walter M. Abbott, S.J. ed., 1966) (emphasis added). “The sacrament of Holy Orders . . . confers an *indelible spiritual character* and cannot be repeated or conferred temporarily.” UNITED STATES CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH, 1582 (2d ed. 1994) (emphasis added).

5. See TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE (2008); PREDATORY PRIESTS, SILENCED VICTIMS: THE SEXUAL ABUSE CRISIS AND THE CATHOLIC CHURCH (Mary Gail Frawley-O’Dea & Virginia Goldner eds., 2007); JASON BERRY & GERALD RENNER, VOWS OF SILENCE (2004); BARRY COLDREY, A CHRISTIAN APOCALYPSE: THE SEXUAL ABUSE CRISIS IN THE CATHOLIC CHURCH, 1984–2004 (2004); PAUL DOKECKI, THE CLERGY SEXUAL ABUSE CRISIS: REFORM AND RENEWAL IN THE CATHOLIC COMMUNITY (2004); BOSTON GLOBE, INVESTIGATIVE STAFF, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (2002); FRANK BRUNI & ELINOR BURKETT, A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE, AND THE CATHOLIC CHURCH (1993).

6. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE (2006), *available at* <http://www.usccb.org/ocyp/charter.shtml> (known colloquially as the “Dallas Protocols”).

demands of conscience or the urgings of the Holy Spirit, but by the public shame of scandal and the relentless pressure of litigation.⁷ For if the Catholic Church is a safer place than it was twenty-five years ago, it is not because the Church finally got religion, but because it got sued, over and over again, by thousands⁸ of courageous men and women who stood up to speak the unspeakable; and because it got shamed, publicly and repeatedly, by a diligent press doing its job,⁹ making sure that scandalous secret behavior had scandalous public consequences.

Well, it might not surprise you to hear that the Catholic Church is not unique in thinking itself unique—and you likewise will not be stunned to hear that other institutions of trust can and do respond badly to child abuse in their midst. It is my purpose today to first explain how institutional child abuse is not just a Catholic thing, and to point to a number of other institutions where similar scandals are bubbling or have erupted; second, to suggest the common institutional attitudes and grandiosity that these institutions share; third, to use a number of case examples from my work to show these attitudes in action; and, finally—lest we ignore the ancient and wise mandate that it is not enough simply to curse the darkness, but that we must light a candle and spread the light as well—I will offer a few simple guidelines for these institutions to follow if they want to end child abuse in their

7. TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE 49 (2008) (citing Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law*, 31 FORDHAM URB. L.J. 549, 551 n.11 (2004) (estimating 3000 civil cases filed between 1984–2004)).

8. LYTTON, *supra* note 9, at 43 (reporting allegations made by 10,667 individuals between 1950–2002, with subsequent audits from 2004–2006 adding an additional 2570 and citing UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES, 1950–2002 (2006) (known colloquially as the “John Jay Study”)).

9. LYTTON, *supra* note 9 at 112 (citing a series of 2002 polls that show “a high degree of public awareness, with between 96 and 100 percent of respondents offering some opinion on the matter”); see also *Archbishop Carlson Reflects on Sex Abuse Mistakes*, WCCO, June 4, 2009, <http://wcco.com/local/archbishop.sex.abuse.2.1071643.html>; *Hundreds of Clergy Abuse Suits Filed*, N.Y. TIMES, June 6, 2002, § 1, at 24; *Special Report: Secrets of a Small-Town Priest*, OREGONIAN, Oct. 15, 2000, at A1; *Spotlight Investigation: Abuse in the Catholic Church*, B. GLOBE, <http://www.boston.com/globe/spotlight/abuse/> (last visited Oct. 10, 2009); *Full Coverage: Abuse Scandal*, L.A. TIMES, <http://www.latimes.com/la-me-priest-sg,0,4527188.story> (last visited Oct. 10, 2009).

midst, help the victims who have been abused under their watch heal, and to take back their places in society as rightly respected institutions of trust where children are safe.

Now, I say rightly respected, and I mean that. So let me give a brief caution and disclaimer here by way of full disclosure: I am not Catholic, nor Mormon, nor Adventist, nor was I a Boy Scout, a cop or a teacher; yet I have high regard for all these institutions and vocations, as well as others that I have sued.¹⁰ Indeed, as a convinced (if very flawed) Christian¹¹—I am a layman in the Episcopal Church, studying for a Masters in Divinity and considering the possibility of ordination myself—I take seriously and in fact have written extensively about the gravity of suing churches¹² as well as secular organizations of good will with high social purposes. As to all of these institutions, I believe in their civic and moral potential. We are not talking here about the child pornography industry. These are instead what I call institutions of trust, that once had and should regain high social respect and influence, but only if they respond differently to child abuse allegations than they have in the past. So nothing I say here today should be taken to mean that I do not respect and expect the best of these organizations.

II. NOT JUST A CATHOLIC THING

To say that the scandal of child abuse is not just a Catholic thing is not to state a hypothesis, but merely to state an empirical fact. Indeed, my office has cases going as we speak against the Mormon Church,¹³ the Seventh Day Adventist Church,¹⁴ the United

10. Kelly Clark, *I Wish I Could Just Blame the Democrats: Child Abuse, Institutions of Trust, and Public Policy*, Address at the O'Donnell and Clark Annual Firm Dinner (Sept. 19, 2007) (transcript available at <http://www.kellyclarkattorney.com/category/Opinion/>).

11. Kelly Clark, *How to Fail: Lessons from an Expert*, Address at the Salem Downtown Rotary (Dec. 14, 2006) (transcript available at <http://www.kellyclarkattorney.com/about-kelly-clark/curriculum-vitae/publications-presentations/>).

12. Kelly Clark, *Remarks from a Peculiar Lamp-post: Observation of a Christian Trial Lawyer on Fifteen Years of Suing the Church*, Paper given at The American Experiment: Religious Liberty Conference, University of Portland (Apr. 14, 2007).

13. First Amended Complaint, *Tom Doe v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, No. 2:08-cv-371-SU (D. Or. May 5, 2008).

14. Complaint, *Carrie Doe v. W. Or. Conference Ass'n of Seventh Day*

Methodist Church,¹⁵ as well as against secular organizations such as the Boy Scouts,¹⁶ a children's medical clinic,¹⁷ and such prominent public institutions as public schools.¹⁸ Even law enforcement itself is no stranger to child abuse in its halls.¹⁹ Within all these organizations, as in the Catholic Church, there is a prevalent attitude that they are unique, that their mission is so important, their work so righteous, that those kinds of problems could never happen there, and if they do, well then, they must first of all protect their good work and good name, even if that means they interpret, ignore, and sometimes violate the rules applicable to the rest of society.

As an aside, for those of you who think that such an attitude, such arrogance, such corruption, could never happen in prominent public institutions like schools or law enforcement agencies, I suggest you have not sufficiently studied the news,²⁰ or the case studies of abuse,²¹ or perhaps you have not sufficiently studied human nature.²² Such corruption does happen in these places, and it is aided by the same kind of institutional arrogance as

Adventists, No. 0904-04942 (Or. Cir. Ct., Multnomah County Apr. 20, 2009).

15. Petition, John Doe HG v. Huffman Mem'l United Methodist Church, No. 09BU-CV00755 (Mo. Cir. Ct., Buchanan County Feb. 10, 2009).

16. Complaint, Jack Doe 1 v. Boy Scouts of Am., No. 0710-11294 (Or. Cir. Ct., Multnomah County Oct. 3, 2007).

17. This case is not filed, but is in negotiations.

18. Complaint, Jack Doe 1 v. Lake Oswego Sch. Dist., No. 0802-0740 (Or. Cir. Ct., Clackamas County Feb. 28, 2008).

19. See generally T.R. v. Boy Scouts of Am., 181 P.3d 758 (Or. 2008) (involving a claim against the City of Dallas alleging that, as a teenager, the plaintiff was sexually abused by a police officer when Plaintiff was involved in a youth program sponsored by the police department).

20. See Calvin Simms, *Los Angeles Police Official is Suspended in Abuse Inquiry*, N.Y. TIMES, Mar. 27, 2003, at A17; Jane Elizabeth Zemel & Steve Twedt, *Special Reports: Dirty Secrets-Why Sexually Abusive Teachers Aren't Stopped*, PITTSBURGH POST-GAZETTE, Oct. 31, 1999, available at <http://www.post-gazette.com/regionstate/19991031newabuse1.asp>.

21. See SAMUEL WALKER & DAWN IRLBECK, UNIV. OF NEB. AT OMAHA POLICE PROFESSIONALISM INITIATIVE, POLICE SEXUAL ABUSE OF TEENAGE GIRLS: A 2003 UPDATE ON "DRIVING WHILE FEMALE," (2003), available at <http://www.unomaha.edu/criminaljustice/PDF/dwf2003final.pdf>; Caroline Hendrie et al., *A Trust Betrayed: Sexual Abuse by Teachers* (pts. 1-3), EDUC. WEEK, Dec. 2 1998, at 1, EDUC. WEEK, Dec. 9 1998, at 1, EDUC. WEEK, Dec. 16 1998, at 1.

22. "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary." THE FEDERALIST NO. 51, at 288 (James Madison) (Robert A. Ferguson ed., 2006); "[F]or all have sinned and fall short of the glory of God." *Romans* 3:23 (New International Version).

we have seen in the Church—perhaps not grounded in subtle theologies of ontological distinction, but no less real and powerful nonetheless.

III. THE ENDS JUSTIFY THE MEANS

The social and political philosophers have a name for this dynamic, of course it is the belief that the ends justify the means. You can read about it in any history book, at least any history book written before we started neutering history by diluting judgments of good and evil with a thousand more politically and academically correct concepts to explain away human wrongdoing.²³ What it means for our purposes (that the ends justify the means) is that institutions of trust where child abuse thrives, believe, in a very real and concrete way, that the ordinary rules of life and law do not apply to them, or do not apply to them in the same way as they do to others who do not share their lofty work, or who do not understand it or sufficiently appreciate it. It is fundamental to understand this dynamic if one wants to make sense of the abuse scandals in the churches and secular institutions of goodwill.

IV. INSTITUTIONAL ACTIONS

Listen and tell me that these attitudes and assumptions do not feed the following actions of several institutions faced with child sexual abuse (CSA) litigation:

23. For an account of this shift, see PAUL JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES (2d ed. 1991). Johnson writes that the major artistic, intellectual, and scientific figures of the early 1900s, intentionally or not, destroyed the nineteenth century “climax of the philosophy of personal responsibility—the notion that each of us is individually accountable for our actions—which was the joint heritage of Judeo-Christianity and the classical world.” *Id.* at 10. For example, Freud taught that “the personal conscience, which stood at the very heart of the Judeo-Christian ethic, and was the principle engine of individualistic achievement, was . . . a mere safety-device, collectively created, to protect civilized order from the fearful aggressiveness of human beings.” *Id.* at 11. Johnson sees this modern moral relativism as an historical disaster, and looks in

[D]etail at the failure of intellectual leadership in the twentieth century, or rather at its apparent inability to offer clear and firm guidance to a perplexed humanity, because this failure or inability lay at the root of the tragedies of the age. . . . Indeed the historian of the modern world is sometimes tempted to reach the depressing conclusion that progress is destructive of certitude.

Id. at 698–99.

A. *Simple Negligence*

In simple negligence actions, where the theory is that churches fell beneath socially acceptable standards of care in failing to supervise, discipline, or remove abusive priests,²⁴ we have seen defenses that would cloak the actions of the churches in full constitutional immunity.²⁵ Church defendants have argued that it would violate the First Amendment to have a secular court evaluate their inner workings or structure,²⁶ or that jury oversight of such employment matters²⁷ would destroy the right of religious liberty by chilling these decisions.²⁸ Translation: the rules of ordinary scrutiny should not apply to them.

B. *The Boy Scouts*

Also in the negligence context, the Boy Scouts and its local councils and numerous church defendants have attempted to revive the long-dead defense of “charitable immunity”²⁹ in arguing—against all common-sense given the prevalence of the non-profit sector—that such organizations should be immune from liability, even for the failure to protect a child, because of the larger good that such an organization does for society.

Again, the translation of all this is that they are immune from the rules that govern everyone else. I note in passing, because many of you are in the mental health field, the concept of grandiosity in the Twelve Step Programs,³⁰ and I ask if you do not hear the same kind of thinking in these examples.

24. See Kelly W.G. Clark et al., *Of Compelling Interest: The Intersection of Religious Freedom and Civil Liability in the Portland Priest Sex Abuse Cases*, 85 (2) OR. L. REV. 481, 494–97 (2007) (discussing the Church’s liability when its clergy violates Oregon’s child abuse laws).

25. Archdiocese Defendants’ Answer to Plaintiff’s First Amended Complaint, *J.C.M. v. St. Mary’s Home et al.*, No. 0304-03718 (Or. Cir. Ct., Multnomah County, Aug. 26, 2003).

26. See Clark et al., *supra* note 24, at 512.

27. *Id.* at 509–12.

28. See *id.*

29. Plaintiff’s Motion for Partial Summary Judgment on Defendants Boy Scouts of America’s and Cascade Pacific Council’s Affirmative Defenses at 11–19, *G.D.M. v. Boy Scouts of Am.*, No. 0708-09289 (Or. Cir. Ct., Multnomah County, Aug. 20, 2008).

30. See generally ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM (4th ed. 2002).

C. *Oregon and Respondeat Superior*

Equally breathtaking has been the responses of institutions of trust to the Oregon rule of vicarious liability known as respondeat superior—the superior shall respond for the wrongdoing of his agent.³¹ In 1999 the Oregon Supreme Court adopted my argument³² that, while sexual abuse may be outside the job duties of youth pastors or Scout leaders,³³ building a relationship of trust is not. Indeed it is central to the duties of these people.³⁴ Accordingly, the court held it will almost always be a jury question whether there is a causal connection between the relationship of trust and the child abuse.³⁵ The Catholic Church, the Boy Scouts of America, the Latter-Day Saints, the Seventh Day Adventists, police agencies, and schools have all frantically and repeatedly argued, so far without success, that they should not be responsible for their agents when they abuse kids.³⁶ They ignore the fact that they

31. Ellin Davtyan, *Time to Strip Religious “Sanctuaries” of Their Protective Blanket: The Effect of Freedom of Religion on Vicarious Liability and Negligence Claims Filed Against Catholic Church by Victims of Sexual Abuse in the United States and Canada*, 12 SW. J. L. & TRADE AM. 525 (2006); Richard Fossey & Todd A. DeMitchell, “*Let the Master Answer*”: *Holding Schools Vicariously Liable When Employees Sexually Abuse Children*, 25 J.L. & EDUC. 575 (1996); Beth Wilbourn, *Suffer the Children: Catholic Church Liability for the Sexual Abuse Acts of Priests*, 15 REV. LITIG. 251, 260–61 (1996); Michael J. Sartor, *Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct: The Implications of Fearing v. Bucher*, 62 WASH. & LEE L. REV. 687, 700–10 (2005).

32. Plaintiff’s Second Amended Complaint, *Fearing v. Bucher*, No. 9412-08665 (Or. Cir. Ct., Multnomah County, Mar. 27, 1995).

33. Plaintiff’s Second Amended Complaint ¶ 11, *Lourim v. Swenson*, No. C95-1000CV (Or. Cir. Ct., Washington County, May 4, 2000); Plaintiff’s Second Amended Complaint ¶ 9, *Fearing v. Bucher*, No. 9412-08665 (Or. Cir. Ct., Multnomah County, Mar. 27, 1995).

34. For example, Catholic Canon Law describes the priest’s role as “teacher and sanctifier”: a priest is “to see to it that the lay Christian faithful are instructed in the truths of the faith, especially . . . through the catechetical formation which he is to give; . . . he is to take special care for the Catholic education of children and of young adults.” THE CODE OF CANON LAW: A TEXT AND COMMENTARY, Canon 218 § 1 (James A. Coriden et al. eds., 1985) (emphasis added). The Scoutmaster handbook describes “Adult Male Association” as one of eleven primary ways to “help boys become honorable men.” THE BOY SCOUTS OF AMERICA, THE OFFICIAL SCOUT-MASTER HANDBOOK 107 (1981). The Scout Master’s “role as friend, coach, and leader is a most important part of Scouting.” *Id.*

35. *Fearing v. Bucher*, 977 P.2d 1163, 1168 (Or. 1999). *See also* *Lourim v. Swensen*, 328 Or. 380, 386–87, 977 P.2d 1157, 1160 (Or. 1999) (holding that a jury can reasonably infer a connection between the relationship and child abuse).

36. *See* Latter-Day Saints Defendant’s Motion for Summary Judgment on Agency at 1–3, *D.I. v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, No. 0603-03429 (Or. Cir. Ct., Multnomah County, Apr. 25, 2007) (arguing that LDS has no right to control the actions of a “home teacher”).

sponsored the relationships of trust, that they normally receive great benefit from such relationships, and that they do not hesitate to claim credit when one of their employees or agents does something laudable. No, as soon as it comes time to step up and clean up after one of their own, these organizations cut and run like so many thieves in the night.

Did you know, for example, that the Boy Scouts of America have no right to control the actions of a Scoutmaster?³⁷ They argue this notwithstanding the fact that they have spent decades telling Scoutmasters, Scouts, and parents just the opposite.³⁸ Indeed, they so argued to the United States Supreme Court,³⁹ in the case testing whether they could exclude a gay from being a Scoutmaster, referencing what they called their “obvious right”⁴⁰ to set and monitor the standards of conduct and character for their volunteers. Of course they control scout volunteers, just as churches control ministers and schools control teachers.

Watching all these institutions of trust try to explain away why they should not have any responsibility when one of these relationships goes wrong always gives me a case of the dry grins: were it not so outrageous it would be funny. But their underlying attitude in all this is that they are beyond all those ordinary rules for ordinary organizations.

D. Withholding Discovery

In resisting the imposition of punitive damages and the accompanying disclosure of financial information, the Mormon

37. The Boy Scouts of America’s Answer to Plaintiff’s First Amended Complaint, *M.S. v. Boy Scouts of Am.*, No. 0801-01668 (Or. Cir. Ct., Multnomah County, Mar. 20, 2008).

38. The Boy Scouts explicitly teach boys that Scout leaders are to be trusted. The Official Boy Scout Handbook describes a Scoutmaster as “the friend to whom you can always turn for advice. He coaches the patrol leaders. He gives his time and effort without pay. Why does he do all this? Because he likes boys and wants to help them become men.” WILLIAM HILLCOURT, *THE OFFICIAL BOY SCOUT HANDBOOK* 21 (9th ed. 1979).

39. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

40. Since its inception, the BSA has maintained its obvious right to set standards of leadership in the organization. This position is set forward in the bylaws in Art. VIII, Sec. 1: “No person shall be approved as a leader unless, *in the judgment of the corporation*, that person possesses the moral, educational, and emotional qualities deemed necessary for leadership and satisfies such other leadership qualifications as it may from time to time require.” *Boy Scouts of America, Procedures for Maintaining Standards of Leadership* (1980) (emphasis added).

Church asked the Oregon Supreme Court two years ago to find that they had, as a matter of religious and sacred duty, a right to withhold such discovery and to keep Church finances totally secret. They argued that the right was anchored in the religion provisions of the Oregon and United States Constitutions.⁴¹ The Court declined to create such a special rule for the Latter-Day Saints Church,⁴² perhaps wisely considering that large and powerful institutions do not need more help in keeping their finances secret from their customers and creditors, including child abuse victims seeking to hold them accountable.

But the Mormons, who in many ways thus far have responded, in my view, more immediately and responsibly than some of the other groups to allegations of child abuse, still wanted a special rule created for them.

E. Secrecy and Privilege

Speaking of civil discovery, I am amazed at how committed all these defendants are to keeping their secrets. They make all kinds of bizarre claims of privilege and exemption from ordinary discovery.

A number of churches, led by the Catholics⁴³ and recently echoed by the Latter-Day Saints,⁴⁴ Seventh Day Adventists,⁴⁵ and Methodists,⁴⁶ have argued that they have a First Amendment

41. Memorandum of Law in Support of Petition for a Peremptory Writ of Mandamus at 21-23, *D.I. v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, et al.*, No. S055003 (Or. S. Ct. July 2, 2007).

42. Order Denying Petition for Peremptory Writ of Mandamus, Lifting Stay, Granting Motion to File Reply, and Granting Motion to Strike, *D.I. v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, No. S055003 (Or. S. Ct. July 9, 2007).

43. Defendant's Answer and Affirmative Defense at 3, *In re Roman Catholic Archbishop of Portland in Oregon*, No. 04-37154-elp11 (Bankr. D. Or. Sept. 27, 2006).

44. Defendants' Motions for Protective Order (Constitutional Arguments), Motion to Quash, and Motion for Stay and Supporting Memorandum of Law at 4-8, *D.I. v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, No. 0603-03429 (Or. Cir. Ct., Multnomah County, June 25, 2007).

45. Answer and Affirmative Defenses at 4, *Sally Doe v. N. Pac. Union Conference Ass'n of Seventh-Day Adventists*, No. 0708-09852 (Or. Cir. Ct., Multnomah County, Nov. 21, 2007).

46. Defendants' Motion to Dismiss and Memorandum in Support at 5, *John Doe HG v. Huffman Mem'l United Methodist Church*, No. 09BU-CV00755 (Mo. 5th Judicial Cir. Ct. May 26, 2009).

Privilege to avoid detailed civil discovery of their structures, beliefs and operations. Likewise, they have argued that ordinary employment conversations between church administrators and clergy—about Elder Johnson’s little problem for example—are somehow shielded under the “clergy-penitent” privilege.⁴⁷ Of course there is no First Amendment Privilege. Privileges are rules, statutorily defined and carefully tailored,⁴⁸ not half-baked constitutional arguments.

A Portland priest and the Archdiocese even argued that the Archbishop was part of the priest’s “mental health treatment team,” that he was entitled to claim counselor-patient privilege and thereby keep from us the priest’s treatment records, though the records had been voluntarily disclosed by the priest to him.⁴⁹

We joke around our office that, instead of cutting and pasting existing privileges and constitutional principles in such a transparently desperate way, these defendants should get honest with the courts and suggest creating an entirely new privilege called the Really-Bad-Shit-That-Totally-Embarrasses-Us Privilege.

F. Ordinary Rules Do Not Apply

Finally, I conclude my laundry list with the most fascinating of all of their attitudes: that the ordinary rules do not apply to them, given who they are. Two or three times I have come across the idea that a witness testifying under oath is part of an organization so special, so unique, so far above the moral and legal code that governs the rest of us, that the witness has license to give something less than the whole truth. I first ran into this a decade or so ago, in

47. Clark, *supra* at note 24, at 523; *see also* Memorandum Opinion at 18–22, *In re* Roman Catholic Archbishop of Portland in Oregon, 335 B.R. 815 (Bankr. D. Or. 2005) (discussing, and rejecting, a very broad reading of the clergy-penitent privilege offered by the Archdiocese of Portland).

48. *See* Nathan Norton, Jr., *Privileges*, 27 ARK. L. REV. 200, 200–28 (1973). Norton writes:

In the garden of evidence the privilege is a tolerated weed. Though generally scorned by scholars, privileges seem to have acquired an inertia that renders their uprooting more difficult than the effort is worth. Consequently, in order to keep them under control, privileges have been perforated with exceptions and qualifications and, when statutory, consistently construed strictly.

Id. at 200.

49. Plaintiff’s Motion to Compel Production Against Defendant, *Fearing v. Bucher*, No. 9412-08665 (Or. Cir. Ct., Multnomah County, Jan. 17, 2001) (on file with author).

a case against the Jehovah's Witnesses, where I read in some of their literature that, in certain circumstances, it is permissible to withhold the truth from "an unrighteous person."⁵⁰ I went round and round with several witnesses in depositions about whether I was such a person—because I was suing their church—and thus whether their oath to tell the truth really meant that they had to tell the truth.

Then, four years ago, I took the deposition of Cardinal William Levada, head of the Congregation for the Doctrine of the Faith at the Vatican and former Archbishop of Portland. His testimony was relevant to a portion of the Archdiocese bankruptcy case. I spent the better part of an entire morning arguing before a United States Bankruptcy Judge. I was against lawyers for the Archdiocese, who were joined by lawyers for the Vatican, Cardinal Levada, and the Archdiocese of San Francisco. We argued about whether we could ask the Cardinal about the old but still prevalent doctrine of "mental reservation."⁵¹ This is the medieval teaching that, in some circumstances, it is morally permissible to withhold a portion of the truth, to mentally reserve it, if a higher moral purpose is served.⁵² The classic example is that if an evil regime comes to arrest an innocent person, it is morally permissible to tell them that "he is not here," while mentally reserving the rest of the sentence "not here for you." At some point during the hearing, Judge Elizabeth Perris, in indicating that she would let me ask the questions I had proffered, shrewdly observed that while I could ask the Cardinal about it, she could not quite see how I would know whether he was engaged in mental reservation as he answered questions about mental reservation.

50. Jehovah's Witnesses are taught that [w]hile malicious lying is definitely condemned in the Bible, this does not mean that a person is under obligation to divulge truthful information to people *who are not entitled to it*. Jesus Christ counseled: 'Do not give what is holy to dogs, neither throw your pearls before swine, that they may never trample them under their feet and turn around and rip you open' (*Matthew* 7:6).

2 INSIGHT ON THE SCRIPTURES 245 (Watch tower Bible & Tract Society of Pennsylvania, International Bible Students Association 1988) (emphasis added).

51. See Deposition of Archbishop William J. Levada at 290, *taken on* Jan. 9, 2006 in San Francisco, Ca. (on file with author); Memorandum Opinion at 8, *In re* Roman Catholic Archbishop of Portland in Oregon, 335 B.R. 815 (Bankr. D. Or. Dec. 23, 2005) (on file with author).

52. Thomas Slater, *Mental Reservation*, in THE CATHOLIC ENCYCLOPEDIA (Kevin Knight ed.), <http://www.newadvent.org/cathen/10195b.htm> (last visited Nov. 20, 2009).

In all these examples, and while I could give more if time permitted, you can see played out in a tragic human drama the idea that the ends justify the means: that their work, their mission, their calling, is so noble, so pure, so divinely inspired, that the laws of human nature or the laws of human society do not apply to them as they do to everyone else. So it is that we can say that the Catholics are not unique in thinking themselves unique.

V. SUGGESTIONS FOR CHANGE

Now, if I were going to make suggestions to these institutions as to how they can change their responses to institutional child abuse and help heal the victims, here is what I would say.

A. *Pedophiles Are Drawn to Institutions of Trust*

A few years ago, we found it necessary to sue a small Bible church operating a school in rural Oregon.⁵³ The school had hired two high school basketball coaches, young men who later abused several of the girls on the high school basketball team. The school had failed perform adequate background checks on these guys. Had they done so, it would have resulted in them not being hired. In deposition after deposition, it became clear that the reason for the failure of the school to do an adequate background check was twofold. First, they felt they could not afford detailed background checks. Second, and perhaps more fundamentally, there was a sense that, given the mission that those in leadership at the church had, they felt they were doing the Lord's work. They simply did not believe that such a tragedy could happen, or that God would allow it to happen there. It may be harsh to call this grandiosity, perhaps it was just naiveté, but the result was the same. They, too, did not believe that everyday rules of life applied to them. One can fairly question their judgment. They may even be challenged on *theological* grounds: if they, as Christians, believe that the world is a broken place, full of broken and sinful people,⁵⁴ how can they be so naive as to think that bad things will not happen to good people and in good places? In any event, the result was that three

53. See *B.M. v. Newberg Open Bible Church*, No. CV-06-0240 (Or. Cir. Ct., Yamhill County, July 2006) (on file with author).

54. "If we claim we have not sinned, we make him out to be a liar and his word has no place in our lives." THE HOLY BIBLE: NEW INTERNATIONAL EDITION, *John* 1:10 (Revised ed., Zondervan Pub. House, 2001).

adolescent girls were spiritually and emotionally wounded and scarred.

In the aftermath, I did an interview with a Christian publication popular in the Northwest,⁵⁵ and I discussed the notion that child abuse can happen anywhere. In response, I got numerous calls from small churches around the state asking: “What can we do?” My answer was always the same: “You do not need to reinvent the wheel. Call other churches, call the large churches, call the denominations,⁵⁶ call the National Association to Prevent Sexual Abuse of Children (NAPSAC),⁵⁷ call other schools or youth organizations that have good policies, and adapt their policies for your use.” Our firm is in the process of putting together some training materials that we can take on the road, particularly into small private schools and churches, with a message that it can happen here.

B. *The Smart Thing Is The Right Thing*

The defendants in child sex abuse cases can do the smart thing, protect themselves, and do the right thing, take care of the victims, at the same time. Doing the smart thing and doing the right thing *is the same thing*. Generally I would tell them to completely take care of the victim first, and they will find that it goes better for them after that.

Recently, we sent a demand letter to a children’s clinic in Portland where, as a child, my client was sexually abused by a

55. See John Fortmeyer, *Protecting the Innocent*, CHRISTIAN NEWS NW, July 2007, available at <http://www.cnnw.com/articles/Protectingtheinnocent.html>.

56. See e.g., JEHOVAH’S WITNESSES OFFICE OF PUBLIC INFORMATION, JEHOVAH’S WITNESSES AND CHILD PROTECTION, available at http://www.jw-media.org/region/global/english/backgrounders/e_molestation.htm (last visited July 14, 2009); The Church of Jesus Christ of Latter-Day Saints, *Considerations for a Public LDS Policy on Child Sexual Abuse*, 1 CASE REPORTS OF THE MORMON ALLIANCE, Ch. 7 (Fielding & Allred ed., 1995), available at <http://mormonalliance.org/casereports/volume1/part1/v1p1c07.htm>; LOIS RIFNER, PHD & SUSAN KEIL SMITH, M.A., WE WON’T LET IT HAPPEN HERE!: PREVENTING CHILD ABUSE IN THE CHURCH (2d ed.), available at <http://safety.synodsun.com/images/PCUSA-policyguide.pdf> (last visited July 14, 2009); SEVENTH-DAY ADVENTIST CHURCH, CHILD PROTECTION POLICY AND PROCEDURES: A BEST PRACTICES MODEL 1 (2001), available at <http://www.adventistrisk.org/pdfs/childprotectionsample.pdf>; OFFICE OF THE GENERAL SUPERVISOR, OFFICES OF THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, CHILD AND YOUTH PROTECTION MANUAL, available at <http://www.foursquare.org/articles/307,1.html> (last visited July 7, 2009).

57. See *National Association to Prevent Sexual Abuse of Children*, <http://sapn.nonprofitoffice.com> (last visited Oct. 3, 2009).

physician. Within days I received a phone call from a very fine defense lawyer in Portland whom I believe to be a man of basic integrity, and who started out his conversation something like this:

I am calling to find out how your client is doing and what we can do to help him. What does he need? Of course we expect he needs counseling, and we want to help with that. And although we do not have insurance for this—there is a sexual misconduct exclusion in our policy—we want to make it right financially as well. But mostly we want to know how he is doing and how can we help. My people feel awful about what happened here, and they want him to know that.

Now, we might or might not get this case resolved, and it might or might not be on terms that everyone would consider to be fair and just, but they have a better chance of getting a reasoned, negotiating attitude from my client with their approach. It just takes all the venom out of the situation. Suddenly, my client no longer has a need or basis to vilify this clinic.

Contrast this with the Archdiocese of Portland in facing the first of the claims I brought against it back in 1994. We had lost on the law at the trial court level,⁵⁸ we had lost on the law at the Court of Appeals,⁵⁹ we were now at the supreme court. The night before oral argument, when nobody was looking and the Church had a chance to do the right thing—on admitted abuse by a priest who was still alive and had acknowledged other victims, with a credible client who would have taken the one \$100,000 insurance policy they had—they offered my client the princely sum of \$5,000. He turned it down. We ended up winning before the supreme court,⁶⁰ and two years later on the morning of trial, he received a settlement that was many times that \$100,000 insurance policy. In addition, the case changed the law in significant ways⁶¹ and resulted

58. Final Judgment of Dismissal as to Defendant Franciscan Friars of California; Final Judgment of Dismissal as to Province of St. Barbara, Order of Friars Minor; and Amended Final Judgment of Dismissal as to Defendant Melvin Bucher, Fearing v. Bucher, No. 9412-08665 (Or. Cir. Ct., Multnomah County, Oct. 13, 1995) (on file with author).

59. See Fearing v. Bucher, 936 P.2d 1023, (Or. Ct. App. 1997) *aff'd in part, rev'd in part*, 977 P.2d 1163 (Or. 1999) (holding that the complaint failed to state a claim, but merely argued a legal conclusion).

60. See Fearing v. Bucher, 977 P.2d 1163 (Or. 1999) (concluding that the complaint sufficiently stated a claim of vicarious liability).

61. See Michael J. Sartor, *Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct: The Implications of Fearing v. Bucher*, 62 WASH. & LEE L. REV. 687 (2005).

in adverse publicity and additional claims. Five years later, the Archdiocese of Portland was the first in the nation to file for bankruptcy.⁶² It eventually cost them \$75 million dollars to get out,⁶³ and all because they would not pay this man the one insurance policy they had. They made it about the money.

So, doing the smart thing and doing the right thing is the same thing. But if you make it about the money, do not be surprised if your approach steels the plaintiff's resolve, and ends up costing you lots of money.

C. *The Very Real Power of Non-monetary Gestures*

While we primarily measure civil justice in this society through monetary awards and verdicts, it is also true that non-monetary elements of settlements can have an extraordinarily healing impact on child sexual abuse survivors. Here are just a few of the non-monetary terms we have negotiated, or attempted to negotiate, for our clients:

1. *An Apology*

Believe it or not, I have never gotten an unequivocal apology for any of my clients from the Archdiocese of Portland (or from any Archdiocese for that matter), from the Latter-Day Saints Church, from the Seventh Day Adventist Church, or from the Boy Scouts of America. Oh, they will agree to letters of regret, they will agree to letters acknowledging the victim's pain and suffering, or the wrongness of the abuse. But I have not yet been able to get an institutional official to say: "As a representative of this institution, I apologize profoundly to you for what our man did to you. It was wrong, he betrayed you and betrayed your trust. And, because he represented us, we betrayed you and violated your trust. I apologize and am so sorry." Why is that so difficult? Governments get it—governments are issuing apologies all the time, to individuals or peoples wronged throughout history.⁶⁴ Why can't

62. Memorandum Opinion Re: Confirmation of Third Amended and Restated Joint Plan of Reorganization at 2, *In re Roman Catholic Archbishop of Portland in Oregon*, No. 04-37154-elp11 (Bankr. D. Or. Apr. 13, 2007) (on file with author).

63. See Noelle Crombie, *Church Bankruptcy Plan Approved*, THE OREGONIAN, April 13, 2007, available at http://blog.oregonlive.com/breakingnews/2007/04/church_bankruptcy_plan_approve.html.

64. See generally Kevin Rudd, Prime Minister, Apology to Australia's

spiritual and moral leaders get it?

Contrast that attitude with a case we had against a large health club chain.⁶⁵ Several small children had been sexually abused by one of the staff, and after he was convicted and we had filed suit and reached a settlement, we negotiated for a conference between the corporate representatives of the company and my clients, the parents of this four-year-old girl. As we gathered for our meeting, everyone was stiff and uncomfortable, taking their chairs around a long conference table, with arms folded and brows furrowed. This is when the Human Resources Director for the organization, a young woman who came up from California for the conference, spoke up and said something like this:

Before we start, I would like you to know that I, too, am a parent of a small child. I have a four-year-old. I cannot imagine what this has done to your family. I cannot imagine your anger and rage and sadness. I cannot imagine what I would do in your situation. I want you to know that I am so, so sorry (she said this with freely flowing tears) and that we failed you, we failed your daughter, and we failed those other families. We are committed to making sure this does not happen again. I apologize to you. I wish we could undo what has been done.

You know, we really could have ended the meeting right there. A sincere, unequivocal, heartfelt apology was basically all my clients needed to hear.

2. *Symbolic Gestures*

I know some of the other speakers here are not big on symbolic gestures, but I really am. There are now memorial gardens at Catholic institutions in tribute to child abuse survivors. There have been masses offered on behalf of child abuse victims. I think all of that makes sense and is important. My question is why

Indigenous Peoples, Speech Before the Australian House of Representatives, Parliament House, Canberra (Feb. 13, 2008), *available at* http://www.pm.gov.au/media/Speech/2008/speech_0073.cfm; Apology Resolution, Pub. L. No. 103-150 (1993) (apologizing to native Hawaiians for U.S. involvement in the overthrow of the Kingdom of Hawaii), *available at* <http://www.hawaii-nation.org/publawall.html>; S.1009, 100th Cong. (1st Sess. 1987) (apologizing for Japanese-American internment during WWII), *available at* http://www.internmentarchives.com/showdoc.php?docid=00055&search_id=19269&pagenum=1.

65. This case was not filed, it resulted in settlement.

is there not more of it? Especially in settings like the Catholic Church, where liturgical symbols are so important, why do they not understand the power of these gestures? If I were the public relations representative for Pope Benedict when he came to the United States, I would have said:

We are going to fly in every child abuse survivor across the country who wants to come; we are going to put them up at the finest hotel in town; we are going to invite them to a healing mass; and there, Your Holiness, you are going to kneel down before them, and you are going to wash their feet, one right after another, until you fall over from exhaustion. That is what Jesus did.

I am a confused Episcopalian, not a Catholic, but I get the power of such a gesture. Why can't they get it?

3. *Changes In Policies*

Even in the cases we have lost against the Catholic Church, based on statute of limitations, or on technical legal rulings, or on some other grounds, I have been able to truthfully say to my clients that they are part of a reform—that their courage in standing up and speaking out their truth has helped change the Church to make it a safer place for kids. I explain to them what the Church is doing now that the Church was not doing twenty years ago, and I explain to them that it is because they and their brothers and sisters have refused to be silent. It really matters to them. They need to know their suffering was not in vain, and that they impacted the reform.

Likewise, I represented a young man a few years ago in a case against a large and powerful Christian denomination that will remain nameless because that was part of the settlement. He was a thirty-one-year-old FBI agent, abused as a child, and now made of inner steel. Still devout, he knew what he was talking about when it came to his church and child abuse, and he was not going to back down. In mediation, we reached a monetary settlement within the first two days, and then we spent the next eight weeks hammering out nearly a dozen policy changes that he wanted to see and how his church trained for, prevented, and handled claims of child abuse. His tenacity was remarkable, and the fact that he was able to get about ninety-five percent of what he wanted was far more satisfying to him than any monetary settlement ever could be.

4. *Archive The Past*

Within days after the confirmation of the bankruptcy plan of the Archdiocese of Portland, I was speaking on a panel with one of the defense lawyers to a conference at the University of Portland.⁶⁶ He said something very close to this: “Well, of course we settled many of these cases, but not because we necessarily believed the allegations. We settled because the cases were so old, the witnesses so sparse, the memories so faded, that we could not really know for sure what happened in many of these cases.” I just about came out of my seat in fury, and retorted, “They settled these cases because they knew damn good and well that the evidence of their institutional failure to protect kids from child abuse was overwhelming, and that a jury would be enraged by the evidence.”

This kind of revisionism is one of the reasons that we pushed so hard in the bankruptcy proceeding and afterwards to force the Archdiocese to release all of the files, as well as other relevant documents, to the public.⁶⁷ As anyone knows who reads history, we archive the past so that we do not repeat the past, or rewrite it. Presently, our firm, dissatisfied with the release of documents the Archdiocese has made, and the obfuscation and confusion with which they surrounded the release of documents, has created our own website, <http://www.archpriestdocuments.org>, in which we have posted the files in an organized and coherent way, complete with some context and explanation. It is akin to what the very good people at *BishopAccountability.org* have done nationwide.

But I want to ask a more fundamental question. Why have *we* had to do this? Why has the diocese not done it? Do they not believe their own teachings: that only by complete and sincere repentance can we be saved? Metanoia is the New Testament word⁶⁸ and it means about face, to turn around and go a different direction. Do they believe this or not? Do they believe that, only in metanoia, done openly and unreservedly, is forgiveness and new

66. Kelly Clark, Remarks at the University of Portland, Garaventa Center for Catholic Intellectual Life and American Culture, (Apr. 12-14 2007), (transcript available in *THE AMERICAN EXPERIMENT: RELIGIOUS FREEDOM 97* (Margaret Monahan Hogan & Laretta Conklin Frederking eds. 2008), <http://www.up.edu/showimage/show.aspx?file=10115>).

67. Kimberly A.C. Wilson, *Judge Orders Release of Archdiocese's Bankruptcy Documents*, *THE OREGONIAN*, July 13, 2009, available at http://www.oregonlive.com/news/index.ssf/2009/07/portland_archdiocese_papers_se.html.

68. 4 *THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT* 626 (Gerhard Kittel ed., Geoffrey W. Bromiley trans., Wm. B. Eerdmans Publishing 1967).

life? Why are they not doing what the government of South Africa did under Nelson Mandela and Bishop Tutu, and voluntarily holding truth and reconciliation hearings⁶⁹ where the full, emotional truth can come out and the community can understand, bleed, and heal, together, unhindered by the arcane legal rules of evidence? Why are these not their ideas instead of mine? I do not understand.

5. *The Practical*

There are, of course, numerous other things that institutions of trust can do to help heal the victims. Many Catholic dioceses around the country, to their credit, have set up programs whereby they will, almost without condition or question, pay for counseling for any person who claims to have been abused by clergy. This is to be applauded. Some other such institutions, the Mormon Church for example, are beginning to do the same. Sometimes, like the situation mentioned above with the health club chain, these institutions understand enough to know that face-to-face dialog is helpful. In one case, a Catholic Bishop who really understood all of this agreed that if my teenage client who was struggling mightily in school—partly as a result of her abuse—could keep her grades above 2.0 (a significant accomplishment for this girl given her background and damage), he would use his influence to get her into any of a number of Catholic colleges around the Northwest.⁷⁰ This was understandably a big deal to my client and her family. The possibilities for this kind of gesture are limited only by the bounds of creativity and commitment.

VI. CONCLUSION

I hope I have shown that institutional child sexual abuse is not just a Catholic thing. Indeed, child sexual abuse will be a problem, sooner or later, for any institution of trust working with children. Some say pedophiles are drawn to such institutions; others say some of these institutions may actually help develop pedophiles through their careless or corrupt attitudes about abuse in their

69. See generally *Truth Commission Report: At a Glance*, BBC NEWS, Oct. 19, 1998, available at http://news.bbc.co.uk/2/hi/special_report/1998/10/98/truth_and_reconciliation/203134.stm.

70. This case was not filed.

midst.⁷¹

We know that prevention of child abuse is done on many levels—through public education and awareness campaigns; by good counselors and social workers helping to heal, so that the cycle of suffering ends; by law enforcement prosecuting molesters and the institutions that enable them; and by civil litigation, so that the public and economic cost of sheltering child sexual abuse becomes too great to bear and the policies get changed and kids become protected. But when it comes to child sexual abuse in institutions of trust, grandiose attitudes of uniqueness and invincibility is one important element in allowing this problem to fester. It does no disservice to the best ideals of the Catholic Church, or the Latter Day Saints, or the Boy Scouts of America, or the City of Dallas Police Department to refuse to buy into their grandiose notions and thereby to call them on their delusions. When it comes to childhood sexual abuse, none of us are unique, and we are all called to face reality.

71. See generally A. W. RICHARD SIPE, *SEX, PRIESTS AND POWER: ANATOMY OF A CRISIS* 83–111 (1995).