JUDGING THE CHURCH: LEGAL SYSTEMS AND ACCOUNTABILITY FOR CLERICAL SEXUAL ABUSE OF CHILDREN

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A thesis submitted for the degree of Doctor of Philosophy of The Australian National University.

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university. To the best of the author's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.

/s/ Meredith Rae Edelman

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ABSTRACT

This thesis considers lessons from different legal systems' approaches to holding Catholic dioceses accountable for child sexual abuse. Following a New Legal Realist approach, it provides an account of four legal systems operating within two social orders – the Diocese of Ballarat in Victoria, Australia, and the Diocese of Gallup in Arizona and New Mexico, in the United States. Using typologies of repressive, autonomous, and responsive law as frames, the thesis explores how overall character of legal systems is shaped by their multiple aspects. It provides insight and context for why law matters, and points to why reform efforts that focus on changing doctrine alone may not bring the kinds of results likely to satisfy advocates and survivors.

The thesis demonstrates how Catholic canon law and the common law of tort fail to account for the realities of the relationships between Church organisations and natural persons, and how these systems embed the interests of powerful institutions in multiple aspects of law. Canon law's overall character is found to be repressive, and tort law autonomous. The thesis then provides accounts of two other legal systems which are each described as quasi-responsive, even as neither is wholly responsive. Catholic dioceses in Chapter 11 bankruptcy in the United States demonstrate how a purposive approach to dispute resolution can empower victims when they have credible leverage to negotiate for their own interests. The Australian Royal Commission into Institutional Responses to Child Sexual Abuse demonstrates how an approach that reflects an informed and sophisticated understanding of victims, and concern for them and their interests, can provide vindication on substantive issues, even without the authority to directly impose consequences.

The thesis argues that truly responsive legal systems require: (1) embedded knowledge of social realities in multiple aspects of law, (2) a purposive approach, (3) procedural flexibility, (4) the deliberate and effective inclusion of impacted stakeholders in legal processes, and (5) a normative agenda of countering domination and accounting for social disparities that impact capacity to further litigant interests through legal proceedings. The thesis shows how bankruptcy and the Royal Commission each have some but not all of these attributes; enough that they can both be characterised as quasi-responsive law. True responsiveness, however, needs all of these attributes. The Royal Commission demonstrates that better legal responses to problems like clerical child sexual abuse are possible with a purposive approach dedicated to providing substantive justice and the capacity to make determinations of moral responsibility can be made even where there may be no legal

responsibility. The decision-making process of bankruptcy provides an example of how legal systems can be procedurally flexible, less adversarial, and enable ostensibly weak parties with strong claims effective voice to parties. Determining the character of legal systems by considering their multiple aspects demonstrates that responsiveness is possible but unlikely be accomplished through piecemeal efforts to reform existing systems.

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CHAPTER ONE: INTRODUCTION

I. INTRODUCTION

Scandal involving the Catholic Church is very much in the public consciousness. A powerful cardinal and Vatican official being convicted of child sexual abuse and sent to prison makes news around the world.[1] A United Nations' committee criticises the Vatican for failing to protect and then later mistreatment of children who have been sexually abused by priests and religious,[2] and for continuing to put children in danger across the globe.[3] Critically acclaimed and widely watched films like *Spotlight*, *Mea Maxima Culpa: Silence in the House of God*, *Calvary*, *Twist of Faith*, and *Deliver Us from Evil* evidence intense public interest in stories of abuse by clergy and moral failure by Church leaders. Child sexual abuse is a longstanding phenomenon that takes place in familial, social, educational, and institutional settings. The history of how child sexual abuse has been defined and understood is long and complex, but since the 1970's, child sexual abuse has become a widely recognized and studied social problem, including in the common-law world.[4] With the Catholic Church's unique social positioning, sexual abuse by its representatives has captured public attention in a way that child sexual abuse in family settings, or even in other institutional settings, has not.

Driving much of the activism and public interest in this issue is a strong sense of public outrage — a sense that, despite legal interventions, justice has not been done. Prominent activists like Marie Collins, who resigned from a Pontifical Commission for the

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[1] See, eg, Naaman Zhou, '"He Was a Witness of Truth": Why the Judges Decided Cardinal George Pell Was Guilty', *The Guardian Australia* (online, 21 August 2019) <https://www.theguardian.com/australia-news/2019/aug/21/he-was-a-witness-of-truth-why-the-judges-decided-cardinal-george-pell-was-guilty>; Daniel Verdú, 'El Reponsable de las Finanzas del Vaticano Acusado de Abusos Sexuales,' *El Pais* (online, 29 June 2017) <https://elpais.com/internacional/2017/06/29/actualidad/1498696127_063244.html>.

[2] The term 'religious' refers to a member of a religious order under monastic vows, and includes both priests who are members of religious orders, and the friars, monks, sisters, and nuns who are members of religious orders, and not ordained priests. See, e.g. Rev. William Saunders, 'The Meaning of the Terms Nun, Sister, Monk, Priest, and Brother', *Catholic Education Resource Centre* (Article, 2003) <http://www.catholiceducation.org/en/culture/catholic-contributions/the-meaning-of-the-terms-nun-sister-monk-priest-and-brother.html>.

[3] ABC News, 'Scathing UN Report Demands Vatican "Immediately" Act against Child Sexual Abuse,' *ABC News* (online, 6 February 2014) <http://www.abc.net.au/news/2014-02-05/scathing-un-report-demands-vatican-act-against-child-sex-abuse/5241300>.

[4] See, e.g.
Rebecca M Bolen, *Child Sexual Abuse Its Scope and Our Failure* (Springer, 1st ed, 2002) 21–2.

Protection of Children citing concerns about victims[5] not being taken seriously,[6] continue to push for new measures of accountability, new and better child protection regimes, and for justice. Aside from concerns about whether reforms are appropriate, there is also a sense that at least some of the harm of clerical child sexual abuse is not being adequately expressed or accounted for in legal proceedings. Stakeholders, academics, and other professionals express that sense in different ways. Those working within the Church, like Angela Rinaldi, of the Centre for Child Protection at Rome's Pontifical Gregorian University, identifies that part of the harm of clerical child sexual abuse arises out of the Church's having empowered and protected abusers by granting them authority.

> The abuser [in a case of a priest committing child sexual abuse] commits an abuse which is spiritual, pastoral, and institutional. And then there is the abuse committed by the whole ecclesiastical institution, because, in the person of the priest, the abused person sees the Church. Before the physical abuse, there is an abuse of power.
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> . . .
>
> Why does this problem cause scandal? It must. If Christ had avoided leaving the Cross behind to be saved by Pontius Pilate - whom, in a certain sense, had the power to do so - it is because he wanted to defend the truth, the Kingdom of God, that is, Himself. The Church represents Christ in the world. If, at the moment when an abuse is denounced, she covers up for the abuser or even pays the victims for their silence, it means that she puts the 'raison d'état' before the abuse, before the person.[7]

Legal scholar Janine Geske, like many others working in the area, points to victims feeling abused by the institution itself, and a sense that the institution is escaping accountability by its focus on individual perpetrators rather than its own complicity in

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[5] Many, including groups like the Survivors' Network of those Abused by Priests (known as 'SNAP'), among others, choose to refer to those who have survived abuse as 'survivors,' rather than victims. See also Kimmery Newsom and Karen Myers-Bowman. '"I Am Not A Victim. I Am A Survivor": Resilience as a Journey for Female Survivors of Child Sexual Abuse' (2017) 26 *Journal of Child Sexual Abuse* 927. For this project, the word victim will be used, rather than survivor, to include and account for the many who did not survive the abuse they suffered. The term 'survivor' will be used to refer to advocates and groups that publicly identify themselves as survivors and as a part of a movement of survivors.

[6] Patsy McGarry, 'Marie Collins Resigns from Vatican Child Protection Body', The Irish Times (online, 1 March 2017) <https://www.irishtimes.com/news/social-affairs/religion-and-beliefs/marie-collins-resigns-from-vatican-child-protection-body-1.2993428 >.

[7] Filipe Domingues, 'Expert Says Abuse of Power at Root of Sexual Abuse Crisis in Church', *Crux* (online, 26 April 2018 <https://cruxnow.com/interviews/2018/04/26/expert-says-abuse-of-power-at-root-of-sexual-abuse-crisis-in-church/>.

> [Question:] So, the root of the problem, for you, is the abuse of power?
> What I want to say is that
> Our religion is beautiful because it is human. When you take away the person, you remove Christ from it. If Christ vanishes, the Christian message disappears, too.

empowering and protecting abusers while denigrating or ignoring victims.[8] The academic literature on clerical child sexual abuse reflects the push for justice and accountability. Much of the literature is centred on critiques of the Church and other social and political institutions, advocating for changes to law, contributing to knowledge on abuse and recovery, or researching ways to detect and prevent future abuse.[9] The problem of child sexual abuse in the Catholic Church has brought to light failures of legal systems in holding organisations accountable. In other words, it has made clear that legal systems, as spaces that regulate and are themselves regulated, allow significant domination of vulnerable people by powerful interests. As the Church is condemned for protecting its financial interests over the interests of children raped by priests who had been declared representatives of the Divine on Earth, there is also an implicit critique of legal systems' failure hold the Church to account. If only a fraction of victims are satisfied that justice has been done, as some research suggests,[10] advocates' cynicism about the capacity of legal systems to meet stakeholder interests is reasonable.

The public consensus about the wrongness of the Church's conduct and dissatisfaction with legal response raises deep questions not just about the phenomenon of child sexual abuse or character of the Catholic Church, but also about law itself and the capacity of law to respond to wrongdoing by large organisations. The genesis of this thesis was a class on corporate restructuring in 2006. At the time, the first few bankruptcy cases had been filed by Catholic dioceses in the United States. The dioceses and religious orders filing for bankruptcy

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[8] Janine Geske, 'Restorative Justice and the Sex Abuse Scandal in the Catholic Church' (2007) 8 *Cardozo Journal of Conflict Resolution* 651, 652–3.

> I was struck by the similarity between the frequent anger of crime victims against the criminal justice system and the anger of the clergy sex abuse victims against the hierarchy of the Roman Catholic Church. Many in both of those groups understand that some person chose to deeply harm them but felt incredibly victimized by a system or institution that should have been there for them. Many victims tell me that it is one thing to have an individual harm you and to have to deal with it, but when an institution which should serve the purpose of support and assistance not only is not helpful but in fact does re-victimize, the harm is that much worse. We have all learned, unfortunately, that the segments of the institutional church in many ways actually inflicted harm on these clergy abuse victims. We all read about survivors of abuse who did come forward and notify church authorities of what had happened. Unfortunately in many situations, church officials took no action or even worse yet, transferred priests to other locations, where they often went on to abuse others.

[9] See, eg, Marie Keenan, *Child Sexual Abuse and the Catholic Church Gender, Power, and Organizational Culture* (Oxford University Press, 2011); Kate Gleeson. 'Why the Continuous Failures in Justice for Australian Victims and Survivors of Catholic Clerical Child Sexual Abuse?' (2016) 28 *Current Issues in Criminal Justice* 239–50; James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10 *International Journal of Transitional Justice* 332–49.

[10] See, eg, Robyn L Holder and Kathleen Daly, 'Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors' (2018) 24 *International Review of Victimology* 25.

will be discussed in more detail in Chapter 7, but all of them did so because of significant financial liability arising out of clerical child sexual abuse. I was interested in bankruptcy's grounding in religious and normative ideas about forgiveness, and was interested in seeing how the secular, but formal, process through which debtors disclose the entirety of their debt in order for it to be discharged would work in cases of Catholic dioceses. Confession and forgiveness are central to the history, theology, and traditions of the Roman Catholic Church. The formal, ceremonial nature of the Sacrament of Confession[11] is a well-known tradition of the Church. Bankruptcy cases filed by Catholic dioceses saw entities known for their formal, religious, ceremony of confession and forgiveness of sins make use of a formal, secular, ceremony of confession and forgiveness of debts. What is more, the debts which make the bankruptcy filing necessary arise from the dioceses' liability for child sexual abuse — behaviour that constitutes sin on multiple levels.

Although it is Protestant Christians and not Catholics who ask divine forgiveness for 'debts' as opposed to 'sins' in their version of the Lord's Prayer (also known as the Our Father),[12] the links between concepts of wrongful acts and money or debt are pervasive in many Western[13] legal traditions and Christian theology. Several of Martin Luther's 95 Theses condemn the then-prevalent practice of buying indulgences, whereby people could give money to the Church to rid their souls of debt and buy the release of loved ones' souls from Purgatory. Albeit for practical, rather than theological reasons, damages for tort victims are almost always expressed in money. The bankruptcy cases brought to the fore the links between sin, harm, debt, money, and forgiveness across Catholic and Western legal traditions and cultures. As will be discussed in more detail in later in this thesis, it also provided a means by which victims could advocate for non-monetary remedies that they would like, in addition to payments of money—including individual apologies from bishops, counselling

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[11] John Richard Neuhaus, 'In Preparation for Lent This Year, a Number of Bishops Issued Impressive Pastoral Letters Calling for Renewed Practice of the Sacrament of Reconciliation--or, as Most Catholics Will Likely Continued to Call It, Confession. (While We're At It)' (2007) 173 *First Things: A Monthly Journal of Religion and Public Life* 67.

[12] Australian Catholic Bishops Conference, 'Let Us Pray The Our Father' *The Catholic Church in Australia* (Web Page, 2019) <https://www.catholic.org.au/prayers/the-our-father>.

[13] Although the concept of a 'Western' tradition can be considered essentialist and other framings have emerged, the term will be used in this thesis because it is the terminology used in relevant literature explaining the linked histories between the Catholic Church, canon law and the secular law that developed alongside it across Europe (including both common and civil law), and to help inform discussions of the ongoing relationship between common law traditions, canon law, the Catholic Church, and the laws of Indigenous people discussed in more detail in Chapters 5 and 6. For a more fulsome discussion problematising the construction of 'the West,' see, e.g. Uma Narayan, 'Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism.' (1998) 13(2) *Hypatia* 86, 106; Georgina Stewart, 'What does 'indigenous' mean, for me?' (2018) 50(8) *Educational Philosophy and Theory* 740,743.

services, religious services expressing regret and shame, and publication of information about abusive priests.

Beginning with these observations about bankruptcy, my interest broadened to consider other legal systems, and whether the problem of clerical child sexual abuse might have lessons about legal systems and their capacity to resolve difficult problems. Rather than adding to the broad literature expressing dissatisfaction with how most cases of clerical child sexual abuse have been handled through law, my thesis asks whether there are reasons to believe some systems are more satisfying than others. It compares legal systems that operate alongside each other in legally plural spaces not by tracing gaps between an ideal of law and lived experience of participants, but by interrogating law's constituent parts and describing its character.

Kitty Calavita explained Law and Society scholars often focus on a perceived 'gap' between 'law as it is lived in society' which she calls 'real law,' and 'law on the books.'[14] She emphasises the movement's focus on this gap – that one of Law and Society's main projects is to describe real law as opposed to 'law on the books.'[15]

> Noting that the law as it is written and advertised to the public is often quite different from the way it looks in practice, law and society scholars have long had an interest in studying that gap.

Calavita was simplifying concepts for an undergraduate audience in her *Invitation to Law & Society*, and was well aware that the juridic study of law is not simple.[16] But an oversimplification risks ignoring or minimising how the constitutive nature of law is reflected in and part of the practice of formal law.

This thesis, following a New Legal Realist approach discussed further in Chapter 2, conceives of a range of aspects of legal systems that together, over time, create law through ideas of social ordering, theories of law, constitutions, legislation, judging, practice, operationalisation, social understandings, stakeholder experiences, and many other aspects, all of which are real law. Rather than exploring the gap between what stakeholders want from legal systems and their experience, I focus on the constitutive relationships of real law, including the mundane details of legal practice, broad purposes of legal systems that orient normative framings, tensions between different regimes within legal orders, relationships

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[14] Kitty Calavita, *Invitation to Law & Society* (University of Chicago Press (2010).
[15] Ibid.
[16] Christopher Tomlins, 'Bucking the Party Line: Calavita's Invitation to Law and Society (In Which the Author Is Invited to a Party Where He Encounters Many Old and Familiar Faces, Becomes Argumentative, Stays Up Too Late, and Finally Departs in Search of New Adventures)' (2014) 39 Law & Soc. Inquiry 226.

between legal orders in plural settings, and relationships between and among actors in the social realms in which law and legal systems exist and operate.

Thus, this thesis is concerned with the legal systems themselves and uses the problem of clerical child sexual abuse as a way to analyse and compare them. It adopts a situated approach attentive to the ways in which inequality and domination work across social orders and intersecting likes of identity and status. Responsive law is adopted as an ideal against which to evaluate legal systems, informing the analysis of how stakeholder goals and interests can be advanced or stymied through formal justifications and process-based rationales. But, by attending to data about how abuse and access to justice differ across social boundaries, the thesis also brings a critical view toward responsive law, and suggests ways that the theory of responsive law can be more alive to the ways in which identity and social status can impact the capacity of legal systems to provide substantive justice.

This thesis brings together legal and empirical analyses to examining four legal systems responding to cases of child sexual abuse by priests and religious arising in two dioceses — one in the United States and the other in Australia. It collapses the boundaries between law on the books and the lived experience of law to consider how aspects of legal systems can function to advance or constrain stakeholder interests. Those building blocks of law change and are shaped by stakeholder interests across time. This can inform calls for increased accountability and access to justice by highlighting the procedural and theoretical basis of existing systems and providing a comparison that reveals how different legal systems impact the justice victims receive. I hope that this work can help refine calls for change, help judges and policymakers see gaps in jurisprudence, and, ultimately, help consider ways that legal systems can do a better job of holding institutions accountable for harm.

A. *Research Questions*

My initial interest was to explore what seemed to be a gap between the perspectives of Catholic Church insiders and 'survivors'[17] regarding whether or not the Church was taking responsibility or being held accountable for child sexual abuse by priests. Newspaper headlines, opinion pieces, and arguments presented before tribunals around the world showed how cries for accountability and justice were getting louder, despite the investigations,

[17] Many, including groups like the Survivors' Network of those Abused by Priests (known as 'SNAP'), among others, choose to refer to those who have survived abuse as 'survivors,' rather than victims. See also Newsom and Myers-Bowman (n 5). For this project, the word victim will be used, rather than survivor, to include and account for the many who did not survive the abuse they suffered. The term 'survivor' will be used to refer to advocates and groups that publicly identify themselves as survivors and as a part of a movement of survivors.

convictions, and civil judgements. Insiders were pointing to measures of accountability as evidence that justice was being done, but in the court of public opinion, in the reports of government investigations, and in the academic literature, there seemed a broad consensus that it is not enough. I wanted to learn about what would satisfy the interests of justice, to understand what might be done. I hoped to investigate why the Catholic Church, which presents itself as a moral leader, could not seem to bridge this gap, to apologise credibly, or implement truly effective measures of redress and prevention (or at least be seen as honestly trying to do so).

As discussed in this chapter, academic and popular discourse around the legal systems tasked with questions arising out of Catholic clergy abusing children is largely centred on: (1) the events giving rise to legal interventions; (2) narratives of individuals' experiences with legal systems; (3) advocacy for specific changes to law in a particular legal system; (4) exposés or critiques of Catholic organisations' participation in or compliance with legal systems; or (5) the potential or actual tangible results of legal interventions. While legal interventions have been considered individually, this thesis takes a different approach, one that draws on previous literature, but which recognises the plurality of the legal space, the diversity of stakeholders, and the diversity of stakeholder interests. As discussed below, the plurality of legal systems and diversity among stakeholders means that the problem of child sexual abuse in the Catholic Church provides a unique opportunity to compare legal systems.

I provide a nuanced account of the different ways that legal systems respond to cases arising out of abuse, and how social factors influence social meaning of the legal interventions. A variety of legal interventions that have very distinct theoretical, doctrinal, and procedural approaches have been implemented in response to Catholic priests abusing children. Analysing systems as distinct as bankruptcy and canon law cannot just focus on tangible outputs, like financial awards to victims. Rather, it should take account of each systems' theory, doctrine, and procedure, as well as the perspectives of various stakeholders, in order to provide a meaningful account of different ways of understanding accountability. Accordingly, the driving question for this inquiry is *how* inequity is reinforced and perpetuated through legal systems – and in this context that requires the following supporting research questions:

(1) How do legal purposes, theories, doctrines, and procedures of canon law, civil litigation, royal commissions, and bankruptcy law, work through existing social orders and physical space to shape stakeholder influence in legal decision-making; and

(2) Are these legal systems best described as repressive law, autonomous law, or responsive law, and can the theory of responsive law help explain the capacity of legal systems to secure justice?

As my research questions seek a perspective on law and its co-constitutive relationship with social orders that requires understanding multiple stakeholder and system perspectives, I adopt a New Legal Realist approach, which is discussed further in Chapter 2. The next section of this chapter will explain why the problem of sexual abuse by Catholic priests has shown itself to be revelatory in terms of how legal systems approach complex problems. The fourth section will outline the remainder of the thesis, explaining how the legal systems will be analysed and what the analysis will contribute to the literature on responsive law. Later chapters will discuss responsive law in more depth.

II. WHY STUDY CHILD SEX ABUSE IN THE CATHOLIC CHURCH?

A focus on the Catholic Church might seem to suggest that the Catholic Church is uniquely responsible for child sexual abuse or uniquely culpable in its cover-up. This is clearly not true — children are abused by family members, trusted friends, in schools, detention facilities, sporting clubs, scouting, and across communities of faith, and no faith.[18] It is not my intention to compare the Catholic Church with any other religious or secular organisation. Instead, my aim is to use the widely known example of child sexual abuse by Catholic priests and religious to explore how different legal systems approach a complex problem. This section will explain why child sexual abuse by Catholic priests and religious is uniquely suited to a comparative project on legal systems. This is a complex social and legal problem that has replicated itself consistently in different places and been the subject of a number of different legal proceedings. This creates an opportunity to compare legal systems that might otherwise not be easily compared, to see how systems with radically different approaches to problem-solving perform as they approach problems arising out of similar sets of facts.

Child sexual abuse in the Catholic Church is a complex social problem.[19] I am interested in complex problems because they are difficult to solve, and I want to know how legal systems might be better able to address them. New approaches to these problems should be informed by deep understandings of how current approaches work. This means that it

[18] See, eg, Tamara Blakemore et al, 'The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence.' (2017) 74 *Child Abuse & Neglect* 35.
[19] Sholom Glouberman and Brenda Zimmerman, 'Complicated and Complex Systems: What Would Successful Reform of Medicare Look Like?' (Discussion Paper No 8, Commission on the Future of Health Care in Canada, Ottawa).

encompasses several subsidiary problems, some of which are themselves complicated, but also including special attributes, unique conditions, interdependency, and changing circumstances.[20] In this case, the subsidiary problems include complicated relationships between the Catholic Church and secular states, religious taboos surrounding sexuality, the harms arising from child sexual abuse, the social implications of blemishes on the Church's reputation, and problems of international law arising from the Church's unique place in the international order. It involves issues associated with some of Western society's most meaningful symbols—sex, religion, and childhood. This section III details the subsidiary problems—the complexities of harm, organisation, and legal order that make this not just a complicated problem, but a complex one.

This problem consists of subsidiary problems including: its impacts on victims, their families and communities; the Catholic Church and its place in Western societies; and the array of legal systems acting in response to the problem. Despite this complexity, however, the facts giving rise to actions in tort, to delicts in canon law, to the filing of a bankruptcy case, and to the Australian government commissioning the Royal Commission into Institutional Responses to Child Sexual Abuse (the 'Royal Commission') are remarkably similar despite significant differences in the social settings in which they arise. Furthermore, few non-experts in canon law, US bankruptcy law, or Australian royal commissions seriously engage with their doctrinal or procedural law, and thus this issue provides the opportunity to compare civil litigation in common law jurisdictions with three legal systems that might otherwise never be examined in the same study. The complexities and consistencies of the problem and diversity of legal systems provide fertile ground for interesting and informative comparisons.

If legal systems are to produce justice, there must be some harm for them to address, a problem for them to solve. To hold Catholic organisations accountable, it should be defined exactly what they are being held accountable for. It must also be understood what we mean when we refer to the Church, or to define the part of the Church that is to be held responsible, and the law under which they are being so held. As discussed below, there are many different harms that victims, their families, and their communities suffer. As further discussed, the complexity of the Catholic Church's governing structure and other laws limiting diocesan and clerical liability mean Church organisations are often able to avoid liability in ways that other organisations cannot. The following subsections highlight the complexities of harms; the

[20] Ibid.

Church's organisation and social status; and of the overlapping legal orders active in this space.

A. *Complexity of Harms*

Child sexual abuse by Catholic priests and religious is a complex problem that harms a range of people in a multitude of ways. Victims, their families, and their communities suffer from a wide array of harms arising out of the abuse itself, the religious context, and social reactions to reports of abuse.[21] There are physical, psychological, spiritual, and emotional harms to victims. There are harms that arise from aggressive litigation tactics by Church leaders and their lawyers. The scandal impacts the Church's reputation in communities where it is often instrumental in providing healthcare, education, and other services. It has complicated the Vatican's reputation with faithful Catholics all over the world and with secular states and organisations. Within the Church, it has revealed divisions on fundamental issues including the role of women in the Church, sexuality, discipline, forgiveness, religious law, and human rights. Abuse by clergy, especially clergy in a faith tradition that privileges clergy above other people, also impacts the faith and spiritual practice of victims, their families, and their communities. This is a problem that crosses boundaries — its implications and impacts are significant for individuals, communities, nations, and internationally. The harms child sexual abuse causes are complex and life-altering.[22] Given its prevalence, its impact on society is difficult to overstate. This section relies on literature from other fields that explain some of the harms. The next section will explain some of the history of how child sexual abuse has been understood in Western societies, and discuss literature documenting its harms. The following section will consider harms that relate to abuse having been committed by a Catholic priest.

1 *Child Sexual Abuse Generally*

Child sexual abuse is a fraught concept. The term emerged in the latter half of the twentieth century, connected to the feminist movement and arising out of changing cultural and legal understandings of childhood, although the concept can be traced to earlier movements coinciding with changing social understandings of childhood.[23] Social historian

[21] Kate Gleeson, 'Exceptional Sexual Harms The Catholic Church and Child Sexual Abuse Claims in Australia' (2018) 27 *Social & Legal Studies* 734.
[22] Terri Lewis et al, 'Does the Impact of Child Sexual Abuse Differ from Maltreated but Non-Sexually Abused Children? A Prospective Examination of the Impact of Child Sexual Abuse on Internalizing and Externalizing Behavior Problems' (2016) 51 *Child Abuse & Neglect* 31.
[23] See, eg, Yorick Smaal, 'Historical Perspectives on Child Sexual Abuse, Part 1' (2013) 11 *History Compass* 702, 704.

Yorcik Smaal notes that the late-20th century is identified 'as a western moment of rediscovery, reinterpretation, or revolution,' and that,

> the complex mix of sexual liberalism, gender wars, and anti-rape and anti-pornography movements at play in the 1970s and 1980s, has cemented the framework of abuse as the dominant interpretative approach in researching sex with children.[24]

It was not until the eighteenth and nineteenth centuries in common law countries that secular laws began to specifically prohibit adults from engaging in sexual activity with young people. In England, the sixteenth century saw the first instances of state protection of children from adult sexual violence with the passage of laws prohibiting the forcible rape of girls under ten and the forced sodomy of boys.[25] In the mid-nineteenth century, laws would define children as a class of people unable to consent to sexual activity. This reflects a changing conception of childhood generally.[26] Children became a special class of person that should be protected from adult predation, even as their competence to testify against someone who harmed them was limited.[27] These social and legal changes in the status of children accelerated during the twentieth century.

In the English-speaking world, Philip Ariès's *Centuries of Childhood* and Henry Kempe's article on 'The Battered-Child Syndrome', among others, drew attention to shifting conceptions of childhood, including cultural beliefs about children and sexual activity in the 20th century.[28] Feminist sociologist Carol Smart and Smaal explain how a 'rediscovery' of

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[24] Ibid.

[25] Hayley Boxall, Adam M Tomison and Shann Hulme, *Historical Review of Sexual Offence and Child Sexual Abuse Legislation in Australia: 1788-2013* (Australian Institute of Criminology, 2014) 7.

[26] Ibid. See also Hugh Cunningham, *Children and Childhood in Western Society since 1500* (Longman, 1995); Rebecca M Bolen, *Child Sexual Abuse Its Scope and Our Failure* (Springer, 1st ed, 2002); Ross F Cheit, *The Witch-Hunt Narrative: Politics, Psychology, and the Sexual Abuse of Children* (Oxford University Press, 2014).

[27] Ibid,

> By the end of the 1700s, societal perceptions of children had shifted drastically to a point where childhood was now being seen as a separate state from adulthood and was characterised by innocence, purity and naïveté. This was particularly the case among the middle and upper class. At the same time, Victorian conservatism and moral puritanism denied children's sexuality as a phenomenon. It emphasised the importance of protecting children from harm (including sexual harm) from others and from themselves. Some educators had started to encourage parents to supervise their children at all times and to ensure they were never naked in front of other adults. This, it was suggested, 'constituted one of the first indications that society at large recognised the potential for children to be sexually abused' [citations omitted];

See also, *Ohio v Clark*, 576 US _ (2015) (Scalia, J, concurring), citing Thomas D Lyon and Raymond LaManga, 'The History of Children's Hearsay: From Old Bailey to PostDavis' (2007) 82 *Indiana Law Journal* 1029, 1030–1: 'At common law, young children were generally considered incompetent to take oaths, and were therefore unavailable as witnesses unless the court determined the individual child to be competent.'

[28] Jane Long Weatherred, 'Child Sexual Abuse and the Media: A Literature Review' (2015) 24 *Journal of Child Sexual Abuse* 16; Smaal, (n 23) (citing Philippe Ariès *Centuries of Childhood: a Social History of Family Life*, tr

child sexual abuse, like movements in earlier periods to protect children from adult sexual predation or responses to those movements that minimize, ignore, justify, or excuse sex between adults and children are all related to and impacted by social and cultural constructions of sex, gender, childhood, race, and social class.[29] Histories of the problem of child sexual abuse as an issue of public concern highlight how social understandings of gender, childhood, and sexuality impact the way child sexual abuse is understood as a social problem — the extent to which it is stigmatized, how victims and perpetrators are treated within their communities, and the social and legal consequences of disclosure.[30]

Cultural historian Timothy Jones' scepticism of a growing consensus about a discovery of child sexual abuse in the 1970's and 80's is reasonable — people have long been aware that adults will abuse children, and so the word 'discovery' is inapt.[31] The twentieth century did, however, see the redefinition, in many parts of the world, of certain behaviour as 'child sexual abuse' and a new recognition of the harm suffered by children subjected to it. Changes to state law, widely publicised trials, and investigations into allegations of child sexual abuse demonstrated states' interest in prosecuting claims of child sexual abuse.[32] Civil and criminal laws were amended to allow for public and private censure.

Childhood, capacity to consent to sexual activity, and the boundaries of acceptable sexual behaviour are defined and redefined through informal social understandings, legislation, new and refined legal theories, and other developments.[33] Pasura et al's study of competing meanings of childhood and social construction of child sexual abuse in the Caribbean highlights how legal definitions may not reflect the complexity of social and cultural understandings of what constitutes abuse, and that these social and cultural understandings are influenced by global trends but also rooted in localities.[34]

Johnathan Cape (Vintage Books/Random House 1962) and CH Kempe, Silverman FN, Steele BF, Droegemueller W, Silver HK, 'The Battered-Child Syndrome' (1962) 181(1) *JAMA* 17

[29] Carol Smart, 'Reconsidering the Recent History of Child Sexual Abuse, 1910-1960' (2000) 29 *Journal of Social Policy* 55; Smaal, (n 23)..

[30] Dean Pavlakis, 'Reputation and the Sexual Abuse of Boys: Changing Norms in Late-Nineteenth-Century Britain' (2014) 17 *Men and Masculinities* 325; Smart (n 29); Julian V Roberts and Renate M. Mohr, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Buffalo, 1994).

[31] Timothy Willem Jones, 'Sin, Silence and States of Denial: Canon Law and the 'Discovery' of Child Sexual Abuse,' (2015) 41(2) *Australian Feminist Law Journal* 237-52.

[32] Cheit (n 26).

[33] Smaal, (n 23).

[34] Dominic Pasura et al, 'Competing Meanings of Childhood and the Social Construction of Child Sexual Abuse in the Caribbean' (2013) 20 *Childhood* 200.

Child sexual abuse is a phenomenon that is encountered across human societies.[35] It has long lasting and serious impacts on mental and emotional health of individuals, families, and communities.[36] Psychologists John Briere and Marsha Runtz explain that, 'the aggregate of positive findings in the literature on psychosocial problems among adults molested as children has led many researchers and clinicians to conclude that sexual abuse is a significant long-term mental health hazard.'[37] Priest and psychologist Msgr. Stephen J. Rossetti observed that authors following the Freudian tradition and other writing before the 1970's tended to downplay the impact of child sexual abuse, or even blame children for their own abuse, but since that time, most research has found significant negative effects of physical, emotional, and psychological health.[38] Public health scholars document impacts of child sexual abuse on broader communities.[39] Thus, although the behaviour now condemned as child sexual abuse is not new, the focus of research on the topic since the late 20th century has shifted, and is more concerned with harm to victims than was previous research.

The harms to victims are significant. Roberts et al found that 'child sexual abuse was associated with a range of outcomes in adulthood.'[40] These include being part of a non-traditional family, poor psychological well-being, teenage pregnancy, and problems that

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[35] See, eg, Marije Stoltenborgh, et al, 'A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World' (2011) 16(2) *Child Maltreatment* 79.

[36] Rob Roberts et al, 'The Effects of Child Sexual Abuse in Later Family Life; Mental Health, Parenting and Adjustment of Offspring' (2004) 28(5) *Child Abuse & Neglect* 525; Rebecca M Bolen and Maria Scannapieco, 'Prevalence of Child Sexual Abuse: A Corrective Metanalysis' (1999) 73(3) *Social Service Review* 281; Jill Astbury, 'Child Sexual Abuse in the General Community and Clergy-Perpetrated Child Sexual Abuse: A Review Paper prepared for the Australian Psychological Society to inform an APS Response to the Royal Commission into Institutional Responses to Child Sexual Abuse' (Review Paper, Australian Psychological Society, July 2013) 5.

> CSA [('Child sexual abuse')] results in short and medium term negative effects on the health and well-being of the child and adolescent including urogenital symptoms such as genital pain, dysuria and genital bleeding, reduced self-esteem and suicidal ideation and lower levels of educational attainment. Others contend that the significance of the association between CSA and educational attainment disappears once confounding social, parental and individual factors have been taken into account.
> CSA can continue throughout life to exert long lasting negative impacts on the neurodevelopment, physical and mental health of many but by no means all of those affected. . . . Lifetime depression, a well-documented outcome of CSA, was found in one US nationally representative study to affect just over half (52%) of childhood rape survivors compared to 27% of non-victims. (citations omitted).

[37] John Briere and Marsha Runtz, 'Childhood Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment' (1993) 8(3) *Journal of Interpersonal Violence* 312, 312.

[38] Stephen J Rossetti, 'The Impact of Child Sexual Abuse on Attitudes Toward God and Catholic Church,' (1995) 19(12) *Child Abuse & Neglect* 1469, 1469–70.

[39] See, eg Kathryn D Scott, 'Childhood Sexual Abuse: Impact on a Community's Mental Health Status' (1992) 16 *Childhood Abuse and Neglect* 282.

[40] Ron Roberts et al, 'The Effects of Child Sexual Abuse in Later Family Life; Mental Health, Parenting and Adjustment of Offspring' (2004) 28(5) *Child Abuse & Neglect* 525, 525.

reproduce themselves in victims' own children.[41] The mental health concerns include post-traumatic stress disorder, cognitive distortions, altered emotionality, disturbed relatedness, avoidance, and impaired self-reliance.[42] There are also links between child sexual abuse and drug or alcohol abuse and dependence.[43]

Child sexual abuse also presents difficulties for those trying to understand its effects. It is common for victims to delay reporting for years, even decades after the abuse occurred, making research on its prevalence difficult.[44] The difficulty of establishing a baseline rate of abuse complicates the efficacy of efforts to prevent, detect, and reduce abuse. How can researchers determine for certain whether interventions have an impact on rates of abuse? Research in this space is largely limited to self-reporting of victims (self-report, interview response, and official registries were the only methods of data collection referenced in one meta-analysis of prevalence of child sexual abuse worldwide),[45] and so if victims never report, and a significant percentage only do so twenty or thirty years after the fact, it is difficult to determine whether rates have increased or decreased for years after an intervention. Child sexual abuse is thus complicated in terms of the manifold measurable harms it causes to victims, their families, and their communities. It is also complicated in terms of our ability to measure its prevalence and its impacts.

2 *Harms Specific to Abuse Perpetrated by Catholic Clergy*

Religion holds a special place in society. It provides a sense of belonging, an explanation about the world and one's place in it. In referring to 'religion,' psychologist Ketan Tailor and colleagues explain that,

> [r]eligion (or religiosity) has been thought to exist across all times and societies and not surprisingly continues to elude adequate definition. Some say to define religion is a contradiction as the function of religious life is to be

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[41] Ibid.

[42] Judy Cashmore and Rita Shackel, *The Long-Term Effects of Child Sexual Abuse* (Commonwealth of Australia, 2013)

[43] Ibid.

[44] See, e.g. J Barth et al, 'The Current Prevalence of Child Sexual Abuse Worldwide: A Systematic Review and Meta-Analysis' (2013) 58(3) International Journal of Public Health 469, 470.

> Whether the prevalence of CSA changes over time is a matter of controversy: some researchers found a decrease of CSA from the mid-1990s to 2005, whereas others did not find a significant variation over time. If such change in prevalence rates over time exists, summarizing prevalence estimates of different time points might be problematic. Previous reviews are mainly based on primary studies which were published in a broad time range (e.g. 1980 until now) and include both studies with adults and studies with children. A study with adults from the 1980s assesses CSA prevalence in the 1950s, whereas a study with children in 2009 assesses more recent prevalence rates. Moreover, studies with adults may be more prone to potential recollection bias than studies on children which is a further source of bias if they are mixed in a meta-analysis. [citations omitted].

[45] Ibid.

> immersed in that which is limitless. To make sense of human religiosity, then, we must consider the characteristics that distinguish the religious from the secular rather than seek a single, all-encompassing definition. Three principle characteristics compose the working definition of religiosity, including: (a) belief in a spiritual dimension, (b) observance of a set of spiritual rituals or practices, and (c) adherence to a doctrine of ethical conduct arising from spiritual teachings (Fontana, 2003). The first characteristic is considered the most significant of the three, being the guiding principle of several prominent religions.[46]

In other words, like law, religion is co-constitutive with the social orders in which it operates, but religion has another dimension – the spiritual. Religion impacts people's lives, their understandings of the world, and sense of self and community – and how they understand events in their lives, including traumatic events like child sexual abuse. But this added dimension of spirituality touches an aspect of the human experience that seeks to transcend boundaries and problematise ethics, existence, and meaning. Some research has found that victims of child sexual abuse find comfort in turning to religious faith,[47] but when clergy themselves are the perpetrators, the impact of abuse complicates that.[48] Sexual abuse perpetrated by clergy can 'impact[] negatively on . . . individual[s'] search for the sacred and the ways in which spirituality can serve as a valuable resource for survivors.'[49]

Even compared to other major religions, the Catholic Church occupies a unique space in social and political orders across much of the world. The Catholic faith tradition is one of the biggest in the world, with a centralized and hierarchical governance structure unique among major religions. The importance of its role in the history of the Western world can hardly be overstated. The Church's doctrines have distinguishing features, including a theology of the priesthood that sees the person of the priest 'as a mediator between the transcendent God and human beings,' which differs from other major faith traditions in which clerics are not understood as ontologically different from other people.[50] The Church's theology of the priesthood and impact on the Western legal traditions is discussed in Chapter 5. It is not surprising, considering the unique status of the Catholic Church, its patriarchal

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[46] Ketan Tailor et al, 'Child Sexual Abuse and Adult Religious Life: Challenges of Theory and Method' (2014) 23 *Journal of Child Sexual Abuse* 865, 867 (citations omitted).
[47] Randy A Sansone, Amy R. Kelley and Jeremy S. Forbis, 'Abuse in Childhood and Religious/Spiritual Status in Adulthood among Internal Medicine Outpatients' (2013) 52 *Journal of Religion and Health* 1085.
[48] See, eg, Amy C Tishelman & Lisa A Fontes, 'Religion in Child Sexual Abuse Forensic Interviews' (2017) 63 *Child Abuse & Neglect* 120.
[49] Kenneth I Pargament, Nichole A Murray-Swank and Annette Mahoney, 'Problem and Solution: The Spiritual Dimension of Clergy Sexual Abuse and its Impact on Survivors' (2008) 17 *Journal of Child Sexual Abuse* 397, 397.
[50] Katherine van Wormer and Lois Berns, 'The Impact of Priest Sexual Abuse: Female Survivors' Narratives,' (2004) 19 *Affilia* 53, 60, see also Joseph J Guido, 'A Unique Betrayal: Clergy Sexual Abuse in the Context of the Catholic Religious Tradition' (2008) 17 *Journal of Child Sexual Abuse* 255.

culture, and the severe harms of child sexual abuse in any context, that abuse by Catholic clergy would bring its own unique, and uniquely painful, harms to victims, their families, and communities.

As clerical child sex abuse has been documented or alleged in communities in so many corners of the world, the harms arising from the mass perpetration of child sex abuse and institutional failure to appropriately react to allegations of abuse are notable in scope and breadth.[51] The question for this section is not about rates of abuse, but the distinctive harms to individuals and societies when Catholic priests sexually abuse children. There are psychological, spiritual, and emotional impacts.[52]

Survivors frequently report having lost religious faith and becoming disillusioned with the Church.[53] Psychologist and Dominican priest Joseph Guido connects the 'sacramental culture of Catholicism' with specific manifestations of harm.[54] He explains that

> the priest-perpetrator is not only a trusted and honoured figure but is by virtue of ordination an *alter Christus*, another Christ, and his betrayal of that trust and dishonouring of that role cannot be separated from his sacramental character and meaning.[55]

Guido, writing to advise therapists and other professionals working with victims of clerical child sexual abuse, called attention to theological and cultural understandings of the roles of

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[51] Patrick Parkinson, 'Child Sexual Abuse and the Churches: A Story of Moral Failure?' (2014) 26(1) *Current Issues in Criminal Justice* 119, 121. Patrick Parkinson, a law professor who has worked on issues related to child sexual abuse in institutional settings, considered the Royal Commission's report of rates of abuse by Australian Catholic priests and brothers, and concluded that the evidence suggests that rates of abuse are higher among Catholic priests and religious than among the general population.

> Is this level of offending higher than for men in the general population? There is no reliable baseline data on levels of offending in the general population in Australia. Peter Marshall's study in England found some indication of population-wide conviction rates. One in 150 men over the age of 20 had a conviction for sexual offence against a minor. Lifetime propensity figures will of course be higher than those derived from a snapshot of the adult male population at a given moment in time. Based on his data of various cohorts of these men, Marshall estimates that between 1% and 2% of the male population would be expected to be convicted for some form of sexual offence over their lifetime (including sex offences against adults). If those figures are similar for Australia, then Prof. Cahill's research would indicate that the rate of convictions for Catholic priests who studied at the seminary in Melbourne is much higher than in the general population (3.7% of those ordained between 1940 and 1966 and 5.4% of those ordained between 1968 and 1971) (citations omitted).

[52] Ibid 60, quoting a survivor:

> Clergy abuse is so much worse because the priests have more power than anybody and represent . . . well they are supposed to represent God, and so . . . they represent not only their position in the Church, but they are supposed to represent Christ [laughs] at Mass. So you know there's real power play thing going on.

[53] Rossetti (n 38); Berns, Lois and Katherine van Wormer. 'Sexual Traumatization by Priests: What Is the Effect on Spirituality?' (2002) *USA Today* 131(2688) 30-32.

[54] Guido, (n 50) 265.

[55] Ibid 257.

priest and bishop, to explain how victims' experience with abusive priests and callous bishops is mediated through a Catholic worldview. He argues 'that it is the sacramental understanding of priests and bishops that lends added weight and meaning to the abuse and that may constitute what is unique about the crisis in the Catholic Church.'[56] Often, because the survivors grew up in a Catholic family or were otherwise taught to trust in and respect the authority of Catholic leaders as *alter Christus*, they report feeling betrayed by the Church or even by God, rather than simply the individual priest.[57]

Research also indicates that the harms extend from the survivors and their families to entire communities, including persons with no direct relationship to clerical sex abuse. Parishioners can lose faith in church leadership, reduce donations to Catholic organisations, and otherwise reflect a widespread sense of anger.[58] There is research suggesting that public disclosure of sexual abuse by clergy impacts charitable giving even outside of giving to religious organisations.[59]

The diversity of harms means that even if a legal system designed to address one type of harm is able to meet some of the stakeholders' interests in justice, there may well be harms that remain unaddressed. A successful legal action may provide financial recovery, but it does not help one reconnect with a damaged relationship with the Divine.[60] All of these complexities and questions provide fertile ground for analysis about how legal systems operate. Each legal system will facilitate a legal response to certain conceptions of harm and certain understandings about accountability. By comparing legal systems, we can see which harms each system accounts for, and how well that accounting serves as a remedy or appropriate redress.

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[56] Ibid 258.
[57] Jennifer M Balboni and Donna M Bishop, 'Transformative Justice: Survivor Perspectives on Clergy Sexual Abuse Litigation' (2010) 13(2) *Contemporary Justice Review* 133; Rossetti (n 38); Diane J Shea, 'Effects of Sexual Abuse by Catholic Priests on Adults Victimized as Children' (2008) 15(3) *Sexual Addiction & Compulsivity* 250.
[58] Paul M Kline, Robert Mcmackin and Edna Lezotte, 'The Impact of the Clergy Abuse Scandal on Parish Communities' (2008) 17 *Journal of Child Sexual Abuse* 290; Michael J Maher, Linda M Sever and Shaun Pichler, 'How Catholic College Students Think about Homosexuality: The Connection between Authority and Sexuality' (2008) 55(3) *Journal of Homosexuality* 325.
[59] Nicolas L Bottan and Ricardo Perez-Truglia, 'Losing My Religion: The Effects of Religious Scandals on Religious Participation and Charitable Giving' (2015) 129 *Journal of Public Economics* 106.
[60] Patrick Bergquist, *The Long Dark Winter's Night: Reflections of a Priest in a Time of Pain and Privilege* (Liturgical Press, 2010).

B. *Organisational Complexity*

The scandal of priests sexually abusing children involves networks of social systems, including, but not limited to: (1) relations between the Holy See and other nations;[61] (2) relations among member states of the United Nations;[62] (3) relations between Catholic organisations and states in which they operate; (4) relations between Catholic organisations and the Holy See; (5) relations between Catholic organisations (including the Holy See) and faithful Catholics; (6) relations between Catholic organisations and survivor advocacy groups; (7) relations between Catholic organisations and survivors themselves; and (8) relations within communities — between and among Catholic leaders, parishioners, survivors of abuse, the criminal justice community, families of survivors, lawyers, journalists and others. Each of the actors involved in relevant social systems plays a role in how power is exercised and the means to achieve desired ends are pursued. In this sense, each actor might be considered a regulator while simultaneously being subject to regulation by other actors.[63]

The complexity of relationships discussed in the previous paragraphs reveals some of the reasons there is a marked degree of inaccuracy whenever one refers to the Catholic Church or its constituent parts. The Catholic Church is not a single entity. There are often disagreements and disputes between and among Catholic leaders at different levels of difference governance structures, and even though all these entities are bound by canon and religious law to the Holy See and the Pope, they do not always act as one. The legal existence of the Church's constituent parts is defined, variously, by national, international, and canon law in ways that can differ significantly across relevant jurisdictions.

For example, Vatican City State and the Holy See are distinct entities in international law. Vatican City State is a sovereign political state recognized under international law.[64] The Holy See is internationally recognized as a sovereign non-territorial system with a legal

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[61] For example, when the former Nuncio (Holy See ambassador) to the Dominican Republic was recalled to the Vatican with the protection of diplomatic immunity after reports were made about his abuse of poor children in Santo Domingo, many in the Dominican Republic protested that he should face prosecution in that country rather than the legal proceedings promised by the Vatican: Laurie Goodstein, 'For Nuncio Accused of Abuse, Dominicans Want Justice at Home, Not Abroad', *The New York Times* (online, 23 August 2014) <https://www.nytimes.com/2014/08/24/world/americas/whisked-away-vatican-ambassador-accused-of-sexual-abuse-of-minors.html>.

[62] Two separate United Nations Committees, the Commission on the Rights of the Child and the Committee Against Torture, have held hearings and/or issued reports regarding the response of the Catholic Church to allegations of sex abuse levied against priests and other religious or lay persons employed by Catholic bodies throughout the world.

[63] Neil Gunningham and Darren Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 133.

[64] See, eg, John R Morss, 'The International Legal Status of the Vatican/Holy See Complex' (2015) 26(4) *European Journal of International Law* 927.

personality akin to that of a state. Canon law defines the Holy See as the seat of Saint Peter, the head of the Catholic Church, and the Roman curia as the government of the Catholic Church. *Christus Dominus* describes the relationship between the Pope and the curia.

> In exercising supreme, full, and immediate power in the universal Church, the Roman pontiff makes use of the departments of the Roman Curia which, therefore, perform their duties in his name and with his authority for the good of the churches and in the service of the sacred pastors.[65]

The Vatican is generally understood to be the Roman curia and the Holy See together. The Pope is the head of the Vatican, and his role is one of sole and absolute monarch. The Vatican operates or is connected to institutions that include a bank, radio station, newspaper, publishing house, academies of higher learning and research, among other things. The Vatican is at once a state and the head of a religion, in a way that is uniquely complicated and deeply intertwined with the history and development of law in Europe and places colonised by Europeans.

Almost all of the nearly 18 percent of the world's population who are Catholic live outside the borders of Vatican City State.[66] Within the boundaries of other sovereign states, Catholic organisations, including dioceses, archdioceses, eparchies,[67] religious orders, schools, and parishes are subject to the laws of those states. The Church can be said to be made up of the Pope, the Vatican, the Curia, dioceses, archdioceses, eparchies, archeparchies, religious orders, and a number of other 'juridic persons'[68] each of which is organised with varying degrees of autonomy under canon law and the secular law of other nations.[69] Some

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[65] Pope Paul VI, 'Decree Concerning the Pastoral Office of Bishops in the Church Christus Dominus Proclaimed by His Holiness, Pope Paul VI on October 28, 1965' *The Holy See* (Web Page, 28 October 1965) [9] <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651028_christus-dominus_en.html>.

[66] Holy See Press Office, 'The Pontifical Yearbook 017 and the "Annuarium Statisticum Ecclesiae" 2015, 06.04.2017', *Summary of Bulletin: Holy See Press Office* (Bulletin, 6 April 2017) <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2017/04/06/170406e.html>.

> The number of baptized Catholics has continued to grow globally, from 1,272 million in 204 to 1,285 million in 2015, with a relative increase of 1%. This represents a total of 17.7% of the total population.

[67] Eparchies are essentially dioceses in the Eastern Rite tradition. Hereinafter, the term 'dioceses' will be used to refer to dioceses, archdioceses, eparchies, and archeparchies.

[68] 'A juridic person, . . . is an artificial person, distinct from all natural persons or material goods, constituted by competent ecclesiastical authority for an apostolic purpose, with a capacity for continuous existence and with canonical rights and duties like those of a natural person.': John P Beal, James A Corden and Thomas J Corden, *New Commentary on the Code of Canon Law* (Paulist Press, 2000) 155.

[69] See, eg, Edward L Buelt and Charles Goldberg, 'Canon Law & Civil Law Interface: Diocesan Corporations' (1995) 36 Catholic Law 69, 70–81. (defining and explaining the nature of juridic persons in canon law, the 1983 Code of Canon Law's distinction between public and private juridic persons and comparing the concept of juridic persons with common law understandings of a corporation and, specifically, a corporation sole under Colorado law.).

other jurisdictions provide special protections or corporate forms to religious organisations, and others do not.[70] Canonist Eugene A. Dooley argues that canon law insists on the Church's authority to establish 'subordinate moral personalities such as churches, seminaries, religious communities and the like,' and that these juridic persons being forced to obtain charters of incorporation from states in in the United States is an example of prejudice against the Church.[71] Notably, as discussed in Chapter 6, the corporate status of Catholic dioceses in Australia has prevented victims there from holding the dioceses responsible for abuse committed against them, demonstrating how this complexity of organisation can have wide-reaching effects.

While the Pope has great authority with respect to Catholic doctrine, archbishops, bishops, and leaders of religious orders are imbued with all other forms of authority over their respective organisations under canon law. A diocesan bishop, for example, has 'all ordinary, proper, and immediate power which is required for the exercise of his pastoral function' within the diocese with which he is entrusted.[72] In most jurisdictions around the world, there is no formal link under state law between dioceses and the Vatican, despite their being subject to the Vatican's authority under canon law.

The long relationship between the Catholic Church and law in Europe and places colonised by Europeans has embedded a number of protections for Catholic organisations in legal systems, including a common practice across centuries of allowing the Church, rather than the state, to have jurisdiction over criminal actions of priests, laws prohibiting priests and bishops from being prosecuted for crime, special laws allowing dioceses to incorporate in ways that severely limit their liability to civil actions, and evidentiary rules such as priest-penitent privilege that allow priests to refuse to disclose what was confessed to them. Although few jurisdictions exempt priests from prosecution now, some laws establishing a priest-penitent privilege remain (or did until very recently), in most United States and Australian jurisdictions.[73]

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[70] But see, eg, *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565, [47], [152]–[154]. (finding that the Archdiocese of Sydney, as an unincorporated association, 'cannot (at common law) sue or be sued in its own name because, among other reasons, it does not exist as a juridical entity,' that Cardinal Pell cannot be said to represent the unincorporated association except to the extent of his personal activities give rise to personal liability, and that the trustees of the archdiocese are not liable for the independent acts of the archbishop).

[71] Eugene A. Dooley, O.M.I. J.C.D., *Persons and Juridical Personalities in Canon Law*, 4 Jurist 405, 432 (1944) (citing the Pio-Benedictine Code of Canon law, later replaced by the 1983 Code, discussed in more detail in Chapter 5).

[72] *Code of Canon Law 1983* ('1983 Code').

[73] For further discussion of the priest-penitent privilege, its history and arguments for and against it, including arguments based on the scandal of clerical child sexual abuse, see, eg, R Genestal, 'Les Origines du Privilege

The Catholic Church, with its unique position in international, national, and sub-national law, and its own system of law, occupies a plural and hybrid space. It is not a single entity in the way that it is sometimes perceived, but it is an identifiable institution with its own legal and regulatory systems, organisational culture, and relationships with other political and social actors. Its history and the power of the Church as an actor and a symbol add to the complexity of child sexual abuse, adding difficulty and complexity to the operation of legal systems. Difficulties in identifying an appropriate legal entity to participate in legal process are evidenced in ICC actions,[74] reports of UN committees,[75] and the rebuffing of domestic actions seeking disclosures or awards from the Vatican.[76] These complexities will be discussed as they relate to the legal systems and dioceses studied in this thesis. They highlight ways that legal systems respond to complex problems and make sense of disputes and problems despite confusing or unique issues that can arise.

Clerical' (1908) 32 *Nouvelle Revue Historique de Droit Francais et Etranger* 161; Christine P Bartholomew, 'Exorcising the Clergy Privilege' (2017) 103 *Virginia Law Review* 1015, John F Wirenius, '"Command and Coercion": Clerical Immunity, Scandal, and the Sex Abuse Crisis in the Roman Catholic Church' (2011) 27 *Journal of Law and Religion* 423; Edward A Jr Hogan, 'A Modern Problem on the Privilege of the Confessional'(1951) 6 *Loyola Law Review* 1; Robert John S J Araujo, 'International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the Priest-Penitent Privilege under International Law' (2006) 15 *American University of International Law Review* 639; D W Elliott, 'An Evidential Privilege for Priest-Penitent Communications' (1995) 3 *Ecclesiastical Law Journal* 272
(2011-2012): 423-494.

[74] SNAP, the Survivor's Network of those Abused by Priests, which was one of several organisations to submit reports to the United Nations committees discussed above, also lodged a complaint with the International Criminal Court (ICC), urging the prosecutor with that court to investigate the Holy See and several of its leaders for crimes against humanity stemming from the abuse of children and 'charging that Vatican officials tolerate and enable the systematic and widespread concealing of rape and other forms of sexual violence around the world': 'SNAP v. the Pope, et al.' *Center for Constitutional Rights* (Web Page, 13 September 2011) <https://ccrjustice.org/home/what-we-do/our-cases/snap-v-pope-et-al>.

[75] The Holy See is a signatory to both the Convention on the Rights of the Child and the Convention Against Torture. The United Nations committees tasked with overseeing the implementation of those charters have both recently considered the sexual abuse of minors by Catholic priests and religious in evaluating the Holy See's compliance with the charters. After the submission of reports and documents by survivor advocacy groups, both committees held hearings at which the sexual abuse of minors by Catholic priests and religious was a focal point of questioning. When the United Nations Committee on the Rights of the Child issued its concluding observations on the Holy See's second periodic report to that committee in early 2014, it strongly criticized the Holy See with respect to the Vatican's response to allegations of abuse of children by Catholic clergy throughout the world. At the hearing before the Committee Against Torture, the representative of the Holy See cited the Vatican's defrocking and otherwise punishing priests who the Vatican had determined had abused children, but the Holy See's statement also made clear its position that the Catholic Church's handling of sexual abuse by clergy and other religious was outside of the parameters of the United Nations conventions to which it is a signatory except insofar as the abuse took place within the borders of Vatican City State. United Nations Committee on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, CRC/C/VAT/CO/2 (31 January 2014)

[76] John L Allen Jr, 'Sex Abuse Ruling in Los Angeles Doesn't Affect Vatican, Attorney Says', *National Catholic Reporter* (online, 2 March 2011) <https://www.ncronline.org/blogs/ncr-today/sex-abuse-ruling-los-angeles-doesnt-affect-vatican-attorney-says>; Rachel Zoll, 'Court Lets Vatican-Sex Abuse Lawsuit Move Forward', *KPCC* (Article, 29 June 2010) <http://www.scpr.org/news/2010/06/28/16653/court-lets-vatican-sex-abuse-lawsuit-move-forward/>.

C. *Legal Complexity*

Sally Engle Merry described legal pluralism as 'the multiple forms law takes within particular communities, regions, or nations.'[77] In an earlier article, she argued that the project of legal pluralism is richer for its attending to both the paradoxes of co-existing legal orders in colonial and post-colonial contexts; relationships of power and resistance among semi-autonomous social fields.[78] The challenge, as she describes it, lies in developing our understanding of both legal systems and the particular places in which they operate.[79] Even legal systems imported from other places develop in ways unique to each social realm – '[d]efining the essence of law or custom is less valuable than situating these concepts in particular sets of relations between particular legal orders in particular historical contexts.'[80] In both Ballarat and Gallup there are a number of overlapping legal orders and semi-autonomous social fields — national and sub-national state law, private law, religious law, and community norms. For each diocese, there are two main relevant legal orders —formal state law and the religious and organisational law of the Catholic Church. Each of these orders can each be further broken down into related legal systems. Church law includes canon law, divine law, and the local and regional regulatory orders imposed by national, regional, and diocesan governing bodies. Formal state law includes, in Australia, Commonwealth law, state law, and the developed common law. In the United States federal law on religious liberty, bankruptcy, and sovereignty intersect with tort, criminal, and procedural law from states and Native American courts as well as regulatory and private law orders.

A number of different legal systems have been employed in assigning responsibility, liability, and sorting what can be done in cases of Catholic priests and religious abusing children. These have included public inquiries, canon law, civil litigation, criminal law, international law, private law, and even bankruptcy law. Some Catholic bishops have implemented quasi-legal systems — of these, the Australian Conference of Catholic Bishop's Towards Healing program is one of the most well-known. The diversity of legal systems accessed provides a unique opportunity to study how very different systems approach a complex problem, potentially opening up new directions for future research or ways of thinking about dispute resolution.

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[77] Sally Engle Merry, 'Legal Pluralism and Legal Culture: Mapping the Terrain' in Brian Z Tamanaha, Caroline Sage, and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012) 66, 67.
[78] Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) *Law & Soc'y Rev* 869.
[79] Ibid, 891.
[80] Ibid, 889.

There is a broad literature on what constitutes law, and how legal and normative orders that operate in the same spaces should be defined.[81] Legal anthropologists have been particularly interested in these concerns. While a 'critical concern of work in legal pluralism is the nature of the interactions among legal spheres,'[82] this thesis has a different purpose — to illustrate how legal systems can be understood through typologies of responsive law, and then compare them. This requires investigation into the systems' internal operations and the social spheres in which they operate.

My discussion of legal systems and legal orders requires a distinction between networks of institutions that form systems within a larger order, and the larger order itself. Many legal pluralists use 'systems' and 'orders' interchangeably,[83] even when applying systems theory to legal pluralism.[84] I define 'legal systems' broadly to include concepts like legal orders, legal disciplines, systems of courts within jurisdictions.

My inquiry is into how each of these systems approaches the cases before it involving clerical sexual abuse, describing the underlying purposes, legal theories, doctrine, procedure, and practical implementation in order to compare the systems can be compared in terms of the typologies of responsive law. For purposes of this thesis, 'legal systems' consist of a particular way of approaching legal problems, or a network of tribunals established to meet a particular legal need. Civil litigation in common law countries, for example, is a legal system. Common law provides for a private right of action in tort or contract in a court of general jurisdiction of a relevant national or sub-national court system.

By paying attention to legal systems themselves and how their theories and procedures understand the phenomenon of child sexual abuse I shed light on how legal systems construct ideas of justice, how legal procedures facilitate or hinder the pursuit of constructed justice,

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[81] See, eg Miranda Forsyth, *A Bird That Flies With Two Wings: Kastom and State Justice Systems in Vanuatu* (ANU Press, 2009) 40 (citations omitted).
[82] Merry (n 78)
[83] See, eg, Ido Shahar, 'State, Society and the Relations Between Them: Implications for the Study of Legal Pluralism' (2008) 9 *Theoretical Inquiries in Law* 417; Anne Peters, 'The Competition between Legal Orders' (2014) 3(1) *International Law Research* 45.
[84] Steven Lierman, 'Law as a Complex Adaptive System: The Importance of Convergence in a Multi-Layered Legal Order' (2014) 21 *Maastricht Journal of European and Comparative Law* 611, 612.

> Nowadays, law too has the features of a complex system. Law is no longer constructed at the national level. The notion of legal pluralism indicates that the national and subnational levels coexist with legal system being developed at the European and the international level. These legal systems interact, influence and counteract each other. The interweaving and interacting o modern legal orders have become a topic of particular interest to legal practitioners and academics alike. This multi-layered legal order results in a pluralism of norms, and legal professionals are called upon to create tools to help to apply these (partly) overlapping and concurring rules, principles and methods.

and how the scandal and the pursuit of justice may be impacted by social differences. This means asking, with respect to the legal systems employed in some aspect of unravelling the complex problem of child sexual abuse by Catholic clergy and the Church's response to it: (1) how does the legal system understand its project—what is the general theory underlying its operation? (2) how does that purpose impact how the particular problem of clerical child abuse is constructed? and (3) what other factors are relevant in producing a narrative of accountability?

While my work is primarily concerned with the potential for legal systems to hold organisations accountable for wrongdoing, this thesis builds on a foundation of scholarship in law, criminology, sociology, psychology, and theology. Using narratives and literature from diverse participants in legal systems, my purpose is to approach legal systems as social phenomena tasked with creating knowledge about the problem of child sexual abuse. By attending to the underlying logic of each legal system, the thesis compares not tangible results, but different ways of understanding social problems in law, different ways of approaching dispute resolution, and different purposes of legal process.

III. SUMMARY OF ARGUMENT AND OUTLINE OF THESIS

Sex abuse in the Catholic Church reveals an instance of a complex global organisation that has caused harm in ways that violate its own moral teachings, making the issue of accountability pressing, as well as highlighting the difficulty in holding organisations accountable for harms fairly attributable to them. By attending to law as an important mode of pursuing accountability for harm, this thesis illustrates how law defines the range of interests actors can pursue and the ways they can pursue them. Law is not, however, static, nor is it singular. The range of interests actors can pursue is a function of factors across what are understood as legal spaces within and among social spaces. As will be discussed in more detail in following chapters, considering multiple formal law systems at work in two specific places allows for analysis and comparison of systems with very different theoretical, doctrinal, and procedural structures, and the ways in which they function within social spaces. Among other things, the work shows how different aspects of law operate to promote the goals and interests of some stakeholders while constraining or working against others. By considering the aspects of different systems as they interact with legal questions arising out of similar sets of circumstances, the thesis highlights how the character of a legal system is constructed from elements of law, society, and the interaction between the two.

A study that looks to the character of legal systems provides a way to compare legal systems empirically, according to identified criteria, and to evaluate their capacity to provide substantive justice for participants. My theoretical and methodological frameworks will be discussed in the next chapter. The overall message of the research is hopeful. After starting from an acknowledgement about the difficulty of the problem of clerical child sexual abuse, it provides evidence that a better system is possible, and models for it are already operating within the common-law world.

As discussed, this problem is complex on multiple levels. Criticism for the Church, other social and political organizations is deservedly harsh,[85] but solutions are not simple. And it is this complexity and difficulty which helps to illuminate the potential in both bankruptcy and the Royal Commission, as later chapters will discuss in more detail.

The next chapter will introduce New Legal Realism as the guiding framework, the normative positioning of responsive law in this inquiry, and a situated socio-legal methodology for data collection, as well as explaining the methods used for such collection. Chapter 3 will explain the four aspects of law that serve as variables for a responsive law analysis. Chapter 4 will introduce the two Catholic dioceses that served as locations for study: Ballarat in Victoria, Australia, and Gallup in northern Arizona and New Mexico. The four aspects, purpose, doctrine, procedure, and logistics serve as entry points to a practical and useful internal and external understanding of legal systems. Taken together, these first four chapters of the thesis set up a study of how formal law and its social context work together through these aspects to shape the systems' capacity to understand harm and expand or limit the range of issues about which it is capable of being concerned.

In order to explain these dynamics, Chapters 5–8 will introduce each legal system, and how different aspects of the systems can work to advance or impede stakeholder interests. By

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[85] See, eg, Nicole Winfield, 'Why Top Vatican Cardinal Will Now Testify about Sex Abuse in Australia', *Christian Science Monitor* (online, 27 February 2016) <www.csmonitor.com/World/Europe/2016/0227/Why-top-Vatican-cardinal-will-now-testify-about-sex-abuse-in-Australia>, quoting Dr Cathy Kezelman, president of Adults Surviving Child Abuse;

> [Cardinal George Pell] is in a position of great power and a symbol of a hierarchy and a system of power which to many repeatedly failed them and continues to do so with perceived hollow apologies, lack on contrition but more so, no real accountability.

Katherine Gallagher, 'Pope's Attitude is Little Different Than His Predecessors', *New York Times Opinion Page* (Article, 14 October 2015) <https://www.nytimes.com/roomfordebate/2015/10/14/the-pope-and-the-sex-abuse-scandal?smid=tw-share>.

> 'Despite his public expressions of sympathy for victims, Pope Francis has doen very little to address the policies and practitices within the Vatican that created and let flourish a culture of sexual violence and cover-up.'

drawing on legal framing adopted by practitioners in pleadings and disciplinary scholarship, it brings out an insider understanding of how each system approaches the problem of clerical child sexual abuse. This perspective also allows for deeper exploration as to how each reflects Nonet and Selznick's framing of repressive, autonomous, and responsive law.

Chapters 5 and 6 examine what might be called 'first line' legal systems: canon law and civil litigation. By first line, I mean that within their respective legal orders, these are the systems to which people turn for an initial determination of people's rights and obligations under the law. They define what action constitutes a wrong, and the means by which wrongs might be addressed. Chapter 5 examines the Church's own legal system, canon law, and its perspective on clerical child sexual abuse. It reviews historical literature on canon law, its development and relationship with the Western Legal Tradition, and reviews canonist literature, aided by narratives of canonists, Church officials and other insiders to explain how the legal system constructs and gives meaning to a view of the problem. Chapter 6 considers civil litigation, how its rules and procedures are applied in cases involving child sexual abuse.

Chapters 7 and 8, respectively on Chapter 11 bankruptcy and the Royal Commission, introduce legal systems of last resort. These are systems to which stakeholders turn when the first line systems have not resolved the problems. Chapter 7, on the United States' system for corporate reorganisation, introduces dominant theories of bankruptcy, and in presenting the Diocesan Debtor cases, demonstrates how purposiveness can be constructed through multiple aspects of a legal system, and how multi-party dispute resolution can facilitate more comprehensive solutions. Chapter 8 considers a single royal commission in Australia that demonstrates how an intentional pursuit of goals of substantive justice can have real impact, even with limited authority resolve legal problems.

Chapters 5, 6, 7, and 8 analyse the legal systems through the perspective of responsive law, assessing whether they are best described as repressive, autonomous, or responsive law systems. This comparison highlights the degree to which legal systems can be responsive to stakeholder needs or to facilitate their pursuit of goals in dispute resolution processes By engaging in this comparison, we can also develop a perspective on how legal systems balance the needs and interests of stakeholders.

Chapter 9 concludes the analysis and considers what can be learned from comparing the four legal systems and their approaches to the problem of clerical child sexual abuse. It will consider how embeddedness of actors' interests can vary markedly between legal systems both in terms of degree and in the aspect of the legal system in which they are embedded — whether it is related to the system's purpose, doctrinal or procedural law, or some logistical

issue — and in terms of the ways in which actors can work to advance interests not so embedded. Understanding how aspects of legal systems can help or hinder stakeholders' interests, and the ways in which actors and the social worlds they inhabit shape and influence the legal systems themselves is a first step to comprehending effective reform.

CHAPTER TWO: THEORY, METHODOLOGY, AND METHODS

I. INTRODUCTION: NEW LEGAL REALISM, A SITUATED APPROACH, AND RESPONSIVE LAW

The problem of sexual abuse of children in institutional settings is studied across a number of academic disciplines. These related literatures, along with what Michael Guerzoni and Hannah Graham refer to as clerical collar crime exposés[86] and government-led investigations and inquiries, have produced a great deal of knowledge about patterns of abuse, cover-up, institutional failures, and the perspectives of victims, perpetrators, institutional leaders, and communities. There have been evaluations of political and legal responses resulting in suggestions for improvements for legal systems produced by criminologists, sociolegal scholars, lawyers, psychologists, and others. These include Kathy Daly's analysis of commissions of inquiry into institutional child abuse,[87] Guerzoni and Graham's critical discourse analysis of institutional responses by Catholic Church officials to clergy sexual abuse in Victoria, Australia,[88] Jodi Death's work on public inquiry as a mode of governing,[89] Kate Gleeson's investigation into institutional structures enabling abuse,[90] and many others. Institutional accountability for harm, including child sexual abuse, is also the subject of doctrinal legal scholarship, often making normative claims about law or proposing reforms.[91]

This literature makes clear that victim interests in accountability, compensation, healing, and vindication are often thwarted through the very systems they turn to for help. Outside of the doctrinal literature, however, there is little discussion of the legal reasoning or explanations for decisions and processes, and even less into fundamental assumptions or internal purposes of law and legal systems. The doctrinal literature, conversely, is focussed on legal remedies and potential reforms to existing law, leaving empirical methods to social scientists.[92] As will be discussed, Legal Realists argue that 'law in action' is just as, if not more, important than 'law on the books.' This thesis uses an approach grounded in New Legal Realism (NLR), following NLR's building on Legal Realism and its progeny. The analysis

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[86] Michael Andre Guerzoni and Hannah Graham, 'Catholic Church Responses to Clergy-Child Sexual Abuse and Mandatory Reporting Exemptions in Victoria, Australia: A Discursive Critique' (2015) 4(4) *International Journal for Crime, Justice and Social Democracy* 58.
[87] Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan Limited, 2014).
[88] Guerzoni and Graham (n86).
[89] Jodi Death, *Governing Child Abuse Voices and Victimisation: The Use of Public Inquiry into Child Sexual Abuse in Christian Institutions* (Routledge, 2018).
[90] Kate Gleeson. 'Exceptional Sexual Harms: The Catholic Church and Child Sexual Abuse Claims in Australia' (2018) 27(6) *Social & Legal Studies* 734.
[91] Marci Hamilton, 'The Barriers to a National Inquiry into Child Sexual Abuse in the United States' (2017) 74 *Child Abuse & Neglect* 107; Marci Hamilton, *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press, 2008).
[92] See, eg, Hamilton, 'The Barriers into a National Inquiry into Child Sexual Abuse in the United States' (n 91); Hamilton, *Justice Denied: What America Must Do to Protect Its Children* (n 91).

also draws on republican normative theories to compare the legal systems engaging with the problem of clerical child sexual abuse in order to analyse how doctrinal, practical, and theoretical aspects of these systems work to thwart or promote stakeholder interests. This chapter introduces NLR and responsive law, explains how a situated methodology furthers the analysis, and describes the methods used to gather and interpret data.

II. NLR AS A GUIDING METHODOLOGY

NLR is the newest chapter in a complex history of scholars seeking to understand the relationship between normative and empirical elements of law.[93] NLR scholars seek to understand law both normatively and empirically; to consider law and legal phenomena across theoretical and political boundaries; and to bring together different kinds of knowledge about the law.[94] The history of NLR and its relationship to other movements of legal and socio-legal scholarship, especially the twentieth-century American Legal Realism movement, the Law and Society movement, world-wide developments of sociology of law, Law and Economics, Empirical Legal Studies, and doctrinal legal scholarship are complex.[95]

> Hanoch Dagan and Roy Kreitner identify five distinctive features of NLR;
>
> (1) NLR is law centered—it carefully addresses both legal doctrine and legal institutions;
>
> (2) NLR is deeply concerned with translating social science and synthesizing its findings into law;
>
> (3) NLR is oriented bottom up; focusing on law on the ground rather than law in appellate cases or doctrinal treatises;
>
> (4) NLR scholars are often committed to constructive legal action;
>
> and finally, as a twenty-first-century school,
>
> (5) NLR is profoundly attuned to both the risks of parochialism and the proliferation of legal forms in an increasingly globalized environment.[96]

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[93] William Twining, 'Legal R/realism and Jurisprudence: Ten Theses' in Stewart Macaulay et al (eds), *The New Legal Realism* (Cambridge University Press, 2016) vol 1, 121; Victoria Nourse and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory' (2009) 95(1) *Cornell Law Review* 61; Hanoch Dagan, 'Normative Jurisprudence and Legal Realism' (2014) 64 *University of Toronto Law Journal* 442.

[94] Elizabeth Mertz, 'Introduction: New Legal Realism: Law and Social Science in the New Millennium' in Stewart Macaulay et al (eds) *The New Legal Realism* (Cambridge University Press, 2016) vol 1, 1.

[95] William Twining and Brian Tamanaha, for example, in sequential chapters of a recent compilation of New Legal Realist thought, reach different conclusions about whether sociolegal studies and other social science approaches to law should be considered an integral part of the study of law, or as a complimentary field existing alongside of law and jurisprudence.

[96] Hanoch Dagan and Roy Kreitner, 'The New Legal Realism and The Realist View of Law' (2018) 43 *Law & Social Inquiry* 528.

While it attends to legal doctrine and institutions, NLR looks to social science for empirical approaches to facilitate its bottom-up perspective, committing to the potential of law to improve human life, although aware of the challenges facing an increasingly globalised world with a wide variety of legal forms. William Twining describes NLR more by what it is not than what it is:

> What kind of 'ism' is NLR? It is fairly clear what it is not: (i) it is not a theory of or about law, nor does it assume a particular conception of law; (ii) it is not a philosophy of law; (iii) it is not an alternative or rival to other perspectives, such as natural law or moderate versions of positivism; (iv) it does not give a precise or specific meaning to the term 'R/realism'; (v) its orientation is empiricist in a broad sense, but it is open-ended about perspectives, methods, and focuses of attention. In particular, it is not confined to the study of adjudication (in a broad or narrow sense), and it encourages 'bottom up' (ground-level) standpoints, among others; (vi) it is not merely a continuation of classical American Legal Realism; (vii) it is not puristic about scientific rigor, but echoes Llewellyn's dictum that 'knowledge does not have to be scientific, in order to be useful and important.'[97]

Thus, among other things, NLR is a tradition that takes law seriously while maintaining a healthy scepticism towards s stated claims about providing justice.[98] Being sceptical can mean questioning whose voices are heard or not heard in law or legal proceedings — and claims that any given law or practice serves the common good.[99] The movement calls for rigorous empirical approaches using a wide range of methods to understand the lived experience of law.

As discussed in Chapter 1, there is sometimes a tendency among Law and Society scholars to discount legal reasoning, over-emphasizing some aspects of law over others.[100] Real law includes legal practice, and thus cannot be understood unless we include in our analysis the way legal professionals understand and work with law. NLR's mandate to take the law seriously means understanding its claims, investigating its doctrine and how it is interpreted and understood in context.[101] It matters what the law says – even as reading the text is not sufficient to ascertain what it means. Sida Liu explains that formal law should be seen as an independent variable in legal systems, and although power is also an important variable, it needs to be situated within 'formal dimensions of law in order to understand its

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[97] Twining (n 93)
[98] Gregory Shaffer, 'New Legal Realism and International Law' in Stewart Macaulay et al (eds) *The New Legal Realism* (Cambridge University Press, 2016) vol 2, 145.
[99] Gregory Shaffer, 'New Legal Realism's Rejoinder' (2015) 28 *Leiden Journal of International* Law 479.
[100] See also Frank B Cross, 'The New Legal Realism and Statutory Interpretation' (2013) 1 *The Theory and Practice of Legislation* 129.
[101] Ḥanokh Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press, 2013).

structural and processual limits'.[102] Alexandra Huneeus builds on Liu's insights, and demonstrates how '[e]mpirical studies informed of the law's content, and imbued with a sense of law's partial autonomy, can bring into view real-world legal dynamics social scientists might otherwise miss.'[103] The language of formal law is intertwined with its other aspects and broader social orders, and an NLR approach has the potential to shine light on those relationships.

NLR's social science roots reinforce the importance of taking theory and methodology seriously in empirical work on law. NLR constitutes a critique of a tendency, especially among law professors, to use empirical methods without adequately justifying or engaging with their methodological and epistemological foundations. Although a lot of discussion about NLR centres on its embrace of both qualitative and quantitative methods, Michael McCann argues that the real differences lie in the relationships among theorization, analytical premises, and empirical data — that NLR insists on more attention to theories and methodological assumptions.[104] Furthermore, NLR benefits from Law and Society traditions that call for attending to the needs and voices of the most vulnerable members of society.[105] As Brian Tamanaha notes, 'law cannot be abstracted from or understood without attention to surrounding social, economic, cultural, political, technological and ecological conditions.'[106] Legal phenomena, as organised systems for enforcement of norms, cannot be understood outside of the social contexts in which they exist. Indeed, those social contexts create and are created by legal systems. The ways in which this constitutive process happens is a critical aspect of law itself.

NLR's commitment to empiricism does not preclude it from being open to a range of methods, although like the traditions preceding it, many of its scholars use qualitative and ethnographic methods. Dagan and Kreitner argue that NLR's promise lies in this capacity to be flexible, that 'its promise of situated empiricism,' and 'combining attention to both the pertinent social science that can guide the law and the craft that typifies legal discourse and legal institutions.'[107] This 'situated empiricism' allows researchers to choose the methods that

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[102] Sida Liu, 'Law's Social Forms: A Powerless Approach to the Sociology of Law' (2015) 40(1) *Law & Social Inquiry* 1, 2–3.
[103] Alexandra Huneeus, 'Human Rights between Jurisprudence and Social Science' (2015)28(2) *Leiden Journal of International Law* 255, 256.
[104] Michael McCann, 'Preface to "The New Legal Realism, *Volumes I and II*"' in Stewart Macaulay et al (eds) *The New Legal Realism* (Cambridge University Press, 2016) xiii.
[105] Bryant Garth and Joyce Sterling. 1998. "From Legal Realism to Law and Society Scholarship: Reshaping the Law for the Last Stages of the Social Activist State." *Law & Society Review* 32: 409–472.
[106] Brian Z Tamanaha, 'Law's Evolving Emergent Phenomena: From Rules of Social Intercourse to Rule of Law Society' (Research Paper No 18-03-03, Washington University St Louis Legal Studies, 31 March 2018).
[107] Dagan and Kreitner, (n 96).

best help illuminate the co-constitutive relationships between legal and social orderings, which can be done by getting close to them, moving past the perceived dichotomy between law on the books and law in action to see a more fulsome picture of real law.

A situated methodology allows for a contextually appropriate means of evaluating aspects of legal systems and stakeholders' perspectives of them. Described by Donna Haraway as a feminist approach to knowledge production,[108] the idea of situated knowledges posits that learning and the production of knowledge is a social process.[109] Situated knowledges are rooted in their context, created through social relationships and lived experience.[110] Situated approaches to research have since expanded well beyond their roots in feminism and have been adapted by many scholars, particularly ethnographers and other qualitative researchers to get at foundational concerns about how social phenomena emerge and how we come to understand them.[111] These approaches are designed to capture and learn from situated knowledges produced in social realms, and require researchers to seek out information 'filtered and interpreted by someone whose understanding of the issues [can] be trusted' within a given community.[112]

In a chapter titled 'Pericles was a Plumber: Towards Resolving the Liberal and Vocational Dichotomy in Legal Education,' Australian legal scholar Craig Collins draws on Twining's discussion of whether law schools in common-law countries should see their role as primarily about developing theory or about helping students develop practical skills.[113] This dichotomy is linked to the one Calavita described between law in action and law on the books – they both ask whether law is best understood through its operations or its asserted normative goals. Collins argues that the dichotomy collapses when viewed from the perspective of practicing lawyers, that at its core, the practice of law is a means of producing situated knowledge about the real norms contained in legal systems, and therefore the

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[108] Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1998) 14(3) *Feminist Studies* 575.
[109] Alisdair Rogers, Noel Castree, and Rob Kitchin. 'Situated Knowledge,' *A Dictionary of Human Geography*, 2013, A Dictionary of Human Geography.
[110] Karen Evans, *Maintaining Community in the Information Age : The Importance of Trust, Place and Situated Knowledge* (New York: Palgrave Macmillan, 2004), 21.
[111] Milia Kurki,'Stretching Situated Knowledge: From Standpoint Epistemology to Cosmology and Back Again,' *Millennium - Journal of International Studies* 43, no. 3 (2015): 779-97.
[112] Evans, (n 110), 118.
[113] Craig Collins, 'Pericles was a Plumber: Towards Resolving the Liberal and Vocational Dichotomy in Legal Education,' Ian Morley and Mira Crouch (eds), *Knowledge as Value: Illumination through Critical Prisms*. 2008.

technical skills acquired through legal practice are necessary components to understanding real law.[114]

A situated approach to legal systems operating in Ballarat and Gallup should thus seek out situated kinds of knowledge about those systems from trustworthy relators – especially those professionals whose discourse informs the systems' operations. For this thesis, a situated approach requires being attuned to the status and position of actors and narrators, including that of the author, and to capture the important contextual distinctions and how actors, ideas, and social phenomena are entangled with legal developments. It means recognizing actors' subjective interests and desired outcomes as victims, accused perpetrators, dioceses, professionals, or other stakeholders vary, even as the legal systems available allow stakeholders to pursue or defend a limited range of interests. It means to be attuned to the social context and social role of each stakeholder as well as to the formal legal structures that give form to the range of choices actors have before them.

Attending to social context and stakeholder perspectives means accepting that the picture that emerges is constructed from subjectivities. Haraway's questions are rooted in debates about subjectivity and objectivity, and the purpose of objectivity in the production of knowledge.[115] Many feminists conclude that even if there is an objective reality, human understandings are always mediated by our subjectivity, and therefore, for purposes of studying human society and institutions, objectivity is approached by making subjectivity as transparent as possible. In this way, they deny that objectivity is a simple or positivistic measure of knowledge, asserting rather that knowledge is constructed from subjective, partial accounts. Accordingly, objectivity requires becoming closer—not farther—away from the focus of one's study.[116] Being attuned to questions of perspective enables the construction of a picture from a diversity of stakeholder perspectives. For purposes of this thesis, the perspectives and literature of participants in legal processes help to construct a landscape of legal systems.

The diversity of legal responses, actors' positioning, and outcomes in cases arising out of claims of clerical child sexual abuse is testament to the strength of contestation and argument within legal systems. Accordingly, methodologies that draw insight from a diverse range of perspectives and the outlines of contested spaces offers much to a study of legal

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[114] Ibid, 203.
[115] Ibid,
[116] Ibid; Sandra G Harding, *Whose Science? Whose Knowledge?: Thinking from Women's Lives* (Open University Press, 1991); Basberg Cecilie Neumann and Iver B Neumann, *Power, Culture and Situated Research Methodology: Autobiography, Field, Text* (Palgrave Macmillan, 2018).

systems in this context. Intersectional scholars call for research to be attuned to the operation of norms or biases relating to sex, gender, sexuality, race, class, religion, and other social categories of difference and marginalisation when collecting, analysing, and writing about data. By considering stakeholder perspectives situated within the larger context of intersecting identities, social patterns, and power structures, I seek to give the reader a means to navigate the subjectivities present in my account.

Situated methodologies allow researchers to navigate subjectivities by seeking out grounded, credible, perspectives on subjects of study.[117] This means the research must be open about how knowledge is produced, the positioning of narrators and observers, and recognise and seek to uncover a plurality of perspectives on a given topic.[118] Studying legal systems, in this case, required insight into the internal logic and practical knowledge of professionals working with them from a variety of stakeholder positions. For this study, I accomplished this through qualitative empirical research, traditional legal research, and literature reviews drawing on knowledge accumulated in other disciplines.

An intersectional sensibility and a situated approach[119] enhance the study of real law here by inviting consideration of how various axes of identity, including gender, race, age, sexuality, and social status have varied effects on people's lives, including their capacity or willingness to access justice systems, and success rates when they do. In structurally racist, patriarchal, and capitalist societies, it is unsurprising, albeit dispiriting, that people who identify as part of communities disfavoured in those societies often experience higher than average rates of victimization. It is important to understand and consider how intersecting axes of disadvantage shape the impacts of and social response to victimization on individual and community levels. Chapter 4 examines what we know about rates of abuse in Ballarat and Gallup and reflects on the ways in which identity shapes the options available to victims in those places. Identity also shapes the perspectives of professionals working in the space — including how they view victims, the Church, and their own roles. Plaintiffs' lawyers, Church representatives, and law enforcement professionals participating in this study understood and

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[117] Haraway, (n 108)
All Western cultural narratives about objectivity are allegories of the ideologies governing the relations of what we call mind and body, distance and responsibility. Feminist objectivity is about limited location and situated knowledge, not about transcendence and splitting of subject and object. It allows us to become answerable for what we learn how to see.

[118] Cecilie Basberg Neumann and Iver B Neumann, 'Pre-Field Autobiographic Situatedness, In-Field Situatedness, Post-Field Text Situatedness' in Cecilie Basberg Neumann and Iver B Neumann (eds), *Power, Culture and Situated Research Methodology: Autobiography, Field, Text* (Palgrave Macmillan, 2018) 13.

[119] Koen Leurs, 'Feminist Data Studies: Using Digital Methods for Ethical, Reflexive and Situated Socio-Cultural Research' (2017) 115(1) *Feminist Review* 130.

reflected on their work, their experiences, and those of their clients through lenses impacted by their own social positioning and their perspective on victim social positioning.

As victims seek legal redress for the harms they have suffered, therefore, it is important to understand how legal systems account for the differences, and the degree to which these systems are available to victims from different backgrounds and who have experienced victimhood in conjunction with other forms of social advantage or disadvantage. It is also important to recognise that this existing aspect of the social order is not invisible to its participants, though they may interpret and give meaning to it in different ways. Accordingly, in this thesis, I use a situated approach, which seeks not objectivity, but instead to understand how situated participants see and think about their circumstances.

NLR thus challenges scholars to consider empirically, normatively, and doctrinally serious approaches to understanding law and legal systems. This kind of research requires a particular attention to the needs and realities of vulnerable people, and research within the NLR project should incorporate vantages and perspectives frequently left out of dominant narratives.[120] NLR scholarship builds not just on the work of legal realists and the Law and Society movement, but like many within earlier movements, also seeks normative input from other critical traditions, such as feminist jurisprudence and Critical Race Theory scholarship. It considers not just the ways law functions in society, but works to be conscious of intersecting lines of difference and how inequity within social orders plays a role in the co-constitutive relationships between legal and social orderings.[121]

In the context of clerical child sexual abuse, there is a wealth of literature on some aspects of the lived experience of law. This thesis fills a gap in the literature by investigating how doctrinal, procedural, and logistical aspects of legal systems shape and are shaped by normative arguments and, in so doing, provides insight into the ways that domination can be built into the very structures of legal systems. In this way we see the porosity of the line between lived experience and formal law. Chapter 1 detailed some of the plethora of literature engaging with the gap between the desire for justice and the lived experience of victims of clerical child sexual abuse. This thesis aims to explain this gap through the logic and logistics

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[120] Dagan and Kreitner, (n 96).

[121] Gregory Scott Parks, 'Toward Critical Race Realism' (2008) 17 *Cornell Journal of Law and Public Policy* 683, 704 ("Just as Realism was the precursor to the Law and Society movement, itself a precursor to Critical Legal Studies, Critical Legal Studies was a precursor to Critical Race Theory."). For a discussion of how the feminist jurisprudence and critical race theory can be critiqued through an intersectional perspective, see Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *1989 University of Chicago Legal Forum* 139, 152; Mae C Quinn, 'Feminist Legal Realism' (2012) 35 *Harvard Journal of Law & Gender* 1, 56.

of legal systems, and in so doing, draw on responsive ideals to identify characteristics of systems that stand in the way of justice and those that have the potential to bridge gaps in justice.

A. *Responsive Law as a Normative Ideal for NLR*

Responsive law provides the backbone of this thesis, the normative core by which legal systems are evaluated and considered. Philip Selznick's work on responsive law, which is sometimes considered a normative framework for the earlier movement of legal realists,[122] is a useful place from which to initiate a normative evaluation of legal systems for a project within the NLR tradition. In line with the responsive law project, this thesis will consider the extent to which four legal systems can be described in terms of Philippe Nonet and Selznick's typologies of repressive, autonomous, and responsive law. But it will also build on responsive law theory in a way that reflects NLR and critical insights, including 'historical, contextual, and sociocultural approaches to understanding how law works,'[123] and the way that situating an organisation or issue in time and place allows for an appreciation of impacts of legal systems along lines of gender, race, class, sexuality, culture, citizenship status, and other forms of social difference.[124]

Nonet and Selznick identify responsive law as one of three typologies in *Law and Society in Transition: Toward Responsive Law*.[125] The four legal systems studied here will be described in terms of these typologies. Although Nonet and Selznick's work has been read to present repressive law, autonomous law, and responsive law as a type of progression, like Ian Ayres, John Braithwaite, and Malcom Feeley, I am sceptical of claims that the typologies describe evolutionary stages in the development of law.[126] In this thesis, the typologies will be used as descriptors, and though responsive law is described as normatively superior to the other two, there are no claims being made that would suggest these to be the only types of law that exist, or that all legal systems could be characterized as one of the three types. Feeley criticized Nonet and Selznick for making claims about the nature of law on the basis of

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[122] B Garth and J Sterling, 'From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State' (1998) 32(2) *Law & Society Review* 409.
[123] Heinz Klug and Sally Engle Merry, 'Introduction' in Stewart Macaulay et al (eds), *The New Legal Realism* (Cambridge University Press, 2016) vol 2, 1.
[124] See, eg, Antonio Pastrana, 'Navigating the Intersectional Imagination: Race, Sexuality, and Power' (PhD Thesis, The City University of New York, 2008).
[125] Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Octagon Books, 1978).
[126] Malcolm M Feeley, 'Law, Legitimacy, and Symbols: An Expanded View of Law and Society in Transition' (1979) 77 *Michigan Law Review* 899; Ian Ayres,and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992)

observations overly centred on legal systems in the Western tradition, and specifically those in the United States.[127] As the systems studied in this thesis are within the Western tradition, these typologies can help analyse them through a republican normative frame, but no claims are presented here about how to analyse non-Western legal systems, or systems that might not resemble any of repressive, autonomous, or responsive law.

Bringing Selznick's insights about the complexity of moral agency and the potential of participatory democracy to the problem of holding Catholic organisations accountable for patterns of domination require a different set of questions from what is currently asked in the literature with respect to clerical abuse and child sexual abuse. There is broad agreement that the Church bears moral accountability for sexual abuse of children, and that it should be held accountable.[128] The investigations brought by law enforcement around the world have detailed how Church officials and organisations have dominated and abused children and the adults they became. The depth of the harm and wrongful behaviour disclosed implicates the Church, but also the legal systems that fail to provide justice, as detailed in the literature discussed in Chapter 1. This thesis digs into how legal systems operate in this space, informing our understanding of why justice eludes so many.

A Selznickian view of the moral worth of organisations is contextual and suggests that we cannot judge the 'ends' of an institution's actions without also paying attention to its means, and vice versa. *Law and Society in Transition: Toward Responsive Law*'s typologies of law are useful as framing for empirical analysis of law and a set of characteristics by which legal systems can be compared which is broadly in line with NLR goals.[129] The theory of responsive law has been developed since Nonet and Selznick's book, including by Selznick himself in later work, refining but not replacing the framework for analysis. NLR's goals include a recognition of legal pluralism, an openness to new legal forms, and a strong critique of formalism. The alignment of goals is, perhaps, unsurprising given the history of thought on which NLR draws. As will be discussed in later chapters, the legally plural environments of Ballarat and Gallup each see peoples' subjectivity to two traditional legal systems and one relatively new legal form. By taking onboard the critique of formalism and noting how the newer legal systems each left certain aspects of formalism behind, this thesis lies in the heart of the NLR project. It pays close attention to the fundamental assumptions, internal tensions,

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[127] Feeley, (n 126).
[128] See, eg, Marci Hamilton 'We Can Take on the Catholic Church for Covering Up Child Sex Abuse. Here's How', *Fortune*, (Commentary, 16 August 2018) <http://fortune.com/2018/08/16/catholic-church-child-abuse-pennsylvania/>.
[129] Nonet and Selznick (n 125).

and processes that impact actors' capacity to pursue their interests through legal systems, as well as stakeholder interests, provides more context, as a richer story emerges of the ways in which legal systems shape and are shaped by stakeholder interests and actions.

Each of canon law, tort law, bankruptcy law, and the Royal Commission will be described by reference to typologies of law and as having a character that is primarily repressive, autonomous, or responsive. This means considering them through a number of 'historical, contextual, and sociocultural' approaches, including doctrinal ones.[130] By studying two dioceses, rather than just one, the research design allows for learning that is alive to the impact of space and context. Furthermore, by attending to underlying legal theories and procedure at work in legal systems, in addition to doctrinal analysis and empirical data, robust characterizations of the systems and responses to them are possible. The last chapter will consider the findings and will use insight from more recent work on responsive law and related concepts to consider how technical aspects of responsiveness – flexibility and purposiveness – only facilitate real responsiveness when they seek and give weight to the voices and interests of all stakeholders, especially those whose position is made weaker by other sources of domination.

1 *Repressive Law*

The prototypical repressive law regime can be identified in nascent sovereign states where Western law first emerged, as well as in totalitarian states, and in other legal institutions that use coercion and domination as primary tools to secure compliance and reinforce class boundaries and social mores. The fundamental purpose of a repressive law regime is order — keeping the peace. It does so largely through coercion in support of a social order that emphasises the moral legitimacy of its political leaders. Nonet and Selznick identify five specific characteristics of repressive law, which they discuss in detail in *Law and Society in Transition*. These characteristics are:

1) Law's identification with the state or dominant force and subordination to raison d'état or benefit to ruler.
2) Legal systems adopting the 'official perspective,' wherein 'conservation of authority is an overriding preoccupation of legal officialdom.'
3) 'Specialized agencies of control, such as the police, become independent centers of power; they are isolated from moderating social contexts and capable of resisting political authority.'
4) Legal systems legitimize and reinforce patterns of social subordination, producing a 'dual law' regime.
5) The criminal code reflects dominant social mores, 'legal moralism prevails.'[131]

[130] Klug and Merry (n 123).
[131] Nonet and Selznick (n 125).

Nonet and Selznick cite Charles Merriam's 'poverty of power' to explain the source of repressive law.[132] If the first goal of law is 'to keep the peace at all events and at any price,'[133] then repressive law may be the product of a regime with few options available to it other than coercion. This Hobbesian approach to social order has been the primary form of law throughout recorded human history, as few states or governing powers, until relatively recently, have had the strength to implement any other kind of governance. Other times, repressive law results from government overreach — introducing mechanisms intended to benefit the population, but without the capacity or inclination to do so in a way that meets the needs of the (nominally or honestly) intended beneficiaries.[134]

2 *Autonomous Law*

Autonomous law transforms legal systems into 'a resource for *taming* repression', and Nonet and Selznick identify autonomous law with 'what is celebrated as the "Rule of Law."'[135] The identification of autonomous law with rule of law and the institutional system that results in 'specialized, relatively autonomous legal institutions that claim a qualified supremacy within defined spheres of competence',[136] sets up the authors' critique of the rule of law as an institutional model.

As with repressive law, Nonet and Selznick identify characteristics of autonomous law, which are the following:

1) The separation of law and politics. The judiciary is declared to be independent, and a sharp line is draw between legislative and judicial functions.
2) The 'model of rules' is central to the legal order. Rules are used to hold officials accountable, but they also limit the creativity of legal institutions and prevent 'their intrusion into the political domain.'
3) An emphasis on procedure such that procedural regularity and fairness, rather than substantive justice 'are the first ends and the main competence of the legal order.'
4) "'Fidelity to law" is understood as strict obedience to the rules of positive law. Criticism of existing laws must be channelled through the political process.'[137]

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[132] Ibid, citing Charles Edward Merriam, *Political Power: Its Composition and Incidence* (Mc Graw-Hill, 1934).
[133] Ibid 33, citing Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press, 1922).
[134] Ibid.
Whatever its origins, whether in the weakness of the early state or in the dynamic of positive government, a gap between the tasks and the resources of government diminishes the capacity of law to recognize rights and moderate the exercise of power. The needs and commitments of the state acquire a special urgency and override competing interests. The hallmark of the law becomes its association with, and subordination to, the requirements of government.
[135] Ibid, 53.
[136] Ibid, referencing Max Rheinstein (ed), *Max Weber on Law in Economy and Society* (Harvard University Press, 1954) 224–321; Roberto M Unger, *Law in Modern Society* (New York: Free Press, 1976) 58.
[137] Ibid ,54.

Autonomous law is identified as the dominant form of legal order in states identifying with the rule of law. It is the result of what Nonet and Selznick identify as an historic bargain: procedural autonomy for legal institutions in exchange for substantive subordination of those institutions to political will. It facilitates a professional monopoly on legal proceedings and legitimated forms of justice. Courts remove themselves from the substantive formation of public policy in exchange for their capacity to hold political leaders and institutions to account to the law formed thereby. As Feeley identified, a focus on common-law jurisdictions, and especially on American constitutional law, limits the concept's utility as a grand theory of law, but their identification of characteristics is nonetheless useful for an analysis of specific legal systems. Nonet and Selznick describe autonomous law as taming repression by maintaining a commitment to law as 'an instrument of social control' based on rules rather than values,[138] and their insight that its focus on procedural rather than substantive justice limits its value as a normative order is powerful.

3 *Responsive Law*

Nonet and Selznick note how legal realists and sociologists of law call for legal institutions to provide more substantive justice through competence and a commitment to the public interest, and how critiques of those calls focus on the risk that an 'instrumentalist' approach might 'los[e] the ability to moderate the role of power in society [and regress] to repression.'[139] They argue that responsive law strives to resolve the tension between the 'passive opportunistic adaptation of legal institutions to the social and political environment' embodied by repressive law and the 'overriding preoccupation [with] the preservation of institutional integrity' that is characteristic of autonomous law.[140] While admitting it is a 'risky venture,' they argue that a sense of purpose and defined values can allow for critique of established practice while controlling administrative discretion.[141] '[R]esponsive law presumes that purpose can be made objective enough and authoritative enough to control adaptive rule making.'[142] It qualifies the legal profession's monopoly on legitimated justice by enabling a model in which stakeholders do not need to be lawyers to participate effectively.

[138] Ibid 63.
[139] Ibid 76.
[140] Ibid.
[141] Ibid 77
[142] Ibid.

Although responsive law is better described as an ideal, rather than an established order, as with repressive and autonomous law, Nonet and Selznick describe characteristics of a responsive legal order. These are:

1) Purpose is fundamental to legal reasoning, and legal developments rest on purpose, rather than rules.
2) Institutions' focus on purpose, rather than rules, relaxes law's claim to obedience and 'open[s] the possibility of a less rigid and more civil conception of public order'
3) '[L]egal advocacy takes on a political dimension, generating forces that help correct and change legal institutions but threaten to undermine institutional integrity.'
4) Responsive law, which puts pressure on legal institutions' authority and capacity to compel action, depends on the competence of those legal institutions—and so responsive law is possible when legal institutions are capable of securing compliance without resort to coercion. [143]

Responsive law and Nonet and Selznick's view of it will be discussed, evaluated, critiqued and the theory developed further throughout this thesis, and especially in the next section, and Chapters 5, 7, 8, and 9.

B. *Why Responsive Law Works for This NLR Project*

A deeper understanding of the concept of responsive law can be gained from Selznick's later work, especially his book, *The Moral Commonwealth: Social Theory and the Promise of Community*. Therein, Selznick argues for an approach to law that involves community participation, flexibility, in an approach that combines the 'avoidance of evil [with the] pursuit of the good.'[144] Selznick defines justice as something that 'affirms the moral worth of individuals; sustains autonomy and self-respect; domesticates authority; and establishes a framework for moral discourse on public matters.'[145] Responsive law is defined by a call for a sophisticated understanding of the complexity of social orders combined with a normative perspective opposed to domination of all sorts.

The Moral Commonwealth presents, among other things, a theory of institutions that declares they have moral agency, despite lacking the moral and ontological primacy of human beings. He argues that they can and should be held accountable for wrongdoing, and ultimately 'be judged by the contributions they make to personal and social well-being.'[146]

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[143] Ibid 78.
[144] Martin Krygier, 'Walls and Bridges: A Comment on Philip Selznick's "The Moral Commonwealth"' (1994) 82 *California Law Review* 473.
[145] Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press, 1992) 431.
[146] Ibid 243.

The moral agency of organisations, Selznick argues, exists separately from the moral agency of the individual actors operating within the organisation, although organisations can act only through individuals or technologies that ultimately depend on human action.[147] He argues that,

> every statement about the structure of an organization, or about an organizational process, should ideally be anchored in evidence about individual decisions and responses. In principle, we must be able to *locate* the collective phenomenon in what individuals want, do, and perceive. It does not follow, however, that the behavior of individuals is self-defined or that organizational characteristics are nothing more than the characteristics of individuals.[148]

Selznick's insight about the moral agency of organisations is more significant than simply recognizing that organisations are capable of acting and being held responsible for such actions. Few would argue that organisations should not be held accountable for harm, and the literature demonstrating moral failures of entities including governments, corporations, and religious institutions is broad. Marx, Foucault, Habermas, and many others have demonstrated how corporations, governments, and other institutions contribute to domination and coercion across social realms. Selznick does not dispute the harm of domination but calls for a more complex view of the nature of organisation, a more sophisticated understanding of their moral capacity and status. He criticises Marx and Foucault for an 'indifference to variation' between disciplines and organisational structures that are 'truly repressive' and 'socialization that forms, more or less effectively, competent and autonomous person.'[149] '[Foucault] cannot distinguish discipline that gives coherence to life and sustains autonomous projects from techniques of control that regiment, denude, and degrade.'[150] In other words, context matters, and 'we should ask: what *kinds* of purposive organisation are justified by the nature of the institution? what *kinds* of authority? what *kinds* of subordination?'[151]

Selznick does not dismiss critiques of authority and bureaucracy but argues for mechanisms that empower communities to respond to repressive power. He presents a vision of participatory democracy and shared decision-making that relies on 'sociologically grounded insights into how institutions actually operate' as well as a deep 'understanding of how difficult it is for principles of moral philosophy to penetrate [institutions] and to satisfy

[147] Ibid 242.
[148] Ibid 242.
[149] Ibid 257.
[150] Ibid.
[151] Ibid 263.

human needs.'[152] 'What matters most is effective belonging, which means, among other things, being taken seriously as a person and as a member.'[153] Ensuring that all those with interests in the outcome of a legal issue have the means to effectively and meaningfully participate in legal processes is a cornerstone of responsive law.

> The objective is not harmony based on powerlessness, it is the creation of a civic order, guided by ideals of community, within which the terms of cooperation can be negotiated and decisions can be monitored, criticized, and changed.[154]

The concept of responsive law is largely aligned with and associated with republican theory. Although Selznick himself may have identified as a Trotskyist when young, and later was branded by some a conservative, his concern with freedom and non-domination resembles that of self-proclaimed republicans like Philip Pettit and John Braithwaite. Republican ideals declaring 'freedom as non-domination' as a normative goal call for a kind of law or regulation that reduces the amount of domination and increases the quantum of freedom afforded people in the world.[155]

Republicans call for flexible, responsive strategies in response to misbehaviour, whether individual, corporate, or organisational.[156] This is largely echoed in Selznick's call for responsive law. As Martin Krygier notes, Selznick's

> theory is grounded in enduring and common features of the natures, circumstances, problems, and aspirations of individuals and communities, yet equally in the irreducible variety, particularity, and idiosyncracy that persons exhibit in living their lives.[157]

This is an argument for a redistribution of power for the benefit of victims of domination with the mechanism for such redistribution steeped in empirical understanding of the reality of how that domination is expressed.

NLR builds on previous theories by, among other things, moving away from its American roots by investigating other domestic settings as well as transnational and local contexts and by what Dagan and Kreitner call 'situated empiricism,' combining social science methods with legal craft.[158] A normative framework for NLR that builds on Selznick's ideal of responsive law should incorporate lessons from critical and intersectional scholarship. This

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[152] J H Skolnick, 'Legacies of Legal Realism: The Sociology of Criminal Law and Criminal Justice' (2012) 8 *Annual Review of Law and Social Science* 1.
[153] Selznick (n 145) 316.
[154] Selznick (n 145) 318.
[155] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press, 1997).
[156] John Braithwaite and Philip Pettit, *Not Just Desserts: A Republican Theory of Criminal Justice* (Oxford University Press, 1990).
[157] Martin Krygier, *Philip Selznick Ideals in the World* (Stanford Law Books, 2012).
[158] Dagan and Kreitner (n 96)

means research should attend to how domination and oppression relate to domains of race, class, gender, sexuality, and other social markers. Its normative framing requires an acknowledgement of how domination and oppression are often expressed through systemic inequity and call for empirical approaches that are constructed in ways that will help make such domination and oppression visible.

Just as NLR builds on earlier movements of legal empiricists, a normative framework for NLR is likely to resemble Selznick's view of responsive law. Krygier highlights Selznick's observations that organisational character can reinforce and adopt social hierarchies disadvantaging already disfavoured social groups, even when an organisation holds itself out as a democratizing force.[159] Krygier argues that Selznick's study of the Tennessee Valley Authority showing how it reinforced disadvantage of Black and tenant farmers to the advantage of wealthy white landowners suggests an awareness of patterns of domination and violence based on race. I do not argue that Selznick was not aware of racial oppression or its insidious effects, but that a more 'bottom up' approach to research will deepen and enrich responsive theory.[160] NLR's 'bottom up' approach builds from a more general call to oppose domination and requires that analyses pay close attention to how interventions interact with existing social arrangements, and the ways that different kinds of domination and oppression existing alongside each other can make different impacts across social groups. A normative framework for NLR, then is likely to build on Selznickian ideals and to further develop the theory of responsive law by a normative perspective that seeks to understand domination from the perspective of the oppressed.

III. METHODS

A. *Qualitative Methods*

Qualitative methods, including interviews, observation, and archival research, yielded rich data about professional and stakeholder perspectives on legal systems, the problem of child sexual abuse by Catholic priests and religious, and the contexts in which claims are brought. By describing the historical and social background of Ballarat and Gallup, relying on academic literature, archival research, and statements from participants, I help the reader put the problem of clerical sexual abuse and the involvement of legal systems into context. The significant social and cultural differences between the two dioceses serve as a way of deepening our understanding of the complexity of the problem and the ways in which legal

[159] Krygier, above (144) ch 3.
[160] Ibid.

systems operate. Just as the problem is constructed by legal systems, it is also socially constructed through the filter of the people and places it impacts. My purpose is to produce a broad and nuanced account of how legal systems operate in two real-life settings, paying attention to how social and normative orders existing alongside operative legal systems impact law and how legal systems construct legal problems from the events occurring in those places.[161]

1 *Observation*

Fieldwork was conducted between February 2015 and November 2017, with some follow-up conversations with interview participants, conversations with attendees at five public hearings of the Royal Commission and three public meetings held by dioceses in New Mexico or Arizona for the benefit of local people impacted by child sexual abuse. From February 2015 to December 2016, I carried out interviews in Australia. While I was primarily based in Canberra, I travelled to Sydney, Melbourne, and Ballarat as necessary to attend hearings and conduct interviews. There were breaks in this fieldwork so that I could complete research in New Mexico and Arizona, with travel around the United States for interviews or conferences (May-September 2015). I was also in Rome from September in October 2015 so that I could seek interviews with officials at the Vatican. In total, I attended, either in-person or online, nine public hearings of the Royal Commission, all of which involved multiple witnesses testifying over multiple days. I attended four of these hearings in person, and in break periods I spoke with lawyers and observers about the proceedings, their impressions of the witnesses and the officials, and their reasons for being there. I attempted to attend an auction held by a bankruptcy court in New Mexico but was denied entry. I attended an annual conference of the Survivors' Network of those Abused by Priests, and there met many Survivors, Advocates, and other stakeholders. Notes were taken during and after these events, which were then read and reread as a part of evaluating the data collected. After December 2016, I continued follow-up conversations initiated by participants and attended two public events in New Mexico in late 2017.

2 *Interviews*

Given the nature of this project, the potential sensitivity of the topic, and because I would be interviewing humans on their experiences, before I conducted any field work, I submitted an ethics application to the Human Research Ethics Committee at the Australian

[161] Monique L Snowden, 'Bettering Her Education and Widening Her Sphere: Betwixt and between Coeducational Experiences' (2011) 17 *Qualitative Inquiry* 930.

National University. After a full ethical review, my project was approved on 20 October 2014. Using a snowball method,[162] I contacted and interviewed professionals working on the problem of child sexual abuse in the Catholic Church in a number of capacities. These professionals included lawyers who represented victims, other lawyers who represented Church organisations, law enforcement officers, officials working in dioceses' child protection offices, Church representatives, and survivor advocates. I attended an annual meeting in Washington D.C. of the Survivors Network of those Abused by Priests in 2015. I attended hearings of the Royal Commission, interviewing professionals I met there, as well as professionals in the United States and Australia known for their public profile working with the Church or victims. Colleagues at the Australian National University introduced me to local officials working with or in local Catholic organisations, who, after my interviews of them, provided introductions to leaders and officials in Catholic organisations around the world. Of the more than 60 people within the Church to whom I was introduced in such a way, only 15 ultimately agreed to be interviewed formally. I reached out to plaintiffs' lawyers directly and found several who were happy to meet and speak with me.

Of the 28 interviews I conducted, 14 of my participants are Australian or work in Australia. 14 are American or work in the United States.[163] 7 were lawyers who represented victims of sexual abuse by clergy. 5 were priests (of these, 3 were current or former vicars general of dioceses, two were canonists). 10 were non-priests who worked in some capacity for Church organisations (3 church lawyers, and 7 who held positions related to child protection, responding to victims of child sexual abuse by priests, or responding to public inquiries about clerical child sexual abuse). 6 were stakeholders who I am broadly grouping together as Advocates (all have had personal or professional experiences that have led them to advocate publicly in support of victims and reform to political, legal, and organisational systems). Figure 2.1 lists the participants by profession.

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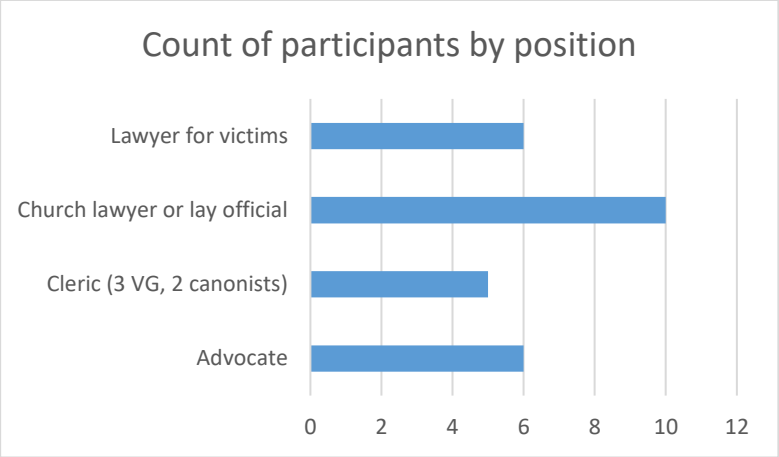
[162] See,eg, Marudan Sivagrunathan et al, 'Barriers and Facilitators Affecting Self-Disclosure among Male Survivors of Child Sexual Abuse: The Service Providers' Perspective' (2018) 88 *Child Abuse & Neglect* 455, citing Rosemarie Streeton, Mary Cooke and Jackie Campbell, 'Researching the Researchers: Using a Snowballing Technique,' (2004) 12 *Nurse Researcher* 35.

[163] Two participants worked for the Vatican in a capacity relevant to the subject of this thesis. Although most of my participants consented to be quoted and named, in order to protect the anonymity of those who requested it, I have anonymized the participants as much as possible, although in some circumstances I will mention attributes of a participant's professional or personal experience relevant to the point, but will endeavour to prevent the easy identification of any individual, and especially those participants who preferred to be anonymous.

Figure 2.1, Participants by Profession



Interviews were mostly unstructured, with some questions prepared beforehand regarding the participants' professional experience relating to child sexual abuse by Catholic clerics, which allowed me to confirm their credibility as reliable narrators of situated knowledge. Interviews sought to elicit participants' perspectives on legal systems' interactions with these cases, and their opinions on the problem of clerical abuse of children, the relevant legal systems, or the Church's response to victims. I relied on social interaction between myself and participants, such that 'spontaneous generation of questions in the natural flow of an interaction' enabled me to follow up on revealing comments, particularities of place or perspective, or information that was new to me. I made clear that my interest was in the legal systems themselves, and as well as policies and procedures of state and Church organisations, and that I was not seeking confidential information or details of individual allegations of abuse. In a number of interviews, participants referenced individual victims only when the victim had previously discussed the story in public, and would name perpetrators who had been convicted or otherwise recognized as accused in public statements. Many of the participants were concerned about being identified in this thesis, and in order to preserve the privacy of those who requested it, all participants will be identified by their profession, and not by name.

Most of my interviews were with people who are publicly known to have worked on cases involving allegations of child sexual abuse by clergy, sometimes in multiple capacities, as many advocates for victims are themselves victims or family members of victims. I was able to find and familiarize myself with most of my participants' public statements, biographical details, and other relevant information before speaking with them. Most of my interviews can be considered elite interviews, as that term is used in literature on

interviewing.[164] Adrianna Kezar defines a transformational elite interview by reference to models of elite interviewing based in conflict, where the interviewer seeks to expose the interviewee or entity represented by the interviewee for some bad act, or ethnography, where the interviewer is seeking only to collect data but not change any part of the subject studied. She presents and describes an approach more in line with feminist and narrative approaches, one which challenges interviewers to be open to transforming systems of power or the perspectives of those they interview when appropriate.[165]

Kezar describes transformational elite interviewing as a way to interview elites in light of principles of,

> (a) commitment and engagement, (b) mutual trust, (c) reflexivity, (d) mutuality, (e) egalitarianism, (f) empathy and ethic of care, and (g) transformation through consciousness raising, advocacy, and demystification.[166]

These principles require awareness and thoughtfulness about the power dynamics, interests, and other structures at play. Some of these goals, such as transformation, advocacy, and demystification were not part of the project here. However, many of the principles were useful, and I sought to be aware and thoughtful about commitment, trust, reflexivity, mutuality, egalitarianism, and empathy in my research.

(a) Commitment, Trust, and Reflexivity

Commitment and engagement are demonstrated through researching participants' backgrounds and public positions and through attempts to develop deeper or ongoing relationships with interview subjects.[167] I researched each of my participants, to the extent possible, online, looking for public statements, letters expressing opinions, and professional profile. With some of my interview subjects, I have developed or maintained ongoing relationships ranging from occasional e-mails on issues related to child sexual abuse to personal friendships. Of course, this kind of relationship was not possible with all of my subjects. I had already been friends with one of these, a lawyer representing many victims of child sexual abuse with claims against the Church, since we had served together on an advisory board of a non-profit organisation in Los Angeles. I interviewed her for this project and have had multiple long and illuminating conversations with her about the problem of

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[164] Adrianna Kezar, 'Transformational Elite Interviews: Principles and Problems' (2003) 9 *Qualitative Inquiry* 395, citing Robert King Merton and Marjorie Fiske Lowenthal, *The Focused Interview: A Manual of Problems and Procedures* (Free Press, 1956); Anna Boucher, 'Power in Elite Interviewing: Lessons from Feminist Studies for Political Science' (2017) 62 *Women's Studies International Forum* 99.
[165] Ibid.
[166] Ibid at 400.
[167] Ibid.

child sexual abuse, legal issues arising in cases of child sexual abuse brought against religious and community organisations generally and Catholic organisations specifically.

I have also developed a relationship with a local journalist in Gallup who sends me the stories she writes about the topic in the local newspaper, alerts me to issues with the diocese, and meets with me when I am in the area. I similarly developed a relationship with a Church official in Australia, a leader in a Church office of child protection, with whom I would occasionally have coffee and discuss the news of the day related to the abuse scandal. I have exchanged emails with a several of the other lawyers, priests, Church officials, and other interview subjects since interviewing them. Most of my participants, however, were very busy people and developing ongoing relationships did not happen.

Even for those participants with whom I did not establish an ongoing relationship, I sought to ground the interview in mutual respect and to create an atmosphere of mutual trust and to reflect on shared commitments to normative goals.[168] I did this by trying to develop a rapport with each participant, typically by finding something that I had in common with the participant. With Catholic officials I referred to my own Christian faith and interest in religion and religious studies. With participants who are lawyers I would introduce myself with a brief discussion of my background as a practicing lawyer and how my expertise in bankruptcy law led to this study. To officials with the Church, I explained how my interest was in the legal systems used to address the problem of child sexual abuse rather than the abuse itself, and reassured participants that my study was not intended to uncover or make allegations about wrongdoing or to reveal otherwise confidential information. I assured those participants who asked not to be identified that I would both refrain from identifying them and also, where possible, will refrain from identifying by name even those participants who agreed to be named in an effort to ensure anonymity for those who want it.

I often felt uncomfortable about this kind of relationship or rapport building in interviews. I listened to the recordings countless times afterwards and grimaced every time I hear myself bring up, again, that I grew up going to a Presbyterian church across the street from a parish in the Gallup Diocese. I rolled my eyes when I hear myself tell lawyers that I used to practice or reference a mutual acquaintance. The impression that I meant to give to participants was that they could trust me, that I was inclined to believe what they had to say, was open to their point of view, and might agree with them on issues related to the legal proceedings we discuss.

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[168] See Charles L Briggs, *Learning How to Ask: A Socioloinguistic Appraisal of the Role of the Interview in Social Science Research* (Cambridge University Press, 1986) 104.

The discomfort comes from a sense that I have conveyed a misleading impression. By being selective about which of my opinions I expressed and how I presented myself, I was not completely transparent with participants. This is especially true of my interviews of Church officials or others responsible for the Church response. But the purpose of interviewing is to gather data about the interviewee's perspective, not to share my own. Especially with the higher-ranking officials and prominent lawyers, I listen to the recordings, and I did not lie at any point. I was, however, very careful about when and how I would ask certain questions, which of my opinions I would discuss or reveal, and how I presented myself. Although my discomfort with the trust-building approach stems from a sense that I was not forthcoming with participants, by presenting myself as having an open mind and then really listening to participants with as much sympathy as I could muster, I have been able to develop a more nuanced perspective than I held before beginning this study. This approach was not always successful, and several Church officials or Church lawyers, were suspicious of me and my motives. Three of these participants, for example, agreed to be interviewed but not recorded. I tried, with no success, to get bishops to actually sit down for a formal interview with me.

Although I may have felt that I was conveying a misleading impression, I am and was open to understanding the perspectives of those with whom I disagree and have found that confrontation is not always the best way to really understand what others are saying. By keeping my positions to myself, I gave interviewees space to tell me their views in their own words. In my experience, challenging questioning can inhibit people's ability to explain their perspectives, leading to less, rather than more, understanding. Issues become points of contention, and often there is more concern with defending against criticism than explaining one's underlying reasoning. Further, because my participants frequently spoke to the media or otherwise made their responses to criticisms or other controversial actions public, I already had access to responses to questions phrased critically. By seeking to draw out my participants' views I want to understand how they are framed outside of known issues of conflict. I have found that being careful to present myself as a potential ally to participants allowed for new insight.

For example, Chapter 5, on canon law, was made possible because, in an interview with a canonist, I was open to a lesson on canon law, canonist literature, and to the idea that critics might have misinterpreted it. I brought up well-known critics of how canon law has been applied with respect to child sexual abuse and asked for help in understanding how canonists would respond. The canonist's reaction to the critic was largely defensive, and

dismissive of the author.[169] Rather than ask for a point by point refutation of the author, by asking the canonist to refer me to more informed sources and literature on the topic, I was able to reassure him that, even as a non-Catholic and with little previous experience interpreting canon law, I was open to learning and have a great deal of respect for the discipline. Asking for his help rather than his response to criticism was incredibly productive for this thesis. Without his introduction to canon law as a discipline, and his explanations of basic concepts that I otherwise would have struggled to understand, I would have struggled to trace the history and purpose of canon law relevant to child sexual abuse on its own terms, which has been largely absent in the secular literature. I hope that he and other canonists find my chapter on the subject informed and respectful of a discipline and discourse to which I am new.

(b) Power, Mutuality, Egalitarianism, and Empathy

One of the key differences between elite and other kinds of interviews is the relative power of the interviewee. Elite interviewees are elites because their professional and social positions mean the individuals having more ability than the average person to ensure his or her needs and goals are met.[170] A number of the people I interviewed would likely object to being described as elites. I suspect none of the women named as officials in charge of diocesan efforts to respond to victims or prevent future abuse with whom I spoke would consider themselves elites in terms of their level of influence or power. Few, if any, of the non-lawyer victims' advocates I have interviewed or met would consider themselves elites. Many of the lawyers and other officials might similarly deny such a classification. Individuals' self-perceptions of their own power or status as elite do not always align, however, with how they are perceived by others.[171] Despite the potential discomfort some participants might have with the term elite, all of my interviews fit into a broad definition of elite through their position, profession, or community status.

Navigating the relative power of the interviewee and interviewer depends on the circumstances of each interview, and the data collected through this process must be analysed and understood in light of the dynamics of power present in the interview. This requires, of the researcher, an understanding of how she is perceived, and how that might differ from her own perception of herself.[172]

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[169] Interview with canonist on file with author.
[170] Boucher (n 164).
[171] Patricia Pliner, Kirk R Blankstein and Irwin M Spigel (eds), *Perception of Emotion in Self and Others* (Springer US, 1979).
[172] Boucher (n 164).

As a white American woman in my thirties, from a modest family background but with experience working as a lawyer at high-powered law firms in the United States and a PhD candidate at the Australian National University, I present and appear to others in ways that signal different things about my own social status. When interviewing the highest ranking of my participants, I presented myself in ways that recalled my previous work as a lawyer. I emphasised professional connections in conversations; dressed in chic, well-maintained clothing; and interacted with interviewees in ways that was respectful but signalled my claim to equal social status. With officials in rural areas, or lower-ranking officials that I suspected would not be comfortable being called elites, I did not present myself as being a part of an elite social class. Rather, I emphasized my own background in rural Arizona; my status as a student; or personal preference for informal, frank, and friendly communication. In doing so, in some ways I sought to mirror the ways that interviewees presented themselves, to seem like a person with whom interviewees could relate, trust, and who would be likely to listen sympathetically to their point of view.

As with the ways in which I sought participants' trust by signalling commonality with them, this signalling discomfited me but, on reflection, I believe that it was both honest and useful. I never presented myself in a way that suggested anything that is untrue, and the formality of my dress and demeanour also reflected the need to mirror the formality, or lack of formality, of the interviewees' offices. By emphasising certain aspects of myself in different interviews I was able to shift the power dynamics in ways that I believe facilitated frank and meaningful conversation. Sometimes that meant equalizing the power dynamics between the interviewee and myself by asking relatively challenging questions, or otherwise engaging in meaningful dialogue with an elite who might not be used to being questioned in such a way.[173] In other cases, where the interviewee may not have seen him or herself as particularly elite or powerful, I would work to convey my own respect for the individual and otherwise to ensure that the interviewee did not feel as though I was claiming a social status higher than his or her own. Kezar described this kind of levelling of social status as a way to make interviews as egalitarian as possible, but my interest was not necessarily about making claims about social standing. Rather, by emphasizing aspects of my person that placed me in a social class that resembled that of interviewees, I sought to put interviewees at ease — to speak to me not as though I were a journalist, but a colleague looking to evaluate and ultimately improve systems that impact us all.

[173] Kezar (n 164) 405.

3 *Archival Research*

Much of the data on which this thesis relies comes from archival research. The Royal Commission has made public a trove of data, records, transcripts, communications, and other documents. Every public hearing was transcribed and made available, as have records from schools, churches, insurance companies, and legal proceedings dating back decades. This trove is available through the Royal Commission's website.[174] Documents filed in legal proceedings, including bankruptcy proceedings in the United States are available to the public. Documents in federal courts are available online through a court website. Research for this thesis included hundreds of hours of reading transcripts of hearings, pleadings and other arguments made on behalf of one or more stakeholder or interest group, the Commission's interim and final reports, and reviewing the documents submitted as evidence.

As will be discussed in more detail in Chapters 4 and 8, the Royal Commission was thorough, and its power of subpoena resulted in an incredible amount of testimony, witness statements, records, and other evidence. The team of investigators, lawyers, and analysts that worked to assemble the evidence and contribute to reports of the Commission's findings meant that I have far more archival evidence available to me about Ballarat than I do for Gallup. I have relied on evidence and reports made public by the Royal Commission for a large part of my research on Ballarat.

Although the diocese of Gallup was forced to disclose many financial records through its bankruptcy case, many of the records victims were most interested in were not made available publicly. Even victims in Gallup were only allowed to read, and not retain copies of, Church records relative to their claims in lawyers' offices. Although I have spent much more time in Gallup, have deeper connections with communities and individuals in the diocese, and interviewed more people connected with the diocese, I have far less data about the diocese of Gallup than I do for Ballarat. The story of Gallup, therefore, is less well resourced, and often relies on the perspective of a single narrator. On the other hand, the Diocese of Gallup and the region is longer, and there is more academic literature on the history and social orders that exist in the areas of Arizona and New Mexico that form the diocese. The comprehensive research conducted by the Royal Commission means there is significantly more direct

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[174] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Document Library', Royal Commission into Institutional Responses to Child Sexual Abuse (Web Page) <https://www.childabuseroyalcommission.gov.au/document-library>.

information about events and decision-making specifically relevant to child sexual abuse within the diocese of Ballarat. The sites will be discussed in more detail in Chapter 4.

B. *Legal Methods*

Legal methods, though they are not generally understood to produce data in the same way that the qualitative methods described above do, represent a great deal of the research supporting this thesis. Practicing lawyers, at least those in the common law tradition, spend considerable time refining their methods of legal research and analysis, by honing skills of doctrinal analysis and by adapting or explaining methods borrowed from or used by other disciplines to provide credible support for positions taken in scholarship or legal practice. They tend spend little time thinking about ontology, epistemology, or methodology.[175] Rather, the legal method is the key to disciplinary knowledge — part of the grab-bag of skills associated with 'thinking like a lawyer'. The doctrinal method is qualitative and idiosyncratic and, especially in the courts and in practice, the outcomes are often limited to the specific facts of the case.[176]

Law is defined not just by statutes and rules promulgated by the state, but by the method by which legal decisions are made and the relevant space and time — including social and political situations. In common law systems, precedent is authoritative, forming a kind of judge-made law. Canon law is cognizant of its own deference to divine law and confines its authority to what it calls secular realms. In all legal systems, good legal analysis requires an understanding of more than just the written law. For purposes of this study, the relevant aspects of legal systems are those that a lawyer would need to know in order to represent a client: (1) the general theory of a legal system — the kinds of problems it is designed to address and the system's role in the larger social order (2) relevant doctrinal law — what, if anything, governs decision makers' approach to the problem (3) procedural law — how cases are brought and what procedural rules might be relevant in these cases and (4) logistics or practicalities — issues such as courthouse location and idiosyncrasies, judges' preferences, how to use online court systems, and other logistical issues required to participate effectively in legal systems.

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[175] See, eg, I Kroeze, 'Legal Research Methodology and the Dream of Interdisciplinary' (2013) 16 *Potchefstroome Elektroniese Regsblad* 35, 65.

[176] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review* 130.

> Legal researchers have not been in the practice of describing their methodologies even within their academic work. In the past, few PhD theses have provided a separate description detailing the extent of the method.

Legal methods are ways of using legal principles, statutes, case law, and other sources to make persuasive arguments. Doctrinal law generally requires a practitioner to act in accordance with a belief that law exists, that the power tribunals have to hear and decide cases and disputes is legitimate, and that the task of the courts is to determine the correct application of the law. In this thesis, I use legal methods to understand the arguments presented on behalf of litigants in cases within all four legal systems.

A. Data Analysis

With data taking the form of observations, interviews, documents from archives, relevant literatures, and legal research, analysis must account for the heterogeneity of those sources. After transcribing the interviews, reviewing those transcripts and my own notes and relevant archival data, the collection of heterogeneous data was read and re-read, with a focus on the ways that diverse sources can shed light on each other, fill in gaps, or present different perspectives on events. Each source was read with a mind to speakers' positionality. Positionality means far more than just whether they worked on behalf of the Church or victims, or their formal role, though all of these are highly relevant. They are also people who live in a place in time.

Although all of the sources were expressed in English (except for some resources on canon law, which were translated from Latin, Italian, or French), each reflects the discourse of its own place, time, and reflect the multiple perspectives of the utterer. [177] Participants' utterances, the transcripts of hearings, and other forms of data were understood as partly a function of the social worlds in which the various speakers and writers live. Statements cannot be separated from their context. Utterances are made in response to questions by a researcher, to a question before a tribunal, in a written filing, in an opinion piece, or other utterance or document. Thus, for example, the form of questioning employed by counsel at the Royal Commission was understood in light of traditional forms of examination and cross-examination, making clear counsels' own perspectives with respect to who was a friendly or hostile witness.

Psychologist Kumar Ravi Priya explains that Kathy Charmaz's constructivist grounded theory approach lends itself to 'processes of coding, constant comparison, memo writing, and theoretical sampling and theoretical saturation to unravel the nuances of human

[177] See, eg Judith T Irvine, 'Commentary: Knots and Tears in the Interdiscursive Fabric' (2005) 15(1) *Journal of Linguistic Anthropology* 72; Richard Bauman, 'Commentary: Indirect Indexicality, Identity, Performance' (2005) 15(1) *Journal of Linguistic Anthropology* 145.

experiences or worldviews within their relational, cultural and socio-political contexts.'[178] Following Christine Parker's method of 'iterated adjustment' between the explanatory and normative,[179] after collecting and closely reviewing data, I used it to write memos describing and articulating interpretive lenses that could explain emerging patterns. Memo writing furthered the pragmatic search for patterns within the heterogeneous data I collected, and allowed for reflexivity about my own positioning and perspectives while testing the strength of patterns I saw emerge from the data.[180] I also used memos to frame the patterns I saw in normative terms, trying out normative theories to see if they were useful in explaining the phenomena I witnessed, read about, or heard from participants. John Braithwaite explains how integrating normative theory with explanatory theory can be helpful for research to be useful in the development of 'any morally acceptable policy project' for addressing contemporary regulatory challenges.[181] Although these techniques are associated with grounded theory, in this instance, the patterns led me to an existing theory – responsive law. In this case, the typologies of repressive, autonomous, and responsive law described by Nonet and Selznick furthered the explanatory project by providing a normative frame for characteristics of legal systems in Western legal traditions.

IV. CONCLUSION

This selection of case studies and sites draws on NLR's is unique capacity to unveil the range of possibilities of law and the complexity of legal problems. While known for capturing the lived experiences of law, NLR also takes law on the books seriously. Furthermore, law on the books in NLR's vision is about more than just doctrine, or even doctrine and procedure. Through NLR, the concept of 'real law' can be problematised to make visible the mutually constitutive relationship between law and society. As Richard Lempert summarises, '[t]his endeavour requires an understanding of law both as it is

[178] Kumar Ravi Priya, 'Using Constructivist Grounded Theory Methodology: Studying Suffering and Healing as a Case Example,' Antony Bryant, and Kathy Charmaz (eds) *The SAGE Handbook of Current Developments in Grounded Theory* (SAGE Publications, 2019).
[179] Parker, Christine, *Just Lawyers Regulation and Access to Justice* (Oxford Socio-legal Studies. Oxford; New York: Oxford University Press, 1999).
[180] Vivian B. Martin, 'Using Popular and Academic Literature as Data for Formal Grounded Theory,' Antony Bryant, and Kathy Charmaz (eds) *The SAGE Handbook of Current Developments in Grounded Theory* (SAGE Publications, 2019).
[181] John Braithwaite. 'The New Regulatory State and the Transformation of Criminology,' (2000) 40(2) *Crimin*, 222, 235.

internally shaped and understood and as it interacts with and is affected by the many forces that shape social life.'[182]

As discussed above, the centrality of empiricism in legal studies can be traced from early legal realists through Selznick and the law and society movement to NLR.[183] Selznick's emphasis on using empiricism to inform normative theory is accordingly well-aligned with the traditions from which NLR draws. Haraway's situated approach calls for researchers to seek objectivity and perspective by being closer to – not distant from – our subjects and objects of inquiry. Thus situating ourselves in legal craft brings us closer to machinations of law itself. Law's contested spaces and reliance on change mean that concerns with objectivity about law are inapposite.[184] Legal scholars do not generally argue that they produce an objective truth, and even the most positivist legal scholarship, doctrinal restatements, acknowledge unsettled areas of law, and take positions about 'preferred' or 'better' practices.[185] This study seeks to account for the ways in which contested spaces and opposing interests contributes to the shaping of legal systems and their relationships to communities, institutions, and individuals — while reflecting the scepticism of objectivity that law requires of its practitioners and scholars.

Chapter 3, next, will pick up from the introduction to responsive law here and discuss what 'aspects' of legal systems are and how an inquiry into the four aspects of the legal systems studied here can help to describe them as fitting typologies of repressive, autonomous, and responsive law. The point is not that there are only four aspects that are relevant to the character of legal systems. There are many aspects of law. But these four help

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[182] Richard Lempert, 'Calavita's Invitation to Law & Society: Introduction to the Symposium' (2014) 39 Law & Soc. Inquiry 204.

[183] See, eg, Dagan and Kreitner (n 96).

> NLR . . . is a species of empirical legal studies. Although it is promoted, and rightly so, as a 'big tent', it has five distinctive features: (1) NLR is law centered—it carefully addresses both legal doctrine and legal institutions; (2) NLR is deeply concerned with translating social science and synthesizing its findings into law; (3) NLR is oriented bottom up; focusing on law on the ground rather than law in appellate cases or doctrinal treatises; (4) NLR scholars are often committed to constructive legal action; and finally, as a twenty-first-century school, (5) NLR is profoundly attuned to both the risks of parochialism and the proliferation of legal forms in an increasingly globalized environment
>
> These features of NLR further the legal realist legacy. . . in at least two ways. The first, and more obvious one, is by carrying its promise of situated empiricism. NLR, moreover, presents compelling work indicating the power of combining attention to both the pertinent social science that can guide the law and the craft that typifies legal discourse and legal institutions. Whereas many other descendants of legal realism offer either an external, social scientific perspective on law, or an internal craft-based alternative, NLR (at its best) offers the winning combination. [citations omitted].

[184] Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015) 31.

[185] Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63 *Journal of Legal Education* 65.

show how the border between law on the books and a lived experience of law is blurred and porous – and how different perspectives of that relationship can help us to develop a broader understanding of legal systems. The character of a legal system is determined by its multiple aspects – not just a gap between real and formal law. To the extent Selznick describes legal realism's values, realism's descendent NLR may add to republicanism calls for a doctrinally informed empiricism and a reclaiming of objectivity characteristic of a situated approach.

CHAPTER THREE: ASPECTS OF LEGAL SYSTEMS

I. ASPECTS OF LEGAL SYSTEMS INTRODUCTION

This chapter explains in more detail what I mean by 'aspects' of legal systems and how the aspects chosen for this study serve as entry points to explore both the hows and whys of legal outcomes. As explained in Chapter 2, attending to multiple aspects of law as it is constructed, practiced, and lived allows for a perspective that looks beyond distinctions between law in action and law on the books and instead recognises the porous, co-constitutive nature of legal and social orders. Here, I argue that all aspects of legal systems are real law, even as they may be more or less visible depending on one's perspective.

Legal theories, alongside doctrine, procedure, and logistics are the aspects I use to evaluate the legal systems confronting the problem of clerical child sexual abuse. Each of these 'aspects' is a way of understanding law — theory relates to law's role in the social order and the normative or social goals embedded in legal systems, doctrine is its formal reasoning, procedure is the rules by which participants must adhere in order for the doctrinal issues to be considered, and logistics captures the often-unwritten rules, social realities, and physical or practical phenomena that impact stakeholders' access of legal systems. An analysis of these aspects can provide a great deal of insight into systems' capacity to understand harm and expand or limit the range of issues about which it is capable of being concerned.

Much of the literature on legal pluralism considers the interactions between and social constructions of legal systems within legally plural spaces. As discussed in Chapter 2, this study is a bit different. By comparing aspects of legal systems rather than tracing relationships and interactions between them, this thesis considers the internal workings of legal systems within a legally plural space. The result is not an account of what participants think of the systems, or of the interactions between them but a comparison of how the systems themselves work through problems arising from similar sets of facts.

With historical and social backdrop that Gallup and Ballarat provide, the empirical core of the thesis comprises four case studies of legal systems: (1) Catholic canon law, (2) tort law in Australia and the United States, (3) American bankruptcy law, and (4) Australian royal commissions. The analytical framework in each empirical chapter seeks to describe the legal systems through different aspects of the law: theoretical, doctrinal, procedural, and logistical. My inquiry is into how each of these systems approaches cases arising out of clerical sexual abuse, and I seek to provide descriptions of the underlying legal theories, doctrine, procedure,

and practical realities of each, and thus determine whether the systems can be described in terms of Nonet and Selznick's typology of repressive, autonomous, or responsive law.

The next sections of this chapter will describe what each aspect is and reflect on how it furthers the responsive law analysis. I do not argue that these are the only important aspects of law, nor that these particular aspects are relevant to all legal systems, rather these are some aspects that, in this context, help describe certain (Western) legal systems as having characters that are largely repressive, autonomous, or responsive. A legal system's place in the social order, the ideal of justice it represents, the particulars of the law and the reasons for the rules, the machinations of the systems, and the larger social and physical realms in which they operate, all help demonstrate a system's character. With respect to legal systems' theories of law, I will draw on theorists in each field to understand the broad purpose of legal proceedings and the project of the legal systems. By 'broad purpose,' I mean the larger purpose of the legal system and the particular theories of harm or basis for legal action in cases arising out of child sexual abuse. This aspect of law will be discussed in more detail in Section II, below. Section III will discuss legal doctrine, especially black letter law, as an aspect of legal systems operating in this space, Section IV will discuss procedure and its importance to theories of responsive law and to the operation of each legal system, and Section V will discuss logistics — the practicalities that shape legal systems and their potential for meeting participants' interests in justice.

II. PURPOSE

Legal philosophers have spilled a lot of ink on questions of the purpose of law as a form of social ordering. That is not the kind of legal theory that I am interested in here. Rather, I am concerned with the social purpose of particular legal systems. Merry notes that '[d]efining the essence of law or custom is less valuable than situating these concepts in particular sets of relations between particular legal orders in particular historical contexts.'[186] Getting close to a legal system requires digging into its foundational assumptions and concerns, which can be seen through its internal concept of purpose. My concern is along the lines of what Nonet and Selznick call the ends of law — the role each system plays in society. Each system within a plural space constructs its place in part by what kind of problems it seeks to solve. It is outside the scope of this thesis to offer a broad critique of the normative ends of these systems but will identify and describe the systems' internal logics and the ways they are understood by those exogenous to them. The role a legal system plays will determine

[186] Merry (n 78).

the range actors turning to the system, motivations for doing so, and the kind of results that courts have the capacity and authority to achieve. Nonet and Selznick broadly describe repressive law as being oriented to serve the interests of the state, autonomous law as intended to separate law and politics and provide an independent judiciary and have the capacity to hold even the most powerful accountable to law, and responsive law is oriented to provide substantive justice. These are broad ideas about what kinds of purposes systems can have, but each of the systems considered in this thesis has a more specific social purpose and internal theories of law.

This thesis will consider systems' purposes and legal theories. These are related but not identical concepts. By purpose, I mean the role the legal system is defined as having in a given polity. A legal system's purpose affects the kinds of cases it considers, what kinds of relief are available, the kinds of actors who participate, the ways and places in which the system has authority or can expect its decisions to be enforced. The internal perspective is the legal theory the system embraces — how the legal system understands the kinds of problems that come before it and what ideals of justice inform the system's decision-making apparatus. In other words, purpose is what a system claims to do within a community largely recognising the legal system as legitimate, and legal theories are ideals legal regimes are structured to recognise and advance.

For the chapters on each legal system, data on purpose consists of interviews, testimonials, and reviews of literature drawing from sources other than legal professionals, and interviews of legal professionals reflecting on their conversations with clients By contrast, theory is understood through traditional legal reasoning and research methods, drawing on academic literature, statutes and code, caselaw where available, and substantive pleadings filed in various legal proceedings.

A. *Purpose*

In order to understand a legal system's purpose, I find instructive Brian Tamanaha's definition of 'function,' as, '"what [a thing] does" or "what it is used for."'[187] Here, my interest is not the functions of law in the broad that an anthropologist might claim to be a structural-functionalist. Rather, I use Tamanaha to illuminate the purposes claimed in the jurisprudence of individual legal systems as I discuss what those systems are used for. Each legal system has such social purposes — roles proponents assert a system plays within larger

[187] Brian Z. Tamanaha, 'Functions of the Rule of Law,' Legal Studies Research Paper Series, Paper No. 18-01-01.

legal and social orders. This helps to define the kind of interests and goals it is designed to recognise as legitimate. Katie Wright uses 'purpose' in a similar way when she calls for understanding the Royal Commission in terms of the forms, history, processes, and purposes of public inquiries in polities where they are used.[188]

Tamanaha also explains why this is important. If law is to be 'understood naturalistically, historically, and holistically,'[189] then the roles that legal systems play in social orders are critically important. A naturalistic perspective on humanity and our social nature points to the emergence of rules governing social behaviour, indicating that the rules, or legal systems, serve social purposes. While complex legal structures and formal law systems are, historically speaking, relatively new creations, they play roles of mediating disputes, adjudicating legitimacy of actions or rules, and allocating damages in response to breaches of rights and rules. Each of the legal systems studied has a particular purpose within the broad range of purposes that law and legal systems can play in social orders. Realists caution against accepting the claims that legal systems make about effecting justice and warn us not to discount the machinations of power in law's design and effects. Describing system purpose is not meant to suggest that the system entirely or even mostly achieves its purposes, or that purposes are entirely just. Purpose does, however, help explain why systems are constructed as they are and the kinds of problems that they aim to solve and might be capable of solving.

By way of example, canon law is one legal system within the broad social, political, and spiritual organisation called the Roman Catholic Church. It is just one of many legal systems the Church recognizes as legitimate, including divine law and the laws of the domestic states where the Church operates. Each of these systems occupies its own role, its recognised sphere of authority and often mutually recognised legitimacy. Canon law's role is similar to that of a national constitution or corporate by-laws. It establishes roles for various persons and entities that together form the governing structure of the Church, sets forth rules that actors must follow and consequences for breach. Canon law defines the status of insiders, outsiders, and status of persons and entities within the organisation. Chapter 5 will discuss canon law in more depth, showing how canon law's overall purpose of internal governance means that it is uniquely capable of sanctioning priests, but also created conditions making

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[188] Katie Wright, 'Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' (2017) 74 *Child Abuse & Neglect* 10, 11.
[189] Tamanaha (n 187)

> In my usage, naturalism views humans as social animals with natural traits and requirements, historicism presents law as historical manifestations that change over time, and holism sees law within social surroundings.

such sanctions complicated and difficult in cases of clerical child sexual abuse. Thus, the relevance of considering the legal systems' claims purposes is not to make normative arguments about them or to provide an empirical analysis of outcomes, rather it is to bring clarity to how systems' defined purposes shape the way they approach solving the problems before them. The next section describes the corollary to purpose: legal theory.

B. *Legal Theories*

> Jurisprudence, broadly interpreted, is the theoretical part of the discipline of law. A theoretical question is one posed at a relatively high level of abstraction. Besides legal philosophy (the most abstract part), it encompasses many interrelated questions at varying levels of abstraction.[190]

There is a difference between theories of law and legal theories within legal disciplines. A great deal of literature traces the history of legal thought and theories of law as expressed by legal theorists from Moses and Aristotle through to Machiavelli, Hobbes, and Kant, and more recently to Foucault and Dworkin. I will not repeat this history here, because the kind of legal theory in focus in this thesis is much narrower, and much closer to the action. My interest is on the legal theories on which legal systems construct adjudications. These theories identify the kinds of problems the system is structured to address and sets forth the kind of justice that the system takes as ideal. Legal theories express the internal concepts that inform the kinds of cases that a legal system concerns itself with, and the ideas of right and wrong that give shape to those cases.

Legal theories and jurisprudence are also intertwined with ideas about jurisdiction. If theories identify the kind of problem a system is designed to address, jurisdiction defines when the system has the authority to do so. Jurisdiction, in legal practice, refers to the subjects, persons, entities, and issues over which a particular court or legal system asserts the power to make legal determinations, thus defining the range of cases about which a legal system is concerned. Arguments before a court about jurisdiction are arguments about whether the case brought is the kind of case that the court understands itself to be legitimately capable of hearing.[191]

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[190] Twining (n 93).

[191] There are many kinds of jurisdiction, but relevant to this discussion are subject-matter and personal jurisdictions. Subject-matter jurisdiction asks whether a court has authority over the kind of legal dispute actors bring to the courts. Different kinds of courts hear different kinds of cases. There are courts that are limited to criminal or civil cases, targeted courts like drug courts, insolvency courts, juvenile courts, courts for minor issues, and courts for family disputes. Subject-matter jurisdiction is concerned with the kinds of disputes, issues, complaints, or problems a system capable of addressing. It is relevant to the things a system claims authority, and the ways such claimed authority legitimated. Personal jurisdiction relates to whether the law assigns the court power over all of relevant parties such that they must abide by its decisions, or if they can resist the courts' authority, if they have waived the right to resist and agreed to be subject to it. In other words, personal

The legal theories explored in this thesis implicate normative assumptions and understandings that inform how actors within legal systems understand the goals of the law, as well as the shared understanding of how, why, and when the system originated, and social justifications for its role in society. Theories of law are not static, but are developed and constructed through argument, practice, and contestation of norms, ideas, and interests. This thesis will show how the fault lines around which scholars and practitioners in each legal system gather can help explain the ways in which theory can limit or expand the scope of issues which the system is capable of addressing.

The discussion will focus on the theories underlying legal systems' approaches to cases that arise from clerical child sexual abuse. As will be shown in chapters 5-8, only one of the four systems, tort law, rests on underlying theories specifically relevant to personal harm or the redress thereof. By contrast, canon law's legal theories supporting the doctrine relevant to clerical child sexual abuse are centred in the clerical status of the priest and arise out of the Church's jurisdiction over the clerical state. Bankruptcy law's two central purposes, the equitable treatment of creditors and the prospect of a fresh start for the 'honest but unfortunate debtor,' is primarily intended as a market intervention. The Royal Commission's broad mission is to establish a narrative of truth and produce policy recommendations.

The empirical chapters describe the purpose and theories of legal systems in order to evaluate their overall characters according to the typologies discussed in Chapter 2. The next section will introduce doctrine as an aspect of law. Theory as an aspect of law is the foundation upon which doctrine, whether in statute, code, or common law, is built. Without theory as a foundation for doctrine, doctrine is without meaning and can be manipulated. The next section will expand on this discussion.

III. DOCTRINE

As discussed in Chapter 2, an NLR approach sees doctrine as an independent variable in legal systems situated within 'formal dimensions of law.'[192] Doctrine is a part of real law, even if understanding doctrine alone is insufficient to predict outcomes of legal matters. Resolutions of legal proceedings depend a great deal on what the law says. While early legal realists may have discounted the role of doctrine in legal proceedings, and looked to other factors to explain legal determinations, doctrine is part of real law. Twining cites Julie

jurisdiction relates to whether the parties to the action are the kind of parties that the court is capable of binding to its determination.

[192] Liu (n 102).

Dickson and Neil MacCormick to argue that 'understanding law needs to combine conceptual, doctrinal, normative, and empirical perspectives in different ways at different levels.'[193] He goes on to argue there is no conflict between legal realism's roots and NLR's increased interest in doctrine, '[t]he basic realist objection is against the dominance of or an exclusive emphasis on doctrinal studies, not on doctrinal studies as such.'[194]

Doctrine is critically important to an examination that considers whether a legal system can be described as repressive, autonomous, or responsive. Repressive law will be designed to serve the interests of the state, allow for powerful interests to avoid accountability, and will legitimize and reinforce existing forms of social subordination. A focus on the text and meaning of doctrinal law for the purpose of regularity in application is a feature of autonomous law systems; it is rule-centred and independent of the state. Responsive law, by contrast, may be more flexibly purposive and more likely to allow for normative argument based on principles, rather than requiring textual support in existing law. Interdependence will be more important in responsive law compared to the independence purism of autonomous law. For each of the legal systems studied here, I consider the applied doctrine relevant to the cases arising out of clerical child sexual abuse and consider whether it is better described as part of a repressive, autonomous, or responsive system.

In defining 'doctrine', Twining's (perhaps unexpected) praise for Ronald Dworkin's definition is instructive, that doctrine is 'principles, concepts, and distinctions in addition to rules.'[195] Doctrine is the substantive law, norms, and policies (the meaning and proper application of which are the subject of legal argument). Doctrine provides for actors' rights and obligations in different circumstances and establishes a baseline of permitted and forbidden acts. It provides the justification for decision-making about which legitimate goals and interests prevail when more than one such interest is presented.

As will be discussed in more detail in Chapters 5 and 6, both tort and canon law have long contained doctrine that established a cause of action providing consequences for the behaviour that forms the *actus reus* that is now broadly understood as child sexual abuse. For neither system, however, did the initial theory underlying the prohibition of the behaviour relate to the harm suffered by the child. Canon law, as will be discussed in Chapter 5, prohibits and strongly sanctions child sexual abuse by priests, but the law is defined as an offense against the Church and a breach of ritual purity required of priests, not an offence

[193] Twining (n 93) 124 (emphasis added).
[194] Ibid 126.
[195] Ibid.

against a child. As will be discussed in Chapter 6, although assault has long been a well-theorized means to bring suit against an individual, until the latter part of the 20th century child sexual abuse was a taboo topic unlikely to be discussed in public, and legal cases arising out of child sexual abuse were rare in tribunals in the United States or Australia. Furthermore, sexual assault was originally theorised as a harm imposed on the father of an unmarried woman or girl or husband of a married woman, rather than an injury to the dignity of the victim.

More recently, changing norms and cultural understandings of childhood, gender, sexuality, personal autonomy, and increasing willingness to confront taboo subjects in the United States, Australia, and other places are connected to increasing social concern regarding child sexual abuse.[196] In the 1980's, as child sexual abuse became an issue of concern in Western society, particular attention was already being paid to reports of Catholic priests abusing children.[197] Wealthy Anglophone countries — the United States, Ireland, Canada, the United Kingdom, Australia, and New Zealand — were at the centre of the first wave of public scandal about clerical child sexual abuse.[198]

Public interest in stories of child sexual abuse, evidenced by the extent of media coverage of high-profile private lawsuits and higher-profile government inquiries, as well as by high-quality empirical research into the nature, prevalence, and effects of child sexual abuse have informed processes that reformed law to facilitate more people bringing claims.[199] These processes have been brought about in large part by the advocacy of child victims becoming adults who live near centres of Western power and who come to count among the wealthiest people on the planet. The chapter on tort law in particular demonstrates how the changes they have effected have made legal forms of redress more accessible for them. Chapter 8, on the Royal Commission, demonstrates what reforms might be possible when reformers adopt a mindset that attends to the entirety of a polity. Victims and advocates leveraged increasing awareness and understanding of child sexual abuse as a social problem to argue for legal changes at various jurisdictional levels. Ross Cheit's *Witch Hunt*

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[196] Cheit (n 26).
[197] Ibid.
[198] See, e.g. Kathleen R. Robertson, Dark Days for the Church: Canon Law and the Response of the Roman Catholic Church to the Sex Abuse Scandals (2005), 4 *Wash. U. Global Stud. L. Rev.* 161, 186 (comparing responses by Church leaders in Australia, Ireland, New Zealand, and the United States.
[199] Hamilton (n 91).

Narrative,[200] and Marci Hamilton's *Justice Denied*[201] provide excellent accounts of legal developments resulting from advocacy about child sexual abuse.

For bankruptcy and the Royal Commission, applicable doctrine sets out rules and norms for the proceedings, but there is no doctrine specifically relevant to the problem of child sexual abuse. Bankruptcy doctrine sets up rights and obligations about how to make decisions regarding a debtor's estate. Royal commissions have delegated authority to pursue investigations through the means investigators believe is likely to produce the most relevant and useful knowledge. As will be noted in the next section on procedure, Chapters 7 and 8 will discuss how bankruptcy Royal Commissions and bankruptcy law rely on definitions and proscriptions of abuse from other legal systems, in both cases resulting in adjudication of individual cases in relatively informal tribunals as well as how the Royal Commission facilitates normative arguments not necessarily based on existing doctrinal law.

IV. PROCEDURE

Procedural law defines how, when, and by whom decisions are to be made. It governs who can initiate cases against whom and under what circumstances. It establishes when different kinds of arguments can be presented and the proper format for presenting those arguments. It defines what is allowable as evidence, how evidence can be presented, the ways in which decision-makers are to consider different types of evidence, the relative reliability of different kinds of evidence, and the range of arguments that can be made regarding admissibility of evidence. Procedural rules can have significant consequences to the potential success of cases or the ability of stakeholders to advocate for or achieve their goals and interests.

Procedural law has long been a key concern of legal realists. Karl Llewellyn's admonishment to 'see it as it works' preceded a rising interest in legal procedure as a factor in legal outcomes in succeeding scholarship.[202] Paul MacMahon argues that the realist tradition has thus inspired greater interest in procedure by American scholars as compared to Anglo (and Australian) scholars, and the significant importance of procedure in legal practice among

[200] Cheit (n 26). Cheit has assembled a compelling history of the major narratives regarding child sexual abuse since the 1980's. One of these narratives, of course, is that of abuse in the Catholic Church. As Cheit points out, literature on media influence and newsworthiness points to at least one reason CSA in the Catholic Church draws such interest—this is a story about sex, violence, children, religion, and an organisation with a unique and important role in Western civilisation.

[201] Hamilton (n 91).

[202] Tracey E. George, Mitu Gulati, and Ann C. McGinley, 'The New Old Legal Realism,' (2011) 105 Nw. U. L. Rev. 689, 736 (citing Karl N. Llewellyn, A Realistic Jurisprudence-The Next Step, 30 Columbia L.R. 431).

American legal systems.[203] He argues that, between the realists and the American reliance on litigation by private parties as a regulatory practice, associated with class actions and large punitive damages, as well as the balancing of authority between separate jurisdictions, procedure is a focal point for American academic and professional lawyers.[204]

Both reflecting and arising out of the fluidity of the line between procedure and doctrine, responsive law is defined in part by its flexibility of procedure and autonomous law by its rigidity.[205] Procedures in repressive regimes are designed to reinforce and legitimise the interests of established power, but autonomous law may have a similar effect even as it stakes claims to procedural fairness and submits the powerful to law. In this thesis, each of the substantive chapters on legal systems will discuss how applicable procedural law shapes the way cases progress and help to determine the systems' characters as repressive, autonomous, and responsive. The chapters on canon law and tort discuss how in both systems (and in both the United States and Australia), generally applicable procedural law has effects on cases involving child sexual abuse that tend to make initiating and proving a case very difficult, and in many cases, impossible. Limitations in both systems on when cases can be brought, rights in law embedding the interests of the powerful, and other procedural rules have made it impossible for many victims to find any justice through the systems.

Bankruptcy procedures, as will be discussed in Chapter 7, push the parties toward a negotiated settlement and provide leverage to the body of victims impacted by clerics working in a given diocese or religious order in that negotiation. But the flexibility in bankruptcy's procedural law resembles tort law in some ways, insofar as it is much easier to access and understand with access to counsel. Unlike tort law, however, victims in bankruptcy

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[203] Paul MacMahon, 'Proceduralism, Civil Justice, and American Legal Thought' (2013) 34 U. Pa. J. Int'l L. 545, 610.

[204] Ibid, (citing John Hart Ely, 'The Irrepressible Myth of Erie' (1974) 87 Harv. L. Rev. 693, 724; Cass R. Sunstein, 'Incompletely Theorized Agreements' (1995) 108 Harv. L. Rev.1733, 1735-36

> American lawyers are "brought up on sophisticated talk about the fluidity of the line between substance and procedure," Yet there is rough agreement on what counts as procedure and what counts as substantive law, however poorly theorized that agreement may be. While it may be difficult to tell whether a particular rule is procedural or substantive, the existence of troublesome borderline cases does not make the distinction meaningless. Mostly, the difference is intuitively obvious. In criminal law, for example, the definition of an offense if a matter of substantive law. In the tort of negligence, the elements of the plaintiff's cause of action—duty, breach, causation, and damage—are matters of substantive law. But the rule that the prosecution must prove the elements of a criminal offense beyond a reasonable doubt is a rule of procedure, and so it the (general) rule that the plaintiff must establish the elements of a cause of action by a preponderance of the evidence. Rules about the proper forum for litigation are procedural, and so are rules about jury selection. Also procedural are the rules about the kinds of evidence the parties may offer to the court.

[205] Selznick (n 145) 466-67

cases of Catholic organisations that have filed for bankruptcy will be represented as a group by counsel paid for by the debtor organisation, which is required to pay for counsel for the statutory committee of unsecured creditors. But the procedural law of bankruptcy, unlike the relatively ad-hoc and malleable procedure of the Royal Commission, does have some fixed rules that can be manipulated for the benefit of some interests over others. For Catholic dioceses, some of those rules allow for entities to shed some of their assets through manipulation of corporate law, reducing the size of the estate available for victims. The diocese of Gallup's metropole, the Archdiocese of Santa Fe, appears to have shielded many of its assets from victims of clerical child sexual abuse this way.[206]

Chapter 8 on the Royal Commission demonstrates that flexible procedures that can be changed to accommodate the particular needs of stakeholders are both possible and can have significant impact on the capacity of the system to develop a narrative of truth. As will be discussed, rather than find ways around traditional procedural law, the Royal Commission looked first to understand the nature and impact of child sexual abuse in institutional settings, and then crafted its procedures with a mind to gather reliable information in ways that did not further traumatize victims, from as large a body of stakeholders as possible. By doing so, the data the Royal Commission collected may not meet the standards required to demonstrate the right to a remedy through tort but has been sufficient to convince policymakers of a need for change in law and a new system for redress.

V. LOGISTICS

NLR, like other forms of legal realism, attends to the way the law works in practice, and much of aspect of law forms part of law in action, and is certainly part of what Calavita would call real law. As will be discussed in the next chapter, empirical studies of law in small towns often take a realist lens to the practicalities of legal systems, and what accessing them looks like for stakeholders. This includes the logistics of access as well as local traditions of legal practice and cultural understandings of law. Logistics of access include stakeholders' capacity to secure competent representation, engage meaningfully with the system, and the means by which that engagement happens. Idiosyncrasies of judges, clerks, and local practice, the proximity of courts to stakeholders, trust in the legal system, and a variety of social variables all factor into the logistics impacting stakeholders' experience with a legal system.

[206] Berkovitch, Ellen et al, 'Dark Canyon: Sexual Abuse and Secrecy in the Archdiocese of Santa Fe. Part 1,' KSFR, Santa Fe Community College (Online 19 September 2017) <https://www.ksfr.org/post/dark-canyon-sexual-abuse-and-secrecy-archdiocese-santa-fe-part-1-0>.

Each chapter on legal systems in this thesis will consider the logistics of accessing the relevant system in either Ballarat, Gallup, or both. Chapter 6 will discuss, for example, how stakeholders access legal systems and retain counsel. It will consider costs to participating, and the kinds of resources, knowledge, and/or capacities required of a stakeholder to be able to participate meaningfully and advocate with reasonable efficacy in pursuit of their interests.

Chapter 6 on tort law demonstrates the ways in which access to legal systems is limited by physical distance and low availability of lawyers in rural areas, and the difficulties faced by people without reliable means of transport to the regional centres where courts are located. It will consider how rurality and access to legal counsel has significant impacts on the capacity of victims to bring tort actions in Gallup, who have unique needs, and whose lifestyle is different from that of urban dwellers.[207] People whose first language is not English or who have limited literacy in English face additional barriers to participating in legal systems conducted only in English. This context contrasts with the thoughtful procedures designed by the Royal Commission, including traveling to regional centres, rural areas, and prisons, holding private sessions via video link, allowing contributions by means of letter or email, and otherwise taking active steps to prevent someone's physical location, ability, access to transport, financial wherewithal, and similar factors from preventing their communication with the Royal Commission.

Autonomous systems maintain a formal doctrine of fairness, which often results in their not attending to the different needs of people who find compliance with formal procedural rules more difficult. By requiring of everyone the same adherence to formal rules, an autonomous system tends to have the effect of privileging those with more resources to hire sought-after lawyers, to maintain records, and the time to dedicate to engaging in a legal process. Responsive systems, on the other hand, would take account of the barriers that stakeholders may face in their recognition of a legal problem, access to legal assistance, or other capacity to advocate for their legal interests, and actively seek ways to make the system more equitable and lower the barriers. Logistics, like the other aspects of law, helps to highlight some key differences between repressive, autonomous, and responsive law. It is particularly relevant in explaining how economic and social conditions can impact

[207] See, e.g. Horning, Megan, 'Border Town Bullies: The Bad Auto Deal and Subprime Lending Problem Among Navajo Nation Car Buyers,' *NLG Review* (Webpage 20117) <https://www.nlg.org/nlg-review/article/border-town-bullies-the-bad-auto-deal-and-subprime-lending-problem-among-navajo-nation-car-buyers/> describing the lack of paved roads or public transport on the Navajo Nation, and resulting vulnerability of Navajo Nation residents to unscrupulous auto dealerships in the 'border towns' in New Mexico or Arizona.

stakeholders' experience with law, and how a responsive system might work to counteract the impact those conditions have in repressive and autonomous law systems.

VI. CONCLUSION

This chapter has explained how purpose, theory, doctrine, procedure, and logistics, as aspects of legal systems, can serve as entry points to a grounded, practical, and contextualised understanding of legal systems' operations and characters. Together, these aspects bring us a perspective on real law as it is practiced, as well as reflecting what I have conceptualised as the character of legal systems. As a part of the NLR project, considering aspects of law rather than narrowly construing the idea of 'law on the books' and 'law in action' allows for a different perspective, and serves as a way of connecting doctrinal and empirical work.[208] In many ways, NLR can be said to be reinvigorating legal realist thought and bringing it into the 21st century. Where earlier legal realists, pushing back against positivist arguments, may have discounted the claimed purposes and norms of law because of their capture by forces of domination, NLR has a more nuanced approach. While highlighting and arguing for reforms that facilitate resistance to domination, NLR is more attuned to the importance of law's claims and the 'black-letter law' that gives law shape in the Western Legal Tradition. This chapter describes how the thesis uses traditional legal research to supply a form of qualitative data, one which sees 'black-letter law', law-in-action, and other aspects of law as constituent parts of 'real law', which together give shape to the general character of a legal system. A practicing lawyer would recognise each of the four aspects introduced in this chapter as a part of what they see as real law. But attending only to what lawyers think of as law would be myopic. Legal systems operate within social worlds and cannot be separated from them – indeed the social and legal orders are part of each other. They are mutually constitutive, and even those systems that are ostensibly the same across physical and social space are uniquely shaped within particular jurisdictions. The next chapter describes the social and historical context of the sites chosen for this study. The histories described are essential to understanding the relationships between stakeholders: Dioceses, parishioners, victims, and others. These relationships, along with the aspects of law discussed in this chapter, do more than just set the scene for legal proceedings – they are real law.

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[208] McCann, Michael, 'Preface to "The New Legal Realism, *Volumes I and II*"' in Stewart Macaulay et al (eds) *The New Legal Realism* (Cambridge University Press, 2016) xiii Michael McCann argues that NLR is a response to movements within the legal academy and describes it as a more informed approach to socio-legal studies than either the Empirical Legal Studies or Law and Economics movements.

CHAPTER FOUR: INTRODUCTION TO BALLARAT AND GALLUP

I. INTRODUCTION AND CASE SELECTION

Ballarat and Gallup are both dioceses in the Catholic Church located in wealthy industrial English-speaking settler colonial nations with complicated histories of contestation between dominant and disfavoured racial and ethnic groups. Canon law defines a diocese as 'a portion of the people of God which is entrusted to a bishop [and] it constitutes a particular church' within the Catholic Church.[209] Definitionally, we see here that canon law enshrines monarchical hierarchy as opposed to being definitionally responsive to inequality. '[A] diocese . . . is limited to a definite territory [and] it includes all the faithful living in the territory.'[210] Thus, canon law, like state law, establishes boundaries that define certain aspects of the societies in which it is recognised as legitimate. Catholics living outside of the dioceses, even those within the same jurisdictions under other legal orders, are not part of the dioceses of Ballarat or Gallup. The co-constitutive relationships between the dioceses and local communities are a product, in part, of the histories of settler-colonialism described below and these relationships impact the operation of canon, tort, bankruptcy, and the Royal Commission as relevant real law in these spaces

The sections on Ballarat and Gallup begin with the dioceses' histories, stories of people from Europe invading regions now known as Victoria, Arizona, and New Mexico, then establishing Catholic communities and organisations there. While in both places people lived there before contact with Europeans, the stories of the dioceses begin with the first Catholic people in the areas. They will trace relevant parts of the histories of Catholic people, and the large social, economic, and political movements that have shaped the regions and the communities living in them. Significantly, in both places, priests and religious who were abusing children were transferred from parish to parish and school to school, leaving traumatised victims behind. In both places, perpetrators were protected and defended by Church leaders as well as local officials, including police. Documents made public in both places evidence these truths, as well as evidence that Church officials and police in Ballarat and Gallup were aware of some of the perpetrators' histories of abuse and yet allowed them to continue in positions with authority over children.

Ballarat and Gallup, as will be discussed more fully below, are similar and different in ways that enable a thoughtful reflection on the ways that race, class, gender, political power,

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[209] The Holy See, 'Code of Canon Law', *The Holy See* (Web Page) Can. 369 <http://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib2-cann368-430_en.html>.

[210] Ibid Can. 372. Chapter 5 will discuss in more detail how canon law fits Nonet and Selznick's typology of a repressive law regime, but for purposes of this chapter, the definition is useful as a way of understanding how bishops and officials understand their role within the dioceses.

and wealth or poverty can impact the rates, impacts, and contexts of child sexual abuse, and how those same factors shape the social responses to victim disclosure and the likelihood of formal legal processes as well as the results thereof. The methodology used in this study allows for that reflection by considering a range of stakeholder and participant motivations and concerns — including how intersecting identities shape participants' capacities to access and find success through legal systems.

Following in Merry's footsteps by taking 'a magnifying glass to [two] small place[s],' this chapter unveils how histories of colonialism and domination of Indigenous peoples in wealthy countries like Australia and the United States continue to inform contemporary dynamics by informing peoples' views of legal institutions just as they continue to shape the institutions themselves.[211] These sites also connect the thesis with the broader history of law and society literature. Carol Greenhouse's 1986 *Praying for Justice: Faith Order and Community in an American Towns* is one of a number of important studies in law and society have been studies of relatively small communities as ethnographic sites.[212] Other small site law and society work include *Law and Community in Three American Towns* by Carol J Greenhouse, Barbara Yngvesson, and David M Engel; Yngvesson's *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court*; Merry's *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*; and more recently, Daniel Newman's article 'Attitudes to Justice in a Rural Community'.[213] These ethnographic accounts consider interactions between everyday people and legal systems. This study is not an ethnography, and draws on reflections from professionals rather than their client. But by drawing on historical and ethnographic literature, this chapter helps contextualise the ways that the everyday people in the relatively rural areas access, understand, and see themselves within legal systems.

Each of Ballarat and Gallup serves a Catholic community that constitutes a significant minority of the population in its geographical jurisdiction. In both places, most people speak at least some English and common law forms the basis for most state law. Despite this, both exist in legally plural environments and the dioceses are subject to a number of different legal

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[211] Martha Merrill Umphrey, 'Introduction' (2004) 38 Law & Soc'y Rev. 833 (citing Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton University Press 1999)).
[212] Carol J Greenhouse, *Praying for Justice: Faith, Order, and Community in an American Town* (Cornell University Press, 1986).
[213] Daniel Newman, 'Attitudes to Justice in a Rural Community' (2016) *36 Legal Studies* 591; Carol J Greenhouse, Barbara Yngvesson and David M Engel, *Law and Community in Three American Towns* (Cornell University Press, 1994); Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court* (Routledge, 1993); Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (University of Chicago Press, 1990).

and normative orders. These legal and normative orders include national (federal) law, sub-national law, canon law, and guidelines from the national conference of Catholic bishops, local community traditions, and religious teachings. Significantly, both of these dioceses have employed relatively large number of priests and religious known to have sexually abused children — some individuals in each place are known to have abused hundreds of children. Together, these abusers caused grievous harm to hundreds or even thousands of children in relatively sparsely populated rural areas.

In both places, perpetrators were protected and defended by Church leaders — documents made available to the public demonstrate at least some Church officials in both Ballarat and Gallup were aware of some of the perpetrators' histories of abuse — all the while continuing to assign them to positions where they had access to children. Likewise, both places have seen a range of legal actions responding to claims and evidence of abuse of children. Ballarat has seen a succession of public disclosures, reports, or tort actions culminating in the Royal Commission at the federal level and a state inquiry. Indeed, Ballarat has been a key site of interest in the Australian public's consciousness of the problem of CCSA. Investigations by the Attorney General of New Mexico and the diocese of Gallup filing for bankruptcy protection are less publicised, and may draw local, but rarely national or even regional attention.

Above all other similarities, Ballarat and Gallup have one thing in common that is of most consequence to this thesis. In both, the multiple legal orders available to the stakeholders allows for a comparison of different legal systems operating with respect to the same subject matter, involving the same stakeholders, and the same specific allegations of harm. For each diocese, only one of the legal systems studied, tort law, discussed in Chapter 6, is generally employed to deal with interpersonal wrongdoing. As will be discussed in more detail in chapters 5, 7, and 8, Canon law is about internal Church governance, Chapter 11 bankruptcy is designed for businesses in financial trouble, and royal commissions have a broad purpose of inquiry into any matter related to 'the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.'[214] This plurality of legal systems has seen many of the same participants and stakeholders participating in multiple actions — leading to victims, lawyers, officials, activists, and journalists in both places all developing expertise in multiple legal systems and forming strong opinions about other stakeholders and participants.

[214] *Royal Commissions Act 1902* (Cth) s 1A.

A. *Inequality and Justice for Victims of Clerical Child Sexual Abuse*

Child sexual abuse is widely underreported.[215] This underreporting may be even more prevalent in marginalised communities, whether from access to legal services, shame, and fear of social stigma often means they are less likely than others to bring claims.[216] 'It is estimated that between 55% and 70% of victims [of child sexual abuse generally] do not tell anyone that they have been abused before adulthood.'[217] Psychologists AM Reitsema and HWE Grietens identify a number of risk factors for child sexual abuse which play a role in disclosure.[218] These include sociodemographic characteristics, socioeconomic status, exposure to stress and adversity, and other experiences leading parents to be more likely to engage in harsh and inconsistent parenting. '[T]hese circumstances may make it more difficult for children to talk about the abusive experience.'[219] Victims' advocates with whom I spoke told me that they were aware of many victims, especially those from marginalised communities, who had not come forward with their stories because of shame and fear of not being believed.[220]

Broader patterns of domination in society are relevant to incidence of abuse even as they also impact the likelihood of obtaining justice through legal systems. In multiple interviews across the United States and Australia, plaintiffs' lawyers, community members, advocates, and journalists told me of their opinions that after complaints were made about abusive priests in wealthier areas, they were likely to be assigned to work in communities where the populations predominately consisted of members of disfavoured social groups (Indigenous people, Black people, immigrants, people living in poverty or in rural areas, as well as people inhabiting other disfavoured identities).[221] The reasons that victims may not seek justice through legal systems are multiple and complex. Lawyers and Church officials told me how bringing claims against the Church is complicated for victims from immigrant communities whose families and communities often benefit from financial, legal, and political support from the Church.[222] One plaintiffs' lawyer told me how systematic criminalisation of alcoholism and drug use in African-American communities (as opposed to medicalisation)

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[215] See, eg, Parkinson, (n 51).
[216] See, eg, Paul D Steele, 'Child Sexual Abuse among Socially Marginalized Groups: Cultural and Governmental Influences Perpetuating Maltreatment in American Indian Country' (2009) *Forum on Public Policy: A Journal of the Oxford Round Table.*
[217] A M Reitsema and H Grietens, 'Is Anybody Listening? The Literature on the Dialogical Process of Child Sexual Abuse Disclosure Reviewed' (2016) 17(3) *Trauma, Violence & Abuse* 330.
[218] Ibid.
[219] Ibid.
[220] Interviews on file with author.
[221] Interviews on file with author.
[222] Interviews on file with author.

meant many, if not most, of his clients have criminal records, making recoveries through legal systems far less likely, because a criminal conviction makes a litigant less credible in evidentiary law, blunting the impact of testimony by those who have previously been convicted of a crime.[223]

Reluctance to come forward may be aggravated by a sense of community loyalty to institutions that provide social services or support community identity. Some informants told me of the difficult position inhabited by children abused by a religious authority in a community that depended on religious authorities to meet political, medical, economic, or other needs.[224] Catholic organisations in Ballarat and Gallup provide medical services, provide service to help poor people, educate children, and advocate for people who need protection from the state (including immigrants), as well as providing social and community identity and a place to express communal and social values. In Gallup, where the social and economic needs are great, these services are vital to peoples' survival in ways that is not as true for the more economically secure Ballarat.

But child sexual abuse is also a crime of opportunity, and a number of different factors can create those opportunities for a person inclined to abuse children. For example, both Ballarat and Gallup are located in relatively rural areas. Participants told me how, in remote communities, abusive priests had easy to access children because of the trust placed in them by local communities, and, practically, because a typical Sunday for a rural priest requires travel from parish to parish, for many years, priest would typically be accompanied by an altar server.[225] People working for Church organisations in both the United States and Australia made clear that they now require priests have an altar server at each parish, and that when priests travel they do so alone or with other adults, never alone with children.[226]

Major studies of historical child abuse have consistently found high rates of abuse in institutions serving Indigenous people and those with other kinds of disfavoured statuses.[227] In June 2017, the Royal Commission published its 'Analysis of Claims of Child Sexual Abuse Made With Respect to Catholic Church Institutions in Australia' (hereinafter, the 'Catholic Report') based on data collected by Church authorities, religious institutes, and the Royal Commission's own private and public hearings.[228] The Catholic Report shows that 75% of the

[223] Interviews on file with author.
[224] Interviews on file with author.
[225] Interviews on file with author.
[226] Interviews on file with author.
[227] See, e.g. Daly (n 87).
[228] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Case Study 50: Institutional Review of Catholic Church Authorities', Royal Commission into Institutional Responses to Child Sexual Abuse (Web

claims of child sexual abuse against a Catholic entity in Australia arose in schools, orphanages, and residential facilities, many of which were filled with Indigenous children who Australian authorities had taken from their parents as a part of what later came to be known as Stolen Generations or poor children taken from Great Britain and brought to Australia as child migrants to be raised in institutions.[229]

The Royal Commission found that many of the orders with the highest rates of abuse were those that worked with Indigenous people, orphans, children with disabilities, and children living in poverty. 40% of the total number of St John of God Brothers, who operated schools for boys with learning difficulties between 1950 and 2010 were alleged perpetrators.[230] 22% of the Christian Brothers, a religious order that once operated numerous schools, residential institutions for poor, orphaned, and Indigenous children in Australia[231] between 1950 and 2010 were alleged perpetrators. Between those years, the comparable figure for the Church as a whole was 7%.[232] This data suggests existing structures of domination reproduce themselves in the context of clerical child sexual abuse, increasing the risk of being sexually abused for children who already face multiple forms of social and political oppression.

Although Gallup has not been investigated as thoroughly as Ballarat was, plaintiffs' attorneys with whom I spoke pointed to segregation between social groups and noted that most of the serial abusers working in the Diocese of Gallup tended to be stationed in the poorest and most rural areas of the diocese. One of these lawyers told me that the bishop knew:

> 'Don't shit in your own bed. They didn't put them at the cathedral or St Francis [in Gallup]. Some rural place — Holbrook, Winslow, Camp Verde. Largely Hispanic, places look like shanty towns. Do you think the mother who's trying to get money together to make a pot of beans is going to say 'hey Father, you touched my kid!'? No, they're trying to do more basic stuff like food. And she would see the priest as someone that would take care of her kid and not hurt him. Little did she know…'[233]

Page, 2017) <https://www.childabuseroyalcommission.gov.au/case-studies/case-study-50-institutional-review-catholic-church-authorities> (hereinafter the 'Catholic Report').

[229] Ibid.

[230] Stephanie Anderson, 'Royal Commission into Sexual Abuse: Who are the Brothers of St John of God?', *ABC News* (online, 6 Feb 2017) <http://www.abc.net.au/news/2017-02-06/who-are-the-brothers-of-st-john-of-god/8245306>.

[231] Christian Brothers Oceania Province, 'Our History', *Edmund Rice* (Web Page, 2019) <http://www.edmundrice.org/our-history.html>; Catholic Report (n 228), p 16.

[232] Catholic Report (n 279).

[233] Interview on file with author.

Similar patterns are apparent across the United States, even as comprehensive data like that produced by the Royal Commission is lacking. The diocese of Great Falls-Billings in Montana filed for bankruptcy in March 2017, citing debt arising out of claims of child sexual abuse. Although Montana is nearly 90% white, and less than 7% Native American,[234] of the cases brought against the diocese in Great Falls-Billings, Montana,

> a majority of those who have come forward with names and locations were allegedly abused on the remote Indian reservations. Off the reservations, victims who have come forward came largely from the former Catholic orphanage in Great Falls, two parishes in Billings and far flung communities in eastern Montana.[235]

A lawyer representing victims from Native American reservations in Montana was quoted in an investigative report by the *Great Falls Tribune*,

> I think the evidence points to [reservations being 'dumping grounds' for predatory priests]. Those who had problems in respect to abusing kids, it's easy to hide in the reservations; people won't complain much, it's isolated there, and there are massively disproportionate balances of power.[236]

Rates of abuse by Catholic clergy among Indigenous people in Alaska have also been reported as extraordinarily high. In one prominent investigation, it was found that 80% of the children on a particular village in Alaska were sexually abused by Catholic officials.[237] The Jesuits in the Northwest, which operated missions and boarding schools in Washington, Oregon, and Alaska, settled the claims of at least 635 people in 2007 and 2011, almost all of them Native American, who had been abused at these missions and schools.[238] The Diocese of Fairbanks, in their bankruptcy case, identified that most of the victims of child sexual abuse in that diocese were, 'native Athabaskan, Yup'ik Eskimo, or Inupiat Eskimo'.[239]

By describing the historical and social background of the dioceses of Ballarat and Gallup, this chapter put into context the socially constructed meanings of knowledge produced by legal systems. The significant social and cultural differences between the two dioceses serve as a way of deepening our understanding of the problem, of understanding that

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[234] United States Census Bureau, 'Quick Facts: Montana', *United States Census Bureau* (Web Page) <https://www.census.gov/quickfacts/fact/table/MT/PST045216>.
[235] Seaborn Larson, 'Montana Reservations Reportedly "Dumping Grounds" for Predatory Priests', *Great Falls Tribune* (online, 16 August 2017) <http://www.greatfallstribune.com/story/news/2017/08/16/montanas-reservations-were-dumping-grounds-predatory-priests-suit-alleges/504576001/>.
[236] Ibid.
[237] Public Broadcasting Service 'The Silence,' (2011) *Frontline* (Web Page) <https://www.pbs.org/wgbh/pages/frontline/the-silence/2011>
[238] Bankruptcy documents, Jesuits in the Northwest
[239] 'Third Amended and Restated Disclosure Statement In Support of Debtor's and the Official Committee of Unsecured Creditors' Third Amended and Restated Joint Plan of Reorganization for Catholic Bishop of Northern Alaska Dated December 16, 2009,' *Catholic Bishop of Northern Alaska*, Chapter 11 Case, USBCD. Alaska, Case No. 08-00110-DMD.

just as the problem is constructed by legal systems, it is also socially constructed through the filter of the people and places it impacts.

Comparing the dioceses of Ballarat and Gallup is useful to an understanding of the ways that social and economic context are inextricably linked to both rates of abuse and rates of access to justice by victims. Many differences between places, including relative social and economic disadvantage in Gallup and cultural shifts in religiosity and sexuality in Ballarat, impact the efficacy and potential for legal systems to provide justice. As will be discussed in Chapter 6, successful claims in tort in the United States are likely to receive higher awards of damages than are successful claims in Australia. This might suggest that victims in Gallup would have a stronger incentive to disclose abuse and seek compensation. In Ballarat, where victims stand to recover less money in bringing successful claims, the public examination of the Church's role in covering up abuse and participation in a redress scheme may provide a sense of vindication even for those victims who have not brought claims, which could disincentivise them from coming forward. As discussed in Chapter 7, it is unlikely that the conclusion of Gallup's bankruptcy case brought victims in Gallup who did not bring claims a similar sense of vindication, especially given local criticism of the manner of Bishop Wall's compliance with the bankruptcy plan requirements to visit parishes and meet with victims.

Table 3.1 compares some of the data on populations, numbers of clerics accused of abuse, number of claims, and data on money paid on account of abuse claims in each diocese. Despite a smaller overall population and half the landmass, Ballarat has a larger population of Catholics, and a higher proportion of the population is reported to be Catholic. They have a similar number of parishes, but Ballarat has significantly more schools, programs, social welfare and pastoral services than does Gallup, which has more priests than Ballarat. Although both can be described as rural, the population of Ballarat is more concentrated in town centres, and more economically secure than the more remote, poorer population of Gallup.[240] The majority of Catholics in Ballarat are members of Australia's dominant ethnic group and the majority of Catholics in Gallup (although not the diocesan leadership) are either Native American or Hispanic — both disfavoured minority groups in the United States. Inequities and intersecting forms of oppression linked to race, class, gender, and other social

[240] Robert Tanton, Dominic Peel and Yogi Vidyattama, 'Every suburb Every town: Poverty in Victoria,' (November 2018) National Centre for Social and Economic Modelling.

> In 2015-16, the overall poverty rate in Victoria was 13.2%. The poverty rate was 12.6% in Greater Melbourne and 15.1% in the rest of the state. These rates were similar to the overall rate for Australia, which was 13.1%.

distinctions are embedded in American and Australian societies. A situated approach requires thinking about how these distinctions are linked and contribute to the cannot be ignored in any understanding the histories of abuse or workings of legal systems. These sites help to make the relationships between those inequities and capacity to advocate for one's interests in a legal proceeding visible. The next sections will provide more detailed histories that help put the information detailed in Table 3.1 into context.

Table 3.1 Comparing the Dioceses of Ballarat and Gallup

	Ballarat[241]	Gallup[242]
Total population in diocese area	407,400	490,000
Total land mass	58,000 km^2 22,000 mi^2	143,660 km^2 55,468 mi^2
Population of largest city in diocese	155,920 (Ballarat)	22,670 (Gallup)[243]
Number of Catholics in diocese	102,018	58,000
Number of Parishes	51	53
Catholic Schools	64	13
Number of priests currently serving in diocese	33	40
Number of priests, religious, or other clerical persons accused of abuse since approximately mid-20th century	21	43
Number of claims acknowledged by diocese	139	121
Total payments	$5,000,000 (AUD) (approximately $3.9million USD)[244]	$22,000,000 (USD) for 57 bankruptcy claimholders, unknown amount paid on account of civil claims pre-

[241] Catholic Diocese of Ballarat, 'Our Diocese', *Catholic Diocese of Ballarat* (Web Page, 2014) <https://www.ballarat.catholic.org.au/our-diocese/dsp-default.cfm?loadref=103>; Australian Bureau of Statistics, 'Ballarat () (201)', *Australian Bureau of Statistics* (Web Page, 12 July 2019) <http://stat.abs.gov.au/itt/r.jsp?RegionSummary&region=201&dataset=ABS_REGIONAL_ASGS&geoconcept=REGION&datasetASGS=ABS_REGIONAL_ASGS&datasetLGA=ABS_NRP9_LGA&regionLGA=REGION&regionASGS=REGION>.

[242] Diocese of Gallup, 'About Us', *Diocese of Gallup* (Web Page, 2019) <https://dioceseofgallup.org/about/>.

[243] Flagstaff has a larger population but has not been a part of the diocese since 1967.

[244] This figure excludes awards made under the National Redress Scheme implemented on the Royal Commission's recommendation, because data about awards made pursuant to the scheme has not been released yet.

		bankruptcy, including those never brought to court.

II. DIOCESE OF BALLARAT

A. *History of Place*

The perpetrators who haunted Ballarat and the Church officials who enabled them are notorious, and are the villains in one chapter of the Australian public's understanding of the problem of child sexual abuse in institutional settings.[245] This section will introduce the Diocese of Ballarat, with a focus on how its history and social context contributed to the ways in which abuse was perpetrated and enabled by authority figures, and will summarise the findings of government commissions of inquiry. The thoroughness of the Royal Commission's work, and the depth of the resulting disclosures are not replicable for the purposes of this thesis, and their research will be relied on to a significant degree in discussing relevant events in the Diocese of Ballarat.

Like most dioceses, the boundaries of the Diocese of Ballarat are defined in part by the secular jurisdictions claiming authority in the territory. Like many other dioceses, it is located entirely within a secular territorial jurisdiction as one of a number of other dioceses and juridic persons in Victoria.[246] The Diocese of Ballarat describes itself as,

> a diverse and geographically extensive Diocese of forty-one parishes which covers the western third of Victoria, extending from the Murray River in the North to the Southern Ocean in the South. To the west it is bounded by the Archdiocese of Adelaide and the Diocese of Port Pirie, to the north by the Diocese of Wilcannia-Forbes and to the east by the Diocese of Sandhurst and the Archdiocese of Melbourne.[247]

The Archdiocese of Melbourne is the head of the ecclesiastical province of Melbourne and Sandhurst, Sale, and Ballarat are suffragan dioceses within the ecclesiastical territory.[248]

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[245] David Marr's Lessons from the Royal Commission', *The Guardian* (online, 12 December 2017) <https://www.theguardian.com/australia-news/2017/dec/13/grappling-with-rome-david-marrs-lessons-from-the-royal-commission>; Mal Byrne and Tindall Gask Bentley 'After the Royal Commission, Will Churches and Governments Do the Right Thing?' *In Daily* (online, 20 December, 2017) <https://indaily.com.au/opinion/2017/12/20/after-the-royal-commission-will-churches-and-governments-do-the-right-thing/>.

[246] Juridic persons are defined by canon law as subjects of rights and obligations 'constituted either by the prescript of law or by special grant of competent authority… They are aggregates of persons (universitates personarum) or of things (universitates rerum) ordered for a purpose which is in keeping with the mission of the Church and which transcends the purpose of the individuals': Code of Canon Law (n 72).

[247] Catholic Diocese of Ballarat, 'Our Diocese', Catholic Diocese of Ballarat (Web Page, 2014) <https://www.ballarat.catholic.org.au/our-diocese/dsp-default-d.cfm?loadref=115>.

[248] Archdiocese of Melbourne, 'Archidioecesis Melburnensis', *Archdiocese of Melbourne* (Web Page) <http://www.catholic-hierarchy.org/diocese/dmelb.html>.

The Diocese of Ballarat's website includes a page on its history, which it begins by noting the 203 Catholic people counted in the 1841 census living in Portland, known as 'the oldest town in Victoria,'[249] despite there being Indigenous people living there long before Europeans came to the area and called it Victoria. The diocese of Ballarat is located on land identified as having traditional owners including: the Gunditjmara, Eastern Maar, Wotjobaluk, Jaadwa, Jadawadjali, Wergaia, Jupagalk, Dja Dja Wurrung, Wadawurrung, and First Peoples of the Millewa-Mallee Peoples and Nations.[250] Mohamed Adhikari and others note that the genocide of Indigenous people has been a feature of colonialism across Africa, Australia, North America, and Latin America.[251] Lyndall Ryan argues that Indigenous peoples' 'virtual disappearance' in Victoria is a classic example of genocide facilitating the material gains of setter-colonial enterprises.[252] The effect of this genocide is that few Indigenous people still live in Victoria—the 2016 Census reveals Victoria to have the smallest percentage of Indigenous persons in Australia, at .9% of the population.[253] The Royal Commission information does not break down the claims against the diocese in terms of race or indigeneity, rendering any disparities invisible. The Catholic Church's expansion in Australia cannot be separated from the settler-colonial project – as it grew, it facilitated the effective genocide of Indigenous people in Victoria and the Diocese of Ballarat.

The Ballarat Parish was established in 1852, and by the end of 1853, it counted 3,600 children in Ballarat.[254] It is not clear whether that count included the Indigenous people living in the area, but the history of the relationship between Indigenous and non-Indigenous peoples in the area was, and continues to be, contested and complicated.[255] The Diocese of Ballarat was erected in March 1874 by Pope Pius IX, and Bishop Michael O'Connor was installed as

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[249] Catholic Diocese of Ballarat, 'Our History', *Catholic Diocese of Ballarat* (Web Page, 2014) <https://www.ballarat.catholic.org.au/our-diocese/dsp-default.cfm?loadref=134>.
[250] Victorian Government, 'Welcome to Country and Acknowledgments Map', *Aboriginal Cultural Heritage and Information System* (Web Page) <https://achris.vic.gov.au/weave/wca.html>.
[251] Adhikari, Mohamed (ed). *Genocide on Settler Frontiers: When Hunter-Gatherers and Commercial Stock Farmers Clash*, (Oxford Press, 2015).
[252] Ryan, Lyndall ''No Right to the Land': The Role of the Wool Industry in the Destruction of Aboriginal Societies in Tasmania (1817–1832) and Victoria (1835–1851) Compared,' Adhikari, Mohamed (ed). *Genocide on Settler Frontiers: When Hunter-Gatherers and Commercial Stock Farmers Clash*, (Oxford Press, 2015).
[253] Australian Bureau of Statistics, 'Estimates of Aboriginal and Torres Strait Islander Australians, June 2016,' Australian Bureau of Statistics (Web Page) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001> (revealing Victoria's Indigenous population to equal 0.9% of its total population. The next lowest, the Australian Capital Territory, with 1.9%. The Northern Territories, with 30.3%, has the highest percentage of Indigenous residents in Australia.
[254] Ibid.
[255] For more on the history of indigenous and non-indigenous people in Ballarat in the mid-nineteenth century, see Fred Cahir, *Black Gold Aboriginal People on the Goldfields of Victoria, 1850–1870* (Australian National University E Press, 2012).

the first Bishop. Since that time, there have been seven bishops, including the current Bishop of Ballarat, Paul Bernard Bird, C.SS.R., appointed 1 August 2012, upon the retirement of Bishop Peter Joseph Connors.[256]

As described in William Bramwell Withers's *History of Ballarat*, first published in 1870 and *Some Ballarat Reminiscences*, first published in 1895, there were rapid changes in the region in the years and decades after that first Mass, when a series of gold strikes brought thousands of Europeans in search of fortune.[257] Many of the new arrivals were Catholic, so the gold mines and the Diocese of Ballarat grew rapidly together, a crucial part of the settler-colonial project in Victoria, as Ballarat grew to become a wealthy regional centre.[258] Timothy Jones and Clare Wright explain that the two dominant religious groups in the area, Catholics and Protestants, were alike in the importance placed on attendance at services or rest on Sundays during the mid-nineteenth century – whether you attended services what services you attended were a crucial part of identity for people in Ballarat.[259] A survey of the diocese conducted in the 1970s recounts its social history by reference to the nearby Diocese, later Archdiocese, of Melbourne, and the broader community of Ballarat and surrounding settlements in the western districts of Victoria.[260] It explains how the influence of particular priest in Melbourne, a perceived hostility toward Catholics from non-Catholics in the area,

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[256] Catholic Diocese of Ballarat, 'Our Diocese: Bishop Paul Bird', *Catholic Diocese of Ballarat* (Web Page, 2014) https://www.ballarat.catholic.org.au/our-diocese/dsp-default.cfm?loadref=129; See also, Royal Commission into Institutional Responses to Child Sexual Abuse, 'Opening Address by Senior Counsel Assisting' (Case Study No 28, Public Hearing into Various Institutions Run by Catholic Church Authorities in and Around Ballarat, 19 May 2015).

> The Catholic Diocese of Ballarat comprises 51 parishes that cover the western third of Victoria, including the City of Ballarat located in the east of the Diocese. James O'Collins was the bishop of Ballarat between 1941 and 1971. Ronald Mulkearns was the coadjutor bishop from 1968 until 1971 when he became Bishop. His vicars general were Father Frank Madden until 1976, Monsignor Leo Fiscalini until 1982 and Monsignor Henry Nolan until 1991. Father Brian Finnigan was in the position from 1991 until 1998.
>
> Father Adrian McInerney was the bishop's secretary from 1973 until 1979. Father IcInerney gave evidence in the first public hearing into Ballarat. Others who held position of secretary were Bishop Brian Finnigan from 1979 until 1985, Father Brian McDermott until 1990, and Monsignor Glynn Murphy until 1998.
>
> Bishop Mulkearns retired in 1997 and was replaced by Bishop Peter Connors who held that position until August 1012. Bishop Paul Bird is the current Bishop of Ballarat.

[257] William Bramwell Withers, *History of Ballarat and Some Ballarat Reminiscences* (Ballarat Heritage Services, 1999).
[258] Ibid.
[259] Timothy Willem Jones and Clare Wright, 'The Goldfields' Sabbath: A Postsecular Analysis of Social Cohesion and Social Control on the Ballarat Goldfields, 1854' (2019) 43(4) *Journal of Religious History*.
[260] John McKinnon, *Report on a Survey of the Religious Attitudes of the Diocese of Ballarat* (Diocese of Ballarat, 1973).

and social patterns led to a number of separate schools for Catholic children in the diocese and relatively few 'mixed marriages.'[261]

B. *Diocesan History, Social Conditions, and Clerical Child Sexual Abuse*

The period between 1950 and 1990 is of critical importance in the history of the Diocese of Ballarat and clerical sexual abuse of children. The Royal Commission's inquiry is focussed on allegations of sexual abuse occurring from the 1950s onward, although there is considerable evidence of abuse earlier than that time.[262] Of the abuse in Catholic institutions made known to the Royal Commission, '[e]ighty-six percent . . . commenced in the period from 1950 to 1989 inclusive. The largest proportion of first-alleged incidence of child sexual abuse fell in the 1970s.'[263] The sociological data provided by the diocesan survey, therefore, is useful in painting a picture of life in the diocese during that critical time. McKinnon relates that '[t]he religious environment was perceived as hostile by the Catholic minority.'[264]

This environment of social segregation set the scene for the diocese becoming known in the twenty-first century as the 'epicentre' of clerical child sexual abuse.[265] The way in which social segregation, including within the police forces, contributed to official protection of abusive priests and religious is detailed in a memoir that contributed to Ballarat's infamy. Former police officer Denis Ryan's *Unholy Trinity: The Hunt for the Paedophile Priest Monsignor John Day*[266] provides a crucial perspective on how the police forces in the Diocese of Ballarat responded to allegations of child sexual abuse. He writes of 'a group of police officers, known as the Catholic Mafia, [that] actively suppressed investigations into paedophile priests.'[267] His story gives critical insight into how child sexual abuse can be enabled by the kind of closed, patriarchal, and hierarchical institutional cultures exhibited by

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[261] Ibid ii.

[262] In addition to evidence discussed in Chapter 5, one of my participants, at the end of his interview, handed me a copy of handwritten notes, internal records, and newspaper clippings describing abuse that bear bates numbers suggesting that they have been disclosed in litigation. Barry M Coldrey, *Papers of Barry Coldrey, circa 1950–2009* (1950–2009): These papers reveal discussions of child sexual abuse by Christian Brothers in Western Australia in the early years of the twentieth century. See also, Charlotte King, 'Violent and Sexually "Defective": What the Royal Commission Taught Us about the Christian Brothers' *ABC Ballarat* (online, 21 December 2017), quoting from a letter from the regional head of the Christian Brothers about the repeated offending of Brother Gerald Leo Fitzgerald, who died in 1987, 'I feel it my duty to censure you as strongly as possible for the following matters that have been brought to my notice'.

[263] Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made With Respect to Catholic Church Institutions in Australia* (Commonwealth of Australia, 2017).

[264] McKinnon (n 260) ii.

[265] Greg Gliddon, 'Ballarat an "Epicenter" of Institutional Child Abuse' *The Ballarat Courier* (27 June 2018); Peta Credlin, 'Collision of Beliefs,' *The Courier Mail* (3 March 2019): 'As a Catholic, a woman, a lawyer, and someone who grew up in the Ballarat diocese that was the epicenter of the abuse epidemic'.

[266] Denis Ryan and Peter Hoysted, *Unholy Trinity: The Hunt for the Paedophile Priest Monsignor John Day* (Allen & Unwin, 2013).

[267] Ibid 8.

the Diocese of Ballarat and the Victorian police. The 'Catholic Mafia' Ryan wrote of developed in a Victoria Police force that reflected the 'sectarianism in Australian society at the time', between Catholics and Protestants.[268]

He notes that, '[f]or a young uniform copper not long out of the academy, the Catholic-Mason divide operated almost invisibly.'[269] However, Ryan writes that, as he moved up the ranks, he was invited to join,

> a group of [Victoria police officers] who, at the request of the Cathedral, look into instances where priests have been charged with offences to see if we can have these matters dropped or dismissed so the Church's good name will not be brought into disrepute.[270]

Although Ryan declined to join, he writes that he assumed the crimes being dropped or dismissed were relatively minor affairs, 'misdemeanours, traffic offences, drink driving and so forth, … crimes that were of no profound criminality but would necessarily bring embarrassment to the Church.'[271] When Ryan was later transferred to Mildura, in the Diocese of Ballarat, he became aware of serious offending by John Day, now one of Ballarat's most notorious abusers. The focus of the book is on his struggle to hold Day accountable — his collection of evidence and compassion for victims, his fight against his superiors in the Victoria Police working against his efforts, and his ultimately being fired from the Victoria Police when he refused to back down from his efforts to bring Day to justice. More than a simple story of one man's struggle to bring justice to abuse children, Ryan's memoir provides insight into a side of the problem of child sexual abuse.

Child sexual abuse was enabled in the Diocese of Ballarat in part by social segregation and perceived hostility between social groups. This can lead to defensive posturing and protection for group leaders, even in the face of evidence those leaders perpetrating harm against other members of the group. The story of *Unholy Trinity* is a story of justice delayed by systems which privileged the powerful over the weak, and of the social conditions that lead to protection for abusers.

Ryan served in the Victoria Police in 1956 and 1972. 'In 1978, Michael Glennon, a Catholic priest, would be the first cleric to go before the courts.'[272] Glennon was convicted in of having abused of 10-year-old girl, only to be released a short time later. He continued to serve as a priest in the 1980s 'mainly to immigrant and Aboriginal communities' where he

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[268] Ibid 24.
[269] Ibid 24.
[270] Ibid.
[271] Ibid.
[272] Ibid 200.

continued to abuse children – crimes for which he was later convicted, even while out on bail and facing new charges.[273] The social conditions that facilitated such repeated offending were supported by religious and government authorities, as well as lay people.

> In one of [Glennon's] trials a woman gave evidence that she saw Glennon in a bed with a boy one night, but thought nothing of it because she trusted him. "Well, of course I did. I'm a Catholic, aren't I?" she told the jury. "I mean, you go by the cloth. Who else do you trust in this world?"[274]

As *Unholy Trinity* and Church records disclosed to the Royal Commission attest, Church and police officials had been aware of abuse for decades, but child sexual abuse by Catholic priests became an issue of concern to the broader Australian public in the 1990s, after the Wood Royal Commission in New South Wales.[275] In response to civil claims and public outcry in the 1990s, the Australian Catholic Bishops' Council determined to implement a change. While the Archdiocese of Melbourne launched the Melbourne Response,[276] the rest of the Catholic organisations in Australia, including the Diocese of Ballarat, adopted Towards Healing,

> a process offered by the Church to a person who has been abused by a priest, religious or other Catholic Church personnel. Towards Healing also formalises the Catholic Church's principles and procedures for responding to complaints of abuse.[277]

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[273] Mark Buttler, Mark 'Pedophile Priest Michael Charles Glennon Dies in Jail', *Herald Sun* (online, 1 January, 2014).
[274] Ibid.
[275] Truth Justice Healing Council, 'Towards Healing', *Truth Justice Healing Council* (Web Page, 2019) <http://tjhcouncil.org.au/support/towards-healing.aspx>.
[276] The Melbourne Response caused controversy within the Australian Catholic Bishops' Conference and has been roundly criticised by victims' rights groups and the Royal Commission, but this history is largely outside the scope of this thesis. See, e.g. Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 16: The Melbourne Response* (Commonwealth of Australia, 2015).
[277] Professional Standards Office, 'Towards Healing', *Professional Standards Office: Catholic Church Queensland* (Web Page, 2017) <http://psoqld.catholic.net.au/documents/towardshealing.html>. See also Royal Commission into Institutional Responses to Child Sexual Abuse, 'Final Report: Preface and Executive Summary', *Royal Commission into Institutional Responses to Child Sexual Abuse* (Web Page, 2017) <https://www.childabuseroyalcommission.gov.au/final-report> (hereinafter, 'Final Report,')

> In the late 1980s, Catholic Church leaders began to discuss the issue of child sexual abuse more formally at the Australian Catholic Bishops Conference (ACBC). In 1988 the ACBC established a dedicated committee to consider issues related to child sexual abuse, and the adoption of a series of national protocols from 1990 was an important step towards formulating a nationally consistent response. However, these protocols retained a focus on responding to the alleged perpetrators of sexual abuse rather than on the needs of victims, and their implementation by Catholic Church authorities was sporadic.
>
> By the mid-1990s there had been a shift in understanding about the appropriateness of keeping alleged perpetrators in ministry where they would be in regular contact with children. At about the same time, members of the newly constituted Bishops' Committee for Professional Standards recognised that a new protocol focusing on the needs of victims was required. The formulation and adoption of Towards Healing and the Melbourne Response in 1996 were considerable achievements in this regard.

Through the late 1990s and through the 2000s, as more people disclosed having been abused, and the problem became a public scandal, Towards Healing and other Church initiatives were increasingly perceived as being insufficient to meet the needs of victims, their loved ones, and the communities in which they lived.[278] Around the same time as *Unholy Trinity*'s publication in 2013, the Victorian Parliament requested its Family and Community Development Committee to provide a report on 'the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations.'[279] Although the conduct of police was specifically outside of the inquiry's terms of reference, the committee found, 'a number of victims, particularly those in the care of the State, felt betrayed by authorities, such as the Government and the police,' citing a lack of supervision and a lack of intervention as the reasons for such feelings of betrayal.[280]

The Royal Commission, established in 2013 and discussed in more detail in Chapter 8, dedicated of hours of hearings in three different sessions to sexual abuse allegations in the Diocese of Ballarat. Those hearings were closely watched across Australia. Australian journalist David Marr writes that the hearings on the Diocese of Ballarat,

> the ratings winner in all the years of hearings turned out to be Case Study 28: Catholic church authorities in Ballarat. It's no surprise. In the public imagination, Ballarat was the epicentre of neglect, abuse and the outrageous protection of the notorious paedophile Father Gerald Ridsdale. Fifty-four thousand viewers watched as these horrors were brought to light.[281]

The Royal Commission, unlike the Victoria Inquiry, did find Victoria Police's response to allegations of child sexual abuse to be within its terms of reference.[282] Despite being satisfied

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> In November 1996, the ACBC agreed that Towards Healing would be implemented in March 1997. A month earlier, the then Archbishop of Melbourne, Archbishop George Pell, had announced that the archdiocese would proceed with the Melbourne Response. The introduction of the Melbourne Response shortly before the implementation of Towards Healing effectively meant that there would not be a uniform national approach.

[278] See, eg, Final Report (n 277).

[279] Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Non-Government Organisations* (Family and Community Development Committee, 2013) vol 1, v.

[280] Ibid 116.

[281] Marr, (n 245).

> Across the world the church hid paedophile priests and snubbed their victims. Whether in Buenos Aires or Berlin or Ballarat, the story was absolutely the same. There were no whistleblowers. It was a faultless, international operation to defy criminal laws in the interests of the church.

[282] Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 28: Catholic Church Authorities in Ballarat* (Commonwealth of Australia 2017) 8, noting that it was investigating, among other things, 'the response of Victoria Police to allegations of child sexual abuse against clergy or religious which took place within the Catholic Diocese of Ballarat.'

that police superintendents and other leading figures in the Victoria Police were alerted of serious abuse by Day and others, that investigations into abuse allegations were insufficient, and that charges should have been brought long before they were, however, the police failures were not listed as a systemic issue arising in the Case Study.[283]

C. *Royal Commission Reporting on Abuse in Ballarat*

The various inquiries into abuse in Ballarat and the response of organisations to that abuse has been major news in national and international media.[284] As noted above, the Diocese of Ballarat is characterized as the 'epicentre' of clerical child sexual abuse in Australia not just because the number of perpetrators and rate of victimization in the diocese is relatively high.[285] It is also because, even before the Royal Commission, the perpetrators and their crimes have become known to the public, their stories told through news reports, major governmental enquiries, and other publications. The Royal Commission's public hearings related to the Diocese of Ballarat, especially the hearings involving its famous former leader, Cardinal George Pell, garnered intense public interest, especially when Church officials, many of them retired, were essentially cross examined in public and on video-link broadcast around the world. The depth and breadth of the research conducted by the Royal Commission is impossible to replicate here, and the following summary of its findings relevant to the Diocese of Ballarat is no substitute for reading the reports themselves, which have been of immense help in the drafting of this thesis.

The Royal Commission published reports for each of their case studies, as well as a final report. One of the reports of case studies and the final report itself have findings specifically relevant to Ballarat. The Royal Commission's report into the Diocese of Ballarat was published in November of 2017 (hereinafter, the 'Ballarat Report').[286] In February 2017, the Royal Commission, through a public hearing, ran an institutional review of Catholic Church authorities, considering 'the current policies and procedures of Catholic Church

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[283] Ibid 440.

[284] Hilary Whiteman, Anna Coren and Jo Shelley, 'Pell's Hometown Ballarat at the Center of Australia's Sex Abuse Scandal' *CNN* (online, 24 March, 2019) <https://edition.cnn.com/2019/03/23/australia/george-pell-ballarat-catholic-abuse-intl/index.html>.

[285] See, eg, Barney Zwartz, 'Catholic Response 'unChristlike'', *The Age* (online, 2013): 'Ballarat has been an epicentre of clerical child sexual abuse, with some 40 victims committing suicide.'; Michael Short, 'Hell on Earth: Judy Courtin Says the Rape of Children by Catholic Priests is Best Dealt with by a Royal Commission', *The Sydney Morning Herald* (online, 25 June 2012). <https://www.smh.com.au/national/hell-on-earth-20120624-20wa8.html>: 'In Ballarat alone, as many as 35 men have committed suicide, victims of two priests, Robert Best and Gerald Ridsdale.'

[286] Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 28: Catholic Church Authorities in Ballarat* (Commonwealth of Australia 2017) (hereinafter the 'Ballarat Report').

authorities in Australia in relation to child protection and child-safe standards, including responding to allegation of child sexual abuse.'[287] On 15 December 2017, the Royal Commission presented its multi-part final report (hereinafter, the 'Final Report'), 'detailing the culmination of a five year inquiry into institutional responses to child sexual abuse and related matters.'[288]

The Ballarat Report is the report most focussed on the Diocese of Ballarat. It details the Royal Commission's investigation into the abuse and findings after considering hours of testimony (in hearings both public and private) and reams of documents handed over by the diocese and other entities. It opens with a description of the hearings held and the testimony presented and describes the standard of proof by which the evidence was considered.[289]

The Ballarat Report is centred on the events themselves. It details abuse perpetrated, children's reports to parents, and parents' complaints to school, Church, and police officials, and repeated failures by authorities to protect children. The Ballarat Report details who knew what when about particular allegations of abuse, about responses to allegations, about when and why abusive priests and brothers were transferred from school to school and parish-to-parish. It details the meetings of officials, conversations with insurance companies, and letters to and from mental health professionals. It lays out, in detail, the stories of abuse told by the victims themselves, and compares those stories with the testimony of officials and documentary evidence to piece together a narrative of iniquity that spans decades. This tracing of events is a crucial reconstruction, and, as will be discussed in Chapter 8, furthers a narrative of truth about the problem of child sex abuse in institutional settings that has been truly consequential for victims and their communities across Australia.

The Catholic Report detailed statistics about reports of child sexual abuse in Catholic institutions. As opposed to the detailed account of about instances of abuse and institutional action (or inaction) found in the Ballarat Report, the Catholic Report provides statistics about all of the dioceses and religious communities in Australia, including the Diocese of Ballarat and the religious institutions operating therein.[290] It finds that 139 people made a claim of

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[287] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Case Study 50: Institutional Review of Catholic Church Authorities', Royal Commission into Institutional Responses to Child Sexual Abuse (Web Page, 2017) <https://www.childabuseroyalcommission.gov.au/case-studies/case-study-50-institutional-review-catholic-church-authorities>.
[288] Final Report (n 277).
[289] Ballarat Report (n 286).
[290] Catholic Report (n 228).

child sexual abuse against the Diocese of Ballarat, which constitutes 3% of all claims of child sexual abuse received by Catholic institutions in Australia.[291]

The Diocese of Ballarat reported that 98 of the claims against it resulted in a payment or payments, whether those payments consisted of compensation, treatment, legal, or other costs. The diocese paid a total of $4.96 million on account of these claims. Of those 98 claims, 38 were brought in civil courts, of which 87% (33) resulted in monetary compensation, totalling $2.31 million. A total of 84 claims went through Towards Healing, of which 47 claims made to Towards Healing claims resulted in monetary compensation through that program, totalling $1.97 million. Although the specific amounts paid to individual claimants is not public information, the $2.31 million paid to 33 victims receiving awards through the civil claims process average $70,000 per claim, while the $1.97 million paid to 47 victims through Towards Healing averages just under $42,000. The Catholic Report listed 21 alleged perpetrators as subject to one or more claims of child sexual abuse received by the Diocese of Ballarat, of whom 20 were identified and all were male. Of these alleged perpetrators subject to one or more claims of child sexual abuse, 17, or 81 per cent, were reported to be priests, three were reported to be non-priest religious. Six alleged perpetrators were the subject of 10 or more claims, while one was the subject of 78 claims.[292] With a total of 199 priests serving the Diocese of Ballarat during the relevant time period, the Royal Commission found that 8.7% of the total number of priests in the diocese had been accused of abuse.[293]

There is broad agreement that the abuse perpetrated in Ballarat constitutes a cluster, and that the rate of abuse was unacceptably high, which justified the Royal Commission's significant investment of time and resources in the case study of the Diocese of Ballarat.[294] The quantitative data produced by the Royal Commission, however, suggests that, while the

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[291] Ibid.
[292] Ibid.
[293] Ibid.
[294] Gleeson (n 9),

> The case study of Ballarat forms the most comprehensive investigation of the Royal commission, in operation since 2013, and highlights the systemic failures of justice for all Australian victims of Catholic clerical child sexual abuse. The we of brothers and priests involved in child sexual abuse in Ballarat from the 1950s to the 1990s suggests an extraordinary density of crimes, including violent rapes, mostly of boys aged 5-14, who were students of local Catholic institutions in the former gold-mining regional town. In one primary school, St Alipius, a female lay teacher was the only teacher not subsequently convicted or suspected of perpetrating child sexual abuse in 1973 (a peak year for abuse). (citing Family and Community Development Committee 2012a:51-7; Waller, V. (2016) Submission to Issues Paper 11: Catholic Church Final Hearing, Royal Commission into Institutional Responses to Child Sexual Abuse, 11 July 2016).

rates of abuse in Ballarat are high, they are not necessarily extraordinary when considered alongside other dioceses and religious organisations in Australia. The proportion of priests accused of abuse in the Diocese of Ballarat is slightly higher than the proportion of abusive priests in Australia as a whole, but several other dioceses had rate that were higher still, and many religious orders had significantly higher rates.[295] The Royal Commission found that the dioceses and orders with the highest rates of abuse are those that regularly operated schools, orphanages, or other facilities that put their members in positions with direct authority over children, and that there was far less variation among dioceses than among religious institutes, many of which operated schools or orphanages as their primary activity.[296]

The Christian Brothers, a religious institute with a high rate of abuse, even among other religious institutes (22% of its members have been credibly accused of abuse), is responsible for much of the clerical child sexual abuse discussed in the Ballarat Report.[297] The Christian Brothers operated the schools where many known abusers were assigned to work, as well as other schools throughout Australia. Although the Christian Brothers and the Diocese of Ballarat were treated separately for purposes of data in the Catholic Report, the Ballarat Report considered the local Christian Brothers' community alongside the Diocese of Ballarat in order to gather information on abuse occurring in the geographical area, regardless of the order or diocese to which the priest or religious belonged.[298]

The relationship between the Christian Brothers and the Diocese of Ballarat during the time studied by the Royal Commission was considered during the inquiry, and although the two organisations had separate leadership, the evidence the Royal Commission considered demonstrated that the two organisations worked closely together, and that Cardinal Pell and

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[295] Catholic Report (n 228) (Listing an average rate of 7.9% for diocesan Church authorities and 7.0% for Australian Church authorities including religious orders). The Archdiocese of Brisbane (9.3%), the Diocese of Lismore (13.9%), the Diocese of Port Pirie (14.1%), the Diocese of Sale (15.1%), the Diocese of Sandhurst (14.7%), and the Diocese of Wollongong (11.7%) have higher rates of abuse. Of religious institutes, the Christian Brothers (22.0%), the De La Salle Brothers (13.8%), the Marist Brothers (20.4%), the Salesians of Don Bosco (non-ordained) (20.9%), the St John of God Brothers (40.4%), the Marist Fathers (13.9%), the Benedictine Community of New Norcia (21.5%), the Pallottines — Society of the Catholic Apostolate (13.7%), and the Salesians of Don Bosco (ordained) (17.2%) have higher rates of abuse.)

[296] Ibid.

[297] Ballarat Report (n 282) 21.

> The Congregation of Christian Brothers (Christian Brothers) is a Catholic male religious order founded in Ireland in 1802 by Edmund Rice. The Christian Brothers was established primarily to provide academic education, vocational training and care for poor boys. The Christian Brothers operated or provided staff for six primary and secondary schools in Ballarat and Warrnambool. St Alipius Boys' School (St Alipius), a primary school in Ballarat East, and St Patrick's College, a secondary school in Ballarat, were the principal focus of our inquiry. They were staffed primarily by Christian brothers from the St Patrick's community. We heard evidence from a number of men that they were sexually abused at these schools.

[298] Ibid.

other leaders were apprised of allegations against diocesan priests and Christian Brothers.[299] Officials of both organisations were involved in the schools where most abuse reported to the Royal Commission with respect to the Diocese of Ballarat was described as having taken place. The Royal Commission examined how officials in both organisations discussed events and issues arising in the schools. But the Christian Brothers and the Diocese of Ballarat were not the only organisations implicated in the Ballarat Report. The Royal Commission heard, and reported on, significant evidence that the Victoria Police were aware of claims that priests in the Diocese of Ballarat had abused children, and the Ballarat Report discussed reports to the Victoria Police, and what happened with respect to those reports.[300]

The evidence collected and made public by the Royal Commission gives insight into how Church and state authorities responded to reports of abuse — often by transferring offenders to new locations, convincing parents and victims to not report abuse to the police, or otherwise covering up the abuse. Significantly, the Ballarat Report discloses evidence of the instances of when Victoria Police notified diocesan officials of decisions not to act on reports of abuse against individual priests and religious and contrasts that evidence with statements by authorities that they had not known about those same individuals' abuse of children.[301] Thus, whereas the Catholic Report provides data about the incidence of abuse and the identities of abusers, the Ballarat Report provides context about how leaders in the Church failed to act when presented with evidence of wrongdoing. Significantly, the Ballarat Report is critical not just of Church leaders, but of the legal system: Victoria Police and even the Victorian Solicitor-General, who are discussed in the report as having been provided with information stemming from Ryan's investigation (discussed above) about Monsignor Day, and deciding not to bring charges because, 'the evidence [was] insufficient to warrant launching prosecutions.'[302]

The history of child sexual abuse by priests and religious in Ballarat is serious, significant, the recidivism is particularly disturbing, and the stories that have made Ballarat known for the problem of clerical child sexual abuse in Australia are worth telling, reading,

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[299] See, eg, Ibid, 158.
[300] Ibid 225.
[301] Ibid 226.

> In May 1972, Superintendent O'Conner [of the Victoria Police] wrote a report to the deputy commissioner in relation to the Solicitor-General's advice. The report stated that Superintendent O'Connor had the previous day advised Bishop Mulkearns of the Solicitor-General's comments concerning Monsignor Day. He recorded in the report that Bishop Mulkearns 'expressed his appreciation of the notification.'

[302] Ibid 225.

hearing, and studying. They provide insight into the circumstances, patterns, and reactions to child sexual abuse in Catholic institutions in Australia, as well as providing critical information into how wider social patterns can impact the capacity and willingness of law enforcement and other authorities to act on reports of abuse. Yet the rhetoric surrounding Ballarat, that it represents a cluster with higher rates of abuse than other areas in Australia or the world, deserves scrutiny. The stories of abuse, coverup, and institutional bias against protection of children serve as critical focus points that have advanced the Australian public's understanding of the problem of child sexual abuse in institutional settings, without which the Royal Commission may not have even been launched. The involvement and lack of action of the Victoria Police, however, demonstrates the importance of considering the wider social context. Without the social conditions that protected abusers within the Church, the Victoria Police, and the wider community, children in the Diocese of Ballarat, the stories may have come to light and been prosecuted much earlier.

III. DIOCESE OF GALLUP

This section will introduce and describe the Roman Catholic Diocese of Gallup, which is a suffran of the Archdiocese of Santa Fe. It is located in the United States, in largely rural northern parts of New Mexico and Arizona. *Figure 3.2* shows a map of the Ecclesiastical Province of Santa Fe and its suffran dioceses. Gallup is one of only two dioceses in the United States to cross state boundaries, its borders having been drawn to include the whole Navajo Nation. Like the Diocese of Ballarat, it was founded on land traditionally occupied by Indigenous people who were not, before colonisation, Catholic. While the available information about the scandal of child sexual abuse by clergy and religious in the Diocese of Ballarat does not contain a great deal of information about the Indigenous or non-Indigenous identities of victims, accused perpetrators, and communities, the history of contestation between Indigenous and non-Indigenous people in Gallup cannot be separated from the story of clerical child sexual abuse there.[303]

Within the diocese are located seven distinct Native American communities, those of the Acoma Pueblo, Laguna Pueblo, Zuni Pueblo, Jicarilla Apache, White Mountain Apache, Hopi, and the Navajo Nation.[304] It is one of the poorest dioceses in the United States, with a

[303] Cheryl Redhorse Bennett, 'Another Type of Hate Crime: Violence against American Indian Women in Reservation Border Towns' in Marianne O Nielsen and Karen Jarratt-Snider (eds), *Crime and Social Justice in Indian Country* (University of Arizona Press, 2018) 21.
[304] *In Re: Roman Catholic Church of the Diocese of Gallup, a New Mexico Corporation Sole* (United States Bankruptcy Court District of New Mexico, No. 13-13676-t11, Doc. 19, 12 Nov 2013) 4.

rural location and high rates of poverty and unemployment among the people residing within it.[305] Of the approximately 470,000 people who live in the 143,660 km^2 area, approximately 60,000 are Catholic. There are 45 parishes and missions within the Diocese, of which about 60% are located on Native American reservations, and many of the remaining parishes and missions are located in areas with significant Native American and Hispanic populations, and high rates of poverty.[306] *Table 3.3*, later in this chapter, lists the poverty rates and percentages of population that are Native American or Hispanic in the towns and reservations where priests and religious who have been credibly accused of abuse have been sent, and compares those places with rates in Arizona and New Mexico.

The three largest populations of people who live in the area are: white people, typically called 'Anglos,' a relatively large portion of which are members of the Church of Latter Day Saints (typically referred to 'LDS' or 'Mormon' people); Hispanic people (some recent immigrants, but mostly descendants of people who have lived in the area for generations, most of whom identify as Catholic); and Native American people, many of whom are Catholic. There are also smaller groups of people with African American, Filipino, Chinese, and Japanese roots.[307]

In the Gallup area today, Mormon and Catholic traditions remain dominant. Not only are these the two largest religious traditions in the area, people in rural Arizona and New Mexico are more religious than the US average.[308] Even those who are not faithful Catholics or Mormons often grew up in one or another of the two traditions, have family or close friends who attend services regularly, and much of daily life in the area is centred around

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[305] Ibid.

> There are no large metropolitan areas within the Diocese, and the geographic area of the Diocese includes significantly poor and underdeveloped areas where there is high unemployment and low income. In many of the counties within the Diocese, approximately forty-three percent (43%) of the people live below the poverty level, and the unemployment rate is approximately forty percent (40%) on the Native American reservations which comprise a large part of the Diocese. As a result, in part because of geographic location and the populations it serves, the Diocese is the poorest diocese in the United States.
>
> When I asked a diocesan official if the statement meant that the people are the poorest people in any U.S. diocese or that the diocese, as an organisation, is the poorest among all dioceses in the U.S., I was told 'both.' It is not clear what data informs the bishop's claims. Interview of diocesan official on file with author.

[306] Ibid.

[307] The city of Gallup resisted efforts to intern its local Japanese population during World War II, and two Japanese-American students were elected as senior class presidents during the war: Andrew B. Russell, 'Enduring Communities: The Nikkei in New Mexico', *Discover Nikkei: Japanese Migrants and their Descendants* (Article, 30 April 2008) <http://www.discovernikkei.org/en/journal/2008/4/30/enduring-communities/>.

[308] Ibid.

religious, cultural, and family traditions.[309] Surveys of religious participation show that between 11 and 18 percent of the population of the area regularly attend Catholic mass, and similar percentages are regular attendees of services in the Church of Latter-Day Saints.[310] This comports with my experience growing up in the area – most of my friends attended church services regularly.

This section will attempt to briefly recount relevant histories in the Diocese of Gallup. As discussed below, the history and social hierarchies of communities living alongside each other in the Diocese of Gallup is complex and variegated, and this makes a difference in how its history of child sexual abuse by priests and religious is treated in legal and social orders alike. While the story of the Diocese of Ballarat is thoroughly investigated through the Royal Commission, no such comprehensive investigation or report has been conducted with respect to the Diocese of Gallup. This section compiles information available with respect to the broader social context of abuse, because no other such compilation exists.

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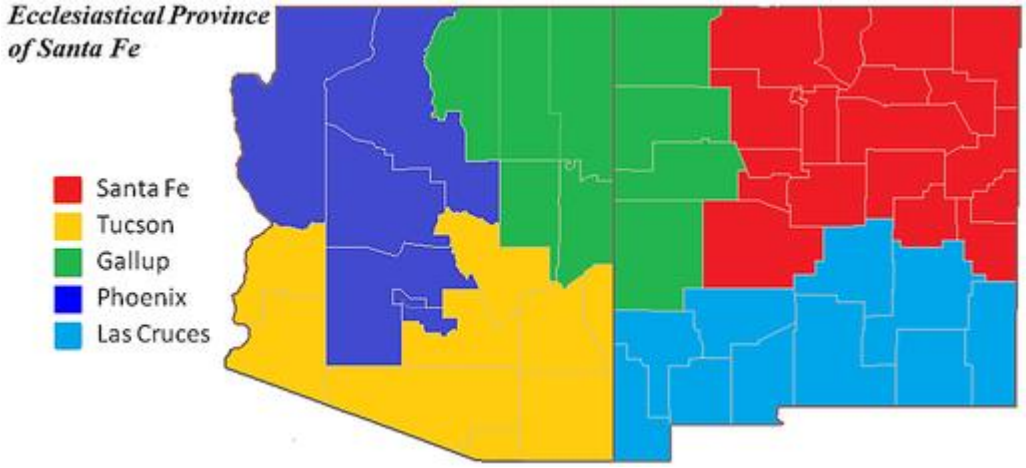
[309] Interview with Diocesan official on file with author. The LDS Church, is a religious movement that is deeply oriented to family and community. Both Catholic and Mormon communities in Arizona and New Mexico tend to include many large families and community members rely on each other and their local parishes and wards for support, ceremony, and celebration in all phases of life. Mormon teachings encourage active participation in civic life. Mormons tend to be socially and politically conservative. They 'believe in patriarchal marriage, have large families, refrain from drinking and using drugs, and go to church every Sunday'. Tamora M Hoskisson, 'The Making of the Modern Mormon: Politics, Discourse, and Power in the Mormon Church, 1945–54' (PhD Thesis, Northern Arizona University, 2009). Hoskisson writes,

> Yet the Roman Catholic Church, a similarly patriarchal and socially conservative body directed by a male hierarchy, claims considerably fewer American conservatives than does the LDS Church. According to the Pew Research Center survey, only 36 percent of Catholics considered themselves politically conservative, compared to 60 percent of Mormon respondents in the same study. Social conservatism alone cannot account for modern Mormon Republicanism. At a 2007 academic conference discussing "Mormonism & American Politics," religious historian Jan Shipps and fellow academic Philip Barlow addressed the question directly. They offered their views as longtime scholars of Mormonism as to why followers have become largely Republican. Shipps maintained that although Depression era Church president Heber J. Grant "hated the New Deal" and did not like FDR, it could not be said that regular Mormons became Republicans before the New Deal. She instead attributed the genesis of Latter-day Saint political conservatism to the virulent anticommunism of LDS authorities in the late 1950s
>
> Philip Barlow offered a more speculative possibility for recent Latter-day Saint Republicanism, based on his own experience with Mormon culture and what he termed the "Mormon mentality." Barlow depicted American Mormons as having been born of a western ethos that tended to champion the notion of rugged individualism, or the idea that a person can "make it on his own" without assistance from others.

[310] Clifford Grammich et al, 'U.S. Religion Census: Religious Congregations & Membership Study' (Census, Association of Statisticians of American Religious Bodies, 2010); Dale E Jones et al, *Religious Congregations and Membership in the United States 2000: An Enumeration by Region, State and Country Based on Data Reported for 149 Religious Bodies* (Glenmary Research Center, 2002).

(a) Figure 3.2 Map of Dioceses in Arizona and New Mexico



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A. *History of the Diocese Before Establishment*

Beginning in 1539 with the arrival of Spanish Franciscan friar Marcos de Niza, the Catholic Church, represented largely by Franciscans, was centrally involved with cycles of colonisation, domination, conversion, violence in the area now forming the Diocese of Gallup.[312] Beginning in 1620, northern 'New Spain,' as it was then known, became part of the Diocese of Durango, headquartered in Durango, Mexico, approximately 1,600 kilometres from the current town of Gallup.[313] In 1850, Pope Pius IX erected the Vicariate Apostolic of

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[311] Map created by Wikimedia user Farragutful based on the New Mexico Locator Map and the Arizona Locator Map: Wikimedia Commons, 'File: Ecclesiastical Province of Santa Fe Map.png', *Wikimedia Commons* (Web Page, 11 September 2018) <https://commons.wikimedia.org/wiki/File:Ecclesiastical_Province_of_Santa_Fe_map.png>.

[312] Frey de Niza, Francisco Vasquez Coronado, Fray Augustin Rodriquez, and the hundreds of people who travelled with them — people from Spain as well as what is now Mexico went looking for mythical cities of gold, as well as seeking to spread their faith. The Tiguex War, fought in the winter of 1540–41 by Francisco Vázquez de Coronado's forces against Tiwa and other Pueblo people was swift and brutal, resulting in Spanish forces retreating from the area. Janet Lecompte, 'Coronado and Conquest' (1989) 64 *New Mexico Historical Review* 279. In 1598, Juan de Oñate, having been named governor by the King of Spain of a territory called 'New Mexico,' organised an expedition for the purpose of colonisation. Oñate travelled through New Mexico, invading Pueblo villages, and meeting resistance with brutality. Oñate and his men enslaved men, women, and children and amputated the feet of men who resisted them. Franciscan friars were assigned to villages in order to convert people to Christianity. The Diocese of Gallup reports that, 'for many years, all of the Franciscan mission activities in the area had the material support of the King of Spain. It seems he and his advisors regarded this new land valuable only because of the mission work to be done'. A letter from Franciscan Brother Juan de Escalona in 1601 to the Spanish Viceroy is sharply critical of Oñate's violent and oppressive treatment of Pueblo peoples, including the forcible taking food, blankets, and other supplies. He blamed the cruelty for the people's rejecting Christianity, 'we cannot preach the gospel now, for it is despised by these people on account of our great offenses and the harm we have done them.' Edwin S Gaustad, *A Documentary History of Religion in America to the Civil War* (Eerdmans Publishing Company, 1993).

[313] At least one goal of the Spanish conquistadors and missionaries was to 'civilise' Native Americans through conversion; the introduction of European methods of agriculture, comportment, dress; and the forced extraction of tribute and labour. The Pueblo population was the primary target for this 'civilisation.' It was estimated to have been about 60,000 people in 1598, living predominately in compact agricultural villages. Franciscan friars founded missions, suppressed Pueblo religious traditions, and forced the conversion of many. In 1680, Pueblo people formed a confederation and drove Spanish people from the area in what is now called the Pueblo Revolt. During the Pueblo Revolt, most of the 33 Franciscan friars who had been in the area were killed, along with 380

New Mexico. Pius IX, whose papacy saw the end of the Papal States and the opening of the First Vatican Council, also erected the diocese of Ballarat in 1874, as discussed above. He is thus a crucial figure in the history of both dioceses and, as will be discussed in Chapter 5, the development of canon law.[314] The Diocese of Gallup was created by Pope Pius XI on 16 December 1939, out of territory previously belonging to the Archdiocese of Santa Fe and the Diocese of Tucson.

The erection of the Vicariate of New Mexico and its later establishment as a diocese came shortly after the 1846 military occupation of New Mexico and its subsequent designation as a territory of the United States of America.[315] As Laura Gómez explains, this resulted in a form of 'double-colonization' where

> American military and civil authorities encountered an entrenched set of European-origin political and social institutions that were operated by a largely non-European population consisting of small, widely dispersed mestizo (mixed Spanish and Indigenous) and Pueblo Indian communities.[316]

Gómez's study of how 'majority Mexican legislatures [in the Territory of New Mexico] responded to Pueblo Indians, Blacks (free and enslaved) and nomadic Indians during the first twenty-five years of the American occupation (1846–1869)'[317] provides a useful and relevant background to the social climate of the Diocese of Gallup, much as Withers' work does for Ballarat. The complex racial and social orderings in New Mexico is relevant to the ways in which child sexual abuse manifested and has been understood within the Diocese of Gallup. As will be discussed below, the social hierarchies of double-colonization, in which Anglo-Americans and certain Mexican-Americans become elites while lower status Mexican-Americans and some Native Americans (Pueblo people) occupy an intermediate status above

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settlers. Ramón A Gutiérrez, 'Honor Ideology, Marriage Negotiation and Class-Gender Domination in New Mexico 1690–1846' (1985) 12 *Latin American Perspectives* 81; see also Ross Enochs, 'The Franciscan Mission to the Navajos: Mission Method and Indigenous Religion, 1898-1940' (2006) 92 *The Catholic Historical Review* 46.

[314] Pope Pius IX, was the longest reigning elected Pope in the history of the Catholic Church, serving from 16 June 1846 until his death in 1878. During his papacy, he convened the First Vatican Council in 1869, which decreed papal infallibility. Catholic Online, 'BI. Pius IX', Catholic Online (Web Page, 2019) <https://www.catholic.org/saints/saint.php?saint_id=7634>.

[315] Laura E Gómez, 'Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico' (2005) 25 *Chicano-Latino Law Review* 9, 14.

[316] Ibid.

[317] Ibid.

other Native Americans (Navajo, Apache, and other peoples),[318] and (later) non-white immigrants can be traced not just through the court and legislative records that Gómez studies, but also in the data released by the Diocese of Gallup about child sexual abuse within the diocese.

The elevation of the Diocese of Santa Fe to an archdiocese in 1875 coincided with a time period of significant changes in the population of the area which would later become the Diocese of Gallup. In the 1880s, the railroad through New Mexico and Arizona was completed, bringing new peoples and industries to the area.[319] The town of Gallup, New Mexico was founded during this period, located to access the rich coal fields directly adjacent to the railroad.[320]

The last decades of the 19th century was also the era of a well-publicised conflict between the United States and a Chiricahua Apache band led by Geronimo, as well as other conflicts between the United States and Indigenous people.[321] As Indigenous people in the

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[318] Ibid.

> An important form of psychological inducement was allowing Mexicans to claim, publicly and formally, white status. Mexicans received a kind of collective psychological boost by being allowed to claim whiteness within the American context of white supremacy. Consider that, however, in order for the boost to be meaningful, Indians had to be excluded from it. The assertion that members of the Navajo, Apache, Comanche, Ute and other nomadic and semi-nomadic tribes were not "white" was not in the least controversial. From the Euro-American perspective, these Indian tribes looked like the Indian tribes whom they had been battling, slaughtering, and gradually pushing west from the time of the first New England settlements. But, as noted Pueblo scholar Alfonso Ortiz has said, Pueblo Indians "posed a paradox for American policymakers. [American] officials in New Mexico were quick to point out the contrasts between such 'savage' tribes as the Apaches, Utes, Navajos, Comanches, Cayugas, Cheyennes, and Arapahos, and the "civilized" Pueblos . . ." ….
>
> The result was a regional racial hierarchy with four tiers (omitting Blacks, who officially numbered only a handful in the region): Euro-Americans at the top; followed by Mexicans, as a "native" group with formal claim to white status; followed by Pueblo Indians as a buffer group among the three native groupings (Mexican, Pueblo, other Indian); with nomadic and semi-nomadic Indian tribes at the bottom. (citations omitted).

[319] See, eg, Laura E. Gómez, 'Race, Colonialsim, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico' (2000) 34 *Law & Society Review* 1129, 1137.

[320] 'About the Diocese of Gallup,' *Diocese of Gallup* (Web Page) <https://dioceseofgallup.org/about/> , explaining that when the town of Gallup was founded,

> [a] large number of persons from the Catholic Mediterranean countries had arrived to work in the mines. The only religious resource available to them was the priest at Seboyeta, (then Cebolleta). Father Juan B. Brun, who served the entire area from the Rio Puerco of the East to the Grand Canyon. He arrived in New Mexico in 1875 to begin his work and in 1879, changed his residence to San Rafael. His first visit to Gallup was in 1884 when Gallup had only about 12 families. In 1893, Father George Julliard arrived to serve as pastor and remained unti1 1910. Father Julliard built the first Catholic Church in Gallup in 1899. This building collapsed in 1916 and the following year a combination school and church was constructed. This church became Sacred Heart Cathedral when the new diocese was created 22 years later.

[321] See, eg, John R Welch and Robert C Brauchli, '"Subject to the Right of the Secretary of the Interior": the White Mountain Apache Reclamation of the Fort Apache and Theodore Roosevelt School Historic District',

region were, tribe by tribe and band by band, confined to reservations, the United States government, the Catholic Church, and other religious organisations began establishing schools for Native American children, including boarding schools, day schools, and other institutions.[322] In the territory now forming the Gallup Diocese, the government and religious organisations including the Catholic Church, ran a number of schools — both day and boarding schools.[323]

The Catholic schools for Indigenous people in the area were often staffed with Franciscans, whose efforts to 'civilise' Indigenous people can be compared to those Merry described of missionaries in Hawaii, who reshaped the sociolegal landscape before annexation.[324] As discussed above, the area now forming the Diocese of Gallup had a long history with Franciscan friars, but the Franciscans had been expelled from the area after Mexico achieved its independence from Spain in 1821.[325] In the late 19th century, however, Katherine Drexel, the daughter of a wealthy banker in Philadelphia and later Mother Superior of the Sisters of the Blessed Sacrament, a religious order she founded, determined to establish

(2010) 25(1) *Wicazo Sa Review* 47; Edward Holland Spicer, *Cycles of Conquest; the Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533–1960* (University of Arizona Press, 1962).

[322] See, eg, Margolis, Eric. 'Looking at Discipline, Looking at Labour: Photographic Representations of Indian Boarding Schools' (2004) 19(1) *Visual Studies* 72.

[323] See, eg, Debra K Barker, 'Kill the Indian, Save the Child: Cultural Genocide and the Boarding School' in Dane Anthony Morrison (ed), *American Indian Studies: An Interdisciplinary Approach to Contemporary Issues* (Peter Lang, 1997) 47; David Wallace Adams, *Education for Extinction* (University of Oklahoma Press, 1995); University of Wisconsin-Madison, 'Statistics as to Indian Schools', *University of Wisconsin-Madison* (Web Page) <http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep99p1/reference/history.annrep99p1.i0035.pdf>; National Archives, 'Navigating Record Group 75: BIA Schools', *National Archives* (Web Page, 13 September 2018) <http://www.archives.gov/research/native-americans/bia-guide/schools.html>; Isaiah Montoya, 'Remembering the "Pueblo Training School"', *Navajo Times* (online, 9 July 2009) <http://www.navajotimes.com/entertainment/2009/0709/070909remembering.php>.

[324] Merry (n 211)

[325] Diocese of Gallup, 'History of the Diocese of Gallup,' *Diocese of Gallup* (Web Page, 2019) <https://dioceseofgallup.org/about/our-history/>.

> A greater threat to the nearly 300 years of work of the dedicated [Franciscan] friars occurred when Mexico was able to win its independence from Spain in 1821 and form their own government. Anti-clericalism was one of the direct results of their revolution and the missions were secularized and the Franciscans were expelled. During the years of Mexican rule, many of the mission churches fell into disrepair and ruin. Many of the sacred vessels, statues and vestments were taken by loyal families and hidden for protection. In May 1848, the Mexican era ended, and New Mexico became part of the United States. During the Mexican era, Santa Fe and the surrounding area were part of the Diocese of Durango, Mexico and the Bishop had visited only three times during this period. There were only nine active priests, most of the Churches were in ruins, there were no schools, and the parishioners were scattered in small villages. The Bishops of the United States sent a message to the Pope requesting that the Territory of New Mexico have a Vicar Apostolic and a See established in the city of Santa Fe.

mission schools[326] in what were then known as the Territories of Arizona and New Mexico.[327] The Franciscan Fathers of Cincinnati, sent missionaries to work with Navajo people in the area between 1890 and 1939 at Drexel's request.[328] Drexel spent much of her life establishing mission schools in the Southwest, including the still-operating St Michael Indian School, in St Michaels, Arizona.[329]

The benevolent intents of Drexel, who was canonised in 2000, did not prevent many schools from causing intense harm to those they sought to serve. Activist Mary Crow Dog, who attended a school founded by St Katherine, called it a 'curse for our family for generations.'[330] Debra K S Barker characterised the schools 'an instrument that emotionally scarred generations of Indian children, leaving them and their children, as well, victims of institutionalised cultural genocide.'[331] The cultural genocide experienced by Indigenous children in what is now called the Diocese of Gallup was not unique to those subject to the ministrations of the Sisters of the Blessed Sacrament or the Franciscan Friars there. It reflected express United States policy of requiring Indigenous people to learn and adopt the 'white man's way of life.'[332] The purpose of 'civilising' Indigenous people has come to be

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[326] John Allan Reyhner, 'Indian Boarding Schools', *California Indian Education* (Web Page, 2008) <http://www.californiaindianeducation.org/indian_boarding_schools/>; The Kumeyaay Information Village & Website, 'History of Indian Boarding Schools', *The Kumeyaay Information Village & Website* (Web Page) <http://www.kumeyaay.info/history/History_Indian_Boarding_Schools.pdf>; Cecilia Murray, 'Katharine Drexel: Learning to Love the Poor' (2006) 9(3) *Catholic Education: A Journal of Inquiry and Practice* 307, citing Nicole Hurd, 'The Master Art of a Saint: Katharine Drexel and Her Theology of Education' (PhD Thesis, University of Virginia, 2002) 38.

[327] Arizona separated from the Territory of New Mexico in 1863: National Archives, 'H.R. 357', *National Archives* (Web Page, 24 July 2019) <https://www.archives.gov/legislative/features/nm-az-statehood/hr357.html>. New Mexico became the 47th State in the United States and Arizona became the 48th, both in 1912: National Archives, 'S.J.Res. 57', *National Archives* (Web Page, 24 July 2019) <https://www.archives.gov/legislative/features/nm-az-statehood/sjres57.html>.

[328] *In re Roman Catholic Church of the Diocese of Gallup*, No. 13-13676 (Bankr, D.N.M.) 'Declaration of Bishop James S. Wall In Support of Chapter 11 Petition and First Day Motions', document 19., Paragraph D.

[329] St Michael Indian School, 'Home', *St Michael Indian School* (Web Page, 2019) <http://www.stmichaelindianschool.org>. Two of the priests listed on the diocese's 'credibly accused' list spent time in St Michaels.

[330] Mary Crow Dog and Richard Erodes, *Lakota Woman* (Harper Perennial, 1991) 31.

[331] See eg, Sally McBeth, *Ethnic Identity and the Boarding School Experience of West Central Oklahoma American Indians* (University Press of America, 1983); Robert A Trennert, *The Phoenix Indian School: Forced Assimilation in Arizona, 1891–1935* (University of Oklahoma Press, 1988); K Tsiannia Lomawaima, *They Called it Prairie Light: The Story of Chilocco Indian School* (University of Oklahoma Press, 1993); Debra K Barker, 'Kill the Indian, Save the Child: Cultural Genocide and the Boarding School' in Dane Anthony Morrison (ed), *American Indian Studies: An Interdisciplinary Approach to Contemporary Issues* (Peter Lang, 1997) 47; Adams (n 322); and Brenda Child, *Boarding School Seasons: American Indian Families, 1900–1940* (University of Nebraska Press, 1998).

[332] 2014 Native Youth Report, Executive Office of the President of the United States of America, (online December 2014) <https://obamawhitehouse.archives.gov/sites/default/files/docs/20141129nativeyouthreport_final.pdf>.

defined as cultural genocide.[333] The residential schools, particularly those designed for the purpose of educating Indigenous children, were hotbeds of cultural, spiritual, physical, emotional, and sexual abuse.[334]

While most of the schools in the Gallup area were day schools, rather than boarding schools, the purpose of education there was not just to teach children to read and write, but a colonial project led by the United States government in conjunction with Christian churches, including the Catholic Church, to strip Indigenous children of their culture and identity in order to replace it with a more 'acceptable' Christian identity. The idea was to erase children's Navajo, Apache, Hopi, Pueblo, Ute, or other Indigenous identity entirely. The impact of the schools continues to be felt across the region, as evidenced by the cartoon shown in *Figure 3.3*, a comic from the *Navajo Times*, published in 2014. The impacts of this policy live on in more than just history books and memories. St. Michael's currently has an enrolment of just under 400 students from kindergarten through 12th grade.[335]

[333] Amanda Bresie, 'Mother Katharine Drexel's Benevolent Empire: The Bureau of Catholic Indian Missions and the Education of Native Americans, 1885-1935' (2014) 32(3) *U.S. Catholic Historian* 1, 23.

[334] See, eg, Letter to Editor of Navajo Times dated 9 October 2014, Sharon Manuelito, Window Rock, Arizona

> I believe it's time for our Navajo government to address the historical trauma that involved the federal government's attempt to eradicate the Navajo language and culture through the BIA boarding school system.
>
> The children were forbidden to speak the Navajo language and were punished and scolded if they spoke the Navajo language. It was the policy of the BIA to assimilate the Navajo people to the Western culture. This policy involved forbidding the Navajo language and choosing a religion for the child.
>
> I witnessed this as a six-year-old child in boarding school. The product you have today is that many Navajos are not fluent in the language.

[335] St Michael Indian School, 'Learn More About Us', *St Michael Indian School* (Web Page, 2019) <https://www.stmichaelindianschool.org/learn_more_about_us.php>.

Figure 3.3 Navajo Times Cartoonist on Boarding Schools for Navajo Children

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B. *Clerical Child Sexual Abuse in Gallup*

As with the Diocese of Ballarat, many priests and religious serving the diocese in the 20th century are now known to have been serial abusers.[337] As in Ballarat, some held positions of significant authority. These include Monsignor James Lindenmeyer, who was vicar general under Bishop Espelage in the 1960s,[338] and Fr. Raul Sanchez, who was chancellor of the diocese under Bishop Hastrich from 1979 to 1986.[339]

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[336] Navajo Times editorial cartoonist Jack Ahasteen, *Navajo Times* (3 April 2014) editorial cartoon.
[337] The diocese lists 77 separate assignments of 22 abusers to a local parishes and schools between 1939 and 1969. Diocese of Gallup, 'Credibly Accused List', *Diocese of Gallup* (Web Page, 2 August 2019) <http://dioceseofgallup.org/youth-protection/credibly-accused-list/>.
[338] Elizabeth Hardin-Burrola, 'Gallup Diocese Hit with 10 More Sex Abuse Lawsuits', *Bishop Accountability.org* (Web Page, 20 June 2013) <http://www.bishop-accountability.org/news2013/05_06/2013_06_20_HardinBurrola_GallupDiocese.htm>. Lindenmeyer served in Winslow, Arizona as an assistant priest from 1948 to 1950, assigned to a church in Flagstaff Arizona. then as a pastor from 1969 to 1976, when he left to work in Farmington, New Mexico. From 1950 to 1969, he was assigned to a church in Flagstaff, Arizona, then came back to Winslow. He then served at St. Mary's Catholic Church in Farmington from 1976 until his retirement in 1996.
[339] Diocese of Gallup, Credibly Accused List (n 337).

Gallup's children did not face the risk of abuse only from within their diocese, however. In 1947, just outside of the diocese, and just south of Santa Fe, Father Gerald Fitzgerald founded the Servants of the Paraclete, a religious community of men dedicated to the treatment of priests struggling with substance abuse and psycho-sexual problems.[340] The Servants of the Paraclete soon began accepting clients referred by bishops for abusing children despite its founder's misgivings about the ability to impact likelihood of repeated offenses for those who abuse children.[341] Bishops all over the world sent priests who abused children to the centre. Among these bishops were Bishop Ronald Mulkearns of the Diocese of Ballarat.[342] Evidence presented to the Royal Commission suggested that at Bishop Mulkearns sent least one priest sent to the Servants of the Paraclete facility who was allowed to spend weekends working in local parishes, even as records from the Servants of the Paraclete facility remain hidden from public view.[343] The Royal Commission's power to require disclosure of records is, as will be discussed in Chapter 8, significantly greater than the power of subpoena any court in the United States has, and has thus enabled disclosure of documents relevant to child sexual abuse in Gallup that people in Gallup have not been able to secure. We can see that participants' concerns about problematic priests being sent from wealthy dioceses serving relatively privileged people to areas serving disfavoured communities are not misplaced, and this phenomenon occurs not just within settler-colonial nations, but internationally.

A lawsuit filed against the Diocese of Gallup before its bankruptcy filing alleged Lindenmeyer wrote to warn other priests that Father William G Allison, who had spent a year

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[340] Servants of the Paraclete, 'Founding of the Congregation' *Servants of the Paraclete* (Web Page, 2010) <http://www.theservants.org/WhoWeAre/FoundingoftheCongregation.aspx>.

[341] See, Patrick J Wall, 'Happy Anniversary, Holy See: It's been 50 years!', *Patrick J Wall* (Blog Post, 29 June 2012) <https://patrickjwall.wordpress.com/2012/06/29/happy-anniversary-holy-see-its-been-50-years/>, quoting from letter from Fr. Gerald Gitzgerald s.P. 'giving notice to the Holy See of the problem of child sexual abuse by the clergy in the United States'. The letter quoted from in available only in poor copy and Wall transcribes it as follows:

> On the other hand, when a priest has fallen into repeated sins which are considered, generally speaking, as abnormal (abuse of nature) such as homosexuality and most especially abuse of children, we feel strongly that such unfortunate priests should be given the alternative of a retired life within the protection of monastery walls or complete laicization.

[342] See Royal Commission into Institutional Responses to Child Sexual Abuse, 'Transcript (Day C084): 28 May 2015', *Royal Commission Into Institutional Responses to Child Sexual Abuse* (Transcript, 28 May 2015) <https://www.childabuseroyalcommission.gov.au/case-studies/case-study-28-catholic-church-authority-ballarat>. Testimony of Gerald Francis Ridsdale, counsel assisting referring to a letter that Bishop Mulkearns wrote to the director of the Servants of the Paraclete facility in October 1989.

[343] See ibid. Gerald Francis Ridsdale, testifying that he was sent to the Servants of the Paraclete facility in New Mexico for about eight months in 1989-1990, and noting that he was aware of another patient at the facility, 'was given the opportunity by, I think it was the Bishop of that diocese but I'm not sure, of doing some weekend ministry in his diocese and I think while he was doing that he was offending.')

at the Servants of the Paraclete facility, was assigned to a parish in Holbrook and a parish in Flagstaff. [344] According to the lawsuit, Lindenmeyer wrote that he had heard of child sexual abuse by Allison, had no reason to doubt the truth of the accusations, and nonetheless requested 'all this be kept in the strictest confidence'.[345] Allison is listed by the diocese as credibly accused of child sexual abuse.[346] Plaintiffs' lawyers bringing actions against the Diocese of Gallup told me of their belief that patients of the facility were frequently used to staff diocesan needs, but that their efforts to have the facility's records made public met strong resistance from officials there.[347]

Without access to the records of the Servants of the Paraclete facility and the Diocese of Gallup, it is not clear the extent to which patients of the Servants of the Paraclete were recruited or allowed to serve in Diocese of Gallup. In recent years, the Diocese has released lists of 'credibly accused' priests and religious, and the places and dates of their assignments.[348] The information provided by the diocese is represented in Figure 3.4, below. The diocese's records have been made provided to the New Mexico Attorney General, but not to the public.[349]

Although Gallup has not been investigated the way Ballarat has, an evaluation of the list of 'credibly accused' priests and religious of the Diocese of Gallup reveals that 77 of the 170 assignments of credibly accused priests and religious were made during Bishop Espelage's tenure.[350] These 77 assignments were given to 22 separate individuals between 1939 and 1969 who the Diocese now admits are credibly accused. There were 32 priests in the Diocese of Gallup at the time of its creation, and 108 by 1967.[351] Many of those 32 first given assignments during Bishop Espelage's time continued to work in the Diocese once Bishop Jerome J Hastrich was appointed in 1969, and an additional 17 priests or religious the Diocese now admits are credibly accused of child sexual abuse were first given assignments

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[344] Hannah Grover, 'Former Farmington Priest Allegedly Sexually Abused Children, Covered up Abuse for Other Priest', *Bishop Accountability.org* (Web Page, 5 September 5, 2013) <http://www.bishop-accountability.org/news2013/09_10/2013_09_05_Grover_FormerFarmington.htm>.
[345] Ibid.
[346] Diocese of Gallup, Credibly Accused List (n 337).
[347] Interview of plaintiffs' lawyers on file with author.
[348] Diocese of Gallup, Credibly Accused List (n 337).
[349] Letter from Hector H. Baldera, Attorney General of the State of New Mexico to Bishop James S. Wall dated as of September 4, 2018 (Web Page, 4 September 2018) < https://www.documentcloud.org/documents/4830051-New-Mexico-Attorney-General-s-letter-to-the.html>; Angela Kocherga, 'Diocese gives AG files on accused priests – "Clearly, grave mistakes were made," bishop says,' *Albuquerque Journal* (12 February 2019), A7.
[350] The chart labelled Figure 3.3 reflects data presented on the credibly accused list provided by the Diocese but organised to facilitate the calculations discussed in the following paragraphs. Diocese of Gallup, Credibly Accused List (n 337).
[351] 'Our History,' *Diocese of Gallup* (Web Page) <https://dioceseofgallup.org/about/our-history/> .

in the diocese between 1970 and 1989. These 17 priests were given a total of 64 separate assignments during Hastrich's tenure.

C. *More Recent Abuse and Legal Proceedings in Gallup*

In 1990, Donald E Pelotte SSS, became the third bishop of Gallup.[352] He was the first person of Native American descent to become a Catholic bishop in the United States.[353] He was also the Episcopal moderator of the Tekakwitha Conference, an association of Native American and First Nation Catholics, from 1986 to 2008. Pelotte was not, however, a local — his father was a member of the Abenaki First Nation, a people from an area far to the east of New Mexico, and he grew up in Maine.

During Bishop Pelotte's tenure, survivors started coming forward publicly and through legal proceedings. Through the early and middle part of the 2000's, some survivors brought their claims directly to the diocese. The Gallup Diocesan Review Board on Juvenile Sexual Abuse, formed in compliance with the Dallas Charter, issued a press release in May of 2003, in which it identified former Gallup priests Michael Aten, James Burns, John T Sullivan, Francis Murphy, Douglas McNeill and Jose Rodriguez as perpetrators of CSA. The *Gallup Independent* also reported that Aten, Burns, McNeill, and Rodriguez were stripped of their priestly faculties in the 1990s. Sullivan had first been identified as having committed abuse in other dioceses.[354] He had been assigned to work in Winslow and a number of other locations in Gallup from the 1950s to the 1970s, as well as spending time in Michigan, New Hampshire, Wisconsin, Texas, and New Mexico. Murphy abused many children in Alaska, but never worked for the Gallup Diocese, although he retired to Cuba, New Mexico in 1990.[355]

On November 30, 2003, Bishop Pelotte wrote a letter to all of the faithful in the diocese, in which he discussed the implementation of the Dallas Charter, committed himself and his staff to transparency and the protection of young people, and released the statistics he

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[352] Catholic Hierarchy, 'Bishop Donald Edmond Pelotte, S.S.S.', *Catholic Hierarchy* (Web Page) <http://www.catholic-hierarchy.org/bishop/bpelotte.html>.
[353] Catholic News Agency, 'Bishop Emeritus of Gallup Donald E. Pelotte Dies at 64' *Catholic News Agency* (online, 8 January 2010) <https://www.catholicnewsagency.com/news/bishop_emeritus_of_gallup_donald_e._pelotte_dies_at_64>.
[354] Elizabeth Hardin-Burrola, 'Local Panel Names Sexually Abusive Priests: Public Asked to Contact Board with Questions and Concerns', *Bishop Accountability.org* (Web Page, 20 May 2003) <http://www.bishop-accountability.org/news3/2003_05_20_Hardin_LocalPanel_James_M_Burns_5.htm>.
[355] Elizabeth Hardin-Burrola, 'Local Panel Names Sexually Abusive Priests', *Bishop Accountability.org* (Web Page, 20 May 2003) <http://www.bishop-accountability.org/news3/2003_05_20_Hardin_LocalPanel_James_M_Burns_5.htm>.

had provided for the John Jay Study.[356] It is clear that Bishop Pelotte was concerned to ensure that the faithful believed (1) their children were safe with diocesan personnel, (2) that the diocese understood their concerns, (3) that there were not many abusers in the diocese, and (4) that any payments made to survivors did not detract from the services provided by the diocese.

Bishop Pelotte's concern for the reputation of the diocese appears to have been a key feature of his response, as has been a global pattern to the responses of Catholic leaders and indeed the responses of other religious groups. This concern was also made clear to me in a conversation with local journalist Elizabeth Hardin-Burrola.[357] She told me that she was first assigned to write about the diocese in connection with child sexual abuse 2002 by her editor at the *Gallup Independent*.[358] She said that the paper had been running a syndicated national news-related cartoon. Apparently, in 2002, a number of the cartoons related to the issue of clerical child sexual abuse after the *Boston Globe*'s investigative reporting on the topic.

As Hardin-Burrola told me, her editor had received a call from Bishop Pelotte, who was upset with the paper for having run the cartoons and wanted to have the paper run a positive report on the diocese.[359] Her interpretation was that Pelotte wanted the faithful in Gallup to believe that their diocese was not like the Archdiocese of Boston and to trust their local priests.[360] In 2005, Bishop Pelotte publicly apologised to survivors at a mass he gave in St. Joseph's Church in Winslow, alongside the victim assistance coordinator at the time, Sister Mary Thurlough. Hardin-Burrola's article describing the mass and survivors' reactions to it was positive. She quoted a survivor referring to the bishop's homily as 'the best thing in the world.'[361] She also wrote about how that man and the bishop later met in person, along with three other survivors. The bishop apologised to them personally, answered the 'frank' questions posed to him. He also promised to investigate the list 19 priests the survivors gave

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[356] Bishop Accountability, 'Diocese of Gallup NM', *Bishop Accountability* (Web Page, 30 November 2003) <http://www.bishop-accountability.org/usccb/natureandscope/dioceses/gallupnm.htm>.
[357] Interview on file with author.
[358] Interview on file with author.
[359] Interview on file with author.
[360] Interview on file with author; see also Bishop Accountability, Diocese of Gallup NM, (n 356) quoting Pelotte

> The support of the Catholic lay faithful for the Church and especially for our dedicated, loving and devoted priests has been overwhelming. I applaud and thank you all for this. I ask each and every one of you to join me in prayer and thanksgiving for our priests. I also ask you to join me in prayer as we commit ourselves to the protection of all vulnerable people in our midst, especially our children.

[361] Elizabeth Hardin-Burrola, 'Bishop Apologizes for Abuse: Pelotte Speaks to Winslow Parishioners', *Bishop Accountability.org* (Web Page, 20 September 2005) <http://www.bishop-accountability.org/news13/2005_09_20_HardinBurrola_BishopApologizes_Clement_Hageman_ETC_1.htm>.

him about whom allegations of abuse had been made. Hardin-Burrola wrote about this meeting in the *Gallup Independent*, including by reference to a victim who 'remained a devout Catholic, [and was] interested in possibly helping reconcile other victims with their spiritual faith and with the Catholic Church.'[362]

Even as Bishop Pelotte made his apology in Winslow and worked to preserve the diocese's reputation, he was requiring victims to sign non-disclosure agreements before he would allow them to be compensated. Hardin-Burrola later wrote a number of articles which contrast Pelotte's warmth in dealing directly with people and the diocese's treatment of people under his leadership — including a lack of action to remove priests accused of abuse.[363] Plaintiffs' attorneys, Hardin-Burrola, and a self-published biography of a local victim all refer to a lawyer from California who represented a number of victims during Pelotte's tenure as bishop.[364] Two plaintiffs' lawyers told me that the lawyer from California had a pattern: rather than file a formal complaint, he would call the diocese, secure a payment ('usually enough for the survivor to buy a truck'), the parties would sign a non-disclosure agreement, and no records would be made public.[365]

In July 2007, Bishop Pelotte was seriously injured under suspicious circumstances and never recovered.[366] On February 5, 2009, Bishop James S. Wall was appointed.[367] A number

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[362] Elizabeth Hardin-Burrola, 'Bishop Talks with Victims of Abuse: Outreach to Native Victims is Discussed', *Bishop Accountability.org* (Web Page, 9 May 2005) <http://www.bishop-accountability.org/news13/2005_05_09_HardinBurrola_BishopTalks_Clement_Hageman_ETC_2.htm>.

[363] Elizabeth Hardin-Burrola, 'Lujan Quits Gallup Diocese As Chancellor', *Bishop Accountability.org* (Web Page, 19 March 2009) <http://www.bishop-accountability.org/news2009/03_04/2009_03_19_HardinBurrola_LujanQuits.htm>.

> Lujan proved to be a staunchly loyal member of Pelotte's staff who adopted Pelotte's biases and prejudices. Although Pelotte could be very friendly and charming in public settings, he had his favored inner circle of staff members and priests, and he waged very private and very aggressive campaigns against those who dared to express contrary opinions. Lujan quickly became very unpopular with many priests because of his adoption of Pelotte's tactics.
>
> Over the last two decades, during a time when most Catholic dioceses across the country lost many aging priests to retirement and death, Pelotte compounded the problem in the Diocese of Gallup by pushing out of the diocese many popular and hardworking priests who angered Pelotte by raising concerns about the tolerance of sexual misconduct within the diocese, the lack of diocesan financial accountability, the sale of church assets, and Pelotte's own personal problems.

[364] Interviews with RP, Elizabeth Hardin-Burrola; Joseph M Baca, *Constant Reminder: A Memoir of Priest Abuse and Recovery* (CreateSpace Independent Publishing Platform, 2013).

[365] Interviews with RP, TM; see also Olivier Uyttebrouck, 'Gallup Diocese Bankruptcy Raises Question of How Many More Victims There Are', *Bishop Accountability.org* (Web Page, 14 December 2013) <http://www.bishop-accountability.org/news2013/11_12/2013_12_14_Uyttebrouck_GallupDiocese.htm>.

[366] Elizabeth Hardin-Burrola, 'What Caused Pelotte's Injury? Catholic Bishop Insists He Wasn't "Beat Up"', *Bishop Accountability.org* (Web Page, 30 July 2007) <http://www.bishop-accountability.org/news2007/07_08/2007_07_30_Hardin_WhatCaused.htm>.

[367] Diocese of Gallup, 'About Our Bishop,' *Diocese of Gallup* (Web Page, 2019) <https://dioceseofgallup.org/about/our-bishop/>.

of interview participants told me that as a priest in the diocese of Phoenix, Bishop Wall had been close with Most Rev. Thomas J. Olmsted, bishop of the Diocese of Phoenix, who administered the diocese from Bishop Pelotte's injury until Bishop Wall's appointment.[368] Bishop Olmsted is regarded locally as a conservative bishop,[369] who made news when he excommunicated a nun who authorised an abortion at a Catholic hospital in order to save the life of the mother.[370] Likewise, interviews with diocesan officials confirmed that Bishop Wall is a conservative Catholic whose views are more in line with those of Pope Benedict XVI than Pope Francis.[371] Chapter 5 on canon law will explain more about the theological implications of political positioning within the Church, but Wall's conservative views align him with positions strongly in favour of patriarchal traditions like all-male leadership and celibacy for priests, and sceptical of the reforms called for by Vatican II in the middle of the 20th century.

Around the same time as the disruption in leadership in Gallup precipitated by Bishop Pelotte's injury, lawsuits claiming began to be filed against the diocese in New Mexico, Arizona, and on the Navajo Nation in which victims sought to hold the diocese to account for the abuse they suffered. In November of 2007, one suit was filed in a Navajo Nation District Court alleging that Charles 'Chuck' Cichanowicz, a Franciscan priest who had served at Catholic parishes in St. Michaels Arizona and Shiprock New Mexico had abused a child on the reservation. Two other lawsuits against the diocese were filed in Navajo District Court by May 2009.[372] These were litigated and ultimately settled for undisclosed amounts. Later, more lawsuits were filed in state courts, and some of these led to significant settlements. Ultimately, settlements and anticipated further liability related to litigation in both Arizona superior courts and Navajo tribal courts, led the diocese to file for bankruptcy protection in

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[368] Elizabeth Hardin-Burrola, 'Pope Steps in, Phoenix Bishop Appointed As Temporary Head of Gallup Diocese' *Bishop Accountability.org* (Web Page, 4 January 2008) <http://www.bishop-accountability.org/news2008/01_02/2008_01_04_HardinBurrola_PopeSteps.htm>.

[369] See, eg, Michael Clancy, 'Olmsted Bringing Changes to Diocese, Liberals Concerned, Conservatives Cheer', *Bishop Accountability.org* (Web Page 3 May 2004) <http://www.bishop-accountability.org/news2004_01_06/2004_05_03_Clansy_OlmstedBringing.htm>.

> A tough stand on abortion, a crackdown on priests who signed a gay rights document and other recent decisions by Bishop Thomas J. Olmsted have raised concerns among liberal Catholics who fear a conservative shift in the diocese. But the same decisions are drawing praise from conservatives in the church.

[370] Bill Tammeus, 'Thomas J. Olmsted: Portrait of a 'Policy-Driven' Bishop' *National Catholic Reporter* (online, 3 June 2010) <https://www.ncronline.org/news/people/thomas-j-olmsted-portrait-policy-driven-bishop>.

[371] Interviews on file with author; see also 'Do Good and Avoid Evil,' Bishop James Wall (blog, letter read to all masses in the diocese the weekend of November 3 and 4, 2014) <http://dioceseofgallup.org/bishopwallblog/117/>.

[372] Elizabeth Hardin-Burrola, 'Third Priest Sex Abuse Lawsuit Filed' *Bishop Accountability.org* (Web Page, 13 May 2009) <http://www.bishop-accountability.org/news2009/05_06/2009_05_13_HardinBurrola_ThirdPriest.htm>.

2013. The lawsuits will be discussed in more detail in Chapter 6, and the bankruptcy case in Chapter 7.

Interviews with influential members of the Gallup Catholic community in 2015 showed a continued reluctance to engage with the problem of abuse generally, including with the role or responsibility borne by the diocese. Every person affiliated with the diocese that I spoke with sought to convince me that most abuse was history, that most happened in the 1960s and 70s, that most people in the diocese did not know the abuse was taking place, that most priests in the diocese were unaware that anyone, much less a priest, would abuse children. I got the sense that these officials were of the belief that the diocese should not be legally liable for the behaviour of individual priests. People told me that the list of credibly accused priests and religious was complete, and that there were no people currently abusing children in the diocese. Since that time, several names have been added to the list of credibly accused.[373]

The list of priests and religious credibly accused of child sexual abuse published by the diocese reflects that 30 assignments of such individuals were made in the diocese during the tenures of Bishop Pelotte and Bishop Wall.[374] Four individuals on that list were first given assignments after 1990.[375] The other assignments were of credibly accused individuals who had first been assigned positions in the diocese under previous bishops, and continued to maintain their positions and receive new assignments under Bishops Pelotte and Wall. Among these credibly accused who worked in the diocese across the tenures of multiple bishops was Jose Rodriguez, who was ordained in the diocese in 1975 and worked as a parish priest in Arizona and New Mexico until at least 2005, when he was assigned to Our Lady of the Assumption Parish in Overgaard, Arizona.[376] Note that being listed as credibly accused does not mean that the individual is necessarily credibly accused of having abused children in each place where he has served or even in the Diocese of Gallup at all. It is an indication that credible evidence is available that the person has abused a child at some point in his life and that the Diocese has a record of that person serving in the locations listed. Not revealing exactly each accusation publicly is meant to preserve anonymity for victims.

[373] Diocese of Gallup, Credibly Accused List (n 337).
[374] See Table 3. below.
[375] See Table 3.3 below. The four individuals are: Father Timothy Conlon, first assigned to St John the Baptist Parish in St Johns, Arizona in 2011; Father Eugene Bowski, first assigned to St Mary's in Farmington, New Mexico in 1995; Brett Candelaria, a lay teacher at the Holy Trinity Parish in Flora Vista, New Mexico in 1991; and Bruce MacArthur, an Ex-Priest of Sioux Falls who volunteered at shelters in Gallup, New Mexico in 2003.
[376] Diocese of Gallup, Credibly Accused List (n 337).

Interviews with victims and other non-diocesan officials in the area suggest that many, perhaps even most, victims of abuse in the diocese have not come forward, and implied that active priests and religious may be abusers. A former high-ranking law enforcement official in a county within the Diocese of Gallup, talked to me about his understanding of the reasons many survivors he knew personally never came forward. He said they were concerned about their families — they had children and didn't want to explain to them what had happened, or they were concerned that their families wouldn't believe them. When asked whether, as a law enforcement officer, he had ever considered bringing charges against the diocese for failure to protect children, he spoke of his pride in prosecuting sex offenders themselves, and that he was more likely than other prosecutors to bring cases of sex abuse of children, but was not particularly interested in holding the diocese itself accountable.[377]

Joseph M. Baca's *Constant Reminder: A Memoir of Priest Abuse and Recovery* is a self-published, unedited memoir of life in Winslow that Hardin-Burrola describes as an 'unvarnished story stand[ing] as a frank testament to the hellish abuse one child endured and then managed to survive'.[378] This book provides insight into the Diocese of Gallup in many of the ways that *Unholy Trinity* does for Ballarat. Baca describes encounters with Monsignor Lindenmeyer, referenced above, and other notorious serial abusers assigned to a parish in Winslow. Baca writes that he told Lindenmeyer that Clement Hageman, another priest in the diocese, was abusing him, and Lindenmeyer failed to help.[379] Baca also wrote of telling his adult brother Leonard about the abuse, that Leonard contacted Lindenmeyer, and took Baca to speak with Lindenmeyer. 'Leonard and I were given a priest's word that punishment would be executed.'[380]

Instead of protection after reporting, Baca suffered even more abuse. Hageman subsequently 'demanded to know why [Baca had] divulged our secret and cursed me with hell and damnation,' and raped him again. Later, Baca writes of how religious and secular failed to protect him again when he was arrested after going on a joy ride in his family car. He was convicted of a crime and sentenced to probation. Lindenmeyer was the Navajo County probation officer assigned to his case. Baca writes:

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[377] Interview on file with author.
[378] Elizabeth Hardin-Burrola, 'Local Clergy-abuse Survivor Writes Memoir' *Bishop Accountability.org* (Web Page, 8 November 2011) <http://www.bishop-accountability.org/news2011/11_12/2011_11_11_HardinBurrola_LocalClergyabuse.htm>.
[379] Joseph M Baca, *Constant Reminder: A Memoir of Priest Abuse and Recovery* (CreateSpace Independent Publishing Platform, 2013).
[380] Ibid.

> Lindenmeyer confied me to a small cell and started his interrogation. He demanded to know how many people were aware of Father Clement Hageman's pedophile activities. I told him the truth — my mother, father, brother and family doctor… [He] threatened to incarcerate me for a long time if I told anybody else. Before he left, [Lindenmeyer], who called himself a man of God, directed me to pray for forgiveness.[381]

Baca points to the firm religious beliefs his parents held for an explanation as to why they did not keep him away from Hageman after he told them of the abuse. He writes that

> they were indoctrinated from childhood about the dogma, etc. [sic] of the Roman Catholic Church. This religious organization is supposed to represent a force for good in world [sic] filled with evil. With these policies so firmly ingrained, they simply could not accept the possibility that evil had entrenched itself as part of the Roman Catholic Church and the Madre de Dios [Parish].[382]

Baca concludes the book by talking of recovery from addiction and a sense of personal redemption. Although he attributes a sense of peace derived from internal fortitude and ability to overcome the obstacles in his path, this peace may come at the cost of accepting that there will never be accountability for the people and institutions who harmed him.

Baca may not have known about it, but Lindenmeyer was known to be a close friend of Hageman.[383] Hageman has been named by at least 16 alleged victims in Winslow,[384] as well as victims in Holbrook,[385] Thoreau, and other places.[386] Hageman's assignment to Winslow was made after Bishop Espelage had been warned about Hageman, according to records disclosed in a suit against the Gallup Diocese and later published online.[387] These records include correspondence in late 1940 between Bishop Emmanuel Ledvina, then the bishop of Corpus Christi and Bishop Espelage, confirming that Hageman had been 'guilty of

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[381] Ibid 48.
[382] Ibid 50.
[383] 'Rev. Clement Hageman: 1927–1975', *Bishop Accountability.org* (Letter, 15 July, 1975) <http://www.bishop-accountability.org/docs/corpus_christi/hageman/Hageman_Rev_Clement_A.pdf>.
[384] Bishop Accountability.org, 'Database of Publicly Accused Priests in the United States', *Bishop Accountability.org* (Web Page) <http://bishop-accountability.org/priestdb/PriestDBbylastName-H.html>.
[385] *Moya v. Roman Catholic Church of the Diocese of Gallup, et al.,* CV-2010-00713 (AZ, 2010).
[386] Uyttebrouck (n 364).
[387] Bishop Accountability. 'Rev. Clement A. Hageman of the Corpus Christi Diocese: His File from the Diocese of Gallup', *Bishop Accountability.org* (Web Page) <http://www.bishop-accountability.org/docs/corpus_christi/hageman/>; Dan Frosch, 'Accusations of Abuse by Priest Dating to Early 1940s', *The New York Times* (online, 10 July 2011) <http://www.nytimes.com/2011/07/11/us/11priest.html>; Bishop Accountability.org, 'Rev. Clement A. Hageman of the Corpus Christi Diocese: His File from the Diocese of Gallup', *Bishop Accountability.org* (Web Page) <http://www.bishop-accountability.org/docs/corpus_christi/hageman/Hageman_Rev_Clement_A_1940s_DOG_00240_00273.pdf>. Letter from Ledvina to Espelage in 1941:

> I am really glad that Father Hageman is doing well. It bears out my opinion, that away from former environments and in a part of the country where not known, he could and would turn over a new leaf. May God give him strength to persevere.

playing with boys'.[388] Yet Espelage gave him many opportunities in parishes across the Diocese of Gallup. He worked in predominately Hispanic small towns in Arizona from 1940 until his retirement in 1975, having raped and molested an unknown (and perhaps unknowable) number of children in the diocese.[389]

Compared to the prominent place the Diocese of Ballarat has in the Australian public's imagination of the problem of clerical child sexual abuse, the Diocese of Gallup has yet to capture much public interest outside of Arizona and New Mexico, where it is overshadowed by the much larger (in population) and richer (financially) Archdiocese of Santa Fe and dioceses of Phoenix and Tucson. There has been public disclosure of claims of abuse and the resolution of legal proceedings, but public discourse on the diocese is largely limited to local media sources, like the *Gallup Independent*, the *Albuquerque Journal*, and local public radio.[390] The diocese has released data on claims against it, priests it deems 'credibly accused', and other information as required by the Dallas Charter and bankruptcy court orders. Disclosure of personnel records and information about what diocesan officials knew about the perpetrators in the diocese has been a point of contention between the diocese and victims in legal proceedings, and victims who spoke at the bankruptcy plan confirmation hearing noted their disappointment that the diocese would not be disclosing records.[391]

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[388] Ibid.

[389] Frosch (n 387).

[390] Colton, Hannah, 'AG: Church And State Must 'Come Clean' About Clergy Abuse,' *KUNM*, University of New Mexico (Online 20 Dec 2018) < https://www.kunm.org/post/ag-church-and-state-must-come-clean-about-clergy-abuse>; 'Dark Canyon Episode Nine: The Diocese of Gallup', *Dark Canyon* (KSFR 100.1FM Santa Fe Public Radio, 14 December 2017); Olivier Uyttebrouck, 'Gallup Diocese Bankruptcy Raises Question of How Many More Victims There Are', *Bishop Accountability.org* (Web Page, 14 December 2013) <http://www.bishop-accountability.org/news2013/11_12/2013_12_14_Uyttebrouck_GallupDiocese.htm>.

[391] Elizabeth Hardin-Burrola, 'Bishop Apologizes: Bankruptcy Judge Confirms Reorganization Plan' *Bishop Accountability.org*, (22 June 2016) describing and quoting testimony from Gallup's bankruptcy plan confirmation hearing,

> Prudence Jones, of Gallup, who was molested as a child on the Navajo Nation by Brother Mark Schornack, a Franciscan friar, was the first to speak.
>
> "Bishop Wall, I want you to know that I accept your apology," an emotional Jones said. "But I also want you to know that the amount of suffering I endured because of Brother Mark is immeasurable and lifelong. The pain he caused me reverberated through my family, and sadly my daughters were raised in the shadow of that pain."
>
> Jones told the bishop he could further her healing process by releasing the files of abusive clergy — something Wall has declined to do.
>
> "I had been opposed to approving the reorganization plan because the non-monetaries did not include releasing these documents," Jones said. "Bishop Wall, the first time we met, I told you I forgave Brother Mark because it was the right thing to do. And I asked you to do the right thing. I'm still waiting."

Of the 170 assignments of credibly accused priests or religious reported by the Diocese of Gallup, 41 were made to locations on reservation land. 31 of these were on the Navajo Nation, 9 in the Fort Apache reservation, where the White Mountain Apache Tribe is, and one was to a location serving the Laguna Pueblo.[392] Of the remaining 129 assignments, most were to small towns with relatively high proportions of people living in poverty, Indigenous people, and Hispanic people.[393] *Table 3.4* compiles demographic data available about each of the places where the Diocese of Gallup lists having assigned a priest or religious who has been credibly accused of abuse, pulled from census data and compared with data for each of Arizona, New Mexico, and the nation as a whole.[394]

Winslow, Arizona is one of the places with the most assignments of credibly accused priests and religious. With two Catholic parishes in the town of just under 10,000 people in Navajo County, the Diocese lists 19 assignments of credibly accused in Winslow.[395] In 2015, the per capita income of the town was $16,782, which is 58.8% of the United States average of $28,555. The town is 34.5% white, 32.8% Hispanic or Latino, 25.7% Native American, and 5.7% Black.[396] Between 1954 and 1989, there were 16 individuals assigned to work at one of Winslow's two parishes who have since been identified as credibly accused of child sexual abuse. 1977 is the only year in which at least one of the two parishes did not have a credibly accused priest working in it. Hardin-Burrola's reporting brought people to her who told her their stories of abuse to her, and between these disclosures and her own research she reached the conclusion that,

> [it] seems like the abusers were mostly sent to small, rural communities with a lot of Hispanic parishes full of very devout Hispanic Catholic families and also to remote Native American communities where people would be struggling with language differences, poverty, probably not inclined to report[397]

A Navajo woman speaking publicly about her experience as a victim of clerical child sexual abuse recounts that her doing so has ostracised her from her family and friends, and that she believed others had refrained from doing so for fear of suffering similar ostracization.[398]

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[392] See Table 3.4. Census data on the Navajo Nation, the Ft. Apache Reservation, and Laguna Pueblo indicate high rates of poverty. Nearly all of the people who live on reservation land are Indigenous.
[393] See Table 3.4. Flagstaff became part of the Diocese of Phoenix in 1967.
[394] The data used to create Table 3.4 is drawn from Census records in 2010-2017, and accordingly, may not be entirely accurate for the time period in which most of the credibly accused priests and religious were active.
[395] United States Census Bureau, 'Quick Facts: Winslow City, Arizona; United States', *United States Census Bureau* (Web Page) <https://www.census.gov/quickfacts/table/POP010210/0483930,00>.
[396] Ibid.
[397] 'Dark Canyon Episode Nine: The Diocese of Gallup' (n 390).
[398] Ibid.

A striking commonality of leaders within the Diocese of Gallup with whom I spoke is a tendency to think of the problem of clerical child sexual abuse as a problem of the individual abusers, and not a problem with a culture of protecting abusers within the Diocese of Gallup.[399] Bishop Wall's statement at the confirmation hearing for the bankruptcy case demonstrates this thinking, 'I want to first begin by acknowledging the reason why we're here today, and the reason is because bad people, bad men committed bad and sinful acts against good people.'[400] He apologised for the 'sinful acts' of abusers but did not take responsibility for the Diocese's stonewalling efforts to seek information or continued refusal to release public documents, as sought by victims and their lawyers. Neither Wall nor other high-ranking officials with whom I spoke acknowledged cultural or social reasons victims might not have come forward.

As will be discussed in Chapter 7, the bankruptcy case concluded with a plan that provided financial recovery and a number of provisions requiring Bishop Wall to apologise and to travel to local parishes and hold masses of healing. The diocese, however, strongly resisted disclosing its personnel files, and was able to avoid disclosing them by convincing victims to agree to a plan that did not require such disclosure. The Albuquerque Journal Editorial Board called the diocese's tactics bullying, and noted that '[t]he diocese threatened to withdraw the settlement when attorneys for the victims sought to have the church publicly release personnel files of accused priests.'[401] In September 2018, Hector H. Balderas, the Attorney General of New Mexico, sent a letter seeking access to those records, suggesting that he would initiate litigation with respect to abuse in the diocese. As of the date of writing, no such litigation has been initiated.[402] Despite these tactics, many in the diocese are not engaged with the issue. A diocesan official told me that most people are focused on their local and personal issues, spend most of their time trying to survive, and trust (and have trusted) their local priest.[403]

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[399] Interview with diocesan official [ET] 'So… what the revelations of abuse really affected was the reputations of some priests. Some priests who were later determined to have been abusive had a following among parishioners. People thought that they were good men, and the revelations of their having abused children shook them.'

[400] *In re Roman Catholic Church of the Diocese of Gallup*, No. 13-13676 (Bankr, D.N.M.) Confirmation Hearing held 21 March 2016, Document 543 (audio).

[401] 'Editorial: Gallup Diocese re-abuses victims with settlement,' Albuquerque Journal, 22 July 2016.

[402] Letter from Attorney General of the State of New Mexico Hector H. Balderas dated September 4 2018, 'Re: Office of the Attorney General's investigation of sexual abuse by priest(s), clergy member(s), or other church official(s) and individuals alleged to have aided, abetted or conspired to conceal sexual abuse'.

[403] Interview on file with author.

Table 3.4 Assignments of Those Credibly Accused of Child Sexual Abuse in Gallup, with Population Data

Town	State/Nation	Number of assignments of credibly accused	population	white alone	hispanic	indigenous (Native American or Alaskan only)	poverty rate
Navajo Nation	Navajo	31	175,005	2.13%	1.83%	95.29%	40.50%
Winslow	Arizona	18	9,427	25.20%	35.40%	33.50%	24.70%
Gallup	New Mexico	14	21,929	42.30%	34.70%	41.80%	29.90%
Flagstaff	Arizona	12	73,964	64.40%	19.40%	8.60%	21.70%
Ft Apache	White Mountain Apache Tribe	9	15,313	2.27%	3.55%	92.14%	44.60%
Holbrook	Arizona	7	5,093	46.10%	25.80%	20.00%	22.00%
Farmington	New Mexico	7	44,788	45.50%	24.90%	26.60%	16.80%
St Johns	Arizona	5	3,502	65.30%	24.90%	13.10%	13.80%
San Fidel	New Mexico	4	564	0.90%	98.90%	8.70%	29.40%
Cuba	New Mexico	4	731	7.20%	62.00%	37.60%	28.00%
Aragon	New Mexico	4	99	39.40%	60.60%	2.10%	0.00%
Springerville	Arizona	3	1,751	60.30%	29.00%	5.70%	36.60%
Kingman	Arizona	3	28,855	78.30%	13.00%	4.30%	19.40%
San Rafael	New Mexico	3	892	24.80%	75.20%	0.00%	2.40%
Cebolleta (also known as Seboyeta)	New Mexico	3	179	0.00%	100.00%	0.00%	0.00%
Ashfork	Arizona	2	824	48.50%	51.50%	0.00%	36.30%
Cottonwood	Arizona	2	11,265	73.49%	23.79%	1.20%	20.40%
Show Low	Arizona	2	10,660	75.57%	19.77%	4.90%	20.40%
Bloomfield	New Mexico	2	8,112	35.90%	37.09%	25.79%	19.60%
Pinetop	Arizona	2	4,282	87.79%	4.53%	7.10%	18.20%
Lumberton	New Mexico	2	260	1.92%	60.38%	36.92%	6.20%
Laguna Pueblo	Laguna	1	3,884	1.88%	2.96%	94.85%	28.40%
Camp Verde	Arizona	1	11,091	69.86%	17.12%	11.74%	22.80%
Mayer	Arizona	1	1,948	92.76%	7.24%	0.77%	18.80%
Yarnell	Arizona	1	658	88.15%	6.08%	0.00%	17.50%
Overgaard	Arizona	1	2,408	78.86%	12.67%	1.99%	17.10%
Blue Water	New Mexico	1	875	76.69%	14.63%	8.34%	15.30%
Clarkdale	Arizona	1	4,097	78.06%	9.59%	8.96%	14.00%
Flora Vista	New Mexico	1	1,935	73.80%	22.53%	3.67%	3.90%
Concho	Arizona	1	146	0.00%	100.00%	0.00%	0.00%
Blanco	New Mexico	1	62	27.42%	46.77%	0.00%	0.00%
New Mexico as a whole			2,095,428	37.10%	49.10%	10.90%	19.70%
Arizona as a whole			7,171,646	54.40%	31.60%	5.30%	14.90%
USA as a whole			325,147,121	61.50%	17.60%	1.70%	14.60%

IV. COMPARING THE DIOCESES

Comparing the dioceses of Ballarat and Gallup is useful to an understanding of the ways that social and economic context are inextricably linked to both rates of abuse and rates of access to justice by victims. Attitudes toward gender, sexuality, and childhood in Gallup tend to be more traditional and more patriarchal than those from other areas in the United States.[405] Conversely, Australia has lower rates of religiosity than the United States, and regional Victoria is largely in line with the rest of the country in that respect. [406] The voting districts in the diocese of Ballarat voted overwhelmingly, like much of the rest of the country, for same sex marriage,[407] which may indicate a rising tolerance of changing norms with respect to sexuality and gender. Victims in Gallup are likely to be Hispanic or Native American, to have grown up poor, to have limited access to legal, medical, and mental health services. Victims in Ballarat were likely from the most vulnerable families in the area, and many have disclosed significant personal struggles, but their visibility as worldwide leaders in survivor movement is a result of their having, as a group, the wherewithal to organise, recognise their collective power, and bring attention to the harms allowed to be perpetrated against them, including how those in power protected abusers at their expense when they were children. As adults they have found power they did not have as children. The extent to which this is true for victims in Gallup is less clear.

Catholic communities in the diocese of Gallup tend to be highly religious and embrace traditional ideas of gender, childhood, and sexuality — conditions that literature suggests lead to high rates of abuse and low rates of disclosure.[408] The barriers to legal systems present in

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[404] Information drawn from United States' Census Bureau, using data from 2010 census or later. Although most assignments were made in the 20th century, the data represented in the figure may be inaccurate for the time period of the assignment. The dominant population groups and relative economic conditions, however, have not changed drastically in the area. (re Navajo Nation, Source: 2013-2017 American Community Survey 5-Year Estimates)

[405] See, eg, Interviews on file with author; Grammich et al (n 310).

[406] See, eg, Australian Bureau of Statistics, 'Census of Population and Housing: Reflecting Australia — Stories from the Census, 2016,' *Australian Bureau of Statistics* (Web Page, 28 June 2017) <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Article~80>.

[407] 'This is how and where Australia voted YES for same-sex marriage,' *The Age* (Online interactive graphic) < https://www.theage.com.au/interactive/2017/samesexmarriagesurveyresults/>.

[408] For discussions on the links between patriarchal norms and rates of disclosure of child sexual abuse see, eg, Mary E Becker, 'The Abuse Excuse and Patriarchal Narratives' (1998) 92 *Northwestern University Law Review*, 1459; Kofi E Boakye, 'Culture and Nondisclosure of Child Sexual Abuse in Ghana: A Theoretical and Empirical Exploration' (2009) 34(4) *Law & Social Inquiry* 951; Boledi Masehela and Venitha Pillay, 'Shrouds of Silence: A Case Study of Sexual Abuse in Schools in the Limpopo Province in South Africa (2014) 32(3) *Perspectives in Education* 22; Adele D Jones and Ena Trotman Jemmott, 'Status, Privilege and Gender Inequality: Cultures of Male Impunity and Entitlement in the Sexual Abuse of Children: Perspectives from a

Gallup because of its remoteness, high rates of poverty, and limited jurisdiction of tribal courts also likely lower rates of victims in Gallup bringing claims. In short, the life experiences and lived conditions of people in Ballarat and Gallup are intertwined with victims' visibility within legal and political systems as well as their capacity to advocate for themselves.

Despite the relative paucity of data about claims in Gallup, between the bankruptcy case and other legal proceedings, the public record reflects a total of 121 settlements or legal claims against the diocese relating to child sexual abuse. Some unknown number of claims were never formally filed, many victims having signed non-disclosure agreements and others never bringing claims. The diocese has named 77 of its priests and religious as credibly accused.[409] In Ballarat, 139 claims have been reported to the diocese of Ballarat against a total of 21 priests and religious.[410] Gallup has had 22 more accused perpetrators than Ballarat. As Ballarat has almost five times the number of schools, and approximately 45,000 more Catholic people than Gallup, this is a significant difference. If Gallup has more perpetrators but fewer claims, then either victims in Ballarat are more likely to bring claims or perpetrators in Ballarat have more victims, on average.

Both explanations can find support in the available data. As discussed, more data is available about the Diocese of Ballarat through the Royal Commission. Six of the 21 alleged perpetrators in Ballarat were the subject of ten or more claims, and 78 claims were brought against a single alleged perpetrator in Ballarat.[411] Average financial compensation for those who were abused by priests in Gallup is significantly higher than for those in Ballarat, which

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Caribbean Study' (2016) 59 *International Social Work* 836; Aileen Moreton-Robinson, 'Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (2009) 15 *Cultural Studies Review* 61; Katherine Beckett, 'Culture and the Politics of Signification: The Case of Child Sexual Abuse' (1996) 43 *Social Problems* 57.

[409] The diocese maintains that at least one of the people on the 'credibly accused' list was accused of sexual abuse in another diocese but never in the Diocese of Gallup. See, eg, Olivier Uyttebrouck. 'Diocese Removes "Accused" Priest', *Albuquerque Journal* (online, 30 January 2014) <https://www.abqjournal.com/344994/diocese-removes-accused-priest.html>.

[410] Royal Commission report of abuse claims against Catholic Church. 6 of the 21 perpetrators were subjects of more than 10 claims, and there were 78 claims against one perpetrator of the 139 claims against the diocese, 38 were made through actions in civil court, 33 of which resulted in monetary compensation averaging approximately $70,000. 84 claims went through *Towards Healing*, 47 of which resulted in monetary compensation averaging approximately $36,000. 25 claims went through other redress processes, 8 of which resulted in monetary compensation averaging approximately $39,000.

[411] 78 claims against a single perpetrator seems like a very large number, but the literature on child sexual abuse sadly demonstrates that some percentage of perpetrators abuse hundreds of children over the course of their lives. I have not been able to obtain data on the breakdown of claims per perpetrator in Gallup to compare.

would be an added incentive to bring claims in Gallup. However, despite the myth of litigious Americans,[412] available literature suggests that the reality is much more complicated.[413]

V. CONCLUSION

This chapter has been long because it is a large task to describe the rich information available about these two regions, each with unique histories of sexual abuse across a range of social and economic factors, including clerical child sexual abuse and legal proceedings responding to such abuse. The distinct contours of those places, and the relative social status of the people who live in them, allow for an analysis that takes into account how overlapping and intersecting forces of domination impact access to forms of justice, and how systems can facilitate resistance. As discussed in Chapter 2, a situated approach to data collection requires getting close to the action. Legal and social orders are not distinct but co-constitutive. All of the legal systems discussed in later chapters operate in places other than Ballarat and Gallup, but the social worlds of these two dioceses are inextricably linked with the systems' operation (or non-operation) in those places – real law exists in social orders and cannot be understood outside of its context.

The heterogeneous data available about the past and present social conditions of Ballarat and Gallup tell interesting stories about how religiosity, economics, and temporal change shape the evolution of scandal. This data gives us insight into the reported numbers about abuse in those dioceses, helps explain why Ballarat is known as a hotspot of abuse while Gallup is not, and sets the scene for the legal systems that will be discussed in later chapters. As discussed above, victims in Ballarat have been able to leverage political power structures to advance their interests while victims in Gallup face a different level of social domination that makes such leverage more difficult. Understanding some of the social context of two places helps with a project of assessing the systems according to responsive law theories because it allows for analysis of the extent to which systems are structured to be: (a) aligned with the interests of the politically powerful, as in repressive regimes; (b) risk subversion of substantive justice goals by the pursuit of procedural regularity and formal

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[412] David Engel, *The Myth of the Litigious Society: Why We Don't Sue* (University of Chicago Press, 2016); Haltom, William & McCann, Michael. (2004). *Distorting the Law: Politics, Media, and the Litigation Crisis*. Bibliovault OAI Repository, the University of Chicago Press.

[413] See, eg, Carol J Greenhouse, *Praying for Justice: Faith, Order, and Community in an American Town* (Cornell University Press, 1986); Carol J Greenhouse, Barbara Yngvesson and David M Engel, *Law and Community in Three American Towns* (Cornell University Press, 1994); Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court* (Routledge, 1993); Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (University of Chicago Press, 1990); Daniel Newman, 'Attitudes to Justice in a Rural Community' (2016) 36 *Legal Studies* 591.

fairness, as in autonomous regimes; or (c) centre political and legal goals of substantive justice, as would a responsive approach. The following chapters 5, 6, 7, and 8, on canon law, tort law, bankruptcy law, and the Royal Commission, respectively, will consider the ways in which stakeholder capacity to advocate for their interests can be impacted by a range of aspects of legal systems. This chapter's description of Ballarat and Gallup is meant to set the scene and introduce the stakeholders whose capacity to secure their interests through the legal systems that are the focus of the later chapters.

CHAPTER FIVE: CANON LAW

I. CANON LAW AND THE PROBLEM OF CLERICAL CHILD SEXUAL ABUSE

In the Catholic Church, there are multiple normative orderings, including canon law and divine law. Canon law is not divine law but the law of the Church as an institution.[414] Divine law is understood to have its genesis in the Divine. When examined by the Royal Commission, canonist Sister Moya Hanlen describes it as, 'the law as it comes from God, which we will find in the scriptures and in documents like the Ten Commandments.'[415] Canon law, on the other hand, is drafted by humans and given force by human effort. It would be more aptly compared to state law or the bylaws of a multinational corporation than a moral code by which people should live their lives.[416] It is sometimes defined as the rules of Christian life and, in that sense, it is as old as Christianity, while the Divine law is understood to exist perpetually, eternal and predating Existence itself.[417] Canon law, while not Divine, is a foundation of the Western legal tradition, and has influenced legal systems around the world.[418] This chapter discusses canon law in light of the complicated and intertwined histories of canon law and state law, with a focus on the legal theories, doctrine, procedure, and logistics relevant to clerical child sexual abuse.

The relationship between canon law and clerical sexual abuse is discussed by canonists, those in the Survivor advocacy movement, reporters, lawyers, scholars of secular law, judges, commissioners, and politicians. The opinions and perspectives are as varied as there are people writing or speaking about it. Many of these authors are canonists: those who have worked as canonists, have degrees in canon law, are bishops or other diocesan officials who have experience with canon law. Among canonists there are two main groups — which I will refer to as conservative Catholics and the Catholic left. Non-canonists who write about

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[414] Royal Commission Hearing day 245, Testimony of Austin.
[415] Royal Commission Hearing day 245, Testimony of Hanlen.
[416] Ibid.

> Canon law actually looks at specific situations in relation to the Church, its governance, et cetera, and spells that out in detail. There are many other laws beside the Code of Canon Law. There are books with liturgical laws. My own lifestyle, your Honour, is governed by a set of laws that are not sitting here in canon law. This is not the only law in the Church. Dioceses enact laws that apply to that particular diocese.

[417] Not all Christians see canon law as a part of their tradition. Calling canon law the law of Christian life reflects a desire for unity frequently expressed by religious leaders theologians within the Catholic Church tradition (consisting of the Latin Church and 23 Eastern Catholic Churches in full communion with the Holy See of Rome). Catholic canon law is not recognised as authoritative by Orthodox, Protestant, Evangelical, or other Christian denominations. For a more comprehensive discussion of Christian history, including how schism, revolution, and reformation shaped the Roman Catholic Church as we know it today, but which is outside the scope of this thesis, see, eg, Adrian Hastings (ed), *A World History of Christianity* (William B Eerdmans Publishing Company, 1999).
[418] Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983); Robertson (n 198).

canon law and clerical sexual abuse tend to be survivors and advocates for victims, lawyers or legal scholars whose expertise is in another legal field, and public figures whose interest in canon law is primarily related to their interest in why Church organisations have tolerated abuse and failed to respond with compassion for victims.

Discussions of the Church's application of canon law to the problem of clerical child sexual abuse tend to engage with one or more of the following issues:

(1) the extent to which canon law encourages, prevents, or discourages bishops and other Church leaders from reporting knowledge or suspicions of abuse to civil law authorities or has done so in the past;[419]

(2) the punishments available under canon law and whether or not they have been imposed on abusive priests;[420]

(3) whether the legal and political environment in which canon law operates privileges the Church, its reputation, or the interests of the clerical caste above those of victims and the faithful;[421]

(4) whether canon law is capable of meeting justice interests of victims;[422] or

(5) how the governance structures established by canon law impacts rates and/or likelihood of an abuser being caught, reported to authorities, and/or punished.[423]

Critical discussions of canon law in this context include the United Nations Committee on the Rights of the Child. In its report and observations pursuant to a periodic review of the Holy

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[419] See, eg, Parkinson (n 51).

[420] Charles G Renati, 'Prescription and Derogation from Prescription in Sexual Abuse of Minor Cases', (2007) 67 *The Jurist: Studies in Church Law and Ministry* 503; John P Beal, 'Doing What One Can: Canon Law and Clerical Sexual Misconduct,' (1992) 52 *The Jurist* 642; Thomas J Green, 'Clerical Sexual Abuse of Minors: Some Canonical Reflections' (2003) 63 *The Jurist* 366

[421] DTI, 'Hearing Day 245: Royal Commission into Institutional Responses to Child Sexual Abuse', Catholic Archdiocese of Melbourne (Transcript, 9 February 2017) 25031 <https://www.cam.org.au/Portals/69/Transcript%20Day%20245.pdf>.

> The reality . . . is, in spite of what the canons have said or provide for bishops, in many instances they are completely bypassed and the action that is taken is something that, whether it's contrary or not to canon law, really doesn't seem to have mattered much. But the rule or the norm that was governing this action was expediency with regard to protecting the image of the institution;

Transcript of Royal Commission Hearing Day 156, pg 16007-08. Counsel assisting, when explaining her understanding of relevant canon law, noted how canon law requires secrecy of those involved with canonical trials and observed that Bishop Robinson and the ACBC had acted contrary to those laws when developing the Towards Healing program.; Dublin Archdiocese: Commission of Investigation, *Report into the Catholic Archdiocese of Dublin* (Report, 2009) ch 4 ('Murphy Report'); Kieran Tapsell, *Potiphar's Wife The Vatican's Secret and Child Sexual Abuse* (ATF Press, 2014) 207.

[422] Elizabeth M Delaney, 'Canonical Implications of the Response of the Catholic Church in Australia to Child Sexual Abuse' (PhD Thesis, 2004) ch 3; United Nations Committee on the Rights of the Child (n 75).

[423] Green (n 420); Renati (n 420); Abby Ohlheiser, 'The Vatican Defrocked 848 Priests For Child Abuse in the Past 10 Years' *The Atlantic* (online, 6 May 2014) <https://www.theatlantic.com/international/archive/2014/05/the-vatican-defrocked-848-priests-for-child-abuse-in-the-past-10-years/361821/>; Thomas P Doyle, 'Clericalism: Enabler of Clergy Sexual Abuse' (2006) 54 *Pastoral Psychology* 189.

See's compliance with the Charter on the Rights of the Child, the committee wrote of its concerns about the use of canon law. In their view, state authorities should have primary competency for crimes against children.[424] It was particularly critical of canon law in that it 'contain[s] no provision for the protection, support, rehabilitation and compensation of child victims'.[425] Law professor Patrick Parkinson writes that 'it is no part of canonical thinking that child sexual abuse is a crime that ought routinely to be reported to the police and dealt with by the criminal courts'.[426] The purpose of this chapter is not to add to this criticism, but rather to dig in to the ways that canon law demonstrates how real law is constructed from multiple aspects of law and the social orders in which they exist.

Michel Foucault, in *Discipline and Punish*, highlighted ways concern with sexuality, as it manifested in Catholic religious orders and secular disciplinary regimes that emerged in the eighteenth and nineteenth centuries impacted development of educational, penal, martial, and other institutions across social orders in which those regimes operated.[427] As will be discussed in this chapter, canon law's influence shaped how diocesan leaders, steeped in the cultures emerging from those institutions conceived of the wrongfulness of clerical child sexual abuse and perceived capacity to hold abusers responsible for their actions. Importantly, however, as will be discussed, canon law's prescribed hierarchical relationships also create conflicts of interest for bishops, who are solely responsible for disciplining priests while also being required to care for priests as a father would his children. Critics point to discrepancies between canon law's prohibition on child sexual abuse and the relative lack of prosecutions, and this might be described as a gap between law on the books and law in action. However, this chapter's discussion of different aspects of canon law shows the relative lack of prosecutions may not be a straightforward matter of bishops ignoring or circumventing 'law on the books' in order to protect the Church's reputation. Rather, we see an archaic legal system that is the model on which the legal systems Nonet and Selznick described as classically repressive were founded. That it is not capable of providing the kind of justice that victims living in places like Ballarat and Gallup in the 21st century might expect should not be surprising.

Other chapters, in getting close to the real law as part of and co-constitutive with the social orders in which they exist, require engagement with events in Ballarat and Gallup.

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[424] United Nations Committee on the Rights of the Child (n 75).
[425] Ibid.
[426] Parkinson (n 51).
[427] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Allen Lane, 1977).

Canon law's social context is better described as the worldwide Church. Canon law proceedings are not public, and while, as will be discussed, there have been some proceedings against individual priests and religious for abusing children, the details of these proceedings are largely not available, so it is not clear how many proceedings have involved priests from Ballarat or Gallup.[428] The relevance of canon law as a response to clerical child sexual abuse in Ballarat and Gallup lies less in its direct application to individual cases in those places, than it does in the way it shapes the understanding of stakeholders within those dioceses about the harm of child sexual abuse, the nature of the problem when priests or religious commit abuse, and the power of bishops in those places to hold priests accountable.

II. PURPOSE AND THEORY OF CANON LAW

A. *History of Canon Law and What That Means for its Purpose in the Life of the Church*

Harold Berman, in *Law and Revolution: The Formation of the Western Legal Tradition*, investigates how the Gregorian revolution (1075-1122) changed the Church's relationship with states, as the Church became an independent political agent with the Vatican as a seat of power (mostly) independent of royal authority.[429] He argues that the centralisation of power in the Vatican ultimately enabled the rise of the modern state in Europe and precipitated the first collection and systematisation of canon law, which in turn played a large role in the development of the Western Legal Tradition across Europe in the twelfth through sixteenth centuries.[430]

The Vatican's assertion of power vis-à-vis kings and secular states included claims that it alone had the right to adjudicate claims against priests and bishops. This right, called 'privilege of the clergy,' was a primary issue in the conflict between Henry II of England and St. Thomas â Becket.[431] The Church also claimed jurisdiction of other classes of people,

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[428] Paul David Ryan, a priest from Ballarat who has been convicted of multiple offences related to child sexual abuse, is frequently described as having been defrocked, but while his faculties were stripped in 1993, the Vatican declined to remove him from the clerical state in 2006. I have not been able to determine whether he was subject to proceedings at some later date or if he accepted laicisation. See, e.g. 'Vatican Refused to Sack Priest Convicted of Child Sex Abuse, Documents Show,' *The Guardian* (online 14 December 2015) <https://www.theguardian.com/australia-news/2015/dec/14/vatican-refused-to-sack-priest-convicted-of-child-sex-abuse-documents-show>.

[429] Berman (n 418), 108. ('The clergy became the first translocal, transtribal, transfeudal, transnational class in Europe to achieve political and legal unity.')

[430] Ibid.

[431] Harry Potter, 'Becket and Criminous Clergy' in Harry Potter (ed) *Law, Liberty and the Constitution: A Brief History of the Common Law* (Cambridge University Press, 2015) 52.

including vulnerable people like Jews and travellers, and certain areas of law, like family, tort, property, and contract law.[432]

This centralisation of power in the Vatican, Berman explains, led to the Church becoming the first European example of a modern (or perhaps better described as a proto-Westphalian) state, developing alongside and in tension with secular states.[433] The Gregorian Revolution also produced the first collection of Church law, the *Decretum Gratiani*, which collected and reconciled the law of the Church.[434] This collection and systematisation of canon law allowed for a reconciliation of the law of the Church of Rome from diverse sources, including councils and synods that date back to the earliest days of Christianity. In turn, as will be discussed next, it allowed for the Church to develop law and legal concepts in the twelfth through sixteenth centuries that are reflected in many contemporary secular legal institutions and practices. Modern constitutional law owes much to theories of representation, consent, and rights first developed by canonists.[435]

In Western Europe between the eleventh and nineteenth centuries, the relationships between the Church and states were dynamic, responding to and shaped by social and political movements and global forces of many sorts.[436] The state's authority grew in comparison to that of the Church with respect to many aspects of daily life, including trials and punishments for accused criminals, although the Church continued to claim parallel

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[432] Berman (n 418); Robertson (n 198).

[433] Berman (n 418),113. Berman argues that, before Pope Gregory VII's papacy, the Church had been merged with the secular social order and both lacked concepts of sovereignty and of independent lawmaking power which are fundamental to modern (or Westphalian) statehood. After Gregory VII, however, Berman argues the Church took on most of the distinctive characteristics of the modern state. It claimed to be an independent, hierarchical, public authority. Its head, the pope, had the right to legislate, and in fact Pope Gregory's successors issued a steady stream of new laws, sometimes by their own authority, sometimes with the aid of church councils summoned by them. The church also executed its laws through an administrative hierarchy, through which the pope rules as a modern sovereign through his or her representatives. Further, the Church applied and interpreted its laws through a judicial hierarchy culminating in the papal curia in Rome.

[434] Ibid.

[435] Charles J Reid Jr and John Witte Jr, 'In the Steps of Gratian: Writing the History of Canon Law in the 1990s' (1999) 48 *Emory Law Journal* 647.

[436] Charles Donahue Jr, 'A Crisis of Law? Reflections on the Church and the Law over the Centuries' (2005) 65 *The Jurist* 1.

> Perhaps more important [than the extreme papalism that had characterized the thinking of some of the eleventh-century reformers] was the extraordinary outpouring of papal decretal law, which begins in the middle of the twelfth century and continues throughout the thirteenth. These decretals were gathered into collections, studied, and glossed. Every diocese, and many subordinate ecclesiastical jurisdictions, had an ecclesiastical court. The jurisdiction of these court varied depending on the settlement with the secular authorities in the area, but in all areas it was far wider than that of any ecclesiastical court today. In England, for example, the church courts dealt not only with marriage and sexual sins, but also with testaments, defamation, and in some periods, with ordinary contract disputes. The church of the high middle ages was a *Rechtsstaat*. There were probably more bishops with degrees in canon law than there were bishops with degrees in theology. There was much litigation; there were many arguments about what the law was.

jurisdiction in certain areas of law. The Church variously claimed the right to discipline clerics or those accused of certain crimes, and to adjudicate certain kinds of disputes, but as time went by, the laws of secular states began to encroach on subject matters previously adjudicated by the Church, until eventually canon law was relegated to matters of Church governance, adjudications related to marriage (increasingly only in matters of marriage in Church records as secular states began to institute their own regulations on marriage), and only occasionally other matters while state courts became the primary location for the resolution of disputes and other legal matters.[437]

After the excesses of the Spanish Inquisition in the fifteenth and sixteenth centuries, canon law confronted a legitimacy crisis, and canonical and other Church legal trials became less prominent. Deviant behaviour began to be labelled 'criminal' and predominantly left to the authority of states. The Church stopped prosecuting laypeople for prohibited behaviour, leaving states responsible for criminal matters. By the twentieth century, very few canonical trials would take place, as responsibility for policing public social behaviour came to be seen as belonging to the state. Pope Leo XIII wrote in 1885 that the State and the Church should be understood as two independent and sovereign societies concerned with different matters: the spiritual and the worldly.[438] Canon law was used more as a constitution providing rules for decision-making and internal church processes than a means for resolving disputes or adjudicating questions of wrongdoing.[439]

Sexuality, sexual behaviour and marriage, however, continued to be spaces where both Church and state claimed the right to enforce normative orders. For example, laws against 'sodomy,' were used to bring down political opponents by both Church and state authorities.[440] Milgate explains that:

> the crime of sodomy in the early fourteenth century was closely allied with the equally serious canonical crime of heresy; and there was a tendency for

[437] See, eg, S J Burns and Robert I (eds), *Las Siete Partidas*, tr Samuel Parsons Scott (University of Pennsylvania Press, 2012) vol 5; *Benefit of the Clergy Act 1575* (UK) 18 Eliz, I c 7. The former is a translation of a Castilian statutory code setting forth the rights of clergy in a secular court. The Benefit of the Clergy Act of 1575 subjected clergy to the same law as laypeople when found guilty of rape or burglary.

[438] Report of Dr Rodger Austin JCD STL, Canon Law, Prepared for submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, https://www.childabuseroyalcommission.gov.au/document-library.

[439] Dr Rodger Austin JCD STL, *Report of Dr Rodger Joseph Austin JCD STL in the Matter of John Andrew Ellis v His Eminence Cardinal George Pell &The Trustees of the Roman Catholic Archidiocese of Sydney & Ors* (Exhibit CCI.0087.00009.0306, 5 September 2005).

[440] See, eg, Michael Milgate, 'The Politics of Sodomy and Legal Process R v Pons Hugh de Ampurias (1311)' (2006) 66 *The Jurist* 483. Tracing King James II of Aragon's prosecution of against Count Pons Hugh IV of Ampurias, an example of 'the political use of sodomy as an instrument of royal as well as ecclesiastical power.

> canonists to link the one crime with the other; so that proof of unnatural sexual preferences might imply guilt of heresy as well, and vice versa.[441]

Section III of this chapter will discuss in more detail the ways in which the canon law has regulated the sexual behaviour of priests and religious over time, and how legal developments shaped how clerical child sexual abuse is theorised and defined by canon law. First, however, we return to trace the development of canon law, which informs our understanding of the purpose it serves in the life of the Church.

The first Ecumenical Council held at the Vatican in 1869 heard requests from bishops for a revision and reform of canon law, which at the time was said to be in a state of disarray.[442] In 1904, Pope Pius X initiated the reform and codification of canon law, influenced by the codification of civil law in Europe in the previous two centuries.[443] In 1917, Pope Benedict XV promulgated the resulting systemized code of canon law (the '1917 Code,' also known as the Pio-Benedictine Code), which brought together and organized existing doctrine and canon law. The 1917 Code was compiled from the accumulated laws of the Church spanning millennia, some of which was seen as outdated even before their codification. The revision and modernisation of canon law was thus one of the identified goals when, in 1959, Pope John XXIII called for a Second Vatican Council ('Vatican II') with the overall goal of modernising the Church. Vatican II convened in 1962 and was officially concluded in 1965.[444]

Vatican II was on one account 'the most important event in the history of modern Catholicism after the Council of Trent.'[445] Pope Paul VI, who became pope in 1963, commissioned a revision and update to canon law, which revision took two decades to complete.[446] In the fifty years since Vatican II, Church leadership has been contested among different factions who define themselves, in large part, on their reaction to Vatican II.[447]

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[441] Ibid.

[442] Austin (n 439) 8, citing Amleto G Cicognani, *Canon Law*, Second Revised Edition Authorized English Version of *Ius Canonicum* (Maryland: Newman, 1934) 414.

> Over the centuries the laws of the Church had been gathered together in collections. By the end of the nineteenth century there were at least twelve collections which constituted the sources from which a knowledge of the law was obtained. Some laws were mutually contradictory, others had fallen into disuse, the laws lacked arrangement and some matters were in need of legislation.

[443] Ibid. (citing Albert Gauthier, *Roman Law and its Contribution to the Development of Canon Law* (Ottawa: St Paul University, 1996) 3-15.) Note that 'civil law' in this context means the law of secular states, and is not intended to distinguish between what secular lawyers might call civil and criminal law.

[444] Ibid 9, citing Pope John XXIII (Address, 25 January 1959).

[445] Massimo Faggioli, *A Council for the Global Church: Receiving Vatican II in History* (Augsburg Fortress Publishers, 2015) 1–10.

[446] Murphy Report (n 421) ch 4.

[447] Mary McAleese, *Quo Vadis? Collegiality in the Code of Canon Law* (Columba Press, 2012).

Major points of contention among factions within the Church after Vatican II relate to clericalism, or the role of the priesthood and collegiality and governances in Catholic social and religious life.[448] This framing is adopted by diverse factions within the Church that, while not always in complete agreement, can be said to make up the Catholic left.[449] Those who resist the changes of Vatican II, or the equally varied and diverse Catholic right, are concerned with maintaining traditions they see as central to the Church's mission. This includes deep concern about moral decay as leadership shifts between antinomianism (an overreliance on faith as opposed to obedience to a moral code as a means to salvation) and legalism ('a rigid and formalistic misunderstanding of law that denies the unity of canon law with its inner theological meaning').[450] These will be discussed in more detail in the discussion of the social meaning of the priesthood in the section on canon law theory below.

But canon law, by the time of Vatican II and the publication of the 1983 Code of Canon Law, was firmly established as primarily centred on issues of internal governance, with the law of marriage being one of very few arenas where canon law might impact the laity's daily concerns.[451] There were rarely canonical trials on any issue other than the law of marriage from at least the drafting of the Pio-Benedictine Code until the clerical sexual abuse scandal drew headlines in the 20th century. For centuries, the Church has been disinclined to use canon law to prosecute individuals for most behaviour perceived as deviant, but, as will be discussed in the next section, canon law has been crucial to setting out the issues and concepts the meanings of which are fundamental to bishops' and other leaders' understanding of its role, and the lines of disagreement and contest within the Church. These lines of disagreement have particular salience to bishops' and other leaders' understanding and approach to the problem of clerical child sexual abuse and the role of the priesthood.

B. *Theory of the Priesthood and its Relevance to Clerical Child Sexual Abuse*

Criticism of the Church often links the social and theological position of the priesthood to the problem of clerical sexual abuse by reference to clericalism.[452] 'Clericalism'

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[448] Ibid.

[449] See, eg, Jessica Coblentz and Brianne A.B. Jacobs, 'Mary Daly's The Church and the Second Sex after Fifty Years of US Catholic Feminist Theology' (2018) 79 *Theological Studies* 543.

[450] John J Coughlin, 'The Clergy Sexual Abuse Crisis and the Spirit of Canon Law' (2003) 44 *Boston College Law Review* 977, 978, citing Ladislas Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Liturgical Press, 1992) 145.

[451] Interview with canonist on file with author.

[452] See, eg, Amanda M Pike, 'Discovering Records Beneath the Robes: Canonical Protection and Civil Resurrection of the Boston Archdiocese Secret Archives' (2010) 19 *Journal of Information Ethics* 86.

> Until recently, the Catholic Church had been able to rely on their community influence and power of clericalism to protect offenders from public scrutiny and prevent scandal from

is defined by Thomas P. Doyle, canonist and celebrated advocate in the Survivor movement, as

> the radical misunderstanding of the place of clerics (deacons, priests, bishops) in the Catholic Church and in secular society. This pejorative "ism" is grounded in the erroneous belief that clerics constitute an elite group and, because of their powers as sacramental ministers, they are superior to the laity.[453]

Doyle and psychiatrist Marianne Benkert linked clericalism with a concept they call religious duress and

> the notion of *reverential fear*, a well-established category in Catholic Canon Law. This is a fear that is induced not from an unjust force from without but from the reverence one has for an authority figure.[454]

They define religious duress as 'the internal pressure experienced by a person as a result of fear-based beliefs.'[455] They identify religious duress as a frequent symptom of having been sexually abused by a Catholic priest because of the great reverence and esteem the faithful, especially children, have for the person of a Catholic priest.[456] Archbishop Mark Coleridge, testifying before the Royal Commission, identified clericalism as a destructive perversion of the power granted priests in Catholic teaching.[457]

Bill McSweeney, writing in the aftermath of Vatican II, uses sociological theory to understand the role of the priest in Catholic social orders.[458] He wrote about how Vatican II saw the Church 'take[] dramatic steps towards a more democratic 'Protestant' conception of the priesthood,' but that the change was limited to theology, and not practiced.[459] McSweeney describes the priesthood as a 'power system in which the three components of religion — ritual, myth and discipline — are interrelated'.[460] The mythology of the priesthood is absorbed by laypeople and clerics alike through 'teaching and religious doctrine internalized

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erupting. Whenever civil authorities were involved in potentially damaging cases, the Church systematically employed its community influence to maintain silence and secrecy.

[453] Doyle (n 423).
[454] Marianne Benkert and Thomas Doyle, 'Clericalism, Religious Duress and Its Psychological Impact on Victims of Clergy Sexual Abuse' (2009) 58 *Pastoral Psychology* 223.
[455] Ibid.
[456] Ibid.
[457] Testimony of Archbishop Mark Coleridge, Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 50: Institutional Review of Catholic Church Authorities* (webpage) Day 254, at 26038 ("Power in itself can be creative; it can be destructive. The call to serve is the call to use power creatively. Clericalism isn't just power; it's power used destructively.").
[458] Bill McSweeny 'The Priesthood in Sociological Theory' (1974) 21 *Social Compass* 5, 'The mediatorial priest, standing between God and man, personally endowed with the supernatural power of offering sacrifice, and capable of using that power on behalf of any he wished to benefit.'
[459] Ibid.
[460] Ibid.

by Catholics.'[461] The power to celebrate the eucharist, aligned with the symbolic power of celibacy, special clothing, and restricted entry to the priestly ranks enforces the separate nature of the clerical state, and efforts to push back against the rigid rules separating priests and laypeople have seen resistance from the Curia.[462]

Thomas Doyle describes a difficulty to envision a priest committing an act of harm against a child (or other bad act) because of the place of reverence and identification with the divine. 'The self-identification of clerics with the favour of the Almighty led to a variety of social and legal privileges, expected deference, vast power, and an aura of fear.'[463]

> Although there is ample historical evidence to clearly demonstrate that priests, bishops, cardinals, and popes remain human in spite of the sacred ceremonies that elevate them to their lofty positions, there persists a belief that erring clerics are somehow above the law and beyond most forms of accountability. In spite of ample evidence of individual and institutionalized corruption, the deep roots of clericalism have enabled the ecclesiastical world to slip into deep denial when faced with the possibility that clerics really are no different and no better than mere mortals.[464]

This deference to priests appears to have led state and Church authorities to disregard or ignore reports of abuse, to deny that priests could have committed such abuse.[465] This is one way that cultural understandings of the priesthood have shaped the potential of canon law to hold priests accountable.[466]

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[461] Ibid.
[462] Ibid.
[463] Doyle (n 423).
[464] Ibid.
[465] Ibid.
[466] See Evidence of Dr. Marie Keenan, Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 50: Institutional Review of Catholic Church Authorities* (webpage) <https://www.childabuseroyalcommission.gov.au/case-studies/case-study-28-catholic-church-authority-ballarat>.

> Influenced by this theology of priesthood, it is little wonder that priesthood was construed by clergy and laity alike as a personal gift and a permanent sacred calling, rather than a gift of service to the community. It is also little wonder that a corrosive culture of clericalism was to be borne from such a theology, which was to effect clergy and laity alike. I am coming to the view that the idea of ontological change, which is associated with a particular theology of priesthood, not alone set otherwise healthy men (who had chosen a life of priestly and consecrated service) apart from ordinary men in an unhealthy manner, but also breath [sic] a culture of clericalism that has been part of the sexual abuse crisis in the Catholic Church. Although the standard word on the topic from theological and ecclesiological scholars accepts that several models of Church are currently in operation, in my view one has been fostered by several recent papacies based on the notion of clergy as elite. Far from Baptism bestowing equality as the rite of passage and as the vision, this ecclesiology gives rise to a dual model of Church in which the Church of the clergy is superior and more "holy" when compared with the Church of the laity. This version of Church can be seen as creating part of the climate in which the sexual abuse of minors became possible in the first instance and in which it remained undetected for far too long.

Doyle is a canonist writing for largely a non-canonist audience. McSweeny studies religion and violence and is not a canonist at all. The preceding discussion of clericalism centres on how it has contributed to the particular harms and unique characteristics of abuse by Catholic priests. The next sections will consider a different perspective — the way clericalism is defined and the ways in which it is discussed within its own legal framework, including the ways in which it is connected to broader theological, political, and doctrinal movements within the Church. The connections between clericalism, and therefore the clerical abuse scandal, and wider debates within the Church are an important part of understanding canon law as real law in this context. The theory of the priesthood is a central issue to one of the most significant points of theological disagreement within the Church. McSweeny notes, for example, that Vatican II called for a more democratic approach to governance, but that such a democratic mindset did not eventuate in actual governance.[467] The next section will explain how Vatican II's embrace of collegiality, which aspires to democratic governance and equality among humanity, is not separate from but critically connected to clericalism. Collegiality and clericalism are contested concepts in the larger discussions about the governance and future of the Church. This does not challenge McSweeny's observations but shows a different perspective of the same phenomena.

1 *Clericalism, Collegiality and Clerical Sexual Abuse*

Clericalism draws from but is not coextensive with the theory of the priesthood in Catholic theology. The priesthood has a complex and contested place in the Church. Canonist Brendan Daly writes that,

> [a] priest acts 'in the person of Christ the Head.' By virtue of his ordination, a priest is sacramentally configured and ontologically identified with Christ. The priest is not simply another Christ like every baptised Christian. Rather a priest represents Christ precisely in his leadership role as head of the body the Church. Just as Jesus does not marry and is totally committed to his mission, the Church requires that those to be ordained as priests have discerned a vocation to celibacy, before they are ordained and act in his name. Their celibacy expresses their complete and total identification with Christ and their commitment to continuing his mission.[468]

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[467] McSweeny (n 458)

> It is only with the Second Vatican Council that we find startling ideas like the priesthood of all believers being stressed and accepted as a defining characteristic of the church in a manner purporting to redistribute in a more equitable form the supernatural gifts at the church's disposal. However, as some advocates of democracy soon discovered, this largesse is confined to theology.

[468] Brendan Daly, 'Priestly Celibacy: The Obligations of Continence and Celibacy for Priests' (2009) 43 *Compass* 20, citing John Paul ll, *General Audience,* July 17, 1993, in *L'Osservatore Romano*, July 21, 1993, 11.

As only priests can be bishops, and bishops have essentially monarchical power in their dioceses just as the Pope does over certain aspects of the Church organisation, the priests' role is important not only because of its symbolic and ritual importance, but also because priests have unique capacity to hold power.[469]

But this vision of the priesthood is contested within the Church as well as from outside activists in the survivor movement. Mary McAleese argues that this contestation takes place largely in discussions about the meaning of the term collegiality, and the relationship between collegiality and the Vatican II reform effort.[470] McAleese, the President of Ireland during the 2000s, during which time the Irish government convened several inquiries into the problem of child sexual abuse in institutional settings (the vast majority of which were Church institutions), left office in 2011 and began studying canon law.[471] Her book, *Quo Vadis*? *Collegiality in the Code of Canon Law*, sheds light on how definitions of collegiality reflect the various worldviews and theological perspectives of those who adopt them.[472] Vatican II's embrace of collegiality has led to two different definitions of the term — one that defines collegiality as a relatively broad democratic approach, where priests and laity together are responsible for Church governance, and one that includes only bishops.

Clericalism is contrasted with the first, broader definition of collegiality, and in the contest between these two different visions of the Church and the appropriate relationship between the laity and ordained priests we find the heart of post-Vatican II relationships and politics in the Catholic Church. Popes John Paul II and Benedict XVI are both seen as part of a movement of conservative clerics who resisted the changes of Vatican II, while the current Pope Francis is seen as a moderate who is more open to the changes Vatican II envisioned.[473]

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[469] Ibid. ('The gift of priestly vocation dedicated to the divine worship and to the religious and pastoral service of the People of God.') (citing Paul Vl, Encyclical, Priestly Celibacy, Sacerdotalis caelibatus, 24 June,1967, no.s 14-15).

[470] McAleese (n 447).

[471] Ibid.

[472] Ibid.

> Commentators differ about the meaning of collegiality. Some argue it is a lost church tradition restored by Vatican II. Others say it is part of the *novus habitus mentis* generated by the Council. For some it is consistent with primatialism and for others it is not. Some see collegiality as a recipe for disunity and schism within the church. Others argue the opposite, while its perceived absence from the Catholic Church is said to be a major barrier to ecumenical dialogue. For some it is about the thoroughgoing quasi-democratisation of the church from the bottom up, while for others it touches only on episcopal collegiality, especially the governance role of the College of Bishops over the universal church.

[473]See, eg, DTI, 'Hearing Day 252: Royal Commission into Institutional Responses to Child Sexual Abuse', Child Abuse Royal Commission (Transcript, 21 February 2017) 25779 <https://www.cam.org.au/Portals/69/Transcript%20Day%20252.pdf>, describing 'the two pontificantes before

Bishop Vincent Long of Parramatta's testimony before the Royal Commission helps to give context to the concept of clericalism as understood by internal stakeholders. He compares the high-power distance index culture he grew up with in Vietnam with a similar culture feeding clericalism in the Church, and critiques both as elitist and violative of the inherent dignity of humanity.

> I see the clericalism as a by-product of a certain model of Church informed or underpinned or sustained by a certain theology. I mean, it's no secret that we have been operating, at least under the two previous pontificates, from what I'd describe as a perfect society model where there is a neat, almost divinely inspired, pecking order, and that pecking order is heavily tilted towards the organisation. So you have the pope, the cardinals, the bishops, religious, consecrated men and women, and the laity right at the bottom of the pyramid.
>
> I think we need to dismantle that model of Church. If I could use the biblical image of wineskins, it's old wineskins that are no longer relevant, no longer able to contain the new wine, if you like. I think we really need to examine seriously that kind of model of church where it promotes the superiority of the ordained and it facilitates that power imbalance between the ordained and the non-ordained, which in turn facilitates that attitude of clericalism.[474]

Bishop Long, and others in the broad Catholic left who see collegiality as a call to greater inclusiveness in Church governance may point to relatively low rates of child sexual abuse in places where more inclusive governance structures have been implemented. One such place is the Archdiocese of Adelaide. Professor of religion and theology Neil Ormerod testified to the impact of an inclusive governance model in the Archdiocese of Adelaide and credited lower rates of abuse reported there to that model.[475] Contrasting ideas of clericalism and collegiality are central to an internal perspective on not just Church governance, but also the problem of clerical child sexual abuse. How people understand the role of the priesthood within the life of the Church impacts their perceptions of the problem, how it arises, and what the Church can and should do in response to it.

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that of Pope Francis' as 'encourag[ing] a certain restoration, you might say, of the traditional model of Church,' and connecting that traditional model to the idea of clericalism that he went on to strongly criticise.

[474] Ibid.

[475] DTI, 'Hearing Day 243: Royal Commission into Institutional Responses to Child Sexual Abuse', Child Abuse Royal Commission (Transcript, 7 February 2017) 24855 <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Case%20Study%2050%20-%20Transcript%20-%20Institutional%20review%20of%20Catholic%20Church%20authorities%20-%20Day%20243%20-%2007022017.pdf>.

> …you're talking about a very male culture, and suddenly to find that there are women in the diocese who have authority over them was not something that a lot of [priests] appreciated. But the figures that you have [with the Archdiocese of Adelaide having the lowest rate of abuse among dioceses in Australia] bear out that there was a significant cultural difference in that diocese from every other diocese in Australia.

This section has demonstrated how the theory and purposes of canon law are critically important to its capacity to address the problem of clerical child sexual abuse. As a legal system that is primarily focussed on Church governance, the critical debate between clericalism and collegiality highlights how the post-Vatican II retrenchment toward traditional values embodied by Popes John Paul II and Benedict XVI influence their view of the proper role of the priest in the life of the Church. Nonet and Selznick's criteria of repressive law regimes includes a dual law system, one in which some kinds of people are subject to different laws than others. Canon law is a classic example of a dual law system, especially the canon law that embraces clericalism and pushes back against the democratising push that some canonists embrace as a needed reform of Vatican II. A clericalist view, one where priests are ontologically different from other humans, and therefore have powers and potential to power and authority over laity is a clear example of a dual law system.

III. CANON LAW DOCTRINE ON CLERICAL CHILD SEXUAL ABUSE

The last section introduced canon law — its function within the life of the Church and the way the theory of the priesthood reflects on the Church's approach of the problem of clerical child sexual abuse. This section will introduce and trace the history of canon law's prohibitions of priests' sexually abusing children as those have been understood over millennia. The theory of the priesthood discussed in the previous section is an important factor in understanding the doctrine and its rationale. As will be discussed, there is a long history of canon law prohibiting sexual contact between priests and (at least) some classes of children, but most of the laws were meant to protect the priest's status (ritual purity), and thus the capacity of priests to meet certain religious needs and obligations. They were not written to protect children from harm. There have been significant changes to canon law since the twentieth century, aimed at widening the definition of abuse, increasing the prescriptions period, and otherwise making it easier to prosecute and convict priests and religious who abuse. I am not interested in questioning the motivation of recent changes, but in considering whether it matters if the harm the law conceptualises is about impurity and breach of vows — an offense against the Church, rather than an offense against a person.

A. *Doctrine on Child Sexual Abuse and Theory of Harm*

One of the earliest condemnations in Church documents dates to 153 CE. The *Didache* lists 'corrupting boys' alongside committing murder, adultery, fornication, stealing, practising magic, using enchantments, abortion, infanticide, speaking evil of others, bearing false

witness, being double-minded or double-tongued, and coveting.[476] Behaviour we now call sexual abuse of children continued to be outlawed by various Church documents, including the *Canons of the Council of Elvira*,[477] the *Penitentials*, attributed to, among others, the Venerable Bede,[478] and St Peter Damian's *Book of Gomorrah*, dated 1051.[479]

Some translations of this early canon law suggest that its concern may be with sexual deviancy as defined by the standards of the time and place of the conference, rather than protection of children. This is supported by text that suggests only abuse of boys is prohibited, and that offenses against girls would be seen as more acceptable, unless the offender began cohabitating with a girl or woman.[480] Presbyterian theologian Samuel Laeuchli, translated the council of Elvira's work as, '[m]en who sexually abuse boys shall not be given communion even at the end.'[481] Not being allowed communion was among the harshest penalties these canons set out — understood in the context of belief that not receiving communion may damn a soul for eternity, it carried a great deal of weight. The English translations of these works do not include explanations of why boys, and not all children, are to be protected. Laeuchli did not explain why he translated 'puerorum' as 'boys' rather than 'children'. Laeuchli relied on a French translation of Latin text for his English work.[482] That French translation provides: 'Les pédérastes ou sodomites ne pouvaient plus être admis à la communion, pas même à leur lit de mort.'[483] The Latin word puerorum may be translated as 'boys' or 'children'. The French is similarly vague in that either 'boys' or 'children' would be a possible translation.

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[476] See, eg, Aaron Milavec, *The Didache: Text, Translation, Analysis, and Commentary* (Liturgical Press, 2003).
[477] Karl Joseph von Hefele et al, *Histoire Des Conciles d'Après Les Documents Originaux* (Ulan Press, 2012). (Letouzey et Ane, Nouv. traduction francaise faite sur la 2. allemande, cor. et augm. de notes critiques et bibliographiques ed, 1907) (quoting from the Canons of the Council of Elvira, '[s]tupratoribus puerorum nec in finem dandam esse communionem'; Samuel Laeuchli, *Power and Sexuality: The Emergency of Canon Law at the Synod of Elvira* (Temple University Press, 1972) 134. See also, Pike (n 452), 'As early as the 305 A.D. Council of Elvira, official church records document an institution absorbed in regulating the sexual conduct of its clergy'; Donahue (n 436).
[478] Penitentials are written codes prescribing various kinds of penance that should be undertaken to atone for sin. The Venerable Bede is an important English saint and scholar who died in 735 CE. See, eg, Allen J Frantzen, 'The Penitentials Attributed to Bede' (1983) 58 *Speculum* 573.
[479] Peter Damian, *Book of Gomorrah*, tr Pierre J Payer (Wilfrid Laurier University Press, 1982).
[480] The Canonic ethos of protecting central institutions (marriage) was thus seen as more important than protecting vulnerable persons (in this case women and girls).
[481] Laeuchli (n 477) 134.
[482] Ibid.

> The critical edition of the Canons of Elvira, announced several years ago, has not yet been published. My translation, which attempts to keep the character of the primitive Latin original, is based primarily on the Hefele text in French, Leclercq form, which goes back to Gonzalez. The new Spanish text, Jose Vives, Tomas Martin, and Gonzalo Martinez, *Concilios Visigoticos E Hispano-Romanos* (Conseio Superior De Investigaciones Cientificas, 1963) vol. 1, does not offer a critical analysis of the manuscripts and does not suffice as a basis for research.

[483] Ibid.

Scholars of religion, history, and theology debate how to understand teachings about gender and sexuality in religious texts and how leading interpretations of texts have changed over time.[484] Questions of how Hebrew, Aramaic, Latin and Greek text should be translated into the vernacular, especially with respect to gender, has been an issue of dispute among feminist theologians for decades, some of whom argue that some early churches or religious societies were more egalitarian than is commonly understood.[485] There are words in these languages that can either be gender-neutral or gender-specific, and how these words should be translated in a given situation is not always an easy question.

To add to the complication of language, the Church's teachings on sexuality has evolved over time, and texts written in a particular time often reflect the issues of the day, and later generations do not always interpret those texts in light of the historical context in which they are written. One of the most frequently cited texts on this issue is the *Book of Gomorrah*, by St. Peter Damian. This text is primarily about sexual activity between clerical men, and when canonists refer to it, it is often in the context of the Church's teaching on homosexuality.[486] This complicated history impacts how texts condemning behaviour we would today call child sexual abuse should be understood. When considered in context, much of this early teaching suggests that child sexual abuse has been prohibited because it is a breach of a vow of celibacy or because it involves sexual activity between two people of the same gender.

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[484] See, eg, Rosemary Radford Ruether, *Women and Redemption: A Theological History* (Fortress Press, 1998), demonstrating an historical approach to feminist Christian theology.

[485] See, e.g. McDonnell, Kilian. 'Feminist Mariologies: Heteronomy/ Subordination and the Scandal of Christology', *Theological Studies*, vol. 66/no. 3, (2005), pp. 527; Julie Faith Parker, 'Blaming Eve Alone: Translation, Omission, and Implications of המע in Genesis 3:6b.' (2013) 132(4) *Journal of Biblical Literature*, 729-747.

[486] See, eg, David Mills, 'In His Book of Gomorrah, an Eleventh-Century Book we'd Bet a Small Amount of Money is Not Read in any Seminary of any Sort in America, but which has Appeared in a New Edition from Wilfrid Laurier University Press in Canada, St. Peter Damian Applies "the Surgery of Words" to those Who should have Said Something and Didn't' (2014) *First Things: A Monthly Journal of Religion and Public Life* 66.

> Some theologians and religious scholars have argued that the *Book of Gomorrah* and other early texts condemning homosexuality were evidence of
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> the flowering of gay clerical culture in the cities of post-millennial Europe, a culture that at least initially enjoyed open toleration. [Historian John] Boswell noted the lukewarm response that Damian's call for a fullscale campaign against sodomites received from his addressee, Pope Leo: while thanking Damian for his efforts, Leo saw no reason to defrock the casual or intermittent offender.

Conrad Leyser, 'Cities of the Plain: The Rhetoric of Sodomy in Peter Damian's "Book of Gomorrah"' (1995) 86 *Romanic Review* 191, citing John Boswell, *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).

The complicated history of canon law and child sexual abuse indicate that the laws which have historically prohibited it have been primarily concerned with clerical celibacy.[487] Catholic historian C Colt Anderson uses the term 'sexual abuse' to describe: (1) clerics cohabitating with adult women,[488] (2) 'coerced and consensual sexual acts between clergy and adult men', and (3) 'seducing or compelling boys and adolescents to submit to sodomy.'[489] Similarly, Coughlin explains that

> sexual contact with a minor qualifies as one of four classification of sexual offenses for which a man may be permanently removed from the clerical state. The other three grounds include any form of coerced sex, a public offense against the sixth commandment of the Decalogue, and continued open concubinage with a woman after an official warning. Permanent removal from the clerical state constitutes one of the most serious penalties contemplated by canon law.[490]

The sixth commandment of the Decalogue is a prohibition on adultery. The 1917 Code listed adultery, debauchery, sodomy, bestiality, and the sexual abuse of persons under sixteen years of age as canonical 'delicts' or crimes, which delicts could be committed by clerics and laity alike.[491] The four grounds for dismissal discussed by Coughlin are set forth in canon 1395 of the revised and updated 1983 Code of Canon law. Canon 1395 is located in Title V of the Code, titled 'Delicts Against Special Obligations'. The five canons in that title all related to special obligations of clerics and religious and include, among other things, prohibitions on exercising a trade or business that is contrary to canon law, or a cleric or religious attempting marriage.[492]

Delicts against special obligations are crimes that, by definition, only priests, deacons, and religious who owe special duties under canon law are capable of committing. Clerical sexual abuse of children is identified as a such a delict, reflecting an understanding that this kind of abuse is different from other kinds of child sexual abuse. Including clerical sexual abuse of children with other offenses, like consensual sexual activities in violation of obligations of celibacy, that are only applicable to those with special obligations suggests that the difference relates to the office and status of the offender, rather than harm suffered by victims. If the harm is about the status of the offender, and all of the prohibited acts involve

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[487] C Colt Anderson, 'When Magisterium Becomes Imperium: Peter Damian on the Accountability of Bishops for Scandal' (2004) 65 *Theological Studies* 741; Daly (n 468)

[488] He noted that these relationships involved such significant discrepancies of power that led to serious abuses, especially as unmarried cohabitants had few rights in Europe of the 11th century, but that Church authorities were concerned with ritual purity and inheritance rights, not women's rights. Anderson (n 487), 748.

[489] Ibid at 749.

[490] Coughlin (n 450).

[491] *Code of Canon Law 1917* ('1917 Code').

[492] 1917 Code s 1395.

sexual activity, the prohibition may relate more to a condemnation of what would be perceived as sexual deviancy than a concern about the protection of children.[493]

Canonist John P Beal, commenting on the delicts in the 1917 Code, explained that the 1917 Code reflected longstanding prejudices connecting disfavoured sexual behaviour with heresy.[494] This connection, he explains, complicates how the instruction of secrecy should be considered. The instruction, he explains, reserves two delicts to the jurisdiction of the CDF: 'the delict committed by a confessor who solicited a penitent for a sexual sin and the delict referred to somewhat euphemistically as 'the worst crime (*crimen pessimum*).'[495] About the *crimen pessimum,* Beal writes that it is defined as,

> "whatever obscene external, gravely sinful deed committed in whatever way or attempted by a cleric with a person of his own sex." For penal purposes, the instruction equated this *crimen pessimum* with grave, external sexual sins committed or attempted with pre-pubescent children (*impuberibus*) of either sex and with brute animals (*bestialitas*).[496]

Beal explains that scholars discussing the reasons for reserving the delict to the CDF suggest one of the following: (1) 'protecting the integrity of the sacraments by ensuring the worthiness of their ministers'; (2) the crimes are subject to the jurisdiction of the both the state and the Church, and 'it would be a source of scandal if a perpetrator were hauled before a secular court for such a scandalous offense while still a cleric'; and (3) 'the longstanding conviction . . . that those who engaged in deviant sexual behavior were heretics or at least suspect of heresy'.[497]

The 1983 Code made significant changes to canon law in this area. Under the 1983 Code, there is no provision on laity's abuse of children. Only priests and religious can be prosecuted under canon law for sexual abuse. In the 1983 Code, canon 1395 §2, located in a section entitled, 'Delicts Against Special Obligations,' provides:

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[493] While the modern-day Catholic sexual abuse scandal is notable in part because available evidence suggests more boys than girls tend to be abused by Catholic clerics, and the opposite is true with respect to child sexual abuse more generally, this discrepancy has yet to be well-understood, and there is no reason to believe that these two issues are connected. See, eg, Meredith Edelman, 'An Unexpected Path: Bankruptcy, Justice, and Intersecting Identities in the Catholic Sexual Abuse Scandals' (2015) 41 *Australian Feminist Law Journal* 271.
[494] Beal is cautioning modern readers not to assume that the 1917 Code was designed to protect children from predation, even when its provisions could be read as criminalising child sexual abuse: John P Beal, 'The 1962 Instruction *Crimen sollicitationis*; Caught Red-Handed or Handed a Red Herring?' (2007) 41 *Studia Canonica* 199.
[495] Ibid.
[496] Ibid 206, quoting Supreme Sacred Congregation of the Holy Office, *Instruction on the Manner of Proceedings in Causes Involving the Crime of Solicitation* (Instruction, 1962) [73].
[497] Beal (n 494).

> A cleric who in another way has committed an offense against the sixth commandment of the Decalogue,[498] if the delict was committed by force or threats or publicly or with a minor below the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.[499]

c. 695 applies the same rule to religious, but there is no similar prohibition on laity. Delaney explains how the theory of the harm is being an offense against the Church rather than the victim remains enshrined in Canon law by the placement of canon 1395 under the title 'Offences against Special Obligations,' rather than a separate title, 'Offences against Human Life and Liberty,' which would communicate that Church's concern is with the harm suffered by children rather than the office of the priesthood.[500] A canon law that theorises clerical child sexual abuse as an abuse of the office, rather than of the child, is demonstrating the concern for conservation of power and control characteristic of what Nonet and Seznick described as a repressive law regime.

Delaney suggests that including laity in this delict would 'be more consistent with the present reality in which the number of lay persons who are engaged in the Church's pastoral care, including health and education, far outweighs the number of clerics or religious'.[501] The explanation she suggests for why it should only apply to those who have promised celibacy is that the offense is related to the commitment clerics and religious make to the Church. The basis for the behaviour's being labelled criminal, then, is harm to the Church, not harm to victims.[502] Like traditional criminal law theory, which saw a criminal offense as a crime against the state,[503] canon law on child sexual abuse by priests frames a crime against the Church. In both the 1917 and 1983 Codes, then, canon law is concerned with the relationship between priest or religious accused of abuse and the Church. This centring of clerics and other consecrated persons may arise from an organisational culture centring on the Church's

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[498] The Decalogue, or Ten Commandments, in the Catholic tradition, lists '[y]ou shall not commit adultery,' as the sixth Commandment. *Catechism of the Catholic Church*, Section 3:2, http://www.vatican.va/archive/ccc_css/archive/catechism/command.htm

[499] 1983 Code (n 7272).

[500] Delaney (n 422) 268.

> Whereas the 1917 Code presented the delict of the sexual abuse of a minor, c 2359, under the title, "on delicts against life, liberty, property, good reputation and good morals," the 1983 Code has placed the corresponding canon, c. 1395 §2, under the title "Offences against Special Obligations." The church's concern for young people has more recently directed its focus, primarily, to the person offended. Likewise, the formulation of the delict and its placement should focus on the harm done. For this reason this delict ought to be considered under the title, "Offences against Human Life and Liberty."

[501] Ibid.

[502] Ibid ch 3.

[503] See, eg, William Blackstone, *Commentaries on the Law of England* (Lippincott Company, 1893); 21 Am. Jur. 2D Criminal Law § 1 (1998).

concerns — from clericalism. The Church and the accused perpetrator are the key parties in canon law, and the victim's role is very limited.

Conceiving the harm as having been committed against the state (sovereign) is familiar in the Western legal tradition. State criminal laws frame crimes as violations committed against the state. Canon and state law thus both tunnel our vision away from an ethic of care for the victim and toward the relationship between accused and sovereign. State law, to various degrees in different jurisdictions over time, has developed mechanisms that shift some attention to the harm experienced by victims, including concessions to restorative justice techniques, crime victim compensation funds, and otherwise centring victims of violent crime.

This has potentially broad implications. Canon law construes the problem as an issue that concerns exclusively the defendant and the sovereign. State law construes it as a problem that concerns primarily the defendant and the sovereign, but in which the victim has a defined role. In Australia in particular, the role of victim in state criminal matters has been somewhat expanded in because of the insurgency against this tradition led by restorative justice theorists and practitioners, many of whom advocate for centring the victim in criminal proceedings. Canon law's prohibition on child sexual abuse was developed from ancient and medieval prohibitions of sexual activity between two male persons, and was premised on vows of celibacy rather than harm to a victim. The history of canon law on this subject suggests that canon law has continued to conceive of the harm as one against the office of priest, or against the Church itself, rather than against the person of the victim.

In the early 1990s, after a number of scandals, the USCCB[504] formed committees to study the problem of sexual abuse — they were charged with discerning how to protect children and respond appropriately while respecting canon law on the rights of priests.[505] In 1994, Pope John Paul II authorised two changes (derogations) to canon law in response to recommendations and discussions with these USCCB committees. These were: 1) redefining 'minor' for purposes of the prohibition of sexual abuse of a minor from sixteen to eighteen, and 2) lengthening the period of prescription during which time a case may be pursued.[506] Reinforcing our earlier analysis of the importance of the geopolitical centre and the rich to insurgency for victims and against institutionally-protective repressive law, these derogations

[504] At the time, the organization was called the NCCB, or the National Conference of Catholic Bishops. It changed its name to become the USCCB in 2001.
[505] See, Bishop Kinney/Bishops' Meeting, 'NCCB Establishes Committee on Sexual Abuse,' *Origins* 23/7 (July 1, 1993) 104-105.
[506] Green (n 420).

were applicable just to the United States. Despite the resistance noted by Australian Bishop Robinson, in 2001, John Paul II issued the motu proprio *Sacramentorum Sanctitatis Tutela*, applicable to the whole world, which clarified the CDF's jurisdiction over cases of clerical child sexual abuse, extended the prescription period to allow suits to begin within at ten years after the victim turns eighteen, and clarifies the kinds of acts that constitute child sexual abuse under canon law.[507] The procedural issues will be discussed in the next section. The more substantive doctrinal changes are change the range of behaviour that is defined as meeting the standard for sexual abuse under law, but not necessarily the reason for the prohibition. Whatever those responsible for the changes believed about the problem of sexual abuse, or hoped the changes to canon law would accomplish, there does not appear to have been a significant shift in the doctrinal theories of law supporting the delicts. Their violation is a violation of requirements of ritual purity connected to the office of the priest and the responsibility that office has for, among other things, Church governance.

B. *Obligation of Secrecy*

Parkinson connects canon law with Church leaders' failing to report abuse to police and other authorities. He criticises what he sees as reluctance to report crime to civil law authorities as a preference for canon law, which he understands requires Catholic leaders to avoid reporting abuse.[508] Counsel assisting the Australian Royal Commission, before putting questions to Bishop Geoffrey Robinson, an Australian bishop and canonist who was deeply involved in the creation of Towards Healing and the Australian Catholic Bishops Conference (ABCB) response to clerical sexual abuse, described a twentieth century pontifical instruction called *Crimen sollicitationis* as binding bishops, administrators, victims, and witnesses to

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[507] Ibid.

[508] Patrick Parkinson, 'Child Sexual Abuse and the Churches: A Story of Moral Failure?' (2014) 26 *Current Issues in Criminal Justice* 119.

> Instructions from the Vatican, issued in 2001, also required that cases that may be dealt with under Canon Law be referred to the Congregation for the Doctrine of the Faith ('CDF') in Rome. The CDF was given some discretion to depart from the prescribed limitation period. In 2011, the CDF issued a document to give guidance 'to assist episcopal conferences in developing guidelines for dealing with cases of sexual abuses by minors perpetrated by clerics'. That document, appropriately, required bishops and leaders to comply with the applicable civil laws of their countries concerning the mandatory reporting of crimes, and noted that child sexual abuse 'is not just a canonical delict but a crime prosecuted by civil law'. It also urged bishops to cooperate with the civil authorities in dealing with such crimes (CDF 2011). Yet, most of the document describes the canonical processes for dealing with complaints of child sexual abuse. There is no indication from the document that such cases ought to be dealt with by the police and criminal courts wherever possible, and only in the absence of a successful prosecution, by ecclesiastical law. The document reads as if the canon law is primary, and the civil law secondary, or at least that the duties of bishops are limited to obeying mandatory reporting laws and cooperating with the police, not that they should actually initiate police involvement.

keep the information obtained in an inquiry secret. Counsel assisting, when explaining her understanding of relevant canon law, noted how canon law requires secrecy of those involved with canonical trials and observed that Bishop Robinson and the ACBC had acted contrary to those laws when developing the Towards Healing program.[509]

The Irish Murphy Report identified the same problems, and attributed them to what it called a 'culture of secrecy' that bishops felt bound by, even though they knew secrecy was incompatible with protecting children.[510] From the perspective of some within the Church, this 'culture of secrecy' can actually mean a culture of confession and canonical closure, of the closed canon court that procedurally progressed openness to the point where the matter could be left in the hands of God's justice. In practice, a problem with this internal theory is that it can facilitated wilful blindness by church officials at best, and wilful blindness to cover-up of repeated failures to protect at worst. The Murphy Report attributed failure to take complaints seriously to a culture of secrecy. Retired lawyer Keiran Tapsell is one of the most widely known critics of canon law as it relates to child sexual abuse by clerics. Like the other critics, Tapsell describes canon law as having been shaped by a 'clerical culture of secrecy and the avoidance of scandal'.[511] He concludes that this shows the Church cares more about its priests and reputation than it does about victims and taking responsibility for the pain they have suffered.[512]

People steeped in canon law have observed that secular criticism often fails to take into account the realities of Church structure and the diversity of peoples that it serves, all of which impacts how canon law is understood and the sometimes glacial pace it takes to change canon law. As discussed in the first part of this section, many questions from outsiders focus

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[509] Transcript of Royal Commission Hearing Day 156, pg 16007-08.
[510] Murphy Report (n 421).
[511] Tapsell (n 421) 207.
[512] Ibid at 7.

> When it came to giving evidence at the *Victorian Parliamentary Inquiry*, the current and former bishops of Ballarat and Melbourne poured the bucket over their predecessors for the cover up of a number of serial sexual abusers. These bishops were following Pope Benedict's lead: blame the bishops, and don't mention canon law and the Pope's responsibility for it. Their stance is understandable. Every bishop prior to his ordination has to take a special oath of loyalty, not to God, or to the Church, but to the pope. One of the bishops, on whom the bucket was poured, was Bishop Ronald Mulkearns, who had a doctorate in canon law, was a founding member of the Canon Law Society of Australia and New Zealand, and the initial chairman of the Special Issues Committee set up by the Australian Catholic Bishops Conference to find a better way of dealing with sex abusing priests than through canon law. Everything Mulkearns did as Bishop of Ballarat, misguided as it was, followed canon law.

Bishop Mulkearns and his role is further discussed in the Chapters 4 and 8 on Ballarat and the Royal Commission.

on a culture of secrecy and whether canon law prohibits bishops from reporting abuse to secular authorities.

The idea that keeping silent about abuse has been a part of the culture within the Church is shared by at least some canonists. Sociologist and former Benedictine monk, Richard Sipe, wrote about secret codes in communications between leaders, leading to his conclusion that crimes against children are hidden by a 'culture of silence'.[513] Dominican priest and longtime critic of the Church's response to victims, Rev Thomas P Doyle's testimony to the Royal Commission has a cogent critique of how Church insiders have followed or ignored canon law but consistently privileged the Church's reputation over the wellbeing of Survivors. He testified of his opinion that canon law has been used as an excuse for not 'taking direct action against reports of sexual abuse. It has been used as an excuse for not reporting to civil authorities, and it has been used as an excuse for allowing accused clerics to continue in ministry'.[514] He reflects that canon law has been used successfully to prosecute abusive priests in a number of instances, but that, in general, Church organisations have acted in order to protect the institution's image, regardless of whether that means obeying or ignoring the requirements of canon law.

> The reality . . . is, in spite of what the canons have said or provide for bishops, in many instances they are completely bypassed and the action that is taken is something that, whether it's contrary or not to canon law, really doesn't seem to have mattered much. But the rule or the norm that was governing this action was expediency with regard to protecting the image of the institution.[515]

In 1922, Pope Pius XI issued an instruction, *Pagella,* which provided that proceedings of canonical trials convened to address claims against clerics be subject to the jurisdiction of the Congregation for the Doctrine of the Faith (CDF) and to the 'pontifical secret,' preventing disclosure of the subject matter of the trial.[516] This instruction, generally referred to as *Crimen*

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[513] A W Richard Sipe, 'Code Words to Hide Sex Abuse', Submission in *Joaquin Aquila-Mendez v Card Roger Mahony et al*, 25 August 2007.
[514] DTI, 'Hearing Day 245: Royal Commission into Institutional Responses to Child Sexual Abuse', Catholic Archdiocese of Melbourne (Transcript, 9 February 2017) 25031 <https://www.cam.org.au/Portals/69/Transcript%20Day%20245.pdf>.
[515] Ibid.
[516] Beal (n 494) 201–2.

> From its establishment by Pope Paul III in 1542, the Sacred Congregation of the Holy Office of the Universal Inquisition (the previous formal name for the present Congregation for the Doctrine of the Faith) has had responsibility for oversight of both faith and moral sin the whole Catholic Church, a responsibility that has entailed its particular competence over certain especially serious delicts, particularly those committed in the celebration of the sacraments.

sollicitationis, was reissued with minor changes in 1962. These instructions were addressed to bishops, who were directed to keep the instructions secret.

It was not until 2001, when Pope John Paul II issued his apostolic letter *Sacramentorum sanctitatis tutela*, discussed in more detail below, that the *Crimen sollicitationis* instruction attracted public attention. Plaintiff's lawyers and media saw the instruction as evidence of cover-up, which became the dominant understanding of the instruction's purpose.

Counsel assisting the Australian Royal Commission, before putting questions to Bishop Geoffrey Robinson, an Australian bishop and canonist who was deeply involved in the creation of Towards Healing and the Australian Catholic Church's response to clerical sexual abuse described *Crimen sollicitationis* as binding bishops, administrators, victims, and witnesses to keep the information obtained in an inquiry 'secret on pain of automatic excommunication that could only be lifted by the Pope personally'. The Murphy Report criticised what it called a 'culture of secrecy' that bishops felt bound by, even as compliance with requirements of secrecy was incompatible with protecting children. Other governments and secular writers, especially Tapsell, are also highly critical of the 'pontifical secret', yet among canonists, the question of what the instruction means is more complicated than it might seem from reading secular sources.[517]

In response to secular critics that argue the instruction was evidence that the Church was trying to cover up widespread child sexual abuse, Beal's work shows that covering up allegations of sexual abuse of children was not the primary goal of the law and procedure relevant to such acts. Rather, the circumstances indicate a concern with the capacity of priests to perform their required role, the reputation of the Church, and with covering up of sexual behaviour between priests and consenting adult men.

> Although the 1962 Instruction included the sexual abuse of minors by clerics among the species of the *crimen pessimum*, the sexual abuse of minors was not its primary meaning. The primary meaning of the term *crimen pessimum* in the 1962 Instruction and its principal focus was what the canonists who wrote it would call homosexual sodomy. To the extent that the drafters of the 1962 Instruction (as well as its 1922 predecessor) might have been prompted to append a section on the *crimen pessimum* by concern about contemporary problems of which the Holy Office had become aware, the tenor of the document suggests that these problems would have been priests engaged in homosexual activities with other adults.[518]

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[517] Murphy Report (n 421).
[518] Beal (n 494) 225.

Beal later explains some ways in which the instruction to keep information obtained during proceedings a secret has been misunderstood — he describes how it applies to all involved with a proceeding, but that accusers and witnesses are not to be censured if they breach it. Delaney explains the instruction requires secrecy to 'prevent harm to the accursed or to witnesses'. She links the instruction to deep concern in canon law for a person's right to a reputation. 'Because a person's good name is held to be sacred, anyone who violates someone's reputation is bound, both morally and in law, to make amends and may be subject to punishment.'[519]

Secular legal authorities have repeatedly, in multiple jurisdictions, including Ireland, the United States, Canada, the Dominican Republic, Australia, and many other places, concluded that secrecy protected the institution at the expense of children. Canonist literature complicates that conclusion, even as it typically agrees that secrecy should not be the Church's policy. Delaney and Beal both explain that the intent of the secrecy provision is to protect the interests of individuals, including both victim and accused, and communities. They critique the use of the secrecy doctrine because it led people to believe that they should not report abuse to civil authorities, and because it had the effect of protecting the Church at the expense of victims and communities. What their insight helps explain is that the concern for secrecy and reputation may relate to a system of rights embraced by canon law as well as a desire to protect Church assets. Reform efforts that do not acknowledge the concern with individual rights are unlikely to secure the trust of those who frame their arguments for secrecy in those terms.

In 2011, the CDF issued guidance requiring bishops and leaders to comply with civil laws concerning mandatory reporting of child sexual abuse.[520] Questions about canon law's insistence on secrecy raise concerns about whether bishops and other Church leaders would interpret this guidance to require reporting only in those jurisdictions where it is required under secular law received relatively vague and non-conclusive answers from canonists at the Royal Commission.[521]

The Royal Commission's questioning on this point may have been influenced by reporting about a training manual for new bishops made available to the public in 2015. This

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[519] Delaney (n 422) 152.
[520] William Cardinal Levada and Luis F Ladaria, 'Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuses of Minors Perpetrated by Clerics', *The Holy See* (Circular, 3 May 2011) <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_en.html>.
[521] Transcript of Royal Commission Hearing Day 143

manual triggered criticism when it was revealed that a theologian wrote in it that whether or not to report sexual abuse to secular authorities should be a decision left to the individual bishop.[522] The document said that whether or not a bishop reports, or is required to report, depends on the law of the country in which the bishop works.

John J Allen Jr, editor of The Crux, a leading source for news and observations about the Vatican had a pithy explanation: 'It's the universality, stupid.'[523] Allen notes that 'two-thirds of the Church's 1.2 billion people live outside the West,' and that bishops from places like the United States often come away from meetings at the Vatican with a sense of how the Church and its structures operate in societies with significant legal and cultural differences. This observation comports with statements made in interviews for this project by Vatican officials.[524] An official with the Pontifical Commission remarked in an interview that in countries with an age of consent below 18, where a bishop has reason not to trust local authorities to take a claim of sexual abuse seriously, or where there are concerns for the safety of victim, there may be good reasons to keep information from local authorities.[525] Given canon law's universal application, therefore, the official explained that canon law needed to be flexible, and in some cases rely on the best judgment of the bishop or ordinary in order to not subject the victim to additional harm.[526]

Similarly, when writing about a report of United Nations Committee on the Rights of the Child, which criticised the Vatican's position with respect to reporting, Grant Gallicho, then of Commonweal Magazine, writes that the committee failed to take context into consideration.

> Even when the committee bumps up against a good idea, it seems uninterested in context. For example, it asks Rome to establish "clear rules, mechanisms and procedures for the mandatory reporting of all suspected cases of child sexual abuse and exploitation to law enforcement authorities," but fails to note that the world's law-enforcement authorities are not all made in the image and likeness of North America's and Europe's. That's why some diocese--in Africa, for example--haven't implemented mandatory-reporting rules. Shouldn't a UN committee show some awareness of that?[527]

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[522] Christine Kearney, 'Vatican advises bishops it's "not necessarily" their duty to always report abuse to authorities,' ABC News (Australia) (Online 12 February 2016) < https://www.abc.net.au/news/2016-02-12/anger-over-vatican-bishop-training/7164636>.

[523] John J Allen Jr, 'Politics of Baby Bishops' School: "It's the Universality, Stupid!" *The Crux* (online, 7 October 2016) <https://cruxnow.com/analysis/2016/10/politics-baby-bishops-school-universality-stupid/>.

[524] Interview with official on file with author.

[525] Interview with official on file with author.

[526] Ibid.

[527] Grant Gallicho, 'Vatican Responds to UN Report on Sexual Abuse', *Commonweal* (online, 7 February 2014) <https://www.commonwealmagazine.org/blog/vatican-responds-un-report-sexual-abuse>.

As discussed in Chapter 2, the fundamental purpose of a repressive law regime is order — keeping the peace. The hallmark of a repressive regime is coercion in support of a social order that emphasises the moral legitimacy of its political leaders. This section has demonstrated how canon law's treatment across history and in the twentieth century was concerned with (1) ritual purity the violation of which complicates the capacity of priests to perform their role within the life of the Church or (2) discouraging those who know about violations of ritual purity from disclosing those violations and ensuring that any official response to such violations was contained in certain administrative offices or otherwise does not harm the Church's reputation. The victim is, essentially, a witness to the crime of betraying the Church rather than the party who has been wronged.[528] The wrong is endangering the faithful's access to the Divine by tarnishing oneself and betraying the office of the priesthood. Although the mission of the Church may be to spread the light of the Divine and bring hope to the world, the mission of canon law is to govern and protect the Church. This protection of and identification with the cause of the Church as the relevant state is characteristic of repressive law as Nonet and Selznick define it.

IV. CANON LAW PROCEDURE AND LOGISTICS: CASES OF CLERICAL CHILD SEXUAL ABUSE

As discussed earlier in this chapter, canon law has been primarily a system of Church governance for centuries. The process of canonical proceedings related to child sexual abuse has changed drastically in the 21st century, as will be discussed below, but until the last decade or two of the 20th century, there had been relatively few canonical proceedings of this subject-matter.[529] In 2014, the Vatican announced that 848 priests had been defrocked using canonical processes, asserting that such prosecutions demonstrated its seriousness in addressing the problem.[530] In 2017, the Royal Commission identified 1,880 alleged perpetrators of child sexual abuse in Catholic organisations in Australia of whom 572 were priests.[531] The world-wide number of abusive priests would likely be orders of magnitude

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[528] See, eg, James T O'Reilly and Margaret S P Chalmers, *The Clergy Sex Abuse Crisis and the Legal Responses* (Oxford University Press, 2014) at 343,

> [T]he accuser is the prime witness against the accused. The accuser is not a party to the case; therefore the case is not the accuser versus the accused, but the Church versus the accused. This means that in the canonical legal system (like the civil legal system), there are legal rights and protections afforded a defendant that are not mirrored for the accuser.

[529] Interview of canonist on file with author.

[530] 'Vatican Defrocked 848 Priests for Abuse', *SBS News* (online, 7 May 2014) <https://www.sbs.com.au/news/vatican-defrocked-848-priests-for-abuse>.

[531] Final Report (n 277).

higher than the number for Australia alone, suggesting canon law is being applied in only a fraction of cases of abusive priests.

This chapter has already suggested some reasons for canonical processes being little used — canon law has, over time, ceded ground to civil law in the realm of interpersonal harms, and because the legal theory underlying the canonical prohibition of child sexual abuse is the same as the prohibition against consensual sexual contact between priests and adult men, many in leadership roles did not distinguish between turning a blind eye to consensual adult behaviour and criminal sexual abuse of children. Both were considered an offense against the Church (a sort of ritual impurity arising from sexual contact between a priest and a person of the same gender) rather than an offense against a person. The increase in canonical proceedings and laicisations can be traced to relatively recent changes to the 1983 Code and canonical procedures that have, among other things: (1) broadened and clarified the scope of behaviour that is prohibited, including sexual abuse of all kinds of people under 18 and vulnerable adults;[532] (2) required reporting to civil authorities where required by civil law; (3) extended the number of years in the prescription periods (the time in which a case must be brought before it is time-barred);[533] and (4) clarified the procedures that must be followed in cases in which clerical child sexual abuse is alleged.[534]

The proceedings, even with recent changes, are very different from the proceedings typical of common law countries in the 20th and 21st centuries. First, like the civil law of continental Europe, canon law is based on a code, and does not include the concept of binding precedent.[535] Canonical interpretation is derived from opinions and recommendations from papal, conciliar, and curial documents — like the varying weight of different kinds of precedent, different kinds of documents from those three sources have different degrees of authority, and their legal significance is a matter of debate.[536] Second, much of the legal procedure is not set out in a statute or made clear through a collected statement of rules in the manner it is in both civil and common law jurisdictions.[537] This section's discussion of canon

[532] Green (n 420); Wim Deetman et al, 'Sexual Abuse of Minors in the Roman Catholic Church' (Final Report, Commission of Inquiry, 2011).
[533] Renati (n 420).
[534] Thomas J Green, 'CDF Circular Letter on Episcopal Conference Guidelines for Cases of Clerical Sexual Abuse of Minors: Some Initial Observations' (2013) 73 *The Jurist* 151.
[535] See, eg Berman (n 418); James T O'Reilly. *The Clergy Sex Abuse Crisis and the Legal Responses* (Oxford University Press, 2014).
[536] Green (n 420).
[537] James T O'Reilly. *The Clergy Sex Abuse Crisis and the Legal Responses* (Oxford University Press, 2014) 314.

> The authors recognize that some readers will be uncomfortable without citations to conventional law resources such as Federal Reporters and highly detailed procedural statutes.

law procedure relies on interviews with canonists, articles in *The Jurist*, Delaney's dissertation, *Quo Vadis*, and James T O'Reilly and Margaret S P Chalmers' discussion of canon law in *The Clergy Sex Abuse Crisis and the Legal Responses*. Third, the bishop of the diocese has a very involved role in the process, serving as the 'father' to all priests in the diocese, the person who has final say on whether a report progresses to a trial, the representative of the interests of the diocese as a whole, and the person who often has final say of what will happen to a priest once a determination has been made about his guilt. The last two differences — the opaqueness and inaccessibility of procedural law and lack of separation between the judicial and political function of the bishop — are characteristic of repressive law regimes.

Additionally, there is one apparent similarity between canon law and criminal law in the Western legal tradition that it is, ultimately, a difference that points to canon law's being a fundamentally repressive law system. Both systems use a rights-based approach to procedure, which can seem to advance a rule of law agenda. Protecting defendants' rights is meant to increase the difficulty of conviction and can restrain over-zealous prosecutors.[538] But not all rights schemes are the same or protect the same interests. In canon law, a defendant's rights include:

> (1) a right to a good reputation (c. 220);
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> (2) a right to privacy (c. 220);
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> (3) a right to choose one's state of life (c. 219);
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> (4) a right to defend one's right (c. 221);
>
> (5) a right not to incriminate oneself (c. 1728);
>
> (6) a right not to be punished with canonical penalties except according to law (c. 221); and for those who are priests,
>
> (7) a right to a relationship with the diocesan bishop, to the support of brother priests, to tangible support, and (in some cases) to ones' ministry.[539]

Some of these, like the right not to incriminate oneself and the right not to be punished except according to law, are similar to rights defendants in criminal trials Australia and the United States have today. Berman and Delaney both trace the origins of modern human rights law to

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For the most par, in canon law these either do not exist, or are published at such lengthy intervals that they are of little current value. Furthermore, decisions in diocesan penal cases are unpublished, and are unable to be published due to their being internally confidential (c.1455) and to protect the privacy of the parties and witnesses. Thus the inclusion of anecdotal material is the best available alternative resource for a liable treatise.

[538] Berman (n 418).
[539] Delaney (n 422).

canon law theories of rights.[540] The Church and its leaders expressed support for 20th century human rights law developments on the basis of 'theological arguments for the dignity of the human person.'[541]

Delaney argues that the robust rights regime afforded priests reflects the seriousness with which canon law and the Church understand what it means to be a priest.[542] In the Western legal tradition, few ideals are as cherished as the idea that protection of liberty is a fundamental interest that justifies weighing the scales in favour of the defendant. Atticus Finch and John Adams are heroes of the American criminal defence bar because they represent unpopular defendants. There is a strong normative current in this perspective — liberty is so important that we cannot allow anyone to be deprived of it unless it is proven beyond a reasonable doubt that they are guilty of a crime meriting such punishment. Delaney shows how being a priest is, within the framework of canon law, so important that being stripped of that office requires the kind of prophylactic rights that the loss of freedom has to civil law criminal defence lawyers.[543]

It is not the protection of rights in general, but the specific rights granted to priests, privileging the already powerful, which can distinguish the rule of law from more totalitarian or monarchical systems, and the rights afforded by canon law, in comparison to civil law, are a good example of that. The right to a good reputation, a right to ministry, and the rights specific to the relationships between priests and bishops, and particular ways of interpreting apparently familiar rights like a right to privacy, a right to choose ones' state in life, and right to defend ones' rights, are likely to benefit priests accused of abuse, since it will bind people to secrecy, hamper investigations, and create unavoidable conflicts for the person of the bishop in executing all of his required duties. It provides rights to priests that others do not have. This kind of privileging one group in society is characteristic of a repressive law regime.

The story of how canon law procedure has changed from the 1917 Code through the present day for cases of clerical child sexual abuse is long and complex — notable for this thesis is the prominent role bishops from Australia and the United States have in advancing

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[540] Berman (n 418) ch 6; Delaney (n 422) 145

> Many human rights can be identified in Roman law and their development traced through the *Corpus Iuris Canonici* to the present *Code of Canon Law*. However, the 1983 *Code of Canon Law* affirms the rights of the faithful in a new way.

[541] Delaney (n 422)146–7.
[542] Ibid.
[543] Ibid.

the law to make it easier for cases to be successful.[544] Canonist Thomas Green argued in 2003 that bishops should have been using canon law processes throughout the 20th century, but that a post-Vatican II 'antinomianism' (belief in faith to the exclusion of law as basis for salvation) led to bishops relying on psychology, rather than canon law, to handle abusive priests.[545] But other canonists point to the ways in which the structure of the law itself made cases difficult. John Beal, writing in 1992, highlighted procedural and logistical difficulties even as he opined that prosecutions would have helped 'dispel the widespread perception that church authorities are more prone to cover-up than to address complaints of clerical misconduct, demonstrate that they have exercised a reasonable standard of care, and honour the obligations assumed toward clerics at ordination'.[546]

One of the reasons for bishops' not using canon law as much as Beal, Green, Coughlin,[547] and others think they should have may have to do with the relationships they are required to have with diocesan priests. Bishops have unique power over and responsibility to the priests in their dioceses.[548] 'It is the bishop's responsibility, through his delegates, to initiate, pursue and bring closure to the process for dealing with an allegation against a priest of his diocese.'[549] This responsibility to hold the priest to account is paired with a personal responsibility for the priest and his wellbeing.[550] Green explains that canon law provides for a special relationship between diocesan bishops and the priests they supervise, which has significant impacts on prosecutions or other disciplinary measures related to clerical wrongdoing.[551] Bishops are required to 'cultivate a special personal and professional relationship with [their] priests'.[552] Canon law discouraged formal trials in favour of informal resolutions of conflict, that before initiating such a process a bishop would have had to ask

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[544] See, eg, Renati (n 420).
[545] Green (n 420).
[546] Beal (n 420).
[547] Coughlin (n 450) 978.
[548] See, eg, O'Reilly and Chalmers (n 528) at 254, explaining how, under the 1917 code, bishops had the power, impose a non-judicial suspension 'based on the informed conscience of the bishop'.
[549] Coughlin (n 450) 978.
[550] James H Provost, 'Some Canonical Considerations Relative to Clerical Sexual Misconduct' (1992) 52 *Jurist* 615.

> [T]he bishop has special responsibilities toward clerics, those genuinely accused (and in a special way, those falsely accused) of sexual misconduct. The bishop is no tin an adversarial role toward his clergy, but must "attend" to his presbyters with special concern. He is to "protect their rights and see to it that they correctly fulfil the obligations proper to their state," and is to make sure that they have the spiritual, intellectual, and material means they need (c. 384). There may be a need to distance the diocese as much as possible from the sexual misconduct of a cleric, but the bishop cannot distance himself from the person of the cleric himself without violating a grave responsibility of his office.

[551] Green (n 420).
[552] Ibid 368.

whether 'scandal [can] be repaired, justice restored, and the offender reformed without a penal process'.[553]

The bishop, notwithstanding the personal and professional relationship he has been required to cultivate with all the priests in his diocese, is uniquely powerful in the canonical process, giving rise to the kind of conflicts of interest that legal systems embracing the rule of law ideal have long criticised. Once a complaint is received by a diocese, the bishop is tasked with ensuring that there is a preliminary investigation that 'is meant to give the ordinary/hierarch a sense of probability that a delict [crime] did or did not occur.'[554] After the preliminary investigation, bishops are required to cause a more formal investigation to proceed — while the law contemplates that bishops could conduct the investigation personally, it is seen as better practice for the bishop to appoint someone else to do so.[555] Once the investigation has been conducted, the results are given to the bishop, who is to consult with his diocesan review board in order to make a determination as to whether the allegations 'at least seem true'.[556] If the bishop makes such a determination, then he must write his canonical opinions as to how the case should be handled, and then the case must be submitted to the Congregation for the Doctrine of the Faith (CDF), which will either take the matter under consideration itself or to direct the bishop as to what should be done next. From this point, there are a range of procedural options that may be taken, depending on decisions made by the CDF and the bishop, but the bishops' decision-making role and authority to make decisions about the future of an accused priest is a constant part of the process.

The bishop's role in the canonical process is complex, but the complexity draws from the duelling nature of the bishop's obligations — he is separately obligated to protect the people of his diocese, the priests in his diocese, and to further the interests of justice. When one of his priests begins harming the people in his diocese, the position of the bishop becomes incredibly difficult. The separation of powers between judicial and political roles is, as Nonet and Selznick discussed, one of the most important characteristics of autonomous law and a

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[553] Ibid.

[554] O'Reilly and Chalmers (n 528) 320 (citations omitted).

[555] Ibid 326 (citations omitted).

> Canon 1717 states that the person who conducts the initial investigation cannot be a judge if there is a canonical trial. Because the bishop is the judicial authority of the diocese, to preserve his impartiality it is strongly suggested that someone else, for example, another priest of 'another suitable person,' investigate the allegation. Some dioceses use the Vicar for Clergy, the Vicar General, or another priest or deacon to do the investigation. Many dioceses prefer to have an outside investigator, a private investigator, or a civil law attorney conduct the investigation so as to preserve impartiality.

[556] Ibid at 335.

key feature of the rule of law. Canon law requires that the bishop play both judicial and political roles. The critique of bishops' failure to use canon law comes from those who feel canon law could have helped the Church avoid the scandal of child sexual abuse, but it is also canon law that set bishops up to fail, by requiring they play contradictory roles in these proceedings. The contradictory nature of roles that ultimately benefits the interests of the most powerful is typical of authority figures in hierarchical and monarchical political orders in which repressive law systems typically exist.

V. CANON LAW AS REPRESSIVE LAW

As discussed in previous chapters, the point of this and chapters 6, 7, and 8 is to introduce aspects of canon law, tort law, bankruptcy law, and the Royal Commission, and to consider whether they reveal characteristics of repressive, autonomous, or responsive law. This chapter has demonstrated that canon law, as it relates to the problem of clerical child sexual abuse, is best described as repressive.[557] Although in recent years, canon law has been used to defrock or otherwise punish priests and religious who have abused children, the underlying theory of the law is about defence of the Church as an institution and it is primarily concerned with the relationship between priest or religious and the Church.

Canon law is designed to benefit and is strongly identified with the Church (state), as we can see from the legal theory of harm underlying the delict of clerical child sexual abuse — the harm is to the Church and the office of the priesthood. The victim is a witness to the crime. As an offense against purity rather than an injury inflicted on a child, canon law also demonstrates its priorities. The purity of a priest or religious is relevant to the relationship between that individual and the Church. Canon law, in this context, only claims the authority over the relationship between accused and the Church. This might be presented as a kind of judicial humility and respect for the authority of state law. Earlier legal realists might simply

[557] Nonet and Selznick (n 125).

1. Law's identification with the state or dominant force and subordination to raison d'état or benefit to ruler.
2. Legal systems adopting the 'official perspective,' wherein 'conservation of authority is an overriding preoccupation of legal officialdom.'
3. 'Specialized agencies of control, such as the police, become independent centers of power; they are isolated from moderating social contexts and capable of resisting political authority.'
4. Legal systems legitimize and reinforce patterns of social subordination, producing a 'dual law' regime.
5. The criminal code reflects dominant social mores, 'legal moralism prevails.'

condemn it as falling into a trap of legalistic moralism. But by considering a wider range of canon law's aspects rather than focussing on the gap between the text of reforms and the lived experience of victims, we see how it is prevented by its own understanding of its purposes from addressing the real harm. Real law is constructed from multiple aspects of law, and considering canon law through its multiple aspects and the ways in which these aspects all shape stakeholder perspectives and powers helps to explain and contexualise gaps between ideals of justice and lived experiences.

Selznick wrote that '[e]very institution has process values, embodied in policies and procedures that reflect the institution's distinctive character and mission.'[558] Canon law's mission of Church governance embeds protection of the institution in its policies and procedures. This embedded protection serves the interests of the broader Church, even, as in the case of child sexual abuse, it can conflict with the mission of the Church in protecting the vulnerable and weak. Defining the harm of child sexual abuse as a crime against the Church also obscures the personhood and needs of victims themselves. Perhaps reflective of this obfuscation, Church officials, in interviews with me, expressed sympathy with currently active, well-meaning, and innocent priests who are cast under suspicion because of public awareness of clerical child sexual abuse.[559] Although facing increased scrutiny and suspicion is unpleasant, it is the refocussing of attention away from the victim and toward the priesthood that is notable. Just as canon law directs the discussion of clerical child sexual abuse away from the harms suffered by the victim and their needs and toward the relationship between priest and Church, Church officials direct discussion away from victims and toward relationships between priest and community, and the Church and the community.

Canon law's status as progenitor of the Western legal tradition and related slow retreat from authority over general criminal matters indirectly also supports it characterisation as repressive. The state law systems that developed alongside of and replaced canon law are the systems Nonet and Selznick identify as prototypical repressive law regimes.[560] Foucault called the corresponding approach to monarchical government as a 'self-referring circularity of sovereignty or principality,' which seeks to protect at all cost the power and control of the sovereign over the subject territory or people.[561] Efforts to change canon law doctrine and

[558] Selznick (n 145) 333.
[559] Author notes of public hearing and private interviews with Church officials, 2015-2017.
[560] Nonet and Selznick (n 125)
[561] Foucault, Michel, *Power*, tr James D Faubion (London: Allen Lane, 2001) 210.

procedure relevant to clerical child sexual abuse in the 20th and 21st centuries have not been able to change its overall repressive character.

The most demonstratively repressive characteristic, however, is the disparate treatment of clerics and laypeople. In this, canon law is a classically dual law regime. As discussed above, the status of the priesthood and what role priests should have in the Church stands at the heart of one of the Church's most significant ongoing ideological and theological debates. Doyle's critique of clericalism, McAleese's examination of collegiality, and Coughlin's discussion of antinomianism all centre around the role of the priesthood, including its theological and legal status, and what that means for Church governance. These discussions link the scandal of clerical sexual abuse with Vatican II and the future of the Church. The theological and canonical theory of the priesthood is deeply connected to the problem of clerical child sexual abuse, intensifying and shaping the harm inflicted on victims, defining the kind of harm cognisable through canon law, and shielding accused priests with special rights not afforded others. This amounts to a reinforcement of the patterns of social subordination already existing in the Church, characteristic of repressive law regimes.

The insight of this chapter is not that canon law is unsatisfactory. Canon law as applied in this context has been roundly criticised by survivor advocates, government investigations and commissions, and the United Nations.[562] That Church institutions, including the USCCB, the ACBC, and the Pontifical Commission increasingly point to initiatives like the Dallas Charter and Towards Healing as the Church's response to the problem, rather than focussing on canon law, supports the conclusion that it is a legal system that has not adapted well to the circumstances of clerical child sexual abuse or responding to the needs of its victims. The purpose here is to take a different perspective, one that gets close to canon law's logics, operations, and meaning. In doing so, it also allows a discussion of canon law's character through the theory of responsive law, just as it demonstrates how canon law has shaped the perspectives, actions, and outcomes for leaders, priests, and religious in the Church.

[562] See, eg, United Nations Committee on the Rights of the Child (n 75); Transcript of Royal Commission Hearing Day 156, pg 16007-08.

CHAPTER SIX: TORT LAW

I. INTRODUCTION: WHICH LAW OF TORT?

This chapter on tort, or the law of civil wrongs, takes on the primary means in common law systems by which private parties seek redress from those who have harmed them. Unlike canon law, tort law is at least relatively familiar to most people living in Ballarat or Gallup, and there are records and information about cases proceeding in both those sites arising from cases of clerical child sexual abuse. But whereas canon law is largely the same through the entire Church, there are significant differences between the law of tort as it is understood, applied, and experienced, depending on where claims are brought.

The point of this chapter is not to compare civil litigation in the two common-law countries.[563] This has been competently done by others. Many of the relevant 'structural and systemic differences' between the two are explained in, for example, Peter Cane's discussion of the legal systems in the United States, Australia, and New Zealand, including the relative isolation of the United States vis-à-vis 'Commonwealth' common law countries.[564] Cane explains how the common law of tort is differently structured in the United States and Australia. Importantly for this analysis, the United States does not have a 'national common law of tort'; each state's common law is independent, with the highest court in the state being the final arbiter of state law. In Australia, there is one High Court, which serves as the final arbiter of tort law for the whole nation.[565] But the differences between the law of tort in Ballarat and Gallup go much deeper than the broad differences between the United States and Australia. This chapter will explain how tort is constructed from multiple aspects of real law as it is theorised, practiced, and lived in context. First, however, it is important to note how political and physical spaces define where cases can be filed and what court system is recognised as having legitimate authority to make determinations of fact and law in those cases.

Tort cases against the Diocese of Ballarat are subject to the authority of the Supreme Court of Victoria, in the civil circuit court for Ballarat. Though the theory and doctrine of tort and insurance law in Victoria is largely federal, civil procedure is Victorian. Cases proceeding against the Diocese of Gallup have been filed in three different jurisdictions. Two of these, New Mexico and Arizona, are states of the United States. The other law of tort applied in

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[563] See, eg, R H Graveson, 'The Task of Comparative Law in Common Law Systems' (1959) 34 *Indiana Law Journal* 571; Frank Bates, 'Comparative Common Law: A Justification' (1981) 14 *The Comparative and International Law Journal of Southern Africa* 259.
[564] Peter Cane, 'Searching for United States Tort Law in the Antipodes' (2011) 38 *Pepperdine Law Review* 257, 282.
[565] Ibid.

cases against the Diocese of Gallup is Navajo law. All three of these have their own laws of tort, procedure, and insurance applicable in cases brought against the Diocese of Gallup. As discussed in Chapter 4, the geographical boundaries of the Diocese of Gallup contain territories of Acoma Pueblo, Laguna Pueblo, Zuni Pueblo, Jicarilla Apache, White Mountain Apache, and Hopi people, each of which has a legal system. At the time of writing, however, I am not aware of any decisions of law reached in any tort law cases involving clerical child sexual abuse against the Diocese of Gallup in jurisdictions other than Arizona, New Mexico, and the Navajo Nation.

This chapter will focus on how aspects of tort can explain the discrepancies between ideals of justice and the lived experience of victims, including relevant differences between the jurisdictions and social orders. As was discussed in Chapter 1, literature on law and the problem of clerical child sexual abuse tends to focus on tort cases, as tort is the primary means of seeking redress through formal law. Survivors and other critics argue that people are denied the opportunity to bring claims or have their claims rejected for legalistic reasons, and many of the positions taken by Church organisations have been criticised as bad faith. Critics are particularly concerned with the applicability of statutes of limitation, the unavailability of records that would prove an accused abuser would have been in a position to have access to a particular child, and the ways in which dioceses delay and use litigation strategies to resist disclosing such records. Others relate to corporate law allowing for an institution to avoid liability. A common thread of these critiques is the way in which the law does not work indiscriminately. They highlight how law works for the benefit of powerful interests. This chapter, building from the critiques, shows how this happens, through application of different kinds of rules and reasonings. It demonstrates how law is constructed over time through embedding the interests of powerful stakeholders within it. Furthermore, it explains how, despite changes intended to address concerns with victims not finding justice, other rules operate to moderate these changes' capacity to provide substantive justice.

This chapter, by digging into aspects of tort, demonstrates that instead of a gap between 'law in action' and 'law on the books,' that can be explained primarily by looking to forces in the broader social order, we also have procedural law, corporate law, constitutional law, and the purposes behind each of those doctrines filling that gap. For tort in Ballarat and Gallup, within what might once have been called a gap, we can see the (sometimes) invisible workings of aspects of law that fill it. In evaluating tort through typologies of responsive law, then, this chapter shows how autonomous legal systems are constructed, particularly how they

privilege rules over values, and how rules developed over time have the tendency to advantage 'repeat players' over 'one-shotters'.[566]

Victims of clerical child sexual abuse bringing claims in tort against the dioceses of Ballarat and Gallup, as will be discussed in this chapter, face obstacles to bringing cases in tort from theoretical, doctrinal and procedural factors, including statutes of limitation, law of jurisdiction and Indigenous sovereignty, and corporate law. These are rules of general application, with their own rationales and purposes — rationales and purposes largely unrelated to child sexual abuse. Statutes of limitation are longstanding procedural rules that encourage people to bring claims quickly, to resolve disputes and to ensure availability of evidence. Stripping Indigenous people of their power to address claims brought by their own members regarding conduct occurring in their land is based in racist and colonialist legal structures outside of the scope of this thesis to interrogate fully. The corporate and legal structure of the Catholic Church in common-law countries is one of the many wrinkles resulting from a long history of contestation. When the purpose behind a rule is perceived by contemporary audiences as obsolete, wrong, or not appropriate for the kind of case in which it is being applied — the rule's application is seen as legalistic. Perceptions of legalism, or focus on procedure over concerns of substantive justice, is typical of autonomous law.[567]

As will be discussed in this chapter, even though Australian, Navajo, New Mexican, and Arizonan law differ in terms of what legal theories for holding dioceses accountable for abuse are cognisable under law, statutes of limitation and whether or not they can be tolled for victims of child sexual abuse, the capacity of Church organisations to be subject to suit, and with respect to other legal issues, their similarity in the determinative role that procedural law and the logistics of bringing claims in contemporary Western society links them together as tort law systems. The role of procedure and logistics in determining compensability in tort also helps to demonstrate the porous boundaries between legal and social orders, collapsing distinctions between law on the books and law in action and revealing a different perspective on real law.

[566] Calavita (n 14) (citing Marc Galanter, 'Why the "haves" Come out Ahead: Speculations on the Setting and Limits of Legal Change' (Working Paper No. 7, Yale Law School. Program in Law and Modernization, 1972)).
[567] Nonet and Selznick (n 125), 64.

II. PURPOSE AND THEORIES OF TORT

A. *Purpose of Tort*

Tort law in practice in Victoria, Arizona, New Mexico, and the Navajo Nation cannot be separated from underlying purposes of tort as a legal system. These purposes are taught in law school and form the basis for arguments made by lawyers in support of their clients' positions. Blackstone, an early commenter on common law, coined the maxim 'that every right when withheld must have a remedy, and every injury its proper redress,' which tort law professors often cite as the basis for tort law.[568] In practice, as will be discussed, Blackstone's maxim is frequently overwhelmed by inequality existing in social realms. Later sections will explain how tort tends to be accessible to relatively wealthy stakeholders, while less privileged people find redress through tort more difficult to secure. While the observed impact of inequality may suggest that tort theory is disconnected from the practice on the ground, understanding it is necessary to understanding the systems, as these theories inform how practitioners understand the law and their own role within the legal systems.

A major purpose of tort, according to tort law theorists, is the provision of a forum for private parties to bring claims against those whose action or failure to act (where legally required) has caused harm.[569] Unlike canon law, with its focus on governance and the Church, tort law is a form of private law — private parties can be plaintiffs and defendants in tort actions, and the range of harms that are cognizable in tort is broad.[570] Tort's purpose of resolving private disputes through a formal process is one of the basic functions that formal law has long claimed to provide. While critics might say it creates an appearance of remedy to private disputes that are in practice almost always sorted informally without resort to formal

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[568] William Blackstone, *Commentaries on the Law of England* (University of Chicago Press, 1979) vol 3, 109.
[569] John C P Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 *Yale Law Journal* 524; Peter Cane, 'Distributive Justice and Tort Law' (2001) 4 *NZ Law Review* 401, 403:

> My starting point is the premise that tort law is a set of rules and principles of personal responsibility, the main function of which is to justify the imposition of obligations to repair harm. I share with Weinrib and Coleman the view that a sound explanation of tort law must account for what Weinrib calls its 'correlativity' — that is, the fact that tort law is a system of correlative rights and obligations as between 'doers and sufferers of harm' (to adopt Weinrib's phrase). I also share their opinion that the economic account of tort law cannot do this; and this is why I will not discuss that account in this article.

[570] John C P Goldberg and Benjamin C Zipursky, 'Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette' (2013) 88 *Indiana Law Journal* 569, 610; Richard Posner, 'Instrumental and Noninstrumental Theories of Tort Law' (2013) 88 *Indiana Law Journal* 469, 470. Note that the discussion in this section about 'purpose' of tort cites scholars who identify the subject of their work as tort theory. The definition of purpose established in Chapter 3 corresponds with what these scholars mean by tort theory. This thesis' definition of theory, discussed in the next section, more closely aligns with what is generally referred to as theories of liability.

process, a more nuanced perspective might point to the law's existence as a frame for informal resolution, by serving as a backstop when informal dispute-resolution breaks down, even if threats of legal action are largely empty.

Philosopher R A Duff explained tort law by reference to the criminal law. Whereas the criminal law is primarily concerned with the wrongs that one person can do to the social order, torts he describes as being,

> focused on harms: typically, harms that have occurred and can (to at least some extent) be repaired. The law enables one who suffers harm at another's hands to shift the cost of that harm onto the other person, by proving that he was legally responsible for it.[571]

Once fault and harm have been established, remedies are awarded or determined for purposes including compensation, deterrence, and loss spreading.[572] The law and economics movement in recent decades has focussed on a theory of tort as a mechanism of cost allocation and deterrence.[573] Scholars in law and economics see tort as a cost shifting mechanism, for which the purpose is to deter or minimise the costs of harms.[574] Guido Calabresi wrote that 'the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents'.[575] This movement has been dominant among tort law scholars in the United States for some time, taught in law schools and built into the way many lawyers understand the role of tort.

In 2003, Peter Cane explained some of the ways that Australian tort law theory differed from that dominant among scholars in the United States,

> United States tort scholarship is generally much more oriented towards viewing tort law as a tool for regulating individual and, especially, corporate behaviour, than Commonwealth tort scholarship, most of which is more inclined to treat tort law as primarily concerned with allocating what Calabresi called 'secondary' accident costs.[576]

He highlights Terence Ison's book, *The Forensic Lottery* and Patrick Atiyah's *Accidents, Compensation and the Law* as Commonwealth contrasts to Calabresi's theoretical framework

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[571] R A Duff, 'Repairing Harms and Answering for Wrongs' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 212, 216.
[572] See, eg, Pam Stewart and Anita Stuhmcke, *Australian Principles of Tort Law* (The Federation Press, 3rd ed, 2012) 6, citing *Pyrenees Shire Council v Day* (1998) 192 CLR 330 [123] (Gummow J).
[573] Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).
[574] Richard Posner, 'Instrumental and Noninstrumental Theories of Tort Law' (2013) 88 *Indiana Law Journal* 469, 470.
[575] Calabresi (n 573), 26.
[576] Peter Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 Melb. U. L. Rev. 649, 653.

for evaluating accident law.[577] Ison, Cane writes, 'offered a practical proposal for replacing tort law with a no-fault system of compensation for 'diseases and violent injuries causing disablement and death.'[578] He traces how Commonwealth countries saw a wave of reforms that led to no-fault schemes in New Zealand and more limited no-fault schemes for specific issues (like automobile accidents) in other Commonwealth jurisdictions.

Australia, despite significant interest and reform efforts, has not followed New Zealand's example. Cane explains that Australian tort reformers fall into three main groups, which he calls 'conservatives, radicals and moderates.'[579] Conservatives, Cane argues, are either compensationists who believe that tort law has allowed for the development of a 'fine balance . . . between the interests of injurers and the injured, and thus oppose reform of tort law.'[580] Those who are not compensationists, Cane calls economic rationalists, to whom 'the prime function of personal injury law is risk-management, not compensation,' and who oppose efforts to limit the range of damages available in tort on the basis that it would expose people to 'unacceptable threats to their personal health and safety.'[581] Radicals, including Cane himself, push for no-fault schemes of various types. Moderates argue that either too much is spent compensating injured people, so damages should be reduced, while others argue that tort law does not place enough weight on injured people's responsibility to avoid harm. But it is noteworthy that tort theories focus on cost allocation in both the United States and Australia. This focus draws the attention of lawyers away from questions of wrongfulness and toward questions of compensability, which in turn shapes the drafting of insurance policies, which, as will be discussed, frequently exempt intentional torts from coverage, which can leave victims of child sexual abuse without a practical recourse.

More recently, (mostly American) civil recourse theorists rejected a view of tort as means of social control and public benefit for one centred on tort as a private right.[582] They argue that the law and economics focus on tort as a means of allocating costs of accidents fails to account for personal wrongs.[583] These scholars focus on tort as a relational and private concept, looking to early commenters like Blackstone to argue that tort law should be seen as

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[577] Ibid, citing Terence Ison, *The Forensic Lottery: A Critique on tort Liability as a System of Personal Injury Compensation* (Staples Press,1967) and Patrick Atiyah, *Accidents, Compensation and the Law* (Weidenfeld and Nicholson, 1970).
[578] Ibid.
[579] Peter Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 Melb. U. L. Rev. 649 (2003)
[580] Ibid at 651
[581] Ibid.
[582] Michael L. Rustad, 'Twenty-First-Century Tort Theories: The Internalist/Externalist Debate' (2013) 88 Ind. L.J. 419.
[583] Ibid.

a ‘basic category of law,’ that is concerned primarily with private wrongs and not be used as a means of social control.[584]

With so many different theories of tort, it becomes important to consider how practitioners and people bringing claims against the dioceses of Ballarat or Gallup understand the purpose of the systems. Tort law scholars may be concerned with the interaction between tort law and insurance premiums, but individuals considering whether to bring claims in tort are unlikely to consider the collective impact on insurance premiums, but only their own circumstances. For example, in an article titled ‘Harry Potter and the Trouble with Tort Theory’, Scott Hershovitz describes how tort theory fails to account for the cost of litigation, including procedure and collateral effects of bringing claims. Among other things, Hershovitz considers a number of potential benefits to actions brought in tort that are not considered by most theorists.[585] First, he argues, bringing a claim can help a plaintiff achieve knowledge about the injury that the defendant had access to but would not otherwise have released. Second, the public nature of the dispute and judge’s opinions contribute to the public discussion of what is right and what ‘our’ values should be. Third, the process of telling one’s story in public is meaningful for people. Fourth, victims typically want to hold the person or entity they see as responsible for their pain accountable for it. There is a sense that a victim wouldn’t get the same satisfaction from holding the ‘person who could have avoided the accident more cheaply’ responsible for their injury if that is not the person the victim understands to have caused the harm.

One plaintiffs’ lawyer, who represented a number of plaintiffs in cases against the Diocese of Gallup, described benefits much like those Hershovitz described when he explained to me how he encourages his clients. He said that he acknowledges that the process of bringing a civil claim is difficult, but that the process can be empowering and help them recast their self-identity. He says that he tells his clients that:

> [This] is about standing up for yourself and saying [to the Church] ‘fuck you — you’re not going to do this to me’. Be empowered, stop being a victim, start being a survivor. Show people that you can fight and that you’re not weak.

The lawyer commented that he wants his clients to know that ‘they’re not weak, … It takes an incredible amount of courage for my clients to just to come into my office that first time and tell me about how a priest [assaulted or raped them]’.[586] Important as the

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[584] John C. P. Goldberg & Benjamin C. Zipursky, Torts as Wrongs, 88 Tex. L. Rev. 917 (2010) (citing 3 William Blackstone, Commentaries *2); but see Gregory C Keating, ‘Is There Really No Liability Without Fault?: A Critique of Goldberg & Zipursky’ (2017) 15 *Jerusalem Journal of Legal Studies* 152.
[585] Scott Hershovitz, ‘Harry Potter and the Trouble with Tort Theory’ (2010) 63 Stan. L. Rev. 67.
[586] Interview with plaintiffs’ lawyer on file with author

psychological benefit to standing up for oneself may be, and as consequential as the various other benefits Hershovitz discusses are, they are not generally described as part of the purpose of tort by theorists, nor are they the focus of lectures on tort in law schools. We can see then, that practitioners occupy a sort of middle-ground, having been taught about tort theory as a function of cost-allocation and burden-shifting, and drawing on that understanding as they present arguments for the benefit of clients who may understand the purpose of bringing a tort claim as standing up for themselves and holding accountable those who wronged them. The process requires lawyers to reframe questions of wrong and harm as questions of compensability, and implicitly acknowledge that tort does not provide a remedy for all harms. Nonet and Selznick identified this kind of reframing of substantive justice issues as procedural questions as a defining characteristic of autonomous law.[587]

B. *Legal Theories in Tort*

Legal theories are aspects of law, as discussed in Chapter 3, that provide a reason for legal action within the internal logic of the legal system. In tort, legal theories are theories of liability — theories that connect wrongs to the right to compensation. For this thesis, this means the theories of liability that provide a formal basis for claims against dioceses by victims of clerical child sexual abuse. At first glance, one might be forgiven for thinking tort to have been designed just to respond to wrongdoing like child sexual abuse. Personal torts such as assault and battery are some of the most longstanding torts recognized under common law.[588] Sexual abuse is cognisable in tort as sexual assault and battery. But these torts have been significantly developed since the 1990s, following the 'discovery of child sexual abuse' and campaigning by activists discussed in Chapter 1. These changes came about as a reflection of changed social understandings of childhood, sexuality, gender, and the significance of sexual assault and sexual abuse including increased concern for the protection of children from sexual predation.[589]

Critically, the cases brought against Catholic dioceses do not allege the dioceses committed assault themselves. Because the abuse was committed by individuals, and not the diocese as an entity, cases must present legal theories that connect the diocese as an entity to the wrong. The theories that make this possible in Ballarat and Gallup are: (1) theories based

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[587] Nonet and Selznick (n 125), 54: Listing, among other attributes of autonomous law, '[a]n emphasis on procedure such that procedural regularity and fairness, rather than substantive justice 'are the first ends and the main competence of the legal order'.
[588] Henry John Stephen, *New Commentaries on the Laws of England: Partly Founded on Blackstone* (Butterworth, 4th ed, 1858) 454.
[589] Cheit (n 26).

on the organisation's relationship with abusive priests — i.e. vicarious liability or *respondeat superior*, whereby organisations are responsible for the tortious acts of their employees and agents, (2) theories based on organisations' relationship with the victims — whether they were owed a duty of care or whether the organisations had assumed an affirmative duty to protect those in their care, or (3) theories in negligence that argue the dioceses knew, should have known, or were reckless as to the chance that a priest had a history of abusing children.

The common law theories relevant to cases against dioceses alleging clerical child sexual abuse can be described as either direct or indirect liability. Dioceses or other organisations are directly liable for the acts of individuals when it can be shown that the organisations were at fault in some way. Typically, this means one of four general types of activities: (1) retaining priests and others who the organisation was or should have been aware were likely to abuse children in positions that, by their nature, facilitated the individuals' access to children; (2) failure to supervise employees and volunteers with access to children; (3) failure to report criminal behaviour to appropriate authorities; (4) concealing knowledge of abuse, or (5) abusive or wrongful tactics in response to allegations of sexual abuse. It is through these theories that organisation can be held directly liable for a personal tort committed by an individual.

Third party theories of liability, often based on an agency theory, allow employers and other principals to be held indirectly responsible for tortious acts committed by their employees and agents. Indirect liability is typically theorised as vicarious liability (in the United States this is often referred to as the doctrine of *respondeat superior*), through which the acts of an agent can be imputed to the principal. This is justified because the agent or employee is presumed to be acting in furtherance of the goals of the principal or employer. In Australia, Allison Silink and Pamela Stewart argue that institutions entrusted with the care of children should have a non-delegable duty to ensure reasonable care is taken, which would provide for direct liability for a principal.[590] As will be discussed below, in the case of Catholic dioceses, however, laws extending liability sometimes conflict with laws providing non-profit or charitable organisations with immunity against claims in tort.[591]

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[590] Allison Silink and Pamela Stewart, 'Tort Law Reform to Improve Access to Compensation for Survivors of Institutional Child Sexual Abuse' (2016) 39 *University of New South Wales Law Journal* 553, 558.
[591] Edward L Buelt and Charles Goldberg, 'Canon Law & Civil Law Interface: Diocesan Corporations' (1995) 36 *The Catholic Lawyer* 69:

> Colorado has enacted a number of statutes which limit the liability of directors, officers, and volunteers of nonprofit corporations. For example, a Good Samaritan Act has been enacted which provides that no board member of a nonprofit corporation shall be liable for actions taken or omissions made in the performance of his or her duties as a board member, except

As the law has changed over time, theories of third-party liability for child sexual abuse have been extended, reinterpreted or changed by law, usually to allow for more claims against organisations to go forward.[592] These changes to law, like extensions of statutes of limitation discussed later in this chapter, are meant to address concerns that characteristics of child sexual abuse render it more difficult for victims to prove their cases.[593]

The difference between vicarious liability and direct liability in this context is whether or not there is a theory that allows for recovery when the diocese did not know of the tendencies of their agent or employee to abuse. A principal who is vicariously liable for the wrongs of its agent is liable regardless of the principal's knowledge and/or behaviour. Claims of direct liability rely on the principal having some awareness of the abuse or its likelihood, and thus require plaintiffs to demonstrate not just the fact of abuse, but also the likelihood that the bishop knew or should have known that the individual was likely to abuse children. Direct claims also include those claims that allege bad faith or negligence in responding to claims of abuse, including covering up or destroying evidence.

In the United States, Catholic organisations have been held liable for the sexual abuse of children both indirectly under theories of vicarious liability, as *respondeat superior*, as well as directly, under theories of negligence.[594] In New Mexico, 'an employer is liable for the intentional torts of his employee if the torts are committed in the course and scope of his employment.'[595] In a case brought against New Mexico and out-of-state Catholic organisations, the New Mexico Supreme Court held in 2002 that

> the liability of a principal for the tortious act of an agent is the same as the liability of an employer for the tortious act of an employee. Such liability is grounded on the maxim 'respondeat superior,' and is to be determined 'by

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where the activity is a willful or wanton act or omission. The legislature has also adopted a statute which limits the vicarious liability of officers and directors for torts committed by employees of nonprofit corporations.

Colorado has also enacted the Volunteer Service Act, which creates immunity from civil liability for volunteers who act in good faith and within the scope of their official functions and duties. Furthermore, Colorado has codified the trust fund immunity doctrine, which provides that a tort action cannot be maintained against a charity where the judgement, if satisfied, would deplete the funds devoted to a charitable purpose. Therefore, in every sexual assault, abuse, or other tort case in which the Archdiocese of Denver or any other nonprofit corporation is a defendant, this statute may be pleaded as an affirmative defense. Thus, plaintiffs should be alerted that the Archdiocese of Denver is not going to hand over the keys to the kingdom even if a plaintiff succeeds in becoming a judgement creditor. (citations omitted

[592] Hamilton (n 91).
[593] Ibid.
[594] See, eg, Janna Satz Nungent, 'A Higher Authority: The Viability of Third Party Tort Actions against a Religious Instituion Grounded on Sexual Misconduct by a Member of the Clergy (2002) 30 *Florida State University law Review* 957; *Doe v Archdiocese of Portland*, 717 F Supp 2d 1120 (D Or 2010).
[595] *McCauley v Ray*, 80 NM 171, 180 (NM 1968).

> considering, from a factual standpoint, the question whether the tortious act was done while the employee ... was acting within the scope of employment.'[596]

In order to determine what acts are within the scope of employment, the New Mexico Supreme Court held that, 'employers who endow their employees with the means and authority to use force can be held liable for their employees' misuse of those instrumentalities and authority'.[597] Thus, whatever actions are implicitly authorised by a principal's placement of an individual in a position of power can be imputed to the principal. As a priest is placed by the diocese in a position of power, the fact a diocese did not authorise abusive behaviour cannot protect it from claims the priest misused his power. This reasoning means that cases against the Diocese of Gallup in New Mexico would have an easier time proving the connection between the diocese and the harm suffered than those brought in Arizona. Indeed, a plaintiffs' lawyer in New Mexico told me that the question of third-party liability was rarely an issue in their matters, that legal issues were usually about whether the statute of limitations had run with respect to claims or the availability of records and the opportunity to conduct discovery with respect to documents that would support claims of direct liability.[598]

The Supreme Court of Arizona in 2012 clarified the test of vicarious liability under Arizona law, holding that the test turns on an employer's control or right to control the employee.[599] In Arizona, '[a]n employee's tortious conduct falls outside the scope of employment when the employee engages in an independent course of action that does not further the employer's purposes and is not within the control or right of control of the employer'.[600] Sexual abuse of children is clearly not within the job description of clergy or educators and is a clear violation of Catholic teachings. Cases in Arizona have accordingly only been able to progress on theories of direct liability, including breaching fiduciary duties to children in their care, negligent supervision, endangerment, and various failures of reporting.[601] Cases in Arizona, therefore, usually require a showing that the person bringing

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[596] *Tercero v Roman Catholic Diocese of Norwich*, 48 P 3d 50 (2002).
[597] *Narney v Daniels*, 846 P 2d 347 (1992).
[598] Interview with plaintiffs' lawyer on file with author.
[599] *Engler v Gulf Interstate Engineering, Inc*, 280 P3d 599 (Ariz, 2012); see also David Potts, 'Arizona Case Note: Engler v. Gulf Interstate Engineering, Inc. and the Role of Control in Vicarious Liability' (2012) 54 *Arizona Law Review* 1157, 1169:

> [Arizona's] new emphasis on control stays true to the policy justification behind vicarious liability, but reorders their importance. By focusing on control, the test only holds employers liable when they actually can prevent or minimize the likelihood of the tortious conduct.

[600] *Engler* (n 599).
[601] See, eg, Associated Press, 'Catholic Diocese of Phoenix Settles Sex-Abuse Claim', *Arizona Daily Star* (online, 27 December 2006) <http://tucson.com/news/catholic-diocese-of-phoenix-settles-sex-abuse-

the claim was not the first person abused by an individual – although the harm suffered by the first victim may not be measurably different from the harm suffered by a later victim. The burden-shifting focus of tort discussed above thus shapes the understanding of tort law in Arizona., where tort law theory has been interpreted to find it unjust to hold an employer accountable for an employee's abuse unless the employer can be proved to have disregarded knowledge that the employee had previously abused children. This amounts to privileging employers over victims of their employees, making bringing claims against the Diocese of Gallup more difficult depending on whether they were abused in Arizona or New Mexico.

Navajo law is significantly more open to victims than either Arizona or New Mexico. In complaints filed in Navajo courts, claimants allege the Gallup diocese and the Franciscan orders are vicariously liable for sexual abuse they suffered at the hands of Chuck Cichanowicz in St. Michaels, Arizona and Shiprock, New Mexico on the Navajo Nation Reservation.[602] They also allege direct liability on theories of negligence, including failing to warn, negligent supervision, premises liability, and for having 'aided and encouraged' and 'ratified,' abuse itself when transferring the abuser to St. Michaels after reports of his abusing children in previous parishes came to their attention.[603] All of these theories of liability were accepted, and the dispute about compensability centred on procedural issues of statutes of limitation and jurisdiction, discussed below. Of tort law applied in cases against the Diocese of Gallup, then, Navajo law allows for the most theories of liability connecting the diocese with harm suffered, and have not embedded the rights of the powerful in law to the extent that Arizona and New Mexico have. These differences in theories of law, with Arizona concerned more about not holding employers responsible when they cannot be proved to have acted in a blameworthy way and Navajo courts more concerned with ensuring those least able to avoid harm do not suffer without redress reflects the values of the polity in those locales. Arizona's population is majority white, and tends to elect conservative judges and lawmakers who do not want to burden enterprises with tort judgements, while New Mexico and the Navajo Nation have elected judges and politicians who see tort not just as a way to allocate blame but to shift costs to those most able to bear them.

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claim/article_d86e391d-b6d2-5cba-9cf3-04732ed03043.html>; Roman Catholic Church of the Diocese of Tucson, 'Third Amended and Restated Disclosure Statement Regarding Plan of Reorganization Dated May 25, 2005', Submission in *Re: Roman Catholic Church of the Diocese of Tucson*, 4-bk-04-04721-JMM, 25 May 2005; *Doe v Roman Catholic Church of the Diocese of Gallup, et al.*, Complaint, CV 2013-361 (Ariz. Superior Court, Cononino County, Dated May 28, 2013.

[602] *John Doe CB v. Diocese of Gallup et al.*, Complaint, No. WR-CV-208-09 (Navajo Nation District Court, District of Window Rock, Arizona, dated 12 May, 2009.

[603] Ibid.

In Australia, where the conservative project of tort reform has, as Cane discussed, not been adopted as widely as it has in places like Arizona in the United States,[604] the Royal Commission explained that there are three 'legal bases for institutional liability for abuse currently available in Australia.'[605] These three bases include: (1) negligence, based on the breach of a duty of care owed by the institution to a child in its care, (2) vicarious liability, and (3) a breach of a 'non-delegable duty to ensure that a third party takes reasonable care to prevent harm.'[606] That being said, the High Court has left the question of vicarious liability and non-delegable duties in the context of child abuse in institutional settings unclear, which has led to a number of stakeholders and scholars calling for clarification of the law and a viable theory of third party liability.[607] The Australian High Court in *New South Wales v Lepore* found that any duty of care that institutions owe to children does 'not extend to illegal conduct or conduct where an employee was pursuing a "frolic of their own".'[608] The *Lepore* court left open the possibility that institutions could be vicariously liable for intentional or illegal acts, but in Victoria, at least, that possibility seemed less viable after the Victorian Supreme Court of Appeal in *Blake v J R Perry Nominees Pty Ltd* held that an employer was not liable for the criminal acts of its employee.[609]

As explained by Silink and Stewart, this has 'left survivors facing considerable uncertainty as to whether a claim relying on vicarious liability will be successful or not under Australian law.'[610] In addition, when defending themselves from suit, as the Archdiocese of Sydney did in the Ellis case, some Catholic dioceses in Australia have argued that parish priests are not employees of the bishop, whose person constitutes the corporation sole of the diocese, giving rise to even more uncertainty in law.[611] This uncertainty prevents many victims in Australia from bringing claims in tort. It incentivises settling claims before a final determination of law can be rendered, as the risks of bringing an unsuccessful claim, as will be discussed below, are quite high. This explains some of the dearth of written decisions in Australian law specifically relevant to claims against the Diocese of Ballarat.

On January 30, 2015, the Royal Commission issued a consultation paper in which they sought submissions from interested parties on issues regarding redress and civil litigation. It has since

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[604] Cane (n 576).
[605] Commonwealth of Australia, 'Redress and Civil Litigation' (Consultation Paper, Royal Commission into Institutional Responses to Child Sexual Abuse, January 2015) 33.
[606] Ibid.
[607] See, eg, Silink and Stewart (n 590) 558.
[608] *New South Wales v Lepore* (2003) 212 CLR 511
[609] *Blake v JR Perry Nominees Pty Ltd* (2012) 38 VR 123.
[610] Silink and Stewart (n 590) 558.
[611] Ellis (n 641), p 32.

made public 41 of those submissions, from a range of stakeholders including individuals impacted by abuse or institutional responses to it; organisations providing legal, counselling, or other services to victims and their families; professional organisations of legal, mental health, and social services professionals; other government commissions of inquiry; and representatives of defendant institutions — including government and religious organisations.

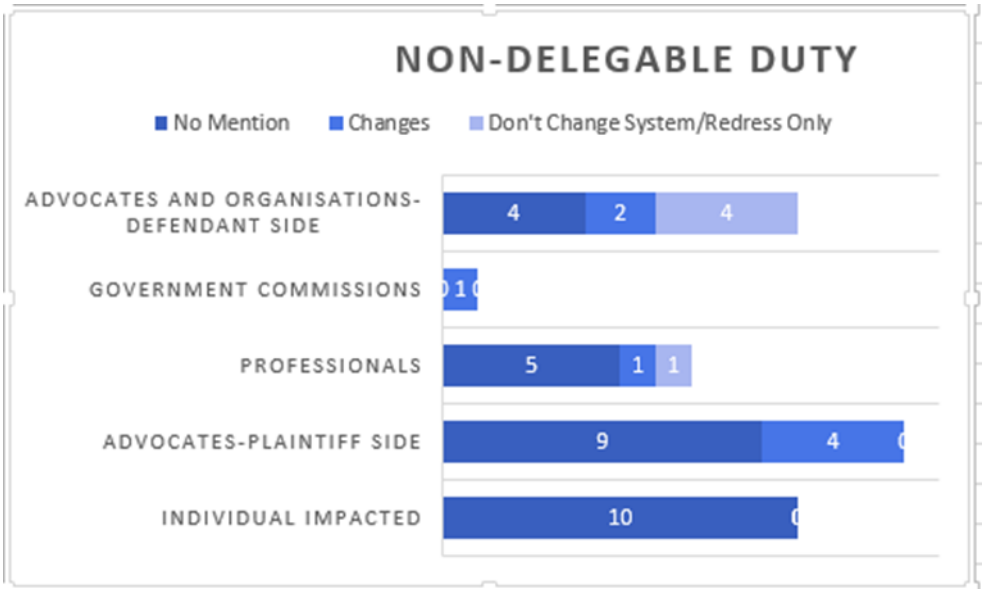

Figure 6.1 Responses to Royal Commission Regarding Non-Delegable Duty of Care

As can be seen in the above Figure 6.1, of 41 submissions, 13 discussed the non-delegable duty issue. It is perhaps not surprising that none of the ten individuals writing in did not identify a complex legal issue — most of those letters were somewhat more general with respect to their suggestions, but six of ten defendant-side organisations, two of seven professional organisations, the Victorian Commission, and four of 13 plaintiff-side advocates identified the question of non-delegable duties as relevant. Most of those identifying the issue argued for the law to be changed.

Four defendant organisations, however, identified it as a problem, but opined that it cannot reasonably be changed. The Anglican Church of Australia, for example, proffered that civil litigation cannot be reformed into the kind of redress system needed by victims, that pastoral care would be more appropriate.[612] Other defendant-side and plaintiff-side advocates

[612] Anglican Church Submission for Consultation paper: Redress and civil litigation, Royal Commission into Institutional Responses to Child Sexual Abuse, 'Document Library', Royal Commission into Institutional Responses to Child Sexual Abuse (Web Page)

supported changing the law with respect to vicarious liability, arguing that vicarious liability should be imposed based on an 'enterprise risk' approach. The approach, 'which has been increasingly applied by the English and Canadian Supreme Courts to issues of vicarious liability in cases of institutional child sexual abuse … treats the creation of risk as a basis for the imposition of vicarious liability in cases of abuse'.[613]

This section has focussed on the theories of law and not individual cases. The situated methodology adopted for this thesis requires getting close to the subject-matter. For a number of reasons, many discussed in following sections, tort cases against the dioceses of Ballarat and Gallup have largely either settled or been dismissed, but no published decisions turn on the applicability of theories of liability or dig into why cases are brought. Lawyers, for reasons of confidentiality, will not discuss the reasons their clients decide to settle cases, nor the advice that they provide them. The result is that, although these theories can be determinative of result for victims, their application occurs largely invisibly. Considering the purpose of tort and theories of liability allow for a glimpse into the mindset of lawyers evaluating the cases they work on (both those representing victims bringing claims and dioceses defending against them). The purpose and theory of tort is considered for the way they structure lawyers' perspective of the viability of cases, serve as barriers to bringing cases, and incentivise settlement. This can provide some context as to why legal theories were not as significant an issue to stakeholders responding to the Royal Commission's call for submissions as were issues of statutes of liability, entity availability to suit, jurisdictional

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<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Redress%20and%20civil%20litigation%20-%20Submission%20-%2018%20Anglican%20Church.pdf >.

> We believe that none of the issues identified is unique to the class of litigants who have suffered child sexual abuse. Some of those issues arise because of the lapse of time between the injury and the commencement of litigation. Similar problems are experienced by persons who suffer from diseases with long latency periods and people who suffer injury in infancy or early childhood but cannot commence proceedings until adulthood. Some issues arise because the plaintiffs have suffered traumatic physical and/or psychological injury. These issues, we note, are common to other kinds of claimants. 'We believe that the existing civil litigation system is inadequate and could not be adjusted to resolve [CSA] claims fully. Pastoral care and assistance may be more suitable to address [CSA] victims' needs than pursuing court action.' 'Victims of [CSA] are able to accept that in some cases institutions were genuinely unaware of the abuse being perpetrated by their officeholders, employees, volunteers, fellow members of the institution, visitors and others. They do not necessarily seek to penalise the institution for the abuse that has occurred to them by the actions of an individual. It is important for such victims that wrongs are redressed by the institution acknowledging that the abuse has occurred.

[613] Knowmore Submission for Consultation paper: Redress and civil litigation, Royal Commission into Institutional Responses to Child Sexual Abuse, 'Document Library', Royal Commission into Institutional Responses to Child Sexual Abuse (Web Page) <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Redress%20and%20civil%20litigation%20-%20Submission%20-%2087%20knowmore.pdf>.

concerns, and practical barriers to stakeholder access to legal systems, all of which will be further discussed in this chapter. The barriers to justice facing victims through doctrinal, procedural, and logistical means are more visible, but the operation of tort theory is no less a part of real law than are the more visible aspects that will be discussed next.

III. DOCTRINE AND PROCEDURE IN TORT LAW

This section combines a discussion on tort law doctrine and procedure, the aspects of law that earlier legal realists might dismiss as 'law on the books,' but which is nonetheless a central aspect of real law. Some of the reasoning for this is that the distinction between the two with respect to tort is not a bright line, despite 'rough agreement on what counts as procedure and what counts as substantive, however poorly theorized that agreement may be'.[614] As discussed in Chapter 3, doctrine is the applicable substantive law or 'merits' of a matter, while procedure governs how legal proceedings should be initiated, prosecuted, and administratively managed.[615] In tort, 'nonmerits factors [often] overshadow the merits', skewing both the incentives and the outcomes in tort proceedings.[616] Accordingly, just as the previous section considered both broader theories of the role of tort in society and the legal theories of liability on which claims against dioceses are brought, this section will consider legal doctrine and procedure and their impacts on the potential outcomes of tort cases brought against the dioceses of Ballarat and Gallup by people who have been abused by priests.

Not all of the doctrine and procedure applicable in these cases is obviously relevant to child sexual abuse. For example, there are a range of laws embedded in the civil litigation process that protect religious organisations. The interests of the Church and other religious organisations have been embedded into law in Australia and the United States as the contemporary iteration of the long history of law and religion in the Western world discussed in chapter 5, and evidencing the depth of relationships between legal and social orders. The embeddedness of institutional interests can be identified in protections for religious organisations in law, including special tax status, clerical privileges, and corporate forms that

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[614] See, eg, Paul MacMahon, 'Proceduralism, Civil Justice, and American Legal Thought,' (2012) 34 *University of Pennsylvania Journal of International Law* 545, 554, citing Cass R Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1735–6.

> While it may be difficult to tell whether a particular rule is procedural or substantive, the existence of troublesome borderline cases does not make the distinction meaningless. Mostly the difference is intuitively obvious.

[615] Ibid, citing Thomas O Main, 'The Procedural Foundation of Substantive Law' (2010) 87 *Washington University Law Review* 801, 810.

[616] Jonathan T Molot, 'How US Procedure Skews Tort Law Incentives' (1997) 73 *Indiana Law Journal* 59.

allow religious organisations to operate in ways that differ from other kinds of organisations.[617]

A. *Statutes of Limitation*

Tort law generally contemplates redress of harms against people who are capable of claiming the protection of law. Children only rarely are capable of doing so. Childhood is a vulnerable time of human life, impacting capacity to recognise when one is being subject to unlawful harm, to communicate, and to advocate for one's needs. Statutes of limitation are laws that bar claims brought after a particular period of time has expired since the events giving rise to the cause of action. They are meant to encourage people to bring claims rapidly and prevent evidence from growing stale. While such laws vary by jurisdiction, many jurisdictions, including all those in which cases have been brought against the dioceses of Ballarat and Gallup, have extended their statutes of limitation for child sexual abuse or have introduced exceptions to them, acknowledging when they do that the previously applicable statutes of limitation were inappropriate for cases involving child sexual abuse. Statutes of limitation in the context of child sexual abuse are a classic example of how autonomous legal systems can prioritise rules over substantive justice. Marci Hamilton's *Justice Denied: What America Must Do to Protect Its Children* makes this point quite clearly.

> The law has been structured so that child predators rarely have to face the legal system for their despicable acts. Justice has been difficult for child sex abuse survivors to obtain because the courthouse doors have been padlocked before they arrived.
>
> . . .
>
> Across the country, there has been a fundamental mismatch between the SOLs on child abuse, which cut off claims very quickly, and the ability of children to come forward. Sadly, this situation has created perfect opportunities for predators. Typically, each survivor's right to sue has expired relatively soon after the abuse, meaning that a predator could bank on the likelihood that each new survivor would not be able to get to court.[618]

Hamilton's central argument is that statutes of limitation for child sexual abuse should be abolished entirely, that child sexual abuse should be treated more like homicide than like simple assault. She argues that there should be no limit on when victims might bring suit or prosecutors bring charges.[619]

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[617] See, eg, *Advocate Health Care Network v Stapleton*, 137 SCt 1652 (2017), discussing an exception to otherwise generally applicable rules meant to benefit religious organisations.
[618] Hamilton (n 91).
[619] Ibid.

Hamilton's argument rests on research finding a significant percentage of victims of child sexual abuse never report their abuse or are only ready to come forward with their stories many years or even decades afterwards.[620] The Royal Commission and the Victorian Law Reform Commission describe similar concerns with the application of statutes of limitation in Australia.[621] In both countries, statutes of limitation have been a key target of Survivor advocates who decry their barring of a significant percentage of claims from going forward. As they note, advocacy in both courtrooms and legislatures has led to change, including for the abolishment or adjustment of statutes of limitation and the introduction of 'discovery' rules that delay the beginning of a limitations period until after a victim has been able to connect the experience of sexual abuse with tangible injuries.[622]

Victims from Ballarat reported taking settlements from the diocese that did not reflect the gravity of their injury because 'short limitations periods [applicable at the time] meant they either had to take the compensation offered or receive no assistance'.[623] Victoria has since eliminated statutes of limitation on causes of action arising out of child abuse.[624] This change was in response to the Parliament of Victoria's Family and Community Development Committee report, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations*, which recommended that limitation periods for child abuse be abolished.[625] As discussed in Chapter 4, that inquiry was launched at least in part because of revelations of child sexual abuse in Ballarat and concern that the courts were not resolving the cases satisfactorily.

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[620] Ibid, citing Jennifer J Freyd et al, 'The Science of Child Sexual Abuse' (2005) Apr 22, *Science* 501; World Health Organization, *World Report on Violence and Health* (World Health Organisation, 2002).
[621] Judith Courtin, 'Sexual Assault and the Catholic Church: Are Victims Finding Justice?' (PhD Thesis, Monash University Faculty of Law, 2015), citing Victorian Law Reform Commission, *Sexual Offences: Final Report* (Victorian Law Reform Commission, 2004) 84.
[622] See, eg, Hamilton (n 91).

> To get around the unfair SOLs, some state courts (and some legislatures) devised the "discovery rule": A survivor would not be required to go to court until she understood that her many problems in life were caused by abuse in the past. In other words, she was given time to discovery the causal ink between the childhood trauma of sexual abuse and her later difficulties. The SOL would be tolled (or stop running) until she had discovered the link between injury and suffering.

[623] Caroline Schelle, 'Ballarat Sexual Abuse Survivor Phil Nagle Hails New Compensation Rules', The Courier (online, 14 June 20019) <https://www.thecourier.com.au/story/6218005/its-a-great-day-ballarat-abuse-survivor-hails-new-compensation-rules/>.
[624] *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) s 1: 'The purpose of this Act is to . . . remove limitation periods that apply to actions in respect of causes of action that relate to death or personal injury resulting from child abuse'.
[625] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (Commonwealth of Australia, 2015).

The comprehensive investigations of the Victorian Inquiry and the Royal Commission did not attempt to estimate how many victims might have never brought claims, but without government-led investigations, the number of victims in Gallup who have never brought claims is even more obscured. There are applicable statutes of limitation in Arizona, New Mexico, and the Navajo Nation, all of which have been changed or interpreted to allow some, but not all, claims of child sexual abuse that would otherwise be barred to go forward. In Arizona, the statute of limitations is generally two years from the date of the act giving rise to the cause of action, but in 1998, the Arizona Supreme Court endorsed the 'repressed memory doctrine,' a 'variation on the discovery rule that makes it legally possible for victims of sexual abuse to overcome the statute of limitations defense'. Thus, those victims in Arizona who could demonstrate that they had repressed memories of their abuse could bring claims.

New Mexico, like Victoria, has changed its law legislatively. In 1995, New Mexico law was changed to allow actions for childhood sexual abuse to be commenced by the later of the victim's twenty-fourth birthday or 'three years from the date of the time that a person knew or had reason to know of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury to the person, as established by competent medical or psychological testimony.'[626] In 2017, it was changed again, this time to allow actions for childhood sexual abuse to be commenced by the later of the victim's twenty-fourth birthday or 'three years from the date that a person first disclosed the person's childhood sexual abuse to a licensed medical or mental health care provider in the context of receiving health care from the provider.'[627] The last change both made final determination of the applicable limitation period easier and allowed for more claims to move forward, which difference was acknowledged in the diocese's bankruptcy case, which will be discussed in the next chapter.[628]

The courts of the Navajo Nation, bound by the Navajo Nation Code, 'utilize *Diné bi beenahaz'áanii* (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulation'.[629] Navajo Nation law provides that, generally, personal injury actions must be filed 'within two years from the date [a plaintiff] discovered or should have discovered the nature, cause, and identity of the person

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[626] *New Mexico Statutes* § 37-1-30 (1995).
[627] *New Mexico Statutes* § 37-1-30 (2017).
[628] *In re Roman Catholic Church of the Diocese of Gallup*, No. 13-13676 (Bankr, D.N.M.), 'Debtors' Plan of Reorganization Dated March 21, 2016,' at ¶3.157 (defining 'Unknown Tort Claim' to include Tort Claims 'barred by the applicable statute of limitations as of the Bar Date but is no longer barred by the applicable statute of limitations for any reason, including for example the passage of legislation that revives such previously time-barred Tort Claims').
[629] *Navajo Courts, 'Title 7 Navajo Nation Code Courts and Procedure'* § 204 A (emphasis added).

causing the injury.'[630] However, following *Diné bi beenahaz'áanii*, the Supreme Court of the Navajo Nation held that in the context of child sexual abuse, because Native American children, 'as a "relatively powerless minority" may be expected to have acute effects of withdrawal and loss of contact with community when exposed to such abuse', the requirement that claims be brought within two years of the time that someone with 'reasonable diligence' must have discovered the link between the abuse and the injury suffered should be that of a reasonable person 'whose judgment is "altered in some way"' as a result of childhood sexual abuse.[631] Accordingly, in the Navajo Nation, claims can go forward when victims can demonstrate that the effects of the abuse prevented them from ascertaining the link between that abuse and their injuries.[632]

In practice, although all of these jurisdictions have technically opened up the possibility of bringing claims past previously applicable statutes of limitation, the differences between the jurisdictions have significant ramifications. In Arizona, victims whose memory of abuse was not repressed, or who cannot sufficiently prove that it was by hiring a psychologist who will credibly testify to that repressed memory, are barred from bringing claims. In New Mexico, victims do not need to prove what they remembered and when, needing only to provide testimony about when they disclosed having been abused to a medical professional. In the Navajo Nation, the statute of limitations is subordinated to the understanding that victims of child sexual abuse may suffer a range of obstacles to pursuing their legal rights. In Victoria, as the polity grew to sympathise with victims of child sexual abuse, the statute of limitations was abolished entirely.

B. *Jurisdiction and Indigeneity*

Before any other determination, courts must first make sure that they have jurisdiction to hear cases before them — that a case is of the sort that the court has the power to make decisions about. Among other things, courts cannot hear cases arising out of events that took place outside of the territorial boundaries of the state or locality which the court represents. The question of jurisdiction is of particular salience for victims bringing claims against the Diocese of Gallup given the stark differences between Arizonan, New Mexican, and Navajo Nation law. Victims abused by priests or religious within the borders of the Navajo Nation can do so under theories of direct and indirect liability, do not need to hire expert witnesses to

[630] *Doe BF v Diocese of Gallup, et al* (Navajo Nation SC, No SC-CV-06-10, 9 September 2011).
[631] Ibid.
[632] Ibid.

testify as to whether or not they have repressed memories, and their disclosing having been abused to a doctor does not prevent them from being able to bring claims when they later connect the mal effects of that abuse with their cause. However, the disfavoured status of indigenous people as enforced through United States constitutional law has effectively discounted the value of those claims.

The United States Supreme Court describes Native American tribes as sovereign but dependent nations, meaning that they possess 'those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status'.[633] This retained sovereignty includes the right to 'exercise some forms of civil jurisdiction over non-Indians on their reservations', including the adjudication of civil disputes stemming from a consensual relationship between the non-Indian and the tribe.[634] The extent of that jurisdiction under U.S. federal law is less certain than suggested by *Wheeler*, as will be discussed, but several victims have brought claims against the Diocese of Gallup, bolstered by the Navajo Supreme Court's claimed authority to make determinations in this space.

In *Doe BF*, a member of the Navajo Nation brought claims alleging sexual abuse by a Franciscan priest and naming the Diocese of Gallup and local Franciscan orders as defendants, and the Navajo Supreme Court held that it had jurisdiction to adjudicate those claims despite the Catholic entities not being members of the Navajo Nation. Before a decision was reached as to liability, it and two similar cases pending before Navajo courts settled out of court for an undisclosed amount. The settlement kept the case from going forward past the discovery stage in the US district court, to which it had been appealed. In so doing, it kept the issue of tribal jurisdiction from being determined by the United States federal courts, where US law, rather than Navajo law, would govern the enforceability of any judgement.

Had the *Doe BF* case not settled, it is not clear what the outcome would have been. A similar case brought by a member of the Choctaw Nation demonstrated the fragility of Indigenous courts' jurisdiction under Constitutional law, when the death of Justice Antonin Scalia likely prevented the United States Supreme Court from stripping jurisdiction over non-Indigenous defendants from the Choctaw Nation's courts, although leaving the door open to the current, even more conservative, court to do so.[635] The power that the federal courts have

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[633] *United States v Wheeler*, 435 US 313, 323 (1978);
[634] *Montana v United States*, 450 US 544, 565 (1981).
[635] Ed Gehres, 'Opinion Analysis: Dollar General, the Court's Longest Pending Case of the 2015 Term is a Four-Four Per Curiam Opinion', *SCOTUSblog* (Blog post, 25 June 2016) <http://www.scotusblog.com/2016/06/opinion-analysis-dollar-general-the-courts-longest-pending-case-of-the-

to determine tribal jurisdiction calls into question the veracity of claims that indigenous nations in the United States have any real authority.[636] If Navajo courts are denied the authority to hold non-indigenous persons and entities liable for wrongdoing committed on their land, indigenous people might legitimately question whether 'dependent' sovereignty is any kind of sovereignty at all.[637] We can see how social disfavour of Indigenous people embeds itself in legal systems, shaping decision-making by Navajo plaintiffs who, rather than risk losing because a federal court might decide that Navajo law cannot adjudicate their claims, settle for an undisclosed amount that is likely much less than what they were awarded through application of Navajo law.

C. *Corporate Law and Entity Availability to Suit*

For religious organisations, legal forms in common law systems embed protection and privilege even as disfavoured groups are made more vulnerable. The Royal Commission's investigation into the response of the Sydney Archdiocese to the allegations of John Ellis highlights a legal problem that is unique to claims brought against Catholic dioceses in Australia. Ellis, an altar boy who was abused by a priest in the 1970's, first sought redress from the Archdiocese through the Towards Healing program, which continues to be utilized in response to survivors of sexual abuse by diocesan priests and other employees.[638] Ellis later brought a claim in the civil courts of New South Wales, with respect to which the court of Appeal ultimately held that there was no legal entity against which Mr. Ellis's claim could proceed.[639] This ruling formed the basis for what came to be known as the 'Ellis Defence', which is widely criticised by survivor advocacy groups, and the Royal Commission itself.[640]

2015-term-is-a-four-four-per-curiam-opinion>; Anna V Smith, '"Win-Loss Is Still Pretty Bad": Tribes Falter at Supreme Court', *Indianz.com* (online, 9 August, 2018) <https://www.indianz.com/News/2018/08/09/winloss-is-still-pretty-bad-tribes-falte.asp>.

[636] Ed Gehres, 'Argument Analysis: Is Tribal Court Civil Jurisdiction over Non-Indians Truly a Constitutional Issue, or One of Settled Precedent?,' *SCOTUSblog* (Blog post, 8 December 2015) <http://www.scotusblog.com/2015/12/argument-analysis-is-tribal-court-civil-jurisdiction-over-non-indians-truly-a-constitutional-issue-or-one-of-settled-precedent/>.

[637] See, e.g., Anna V Smith, '"Win-Loss Is Still Pretty Bad": Tribes Falter at Supreme Court', *Indianz.com* (online, 9 August, 2018) <https://www.indianz.com/News/2018/08/09/winloss-is-still-pretty-bad-tribes-falte.asp>.

[638] Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 8: Mr. John Ellis's Experience of the Towards Healing Process and Civil Litigation* (Commonwealth of Australia, 2015).

[639] Ibid.

[640] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Consultation Paper: Redress and Civil Litigation' (Consultation Paper, Royal Commission into Institutional Responses to Child Sexual Abuse, January 2015) 224.

> Given that the benefit of succession in relation to property ownership is conferred on a number of religions and religious bodies by state and territory legislation, it may be appropriate for that state and territory legislation to be amended to provide that any liability of the religion or religious body that the property trust is associated with for institutional child sexual abuse can

Ellis's claims were brought against three defendants: Cardinal George Pell, then the Archbishop of the Sydney Archdiocese, the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, and the individual priest who abused him.[641] Although naming him as a defendant Ellis did not pursue the claims against the priest because he was deceased and his estate did not have sufficient assets to be distributed. With respect to the Archdiocesan trustees, the New South Wales Court of Appeal held that, despite the trustees having power over the management and disposition of all assets of the Archdiocese, that only the Archbishop had a role in the appointment an oversight of priests, and therefore the trustees could not be liable for the Archbishop's (or the priest's) actions.[642]

With respect to then-Archbishop Pell, Ellis argued that, as the successor to the office of Archbishop, Pell 'is a legal person who *eo nominee* is liable for the obligations of his predecessor because perpetual succession (with attendant liability in tort) is conferred upon the office'. However, the court found that because there is 'no statute or Crown grant constituting the Roman Catholic Archbishop of Sydney a corporation sole',[643] and because the Church in Australia has 'used the law of charitable trusts and, latterly, statutory trust corporations like the Trustees',[644] to conduct their affairs, that liability cannot pass from Archbishop to Archbishop, so liability for the torts which may have been committed by Pell's predecessor in office perished with him. Accordingly, the Court of Appeal held that neither Pell nor the Trustees were proper defendants for Ellis's claim — that there was, in essence, no entity against which Ellis could bring his claim.

The *Ellis* decision and the objections to it highlight the ways in which legal proceedings that focus on formal structures of law can render useless doctrine which is meant to provide avenue for legal redress. Although there was no active dispute about whether or not Mr. Ellis had been abused, nor was there any active dispute about whether the abuse he suffered was the cause of suffering he described in his complaint, or that the priest who abused him had been under the control and administration of the Archdiocese, the court

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> be met from the assets of the trust and that the trust is a proper defendant to any litigation involving claims of child sexual abuse for which the religion or religious body is alleged to be liable.

[641] *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565.
[642] Ibid [149].

> The fact that the Trustees hold property for an on behalf of 'the Church', including property devoted to various charitable trusts, cannot be inverted into the proposition that the Trustees (and the funds they administer, many of them on specific charitable trusts) can be rendered subject to all legal claims associated with Church activities.

[643] *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565 [162].
[644] Ibid [181].

determined that New South Wales left him without a defendant against whom he could seek redress. The kind of legalism that will, despite agreement about harm, fault, and causation, deprive litigants of a substantive outcome is a feature of Nonet and Selznick's concept of autonomous law.[645]

In the *Ellis* case, the application of the rules left the plaintiff without a remedy to an undisputed harm, because the entity controlling the Archdiocese's assets, which was established to exist in perpetuity, was found not to be liable for the tortious acts of the previous Archbishop because the office of the Archbishop did not exist in perpetuity in Australian law such that successor Archbishops inheriting the liability of their predecessors. Thus, although the Archdiocese's assets remain available to it in perpetuity, it is able to avoid liability for tortious activity every time a new Archbishop is appointed. Thus, although the law of tort and public policy would appear to provide a remedy to children who are sexually abused and to hold those who could have prevented that abuse accountable for its harms (as discussed above), the application of corporate and trust law allows Catholic dioceses to evade public policy.

Judith Courtin quotes from the Ellis's unsuccessful application to the High Court of Australia for leave to appeal from the decision of the Court of Appeal emphasising how the court's decision failed to provide substantive justice.

> If the Court of Appeal's decision is correct, then the . . . Church in NSW and the ACT has so structured itself as to be immune from suit other than in respect of strictly property matters for all claims of abuse, neglect or negligence, including claims against teachers in parochial schools . . . That immunity, they say, extends to the present day in respect of the parochial duties of priests. We say such an immunity would be an outrage to any reasonable sense of justice and we say it is wrong in law.[646]

This decision has been roundly criticised by activists, Survivor advocates, and by the Royal Commission itself. This criticism is reflected in the submissions to the Royal Commission regarding civil litigation, as noted in Figure 6.2, below. Eleven of thirteen submissions from plaintiff-side advocates called for a change in law such that institutions caring for children

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[645] Nonet and Selznick (n 125), 64.

> Legality, understood as close accountability to rules, is the promise of autonomous law; legalism is its affliction. A focus on rules tends to narrow the range of legally relevant facts, thereby detaching legal thought from social reality. The result is legalism, a disposition to rely on legal authority to the detriment of practical problem solving. The application of rules ceases to be informed by a regard for purposes, needs, and consequences. Legalism is costly, partly because of the rigidities it imposes but also because rules construed *in abstracto* are too easily satisfied by a formal observance that conceals substantive evasions of public policy.

[646] Courtin (n 621) quoting Transcript of Proceedings, *Ellis v The Trustees of the Roman Catholic Church for the Archdiocese for Sydney* [2007] HCA Mr Morrison, 16 November 2007).

would always have an entity available to be sued for harms suffered by those children. Notably, of ten submissions from defendant-side advocates and organisations, four similarly called for such a change, and only two defended the *status quo*. It was not fully abolished until 2019.[647]

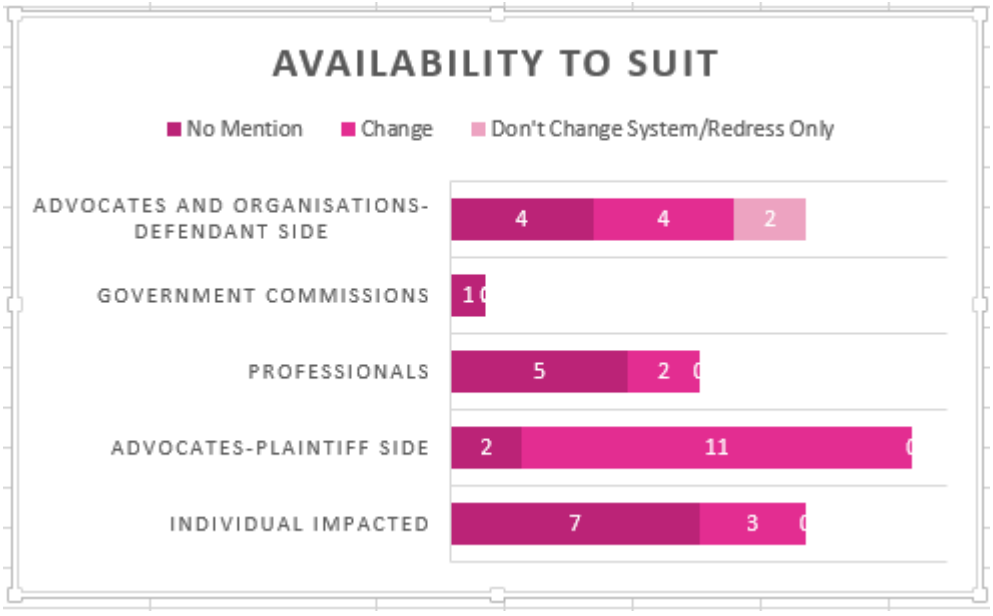

Figure 6.2 Responses to Royal Commission on Entity Availability to Suit

IV. LOGISTICS IN BALLARAT AND GALLUP

A. *Difficulty of Bringing Claims*

Previous sections of this chapter discussed theoretical, doctrinal, and procedural challenges claims brought by victims of child sexual abuse in Ballarat and Gallup must overcome. But the barriers to justice also take the form of more quotidian concerns — physical access to courts, the very real emotional and difficulties in pursuing a claim, and other logistical issues that can keep people from being successful in their claims. This section will discuss the logistics of bringing a claim in Ballarat and Gallup, and in so doing, reveal some of the practical barriers to success in litigation for victims in these dioceses.

As a new lawyer in practice, a mentor would constantly remind me to be aware of 'logistics.' For a litigator, this means being aware of how long various processes take, calculating deadlines, knowing unwritten or local rules, and ensuring that the right documents, evidence, and arguments are presented at the right time, in the right place, with the right permissions having been obtained, in the right physical or electronic format, to the

[647] Michelle Brown, 'Catholic Church Ellis Defence Scrapped in "Momentous Day" for Abuse Survivors,' *ABC News* (online 1 January 2019) <https://www.abc.net.au/news/2019-01-01/catholic-church-ellis-defence-scrapped-from-new-years-day/10675890>.

right audience. Failure to do so can forfeit legitimate claims. Lawyers in all kinds of practice need to be aware of the logistics of practice. The logistics of being a party to a legal case include one's access to legal services, the quality of that service, capacity to find and assess the quality of legal services, capacity to participate in the legal process, finance a case, and process the emotional toll it takes. Both kinds of logistics are important to understand if we are to achieve a broad perspective of tort law's operation in Ballarat and Gallup.

First, as compared to most actions in tort, bringing a claim of child sexual abuse against a Catholic diocese is an emotionally, spiritually, financially, and at times even physically difficult task. Consider oral testimony. The plaintiff's story has to be told in front of multiple people. In the United States, long before any trial, depositions are a required part of the process.[648] Many of the people who are present at trial and in depositions are strangers, some of them being paid to argue that the plaintiff is lying, mistaken, or that acknowledged abuse nonetheless does not warrant compensation. Also, in the room is the most powerful man in a Catholic diocese — a man Catholic children are taught to revere as a living connection to the Divine. And this powerful man (and his predecessors) hired, supported, protected, and continues to take the side of the abuser. Compared to being injured in a car crash or suffering property damage, the events in question feel intensely personal, usually bringing deep feelings of shame, pain and sadness.

In few cases in tort, even cases involving personal injury, is the nature of the injury so emotionally fraught or giving testimony so difficult. This is a serious barrier to people pursuing their claims. It requires incredible bravery to tell this kind of story out loud, much less in front of hostile parties, especially when those hostile parties are powerful religious leaders. Not only is this difficulty a deterrent to bringing actions, it also provides dioceses with significant leverage in negotiating settlement. A case's potential worth is diminished by the defendant's knowledge that the plaintiff does not wish to testify.

In addition to the emotional difficulty, there are financial and practical barriers to bringing claims. Before a victim of child sexual abuse begins an action in tort in common law countries like the United States and Australia, a lawyer is almost always consulted and retained. For most victims, the prospect of paying fees to a lawyer during a suit would be prohibitive. In the United States, most tort cases brought by individuals are taken on a contingency basis — so the lawyer will pay all fees upfront but will receive a percentage (usually between 20 and 40%) of any recovery. In Australia, contingency fee arrangements

[648] Michael J Legg, 'The United States Deposition — Time for Adoption in Australian Civil Procedure?' (2007) 31 *Melbourne University Law Review* 146.

are illegal, and so lawyers taking cases on a no win no fee basis charge additional fees to compensate for the risk they take in providing the costs up-front to their clients.[649] Furthermore, unsuccessful plaintiffs in Australia are typically responsible for paying the costs of the defendant.[650] John Ellis, discussed above with respect to entity availability to suit, was ordered to pay the costs of both Pell and the Archdiocese — which totalled over AUD$650,000.[651] This was a personally costly and life-destroying example of the process being the punishment for a tort complainant taking on a powerful defendant. The purpose of these schemes is to encourage lawyers to only bring those claims that they believe have a good chance of winning, and to settle.[652] The result of incentivising lawyers to only take cases they believe are likely to result in a successful claim means that a lawyer's assessment of a potential client's emotional capacity may play a larger role in claims arising out of child sexual abuse than it does in less fraught kinds of cases. Lawyers' perception of the compensability of a potential victim's claim then is an initial barrier to a claim that operates invisibly, keeping claims from even being presented to a court.

Another difficulty in bringing claims relates to the availability of evidence other than the testimony of victims. For example, from the time cases were filed in Arizona's Coconino County Superior Court, cases that would lead to Gallup's bankruptcy filing, the lawyer bringing them acknowledged that he would need the diocese to release certain records.[653] These records proved difficult to obtain. Religious organisations argue that certain kinds of disclosures would violate their rights to religious freedom, right to free association, and other fundamental rights.[654] Diocesan disclosure of records continued to be an issue throughout the diocese's bankruptcy case, and testimony at the plan's confirmation hearing suggests that not

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[649] Stuart Clark and Christina Harris, 'The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?' (2008) 32 *Melbourne University Law Review* 775, 788.

[650] Ibid 768.

[651] Royal Commission Into Institutional Responses to Child Sexual Abuse, *Public Hearing — Case Study 8 (Day 52)* (Transcript No 52, 10 March 2014) 5302.

> The pursuit by Corrs of the archdiocese's costs against Mr Ellis was causing him so much distress that his wife, Nicola Ellis, intervened by writing to Monsignor Usher, who was by them the chancellor for the Archdiocese of Sydney. Mrs Ellis knew Monsignor Usher, and she requested a meeting regarding the claim for costs. She stated that she and her husband did not have the financial capacity to pay the costs of Cardinal Pell and the trustees. She also advised that her husband in a fragile psychological state.

[652] Cane (n 564), 282.

[653] Michael Clancy, 'Suits Allege Sex Abuse by Ariz. Priests', *The Arizona Republic* (online, 25 June 2013) <http://archive.azcentral.com/news/arizona/articles/20130625suits-allege-sex-abuse-by-ariz-priests.html>: 'The cases could be difficult to prove unless Pastor can pry loose diocesan records on the priests. Documentation is available on Hageman, Sullivan and Allison, but not on [Sanchez, Lindenmeyer, and Schomack].'

[654] Nicholas P Cafardi, 'Discovering the Secret Archives: Evidentiary Privileges for Church Records' (1993) 10 *Journal of Law and Religion* 95; Jeffrey Hunter Moor, 'Protection against the Discovery or Disclosure of Church Documents and Records' (1999) 39 *The Catholic Lawyer* 27.

having greater access to records is the main disappointment victims have in the plan.[655] Under the plan, claimants have the option, for one year, to view in person records relevant to the person who abused them, but not take or keep copies of those records, and the records may not be recorded or used in any way.[656]

B. *Inequity in Barriers to Legal Services*

In Australia, the story of John Ellis is often mentioned in connection with the scandal of child sexual abuse, and while it stands as an example of the high cost of litigating a claim, it also demonstrates how it is that wealth facilitates access to justice. Few individuals can afford to litigate cases through the appeals stage as he did. Most people settle. Ellis had more capacity than many other victims to pursue justice for himself. He had more knowledge of the legal system, was in a stronger financial position, and benefitted from family and community support. Before initiating action, he was a partner at a large, international law firm.[657] As a highly educated, relatively wealthy, married man with a sophisticated understanding of the legal system and access to some of the most skilled lawyers in New South Wales, he had advantages in bringing his claim that few other victims of clerical child sexual abuse have. That he nonetheless suffered significant hardship is testament to the traumatic nature of both the abuse and the tort process itself.[658] Cynics might say that exploiting one's full legal rights in tort is only a game for the rich, and winning at it is a game for the extremely rich, like the Church.

Few in Ballarat and fewer in Gallup have Mr. Ellis's advantages. Inequity between classes and asymmetrical impact of rule enforcement on disfavoured groups within society is predicted in Nonet and Selznick's account of autonomous law.[659] In Ballarat and Gallup this inequity took shape in response to social issues including: poverty, rurality, indigeneity, and immigration status. There is not room to catalogue all of the reasons there is inequity in the legal system, so this section will focus on a few examples.

The Victorian Aboriginal Child Care Agency's submission to the Royal Commission's call for consultation on redress and civil litigation highlights the way that, for people whose experience with the government and legal system has been as traumatic and abusive across

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[655] Hardin-Burrola (n 391).
[656] *In re Roman Catholic Church of the Diocese of Gallup, No. 13-13676 (Bankr, D.N.M.), 'Debtors' Plan of Reorganization Dated March 21, 2016,'*, Exhibit R ¶. 16-17.
[657] Royal Commission Into Institutional Responses to Child Sexual Abuse, *Public Hearing — Case Study 8 (Day 52)* (Transcript No 52, 10 March 2014) 5324.
[658] Ibid.
[659] Nonet and Selznick (n 125), 64.

centuries as it has been for Indigenous people, bringing a claim against a Catholic diocese involves considerations that people who have usually been able to rely on the system for substantive justice do not have.

> One of the significant healing opportunities that this Royal Commission provides Aboriginal people with is the fact that they will be heard and will be believed and they don't have to fear 'proving' their story (often at the hands of the 'white man'). The 'system' is still experienced by many Aboriginal people as insurmountable and there is little point in putting yourself through the trauma of trying to have your word believed. VACCA acknowledges the trauma that those who have tried to have their sexual abuse and other childhood traumas including the trauma of removal and disconnection from land and culture addressed...[660]

As discussed in Chapter 4, Indigenous people are a significant portion of victims in Gallup, but relatively few Indigenous people live in the diocese of Ballarat, and little information is available specifically discussing the Indigenous experience in Ballarat. The Victorian Aboriginal Child Care Agency's statement does resonate in Gallup, after successive colonisations and centuries of abuse by Spanish, Franciscan, Mexican, American, and other religious and secular governments and legal systems, including policies of stripping Indigenous people of their culture whether by force or 'education.' A lack of trust in legal systems, which have been as much a part of the settler-colonial project as has been the Church, is rational for people in Gallup just as it is for Indigenous Australians.

For those who do trust in law and legal systems enough to bring a claim, they must also have access to legal services to advocate for their case. For people who live in urban or suburban regions, this means looking up lawyers through advertising or word of mouth. While many urban dwellers lack resources to adequately evaluate or retain lawyers, rural residents face a lack of legal services that urban residents do not. Urban areas may have lawyers who hold themselves out as specialists in cases involving child sexual abuse — often having become specialists through taking an initial case and then growing a practice in the field through making connections with Survivor organisations and networks. Survivor organisations are largely located in urban and suburban settings. People who reach out to survivor organisations therefore are usually able to find lawyers who specialise in bringing cases of child sexual abuse on behalf of victims against religious, state, or charitable

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[660] Victorian Aboriginal Child Care Agency Submission for Consultation paper: Redress and civil litigation, Royal Commission into Institutional Responses to Child Sexual Abuse, 'Document Library', Royal Commission into Institutional Responses to Child Sexual Abuse (Web Page) <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%2036%20Victorian%20Aboriginal%20Child%20Care%20Agency%20%28VACCA%29.pdf >.

institutions. In rural areas, finding a lawyer or any form of legal support is a more difficult process.

Both Arizona and New Mexico have low rates of lawyers for their state population as a whole, and the vast majority of those lawyers are concentrated in metropolitan areas like Phoenix, Albuquerque, and Tucson, leaving few private attorneys in rural areas, which include the entire diocese of Gallup.[661] Those few private attorneys tend to live in county seats, larger towns, and relatively wealthier areas within rural counties. This means that people living in the most remote, poorest areas of the diocese, like those living in most of the Navajo Nation, have to drive hours just to meet with a lawyer. There is no public transportation. Not everyone has access to a dependable vehicle. Internet connectivity is more expensive and complicated in poor, rural areas like the Navajo Nation.[662]

Life in any rural area also means a lack of anonymity for both lawyer and client. A plaintiff living in a city can usually go about their business and not be recognised by people who are aware of their having made public allegations against a religious organisation. In a small town in a rural area, however, plaintiffs will not be able to maintain privacy as easily.[663] For the lawyers, the lack of anonymity complicates the prospect of taking on cases challenging powerful local institutions.[664] So a lawyer living and practicing in one of the better-off town centres might be socialising with local authorities, including Church officials,

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[661] My father was a lawyer practicing in Navajo County from approximately 1984 to 1998 — first as the county's prosecutor dedicated to crimes against children and crimes involving sexual assault, and then as a lawyer in private practice handling a range of domestic, civil, and criminal matters. Growing up in that context I knew that most of the lawyers in the county lived and had their offices in either the county seat (Holbrook) or one of the relatively wealthy towns — like Pinetop-Lakeside, where I grew up. Table 3.4, listing the places in the Diocese of Gallup where 'credibly accused' priests worked shows only one assignment for a relatively short time period the parish in Pinetop-Lakeside, St Mary of the Angels, which was across a small country lane from the Presbyterian church I attended.

[662] An article from 2019 in the *Salt Lake Tribune* writes of optimism that schools (not residences) on the Navajo nation might get broadband internet in 2020. Zak Podmore, 'Broadband Internet Access Coming to Navajo Nation Communities in San Juan County', *The Salt Lake Tribune* (online, 15 November 2019) <https://www.sltrib.com/news/2019/11/15/broadband-internet-access/>.

[663] Lisa R Pruitt & Beth A Colgan, 'Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense' (2010) 51 *Arizona Law Review* 219.

> Lack of anonymity and an accompanying diminution of privacy are socio-spacial consequences of the 'high density of acquaintanceship' that tends to mark rural places. The fact that legal actors (e.g., law enforcement, prosecutors, and judicial officials) are also neighbors, acquaintances, and even friends or family may help explain rural residents' reluctance to engage the state. This ethos of independence and self-reliance associated with rural places is reflected in residents' reluctance to seek government assistance. It is manifest, too, in the lesser likelihood that they will report a crime, a reluctance perhaps predicable with regard to sex-related crimes or to intimate partner and other family violence, but which persists even when a stranger perpetrates the crime. (citations omitted).

[664] Ibid.

on a regular basis.[665] The lack of anonymity in Mildura, for example, meant that one of the highest-ranking police officers and a local magistrate were both close friends with and able to protect the abusive priest Ryan was trying to investigate. But the entire community knew that Ryan was challenging the church. He tells of shopkeepers coming out when he walked by to threaten him over '[b]ringing disgrace on our Church.'[666] This kind of social pressure is a disincentive to those lawyers to bring cases of people from poorer towns against powerful local institutions centred in larger towns. Between the lack of lawyers and the close-knit communities in Gallup, it is perhaps not surprising that plaintiffs who brought cases against the diocese were represented by lawyers from larger cities outside of the boundaries of the diocese. The bankruptcy court listed the three plaintiffs' lawyers who represented claimants in the case — only one has an office in the diocese, and he is in Gallup, the largest town.

Rural areas with sparse populations living far apart from one another can mask a wide range of social and legal problems.[667] Pruitt and Colgan trace how distance, economics, and a slew of other impediments to access to legal representation are common in rural areas of Arizona, even as each place has unique characteristics that impact access to legal services in particular ways.[668] They note that access to justice is particularly difficult for Indigenous people in the United States, only some of which can be explained by high poverty rates and low trust in legal systems.[669] They argue that Arizona's system of funding justice services exclusively through county-based tax revenue creates significant disparities in access to justice for people in Navajo and Apache counties (the two which are part of the Diocese of Gallup and the two with the highest percentages of Indigenous people) as compared even to other rural counties in the state.[670]

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[665] Ibid (citations omitted).
[666] Ryan and Hoysted (n 266), 154.
[667] Pruitt & Colgan (n 663).

> The material spatiality that defines rural living also masks social problems, many with legal implications. Migrant farm workers and other rural residents endure substandard housing and abusive working conditions. The elderly, disabled, and veterans — all disproportionately represented in rural America — need a wide array of supports. The access to justice challenge for American Indians, who face myriad social ailments and disproportionately high poverty rates, is aggravated by the byzantine tapestry of state, federal, and tribal laws that form the backdrop to their lives. And rural places are increasingly the dumping ground for externalities associated with extractive industries and with all sorts of environmental hazards cast off by metropolitan areas. All of these implicate legal issues. (citations omitted).

[668] Ibid; Lisa R Pruitt and Bradley E Showman, 'Law Stretched Thin: Access to Justice in Rural America' (2014) 59 *South Dakota Law Review* 466, 528; Linda L Chezem, 'Public Health Law & Equal Access to Justice in Rural America' (2014) 59 *South Dakota Law Review* 529, 556.
[669] Pruitt & Colgan (n 663).
[670] Ibid.

Poverty is similarly relevant to a victim's capacity to access legal services. The Kingsford Legal Centre points to the Australian ban on contingency fee agreements as a barrier to poorer people bringing claims.[671] Poverty can also prevent people from having reliable means of communication with a lawyer, impacts how they are perceived by society, their perceived credibility, and therefore the value of their claim, ultimately meaning they are likely to take lower settlement offers. This, in addition to often pressing needs for money in the short-term results in poorer people not being able to recover as much as wealthier people.

The rule of law is premised on the idea that all are equal before the law, that a person's position in society, including wealth or lack thereof, should not be a factor in the operation of law. This section's review of research about access to lawyers and courts in rural areas, especially in combination with poverty and existing social orderings that disadvantage Indigenous people, immigrants, and other disfavoured groups reiterates the findings of Law and Society scholars that this premise of equality cannot be trusted. Yet the gap between ideals of justice and their failure to manifest on the ground is not simply bad faith or hypocrisy. Instead, the interests of powerful entities are embedded in the practice of law in more subtle ways, including through the logistics of bringing claims for relatively poor people who live in rural areas, whose experience with legal systems discourage trust.

C. *Logistics of Settlement and Recovery*

This chapter, thus far, has considered: (1) how tort law theories of liability shift concern away from the harm and toward the relationship between abuser and principal, (2) how doctrinal and procedural law including statutes of limitation, jurisdictional limits, and corporate law have the effect of protecting the powerful from the legitimate claims for accountability by vulnerable people; and (3) how problems of logistics stemming from the emotional and financial difficulty of bringing claims, poverty, rural life, and a general lack of legal and material resources can all operate to make bringing claims and seeing any recovery difficult for victims. As noted earlier, these issues impact the decision-making process for plaintiffs, resulting in many taking settlements at amounts lower than those they sought for fear that they would be denied any recovery at all. As one plaintiffs' lawyer in New Mexico told me, whether or not plaintiffs settle depends on a range of factors, and sometimes result in

[671] Kingsford Submission for Consultation paper: Redress and civil litigation, Royal Commission into Institutional Responses to Child Sexual Abuse, 'Document Library', Royal Commission into Institutional Responses to Child Sexual Abuse (Web Page) <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Redress%20and%20civil%20litigation%20-%20Submission%20-%2086%20Kingsford%20Legal%20Centre.pdf>.

settlements earlier in the progress of litigation than the lawyer advises as the clients, 'sometimes have pressing needs and push for settlement, while others push for continued litigation.'[672] These settlements often come with confidentiality requirements – defendants requiring the silence of victims in exchange for money. Decision-making in legal matters is a function of social and legal issues, but these issues are not distinct from each other, but deeply connected.

Elizabeth Hardin-Burrola published an article in 2017 in the *Gallup Independent* of the last clergy sex abuse claim to be publicly filed with respect to abuse occurring within the diocese's borders.[673] It was brought against the Sisters of the Blessed Sacrament and St. Michael Indian School, as the claims against the diocese itself had been settled through the bankruptcy case that will be discussed in the next chapter. Hardin-Burrola wrote that the plaintiff, a member of the Navajo Nation, alleged abuse by a Franciscan brother working at St Michael Indian School, that while the case had been stayed during the pendency of the bankruptcy case, it settled after a mediation in October 2017.[674] She spoke with the plaintiff's attorney, who said that the 'the Sisters of the Blessed Sacrament, had insisted the settlement provisions be kept confidential.'[675] When she asked him 'if his client was satisfied with the settlement agreement,' she quoted his response as,

> I do not believe victims of sexual abuse experience satisfaction when sexual abuse lawsuits are settled, . . . Nothing can ever be said or done to repair the scars caused by clergy sexual abuse. By resolving cases like this one, however, we hope it offers survivors of clergy sexual abuse some sense of closure and some sense of validation that the perpetrator is a confirmed sex offender who was allowed to prey upon innocent children.[676]

Finally, while many settlements included a promise by dioceses to pay for mental health services, or to maintain contact with the victim for pastoral care, testimony of victims provide anecdotal evidence that dioceses have not always honoured those agreements.[677] Enforcing those agreements would require the initiation of an entirely new lawsuit, with all the attendant difficulties discussed earlier in this section. Those who have already been through abuse and a

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[672] Interview with plaintiffs' lawyer on file with author.
[673] Elizabeth Hardin-Burrola, 'Clergy sex abuse case ending in settlement' *The Gallup Independent*, 20 November 2017.
[674] Ibid.
[675] Ibid.
[676] Ibid.
[677] Testimony of BAC Royal Commission into Institutional Responses to Child Sexual Abuse, 'Transcript (Day C077): 19 May 2015', *Royal Commission Into Institutional Responses to Child Sexual Abuse* (Transcript, 19 May 2015) 'In many cases Catholic intuitions [sic] move personnel around and overseas and details of settlements are unattended to.'

retraumatising legal process are understandably disappointed and frustrated when hard-won settlements are ignored or their terms unfulfilled.

For those who bring claims, the discrepancy between what the lawyers think would have been just compensation and what victims usually settle their legal claims for reflects the limitations of tort as a system. Lawyers I interviewed expressed frustration at the low settlements their clients took, even as they understood and sympathised with their reasoning.[678] As noted by plaintiffs' lawyers with whom I spoke, the likelihood of a favourable outcome for claimants depends on, among other things, the victim/plaintiff's wherewithal to endure the process, and a calculation of likelihood of success given the realities of circumstance, available evidence, procedural law, and applicable substantive law.[679] Nonet and Selznick identified this kind of reframing of substantive justice issues as procedural questions as characteristic of autonomous law.[680]

V. CONCLUSION: TORT LAW AS AUTONOMOUS LAW

As has been shown in this chapter, a number of doctrinal, procedural, and logistical barriers to success in tort exist for survivors of child sexual abuse in both Ballarat and Gallup. Further, and as suggested by various submissions to the Royal Commission, the sorts of harms perpetrated against children in institutional settings are often spiritual, emotional, and personal in ways that cannot be meaningfully addressed by the kinds of remedies available through civil litigation. Money damages, therapy, apologies made after earlier refusals to admit fault, and other remedies available are certainly forms of justice, but many scholars, advocates, professionals, individuals affected by abuse, and others have commented that they are not sufficient. These concerns draw, at least in part, from a focus on legality, procedure, and fidelity to the rules of positive law that characterise tort as an autonomous system.

According to Nonet and Selznick, and as discussed in Chapter 2, characteristics of autonomous law include:

1) The separation of law and politics. The judiciary is declared to be independent, and a sharp line is drawn between legislative and judicial functions.
2) The 'model of rules' is central to the legal order. Rules are used to hold officials accountable, but they also limit the creativity of legal institutions and prevent 'their intrusion into the political domain'.

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[678] Interview with plaintiffs' lawyer on file with author.
[679] Interview with plaintiffs' lawyer on file with author
[680] Nonet and Selznick (n 125), 54: Listing, among other attributes of autonomous law, '[a]n emphasis on procedure such that procedural regularity and fairness, rather than substantive justice 'are the first ends and the main competence of the legal order'.

3) An emphasis on procedure such that procedural regularity and fairness, rather than substantive justice 'are the first ends and the main competence of the legal order'.
4) 'Fidelity to law' is understood as strict obedience to the rules of positive law. Criticism of existing laws must be channelled through the political process.[681]

The rule of law project in the Western legal tradition was developed to counter the excesses of repressive law systems emblematic of law in pre-enlightenment Europe (which in turn, as described in Chapter 5, were formed alongside of and in response to the development of canon law), and was part of these societies' slow transition from purely monarchical to more republican forms of government.[682] As Max Weber pointed out, one key paradox is that the gradual accumulation of many good rules and good procedures to temper repression build up a more formal, rational and complex body of law that structurally advantages formally rational and complex organisations over damaged citizens.[683] Autonomous law in Western society is the result of what Nonet and Selznick identify as an historic bargain: procedural autonomy for legal institutions in exchange for substantive subordination of those institutions to political will. It facilitates a professional monopoly on legal proceedings and legitimated forms of justice. Courts remove themselves from the substantive formation of public policy in exchange for their capacity to hold political leaders and institutions to account to the law. As Feeley noted, Nonet and Selznick's focus on common-law jurisdictions, and especially on American constitutional law, limits the concept's utility as a grand theory of law, but their identification of characteristics is nonetheless useful for an analysis of tort law as practiced (or real tort law) in Ballarat and Gallup. Nonet and Selznick argue that autonomous law tames repression but maintains a commitment to law as 'an instrument of social control' based on rules rather than values.[684]

In Australia, the Court of Appeal's finding that the Archdiocese of Sydney did not exist in a form capable of being sued for abuse that occurred under the authority of a previous archbishop, demonstrates how legal ontologies for religious organisations embedded in law over times complicate the connection between entity and harm that apply to organisations that have never held the kind of power the Church has had in relation to state law. In a United States that has yet to come to grips with its dark history of genocide and cultural abuse in boarding schools for Indigenous people, Indigenous nations' power to hold Catholic

[681] Nonet and Selznick (n 125), 54.
[682] Foucault (n 561).
[683] Max Weber, On Law in Economy and Society, ed Max Rheinstein, tr Edward Shils (Harvard University Press, 1966) 228-29 trans of: *Wirtschaft und Gesellschaft*, Second Edition (1925)
[684] Ibid 63.

organisations to account for sending known child rapists to institutions in their territory is uncertain. It is a hallmark feature of autonomous law that powerful interests are able to embed their advantages in law while those with less power do not enjoy rights that would otherwise be protected. Embedded anti-Indigenous law and special legal status for Catholic organisations has the effect of exempting those organisations from application of theories of liability and thereby keep certain harms, relationships, and wrongdoing from being subject to scrutiny.

Tort's focus on procedural rather than substantive justice limits its value as a normative order, as we can see how particular rules as applied to cases brought in Victoria, Arizona, New Mexico, and the Navajo Nation render some claims more or less compensable, based on factors unrelated to questions of whether or not the plaintiff suffered abuse at the hands of a diocesan agent or employee. Thus, even as particular contexts shape theories of tort, applicable doctrine and procedure, and the logistics of both practice and seeking justice in Ballarat and Gallup, the overall character of tort as a system across these contexts is largely autonomous. While context can shape tort law to make it more accessible, make justice less difficult to obtain, as changing perspectives influence the shape of tort law, none of the tort law systems discussed here can be described as responsive, given the remaining difficulties and barriers to justice victims face. This chapter has discussed civil litigation and the claims brought against Catholic dioceses. Tort claims brought against Catholic dioceses and religious organisations in the United States have resulted in settlements and judgments amounting to billions of dollars. Catholic organisations in the United States are organised independently of each other under the law of the state (or states) in which they operate, and so judgements are against individual organisations, and not distributed evenly among them.[685] For some organisations, this liability can be managed through insurance policies and liquid assets. For

[685] See, e.g. Mark E Chopko, 'An Overview on the Parish and the Civil Law' (2007) 67 *The Jurist* 194, 198.

> [T]he parish has a civil status — and therefore, rights, duties, and liabilities — fixed by its civil corporate charter or other civil form, or the lack thereof. To look a little bit ahead, that means that a parish's canonical structures and rights must be expressed in civil documents themselves to be better assured, in this legal culture, that they will be adequately protected. From a short survey of colleagues, the dioceses and their parishes tend to have five or six structures. These structures often have as much to do with history and expectations dating to the time when the diocese was organized in that region and whether the state law reflected a tolerant attitude towards religious (especially Catholic) structures as with current needs. Professor William Bassett's treatise on religious organizations lists the following as example structures: religious corporation (special purpose corporation), nonprofit corporation, religious trust, unincorporated association, and corporation sole. Catholic parishes and dioceses exhibit those structures.

others, the liability is of more consequence. The next chapter will consider what happens to Catholic dioceses in bankruptcy, and the Diocese of Gallup's case in particular.

CHAPTER SEVEN: BANKRUPTCY LAW

I. REAL LAW AND THE DIOCESAN DEBTORS

Between July 2004 and May 2020, seventeen Catholic dioceses, six archdioceses, and three religious orders in the United States (the 'Diocesan Debtors') have filed for protection under the United States Bankruptcy Code.[686] One of these is the Diocese of Gallup, which filed for chapter 11 protection on 12 November 2013, in the United States Bankruptcy Court for the District of New Mexico. At the time of its filing there were 13 lawsuits on behalf of survivors pending in Arizona or Navajo court against the diocese, all of which had been filed by the same plaintiffs' attorney, Robert Pastor. Some of these were about to enter into a trial phase, prompting the filing. Hardin-Burrola commented that, in its timing, the Diocese of Gallup's filing was like other Diocesan Debtor cases, '[w]hen a diocese is coming very close to a court date, they tend to file for bankruptcy because it stops all the lawsuits against it, and that's exactly what happened.'[687] Pastor agreed, saying that Bishop Wall, 'has done what we see all the other bishops do – they run to bankruptcy perhaps seeking financial protection but more importantly protection from the discovery process.'[688]

Bishop Wall, in a declaration filed on the first day of the bankruptcy proceeding, tried to stave off criticism by: (1) deflecting blame for child sexual abuse by arguing abuse occurred primarily decades before his tenure '[m]any of the claims related to acts that occurred in the 1950's, 1960's and 1970's, although most are alleged to have occurred in the 1950's and 1960's,' and listing the programs it has adopted,

> . . . the Safe Environment Program emphasizes prevention by communication to all parishioners that abuse must be resported, requiring background checks on all adults working with minors, and requiring each school and Parish in the Dicoese to appoint a local Director of Safe Environment to oversee the local program and to submit and annual compliance report to the Diocese. In addition, all who minister with minors must successfully complete the juvenile sexual abuse training awareness program VIRTUS. VIRTUS is the brand name of the program developed and provided by the National Catholic Risk Retention Group, Inc. and it identifies best-practices programs designed to help prevent wrongdoing and promote "rightdoing" within religious organizations[689]

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[686] Marie T Reilly, 'Appendix A: Case Information', *Catholic Dioceses in Bankruptcy* (Chart, September 2019). For ease of reference, references a 'diocese' in this thesis, unless describing a particular diocese, are intended to include religious orders, eparchies, archeparchies, and archdioceses.
[687] 'Dark Canyon Episode Nine: The Diocese of Gallup' (n 390).
[688] Mary Wisniewski, 'America's Poorest Diocese Set to File for Chapter 11 Bankruptcy Amid Sex Abuse Claims,' *NBC News* (online 4 September 2013) < https://www.nbcnews.com/news/us-news/americas-poorest-diocese-set-file-chapter-11-bankruptcy-amid-sex-flna8C11071499>.
[689] Wall Declaration (n 328).

(2) putting forward the diocese's relative poverty and emphasising the programs it provides to communities within its boundaries,

> the services provided by the Diocese to the communities within its geographic territory are particularly important given the number of parishioners who are living below the poverty level, and often unable to pursue education beyond high school (or in many cases, not even that)[690]

and (3) arguing that the diocese's purpose in filing is to

> reach a resolution that will take into account the important interests of all these constituencies and provide compensation to those harmed, provide counselling and spiritual services to those who have been harmed and still allow the Diocese to continue ministering to those within its community.[691]

Facing similar criticism that filing for bankruptcy protection is a means of avoiding responsibility for child sexual abuse, the Archdiocese of Milwaukee said it filed so that it could,

> use available funds to compensate all victims/survivors with unresolved claims in a single process overseen by a court, ensuring that all are treated equitably. In addition, by serving as a final call for legal claims against the archdiocese, the proceeding will allow the Church to move forward on stable financial ground, focused on its Gospel mission.[692]

A former priest now advocating for survivors discounts these arguments, commenting that whatever they say, bishops are only seeking bankruptcy for their own benefit,

> the bankruptcy code, like all matters of civil law has been used as a shield and a sword by Roman Catholic bishops . . . [so] the only reason they would employ bankruptcy is because it was to their benefit. So even if it was the best pastoral option for survivors, they would only do it if it was best for them, personally. This is not for the people. This has never been about survivors, they only thing they choose is self-defense.[693]

This discrepancy between bishop's claims to be filing bankruptcy in order to treat victims fairly and critics' observations that the filing allows dioceses to avoid facing victims in a court of law seem irreconcilable, and reminiscent of the gap between the promise of

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[690] Ibid.

[691] Ibid.

[692] *Listecki v Official Committee of Unsecured Creditors*, 780 F. 3d 731, (7th Cir., 2015), quoting Archdiocese of Milwaukee, 'Chapter 11 Reorganization: Original Statement (Jan. 4, 2011); see also, Elizabeth Hardin-Burrola, 'Diocese of Gallup to File Bankruptcy: Mounting Clergy Sex Abuse Legal Claims Spark Chapter 11 Reorganization', Bishop Accountability.org (Article, 3 September 2013) <http://www.bishop-accountability.org/news5/2013_09_03_Hardin_Burrola_Diocese_of_Gallup.htm>, quoting Bishop Wall:

> Under Chapter 11, the Diocese will have the opportunity to present a plan of reorganization that provides for a fair and equitable way to compensate all those who suffered sexual abuse as children by workers for the Church in our Diocese those who are currently known, those who haven't yet made the decision to come forward, and those who might come forward in the future.

[693] Interview on file with author.

doctrinal law and the lived reality discussed in the previous chapter. Indeed, the equitable purposes bishops are claiming may seem entirely unlikely to victims who have dealt with obstruction from bishops in tort law cases. Is it possible for bankruptcy to treat victims, who are creditors in a bankruptcy case, fairly when bankruptcy is designed to allow a debtor to avoid paying all it owes?

This chapter will consider bankruptcy from a different perspective, by taking account of its multiple aspects, including the ones only bankruptcy professionals usually take note of, and by situating the study in Gallup and the other Diocesan Debtors' cases. Among other things, this chapter will explain how, in the United States, bankruptcy does not always result in a corporate entity getting away with refusal to pay victims. As will be discussed, the Diocesan Debtors and a majority of victims who have claims have mostly agreed on plans that lead the diocese out of bankruptcy and most known victims receiving compensation. The dioceses continue to exist, leaving their liability and a sum of money in a trust from which claims are then paid, after being adjudicated by an arbitrator agreed to by both diocese and victim representatives. Bankruptcy, despite being perceived as a way to escape accountability, is a legal system that has unique capacities, and its features allow for a new way to imagine responsiveness.

Like the other legal systems studied here, bankruptcy has its own philosophical underpinnings, its own processes and procedures, its own way of resolving conflicts, and its own practicalities and logics. Like other systems, it also exists in relationship with other legal and social orders, outside of which bankruptcy cannot be understood. The next section introduces Chapter 11 bankruptcy in terms of its purposes and theories. The following section will trace the way it works to solve problems — its doctrine and procedure. Following that is a section focusing on the logistics of practice and conflict resolution in the Diocesan Debtors' cases. It demonstrates how perceptions and expectations of injustice can obscure the production of surprising forms of justice, which reaffirms the co-constitutive relationships between legal and social orders. Finally, the chapter suggests that, to some extent, Chapter 11 can be considered responsive. This quasi-responsiveness is a function of the ways in which bankruptcy facilitates multi-party negotiated resolutions, leverage on the basis of debt rather than resources, and a purposive approach to legal procedure. But victims' experience of missing their day in court cannot be dismissed, and is part of why the system is consider quasi-responsive, rather than responsive. Bankruptcy's potential for responsiveness, while it may be new to those outside the field, has been written about by bankruptcy scholars, who have developed a relational theory of bankruptcy that seeks to build upon its purposive

doctrinal and procedural approach. This relational approach will be discussed in the last section of this chapter, in order to consider how such an approach would impact bankruptcy's characterisation as quasi-responsive.

II. THEORY AND CHAPTER 11 BANKRUPTCY

Chapter 11 is primarily used as a tool for corporations to shed unsustainable debt. It is part of a longer tradition of bankruptcy or other mechanisms for dealing with unsustainable debt. Although it is not a legal system that receives a great deal of attention from socio-legal scholars, the history of insolvency law demonstrates clearly the co-constitutive relationship between law and social orders. A means of addressing unsustainable debt is necessary in any economic system that allows for credit, and such means have existed across social, geographic, and cultural boundaries for most of recorded history.[694] Notable for this thesis are the deep roots that insolvency law has in Christian history and theology. Mechanisms for forgiveness of debt prescribed in the Hebrew Scriptures and Christian theology have connected those mechanisms with the message forgiveness central to Gospel.[695] These means were meant to soften existing practices of enslaving people or their children on account of debts they could not repay. Leviticus prescribes jubilee years as a mechanism that allowed people to escape the burden of their debt.[696] Jubilee years and other early forms of debt discharge served a practical purpose – allowing actors to resume economic activity that benefits the larger social order, and a normative purpose in forgiving debt and allowing people who had been sold into slavery to return to their families.

Linking forgiveness with debt relief in Christian doctrine has continued two millennia into the Common Era. In 2000, the Catholic Church, referencing a tradition begun in 1300 by

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[694] See, eg, Theodore C Albert, 'The Insolvency Law of Ancient Rome' (2006) 28 *California Bankruptcy Journal* 365.

[695] 'And you shall hallow the fiftieth year and you shall proclaim liberty throughout the land to all its inhabitants. It shall be a jubilee for you: you shall return, every one of you, to your property and every one of you to your family': Leviticus 25:10 (NRSV Bible).

[696] Robert S Kawashima, 'The Jubilee Year and the Return of Cosmic Purity' (2003) 65 *The Catholic Biblical Quarterly* 370.

> The disruption or chaos caused by an Israelite's falling into slavery or selling off his property is viewed as a form of pollution, because people have been separated from their ancestral land, compromising the nation's geopolitical order. In order to eradicate the possibility of an irremediable pollution, the Jubilee Year abolishes slavery and the selling of land: one can sell only one's labor (Lev 25:40) or the crops of one's field (25:16) but not one's actual person or field, for both belong already to God (25:23, 41, 42, 54, 55). Whatever pollution does accrue in the interim between Jubilee Years is symbolically eliminated through the proclamation of 'liberty' on the Day of Atonement (25:9): on the very day that the scapegoat disposes of the people's sins in the wilderness, the people and the land return to their original, sacred distribution.

Pope Boniface VIII, declared a jubilee year, and used that year to focus on international debt relief for poor countries.[697] In his declaration, John Paul II noted the links between forgiveness of sins and forgiveness of debts.[698] Linking together a social obligation to forgive debts with divine forgiveness of sin sends a powerful message about the theological importance of forgiveness.

As John Paul II's *Apostolic Letter Tertio Millennio Adveniente* demonstrated, forgiveness of debts is intellectually, symbolically, and normatively linked to forgiveness of sins. The sacrament of confession is a sacred ritual linked to the forgiveness of sins and is of central importance in Catholic doctrine. It is powerfully identified with the Church and its ritual practices, core beliefs, and organisational structure.[699] Koffler's description of a bankruptcy hearing as a sacred ritual, when considered in light of the Diocesan Debtor cases presents an uncomfortable irony.[700] Dioceses are turning to an arm of the state for the ritual forgiveness of financial debt arising out of the sins of their own priests. This idea, that the Catholic Church, so known for their own sacred ritual of forgiveness, would be forced to use the sacred rituals of the secular legal system for forgiveness of debts, especially when the debts were incurred because the Dioceses had hired, enabled, and protected priests who were committing heinous acts against children. The Diocesan Debtors seem to stand at intersections of symbols of sin, debt, forgiveness, and right relationships within a normative order. This was the image that inspired the thesis, connecting my disparate interests in religion, bankruptcy, and law's impact on the social order.

Theoretical links between bankruptcy and insolvency law and normative concepts of forgiveness and mercy are also made by bankruptcy scholars and professionals.[701] 'The concept of an even-handed process to deal with financial distress, insolvency, and the interests of all involved parties, . . . has a history that goes back to biblical times.'[702] That he neither cited a reference for that statement nor provides any other support shows how uncontroversial he believes the statement to be. Judith Koffler's vivid description of the

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[697] Pope John Paul II, 'Apostolic Letter; Tertio Millennio Adveniente of his Holiness Pope John Paul II to the Bishops, Clergy and Lay Faithful on Preparation for the Jubilee of the year 2000', The Holy See (Letter, 10 November 1994) <http://www.vatican.va/content/john-paul-ii/en/apost_letters/1994/documents/hf_jp-ii_apl_19941110_tertio-millennio-adveniente.html>.
[698] Ibid.
[699] See, eg, Elizabeth Jordan, 'Reconciling Women: A Feminist Reading of the History of Confession in the Roman Catholic Tradition' (1999) 14 *Australian Feminist Studies* 303.
[700] Judith Koffler, 'Dionysus in Bankruptcy Land' (1975) 7 *Rutgers Camden Law Journal* 655.
[701] See, eg, Leonard D Van Drunen, 'Debt, Risk, and Grace' (2015) 18 *Journal of Markets and Morality* 61; Thomas Micahel LeCarner, 'Dollars and Sense: Economies of Forgiveness in Antebellum American Law, Literature, and Culture' (Phd Thesis, University of Colorado, 2014).
[702] Harvey R Miller and Shai Y Waisman, 'Is Chapter 11 Bankrupt?' (2005) 47 *Boston College Law Review* 129.

conceptual similarities between bankruptcy and deeper social meaning highlights the way that bankruptcy's role in a capitalist economy is similar to the role ritual sacrifice, ritual destruction, and forgiveness have played in Western societies for millennia.[703] Elizabeth Warren, a prominent bankruptcy scholar, now a United States Senator from Massachusetts, conducted an extensive study of personal bankruptcy with Theresa Sullivan and Jay Westbrook for their book *As We Forgive Our Debtors*,[704] the title of which is a direct reference to Christian thought.[705] Bankruptcy and the 'fresh start' that comes for debtors after exiting a bankruptcy process has roots in religious, and specifically Christian and Catholic norms of forgiveness.[706]

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[703] Koffler, (n 700).

> Having secured [leave of the judge to attend a bankruptcy hearing], I solemnly entered a small courtroom echoing with whispers. In this chamber were pews on the one side for the creditors seeking justice, on the other side for the supplicants and their spiritual advisors. At the front of the chamber, a dark uncovered altar rose high above the floor; at the right of the altar, a confessional chair and, next to that, the station of the scribe. At the intonation of an elderly acolyte, the high priest entered in his flowing black robes. All rose reverently at his entry, and stood until he installed himself behind the altar. There was no need for incense and bells; the magic had begun. The scribe loudly called out the name of the supplicant, John Debtor! Up stepped Debtor, trembling with uncertainty, led to the confessional chair by his spiritual advisor, a lawyer well versed in the mysteries of this particular rite, the first meeting of creditors. Give an account of yourself! Was the imperious command. Confess you name, your sins, their source. What claim do you make of your worthiness for this relief? The penitent named his sins, the persons against whom he had transgressed, the cause of his failings: his Master Charge, his BankAmericard, the adversity of circumstances, unemployment, sickness, personal calamity. Tell whether you have ever south remission of sins before. Never have I sought this extreme unction, was the pitiable reply. Now name the sacrifice you offer to merit this blessing. And the penitent offered his all. He included his mortgaged house and car, the pennies in his bank account, the items of furniture in his home, the clothes in his closet—all the worthless valuables he could name. *Do us des* was the prayer of the debtor: I sacrifice that you may have mercy. Having confessed his transgressions before the high priest and those to whom he was indebted, the shivering, penitent Debtor lowered his eyes before the priest. This dual ritual of penitent confession and sacrifice fulfilled the debtor's role in initiation.

[704] Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (Beard Books, 1999).

[705] 'As we forgive our debtors' is a line from the Lord's Prayer in many Protestant denominations — the Catholic version of the Lord's Prayer in English reads, 'as we forgive those who have sinned against us'. This difference stems from different translations of a Greek root words used in both Lucan and Matthean versions of the prayer that can mean debt or sin. Giovanni Battista Bazzana, '"Basileia" and Debt Relief: The Forgiveness of Debts in the Lord's Prayer in the Light of Documentary Papyri' (2011) 73 *The Catholic Biblical Quarterly* 511.

[706] In a discussion of a version of this chapter with faculty from USC Law, Robert Rasmussen noted that most scholarship linking religious ideas of forgiveness and bankruptcy focus on the individual debtor, and not corporate entities. He pointed to Chapter 7's dissolution of corporate entities and discharge for individual debtors as evidence of the way bankruptcy law distinguishes between the kind of debtors that receive forgiveness and the kind that do not. Chapter 11, however, does not distinguish between an individual and a corporate debtor in terms of the effect of a confirmed plan, which defines stakeholder rights with respect to a debtor's assets and liabilities. To the extent my thesis seeks to consider how legal systems can approach the problem of holding an organisation accountable for grave harm inflicted on and by individuals, this observation may make Chapter 11 an excellent example — as a system drawn from a process grounded in ideas of forgiveness (which can apply only to individuals) applied to entities which are not constitutionally capable of being forgiven.

In the United States, those norms are embedded in insolvency law. Bankruptcy in the United States is said to have two primary purposes: (1) to give severely indebted persons the opportunity for a 'fresh start,' allowing for renewed economic activity, and (2) to ensure that creditors are treated equitably.[707] The Bankruptcy Code, codified as Title 11 of the United States Code, sets out a number of different chapters that allow individuals and organisations to liquidate, restructure and shed debt, or accomplish numerous other goals.[708] Chapters 7, 9, 11, 12, 13, and 15 of the Bankruptcy Code each accommodate different kinds of debtors in different situations. This chapter will focus on Chapter 11, under which all of the Diocesan Debtors have filed for protection. Chapter 11, titled 'Reorganization,' is principally used by corporations to restructure debts and other obligations and emerge from bankruptcy in a healthier financial position.[709] Chapter 11 is intended to help otherwise profitable organisations to reorganise their debt loads, but not necessarily avoid repayment. The debtor in a Chapter 11 case expects that at least some of the existing debt will be paid through a plan agreed to by most stakeholders after the bankruptcy case has been concluded.

Since the 1990's two competing camps have dominated the literature on theories of bankruptcy: proceduralists and traditionalists. These two groups have different views about why these primary purposes are important. Proceduralists would say the motivating factor is the functioning of the overall economy while traditionalists would point to norms of equity and rehabilitation. Proceduralists, often affiliated with the law and economics movement, argue that the purpose of bankruptcy is efficiency and wealth maximisation. They tend to criticise the 'fresh start' concept as not applicable to corporate debtors, and generally discount the importance of the normative ideal of forgiveness in connection with economic activity. Traditionalists see bankruptcy as an equitable mechanism that should be used to pursue social norms of forgiveness, equity, and justice, and believe that bankruptcy should be employed to ensure just distribution to the weakest of a firm's creditors and to protect against the worst effects of firm failure.[710] Not every theorist falls cleanly into one group or the other — there is

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[707] See, eg, *Grogan v Garner*, 498 US 79 (1991); *Local Loan Co v Hunt*, 292 US 234 (1934). Explaining that the purpose of bankruptcy is to provide a mechanism by which the 'honest but unfortunate debtor' might enjoy a 'fresh start', 'unhampered by the pressure and discouragement of preexisting debt.'

[708] *Bankruptcy Code*, 11 USCS prec § 101; but see, Katherine Porter and Deborah Thorne, 'The Failure of Bankruptcy's Fresh Start' (2006) 92 *Cornell Law Review* 67, using empirical data to consider the extent to which consumers were actually able to achieve the 'fresh start' contemplated under the Code.

[709] *Bankruptcy Code*, 11 USCS § 1101 et seq.

[710] See, eg, Susan Block-Lieb, 'The Logic and Limits of Contract Bankruptcy' (2001) *University of Illinois Law Review* 503, 508–9.

> On one side, theorists who apply and economic analysis embrace efficiency as the sole normative purpose of bankruptcy rules, argue that bankruptcy law should seek only to maximize creditors' collective wealth, and criticize redistributive bankruptcy laws and criticize

diversity among bankruptcy theories.[711] In more recent years, a third perspective has emerged, mostly descended from the traditionalist camp, which argues that both proceduralists and traditionalists are missing the point, at least with respect to corporate reorganisation, and that bankruptcy judges and practitioners are not moved by academic theories but by the realities of the situations before them.[712] This third perspective might be seen as calls for an NLR approach to bankruptcy scholarship – one that considers doctrinal, empirical, and theoretical approaches. Bankruptcy lawyers in practice need to understand and engage with legal theories, the structures of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, their clients' understandings of the process, and the logistics of practice that are often obscured.

Traditionalists, which camp also tends to include most practicing bankruptcy lawyers and judges, are criticised by proceduralists, who are mostly law professors,[713] for not having an elegant theory of bankruptcy.[714] Traditionalists see the purpose of a Chapter 11 proceeding as rehabilitative and centred on preserving the value of a business as a going concern, and they defend the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure as

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> redistributive bankruptcy laws and reform proposals as inefficient. On the other side, the so-called traditionalist commentators reject wealth maximization as an appropriate goal for bankruptcy legislation, contending that this law should seek to temper the harsh effects of a debtor's insolvency and redistribute losses so as to protect those least able to protect themselves in the marketplace.

[711] Jonathan C Lipson, 'Debt and Democracy: Towards a Constitutional Theory of Bankruptcy' (2007) 83 *Notre Dame Law Review* 605.

[712] George W Kuney, 'Hijacking Chapter 11' (2004) 21 *Emory Bankruptcy Developments Journal* 19, 30, arguing, with respect to academic writing seeking reform of Chapter 11 that:

> If meaningful understanding or reform of Chapter 11 I to be had, those participating in the process must face facts and look beyond and through platitudes and incantations about benefits to unsecured creditors, and even equity holders, that echo every day from the Bankruptcy Code's legislative history, and bankruptcy pleadings and courtrooms. It may have taken some time, but the lending industry and the insolvency community found the holes and handles in Chapter 11 and have used them to their advantage. Perhaps it would be best to note the market-driven ingenuity of this effort and embrace its purpose, amending the statutes and rules that can regulate and moderate its excesses while also serving its goals.

Declining to engage in ongoing academic debates between proceduralists and traditionalists by agreeing with the position articulated by Karen Gross, 'the academic writing and studies about the nature and function of Chapter 11 are [not] what move the bankruptcy judiciary'. Karen Gross, 'Finding Some Trees But Missing the Forest' (2004) 12 *American Bankruptcy Institute Law Review* 203, 213.

[713] Douglas G Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 *Yale Law Journal* 573, 576–7, citing articles by proceduralist scholars such Thomas H Jackson, Barry E Adler, James W Bowers, Frank Easterbrook, Robert E Scott, Randal C Picker, Robert K Rasmussen, George G Triantis, and Michelle J White. Scholars Baird identified as proceduralists whose primary scholarship is something other than bankruptcy include Lucian Arye Bebchuk, Robert C Clark, Mark J Roe, and Alan Schwartz.

[714] David A Skeel, Jr. 'Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship' (1999) 113 *Harvard Law Review* 1075, 1119: 'The methodological response of progressive scholars to the law and economics movement is at least as striking as their rejection of its policy recommendations. As law and economics pervaded the literature, an obvious response would have been to articulate a competing normative theory of bankruptcy. Rather than suggesting such a theory, however, several leading progressive scholars have focused on empirical work.'

pragmatic and adaptable tools used to further those purposes. Rejecting concerns about bankruptcy's impact on the economic system as a whole suggests a view of bankruptcy as a normative mechanism offsetting the harsh downsides of a free-market system. This view lends itself well to the image of debtors who cannot pay their debts as penitents seeking absolution through sacred ritual. But traditionalists argue that bankruptcy processes are also efficient and fair, and thus better for broader society. The Bankruptcy Code, to traditionalists, is intended to give stakeholders and bankruptcy judges the flexibility to pursue pragmatic and equitable solutions tailored to each debtor's particular circumstances.[715]

Critics of Chapter 11 often point to this flexibility and argue that it allows the process to be drawn out, disadvantaging creditors who must wait years before receiving a fraction of what they are owed.[716] In the corporate reorganisation context, Warren argues that flexibility combined with the participatory nature of decision-making in Chapter 11 is an effective way to maximise the value of a troubled firm and distribute that value fairly among disparate groups of stakeholders.[717] She points to evidence that corporate restructuring through the Chapter 11 process: (1) is relatively efficient at sorting those firms for which a financial restructuring is possible from those for which it is not; (2) facilitates that reorganisation process in an efficient way; and (3) is at least as good, if not better, for most creditors than a more rigid process that strips control of firms from managers and enforces a strict absolute priority rule.[718] She argues that flexibility and encouragement of consensus-building in the Chapter 11 process incentivises cooperative and mutually beneficial behaviour among stakeholders.[719]

Proceduralists, on the other hand, whose work has dominated the academic literature on bankruptcy, 'envision[] bankruptcy law as a set of rules approximating the contractual terms to which, at the time credit is extended, a creditor and debtor would agree should govern in the event of the debtor's insolvency'.[720] This is often referred to as a contract theory of bankruptcy. A contract theory of bankruptcy is also linked to the idea of the 'creditors'

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[715] See, eg, Miller and Waisman, (n 702), 146–50, explaining how seminal United States Supreme Court cases emphasised a doctrine of flexibility to pursue equitable solutions to complex problems, concluding that the cases 'make clear [that] rehabilitation and reorganization were the policy goals underlying the enactment of the Bankruptcy Code. In the early years following the 1978 Act, judges did not hesitate to interpret the Bankruptcy Code and exercise their perceived equity powers to achieve and implement that policy.'
[716] See, eg, Lynn M LoPucki, 'The Trouble with Chapter 11' (1993) *Wisconsin Law Review* 729, 747–9.
[717] See, eg, Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 *Michigan Law Review* 336, 344–73.
[718] Elizabeth Warren, 'The Untenable Case for Repeal of Chapter 11' (1992) 102 *Yale Law Journal* 437.
[719] See, eg, ibid.
[720] Robert K Rasmussen, 'An Essay on Optimal Bankruptcy Rules and Social Justice' (1994) 1 *University of Illinois Law Review* 1.

bargain', which holds that 'the proper way to view the bankruptcy system [is] from the perspective that creditors would have chosen for themselves had they been in a position to do so before bankruptcy'.[721] Bankruptcy serves these interests when it is primarily understood as a means of 'ensur[ing] that fights among creditors and other investors of capital do not accelerate a firm's liquidation'.[722]

Although a contract theory of bankruptcy might not seem to have much to say about tort creditors like the victims in Diocesan Debtor cases, Robert Rasmussen and David Skeel argue that a contract model of bankruptcy might require the privileging of tort claimants ahead of consensual creditors, even if that increases the cost of credit in the market, because 'it [would] force[] corporations to take into account the injuries their behavior imposes on third parties'.[723] Tort claimants represent, for Rasmussen and Skeel, an exception to the general rule of 'deference to private contracting'.[724] 'Economic theories of bankruptcy . . . require that the state establish the appropriate treatment of nonconsensual creditors and that this rule cannot be altered by contract.'[725] But these statements are more musing about a wrinkle that needs ironed out in a grand theory than a constructed argument for reforms that would effect such an approach.

Proceduralists' focus on the economic efficiency of bankruptcy and Chapter 11 may impact their view of the capacity of bankruptcy courts to resolve the kind of problems that lie at the heart of the Diocesan Debtor cases. Their grand theory of bankruptcy does not have space for the complexity of problems arising in Diocesan Debtor cases. While there are some arguments that tort victims should be treated differently from consensual creditors, there is little discussion of how this different treatment should be manifested, and far more interest in finding arguments for why dioceses are not appropriate debtors and these cases not well suited to Chapter 11. Instead of taking the opportunity to make a case for a new theorisation of bankruptcy law, one which recognises the disparate positioning of tort and voluntary

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[721] Thomas H Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 *Yale Law Journal* 857.

[722] Baird, (n 713), 578.

> The proceduralists . . . worry intensely about how rules in bankruptcy affect behavior elsewhere. Substantive rules implemented exclusively in bankruptcy are suspect because of the effects they may have on investment beforehand. Conversely, if a social policy is worth implementing in bankruptcy, it should be implemented everywhere. Inconsistency may do more harm than good, even for the particular group one is trying to protect.

[723] Robert K Rasmussen and David A Skeel, Jr, 'The Economic Analysis of Corporate Bankruptcy Law' (1995) 3 *American Bankruptcy Institute Law Review* 85, 87.

[724] Ibid.

[725] Robert K. Rasmussen, (n 720), 19, citing Robert K Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1992) 71 *Texas Law Reveiw* 51, 67.

creditors in recovering on claims in the bankruptcy context, proceduralists argued that the kind weighty normative arguments associated with the complex legal problem did not belong in bankruptcy court.

For example, Skeel and Lipson consider whether the appointment of a trustee or other bankruptcy court action would violate First Amendment protection of religious practice and whether or not canon law should be considered in determining ownership of real property. Lipson asked what role parishioners should play, noting their critical importance to the life of the Church, but lack of legal claim. He predicted that parishioners' role in a bankruptcy proceeding would be limited because, '[i]f there is an analogue to a "shareholder" in these cases, it would appear to be the Catholic Church itself, akin to the "parent corporation"'.[726] Daniel Marcinak wrote about other First Amendment[727] implications of bankruptcy court oversight of a Catholic diocese, including disputes regarding the size of the bankruptcy estate, as in the majority of instances title to parish property was held in the name of the diocese but the diocese asserted them to be held in trust. This issue will be discussed in more detail in the next section.

The traditionalist alignment with bankruptcy practitioners and judiciary is an intellectual alliance that is somewhat unusual in the American system.[728] Skeel points to the agreement on the value of flexibility in the Chapter 11 process as a key component of this intellectual alliance.[729] This flexibility is so central to the practice that it is noted in the New York Times obituary for Harvey Miller, one of the most high-profile, elite corporate restructuring lawyers in the country.[730] This flexibility has been a key feature in the

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[726] Jonathan Lipson, 'When Churches Fail: The Diocesan Debtor Dilemmas' (2005) 79 *Southern California Law Review* 363, 399.

[727] The First Amendment to the *United* States *Constitution* provides that, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. See, eg, Daniel J Marcinak, 'Separation of Church and Estate: On Excluding Parish Assets from the Bankruptcy Estate of a Diocese Organized as a Corporation Sole' (2005) 55 *Catholic University Law Review* 583 for more discussion of the First Amendment's relevance to the Diocesan Debtor cases.

[728] Skeel (n 714) Skeel's tribute to Vern Countryman (one of the giants in American bankruptcy law) examined the history of how this alignment came to be and explained why it is unusual for a left-of-center academic perspective to be so aligned with practitioners at elite law firms whose client base is primarily large corporate debtors and their institutional investors, stockholders, and advisors.

[729] Ibid 1118: '[C]urrent progressives closely ally themselves in policy debates with bankruptcy lawyers and organisations such as the National Bankruptcy Conference. If anything, recent progressives' commitment to flexible reorganisation rules may have strengthened the connection by removing an important source of conflict between the practicing bar and earlier progressives.'

[730] Michael J de la Merced, 'Harvey R. Miller, Renowned Bankruptcy Lawyer, Dies at 82', *New York Times* (online, 27 April 2015) <https://www.nytimes.com/2015/04/28/business/harvey-r-miller-renowned-bankruptcy-lawyer-dies-at-82.html>.

> In Mr. Miller's eyes, bankruptcy law allowed him to rove across industries that included banking, steel and energy, a freedom he relished.

development of mass tort proceedings, of which the Diocesan Debtors are an example, in chapter 11 practice.

Flexibility is built into Chapter 11 doctrine. This flexibility is a central feature of Chapter 11 — in theoretical terms, it means that bankruptcy is purposive rather than rule-focused. This purposive nature stems from the central purposes it claims: a fresh start for debtors and equitable treatment for creditors. Nonet and Selznick identify purposiveness as a feature of responsive law.[731] The twin purposes at the heart of the Bankruptcy Code are, in the traditionalist view of bankruptcy, the reason that Chapter 11 requires flexibility. Flexibility in pursuit of a fresh start and equitable treatment of stakeholders suggests bankruptcy practice has responsive (perhaps incipiently responsive) characteristics.

Jonathan Lipson calls for a theory of bankruptcy which accounts for concerns about the relationships between the powerful and the less powerful as they encounter our system of insolvency, which would make bankruptcy more responsive.[732] He calls this a relational theory of Chapter 11, arguing that: 'relational contract theory provides a better framework for assessing contracting in bankruptcy than other theories used to date (or none at all)'.[733] He argues that bankruptcy judges should pay attention to the relationships among the relevant parties as they consider whether settlements should be approved. He notes that a relational theory of contract in bankruptcy would 'ask courts to focus on' agreements between creditors, investors, and debtors (or other parties) made at the expense of weaker stakeholders.[734] In making this argument, Lipson calls for a shift in bankruptcy scholarship from ex-ante entitlements (the proceduralist position) or ex post outcomes (the traditionalist position), to focus on the process and the relationships between and among parties and professionals.

Ian MacNeil's relational theory of contract argues that contract terms must be understood in terms of the social, cultural, and political context in which they are agreed, and that this understanding should impact the interpretation of those terms. [735] Relational contract

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"It is probably the last area of the generalist," he told The New York Times in 2007.

. . .

"You had a chance to be different people — a litigator one day, an administrator another day, a negotiator the next day," he told Super Lawyers, a legal trade publication, in 2009. "It was living a fantasy."

[731] Nonet and Selznick (n 125), 83–4.
[732] Jonathan C Lipson, 'Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy' (2016) 6 *Harvard Business Law Review* 239.
[733] Ibid. 'The relationalist project is deeply invested in studying these environments, although it has not yet focused on Chapter 11 reorganizations.'
[734] Ibid.
[735] Ibid.

theory requires consideration of ongoing relationships between actors as inherently relevant to considerations of whether discrete instances, whether breaches or settlements, are fair.[736] In adapting that theory to situations involving violence and disparate power relationships, Tamara Kuennen argues for giving decision-makers the authority to override stakeholders' decisions when a relational analysis indicates that the less-powerful party is being coerced.[737]

Lipson points to relational concerns with 'interpersonal relations across many dimensions, including bargaining leverage, the effect of contracting on third parties, and the efficacy of formal versus informal legal mechanisms',[738] and argues that these concerns are under-theorized in the corporate reorganisation context. He suggests that a relational theory of corporate restructuring would also consider the 'repeat players',[739] including distressed investors, bankruptcy professionals, and bankruptcy judges, and the important roles they play in Chapter 11 cases. He points out that the actors involved in large cases tend to be repeat players from a small number of courts, law firms, accountants, other service providers, and distressed debt investors. These professionals understand how to use the flexibility of the Bankruptcy Code to benefit their clients, but also seek to maintain their reputations within the small community of repeat players in major bankruptcy cases. Lipson calls for a theory, which accounts for the roles of these repeat players and considers their relationships and interests as a part of the overall picture of Chapter 11.

A relational theory of Chapter 11 would take into account the advantages that repeat players and professionals gain through experience and ongoing relationships as well as how the Chapter 11 process impacts relationships of power between debtors, creditors, and other stakeholders. A relational perspective is also in line with an NLR approach to understanding law by considering both how the process actually works and what that means in the context of broader social goals. Among those broader social goals are holding wrongdoers accountable — and so a relational, or a more fully responsive, Chapter 11 would have a way to respond to debts arising out of normative wrongdoing that could communicate reprobation or condemnation of wrongful behaviour that it does not currently have. The Diocesan Debtors

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[736] Tamara L Kuennen, 'Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence' (2010) *Brigham Young University Law Review* 515, 596.
[737] Ibid.
[738] Lipson, (n 732).
[739] For a discussion of why repeat players tend to benefit from legal action, especially in tort actions brought by injured individuals against corporations or other institutions, see, e.g. Marc Galanter, 'Why the "haves" Come out Ahead: Speculations on the Setting and Limits of Legal Change' (Working Paper No. 7, Yale Law School. Program in Law and Modernization, 1972); Joel B Grossman, Kritzer, Herbert M Kritzer, and Stewart Macaulay, 'Do the "haves" Still Come out Ahead? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988' (1999) 33(4) *Law & Society Review* 803-810.

present an excellent opportunity to consider the prospect of a relational theory of bankruptcy in that they are the result of significant normative wrongdoing. As will be discussed below, bankruptcy's most responsive quality lies in shifting the interests of various stakeholders, resulting in the victims of clerical child sexual abuse having significant leverage to secure many of their interests through the plan negotiation process. However, without the capacity to communicate reprobation of wrongful behaviour, its potential for responsiveness is limited.

III. BANKRUPTCY DOCTRINE AND ISSUES IN DIOCESAN DEBTOR CASES

A. *Issues and Disputes in Diocesan Debtor Cases*

This section provides a basic introduction to the process of reorganisation under Chapter 11 and some of the issues that arise in the Diocesan Debtor cases. Many of the Diocesan Debtor cases had similar issues and problems arising from the specific context of these cases — including the interaction of laws protecting religious freedom and laws of general application.[740] Despite the difficulty of resolving problems, including sticky problems of how to deal with the bad faith of key participants, the bankruptcy process holds advantages for stakeholders through, among other things, its inclusive approach to participation in the process. Bankruptcy law does not have a great deal of doctrine, rather it is a process and a means by which stakeholders are encouraged and supported in finding solutions of their own. The relevant issues in any Chapter 11 case can be very situation specific. This section will analyse two applications of bankruptcy law in Diocesan Debtor cases that are relevant to the question of whether Chapter 11 can be described as responsive.

A bankruptcy case is initiated by the filing of a petition in the bankruptcy court.[741] The instant that a bankruptcy case is filed, nearly all kinds of proceedings that might be

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[740] Marie T Reilly, 'Catholic Dioceses in Bankruptcy' 49 *Seton Hall Law Review* 871.

> The Catholic bankruptcy cases put a legal spotlight on the secular and ecclesiastical relationships between a diocesan debtor and the parishes, schools, cemeteries, and other entities that operate within the diocese and under the bishop's authority. Although fights about the nature and value of a debtor's property are common in Chapter 11 cases, Catholic dioceses are not ordinary debtors. Skirmishes between sexual abuse creditors and the debtors were unusually aggressive and public. Advocates for sexual abuse claimants stoked the media with plans "to go after . . . parish assets." One attorney described the push to include parish assets as a "'slugfest' [that] must occur 'before people get serious' about settlement." The Catholic debtors pushed back, seeking protection from bankruptcy court-adjudication of property of the estate on religious freedom grounds. They also argued that the property rights subject to their bankruptcy cases did not include property that they attributed to parishes and other diocesan affiliates under secular and religious law.

[741] Bankruptcy court jurisdiction, including what kinds of disputes the bankruptcy court is capable of resolving, the kinds of connections that are sufficient to permit a debtor to file in a particular jurisdiction, and the extent to which state sovereign immunity applies to bankruptcy court actions, is the subject of long lines of case law and a

ongoing or contemplated against a debtor to determine, collect, or enforce a debt existing before the moment the petition was filed are stayed or paused, and brought before the bankruptcy court.[742] If a creditor, regardless of jurisdiction or forum, attempts to collect or otherwise act on a pre-petition debt, any such act is void or voidable, and wilful violations are taken seriously by bankruptcy judges who may hold creditors in contempt or even award punitive damages.[743] This is what Hardin-Burrola and Pastor were referring to when expressing frustration with the pending cases against Gallup being halted – plaintiffs go from being technically in control of tort proceedings they brought to being potentially subject to serious penalties for taking any action against the diocese.

As with other mass tort bankruptcy cases, the chapter 11 process creates something of a paradox – plaintiffs seeking their day in court are disappointed, and will usually not have their claims vindicated by a judge or jury determining the wrongfulness of a defendant's conduct, but the simplicity of filing a claim in bankruptcy compared to brining a lawsuit means that more people are likely to obtain redress than would have done otherwise. In the Diocesan Debtor cases, most of the claims against the dioceses are brought by victims of sexual abuse. While some of these are judgments or settlements that the debtor already owes, most have yet to be reduced to judgement and are either pending or have not yet been filed at all. In Gallup, as discussed, there were 13 tort actions pending against the Diocese of Gallup when it filed for bankruptcy protection, but there were ultimately claims filed in the bankruptcy court on behalf of 57 victims of clerical child sexual abuse.[744]

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great deal of academic discussion, which discussion is outside the scope of this thesis. See, eg, *N Pipeline Constr Co v Marathon Pipeline Co*, 458 US 50, 102 S Ct 2858 (1982).

[742] *Bankruptcy Code*, 11 USCS §362; H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97; S. Rep. No. 95-989, at 54-55 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840-41

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

[743] *Bankruptcy Code*, 11 USCS §362(k); *In re Shamblin*, 890 F.2d 123, 125 (9th Cir. 1989); *In Re Schwartz*, 954 F.2d 569, 572 (9th Cir. 1992); but see *Bankruptcy Code*, 11 USCS § 362(d):

> the court shall grant relief from the stay . . . by terminating, annulling, modifying, or conditioning such stay---
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section if—
>
> (B) (A) the debtor does not have an equity interest in such property; and such property is not necessary to an effective reorganization.

[744] Elizabeth Hardin-Burrola, 'Diocese of Gallup to File Bankruptcy: Mounting Clergy Sex Abuse Legal Claims Spark Chapter 11 Reorganization' *Bishop Accountability.org* (Article, 3 September 3 2013) <http://www.bishop-

While it is understandably frustrating for the victims to have a trial stayed during the pendency of the proceeding, which generally results in their not being able to present their arguments in the forum of their choice, the substance of the law applicable to their claims does not change. Claims arising under statutory, contract, tort, or other regimes are still governed by those regimes. Through Chapter 11, multiple claims against the same debtor are resolved in a single forum. Thus, instead of pursuing their claims in state court, creditors file claims with the bankruptcy court, with amounts owed either (1) agreed to by the creditor and debtor or (b) to be determined through a process (a) agreed to by most stakeholders or (b) approved through operation of bankruptcy law. Creditors with any kind of claim against a debtor that relates to pre-petition activity have the right to submit a claim — whether that claim is of a determined amount or is contingent, whether the claim is acknowledged or disputed, and whether or not the creditor has a right to be paid at the time of filing. A claim's validity is determined under state law, while bankruptcy law controls its collectability.[745]

B. *Property of the Estate and Diocesan Debtors*

The commencement of a bankruptcy case gives rise to an estate comprised of almost all property to which a pre-petition debtor has a bona fide claim or interest, including property which can be reclaimed under state or bankruptcy fraudulent transfer law.[746] It excludes, among other things, property held in trust for the benefit of another and money earned by an individual debtor after the petition was filed.[747]

One of the major issues in the Tucson, Spokane, Portland, and St Paul cases was whether or not certain property, which the organisations claimed to hold in trust for the benefit of parishes or other persons or entities, constituted property of the estate. In other cases, either the parties negotiated to settle these issues through the plan, or the parishes had been separately incorporated before the bankruptcy filing and held property in their own names.[748] The legal issues in in Tucson, Spokane, Portland, and St Paul primarily revolved around whether or not property held by dioceses or used by parishes (often purchased with funds raised by those parishioners) can be considered to be held in trust or whether the parishes are the property of the diocese.[749]

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accountability.org/news5/2013_09_03_Hardin_Burrola_Diocese_of_Gallup.htm>; Marie T Reilly, 'Appendix B: Outcomes of Cases,' *Catholic Dioceses in Bankruptcy* (Chart, September 2019).

[745] See, eg, *United States v Whiting Pools, Inc*, 462 US 198 (1983).

[746] *Bankruptcy Code*, 11 USCS §541.

[747] *Bankruptcy Code*, 11 USCS §541(b).

[748] Reilly (n 740).

[749] See, eg, Chopko (n 685); Catharine Pierce Wells, 'Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy' (2004) 29 *Seton Hall Legislative Journal* 375; Jo Renee Formicola, 'The Further Legal

In Gallup, before the case was filed, Bishop Wall filed a notice of a trust relationship between the diocese and parishes in each county where a parish was located. These filings asserted that, although the property was held in the name of the diocese, 'the diocesan bishop does not have the right to possess, sell, encumber or otherwise dispose of parish property'.[750] This issue is a reflection of the embeddedness of protection for Catholic Church across legal systems having impact in diverse situations. Corporations sole, a corporate form discussed in Chapter 6, allowed dioceses in Australia to avoid liability. Although dioceses using that form are capable of being sued in all of the United States, their use of this form and its interaction with canon law led to the question of whether parishes are property of the estate or independent entities. The legal development of that argument led to bishops protecting those assets in the way that Bishop Wall did in Gallup.

Religious organisations, whether organised as corporations sole, non-profit corporations, or pursuant to some other state law corporate structure, are considered to be 'charitable organizations' in bankruptcy.[751] Without a class of equity-holders or owners, and having a charitable, rather than profit-making purpose, charitable organizations require special rules.[752] One of these special rules is that the Chapter 11 case of a charitable organizations may not be converted to a case under Chapter 7 (liquidation) without consent of the management.[753] Non-consensual conversion is typically thought of as a means by which the bankruptcy court can enforce requirements of good faith. The means by which debtors who are incompetent or acting in bad faith are generally sanctioned, the appointment of Chapter 11 trustees or receivers, may violate the First Amendment of the Constitution to the

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Consequence of Catholic Clerical Sexual Abuse' (2007) 49 *Journal of Church and State* 445; Nicholas M Gaunce and Robert Luther III, 'Deliver Us From Evil: Why Bankruptcy Judges May Properly Rely on the Free Exercise Clause & RFRA to Protect Church Property from the Grasps of Tort-Creditors' (2008) 43 *Valparaiso University Law Review* 641; Angela C Carmella, 'Constitutional Arguments in Church Bankruptcies: Why Judicial Discourse about Religion Matters' (2005) 29 *Seton Hall Legislative Journal* 435; Christina Davitt, 'Whose Steeple Is It? Defining the Limits of the Debtor's Estate in the Religious Bankruptcy Context' (2005) 29 *Seton Hall Legislative Journal* 531; *Comm of Tort Litigants v Catholic Diocese of Spokane*, 364 B.R. 81 (ED Wash, 2006); *Tort Claimants Comm v Roman Catholic Archbishop (In re Roman Catholic Archbishop)*, 335 BR 842 (Bankr D Or, 2005).

[750] Wall Declaration (n 328)., paragraph 10.

[751] Marion R Fremot-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* (Belknap Press, 2004).

[752] Wells (n 749), 378:

> The non-commercial character of a charitable organization has a number of consequences in the bankruptcy context. First, it means that an attorney general is a necessary party to any proceeding — including those in bankruptcy court — that adjudicates the disposition of charitable funds. Second, it affects the distributional equities. The situation is no longer governed by purely commercial considerations. Risks cannot be clearly prioritized by simply placing creditors ahead of "ownership" interests. (citations omitted).

[753] 11 U.S. Code § 1112(c).

extent that it constitutes government control of a religious organisation.[754] For the Diocesan Debtors, therefore, dismissal of a case is the only means by which a bankruptcy court may sanction bad faith or incompetence.

Notably, only one of the Diocesan Debtor cases has been dismissed — the others either resulted in a confirmed plan or are ongoing at the time of writing. The Chapter 11 case filed by the Archdiocese of San Diego was dismissed after the Archdiocese and a large group of tort claimants reached a settlement.[755] Although the Archdiocese had requested dismissal because of the settlement, the bankruptcy judge was, at the time, threatening to dismiss the case on grounds of bad faith.[756] But, as described below, bankruptcy judges, including the one overseeing the Diocese of Gallup's bankruptcy case, are often reluctant to penalise debtors in order to further the goals of the bankruptcy process, even where bad faith is evident.

The Diocese of Gallup sought to raise money to fund its bankruptcy plan by selling off parcels of real property in its possession.[757] In 2015, the diocese held two events intended to raise money to fund the bankruptcy plan by auctioning off parcels of real property. The Bankruptcy Code allows for auctions such as these when approved by the bankruptcy court,

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[754] David A Skeel, Jr, '"Sovereignty" Issues and the Church Bankruptcy Cases' (2005) 29 *Seton Hall Legislative Journal* 345, 355-56, lamenting that a bankruptcy court lacks a 'stick' required to 'move the process along[] and to increase the likelihood that the parties will actually agree to a consensual reorganization plan'. Skeel notes that 'the liquidation stick isn't available to focus the debtor's attention on striking a deal,' but fails to consider that, if a court is convinced that a debtor is not acting in good faith (or [the situation is such that appointment of a trustee might be a reasonable action had the case been one of a for-profit entity], the court may simply dismiss the case and avoid any concerns that it might be interfering with the management of a religious entity in Constitutionally impermissible ways).

[755] Sandi Dolbee, 'Two Judges Share How They Guided Church Case', *Bishop Accountability.org* (Article, 29 January 2008) <http://www.bishop-accountability.org/news2008/01_02/2008_01_29_Dolbee_TwoJudges.htm>.

[756] At the hearing held regarding the case's dismissal, the judge made clear her opinion that the diocese had not been truthful in all of its disclosures, particularly about the value of its real property holdings and its actual financial position. Ibid, quoting US Bankruptcy Court Judge Louise DeCarl Adler, 'It's entirely possible I would have gone through with the dismissal'; Sandi Dolbee and Mark Sauer, 'Judge's Tears, Rebuke Close Case', *Bishop Accountability.org* (Article, 2 November 2007: Describing the scene as the bankruptcy court granted the diocese's request that the case be dismissed after the diocese had reached a settlement with plaintiffs.

> The San Diego Catholic diocese's eight-month-old bankruptcy case drew to an emotional close yesterday with the judge shedding tears and scolding the church for being "disingenuous" in reporting its finances to parishioners as part of a campaign to fund a $198 million settlement with victims of sexual abuse.

'Spiritually Bankrupt', *Dan Rather Reports* (HDNet, 30 July 2013), quoting attorney John Manly:

> The diocese owned, probably at the time, several billion dollars' worth of real property. And they listed their property in the bankruptcy schedules as being worth the book value, in other words, what they paid for it. Well, the diocese has been around since the 1800's. So, you had a building listed that was worth five million dollars, and they would list it for $150,000, what they paid for it originally.

[757] See, eg, Elizabeth Hardin-Burrola, 'Did Diocese's Auctioneer Mislead Bankruptcy Judge?', *Bishop Accountability.org* (Article, 14 October 2015) <http://www.bishop-accountability.org/news66/2015_10_14_Hardin-Burrola_Did_dioceses.htm>.

which auctions should generally be conducted in public.[758] The diocese sought and obtained permission to conduct an auction in each of Arizona and New Mexico, most of which property were relatively small parcels of vacant land left to the diocese, but notably including the land upon which the Catholic Charities building is located in Farmington, New Mexico.[759] The auction of property in Arizona was conducted on 12 September 2015, was attended by reporters who publicised the event, and resulted in 12 properties being sold for an average price of USD$4,913. One of these properties, a 13.9-acre site next to a ranch owned by Paul McCartney, was described in an Arizona newspaper as having an assessed value of USD$750,000.[760] As I was in New Mexico on 19 September, 2015, I determined to attend the auction. Upon arrival at the auction venue, I encountered Hardin-Burrola, who also wished to observe the auction. We were both denied entry, rather forcefully, and were told that unless we intended to bid on the property, we would not be allowed to witness it.

Judge David T. Thuma, one of two bankruptcy judges in New Mexico, both sitting in the capital of Albuquerque, was the judge in the Gallup bankruptcy case. My brother, Spencer Edelman, was Judge Thuma's law clerk between 2013-2014. When I told him that I had been denied entry, he encouraged me to call the judge or write an email to inform the court of what happened. Both I and Hardin-Burrola proceeded to do write the court.[761] The auction in New Mexico resulted in the sale of 23 properties for an average of USD$7,222. The plot in Farmington, New Mexico, where the diocesan Catholic Charities office was located, was sold for USD$55,000. Hardin-Burrola told me that it was her understanding that the parcel was purchased by a diocesan parishioner who donated it back to the diocese.[762] In response to the letters that Hardin-Burrola and I sent to the court, the judge issued an order directing the diocese 'show cause why the auction sales should not be invalidated.'[763] Despite netting only USD$160,420 after fees taken by the company running the auction, the diocese stated in response to Judge Thuma's order, '[t]he Auctions were more successful than the Debtors had hoped in that all Sale Assets were sold, and sold for prices in excess of what the Debtors

[758] 11 U.S.C. § 363; Fed. R. Bankr. P 6004(f)(1).
[759] *In re Roman Catholic Church of the Diocese of Gallup*, No. 13-13676 (Bankr, D.N.M.) 'Notice of Auction of Property, Exhibit A,' Document 426-1.
[760] Gabriela Rico, 'Court-Ordered Auction Features Arizona Properties' *Tucson.com* (online, 15 August 2015) <https://tucson.com/business/local/court-ordered-auction-features-arizona-properties/article_04c4b1aa-8e39-5593-ba18-44cff6412447.html>.
[761] *In re Roman Catholic Church of the Diocese of Gallup*, No. 13-13676 (Bankr, D.N.M.) 'Order to Show Cause and Notice of Hearing,' Document 441.
[762] Private conversation with Hardin-Burrola, notes on file with author.
[763] Order to Show Cause (n 761).

believed could be achieved.'[764] Furthermore, despite the publication of pictures and video evidencing the attendance of reporters at the auction in Arizona, not to mention the Federal Rules' of Bankruptcy procedures' requirement that auctions be public, the CEO of the company conducting the auction submitted a sworn declaration stating, '[i]n my 33 years of conducting auctions, it is, and has been, my custom and practice not to admit non-bidders to an auction.'[765] Despite expressing his concern, and cautioning the diocese that future dealings should be conducted in good faith, Judge Thuma determined, that on balance, the interests of all stakeholders would be better served by not invalidating the sales, because of the cost and difficulty of so doing.[766] If the diocese had not been a religious organisation, the judge would have been able to find that bad faith merited a conversion of the case to Chapter 7, or a replacement of the debtors' management with an appointed trustee. The diocese was thus able to demonstrate bad faith in securing funds for compensating victims through the plan, and see no consequence of that bad faith, in part because of its status as a religious organisation, and the special protections embedded in law for such organisations.

Apart from Diocese of San Diego, the Diocesan Debtors have not, for the most part, seen calls from victims or other parties for their dismissal, even when the cases involve serious disputes about good faith. Nancy Peterman, who represented a number of victims whose claims against dioceses related to sexual abuse were adjudicated through the Chapter 11 process in Spokane and Portland, commented that the disclosure requirements and tools available to force disclosure of still more information are one reason that plaintiffs have not generally sought to have the Diocesan Debtor cases dismissed.

> For the claimants and the victims in these cases, the bankruptcy case provides a forum where they may easily discover what assets are owned by the dioceses. For example, the claimants can take advantage of the broad discovery afforded by a Rule 2004 examination. And there are many other tools that can be used to gain information on the assets of the archdiocese, such as 341 meetings or examiners, in order to begin to structure a fair settlement for the abuse victims.[767]

Federal Rule of Bankruptcy Procedure 2004 allows for examinations, upon the 'motion of any party in interest' of 'the acts, conduct, or property or to the liabilities and financial condition

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[764] *In re Roman Catholic Church of the Diocese of Gallup*, No. 13-13676 (Bankr, D.N.M.) 'Debtors' Response to "Order to Show Cause and Notice of Hearing" [Dkt. No. 441],' Document 444.
[765] Ibid, Exhibit 1.
[766] *In re Roman Catholic Church of the Diocese of Gallup*, No. 13-13676 (Bankr, D.N.M.) 'Minutes of Show Cause Hearing Held on October 7, 2015,' Document 446 (audio).
[767] Bruce A Markell et al, 'Transcript of the Dedication Ceremony for the Conrad B Duberstein Bankruptcy Courthouse: Roundtable Discussion: Religious Organizations Filing for Bankruptcy' (2005) 13 *American Bankruptcy Institute Law Review* 25, 31.

of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge'.[768] Thus, even though the tools available to claimants in the Diocesan Debtors cases are more limited than in a typical mass tort case, and victims are often unhappy with the diocese's conduct, there remain useful tools in Chapter 11 such that dismissal (and return to the pre-bankruptcy status where claims are actionable under tort, if at all) is not an attractive option.

Despite the availability of examinations under FRBP 2004, the problems of religious freedom and law in the Diocesan cases is a sticky and difficult problem, one that may be unique to mass tort cases involving religious organisations, and this difficulty may not be completely resolvable. However, as discussed in the next section, bankruptcy procedure uses promising mechanisms for resolving the disputes that arise in Chapter 11 cases, and the Diocesan Debtor cases are good examples of why these mechanisms may facilitate an incipient kind of responsiveness.

IV. CHAPTER 11 IN ACTION — PLANS, LOGIC, AND LOGISTICS

A. *Leverage and the Plan Process*

In order to exit bankruptcy protection, a Chapter 11 debtor must propose and confirm a plan of reorganisation. Chapter 11 cases can be quite complex, and there are many paths that debtors take through the process. Many cases do not confirm a plan of reorganisation. Those who successfully draft, negotiate, propose, and confirm a plan of reorganization 'effect fundamental changes to the debtor's operational, debt, capital, and/or corporate structure'.[769]

The difficulty of confirming a bankruptcy plan is that, if the plan proposes to change but not eliminate the rights of any class of creditors or stakeholders, it requires the consent of at least one such group.[770] This difficulty is also, in a sense, the reason bankruptcy works.

> The genius of bankruptcy reorganization law is that it provides incentives for debtors and their creditors, notwithstanding their disparate interests, to reach a voluntary agreement on the terms of the restructuring.[771]

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[768] Federal Rule of Bankruptcy Procedure 2004 (a)–(b).

[769] Bruce H White, J Thomas Beckett and Brian M Rothschild, 'Digging Out of a Hole: Reorganizations and Workouts in the Mining and Hydrocarbon Sectors' (2016) 2016 *Journal of Rocky Mountain Mineral Law Foundation* 354.

[770] *Bankruptcy Code*, 11 USCS § 1126(c)
A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

[771] Steven L Schwarcz, 'Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach' (2000) 85 *Cornell Law Review* 956, 959.

By limiting the extent to which a plan proponent can divide classes of claims and requiring consent from impacted parties, the Bankruptcy Code impacts parties' relative power — incentivising stakeholders to reconsider the bargaining positions and settlement possibilities available. Unlike a typical civil case, in which parties are either plaintiffs or defendants, and therefore adversaries, in a Chapter 11 case the various stakeholders have interests that may align, or not, with other stakeholders in what might best be described as a game of three-dimensional chess.

As courts of equity, bankruptcy courts have the discretion to be open to creative solutions to the problems facing stakeholders, and most judges strongly encourage parties to find common ground. The process of proposing and confirming a plan of reorganisation thus draws on the perspective of the various stakeholders' – they can pursue their goals according to their own incentives and interests, including forming new alliances or purchasing positions that allow for additional input in decision-making. The law has evolved here responsively to the reality that restructuring can only reduce harm if it is attuned to the particularities of individual bankrupt organisations, and that that best way to do that is to give parties with the most at stake voice in what happens. Those parties with something at stake, or stakeholders, include any party with an interest in the debtor or the estate. Stakeholders include: (1) secured creditors, who may hold any number of different kinds of liens of real or personal property; (2) unsecured creditors including bondholders, trade creditors, banks, victims in tort, employees, taxing authorities, government licensing or other bodies; (3) holders of equity interests in a corporate debtor; and (4) the debtor and related parties, among others.[772]

In the Diocesan Debtor cases, the attorney general of each state where the diocese or order operates is also a party to the bankruptcy case, as is true for charitable organisations generally — the attorney general represents the interests of the general public in a charitable case. Each stakeholder has its own interests — their ability to pursue their interests in bankruptcy depends on both non-bankruptcy and bankruptcy law. Within each group of stakeholders, there are varying degrees of priority, some of which are set out in the Bankruptcy Code, and others by private agreement or other applicable law.[773]

An article by three well-regarded practitioners on the practical issues that accompany advising and representing a troubled corporation demonstrates the ways in which filing a

[772] *Bankruptcy Code*, 11 USCS § 1109.

[773] In corporate cases, it is common for a debtor to have multiple groups, or tranches, of debt. Typically, this means different issuances of bonds or other securities (including convertible bonds), some of which are expressly subordinated to other types of debt.

bankruptcy case impacts the rights and potential leverage available to stakeholders.[774] Baker, Butler, and McDermott explain that outside of bankruptcy, the board of directors and senior management of a solvent corporation owe fiduciary duties, including the duties of loyalty and care, to the corporation's shareholders.[775] No duty is generally owed to the creditors of the corporation outside of obligations under contract, tort, or other law governing the relationship the corporation and any given creditor or other interested party. As a corporation enters the 'zone of insolvency,' however, those duties shift, and the interests of the creditors begin to take priority.[776] 'What this means as a practical matter is that directors and officers must manage an insolvent company and maximize its value for the benefit of creditors as well as shareholders.'[777]

Filing for protection under Chapter 11 also effects a shift in the balance of power between the various stakeholders.[778] While formally the duties of the directors and managers do not change, the company may no longer take any action outside of the ordinary course of business without notice and approval of the bankruptcy court.[779] As the process continues toward the ultimate goal of confirming a plan of reorganization, creditors in a position to have some, but not all, claims paid have a particular kind of leverage. Indeed, this creditor (or group of creditors), known as the 'fulcrum,'[780] is the party whose vote on a plan of reorganization is most crucial to its confirmation.[781] One strategy of professional distressed investors is to invest in multiple tranches of securities in companies in financial straits in

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[774] DJ (Jan) Baker, John Wm (Jack) Butler and Mark A McDermott, 'Corporate Governance of Troubled Companies and the Role of Restructuring Counsel' (2007) 63 *The Business Lawyer* 855. For academic comments on corporate governance for distressed and bankruptcy firms, see Jonathan C Lipson, 'The Shadow Bankruptcy System' (2009) 89 *Boston University Law Review* 1609; Douglas B Baird and Robert K Rasmussen, 'Antibankruptcy' (2010) 119 *Yale Law Journal* 648, 659; Stuart C Gilson, 'Bankruptcy Boards, Banks, and Blockholders: Evidence on Changes in Corporate Ownership and Control when Firms Default' (1990) 27 *Journal of Financial Economics* 355; Lynn M LoPucki and William C Whitford, 'Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies' (1993) 141 *University of Pennsylvania Law Review* 669.

[775] Baker, et al (n 774).

[776] Ibid: 'when a corporation becomes insolvent, the directors' and officers' fiduciary duties expand and extend to the firm and its "entire community of interests," including creditors'.

[777] Ibid. But see Douglas G Baird and Robert K Rasmussen, 'Private Debt and the Missing Lever of Corporate Governance' (2005) 154 *University of Pennsylvania Law Review* 1209, arguing that the role of private creditors in corporate governance has increased substantially since the 1980s, noting the trend of creditors, among other things, requiring firms appoint independent restructuring advisors, prevent firms from taking on certain projects, and other changes, in part by closely monitoring and controlling the firm's access to a credit facility.

[778] Lipson (n 774) at 1632.

[779] *Bankruptcy Code,* 11 USCS § 363.

[780] Mark S Lichtenstein and Matthew W Cheney, 'Riding the Fulcrum Seesaw: How Hedge Funds will Change the Dynamics of Future Bankruptcies' (2008) 24 *New Jersey Law Journal.*

[781] Jonathan C Lipson, 'Governance in the Breach: Controlling Creditor Opportunism' (2010) 84 *Southern California Law Review* 1035, 1039.

order to obtain the fulcrum security.[782] If they ultimately hold sufficient amounts of a fulcrum security, they enjoy a particular leverage over the debtor.[783]

The plan confirmation process provides leverage to the fulcrum security because it is likely to be the class of creditors whose vote is required for a plan to be confirmed. Plan confirmation requires the vote of a majority (two thirds in amount and one half in number) in a class of claimants whose claims are impaired by the plan must vote to accept the plan.[784] The primary constituencies whose acceptance of a plan structure the plan proponent[785] will seek are those holding fulcrum securities — especially those who might be willing to accept something other than money in return for their support for the plan. Creditors and other stakeholders who know that they would be paid in full or who know they will receive nothing have less of an incentive to negotiate, and less influence over the plan's confirmation.

Debtors and other stakeholders have opinions formed on the basis of their projections, valuations, and strategic positions about the valuation of the company. These opinions about how much might be available to pay creditors in cash on the effective date of a plan, the value of the company as a going concern, and its income stream post effective date are reflected in stakeholder positions about their leverage in the case. Accordingly, while there are often disputes about which creditors are 'in the money', the positions of the relevant parties with respect to which creditor is in the money are clear. All of these positions are relevant to the process of negotiating and confirming a plan. Creditors who believe a debtor's estate to be larger than the debtor asserts it to be must consider not only what they believe to be the true size of the estate, but also the cost of litigating the dispute about the size of the estate in comparison to a potential recovery when considering how stridently to dispute the debtor's valuation. Often, where the value of the estate is in dispute but it is clear who are the class of creditors whose claims are at the fulcrum, the class's perspective on its potential recovery depends on its members' risk tolerance and willingness to engage with the debtor after confirmation of the plan. A creditor class that is partially in the money may be willing to accept stock, bonds, or other interests, or to otherwise be willing to accept something other

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[782] Ibid.

[783] Michelle M Harner, 'Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives' (2008) 16 *American Bankruptcy Institute Law Review* 69, 70, citing Jonathan M Landers, 'Reflections on Loan-to-Own Trends' (2007) 26 *American Bankruptcy Institute Law Review* 44–6 and 'The Vultures Take Wing: Investing in Distress'. *The Economist* (31 March 2007) 77–8; Lipson (n 774), 1632.

[784] *Bankruptcy Code,* 11 USCS § 1121.

[785] While most plans are proposed by debtors, once a period of exclusivity expires (or is terminated for cause), creditors and other stakeholders are allowed to propose plans, often plans that compete with the debtors. *Bankruptcy Code,* 11 USCS § 1121.

than cash on the effective date to compensate for claims not being paid in full on the date on which they are owed.

So, creditors holding fulcrum securities and those who might benefit the most from a payment under the plan that consists of something other than cash often have significant leverage in negotiating the terms of a potential plan of reorganisation. In Chapter 11 proceedings that ultimately confirm a plan of reorganisation, the fulcrum typically lies within the body of unsecured creditors.[786] In these cases, the committee of unsecured creditors tends to occupy a strong negotiating position. As will be discussed in the next subsection, this creditors' committee is particularly influential and important in the Diocesan Debtor cases because committee representatives in those cases are almost entirely composed of victims, and because there are few other creditors — secured creditors and non-tort claimants represent very small fractions of the debt in almost all of the Diocesan Debtor cases.

1 *Mass Tort Cases — Asbestos, Insurance, and a Seat at the Table*

The Diocesan Debtor cases, insofar as they are precipitated by liability arising in tort, are filed by entities that, but for their tort liability, would be solvent. The cases have mostly been resolved with the creation of a trust to which the debtor and its insurers contribute money that is then paid to tort claimants who present their case to a mutually agreed arbitrator who makes determinations based on a matrix agreed to through the plan process. In this way, the Diocesan Debtors are like other so-called 'mass tort' bankruptcy cases. The prototypical mass tort case is a Chapter 11 bankruptcy of an asbestos manufacturer. A number of such cases have been filed as a result of liability for illnesses arising out of asbestos exposure despite manufacturers knowing or constructively knowing of its harms. These companies filed because after exposing thousands of people to dangerous products, they faced very high compensatory and punitive damages. Although the companies continued to be profitable, often after beginning to use or manufacture different materials, they argued that the uncertainty of their potential liability weighed down their ability to re-invest capital in the business and ensure a future profit-stream.[787]

Section 524(g) of the Bankruptcy Code, added after the first asbestos cases, provides that companies facing claims related to asbestos may use the process to transfer their

[786] Cases with a high likelihood of success in reorganization generally are producing profit or have the potential to do so but are carrying more debt than is capable of being serviced by the company's revenue stream. Unsecured creditors will be inclined to vote for a plan when they anticipate getting a larger portion of the debt repaid through the plan than they would be paid if the company were to be liquidated.

[787] See, eg, Douglas G Smith, 'Resolution of Mass Tort Claims in the Bankruptcy System' (2008) 41 *UC Davis Law Review* 1613; Troy A McKenzie, 'The Mass Tort Bankruptcy: A Pre-History' (2012) 5 *Journal of Tort Law* 59.

liabilities and channel all future claims to a trust.[788] It provides that the bankruptcy court can issue 'channelling injunctions' shielding non-debtor third parties from suit, including insurance companies that contribute to the trust. Although Section 524(g) is applicable only to cases involving asbestos, similar trusts have been established in a number of other contexts.[789] Medical device manufacturers like the AH Robins corporation, maker of the Dalkon Shield, and other companies filing mass tort cases have created trusts to manage their liability for injuries related to faulty products.[790]

In the Johns-Manville bankruptcy case (a large asbestos case), as in many other mass tort cases, the debtor's insurance policies were the bankruptcy estate's most valuable asset (to the extent they covered the tortious acts underlying the claims against the debtor), but their value was uncertain because the extent of their coverage was disputed.[791] Ultimately, Manville and its insurers settled, with the insurers paying approximately $770 million in exchange for a release of any further claims against the insurers and a channelling injunction preventing tort claimants from bringing claims against any entity other than the bankruptcy.[792]

Mass tort cases do not always satisfy victims of defective products or corporate malfeasance, and there are significant issues with the resolution of asbestos and other mass

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[788] Lynn K. Neuner and Sheila M. Brodbeck, *Asbestos Bankruptcy Cases; NEWS; Insurance Coverage Law Bulletin Insurance Coverage Law Bulletin January 2006* Pg. 1 Vol. 4 No. 12; See Stephen J Carroll et al, *Asbestos Litigation* (RAND Corporation, 2005) 151–5, reporting at least 73 asbestos-related bankruptcies since 1982.

[789] Chapter 11 debtor Dalkon Shield manufacturer's plan could properly require injunction of suits that have connection to Dalkon Shield, against certain entities other than debtor where injunction only impacts on members who elected to opt out of settlement and, given impact of proposed suits on reorganisation and fact that members who chose to opt out could have had their claims fully satisfied by staying within settlement, injunction is properly within court's equitable powers under *Bankruptcy Code* 11 USCS § 105, § 524(e) will not be construed so that it limits equitable power of Bankruptcy Court to enjoin questioned suits where (1) plan was overwhelmingly approved, (2) plan, in conjunction with insurance policies provided as part of plan, give second chance for even late claimants to recover, even though some have chosen not to take part in settlement in order to retain rights to sue certain other parties, and (3) entire reorganisation hinges on debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against debtor. *Menard-Sanford v Mabey (In re A.H. Robins Co.)* (1989, CA4 Va) 880 F2d 694, 1 Fourth Cir & Dist Col Bankr Ct Rep 212, 19 BCD 997, CCH Bankr L Rptr P 72955 (criticized in *In re American Hardwoods* (1989, CA9 Or) 885 F2d 621, 19 BCD 1354, CCH Bankr L Rptr P 73130) and cert den (1989) 493 US 959, 107 L Ed 2d 362, 110 S Ct 376 (criticized in *In re Greate Bay Hotel & Casino, Inc*. (2000, BC DC NJ) 251 BR 213).

[790] Peta Spender, 'Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability' (2003) 25 *Sydney Law Review* 223.

[791] *In re Johns-Manville Corp*, 517 F 3d 52, 57 (2nd Cir, 2008): 'Travelers, Manville's primary insurer from 1947 through 1976, paid nearly $80 million into the bankruptcy estate (in addition to the $20 million already paid in litigation expenses on behalf of Manville) in exchange for a "full and final release of Manville-related claims." Travelers' settlement, like those of the other Manville insurers, was predicated upon the bankruptcy court issuing an injunction that barred suits against Manville's insurers — including Travelers — and directed litigation by potential claimants instead against the Manville Personal Injury Settlement Trust. The injunction, embodied in the 1986 Confirmation Order the 1986 Insurance Settlement Order, channeled to the Manville Trust any and all claims that were based upon, arose out of, or related to Manville's liability insurance policies' (citations and parentheticals omitted).

[792] Ibid.

tort bankruptcy cases.[793] However, my argument that Chapter 11 may be incipiently responsive does not imply that it is not vulnerable to capture or the bad faith of participating parties. The importance of the mass tort bankruptcy is the way in which it approaches the problem of mass tort more inclusively than does tort and other forms of civil law. One of the most notable differences is bankruptcy's severing the interests of insurers and corporate defendants. Outside of Chapter 11, insurers are required to defend each allegation brought against insured parties and only once the amount of liability has been fixed will the insurance company concern itself with the percentage it will pay and what claims it may deny under its interpretation of its own policy. In bankruptcy, as will be discussed below, insurers have different incentives, creating space for multi-party negotiation that, I argue, has some responsive qualities.

As discussed in Chapter 6, in tort cases brought by victims of sexual abuse against Catholic organisations, we see effects of specific knowledge produced in a civil litigation context. The role of insurance policies belonging to dioceses is critical in these cases. The mere threat of an unfavourable factual finding can have important effects on stakeholder behaviour – and institutions take measures to avoid those findings, even at cost of money or reputation. In Gallup, the diocese filed for bankruptcy shortly before trials began in cases where the fundamental issue was the diocese's level of knowledge about a priest's tendency to abuse. A jury or judge's factual finding that the diocese knew or should have known that Charles Hageman was likely to be abusing children would have limited the ability of the diocese to resist future claims, and potentially lead to punitive damages. It might also have impacted their insurance coverage. This sequence of events suggests that the diocese was seeking to avoid a determination of fact unfavourable to their legal position, and risking their insurance coverage. This interpretation is supported by the diocese's continuing reluctance to release records of its priests, preferring to protect its records at the cost of other priorities in negotiating a settlement with victims. By filing for bankruptcy protection, the diocese of Gallup was able to avoid a full accounting of its knowledge about the priests who abused

[793] See, e.g. United States Congress, *The Effect of Bankruptcy Cases of Several Asbestos Companies on the Compensation of Asbestos Victims: Hearing before the Subcommittee on Labor Standards of the Committee on Education and Labor, House of Representatives, Ninety-Eighth Congress, First Session, Hearing Held in Washington, D.C., on February 10, 1983* (US Government Publishing Office, 1983) I–70, containing testimony from victims of asbestosis who were discouraged and concerned about compensation for victims when companies filed for bankruptcy as a result of liability; William P Shelley, Jacob C Cohn and Joseph A Arnold, 'The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update — Judicial and Legislative Developments and Other Changes in the Landscape Since 2008' (2014) 23 *Widener Law Journal* 675, 675–8; S. Todd Brown, 'Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation' (2013) 23 *Widener Law Journal* 299.

children within the diocese. The importance of insurance to dioceses facing tort claims is not limited to the United States. The Royal Commission made public letters from Catholic Church Insurance to dioceses in Australia, including Ballarat, denying coverage for claims relating to abuse occurring after the insurer deemed the dioceses knew or should have known, demonstrating the often-unseen importance of insurance coverage in this context. In the context of mass tort bankruptcies, however, the chapter 11 process shifts the interests of insurance companies, and by creating a committee of unsecured creditors, also shifts the balance of power between the debtor, its insurers, and the body of tort claimants.

2 *Unsecured Creditors' Committee Makeup and Representation*

Early in a Chapter 11 bankruptcy case, the United States Trustee (UST) will appoint a committee of unsecured creditors to represent the unsecured creditor body as a whole.[794] The committee is formed of members who are unsecured creditors of the debtor, and generally includes representatives of the various interests and groups that exists among the unsecured creditor body. The creditors' committee (and other statutory committees, such as committees of equity-holders, or in the Diocesan Debtor cases, of parishioners) have rights, obligations, and duties as set forth in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, and is generally a central player in the negotiation and approval of a plan of reorganisation.

The professionals retained by statutory committees must be approved by the bankruptcy court and are paid out of the bankruptcy estate, in much the same way as the debtor's own lawyers are retained and paid.[795] In all but three of the Diocesan Debtor cases, Pachulski Stang Ziehl & Jones LLP (Pachulski Stang),[796] represented a statutory committee of creditors. Pachulski Stang is a well-regarded bankruptcy boutique firm with a sophisticated practice, and in all of the Diocesan Debtor cases in which the firm was retained by a statutory committee, named partner James Stang was lead counsel for the committee. While the names of the members of the committee have not generally been made public, interviews with professionals confirmed that the committees appointed in the Diocesan Debtor cases were largely or entirely made up of people who had claims against the dioceses arising out of child sexual abuse.[797]

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[794] *Bankruptcy Code* 11 USCS § 1102.
[795] *Bankruptcy Code* 11 USCS § 1103.
[796] Pachulski Stang Ziehl & Jones, 'Representative Cases', *Pachulski Stang Ziehl & Jones* (Web Page, 2020) <http://www.pszjlaw.com/results.html>.
[797] Interviews with professionals RP, JM, GB, on file with author. The following discussion relies heavily on these interviews but does not provide specific quotes in order to maintain anonymity and respect the wishes of

In Gallup, for example, Hardin-Burrola reported the names of three individuals who have identified themselves as members of the committee, two of whom have spoken publicly about their experience as victims.[798] Ellen Berkovitch and Hannah Colton report for Santa Fe Public Radio that, of the seven members of the committee in the Gallup case, two were women, and one of those women was the only Native American on the committee, but imply that all members of the committee were victims.[799] Similarly, the Seventh Circuit Court of Appeals noted that all of the individuals sitting on the committee of unsecured creditors in the Archdiocese of Milwaukee Chapter 11 case are 'private, individual creditor[s] who [were] sexually abused by the clergy.'[800] In the Saint Paul and Minneapolis Case, a group representing separately incorporated parishes sought the appointment of a parish committee, arguing that they are creditors of the debtor and deserve to be represented by a statutory committee, implying that their interests do not align with the interests of the five victims appointed to the creditors' committee.[801]

In the Diocesan Debtor cases, including in Gallup, the committees have been very involved in the proceedings and progress of the cases. In a number of cases, bankruptcy plans have been jointly proposed by the debtor and the committee of unsecured creditors, and in others, the plans were or are currently in the process of being negotiated and drafted in order to ensure that the committee would not object to them.[802]

B. *Shifting of Leverage: What this Means in Diocesan Debtor Cases*

In every Diocesan Debtor case that has resulted in a confirmed plan, the plan sets up a trust funded by the diocese and its insurers from which victims are paid after their claims are reviewed and determined by a claims administrator.[803] The trusts are set up in largely the

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those who were concerned specific quotations could lead to identification of their clients or the details of discussions between committee-members.

[798] Elizabeth Hardin-Burrola, 'Diocese Apologizes; Healing Services Still Delayed,' *Bishop Accountability.otg* (Article, 18 March 2017).

[799] 'Dark Canyon Episode Nine: The Diocese of Gallup' (n 390).

[800] *Listecki v Official Committee of Unsecured Creditors, 780 F. 3d 731, (7th Cir., 2015).*

[801] *In re The Archdiocese of Saint Paul and Minneapolis,* Case No 15-30125, United States Bankruptcy Court, District of Minnesota, 'Notice of Hearing and Motion for Order Appointing a Creditors' Committee of Parishes' Doc No. 144, pg. 12. (dated 18 Mar 2015).

> In this case, the composition of the unsecured creditors' committee consists of solely of five clergy abuse creditors. Although the committee theoretically represents all of the unsecured creditors, no other class or category of creditor serves as a member of the committee. As a result, no other class or category of unsecured creditors has a voice on the committee. The attorneys hired to represent the committee have been chosen by a vote of only clergy abuse creditors. Under the circumstances, it is almost certain that the existing committee will take positions which favor the clergy abuse creditors. This becomes a significant issue because the interests of the clergy abuse creditors are adverse to the interests of the parishes.

[802] Interview with professionals on file with author.

[803] Reilly (n 740).

same ways as trusts are set up in asbestos and medical device cases. Many of the professionals participating in other mass tort trusts, or involved in high-profile bankruptcy or class action suits, are the same professionals appointed as arbitrators and trustees for the trusts in the Diocesan Debtors cases. The differences are the total amounts owed and the number of tort claims, and the different underlying harms giving rise to the tort claims. In terms of bankruptcy law, however, the cases are very similar.

In these cases, we can also see that Chapter 11 has changed the leverage or shifted the interests of both insurers and victims as compared to what happens in civil cases. Insurance companies are incentivised to settle because of the prospect of establishing a finite cap on the amount they owe, a channelling injunction prescribing future claims on the policies held by the dioceses, and no longer be obligated to pay for the dioceses' litigation defences. Insurance companies benefit from not funding litigation and arguing about coverage for years on a case-by-case basis. Creditors' committees, controlled by victims in the Diocesan Debtor cases, are critical to securing votes to confirm a plan, and therefore have a fair degree of leverage in negotiations on the terms of the plan, especially compared to the leverage a single plaintiff would have in an individual tort action. Individually, this may seem rights-insensitive, but collectively and pragmatically, it seems to improve average outcomes for victims and shifts resources from contestation and transaction costs to compensation payments while allowing victims to insist on enforceable non-monetary concessions (as discussed below).

Insurance companies, as discussed above, have an incentive to settle, which they will seek to do for as little as possible. Insurance disputes were litigated in adversary proceedings or were crucial to reaching a plan in the Tucson, Fairbanks, Oregon Jesuits, Wilmington, St. Paul and Minneapolis, and Gallup cases. In Gallup, the most notable insurance issue arose around New Mexico Property and Casualty Insurance Guaranty Association's ("NMPCIGA") role a as an appointed receiver in the liquidation of the Home Insurance Company, which had issued policies to the Gallup diocese between 1965 and 1977. NMPCIGA is an entity created by New Mexico Law to ensure payment and avoid financial loss to claimants or policyholders as a result of the insolvency of an insurer. NMPCIGA argues that the relevant policies did not cover 'bodily injury that is either expected or intended by the insured.'[804] Pointing to complaints and claims that the diocese 'knew or should have known' of the abusive

[804] *In re Roman Catholic Church of the Diocese of Gallup*, No. 13-13675-t11, 'New Mexico Property and Casualty Insurance Guaranty Corporation's Statement in Connection with November 10, 2015 Status Conference' Docket No. 479 (9 Nov 2015).

tendencies of people like Father Hageman, NMPCIGA argued that the policies do not cover the harm incurred.

Public pressure and sympathy for victims may have also played in motivating and incentivising NMPCIGA's settlement and contribution to the plan. The local *Gallup Independent* published an editorial using arguments grounded in Christian theology[805] and pointing to NMPCIGA's argument about not covering claims when the diocese knew or should have known of the abuse as 'a classic example of why the public frequently views both lawyers and insurance companies with similar distaste'.[806] In civil cases, insurance companies are generally less vocal or visible, as they tend to pay for litigation defence, and their interests (in denying liability and, if there is liability, paying as little as possible), align with those of the diocese. The Diocesan Debtor cases incentivise insurance companies to settle because it puts a finite limit on their liability, but it also makes their participation in the case more visible than it is in civil litigation. In Gallup, we can see that the religiousity of the area can be used to leverage compliance by insurance companies, as demonstrated by the *Gallup Independent*'s argument against with respect to NMPCIGA. The parties ultimately settled with NMPCIGA purchasing its obligations under the policies for USD $1,850,000 in exchange for a channelling injunction in the plan of reorganisation.[807] The victims also received a priority claim in the Home Insurance Corporation's liquidation proceeding of USD$3,750,000, the proceeds of which would be available to victims through the trust.

3 *Diocesan Debtors*

For the Diocesan Debtors, one advantage of bankruptcy is that they are likely to ultimately pay less to each victim through a plan of reorganisation than they otherwise would have been required to pay if all, or even a portion, of the victims were to bring civil claims. They also avoid dragging out the bad optics of opposing victims in litigation as the cases

[805] Editorial, *Gallup Independent*, Nov. 23, 2015, 'Taking the low road in diocese bankruptcy' ('"Do not exploit the poor because they are poor and do not crush the needy in court'" citing Proverbs 22:22).
[806] Ibid.
[807] *In re Roman Catholic Church of the Diocese of Gallup*, No. 13-13675-t11, Exhibit H to Plan of Reorganization,' Docket No. 554-8 (21 April 2016).

> The Parties acknowledge and agree that NMPCIGA is paying the Purchase Amount to the Claimants for (i) the purchase of the Home Guaranty Claims from Claimants, pursuant to Bankruptcy Code §§ 363(b), (f), and (m) and, if applicable, 105(a), and Bankruptcy Rules 6004 and 9019, free and clear of all Claims and Interests of all Entities, (ii) for the entry of the Confirmation Order and the protections afforded to NMPCIGA pursuant to the Plan and the Confirmation Order, and (iii) in exchange for a complete settlement and release of any and all Home Guaranty Claims Claimants may have against NMPCIGA in connection with, related to, or arising from the Home Policies and the NPICIGA Statutory Obligations with respect to the Home Guaranty Claims.

come forward.[808] Instead, the bankruptcy proceeding allows them to resolve all the claims against them, gives them leverage to convince insurance companies to make large contributions, and changes the tone and purpose of the applicable law. Instead of a tort system that is intended to determine whether or not the diocese harmed the victim seeking redress, Chapter 11 is thought of as a disinterested mechanism focused on financial and bankruptcy-specific issues

Bankruptcy also offers Diocesan Debtors procedural advantages. In drafting and proposing a plan of reorganisation, a debtor in Chapter 11's key leverage is in the 'exclusivity period', during which time only the debtor may propose a plan.[809] This allows Diocesan Debtors a great deal of leverage in crafting a plan. For as long as they can convince the bankruptcy court to continue the exclusivity period, they have unparalleled power in drafting and negotiating the terms of a plan. Accordingly, bankruptcy allows the Diocesan Debtors to bring insurance companies and all known victims holding unresolved claims to the table together to consider a plan, but the debtor's control of that plan means that it retains significant leverage in negotiation.

4 *Victims/Committees of Unsecured Creditors*

Literature on clerical sexual abuse and anecdotal stories of survivors indicate that survivors often desire redress in forms other than money — that a communication of belief in the veracity of the survivor's story, sincere regret for the occurrence of abuse, and significant steps to prevent future occurrence are often primary motivators for survivors to come forward.[810] Jennifer Balboni observed that many victims look for 'public acknowledgement of their pain, acceptance of responsibility for wrongdoing by the Church, and opportunity for voice (representativeness), and an apology'.[811] Plaintiffs' lawyers repeated to me that their clients were not primarily seeking money, but a sense of dignity and empowerment that comes from holding the Church accountable for failing them.[812] Through the Chapter 11 process, not only do survivors have the chance to inform dioceses what they want, they have the leverage to obtain the consent of the diocese to perform, and to have the dioceses'

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[808] Reilly (n 740).
[809] *Bankruptcy Code* 11 USCS § 1121(b).
[810] See, eg, Kathleen Daly, 'Sexual Violence and Victims' Justice Interests' in Estelle Zinsstag and Marie Keenan (eds), *Sexual Violence and Restorative justice: Legal, Social and Therapeutic Dimensions* (Routledge, 2017) 108, surveying literature on victims' justice interests and identifying 'five elements of victims' justice interests — participation, voice, validation, vindication, and offender accountability-taking responsibility,' as interests about which there is a general consensus; Interviews with professionals on file with author.
[811] Jennifer M Balboni, *Clergy Sexual Abuse Litigation: Survivors Seeking Justice* (First Forum Press, 2011) 125.
[812] Interviews of professionals on file with author.

performance be monitored by third parties, including court-appointed experts and the federal bankruptcy court itself.

Victims in Diocesan Debtor cases usually, as a collective, hold the fulcrum position — and the opportunity to negotiate a creative settlement as a part of the plan. Up to this point in the thesis the recurrent theme has been of legal institutions putting victims in the disadvantaged position for a range of different reasons. Here we have something new – a substantive legal responsiveness that, to a significant degree, swivels victims to the fulcrum position where they have power that matters. In this sense bankruptcy law enables a feat of responsive legal imagination that eludes other doctrines – repressive and autonomous – that reinforce the entrenchment of disadvantage and hopelessness.

In a typical bankruptcy case of a for-profit corporation, a creditor holding the fulcrum security might opt for stock, convertible debt, security interests, or some form of compensation other than cash or a simple promise to pay cash. In the Diocesan Debtor cases, of course, many of these forms of compensation are not available. Corporations sole do not have stockholders, and they are not able to issue bonds or other securities, victims are not likely to be interested in security interests of Church buildings, and accepting bonds or promissory notes on the prospect of future charitable donations is not generally acceptable to creditors. Further, because most victims' claims are not yet expressed in a fixed amount owed (the amount owed is in dispute and contingent on settlement or judicial resolution), the compensation scheme must anticipate a process of evaluating and liquidating victim claims. Victims, therefore, can be anticipated to exert what power they may have to shape the form of claims evaluation and to find alternate forms of compensation. This section discusses how the Diocesan Debtor cases so far provide evidence that committees were able to have significant influence on the form of claims resolution processes and the inclusion of non-monetary forms of compensation.[813]

One informative website, BishopAccountability, which seeks to 'assemble on the Internet a collection of every publicly available document and report on the crisis,' of sex abuse in the Catholic Church[814] includes a list of major settlements (whether through civil

[813] Stephanie Innes, 'Diocese Abuse Victims Speak as Bankruptcy Case Nears End' *Bishop Accountability.org* (Article, 10 July 2005); Elizabeth Hardin-Burrola, 'Diocese to Accept Liability, Apologize?: Reorganization Plan Includes Amends for Sex Abuse Victims' *Bishop Accountability.org* (Article, 14 May 2016); Interviews with professionals GM and RP on file with author.

[814] Bishop Accountability.org, 'Who We Are', *Bishop Accountability.org* (Web Page, 28 July 2014) <http://www.bishop-accountability.org/Who_We_Are>.

litigation or bankruptcy) between survivors and Catholic dioceses and other entities.[815] This list includes information detailing the dollar amount of settlements, the amount of compensation per survivor, and other terms of various settlements. The inclusion of nonmonetary provisions in settlement agreements is publicly praised by survivors and their advocates — it is often the relief plaintiffs' lawyers report their clients most value.

More than half of the settlements listed as containing non-monetary provisions on the BishopAccountability website are a result of Diocesan Debtor cases.[816] Where the settlements affect claims brought by individuals or smaller groups, the nonmonetary provisions sometimes included private or public apologies, allocation of (relatively) small sums to establishment of programs to assist other survivors, public disclosure and removal form the priesthood of the priest or other person responsible for the abuse, and promises of educational and other sorts of abuse prevention actions on the part of the diocese or religious order. By advocating for their own needs in the plan process, victims in Diocesan Debtor cases have ensured restorative, transformative, preventive, and responsive measures have been required of dioceses.

In the Diocesan Debtor cases, as in many of the other cases, non-monetary provisions included requirements of private and public apologies, the institution of educational and other programs intended to help prevent future abuse, funding of therapy for survivors, public disclosure of the names of those credibly accused of abuse and their removal from the priesthood where possible, changes to policy, and public statements of regret. Some of these public statements are fairly dramatic — in the plan confirmed with respect to the Diocese of Wilmington, Delaware, the bishop was required to issue a written statement of gratitude for survivors who have spoken about abuse suffered as minors.[817] Others require bishops take public positions in support of the lifting of statutes of limitations with respect to child sex abuse allegations.[818]

None of the plans in the Diocesan Debtor cases has exactly the same list of non-monetary provisions as any other, which may be evidence of chapter 11's responsiveness to context and voice. Despite their differences, however, most of the plans include requirements

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[815] Bishop Accountability.org, 'Settlements and Monetary Awards in Civil Suits', *Bishop Accountability.org* (Web Page, 28 July 2014) <http://www.bishop-accountability.org/settlements/>.
[816] Ibid.
[817] Diocese of Wilmington website, 'Non-Monetary Settlement Undertakings', *Diocese of Wilmington* (Web Page, 2019) <https://www.cdow.org/non-monetary-settlement-undertakings/>.
[818] Scott Lauch and Allison Retka, 'Choosing Morals and Money: Plaintiffs Settle with Diocese of Kansas City-St. Joseph', *Bishop Accountability.org* (Article, 1 September 2008), describing non-monetary provisions in Kansas City-St. Joseph case as well as in other cases nation-wide.

that include: that the bishop (or other highest authority in the organisation) personally provide apologies to survivors; that bishops travel to parishes where abusive priests worked in order to listen to survivor stories and make public apologies; that schools and parishes post plaques condemning abuse; and that diocesan printed materials include acknowledgement of abuse and responsibility-taking, publish survivor testimonies, and provide information on accessing diocesan and outside resources.

Another advantage of chapter 11 lies in the enforceability of non-monetary compensation. Bankruptcy plans are confirmed by a bankruptcy court, and the court retains jurisdiction to enforce their terms. On the other hand, an agreement to nonmonetary terms in a settlement is essentially treated as a contract between two parties, and a claim that a diocese violated the terms would generally have to initiate a new lawsuit in order to enforce then.[819]

In bankruptcy, the court retains jurisdiction to enforce the terms of plans, including non-monetary provisions.[820] Further, the bankruptcy plans in most cases that involve the appointment of a third-party trustee to oversee the claim process also gives this third-party trustee authority to quickly and finally resolve disputes about the terms of the plan. Thus, disputes about the sufficiency of the Diocesan Debtors' implementation of the non-monetary provisions can, in theory, be resolved more efficiently than disputes about the implementation of a private settlement agreement. Thus, the plan negotiation and confirmation process

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[819] *See* Lauck & Retka (n 818) (describing resistance by the Diocese of San Diego, the Archdiocese of Los Angeles, and the Archdiocese of Portland to compliance with non-monetary provisions of settlements made outside of the Chapter 11 process.) It is noteworthy that both the Diocese of San Diego and the Archdiocese of Portland filed Chapter 11 cases yet are listed as failing to comply with their nonmonetary agreements. While this might seem to argue against the point, they in fact demonstrate the utility of the bankruptcy court retention of jurisdiction in resolving disputes about performance of nonmonetary provisions. The Diocese of San Diego settled with survivors outside of that process and the case was dismissed, so the nonmonetary provisions were not subject to the jurisdiction of the bankruptcy court. With respect to the Archdiocese of Portland, there is no dispute that the majority of the provisions were actually complied with. The Archdiocese of Portland resisted releasing certain documents about priests when it believed the allegations were weak or uncorroborated, and the parties have utilised the bankruptcy court in resolving disputes about whether or not particular documents are required to be released, without having to initiate new proceedings.

[820] Except where that authority is granted to a third-party trustee from whose decision the parties may not appeal. *Gomes v Roman Catholic Church of the Dioceses of Tucson* (*In re Roman Catholic Church of Diocese of Tucson*), BAP No AZ 07-1409 (9th Cir BAP, 2008)

> In the current case, the bankruptcy plan provides for a special arbitrator to decide on allowing or disallowing tort claims according to the procedures and criteria contained in the plan. These procedures do not incorporate the dispute resolution statute in 28 U.S.C. § 657(c), and they do not allow for an appeal of a special arbitrator's decision or a request for a new trial. Rather, once the special arbitrator has disallowed a claim, the rights of the claimants are terminated, and there is no procedure in the bankruptcy plan for reviewing the special arbitrator's decisions.

incentivises debtors and creditors to work together to find ways of resolving their disputes.[821] It is not uncommon for creative solutions to emerge through this process. For the Diocesan Debtor cases, the Chapter 11 process has facilitated the inclusion of non-monetary provisions and provided enforcement mechanisms that allow survivors to have more leverage to enforce the non-monetary provisions than they do in settlements of civil cases.

In practice, the effectiveness of the non-monetary agreements has varied significantly, and in Gallup, the bad faith of the diocese undermined the effectiveness of the agreements. The plan in Gallup required, among other things, that

> [t]he Bishop will personally visit each operating Parish or Catholic school in which abuse is alleged to have occurred or where identified abusers served, with a schedule to be published at least thirty (30) days in advance of each meeting (including by posting on the Diocese's website, posting in the Parishes, publishing in the Parish bulletins, publishing in the *Voice of the Southwest*, and by reasonable notice to all Tort Claimants of any such meetings), inviting all known survivors of abuse in that Parish or geographical area to attend and shall provide a forum/discussion during his visit to address questions and comments. The Diocese shall provide a telephone number and email address for parties to contact on a confidential basis in order to schedule a meeting. The Bishop shall be available upon reasonable notice to have a private conference with any Tort Claimant or any other person that informs the Diocese that he or she was sexually abused by clergy, religious or employees of the Diocese.[822]

Although this and other requirements appeared similar to those in other plans, they did not contain deadlines by which they were required to be accomplished. A member of the creditors' committee explained that the Diocese had taken aggressive postures, strongly

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[821] Smith, Douglas G., 'Resolution of Mass Tort Claims in the Bankruptcy System' (2008) 41 *UC Davis Law Review* 1613.

> Mass tort litigation often presents intractable problems for the civil litigation system. The sheer volume of claims and the ability to forum shop serve to defeat the rational and efficient resolution of such claims. The tools available under the Code present a practical solution to these problems. The bankruptcy system affords an opportunity for centralised resolution of all related claims in a single proceeding in which those claims that have merit may be equitably compensated, while those that do not may be disallowed.
>
> Once claims are centralized and consolidated utilizing procedural mechanisms such as § 157(b), traditional litigation tools such as application of the requirements ensuring the reliability of scientific evidence under Rule 702 and summary judgment procedures to address common issues of liability and damages may be employed to separate those claims that have merit from those that do not. Because the proceedings occur in a single forum where all interested parties are represented, they ensure uniformity and equality in treatment that is sorely lacking outside of Chapter 11. As mass tort litigation expands to new products and defendants, it is likely that courts will increasingly be called upon to employ these tools to efficiently and equitably resolve such litigation.

[822] *In re Roman Catholic Church of the Diocese of Gallup, No. 13-13676 (Bankr, D.N.M.), 'Debtors' Plan of Reorganization Dated March 21, 2016,'*, Exhibit R ¶. 8.

resisting every attempt to get it to take responsibility, including with respect to non-monetary agreements, including resistance to including timelines on the non-monetary agreements.

> We were hitting the wall. There was this huge resistance for any little thing that came up. Whether it was one filing, whether it was a paper, whether it was a definition, or a timeline. We were fighting the Church at every turn.[823]

A few months after the plan was confirmed, on 28 September, 2016, the *Gallup Independent* published an editorial criticising Bishop Wall for not attending a panel discussion held at a local theatre in Gallup after a screening of the movie *Spotlight*, and noting that the bishop had yet to begin complying with the requirement to hold healing services in places where people were abuse.[824]

> [B]y skipping the invitation, Gallup's bishop missed a perfect opportunity. He missed the opportunity to show the public he truly is a courageous spiritual leader, worthy of the position he holds.

Suzanne Hammons, the diocese's director of communications, responded in the same issue, citing the bishop's attending a retreat during the week of the event, and 'administrative duties' on the day of the event that preventing him from attending.[825] The first of the required healing services was held in November 2016 at the cathedral in Gallup.[826] But, this was not the end of concern in Gallup with the diocese's compliance with the requirement to hold healing services. Through 2017, the diocese announced and postponed several healing services in the diocese, and their being postponed was criticised by the *Gallup Independent*. [827]

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[823] 'Dark Canyon Episode Nine: The Diocese of Gallup' (n 390).

[824] 'Editorial and Letter to the Editor response,' *The Gallup Independent*, 28 September 2016.

[825] Ibid

> Mrs. Hardin-Burrola states she wanted to bring the showing of "Spotlight" to Gallup to help foster a discussion on preventing abuse in our community. If this truly was her intention, it must be applauded. We appreciated the invitation to participate, but as was made clear to her, the showing fell during the same week as our priests' retreat in Tucson. Further administrative duties required our Bishop to stay through the next day, and the priests who returned had a week's worth of work waiting for them. The needs of our parishioners take priority, and while we recognize the importance of public discussion, we are not at the beck and call of the Independent.

[826] Elizabeth Hardin-Burrola, 'Diocese to Begin Services for Sexual Abuse Survivors Saturday,' *The Gallup Independent*, 17 November 2016.

[827] Editorial, 'The Gallup bishop's upside-down priorities,' *The Gallup Independent*, 31 August 2017

> Bishop Wall's poor sense of priorities has become a common theme for the past eight years. To many clergy sex abuse victims and their families, he is "Bishop Stonewall" — the bishop who used lawyers and legal maneuvers to battle them for years. And to many Catholics in the pews, such as the members of Gallup's St. John Vianney Parish, Bishop Wall is the aloof autocratic bishop who refused to meet with them when it appeared he was trying to shut down their parish in 2015.
>
> This year, Bishop Wall has once again demonstrated his upside- down, skewed priorities by postponing eight healing services for clergy abuse survivors that were mandated by the terms of the diocese's Chapter 11 reorganization.

In November 2017, Hardin-Burrola invited me to return to the Gallup area and attend one of the healing services, 'to see how the bishop reads from his notebook in a monotone voice.'[828] I attended a service in Shiprock, New Mexico, in the Navajo Nation, where the service consisted of Bishop Wall and a local priest reading prepared statements, some singing of religious hymns, and scripted prayer. After the service, the bishop was available in a small room at Christ the King Parish for people to speak with him privately. I met with him once there were no others waiting for his time, and after disclosing that I was a researcher, asked if he would agree to an interview with me. He agreed, but his office did not respond to emails or calls seeking to set up a time for that interview.

The Gallup Independent published an editorial on 20 April 2018, reflecting on the healing services 'held at nearly 40 Catholic parishes across the diocese in Arizona and New Mexico.'[829] It criticised Wall for offering religious services rather than a 'forum/discussion during his visit,' as had been required by the plan.[830] I had noted the religiosity of the service and lack of opportunity for public discussion in my visit to Shiprock, but was not sure how it would be received by others. The editorial continued,

> Before we offer further criticism, let us be clear: The healing services were helpful for some survivors of clergy sex abuse. Those individuals have said they found the scriptural readings and the bishop's words to be healing. They have appreciated speaking with the bishop after the service, and they found him to act responsive and caring.
>
> However, the services have only provided healing for a small number of abuse survivors. The bishop and his staff have failed many other abuse survivors, the Catholic laity and the general public through their lack of courage, shortage of empathy and pervasive incompetence. Many abuse survivors never attended a healing service because they can't emotionally bring themselves to step

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One service in February was postponed for more than a year because of an "oversight" by the bishop's staff, which scheduled the service on the same evening as the bishop's Mardi Gras fundraiser. The fundraising party was a top priority, and clergy abuse survivors were a low priority.

Two more healing services in July were pushed back to 2018 so Bishop Wall could make an appearance at the national Tekakwitha Conference for Native American Catholics. That was another scheduling oversight by the bishop's staff. According to the bishop's spokeswoman, Bishop Wall needed to attend the conference because he "has the responsibility of listening to the voices of Indigenous Catholics" and the conference "provides Native People with a major platform to voice their needs and concerns on a national scale." So once again, Bishop Wall's priorities were clear: a national conference was high priority, clergy abuse survivors were low priority. That decision was also steeped in irony since Bishop Wall is not known for "listening to the voices" and the "needs and concerns" of everyday Catholics in his own diocese, some of whom are Native American.

[828] Email from Elizabeth Hardin-Burrola to Meredith Edelman dated 8 November 2017, 'Re: Gallup Independent Nov. 2, 2017 Editorial: Hard lessons, truths for Sisters of the Blessed Sacrament.'
[829] Editorial, 'Diocese's healing services reflect a slipshod bishop,' *The Gallup Independent,* 20 April 2018.
[830] Ibid.

> through the doors of a Catholic Church. Others refused to attend because they are still angry over the many years the diocese fought abuse survivors with hardball legal tactics. Most of the Catholic laity and the general public never attended because they realized no real answers about clergy sex abuse would be forthcoming.[831]

This editorial suggests that for some in the diocese, the healing services were seen as a requirement of a court, rather than a reflection of genuine regret and taking of accountability.

Thus, non-monetary agreements in plans, while they carry the trappings of the kind of remedy many victims are seeking, may not carry the moral condemnation that comes with a criminal conviction or a determination of liability in a civil action. In Gallup, the judge allowed victims to speak at the confirmation hearing, where they spoke of the pain and harm that had come their way because of being abused and then ignored by priests and leaders in the diocese.[832] But the judge's rulings confirming the plan and closing the case centred on whether or not the requirements of the Bankruptcy Code had been met and did not mention the underlying reason for the bankruptcy filing. In his orders, the judge did not provide any reprobation of the Diocese's behaviour over decades during which hundreds of children were abused.

V. PROBLEMS WITH CHAPTER 11 AS A RESPONSE TO CLERICAL CHILD SEXUAL ABUSE

This chapter has discussed ways that the Chapter 11 process might be described as incipiently responsive insofar as: (1) its theoretical and normative basis is purposive, rather than rule-centric, (2) the applicable doctrinal and procedural rules have the effect of broadening the field of participants and facilitating negotiated, rather than imposed, resolutions.[833] Empowering victims by their positioning as fulcrum drives forward possibilities for a substantive focus on better outcomes for victims. This can happen by pushing aside procedural delays, simplifying and marshalling resources in ways that privilege substantive problem-solving expenditures over procedural expenditures, and especially by sidelining legal game playing of the worst kinds. Importantly, it allows victims a larger measure of control over the outcome than is available in canon or tort law. This is not to say that Chapter 11 meets all of the legitimate justice interests of stakeholders, or that it can be justly described as fully responsive. Plaintiffs' lawyers and Survivor advocates are sharply

[831] Ibid.
[832] Hardin-Burrola (n 391).
[833] Nonet and Selznick (n 125), 97–9.

critical of the Chapter 11 process as it has been implemented in many of the Diocesan Debtor cases.[834] In other words, 'incipiently,' is doing a fair amount of work.

One of the more problematic aspects is the treatment of victims who do not file claims in the bankruptcy case. In Chapter 11 cases, courts establish a 'bar date' before which time claims against the estate arising from any time before the 'petition date' (on which day the bankruptcy case was filed) must be filed or be barred from being enforced.[835] Mass tort cases sometimes have provisions for people who will at some point have a claim based on event that happened pre-petition, but which for whatever reason, cannot be submitted before the bar date. In some of the Diocesan Debtor cases, people who were abused pre-petition, but whose claims are tolled or otherwise cannot be brought before the bar date, are represented by a future claims representative. Despite having representation, however, even in the best of cases, those victims who do not file claims by the bar date will not be entitled to the same recoveries as that those who do.

Lawyers who represent dioceses might argue that the process of filing a claim in bankruptcy is much simpler and less emotionally fraught than bringing a lawsuit. As the claim form does not require the claimant to detail the abuse but only the existence of a claim, any required live testimony is before a limited audience, and the adjudication process is significantly less formal, there is some truth to this. That being said, the bar date period is relatively short, and the diocese is unlikely to be aware of all the people who have a claim against it, and so giving notice and informing people of what they need to do if they have a claim is difficult. Bankruptcy courts usually resolve this problem by requiring the posting of advertisements in newspapers, but it is likely that some percentage of victims are never made

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[834] See, eg Corina Knoll, 'He Sued Over a Priest's Abuse. Then the Diocese Filed for Bankruptcy', *The New York Times* (online, 26 September, 2019) (quoting a representative of a nonprofit victims' advocacy group, 'To see institutions now deviously try to make an end run around accountability is just horrifying.'); Elizabeth Hardin-Burrola, 'Diocese of Gallup to File Bankruptcy: Mounting Clergy Sex Abuse Legal Claims Spark Chapter 11 Reorganization,' *Bishop Accountability.org* (Article, 3 September 2013)

> [Attorney Robert] Pastor described the timing of the bishop's letter, less than three weeks from the bishop's scheduled deposition, as "not coincidental."
>
> "We have seen time and time again that Catholic bishops will file bankruptcy to avoid having to answer questions about a systemic and cultural pattern and practice of covering up clergy sexual abuse," he said. "Our clients deserve to hear their Bishop explain under oath why so many pedophile priests were allowed to hurt children even though the bishop knew these priests were a danger.
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> "Chapter 11 bankruptcy was designed to help companies restructure debt," Pastor added. "Bankruptcy was never intended to be a tool to help Catholic Bishops hide other perpetrators or the knowledge it had about pedophile priests working in the diocese."

[835] See Federal Rules of Bankruptcy Procedure, 3003(c)(3): 'Time for Filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.'

aware of the requirement that they file a claim with the bankruptcy court before the bar date. Even if they are made aware of the bar date, some may not have the material resources or capacity to obtain the correct form, fill it out properly, and return it to the bankruptcy court before the bar date. While bankruptcy makes some of the logistics of seeking compensation easier than other systems, it does not eliminate logistical difficulties. And the timing of the bar date makes compliance with logistical requirements especially critical.

As discussed in previous chapters, it often takes decades for victims of child sexual abuse to recognize the harm that has befallen them, to understand that the harm relates to the sexual abuse they experienced as a child, or even to remember that they were, indeed, abused as children. Given what we know about the nature of child sexual abuse, we can assume that not all victims who might hold claims have come forward in the Diocesan Debtor cases. Some of these are people who were abused and who, for whatever reason, have not been able to come forward. Others are aware that they were abused but not aware that they had a claim, or not aware of the bankruptcy filing, or not aware of how the bankruptcy filing affected their rights.

Another problem with bankruptcy is the perception people have that Chapter 11 is a way to avoid accountability.[836] This perception is important in part because it shapes the attitudes stakeholders bring with them to negotiate, public perception of stakeholders, and thus its potential for resolving social problems. We have seen that bankruptcy's role in society is to absolve debtors of their debt, and that this concept is deeply linked to ideas about forgiveness of sins. The Catholic Church believes in forgiveness of sins. But when Catholic dioceses seek to access this forgiveness, there is something perverse about the image it creates, which reinforces the perception of the Church seeking to avoid accountability. This is especially true because the real sin underlying the bankruptcy filing is the rape of children by men who the Church and their families taught them were holy. This is a grave harm — and avoiding responsibility for that is perverse. Bankruptcy is designed to absolve people of financial debt, not the shame of having deeply wounded some of society's most vulnerable. The initial reactions that ran as opinion pieces in newspapers, criticizing dioceses for filing bankruptcy are understandable in this light.

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[836] See, e.g. Knoll (n 835),

> For Mr. Saracino, who is suing the Rochester diocese, the Catholic Church can go no lower than evading transparency, which is, he said, the ultimate goal of bankruptcy.
>
> "The thing they squander most in doing this is their moral authority," he said. "They have none anymore."

In not providing a mechanism for blame, is Chapter 11 making victims, and the harms that have come to them, invisible? The extent to which victims, and to a much lesser extent, parishioners, are made invisible in a Diocesan Debtor case may indicate whether the cases contribute to a sense that the dioceses have been publicly admonished or blamed for harm to victims. This chapter has presented evidence that victims in a Diocesan Debtor case have a degree of leverage in negotiating and ultimately approving a plan of reorganisation, but Gallup presents a cautionary tale of how bad faith on the part of the debtor can impede the incipient responsiveness of the legal system. Colton and Berkovitch point to reticence to speak publicly about taboo subjects in the diocese as an unfortunate enabling of the diocese's bad faith, as those who speak out are sanctioned through the loss of friends and family members, rather than increasing pressure on the Church.[837]

Although bankruptcy is not typically intended as a mechanism for doing justice, in the Diocesan Debtor cases it has been asked to perform that role. It is fair, then, to ask what justice looks like in the Diocesan Debtor cases. As discussed above, the other bankruptcies resulting from mass torts have shown it can allow for a relatively fair and simple system of dispensing compensation to victims. In other mass torts, however, the underlying tort is relatively simple — it is a product or material that has done physical damage to victims. There may have been emotional or financial consequences, but the underlying harm in the Diocesan Debtor cases is something different. Sexual abuse of children by priests is damaging on a physical, emotional, spiritual, and social level that bishops, theologians, and other Church leaders do not deny. Victims need for an acknowledgement of harm and a social condemnation of the Church organisations is understandable.

Accordingly, despite the evidence that the process is more inclusive than tort proceedings, that its purposive nature may hold promise for tangible outcomes that seem to provide more justice than civil litigation does, Chapter 11 still fails to hold dioceses accountable in significant ways. Bankruptcy law may be pragmatically driven toward substantive justice, but it is hardly emotionally intelligent justice that attends much better to victim vindication than repressive canon law. This system designed to forgive financial debt is not necessarily well equipped to apportion moral condemnation. Forgiveness is reconfigured from a moral emotion to a financial fact. A worthy future research project would be to evaluate the extent to which sincerity matters for non-monetary provisions like apologies or agreed to in plans of reorganisation. Heather Strang's research, for example,

[837] 'Dark Canyon Episode Nine: The Diocese of Gallup' (n 390).

shows that apology only matters when it is perceived as 'sincere apology'.[838] A forced apology is likely to be perceived as less sincere than a gift of apology that is volunteered out of a sense of remorse. Masses of healing, for example, may not contribute as much to true healing when victims know they are compelled by order of a bankruptcy court, or when they are conducted in ways that undermine victim healing. Although the process may have facilitated agreement on a plan, it may have done so at the cost of victims having their day in court, of hearing an authority condemn the actions of a wrongdoer — for moral accountability.

VI. RESPONSIVE LAW AND CHAPTER 11

The Diocesan Debtor cases illustrate both the promise and weaknesses of Chapter 11 as a potentially responsive legal system. They provide tangible recoveries and results for victims as compared to tort. It is easier to participate as a creditor in a bankruptcy case than it is to bring a tort claims as a plaintiff. As a group, victims have leverage to secure both financial and non-monetary awards and severing of interests between insurance company and diocese allows for multi-party negotiation and more creative settlement arrangements. However, the nearly exclusive focus on economic concerns means that bankruptcy courts are ill-equipped to address a party's moral accountability, leaving many believing the process allows dioceses to avoid meaningful justice. As discussed above, I argue that Chapter 11's promise comes from bankruptcy's theoretical proceduralism and inclusive, negotiated process for decision-making, which resembles Selznick and Nonet's description of responsive law. This concluding section will consider a recent call for a relational approach to bankruptcy in light of the weaknesses that the Diocesan Debtor cases make visible, and how this impacts my assessment of Chapter 11 as incipiently responsive.

In the Diocesan Debtor cases, considering a relational perspective means asking whether victims agreed to the terms of the plans primarily because they knew they represented the best possible terms given the limits that powerful actors had put into place, or if they actually found the terms to be fair, or at least a reasonable compromise. In the Milwaukee case, many victims and their lawyers sharply criticised the plan they agreed to, saying that the diocese had acted in bad faith and that they agreed to the plan only because the

[838] Heather Strang and Lawrence W Sherman, 'The Practice of Restorative Justice: Repairing the Harm: Victims and Restorative Justice,' (2003) *Utah Law Review*, 15.

other options would have been worse.[839] If, as Lipson argues, bankruptcy judges 'have a special duty [to] not approve contracts in bankruptcy unless they are confident that the contracts are the products of reasonably fair and efficient bargaining processes', should judges reject plans when approving parties did so reluctantly?[840]

Because the bankruptcy judges are called to determine whether or not the plan meets the criteria of the Bankruptcy Code, and are not asked to consider whether or not the plan is substantively fair or just, plans like those in Gallup are more likely when the relationship between the diocese and victims is adversarial. Gaming the law remains a profound risk in repressive, autonomous and responsive legal arenas alike, as does emotionally unintelligent justice. In Gallup, Hardin-Burrola quoted a victim and member of the creditors' committee speaking at the confirmation hearing, who expressed her disappointment that Gallup diocese had not agreed to release personnel records despite her reluctant assent to the plan: 'Bishop Wall, the first time we met, I told you I forgave Brother Mark because it was the right thing to do. And I asked you to do the right thing. I'm still waiting.'[841]

Considering a relational perspective means considering all of the relationships relevant to the conclusion of a case. As discussed above, a number of professionals worked on multiple Diocesan Debtor cases, including Pachulski Stang as counsel for the committees of creditors, a number of experienced arbitrators and former judges,[842] and law firms for the dioceses. In some cases, including Tucson and Gallup, participants commented that existing

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[839] Marie Rohde, 'Judge Approves Milwaukee Archdiocese's Plan to Emerge from Bankruptcy' *National Catholic Reporter* (online, 10 November 2015) <https://www.ncronline.org/news/accountability/judge-approves-milwaukee-archdioceses-plan-emerge-bankruptcy>.
Clearly, many of the survivors who filed claims with the archdiocese were unhappy with the settlement. One of the men who were abused as a child, who wished to remain anonymous, put it this way: "A lot of people think it was about money. It was about justice and there was not justice in this courtroom."

[840] Lipson (n 732).

[841] Elizabeth Hardin-Burrola, 'Bishop Apologizes: Bankruptcy Judge Confirms Reorganization Plan' *Bishop Accountability.org*, (Article, 22 June 2016).

[842] Many of the judges and other professionals working on Diocesan Debtor cases are among the most highly respected in the field. Hon Gregg Zive, for example, was for a long time the only bankruptcy judge in Reno, Nevada, and only the judge in Nevada to whom a large Chapter 11 case would be assigned. There was a saying that I heard repeated at conferences, social gatherings, and in strategy sessions, that if a Chapter 11 case could be filed in Nevada, it would be malpractice to allow a client to file in another state. Judge Zive was highly respected because he understood the needs of business (i.e. was flexible enough to the business realities facing a school bus manufacturing company that he confirmed a plan fewer than three days after the bankruptcy filing. He was known to be fair, and for explaining his reasoning in well-written and helpful orders. Lipson, who points to judges in the Southern District of New York and the District of Delaware as having the most knowledge about corporate restructuring, might have added Judge Zive to that list.

relationships between professionals helped facilitate a consensual settlement.[843] Grossman et al, drawing on Galanter, point out that being a repeat player gives tort defendants structural advantages.[844] Since tort defendants are more likely to be wealthy companies, this structural advantage, like others discussed in Chapter 6, privileges the already powerful. But social orders are not entirely determinative, as chapter 11 demonstrates.

In a typical chapter 11 case, powerful interests may hold interests in any of the potential positions. In any given case, 'haves' may be debtors, creditors, lenders, suppliers, professionals, or other stakeholders. With skilled counsel, deep knowledge of context and strategy, and depending on the situation, almost any of position can have points of leverage. Built-in flexibility rather than structural advantages benefits all stakeholders – and allow for dynamic and creative possibilities. The chapter 11 bankruptcy bar is relatively small, increasing the effect of repeat professionals plays in the Diocesan Debtor cases, and demonstrating the porous boundaries between legal and social orders. Dioceses, victims, and insurers all have access to counsel with specific knowledge about the relevant issues and who have developed relationships with each other as professionals. These relationships are part of the real law of bankruptcy, as it is practiced in Gallup and elsewhere.

Deliberative democrats point to the benefits of having representative groups of citizens participate in decision-making processes.[845] Participation is a notable difference between bankruptcy and class actions or tort actions involving the joinder of multiple plaintiffs through other procedural means. The shifts in leverage that accompany the shifts from a dual-party adversarial system to a multi-party negotiation and the unique positioning of a debtor-funded committee of creditors allow for a deliberative process that may be bankruptcy's most useful feature. When participating in consensus-building processes at my Quaker college, it was explained that the consensus process gave those with the strongest interest leverage in decision-making. Parties who cared the most would be the most likely to

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[843] Interviews with professionals on file with author; Arthur H Rotstein, 'Tucson Diocese Bankruptcy Effectively over a Year Later' *Bishop Accountability.org* (Article, 18 September 2005), quoting Judge James M Marlar,

> The attorneys involved were all experienced bankruptcy lawyers who knew, liked and respected each other an their legal abilities, . . . [a]s a consequence, there was no unnecessary "posturing" and they quickly identified the legal problems that needed to be solved, and worked toward resolving them by consent, rather than by litigation.'; quoting lawyer for sexual abuse victims who had believed the bankruptcy filing, 'was just another scam to defraud the victims, I never thought it could be resolved as amicably as it's being resolved today', saying of Judge Marlar, '[h]e treated the victims with complete respect in the courtroom, and spent more time than I've ever see a judge spent, trying to address the concerns of the victims, whether they were legally valid or not.

[844] Grossman, Kritzer, and Macaulay (n 739).
[845] Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2017).

hold out for what they want. By contrast, a feature of autonomous systems is that the parties with power tend to have leverage. Responsive law should afford leverage according to interest, and a deliberative process can facilitate that. Flexibility and a purposive dispute-resolution focus can serve the interests of 'have-nots' when their measure of influence is allocated according to what they are owed, rather than by what they have.

Diocesan Debtor cases are able to bring parties with cognisable legal claims to a point of settling their disputes but doing so has meant that normative and social goals have not been very visible through the process. There is still inequity between victims, as bankruptcy law, like other legal systems, is not separate from but part of inequitable social orders. The Diocese of Gallup's bankruptcy case demonstrates how the interconnectedness of legal and social orders can enable organisations to leverage embeddedness of protections for religious organisations in law as well as religiosity and respect for religious leaders in social orders to avoid public forms of accountability. Questions of culpability and shame are not central aspects of the settlement. Accordingly, the Diocesan Debtor cases are able to highlight interesting ways that shifting leverage and interests can help resolve apparently intractable problems, showing how a purposive approach has advantages for a broad swathe of stakeholders despite complexity of factual circumstances and legal issues to be resolved.[846] That being said, a focus on resolving legal disputes rather than addressing normative concerns can come at the cost of rendering the underlying problems invisible.

[846] Nonet and Selznick (n 125), 90–1, citing Max Weber, 'Politics as a Vocation,' in H H Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Oxford University Press,1946) 77.

> Purposive law contributes to civility because it is informed by an 'ethic of responsibility' rather than an 'ethic of ultimate ends.' In the latter 'the believer . . . feels 'responsible' only for seeing to it that the flame of pure intentions is not quenched. But in the ethic of responsibility 'one has to give an account of the foreseeable results of one's actions,' and hence to consider multiple interests and competing values. Thus ideology is a persistent threat to civility, for it undermines purposive and responsible thinking. Ideologues refuse to recognize the limited and partial nature of their perspective; they thereby encourage divisiveness and frustrate dialogue. The alternative to ideology is a cognitive style that narrows issues, bridges differences, and respects the complexity and variability of factual circumstances.

CHAPTER EIGHT: THE ROYAL COMMISSION

I. INTRODUCTION

On 16 February, 2016, Australian comedian Tim Minchin posted a song online.[847] The song bluntly, comically, and somewhat crudely calls for Cardinal Pell to return to Australia to appear in person at the Ballarat Hearing, and while calling Pell a 'goddamn coward,' and expressing disbelief in Pell's claims of ignorance about Ridsdale's abuse of children as well as belief, support, and admiration for victims.

> Couldn't you see what was under your nose, Georgie
> Back in '73 when you were living with Gerry?
> Is it true that you knew but you chose to ignore
> Or did you actively try to keep it buried?
> And years later, when survivors
> Despite their shame and their fear
> Stood up to tell their stories
> You spent year after year
> Working hard to protect the church's assets
> I mean, with all dude respect, dude
> I think you're scum![848]

The song was published after the Royal Commission determined to allow Pell to appear via video link from Rome, where he was the Prefect of the Secretariat for the Economy, the third highest role in Catholic hierarchy.[849]

Pell had submitted evidence that a medical condition prevented him from flying, and although counsel appearing for victims noted the medical condition was relatively common and doubted the veracity of claims flying was a risk to Pell's health, the 'Commissioners [were] satisfied' that giving evidence by video link was acceptable.[850] Minchin's 'pitch-perfect protest song' evidenced and channelled the Australian public's anger with the Catholic Church and Cardinal Pell as a symbol of the Church and its leadership.[851] It also served as a demonstration of the efficacy of the Royal Commission in shaping the public narrative of clerical child sexual abuse, and the power of that narrative for victims. The song was linked to an online fundraiser. In six days, the fundraiser collected AUD$203,065, when it was closed

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[847] Tim Minchin, 'Come Home (Cardinal Pell) – Tim Minchin' (YouTube, 16 February 2016) 00:00:00-00:04:49 <https://www.youtube.com/watch?v=EtHOmforqxk>.
[848] Ibid.
[849] 'What is George Pell's Job at the Vatican?' *ABC News* (online, 29 June 2017) <https://www.abc.net.au/news/2017-06-29/what-is-george-pells-job-at-the-vactican/8663256>.
[850] Melissa Davey, 'George Pell Cleared to Give Sex Abuse Royal Commission Evidence by Video Link,' *The Guardian* (online 8 February 2016) <https://www.theguardian.com/australia-news/2016/feb/08/george-pell-cleared-to-give-sex-abuse-royal-commission-evidence-by-video-link>.
[851] Liam Viney, 'Tim Minchin's Come Home Cardinal Pell is a Pitch-Perfect Protest Song,' *The Conversation* (online, 18 February 2016) <https://theconversation.com/tim-minchins-come-home-cardinal-pell-is-a-pitch-perfect-protest-song-54945>.

because it had collected almost thrice the amount required for its purpose of sending a group those who had suffered clerical child sexual abuse in Ballarat to Rome to witness Pell's testimony.[852] Meshel Laurie, an Australian radio personality among the organisers of the fundraiser wrote in an update,

> . . . our support for the survivors has come as a wonderful surprise to so many of them. They've told me repeatedly in the last week that they didn't think we in the wider community cared about them. They thought we didn't want to know about what happened to them, but your donations changed that. You've made them feel cared for and like what happened to them mattered to all of us. You've genuinely changed these people's lives. Never forget that.[853]

This song and the fundraiser it publicised was a critical moment that encapsulates the Royal Commission's power to shape the narrative about clerical child sexual abuse in Ballarat and in the broader Australian community, resulting in the shifting of public support toward victims and the project of the Royal Commission itself.

Just as previous chapters considered events involving the Diocese of Gallup and the Diocese of Ballarat, but also events in other dioceses that help shed light on legal processes, this chapter will attend to the Royal Commission's investigation into child sexual abuse in the Diocese of Ballarat, but will also consider the Royal Commission's work more generally, in order to consider the extent to which it can be described as repressive, autonomous, or responsive. As will be discussed, the Royal Commission's work was empathetic toward the powerless, active and sustained in listening and responding to their claims for justice. It also had clear practical benefits – changes to law, policy, regulation, and the products of a well-funded and expert-led research agenda that shapes understanding of child sexual abuse across discipline, context, and perspective. I will also discuss the ways in which the Royal Commission falls short of achieving substantive justice for victims, ultimately determining that it is quasi, rather than fully, responsive.

The next section will consider the purposes of royal commissions generally in Australian society, as well as this specific Royal Commission. It will discuss what those who called for it were it hoping it would do, how the terms of reference defined its scope and aims while giving it the flexibility that allows it to be purposive, and how the role that royal commissions play in Australian legal culture enable them to shape public narratives. Section III, on doctrine and procedure, will consider the inquiry's coercive powers, and how these powers to compel disclosures and testimony demonstrate a unique capacity to provide

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[852] Michelle Nicol, 'Send Ballarat Survivors to Rome' (gofundme, 17 March 1016) <https://www.gofundme.com/f/sendballarattorome>.
[853] Ibid, update by Meshel Laurie, dated 20 February, 2016.

vindication and avoid the embeddedness of special protections for the Church in other legal systems. Section IV will discuss procedure used in the Royal Commission and how the purposive approach taken by commissioners was able to overcome many of the logistical problems that impacted victims being able to tell their stories and gain a sense that they had been heard, believed, and validated. Despite the vindication the Royal Commission provides, however, as will be discussed in section V, the Royal Commission's power is held by the Commissioners, who ultimately issue recommendations for policymakers and other powerful entities. Thus, despite the Royal Commission's effectiveness in many respects, victims themselves had no decision-making power. Their voices were heard because commissioners chose to hear them, not because their consent and participation was required within the process. Without stakeholder participation in decision-making, or the power to make specific determinations about individual or organisational accountability, the Royal Commission cannot be described as fully responsive. That being said, because the commissioners chose to listen to victims, the significant practical outcomes benefitting victims or improving practices to prevent future abuse or respond better to future report demonstrate the value of the Royal Commission's quasi-responsive approach. We will see that the Royal Commission's broad remit is key to its responsiveness, despite the weaknesses discussed.

This chapter will conclude with reflections on the Royal Commission's underlying purposes of producing knowledge about the problem of CSA in institutional settings, deliberate inclusion of a variety of voices, and flexibility of procedures define its general character as quasi-responsive law. While the commission itself did not make final determinations about the rights and obligations of stakeholders in individual cases, and had limited powers to put into place their recommendations, its strong power to investigate and purposive character demonstrate how a responsive approach may be able to produce substantive justice, even as the limits to its authority detract from its character as responsive. Furthermore, the Australian belief in the system create a context in which the Royal Commission was capable of altering the public narrative about the problems it considered, evidencing the co-constitutive relationship between legal and social orders.

II. THEORY AND PURPOSE OF ROYAL COMMISSIONS AND THE ROYAL COMMISSION

A. *Royal Commission Authorizing Legislation*

'Royal Commissions are special advisory and investigatory bodies found in Westminster democracies.'[854] In Australia, the *Royal Commissions Act 1902*[855] provides that the Governor General of Australia may issue letters patent in the name of the monarch, directing and authorizing the establishment of an independent commission 'which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.'[856] Royal commissions in Australia are temporary, ad hoc 'instruments of investigation of executive government,'[857] appointed and paid for by government, and commissioned to perform specific tasks. Their 'primary function,' Katie Wright explains, 'is widely acknowledged as learning lessons from past events to inform the future.'[858]

Nicholas Aroney explains that, in general, inquiries like royal commissions will be primarily either inquisitorial, investigative or advisory, although some inquiries have elements of all three.[859] The letters patent issued upon their appointment instruct the commission on the matters about which the government has authorized it to investigate and report. As advisory bodies, royal commissions serve to 'marshal the facts and data needed for soundly based government decision-making.'[860] Since the growth of administrative and other government agencies providing a permanent source of data on which most governing relies, however, royal commissions have frequently served to 'provide accountability, to allow wide public participation and to enrich the process of public policymaking.[861]

Royal commissions, as compared to other public inquires in Australia, are less frequent[862] and are generally reserved for the most important social and political concerns. The are considered Australia's premier investigative mechanism, and have a reputation as

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[854] Scott Prasser, 'When Should Royal Commissions be Appointed?' (2005) *Public Administration Today* 57, 57.
[855] Although states and territories in Australia, as well as the Commonwealth government, have legislation providing for royal commissions, for purposes of this discussion, references to royal commissions, except where specifically noted, will refer only to those appointed by the Commonwealth government under the *Royal Commissions Act 1902*.
[856] *Royal Commissions Act 1902*.
[857] Susan Pascoe, 'The 2009 Victorian Bushfires Royal Commission: Lessons for the Conduct of Inquiries in Australia' The Australian Journal of Public Administration, vol. 69, no. 4, pp. 392–400
[858] Wright (n 188), 11.
[859] Nicholas Aroney, 'The constitutional first principles of royal commissions,' in Scott Prasser and Helen Tracey (eds), *Royal Commissions & Public Inquiries: Practice & Potential*, (Connor Court Publishing, 2014)
[860] Scott Prasser and Helen Tracey, 'History, trends and key issues—the story so far . . .' Scott Prasser and Helen Tracey (eds), *Royal Commissions & Public Inquiries: Practice & Potential*, (Connor Court Publishing, 2014), 5.
[861] Ibid.
[862] Ibid.

independent, rigorous, and effective.[863] Public servant and Member of the Order of Australia Susan Pascoe, writes that,

> [t]he establishment of a royal commission attests to the gravity of the subject as governments reserve this elevated mode of public inquiry for the most weighty matters. Royal commissions carry the expectation of independence and rigorous inquiry and attract high levels of media and community interest. This level of independence renders royal commissions risk for government as they cannot be controlled once they are created.[864]

Not every important issue sees unanimous support for a royal commission, however. For example, the Morrison government announced a royal commission into the bushfires of summer 2019 and 2020[865] despite resistance to it from fire and ecology experts. One such expert, Kevin Tolhurst wrote that a new royal commission was not needed after 57 previous 'formal public inquiries, reviews and royal commissions related to bushfires and fire management,' many of which produced recommendations that have yet to be implemented.[866] He also noted the expense in time and resources that royal commissions require, and suggested that 'money spent on a federal royal commission could be better used to deal with bushfire management across the country.'[867]

Less than a decade earlier, such concerns did not stop advocates for the Royal Commission although there had been a few previous inquiries into child maltreatment in related contexts. Lawyer Judy Courtin, another visible advocate for victims of sexual abuse by Catholic clergy in Australia, demonstrated her faith in royal commissions when she criticized the Victorian government in 2012 for appointing a parliamentary inquiry, rather than a royal commission.

> Any inquiry that is to comprehensively deal with the Catholic Church must parallel its wealth and its legalist, adversarial and arrogant modus operandi. Heads need to roll. Prosecutions are needed. The Church must be held accountable for the decades of crimes and concealment, and for the premature

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[863] Janet Ransley, 'Public Inquiries into Political Wrongdoing,' Scott Prasser and Helen Tracey (eds), *Royal Commissions & Public Inquiries: Practice & Potential*, (Connor Court Publishing, 2014).
[864] Pascoe (n 857) (citing Prasser (n 854)).
[865] Stephanie Dalzell, 'Royal commission into bushfire crisis to examine climate change, harmonised approach to hazard reduction,' *ABC News* 6 February 2020, <https://www.abc.net.au/news/2020-02-06/royal-commission-into-the-bushfire-crisis-to-examine-harmonised/11934484>

> While royal commissions can sometimes run for years, the Prime Minister wants this one completed by the end of August. He has kept the details shrouded in secret, with Labor leader Anthony Albanese arguing the Opposition should have been consulted as a matter of "common courtesy". The royal commission will be headed by former chief of the Defence Force Mark Binskin.

[866] Kevin Tolhurst, 'We have already had countless bushfire inquiries. What good will it do to have another?' *The Conversation* (online 16 January 2020) <https://theconversation.com/we-have-already-had-countless-bushfire-inquiries-what-good-will-it-do-to-have-another-129896>
[867] Ibid.

> deaths and suicides. That victims and their families need and deserve a well-resourced, uncompromising, forensically sound Royal Commission, is not negotiable.[868]

In Courtin's telling, only a royal commission has the authority to overcome the centuries-old embeddedness of privilege for the Church in law, a mere parliamentary inquiry not having sufficient authority.

Hetty Johnston, another Australian child protection advocate whose work helped bring about the Royal Commission, demonstrated her belief in the power of royal commissions when she called for one into how the family law system and the Australian family courts might better serve children. Her call for such a commission is rooted in her belief that it would provide 'the fastest and most effective protection to thousands of Australian children who remain at imminent risk,' noting that '[a] royal commission was the only legal framework capable of overcoming significant hurdles necessary to properly investigate failings.'[869]

B. *The Royal Commission: Terms of Reference and Purpose*

Johnston and Courtin were part of the larger movement of Survivors using the discourse of children's rights to critique past and contemporary practices relevant to children in schools, churches, care facilities, community groups, and family life. This movement was discussed in Chapters 1 and 6 in relation to advocacy for changes in law and public interest in issues of child protection. The history of the advocacy leading to the Royal Commission brings to the fore the diversity within the broader movement of survivors. Katie Wright and Shurlee Swain describe two main streams of activism: 'one focused on the historical abuse of children in out-of-home residential 'care', the other on clerical sexual abuse in community settings.'[870]

Prime Minister Gillard announced the Royal Commission on 12 November 2012, and the terms of reference were issued on 11 January 2013.[871] This happened after, and perhaps because of, a call for a royal commission by the *Newcastle Herald* and an appearance on a popular television program from then Detective Chief Inspector Peter Fox. Both the *Herald*

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[868] Courtin (n 621).
[869] SBS News, 'Child Protection Campaigner Hits Out at PM' *SBS News* (online 21 July 2017) <https://www.sbs.com.au/news/child-protection-campaigner-hits-out-at-pm>.
[870] Katie Wright and Shurlee Swain, 'Speaking the Unspeakable, Naming the Unnameable: The Royal Commission into Institutional Responses to Child Sexual Abuse' (2018) 42(2) *Journal of Australian Studies* 139.
[871] Royal Commission into Institutional Responses to Child Sexual Abuse, Terms of Reference, available at https://www.childabuseroyalcommission.gov.au/terms-reference.

call and Fox's appearance centred on clerical sexual abuse in community settings rather than abuse of children in residential 'care' facilities.[872] The call and appearance were both linked to media attention to rates of suicide among victims of sexual abuse by Catholic priests, and specifically to John Pirona, the son of a prominent solicitor and activist in the Survivor movement who was abused by a priest in the Diocese of Maitland-Newcastle.[873] This context may have contributed to the terms of reference being restricted to investigating sexual abuse, as opposed to child maltreatment more broadly, while broadening the scope of institutions being investigated from those 'caring' for indigent, immigrant, Indigenous, or otherwise low status children to all institutions interacting with children at all levels of the social order.

Frank Golding calls attention to the disappointment among those who were brought up in 'institutional out-of-home Care (OOHC) in Australia,'[874] when the Royal Commission's terms of reference were issued with a narrow focus on sexual abuse. Care leavers, whose advocacy and efforts were critical to the eventuation of the Royal Commission, had hoped that the investigation would consider not just sexual abuse, but also 'the physical suffering, the emotional starvation and the cold absence of love, of tenderness, of care,' for which Prime Minister Rudd had apologized in 2009.[875] Indeed, those hopes were raised when Prime Minister Gillard announced the Royal Commission. Before the terms of reference, she specifically referenced Rudd's apology and linked it to the initiation of the Royal Commission.[876]

As will be discussed later in this chapter, Golding, Kathleen Daly, and others later critiqued the Royal Commission and the national redress scheme for unsatisfactory results for

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[872] Wright and Swain (n 870), 139-152

[873] Joanne McCarthy, 'John Pirona's Suicide in 2012 Was an "Important Cog" that Led to a Royal Commission, Said His Father,' *Newcastle Herald* (online, 20 October 2018) <https://www.newcastleherald.com.au/story/5706527/too-much-pain-the-family-tragedy-behind-a-royal-commission-and-national-apology>.

[874] Golding, Frank. "'Problems with Records and Recordkeeping Practices Are Not Confined to the Past": A Challenge from the Royal Commission into Institutional Responses to Child Sexual Abuse." Archival Science, 2019, 1-19 (explaining that '[t]he term "Care" is problematic; hence, it is often capitalized (as in this paper) or used in ironic quotation marks.'); Wright and Swain (n 870),

> The groundwork for a royal commission had been laid through decades of survivor activism, a long succession of previous Australian inquiries into institutional child abuse and a growing number of inquiries internationally. While the explosive allegations, by a senior police detective, of Catholic Church cover-up was the immediate catalyst, this built on ongoing pressure from two distinct victim groups: people abused in institutional "care" and people exposed to sexual predators in other non-residential community settings, primarily churches.

[875] Ibid.

[876] Ibid.

care leavers and others with lower social status as children.[877] The disappointment expressed is indicative of the hope that had been placed in the Royal Commission and reflective of the importance placed on royal commissions in Australians' legal consciousness.[878] Golding's account of how organisations like the Care Leavers Australia Network (CLAN) lobbied intensively for the Royal Commission after receiving Rudd's apology similarly speaks to their belief in the significance of royal commissions in early 21st century Australian society.[879]

The terms of reference directed the Royal Commission to examine how institutions had responded to child sexual abuse. It was charged with investigating systemic failures and with making recommendations for policy, practice, and legal reform. It was also tasked with making recommendations as to how the effects of abuse could be alleviated and how victims could receive justice. As with most public inquiries, it was at once concerned with both the past and the future. A central focus was learning lessons from people's experiences of institutional child sexual abuse and institutional responses to allegations or instances of abuse, and improving the lives of children in the future. The common refrain, articulated by Gillard when announcing the inquiry and by many others subsequently, was that its chief purpose was to ensure that what happened to children in the past could never be allowed to happen again.[880] The co-constitutive relationship between legal and social orders is made clear here, as a social movement critical of existing law and practice led the appointment of the Royal Commission, which sought to learn from people's stories, the telling of which shaped the national narrative, increasing the power of the social movement, and as will be discussed, resulted in significant changes to doctrinal law, regulation, and practice.

In its *Interim Report*, delivered in 2014, the Royal Commission explained how it interpreted its terms of reference and explained what the commissioners had come to believe was necessary to complete their task.[881] Specifically, in order to 'bear witness to the abuse

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[877] Kathleen Daly, 'Inequalities of Redress: Australia's National Redress Scheme for Institutional Abuse of Children' (2018) 42(2) *Journal of Australian Studies* 204. The term 'care leavers' generally refers to those who had been raised in out of home 'care' facilities of one sort or another.

[878] Frank Golding 'Sexual Abuse as the Core Transgression of Childhood Innocence: Unintended Consequences for Care Leavers' (2018) 42(2) *Journal of Australian Studies*, 191-203 (citations omitted)

> International comparative studies of commissions of inquiries into child abuse show that the Australian Royal Commission is somewhat unusual in two seemingly contradictory ways: its terms of reference restricted its focus to sexual abuse while at the same time obliged it to examine a very broad range of institutional types extending far beyond OOHC.

[879] Ibid, 191-203.

[880] Wright and Swain (n 870), 139-152

[881] Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (Commonwealth of Australia, 2014).

and trauma inflicted on children who suffered sexual abuse in an institutional context,' the commissioners saw both public hearings and private sessions as necessary—one a more formal, public affair, aimed at establishing a public record, and the other a private, supportive setting aimed at ensuring as many people as possible testify about their experiences.[882] The Royal Commission identified '[a]n extensive research program that includes roundtables and issues papers' focused on prevention, identification, response, and justice for victims.[883] Among a number of other research reports, the Royal Commission commissioned and funded Swain's project inquiring into the history of Australian inquiries reviewing institutions providing care for children.

Swain described the Royal Commission as being one of a group of inquiries that are 'marked by a shift in focus from the policy makers to the victims whose testimonies constitute the greater part of the evidence.'[884] Earlier inquiries, she found, are best 'understood as part of the process of establishing and then refining the various systems that provided 'care' for children outside their families,' or 'inquiries that respond to a particular crisis, investigating causes and suggesting remedies to ensure that the incident does not occur again,' which she called 'damage control.' Although the Royal Commission was initiated under the same authorising legislation as earlier investigations, its chief purpose — 'to ensure that what happened to children in the past could never be allowed to happen again'[885] — reflects its place as a part of what Jeffrey Olick describes as an age of regret.[886]

> The practices of individualizing accusations of sexual abuse, discrediting witnesses and minimizing reporting in the interests of public morality were successful only while inquiries looked to experts rather than victims for the answers to the problems they were addressing. The inquiries since the late 1980s, which have actively sought survivor testimony, have broken open such silences. While residents of children's institutions had in the past been invited to give evidence before inquiries, their testimony was always corrupted by their status. The shift in focus is linked to the apology movement that has become increasingly evident across the Western world in the aftermath of World War II. Initially a function of recognizing and remembering the

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[882] Ibid.
[883] Ibid.
[884] Shurlee Swain, Royal Commission into Institutional Responses to Child Sexual Abuse. Sydney. Royal Commission into Institutional Responses to Child Sexual Abuse, *History of inquiries reviewing institutions providing care for children* (Commonwealth of Australia, 2014).
[885] "Transcript: Read the PM's Full Statement on the Child Sex Abuse Royal Commission," Newcastle Herald, 12 November 2012, http://www.theherald.com.au/story/969662/transcript-read-the-pms-full-statement-on-the-child-sex-abuse-royalcommission/.
[886] Jeffrey K. Olick, *The Politics of Regret: On Collective Memory and Historical Responsibility* (New York: Routledge, 2007), 12.

> Holocaust, apologies have since spread to the impact of war, racial discrimination and, more recently, social wrongs.[887]

Swain explains the Royal Commission's focus on sexual abuse as a result of high-profile revelations of sexual abuse in inquiries into the Stolen Generations, child migrants, and Forgotten Australians, and growing interest in child sexual abuse as a separate social problem.[888] By the time South Australia and Victoria launched inquiries in the 21st century, child sexual abuse and deaths in care became what Swain called 'the core subjects for investigation.'[889]

The Royal Commission, then, to the extent it is understood as an instrument for reconciliation and large-scale social change, invites comparison to transitional justice processes around the world. An in-depth comparison to transitional justice processes is outside of the scope of this thesis, but it is notable how its purpose is similar to those of legal systems designed specifically for social healing, responding to traumatic events, and attending to harms impacting relatively large portions of a population.[890] Like transitional justice processes, it's purposive nature is a defining feature, called for by the outcry of a survivor movement, and designed to further the goals of substantive justice adopted as its theory of law. This purposive nature is a key factor in my characterisation of the Royal Commission as quasi-responsive, along with its capacity to collect, analyse, make public, and learn from evidence, discussed in more detail in the next section.

III. ROYAL COMMISSION DOCTRINE AND PROCEDURE

A. *Statutory and Typical Powers of a Royal Commission*

Michael Eburn and Stephen Dovers identify three characteristic features of Australian royal commissions. First, despite being called for by the government of the day and having powers established by statute, they are commissioned by the Governor-General in order to foster the perception that they are independent of government.[891] Second, royal commissions

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[887] Swain (n 884), 9-10.
[888] Ibid.
[889] Ibid.
[890] James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10 *International Journal of Transitional Justice*, 332; Michael Salter, 'The transitional space of public inquiries: The case of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse,' (2019) *Australian and New Zealand Journal of Criminology*, 1.

> [P]ublic inquiries are uniquely positioned to act as transitional spaces between the personal and political dimensions of traumatic experience, while recognizing the challenges posed to this space by the contemporary bureaucratic state.

[891] M Eburn and S Dovers 'Learning Lessons from Disasters: Alternatives to Royal Commissions and Other Quasi-Judicial Inquiries'(2015) 74 *Australian Journal of Public Administration*, 495.

enjoy significant coercive authority, including the ability to summon people to appear and testify and produce documents, and the power to compel such appearance and production despite concerns about privilege and self-incrimination.[892] The strength of Australian royal commissions to compel disclosure is notable even among other countries that follow the Westminster model and employ royal commissions.[893] Third, hearings are usually public and witnesses 'may be examined and cross-examined by counsel assisting the commission as well as counsel who have been granted leave to appear to represent the interests of parties who may be affected by the outcome of the inquiry.'[894] Thus, although the practice of royal commissions may appear similar in many respects to the practice of law in other legal systems, its unique capacities separate it from other systems, allowing it to be studied as a system in its own right. For example, whereas most legal systems do not conduct their own research, the public hearings are only the tip of the iceberg of information available to commissioners. The Royal Commission, for example, 'had an extensive policy and research program that drew upon the findings made in public hearings and information from private sessions, as well as generating new evidence through research' and backstage deliberation with experts.[895]

Commentators and experts on public inquiries in the Australian context explain that royal commissions are valued in Australia because of the perception that they are independent and powerful investigatory mechanisms.[896] Janet Ransley points to independence as the 'key criterion' underlying the 'perception that royal commissions . . . are a superior type of investigation.'[897] She goes on to note that permanent investigatory bodies also

> possess considerable, if not superior, powers to ad hoc commissions, as well as the same freedom from adversarial procedure. The real advantage possessed by royal commissions is their independence from government control, and in particular, the public perception of that independence that leads to a legitimacy

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[892] Ibid.

[893] Prasser (n 854), 58

> Importantly, what really distinguishes Australian royal commissions from most other forms of public inquiry and their counterparts in the United Kingdom is their establishment under specific legislation. In Australia nationally, this is the *Royal Commission Act 1902*. Similar legislation exists in each state. Such legislation confers on Australian royal commissions coercive powers to collect and procure information, make witnesses attend hearings and give evidence, even if self-incriminating. By contracts, royal commissions in the United Kingdom are not statuory based and do not have the same coercive investigatory powers.

[894] Eburn and Dovers (n 891).

[895] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 1: Our Inquiry* (Commonwealth of Australia 2017).

[896] See, e.g. Janet Ransley, 'Public inquiries into political wrongdoing' in Scott Prasser and Helen Tracey (eds), *Royal Commissions & Public Inquiries: Practice & Potential*, (Connor Court Publishing, 2014).

[897] Ibid.

> and degree of political support for the work of the commission. This independence is not absolute, and royal commissions are all subject to various forms of outright and subtle pressures from government, ranging from the ability to withdraw the commission or manipulate the terms of reference, to imposing budgetary and other resource constraints. Even more significantly, governments may simply reject or not act on commission recommendations.[898]

Ransley posits that royal commissions can maintain public support, even in an otherwise hostile political climate, if they can maintain a perception of independence. This perception also engenders trust in a sometimes-cynical Australian public, which trust undergirded the calls for a royal commission.

Because royal commissions cannot independently change doctrine or public policy, public perception of independence is important so that royal commissions' findings tend to be believed and their recommendations taken seriously. But trust has two sides: perception of trustworthiness and trustworthiness itself. Independence is a valued characteristic of royal commissions but there is no certainty that the knowledge on an issue so generated will guide the actions of government. Public policy scholar Scott Prasser explains that governments establish royal commissions for 'politically expedient reasons such as to show concern about an issue, give an illusion of action, show responsiveness to a problem, co-opt critics, reduce opposition, delay decision-making and reassert control of the policy agenda.'[899] Royal commissions must then be seen as especially independent and trustworthy in order to overcome any cynicism about their origins. The practice of royal commissions requires they be perceived as above quotidian partisan disputes. This justifies their powers to obtain and test relevant information not being subject to limitation – it gives them the authority to be trustworthy, and to demonstrate their independence.

The *Royal Commissions Act 1902* sets out the powers of Royal Commissions.[900] Among these are the power to acquire any documentary, physical, or testimonial evidence that might exist in Australia under the control of someone subject to Australian law and to require the testimony of any person in Australia. The Act contemplates that royal commissions will appoint counsel to question witnesses appearing before them, and provides that this counsel, and counsel representing parties in interest, 'may, so far as the Commission

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[898] Ibid.
[899] William Budiselik, Frances Crawford, and Donna Chung, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse: Dreaming of Child Safe Organisations?' *Soc. Sci*. 2014, 3, 565-583.
[900] *Royal Commissions Act 1902*.

thinks proper, examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry'.[901]

By bringing to light all relevant evidence the commissioners and staff can identify, giving parties the opportunity to test that evidence in public, and ensuring as many points of view are heard as the commission deems relevant, a royal commission can live up to its reputation as trustworthy and simultaneously establish a narrative of truth about an issue of public concern.

Independence and input from stakeholders are features of other kinds of inquiries as well. Even autonomous legal systems feature independence from politics. The degree of power royal commissions have to compel testimony and production of documents distinguishes them from other kinds of inquiry, although this power is not unanimously praised.[902] In 2009, the Australian Law Reform Commission ('ALRC') issued a report in which it whether or not the Act should be amended.[903] The ALRC recommended that coercive powers be used more sparingly, but their recommendations have not been taken up.[904] Instead, the *Prime Minister and Cabinet Legislation Amendment (2017 Measure No. 1) Act 2017* provides for increasing the penalties applicable for failing to attend, produce documents, or give information or statements from '$1,000 or imprisonment for 6 months,' to '[i]mprisonment for 2 years.'[905]

Other kinds of legal proceedings can require the production of documents and testimony, but royal commissions have power to compel production of evidence that is exempt from production in other legal systems.[906] A royal commission 'may require the

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[901] Ibid.

[902] *Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1*) Bill 2017, 9 August 2017, Schedule 5—Royal Commissions

> A Royal Commission in Australia has unique powers of investigation which in some ways are more extensive than a court's. It has been noted that maybe because such Commissions are not established to determine individual guilt their powers can be less fettered than a court's. Thus under the Royal Commissions Act a natural person is not excused from giving evidence on the grounds of self incrimination (section 6A), although evidence given to a Royal Commission is not admissible in evidence against the person in civil or criminal proceedings in any Australian court (section 6DD). Similarly legal professional privilege is more curtailed than in a court of law (section 6AA).

The powers of a Royal Commission have been described as coercive with sanctions imposed inducing witnesses to cooperate. Those sanctions may be punishable either as contempt of the Commission or alternatively as specific legislative offences.

[903] Australian Law Reform Commission (ALRC), Making inquiries: a new statutory framework, Report, 111, ALRC, Sydney, October 2009.

[904] Ibid.

[905] *Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1*) Bill 2017 (n 902).

[906] ALRC Report (n 902).

production of documents even if they are subject to client legal privilege.'[907] Unlike in other legal proceedings, people may not refuse to testify, fail to produce a document or thing, or answer a question, even if doing so would incriminate that person or make that person subject to a penalty.[908] A spouse can be compelled by a royal commission, but not other courts, to testify against their spouse.[909] Other statutory privileges, like the confidential professional relationships privilege, the religious confessions privilege, and the exclusion of evidence arising from a settlement of a dispute are similarly not applicable in royal commissions.[910] Hearsay and opinion evidence is not excluded from the kinds of evidence a royal commission can consider.[911] There are some limitations on the royal commission's coercive powers, notably that statements made by a witness cannot be used against them in other proceedings and protection of manufacturing secrets,[912] and disclosures can be withheld from the public to protect stakeholder or public interests where the commission deems necessary.[913] But, Australian royal commissions have significantly more coercive power than other legal systems.[914] As discussed in previous chapters, this coercive power has allowed the Royal Commission to require production of internal Church documents that are protected by norms embedded over centuries in service of the Church's interests – notably providing evidence that abusive priests were sent from Ballarat to New Mexico.

Ransley points to royal commissions' flexible procedures, 'particularly in their ability to conduct hearings not bound by the rules of evidence and to generally act as inquisitors rather than as part of the adversarial system,'[915] as reasons they can competently investigate political wrongdoing.[916] Even with those flexible procedures, however, when it came to the

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[907] Ibid. at 17.11 (citing *Royal Commissions Act 1902)* (Cth) s 2(5).
[908] *Sorby v Commonwealth of Australia* (1983) 46 ALR 237 (Gibbs CJ).
[909] ALRC Report (n 902) (citing *S v Boulton* (2006) 151 FCR 364, 387 (Black CJ dissenting)).
[910] Ibid at 17.127
[911] Ibid at 16.73 n 85.
[912] Ibid at 250; *Royal Commissions Act 1902* (Cth) 6DD.
[913] ALRC Report (n 902), chapter one.
[914] Nicholas Aroney, 'A Power "Singular and Eccentrical": Royal Commissions and Executive Power after Williams' (2014) 25(2) *Public Law Review*, 99 (Considering whether royal commissions investigatory power is limited to the legislative power of Parliament or whether they can be commissions for matters outside the competence of Parliament, like constitutional amendments and matters 'reserved' to the states. This discussion is outside the scope of this thesis.)
[915] Janet Ransley, 'Public inquiries into political wrongdoing,' in Scott Prasser and Helen Tracey (eds), *Royal Commissions & Public Inquiries: Practice & Potential*, , (Connor Court Publishing, 2014).
[916] Mary Anne Neilsen and Kirsty Magarey, Royal Commissions Amendment Bill 2013, *Law and Bills Digest* (Bills Digest no. 83 2012–13, 7 March 2013)

> Royal Commissions have the discretion to sit in private or public. Royal Commission hearings often sit in public, although there is no legal requirement that they do so. It has been suggested that Royal Commissioners are frequently reluctant to use private hearings, as they diminish the capacity of Commissions to acquire information from the public, undermine public confidence in Commissions, and reduce the 'cleansing effect' of hearings. These concerns were

Royal Commission, Parliament deemed it necessary to pass legislation amending the *Royal Commission Act*:

> to introduce and specify regulation of 'private sessions' for the Royal Commission into Institutional Responses to Child Sexual Abuse to facilitate the Commission's receipt of information from persons directly or indirectly affected by child sexual abuse in a manner less formal than a hearing.[917]

The legislative effort to confirm that the Royal Commission could create a supportive environment for people to tell their stories is an example of the Royal Commission's connection to the political order from which it emerged, as well as its status as a legal system with unique powers and purposes. Among other things, as discussed later, testimony in private sessions was not formally considered 'testimony,' and therefore there was no threat of perjury in the making of a statement in a private session. Victims telling their stories did not have to be concerned that not remembering details, or not being able to prove the truth of their statements would subject them to any kind of consequence. The practice of the Royal Commission thus enabled disclosure of stories, evidence, and other kinds of information that would not have been available to another kind of legal system, serving its purposive approach and enabling the production of knowledge and thereby reform of other legal and regulatory orders. It was able to be simultaneously tough on the Church and sensitive to victim needs, the opposite of tort law, where the Church can rely on its status to keep its records secret and victims' testimony is subject to cross-examination.

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encapsulated by Mason J when he observed that an order that a Commission proceed in private:

> seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report.

That said, Royal Commissions are also generally aware of the damage that may be caused to reputations if hearings are held in public and, according to Donaghue, this awareness has contributed to major Royal Commissions into crime conducting a significant proportion of their hearings in private.

Witnesses also have the right to request private hearings in certain circumstances, namely when the evidence relates to the profits or financial position of any person, and the taking of that evidence in public would be unfairly prejudicial to the interests of that person. In these cases the Commission may, if it thinks proper, take that evidence in private (subsection 6D(2)).

The Royal Commissions Act also empowers the relevant commissioners to direct that evidence shall not be published except in such manner and to such persons as the Commission specifies (subsection 6D(3)). Publication in contravention of such a direction is an offence (subsection 6D(4)).

[917] Ibid.

B. *Royal Commission Approach to Evidence Collection and Reporting*

Royal commissions are typically chaired by senior legal professionals,[918] and the Royal Commission was no exception.[919] The chair, the Honourable Justice Peter McClellan AM, is a Judge of the Court of Appeal in New South Wales, and the other commissioners are senior leaders from law, police, public service, psychiatry, and politics.[920] In comparison to most royal commissions, the Royal Commission was longer, conducted more hearings, commissioned more research, interviewed more people, made available more evidence, and captured more of the public's attention.[921] It worked hard at providing emotional support and general responsiveness to victims.[922] The letters patent authorizing the Royal Commission made clear their issuer's understanding that child sexual abuse in institutional contexts is a systemic problem that required an interdisciplinary, well resourced, and well-planned research agenda.[923] The commissioners understood their project to include being cognisant of the

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[918] Prasser (n 854), 58.
[919] *Our Inquiry* (n 895).
[920] Ibid.
[921] Ibid.
[922] Ibid at 3.0.

> People who contacted us were provided with the opportunity to share their story in different ways. Private sessions allowed people to tell of their experiences of institutional responses to child sexual abuse in a confidential, protected and supportive environment with at least one Commissioner. Written accounts, which described or documented a person's experience of institutional responses to child sexual abuse were another way survivors could share their experiences with Commissioners. Written accounts allowed individuals who did not wish or were not able to attend private sessions to share their experiences with Commissioners. Information provided to us in private sessions and written accounts helped us to identify systemic issues and institutions we should consider for public hearings.
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> . . .
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> We held public hearings to receive evidence about, and examine in detail, the responses of institutions. Public hearings allowed those affected by child sexual abuse in institutional contexts to give evidence about their experiences, to examine the response of the institution to complaints made and importantly, to raise community awareness and understanding of child sexual abuse and the institutions in which it occurred.

[923] Ibid. at 2.2.

> Without limiting the scope of the inquiry, the Terms of Reference directed us to have regard to:
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> - the experience of people directly or indirectly affected by child sexual abuse and related matters in institutional contexts, and the provision of opportunities for them to share their experiences in appropriate ways while recognising that many of them will be severely traumatised or will have special support needs
> - the need to focus the inquiry and recommendations on systemic issues, recognizing nevertheless that we would be informed by individual cases and may need to make referrals to appropriate authorities in individual cases

trauma experienced by victims of child sexual abuse. The practice of law in the Royal Commission sought to be trauma-informed and to counter systemic forces of domination that have prevented victims from obtaining justice through other legal systems.

The Royal Commission's research agenda included seeking information relevant to institutional responses to child sexual abuse through personal accounts and public hearings. It also commissioned and undertook its own research.[924] Many outside experts, concerned citizens, activists, family members, and victims submitted reports and responses to calls for submissions to advise and contribute to the Royal Commission. Many of the more than 1,300 contributions to the *Message to Australia* shared with the National Library of Australia demonstrate a belief that the Royal Commission contributed to healing and hope that it would result in a safer environment for children.[925] The beliefs and hopes expressed demonstrate the perceptions of independence and thoroughness of the investigation and the trust that Australians have placed in the Royal Commission.

In private and public sessions, the Royal Commission received testimony of thousands of victims of sexual abuse in institutional settings. It sought and received comment from victims' advocates, experts, institutional representatives, past and present leaders, teachers, psychologists, other professionals and the public on a range of issues, including redress schemes, working with children checks, and institutional programs for redress and accountability, receiving over 23,900 pieces of correspondence.[926] Victim submissions and testimony are frequently cited and seriously engaged with in its reports.[927] The Royal Commission's report on redress schemes, for example, takes seriously the concerns of victims calling for payments large enough to demonstrate the significance of the harms that were

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- the adequacy and appropriateness of the responses by institutions, and their officials, to reports and information about allegations, incidents or risks of child sexual abuse and related matters in institutional contexts
- changes to laws, policies, practices and systems that have improved over time the ability of institutions and governments to better protect against and respond to child sexual abuse and related matters in institutional contexts.

[924] Ibid.

[925] Helen Pitt, 'Royal Commission's message to Australia,' *The Sydney Morning Herald* (online, 14 December 2017) <https://www.smh.com.au/national/royal-commissions-message-to-australia-20171214-h04fin.html last accessed 28/12/2019>

> Over the past five years, more than 15,000 Australians contacted the royal commission. Over 8000 of them spoke with a commissioner in a private session; for many it was the first time they had told their story.

[926] *Our Inquiry* (n 895).

[927] Ibid at 3.1.1 (explaining the commissioners votes in determining whether or not to publish a list of the names of institutions identified in private sessions).

inflicted on them, for demonstrations of contrition, and for commitments to protect children going forward.[928]

The Royal Commission's policy and research program drew on information disclosed in public hearings, private sessions, and written accounts, as well as consulting with communities, academics, policymakers, and representatives from government, non-governmental organisations, regulatory and advisory bodies, and advocacy groups through released issues and consultation papers, roundtables, expert consultations, community forums, and public and private hearings on policy issues. It published 11 issues papers, receiving (and publishing) 621 submissions in response. It published 5 consultation papers about which 410 submissions were received and published. It held 7 public and 28 private roundtables, 44 commissioner-led community forums, and 9 consultations with young people (3 of which took place in youth detention centres).[929]

The Royal Commission was also actively concerned with working in a culturally safe and appropriate manner with Aboriginal and Torres Strait Islander communities across Australia. They may not have always been successful in avoiding retraumatising people,[930] but there was significant effort and thought put into each step of the process. The Final Report explained that the Commission

> . . . connected with a range of stakeholders in these communities including Elders; community members; land councils; Stolen Generations groups; Aboriginal health; legal and children's services; and other Aboriginal and Torres Strait Islander community organisations, to obtain permission and build support for our work. We also worked with survivor groups from particular institutions, and held survivor gatherings or consultations in a number of regional and remote communities. Our Aboriginal staff were critical to reducing barriers to engagement and building trust.[931]

This concern was also reflected in its research agenda. The Royal Commission's Aboriginal Knowledge Circle collaborated with expert researchers to produce reports on Aboriginal and

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[928] *Redress and Civil Litigation Report* (n 625.
[929] *Our Inquiry* (n 895), 3.3.

> We held forums in all capital cities and many regional locations. Some of these were targeted towards particular groups, sectors and communities who needed a safe space to share their ideas. We also hosted thousands of meetings with organisations that were directly affected by or interested in our work or covered by our Terms of Reference.

[930] Jane Bardon, 'Sexual Abuse Survivor Falls Through the Cracks, as Lawyers Accuse Governments and Institutions of Playing Hardball,' *ABC News*, 2 December 2018 (quoting Michelle James, head of abuse law at Maurice Blackburn, 'They are survivors of child sexual abuse, and this whole legal process can be incredibly retraumatising for them'.)
[931] Ibid at 3.4.2.

Torres Strait Islander children and child sexual abuse in institutional contexts.[932] One such report describes the ways that Indigenous children have been uniquely vulnerable to predation since the beginning of the settler-colonial project in Australia and concludes with its repeating of Indigenous peoples' call to be 'directly involve[d] . . .in any and all decisions that affect them and the lives of their families.'[933]

In addition to its thoughtful approach to serving Indigenous communities, the Royal Commission also considered culturally and practically relevant concerns in order to communicate effectively and compassionately with incarcerated people, people living with disabilities, children and young people, immigrant communities, older people, people experiencing homelessness and other vulnerable groups across Australia.[934] CLAN leader Leonie Sheedy praised the warmth and personal kindness she received from McClellan and other Royal Commission staff, crediting them with earning the trust of her organisation's membership, telling a story that demonstrates her perception the Royal Commission's dedication to caring for victims and how that differs from other legal authority-figures.

> And one of our 80-year-old members said to him, "What should we call you Sir?" . . . he said, "You call me Peter". And then he stayed with us in that garage for hours, answering all of our questions. How many judges have done that?[935]

With multiple means of electronic and personal connection, the Royal Commission's efforts to be informative, responsive, and sensitive to community need were evident. These efforts were appreciated, as indicated by the standing ovations and loud applause that the commissioners and counsel assisting received in their final sitting and positive treatment in news and opinion articles.[936] Even those, like Golding, who criticised the terms of reference'

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[932] Telethon Kids Institute, 'Aboriginal and Torres Strait Islander Children and Child Sexual Abuse in Institutional Contexts,' (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, July 2017).
[933] Ibid, 44.
[934] Ibid.
[935] Melissa Davey, "'They Had Nowhere to Hide": Abuse Survivors Praise Commission for Shaking Institutions,' *The Guardian* (online 1 April 2017) <https://www.theguardian.com/australia-news/2017/apr/01/nowhere-to-hide-abuse-survivors-praise-commission-shaking-institutions>.
[936] Michael Salter, 'Royal commission provides a vital blueprint for justice for sex abuse victims – now it's time to act,' *The Conversation* (online 15 August, 2017) <https://theconversation.com/royal-commission-provides-a-vital-blueprint-for-justice-for-sex-abuse-victims-now-its-time-to-act-82491>; Helen Pitt, 'Royal Commission's message to Australia,' *The Sydney Morning Herald* (online 14 December 2017) <https://www.smh.com.au/national/royal-commissions-message-to-australia-20171214-h04fin.html last accessed 28/12/2019>

> The final sitting of the royal commission into institutional responses to child sexual abuse was packed to overflowing Thursday and ended with a standing ovation when Justice Peter McClellan concluded his message.

limiting the Royal Commission's jurisdiction to issues involving child sexual abuse, wrote positively of the Royal Commission's acting to benefit all former residents of government or religious institutions and going beyond their mandate in their advice with respect to records and record-keeping to ensure that their recommendations would benefit a wider population.[937]

Like other royal commissions, the Royal Commission also had an adversarial component, especially in the public hearings. Watching the hearings and reading transcripts, the compassion and consideration counsel assisting the Royal Commission showed to victims who testified and the sharp rigor with which they treated senior (and formerly senior) officials in Catholic organisations are both notable.[938] At hearings I attended, people there, some of whom told me they were victims, commented on their appreciation for seeing, for example, Brother Paul Nangle, who had been headmaster at St Patrick's College, where they had been abused challenged by authoritative Senior Counsel on his statements about not knowing or suspecting that children in his charge were being abused.[939]

As discussed above, the privilege against self-incrimination is not applicable in royal commissions, and while self-incriminatory testimony is not admissible against the speaker in a later proceeding, there is no limit on the use of testimony and evidence against any natural person or entity other than the speaker. Officials are aware that their testimony could be used against Church organisations, even if not against them personally. For Cardinal Pell and other high-ranking officials before the Royal Commission, their testimony generally consisted

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> Scores of survivors of sexual abuse, and the people who supported them, alongside the Prime Minister Malcolm Turnbull and leader of the opposition Bill Shorten, applauded loudly as the commissioners took their seats for the final time in the Sydney hearing room.

[937] Golding, Frank. '"Problems with Records and Recordkeeping Practices Are Not Confined to the Past": A Challenge from the Royal Commission into Institutional Responses to Child Sexual Abuse.' (2019) *Archival Science*, 1,

> . . . although the Royal Commission disappointed many Care leavers with its narrow focus on sexual abuse, when it eventually reported on records and recordkeeping the Commission surprised many by moving well be3yond its narrow mandate.

[938] Personal notes, on file with author; see also Bryce, Ian. 'Child Abuse Royal Commission - a Personal Perspective,' *The Australian Humanist* no. 126 (2017): 20-21

> [w]itnesses giving testimony include some accused of abuse (many are in jail) or (more often) accused of covering up abuse. Typically they get pressed and question somewhat aggressively by tenacious Council Assisting – it's good to see them squirm.

[939] Chris Johnston, 'Ballarat Christian Brothers headmaster 'can't recall' abuse,' *The Age*, (online 23 February 2016) <https://www.theage.com.au/national/victoria/ballarat-christian-brothers-headmaster-cant-recall-abuse-20160223-gn1kf1.html>

> Yet all day lawyers for the commission and for victims of abuse suggested [Christian Brother Paul Nangle, the former principal of St Patrick's College in Ballarat] may have been covering up for abusive priests under his watch. The courtroom in Ballarat was packed with survivors and supporters and they jeered him on the hour until warned not to by Justice Peter McClellan.

almost entirely of cross-examination by counsel assisting. The testimony of notorious abuser Gerald Ridsdale highlights this dynamic. Having already admitted to more than 100 crimes against children and giving his testimony from prison, he maintained that he did not know or could not remember who knew about his abuse, why he was moved from parish to parish, and what diocesan officials supervising him did when they learned of his crimes. Officials and others who see their loyalty to the Church as paramount looked for ways to protect the Church, even when they had given up hope of the Church's protecting them in return. It is clear that he was seen as a hostile witness, who needed to be cajoled into admitting wrongdoing.[940] This is apparent in how questions are composed as well as in terms of the kind of testimony that the questions are designed to elicit. This treatment of Catholic officials, combined with warm and supportive treatment of victims and survivor advocates added to a narrative that connected the Australian public's concern with victims and directed anger at the Church and its representatives.

As discussed previously, the Ballarat Hearing was the subject of intense public interest, and the public's concern crystallised over the stories of victims from Ballarat.[941] Journalist Brigid Delaney 'sees God not in the cardinals or bishops but in the broken men of Ballarat.'[942] Over the course of the Ballarat hearing, there were almost 54,000 views of the live hearing streamed on the Royal Commission's website.[943] Pell and other officials were roundly criticised in the press for multiple assertions that they cannot remember certain events.[944] Delaney comments, '[t]he stories of the Ballarat men feel authentic and real. They connect with us. The same cannot be said for the testimony of Pell.'[945] Opinion pieces and public discussion of Cardinal Pell's testimony during early March 2016, declared him to have proven himself to be cold, calculating, and untruthful.[946]

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[940] Frank Brennan, 'Cardinal Pell, his lawyers and the Royal Commission,' *Eureka Street* (online 22 November 2015).
[941] Brigid Delaney, 'The stories of the broken men of Ballarat have unleashed compassion on a national scale,' *The Guardian* (online 2 March 2016) <https://www.theguardian.com/commentisfree/2016/mar/02/the-stories-of-the-broken-men-of-ballarat-have-unleashed-compassion-on-a-national-scale>.
[942] Ibid.
[943] *Our Inquiry* (n 895) 3.4.3.

> Case Study 28: Catholic Church authorities in Ballarat, which was held for 31 days over 2015 and 2016, was the most viewed public hearing. This included a total of almost 54,000 views over the course of the hearing, primarily from Australia (51,594), the USA (563) and the UK (848).

[944] See, e.g. Melissa Davey, 'Commission challenges bishop's claims he was unaware of priest's child abuse,' *The Guardian* (online 11 December 2015) <https://www.theguardian.com/australia-news/2015/dec/11/commission-challenges-bishops-claims-he-was-unaware-of-priests-child-abuse>.
[945] Delaney (n 941).
[946] Konrad Marshall, 'Cardinal George Pell: Ballarat reacts to testimony characterised by memory loss,' *The Age* (online 29 February 2016) <https://www.theage.com.au/national/victoria/cardinal-george-pell-ballarat-reacts-to-

In his testimony from Rome, appearing via video link but with 15 victims and their supporters in the room with him, Cardinal Pell's demeanour read as 'cut from cardboard.'[947] One of those in the room 'told reporters he did not believe Pell had been honest or truthful in his royal commission testimony,' and another refused to meet with him personally, saying '[t]he Australian people have no respect for him after listening for four days, so anything he has to say the Australian people will not take seriously.'[948] He chose his words carefully in response to the questions asked of him — likely in order to avoid perjuring himself and avoid admitting fault in his handling reports of child sexual abuse. Instead, he said, '[i]t was a sad story and of not much interest to me . . . I had no reason to turn my mind to the evils Ridsdale had perpetrated.'[949] That statement came to be emblematic of Pell's response to the Royal Commission – perhaps because avoiding admitting fault is not compatible with empathy.[950]

Susan Pascoe, in writing about another royal commission, commented that '[i]n determining what form of inquiry to adopt a government would do well to consider if its intent is primarily to determine what happened, to improve practice or allocate blame.'[951] This flexibility that royal commissions have to design an inquiry that aligns with their purpose is a central reason that the Royal Commission can be described as responsive.

> A trauma-informed approach was adopted to the conduct of private sessions and surrounding processes. This meant we had to be aware of the diverse and

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testimony-characterised-by-memory-loss-20160229-gn65yi.html>; Charles Miranda and Victoria Craw, ' Royal Commission expected to recall Bishop Mulkearns as Cardinal Pell begins day three of testimony in Rome,' *News.com* (online 2 March 2016) <https://www.news.com.au/national/courts-law/royal-commission-expected-to-recall-bishop-mulkearns-as-cardinal-pell-beings-day-three-of-testimony-in-rome/news-story/a230f195dea5fa730ce1776f72b2340f>

> Cardinal Pell was accused of 'designing' his evidence to deflect blame during the third day of testimony in which the 'extraordinary world of crimes and coverups' within the Catholic Church were exposed.

[947] David Marr, 'We Learned About George Pell's Pain. But What About the Children,' *The Guardian* (online 3 March 2016) <https://www.theguardian.com/australia-news/2016/mar/03/we-learned-about-george-pells-pain-but-what-about-the-children>.

[948] Stephani Kirchgaessner, 'Pell Says Meeting with Australian Abuse Survivors was "Hard and Honest,"' *The Guardian* (online 4 March 2016) <https://www.theguardian.com/australia-news/2016/mar/03/cardinal-pell-meeting-australia-abuse-survivors>.

[949] David Marr, 'George Pell Wasn't Much Interested in Stories of Abuse by Priests. Which was Lucky for His Career,' *The Guardian* (online 1 March 2016) <https://www.theguardian.com/australia-news/2016/mar/01/george-pell-wasnt-much-interested-in-stories-of-abuse-by-priests-which-was-lucky-for-his-career>.

[950] Pell was later prosecuted for abusing two boys in Victoria, was convicted and imprisoned. He was released after the High Court quashed his conviction in April 2020. This story, while deeply connected to the story of the Royal Commission, and the subject of intense interest in Australia, is a criminal law matter, and thus its proceedings are outside the scope of this thesis. Melissa Davey, 'George Pell: Australian Cardinal Released From Jail After High Court Quashes Child Sexual Abuse Conviction,' *The Guardian* (online, 7 April 2020) <https://www.theguardian.com/australia-news/2020/apr/07/cardinal-george-pell-conviction-quashed-australia-high-court-freed-jail-appeal-upheld>.

[951] Susan Pascoe, 'The 2009 Victorian Bushfires Royal Commission: Lessons for the Conduct of Inquiries in Australia' The Australian Journal of Public Administration, vol. 69, no. 4, pp. 392–400

> far-reaching impacts of childhood trauma on survivors. We engaged people in ways that affirmed their experiences and responses while minimising interactions or processes that could increase their trauma.[952]

Alongside of enrolling a professional cadre of judges, lawyers, counsellors, and investigators whose main task—investigation and truth-telling — was largely aligned with the interests of victims in vindication and validation as well as the more general interests of society in knowledge and policy reform — the Royal Commission was largely able to design procedures and collect evidence in ways that furthered those interests in trauma-informed ways. Victims were given a variety of means by which they could tell their stories, express their opinions, and otherwise engage with the process.[953]

Although some victims would later report their stories to police and many prosecutions were initiated as a result of the Royal Commission, the testimony provided to the Royal Commission served as data to understand child sexual abuse in institutional settings as a social problem, and helped the Royal Commission in discerning how to hold institutions responsible for their role in the social problem. The trove of evidence and data provided by victims, witnesses, academics, researchers, and advocates collectively formed the basis on which counsel assisting and the Commissioners would test the evidence put forward by officials and others defending institutions that had failed the children in their charge. This approach, including giving institutional parties about whom negative conclusions were drawn the opportunity to respond, led the Royal Commission to make findings with respect to the Ballarat Hearing that serious concerns about the truthfulness of testimony of senior Catholic officials in Ballarat that was seen as credible, fair, and devastating for the reputation of the Church. Although observers expressed their frustration at officials' testifying that they did not recall events,[954] the Royal Commission's findings made clear that the Commissioners had

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[952] *Our Inquiry* (n 895) 28.

> We endeavoured to mitigate potential further harm by being alert to the diverse and far-reaching impacts of childhood trauma on survivors. We engaged with people in ways that affirmed their individual experiences and responses, and provided them with choice while minimising interactions or processes that could increase their trauma.

[953] Susan Pascoe, 'The 2009 Victorian Bushfires Royal Commission: Lessons for the Conduct of Inquiries in Australia' The Australian Journal of Public Administration, vol. 69, no. 4, pp. 392–400

[954] Marshall (n 946)

> "It's everything I expected. The memory loss. The little tricks to get away with it. They haven't gotten away with it though, because even if man misses it, He doesn't," Lane said, looking through the top floor skylight of the Ballarat Town Hall, up at the heavens. "They can hide behind his word and scripture, but He had no part of it. He's with us."

seen through protestations about memory and found the officials' lacking, thus affirming the feelings and perceptions of observers and victims alike.[955]

Responsiveness is so linked with flexibility that it bears repeating that flexibility alone is not sufficient. Responsiveness requires responsible, discriminate, and selective forms of flexibility.[956] A responsive institution is not just flexible, it centres the normative and counter-domination impulses essential to its integrity while taking account of new forces in its environment.'[957] The Royal Commission's capacity to adapt its procedures to collect evidence in ways that respond logically to the incentives of different stakeholders demonstrates its purpose-centred and adaptive approach. The Royal Commission's responsiveness is a product of a broad purpose to improve Australia's response to child sexual abuse in institutional settings and intentional accommodation of people who might otherwise face challenges in engaging with a legal system. The stated intent of using the coercive and legal authority of a royal commission for the benefit of victims forms the basis the Royal Commission's commitment and capacity to counter defined forms of domination. Its discrimination and responsible approach to gathering sufficient evidence to test the truthfulness of officials while making efforts to protect victims from unnecessary trauma in providing their evidence demonstrates the purposive approach that suggest the Royal Commission was, at least, incipiently responsive. This adoption of counter-domination as a normative agenda is crucial to the possibility of responsive law.[958]

IV. THE LIMITS OF ROYAL COMMISSIONS

A. *The Royal Commission and Substantive Justice*

Thus far, this chapter presents a hopeful image of the Royal Commission — flexible procedures and a purposive approach allow it to be attentive and responsive to the needs of Australia's diverse communities, and its narrative power has shaped how the Australian public understands the problem of child sexual abuse in institutional settings and vindicated victims. But, as was true in Chapter 7 for bankruptcy, the Royal Commission has significant weaknesses that keep it from being wholly responsive. The two that are relevant to this analysis lie in the Royal Commission's capacity to affect the policy and other recommendations it made in its Final Report and a remaining perception of inequity of treatment for victims who had been in 'Care'.

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[955] Ballarat Report (n 282).
[956] Nonet and Selznick (n 125), 77.
[957] Ibid.
[958] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002)

As mentioned above, Daly, like Golding, traces her critique to the Royal Commission's terms of reference limiting the focus to child sexual abuse and the redress scheme proposed by the Commission's failing to distinguish between those who lived in 'closed' as opposed to community settings.[959] Daly, reviewing the redress scheme proposed by the Royal Commission, argues that the proposed scheme was likely to put care leavers at a disadvantage. First, the other kinds of abuse that children in residential facilities, orphanages, homes, detention centres, and similar facilities suffer — physical, emotional, and cultural — is not addressed in the proposed scheme, and the scale of severity is determined almost solely by degree of sexual contact, thus devaluing experiences of trauma and abuse.[960] Second, Daly points to a report prepared for the Royal Commission showing significantly lower payments to care leavers (average AUD$30,000) than non-care leavers (average over AUD$50,000) through the Towards Healing protocol, despite evidence care leavers suffered 'a higher severity of abuse,' and argues that this disadvantage is likely to continue with the individualised assessment put forth by the Royal Commission.[961]

As of December 2019, the assessment framework set forth in the Redress Scheme enacted by Parliament contemplates payments of $5,000 in recognition of non-sexual abuse and $5,000 in recognition of the victim's being 'institutionally vulnerable.'[962] There is no distinguishing between severity of abuse or the experience of life in a grim institution.[963] By

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[959] Daly (n 877).
[960] Golding (n 878).
[961] Daly (n 959).

> unless corrective measures are taken, the individualised assessment for the monetary payment is likely to put care leavers at a disadvantage. This is because different groups will be subject to "equal treatment", and I anticipate that non-care leavers' experiences of abuse and their social status (as children) will be used as the standard against which the care leaver group may appear not to measure up. Evidence for my claim comes from a report by Finity Consulting that was prepared for the Royal Commission in 2015. In a short section, it compared average payments awarded by the Catholic Church in its Towards Healing protocol to those abused in different contexts. The average payment was $30,000 for abuse in residential care (care leavers), but it was $50,000 to $55,000 for abuse in education and religious settings (largely non-care leavers). The report says the different amounts were "inconsistent with private session information", which suggested "a higher severity of abuse in residential settings" compared to other settings.

[962] National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018, <https://www.legislation.gov.au/Details/F2018L00969>.
[963] Ibid.

> Care leavers were state wards or placed by family members in out-of-home care, or they were committed to youth detention. This occurred for many reasons. For those in out-of-home care, a key one was a "lack of financial support for families in crisis …or for unmarried mothers"; children were also removed because of "sex abuse by a parent or step-parent". Children grew up in "total institutions", that is, batch living of a large group of "inmates", controlled by a small supervisory staff. The major spheres of life (sleeping, playing, working) were all in "the same place and under the same single authority". Survivors recall a "dehumanizing

way of comparison, awards for sexual contact ranged from $5,000 for 'exposure abuse' to $70,000 for 'penetrative abuse.'[964] Golding described the Royal Commission's terms of reference as embodying the perception of sexual abuse as the 'core transgression of innocent childhood,' and described how the narrow focus took public attention away from care leavers and centred it on children who had been abused in community settings.[965] Following this logic, the Government's defining recovery amounts by reference to the degree of sexual contact while offering relatively small amounts in recognition of other forms of abuse sends the message that 'physical assault, emotional abuse, exploitation, neglect of health and education,' and other abuse in closed institutional settings was acceptable for the lower-status children who resided in them even as it (rightly) establishes that a single instance of sexual abuse against a middle-class child is unacceptable. Although the Royal Commission had recommended that the framework should account for both impact of abuse and 'severity' according to a scale of contact,[966] the one that was ultimately adopted followed the terms of reference in focusing only on sexual abuse and allocating awards primarily by reference to severity of physical/sexual contact.

The Royal Commission heard from a number of community representatives, including those who argued that the Commission's recommendations should depart from the terms of reference and recommend redress for those who suffered other kinds of abuse in institutional contexts., and acknowledged that the approach they would take 'will disappoint a number of those who have participated in our consultation processes to date.'[967] The Royal Commission made clear, however, that they did

> not accept that out Letters Patent allow us to consider redress for those who have suffered physical abuse, neglect or emotional or cultural abuse if they have not also suffered child sexual abuse in an institutional context. Also, we do not accept that our Letters Patent allow us to consider redress for all of those who were in state care, who were child migrants or who are members of the Stolen Generations, regardless of whether they suffered any child sexual abuse in an institutional context.[968]

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institutional environment", one of being "totally at the mercy" of staff with no one to turn to. They lived in "a constant fear of sexual abuse [and were subject to] deprivations of food and schooling, forced labour, and medical neglect", alongside physical and sexual abuse.

[964] Ibid.
[965] Golding (n 878).
[966] Royal Commission into Institutional Responses to Child Sexual Abuse, *Recommendations* (Commonwealth of Australia, 2015) p 231.
[967] *Redress and Civil Litigation Report* (n 625), 102.
[968] Ibid, 6.

Thus, the Royal Commission acknowledged that there were serious justice issues that impacted care leavers, and that significant constituencies believed that they could and should include more than just sexual abuse in their consideration, but they considered themselves to be bound by the terms of reference, and that they had no power to consider topics not within their defined remit.

Ben Mathews, calling the terms of reference 'prudently drawn' shortly after their announcement, suggests that the particular harms related to the violation of taboos inherent in child sexual abuse are good reasons to treat child sexual abuse separately from other kinds of abuse.[969] Whether this justifies being treated separately in redress schemes is a normative argument — but it does not appear to be the Royal Commission's argument. By rooting their reasoning in the powers delegated to the Commission without making a normative argument, one can surmise that the Commissioners were not convinced that sexual abuse is 'the core transgression of childhood,' but were convinced that they were bound by their terms of reference.

Responsiveness requires a normative frame of mind — moral arguments for shared values are central to any conception of substantive justice.[970] Although the Royal Commission demonstrated its capacity to use moral arguments in condemning governments and institutions, including the Catholic Church in Australia for their failures in responding to child sexual abuse, it retains some characteristics of autonomous law in its conception of its own remit, which prevent the system from being fully responsive. By considering itself bound to a strict interpretation of its terms of reference, the Royal Commission declined to engage with deeper questions of whether it can provide justice by rejecting the limits it believes were placed on it. By accepting the limitation of its authority without a normative justification for it, the Royal Commission reflects its roots in autonomous law.

As will be discussed in the next section, royal commissions are limited to making recommendations, and require legislative action to implement their policy recommendations. Therefore, that apparent acceptance of arbitrary limits to the scope of their recommendations implies a belief that the Royal Commission cannot or should not even make recommendations that Parliament is free to ignore, if such recommendations lie outside of their terms of

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[969] Ben Mathews, 'Royal commission faces challenges but provides an opportunity for change,' *The Conversation*, (online 14 January 2013)

[970] See, e.g. Selznick (n 145); Christine Parker, 'The "Compliance" Trap: the Moral Message in Responsive Regulatory Enforcement,' (2006) 40(3) *Law & Society Review*; John Braithwaite, 'The Essence of Responsive Regulation,'(2011) 44(3) *University of British Columbia Law Review*, 475.

reference. Nonet and Selznick write that this deference to authority and strict interpretation of the limits of delegated power is a defining feature of autonomous law.

> [Autonomous law], concerned with legal purity, keeps its distance from the political order and adheres to the rules without assuming responsibility for the consequences of enforcement. Repressive and responsive law are more interested in outcomes, and hence are more ready to deploy political resources.[971]

This reluctance to extend beyond defined limits also helps to explain perceived gaps between the text of doctrinal law and law as it is experienced by those seeking justice. The reluctance to step outside defined limits to pursue substantive justice is a principle that fills these gaps, as it serves a fundamental purpose of autonomous law – keeping strictly to defined limits in order to maintain independence, and thereby, legitimacy.

B. *Royal Commissions and Outcome Orientation*

These autonomous law roots may also be reflected in the Royal Commission's lack of power to ensure their recommendations get taken up. Royal commissions across sectors have issued well-researched reports with reasonable recommendations for addressing the problems identified in their terms of reference and seen those recommendations fail to be made into law or adopted as policy. Prasser and Tracy point out that royal commissions' work has been at various times disregarded for over a century, including the very first royal commission, which recommended in 1903 the Commonwealth government select Albury and Tumut as the site for Australia's capital. 'The site of Canberra was not settled until 1908, after several years of further political and parliamentary debate.'[972] In recent decades, Australians have seen royal commissions investigate Indigenous deaths in custody,[973] corruption in political arenas, public officials' response to bushfires, and a number of other important issues that have issues reports detailing recommendations for changes to law, policy, or regulatory approach, that legislatures across Australia have declined to implement.[974]

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[971] Nonet and Selznick (n 125).
[972] Prasser and Tracey (n 860).
[973] Thalia Anthony, 'Deaths in custody: 25 years after the royal commission, we've gone backwards,' *The Conversation* (online 13 April, 2016) <https://theconversation.com/deaths-in-custody-25-years-after-the-royal-commission-weve-gone-backwards-57109>.
[974] Prasser (n 854), 6.39

> It is important, as Justice Moffitt reminds us, to appreciate that 'failure to respond effectively to recommendations and revelations of commissions of inquiry', has 'not been confined to any one government or one political part'. It afflicts all governments and jurisdictions. Oppositions may rail against governments for their lack of response to public inquiry reports and the failure to implement proposals, but one in power, their views often change about whether to appoint inquiries and what to do with those which report to them during their time in office.

Royal commissions have never been understood to require parliamentary action, as Aroney summarises Brennan J's explanation:

> . . . while the findings of a royal commission do not (and legally cannot) have direct legal consequences for any person's rights, duties or liabilities, they do have every potential to move the Executive to exercise its other undoubted powers in some form of governmental or ministerial response, such as the prosecution of an individual for an alleged commission of a crime or the introduction of a Bill into Parliament.[975]

With respect to the Royal Commission, when it was established, there was a great deal of hope about its potential, and when the Royal Commission issued its Redress Report and proposed scheme], and, outside of the equity concerns expressed within the Care-leaver community, it received broad praise. Timothy Jones wrote that,

> [t]he commission constitutes the most sophisticated and thorough investigation yet into abuse within the Catholic Church globally. Its recommendations are breathtakingly bold. They provide the most comprehensive pathway so far, to redress and prevent abuse in an institution that has had endemic and catastrophic failures in this area.[976]

But the Redress Scheme that was ultimately adopted fell short of the recommendations, as the Commonwealth government weakened a number of pro-victim aspects in order to induce more state governments and institutions to join.[977] For example, while the Royal Commission recommended a number of changes in law to facilitate victims bringing claims against institutions — notably implementing strict liability for certain institutions when children subject to their control are abused —Victoria and Queensland, among other places, have retained a vicarious liability approach that leaves available a defence for institutions.[978]

The Royal Commission's advising Australian governments to adopt new law or make policy changes, which Parliament and legislatures then fail to implement is part of a long tradition of royal commissions not having the practical impact desired when the commissions were established. Thus, either royal commissions are not outcome-oriented, or the outcome desired is something other than legal or policy change. Prasser's explanation, that royal

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[975] Aroney (n 914) (citing *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 53-55 (Gibbs CJ), 69-73 (Stephen J), 94-95 (Mason J), 105 (Murphy J), 119-120 (Aickin J), 129-132 (Wilson J), 158-162 (Brennan J))

[976] Timothy W. Jones, 'Royal commission recommends sweeping reforms for Catholic Church to end child abuse,' *The Conversation*, (online 15 December 2017) <https://theconversation.com/royal-commission-recommends-sweeping-reforms-for-catholic-church-to-end-child-abuse-89141>.

[977] Kathleen Daly and Juliet Davis, 'National Redress Scheme for child sexual abuse protects institutions at the expense of justice for survivors,' *The Conversation*, (online 7 March 2019) https://theconversation.com/national-redress-scheme-for-child-sexual-abuse-protects-institutions-at-the-expense-of-justice-for-survivors-112954>.

[978] Laura Griffin, 'Victims of child sex abuse still face significant legal barriers suing churches – here's why,' *The Conversation* (online 13 November 2019) <https://theconversation.com/victims-of-child-sex-abuse-still-face-significant-legal-barriers-suing-churches-heres-why-126510>.

commissions function to serve government interests such as apportioning and deflecting blame, is difficult to deny in light of repeated failures to implement recommendations.

V. PRACTICAL BENEFITS OF THE ROYAL COMMISSION

Despite the concerns with treatment for Care leavers and disappointment where the Royal Commission's recommendations have gone unimplemented, the Royal Commission has been largely praised in the academic literature and the public conversation. The international journal *Child Abuse & Neglect*[979], the Australian journal of Christian theology *St Mark's Review*[980], and the *Journal of Australian Studies*[981] all published special editions focussed on the Royal Commission, while several prominent journals in other disciplines published articles about the Royal Commission or relying on its findings.[982]

There are significant practical benefits attributed to the Royal Commission by the diverse array of scholars writing about it. The wealth of data, research, and knowledge that the Royal Commission collected and made available to researchers, policymakers and the public has informed Australian public discourse and social meanings relevant to institutional child sexual abuse. Its recommendations are largely endorsed by experts and commenters are optimistic that successful implementation of the recommendations is likely to reduce rates of child sexual abuse in the present and future, increasing the likelihood that victims are believed and helped, and improving the quality and efficacy of that assistance. Many, if not most, of its recommendations for organisations and governments have been adopted, at least in some form, by governments and child-facing institutions across Australia.

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[979] (2017) 74 *Child Abuse & Neglect*.
[980] (2018) 245 *St Mark's Review*.
[981] (2018) 42(2) *Journal of Australian Studies*.
[982] See, e.g. Kim Oates, 'The Royal Commission into Child Sexual Abuse: A Beginning, Not an End' (2018) 54(3) *Journal of Paediatrics and Child Health*, 221; H Milroy, 'Learnings from the Royal Commission Into Institutional Responses to Child Sexual Abuse and its Application to Psychiatry' (2017) 51(s1) *Australian And New Zealand Journal Of Psychiatry*, 4; Kaufman, K.L. et al., 2019. 'Recommendations for Preventing Child Sexual Abuse in Youth-Serving Organizations: Implications From an Australian Royal Commission Review of the Literature,' (2019) 34(20) *Journal of Interpersonal Violence*, 4199; Penny Crofts, 'Monsters and Horror in the Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2018) 30(1) *Law & Literature*, 123; Carolyn Ford, 'Commission of Care: The Royal Commission into Institutional Responses to Child Sexual Abuse Brought Innovative Special Measures to Its Five-Year Inquiry,' (2018) 92(12) *Law Institute Journal*, 20; J Tucci & M Blom, 2019. '"These were terrible years. no love or kindness, no safety or warmth" Reflections on the outcomes of the Royal Commission into Institutional Responses to child Sexual Abuse in Australia.' (2019) 20(4) *Journal of Trauma & Dissociation*, 373; Michael Salter, The transitional space of public inquiries: The case of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse,' (2019) *Australian and New Zealand Journal of Criminology*.

The Royal Commission's research agenda was interdisciplinary, mixed-methods, and extraordinarily broad in scope.[983] It has made major impacts on knowledge relevant to child abuse across disciplines. Aside from the unparalleled quantitative data and deep well of qualitative data made available to researchers, representative examples of the research produced includes of these impacts include new knowledge about the best ways to support children's testimony in court,[984] new understanding of stigma constituted in institutional settings,[985] new knowledge about patterns of reporting and convictions after delays in reporting child sexual abuse,[986] and new insight into the influence of organisational culture on incidence of child sexual abuse.[987] But the Royal Commission did not just collect a library of evidence and fuel academic insight. It also sought expert and stakeholder opinion on the evidence in order to advise organisations and policy makers, and to change cultures across institutions and Australian society. To do this, it worked to weave the various sources together into a coherent narrative and slate of recommendations for changes to law, public policy, organisational policy, regulatory agendas, and norms of interaction within child-serving organisations across Australia. Sarah Morton argues that the Royal Commission's efforts at translating the evidence and crafting recommendations for changes show promise as a model for reform in other areas of social life.[988]

Criminologist Michael Salter praises the Royal Commission for serving as a 'transitional space' between personal trauma and public understandings of child sexual abuse and thereby making new understandings and social change possible.[989] He brings up its nonadversarial and flexible procedures, crediting them with providing material for interspersing personal narratives alongside narratives of law or policy. Weaving together the personal with the legal in this way allowed the Royal Commission to serve as a 'transitional mechanism' that can be both 'personally and politically meaningful.'[990] Salter argues that this

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[983] Sarah Morton, 'Getting Evidence into Action to Tackle Institutional Child Abuse,' (2017) 74 *Child Abuse & Neglect*, 111. Morton uses the term 'evidence' broadly, 'including research evaluation, data, testimony, commentary' collected by the Royal Commission. I adopt this usage of the term for this section.
[984] Becky Earhart et al, 'Judges' Delivery of Ground Rules to Child Witnesses in Australian Courts,' (2017) 74 *Child Abuse & Neglect*, 62 (comparing content of 'ground rules' given to child witnesses intended to prepare them for questions in criminal trials).
[985] Kathleen McPhillips, 'Traumatic Isolation: Institutional Stigma and the Australian Royal Commission into Institutional Responses to Child Sexual Abuse,' (2018) 20:2 *Health and History*, 75.
[986] Judy Cashmore, et al, 'The Characteristics of Reports to the Police of Child Sexual Abuse and the Likelihood of Cases Proceeding to Prosecution After Delays in Reporting,' (2017) 74 *Child Abuse & Neglect* 74 (2017) 49.
[987] Donald Palmer and Valerie Feldman, 'Toward a More Comprehensive Analysis of the Role of Organizational Culture in Child Sexual Abuse in Institutional Contexts,' (2017) 74 *Child Abuse & Neglect* 23.
[988] Morton (983) at 113.
[989] Salter (n 982), 6.
[990] Ibid.

creates spaces for interaction between 'traumatized and non-traumatized systems of meaning' and a public discourse imbued with emotional depth.[991]

Reflecting on some of the narrative-shaping power wielded by the Royal Commission, Penny Crofts writes that it recast the 'monster' in stories of child sexual abuse from the abstract and othering category of 'pedophile' and toward the enabling presence of larger social institutions.[992] A legal defence presented by religious organisations to the Royal Commission was rooted in this notion of pedophile as monster, suggesting they should not be held accountable for the unpredictable actions of 'bad apples'.[993]

By weaving narrative with legal, sociological, psychiatric, and other forms of knowledge, the Royal Commission reframed the public narrative about institutional child sexual abuse. No longer is it an unfixable problem caused by individual super-human monsters[994] – as testimony revealed it often seemed to a victimised child. Instead, with the benefit of empirical evidence, expert advice, and victim narratives, it is recast as a social problem than can be addressed by implementing legal and policy changes, learning and implementing best practices for the promotion of child-safe and child-friendly environments, and listening to our children. The Royal Commission changed the public discourse about

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[991] Ibid, 15.

[992] Crofts (n 982)

> [Exploring, among other things,] the claim that one of the main effects of regarding sex offenders as monsters is that these offenders are construed as having extraordinary powers so that ordinary measures to stop them would be ineffective – accordingly, this reading underplays the significance of institutional responsibility. I conclude that although the Royal Commission consistently undermines and rejects the idea of sex offenders as monsters, a horror reading is still appropriate and insightful. The true "horror" of the Royal Commission is aroused not by the figurative monsters but by the institutions themselves, and their failures.

[993] Stephen Smallbone, 'The Impact of Australia's Royal Commission on Child- and Youth- Serving Organizations,' (2017) 74 *Child Abuse & Neglect*, 99, 100

> . . . in the absence of a coherent framework for understanding the dynamics of sexual abuse, organizational personnel seem very susceptible to the simplistic stereotyped construction – promulgated by the media, but also perhaps unwittingly by researchers, professionals and advocates – that reduces the cause of sexual abuse to the mysterious existence of a limited number of disturbed, determined, adept, 'pedophiles'. Indeed the legal defense in a number of the Royal Commission's Public Hearings seemed to be based on this stereotyped conception – essentially that organizations should not be held responsible for the behavior of one or two 'bad apples' who had used devious and sophisticated methods to manipulate organizational systems and avoid suspicion, often over long periods of time. Thankfully this kind of defense gained little traction in an Inquiry whose terms of reference were focused on systemic and situational aspects of the problem.

[994] Crofts (n 982) citing (Michel Foucault, *Abnormal: Lectures at the College de France*, tr G Burchell (Verso, 2003), 64-65 ('Monsters are represented in horror and conceptualized in philosophy as beyond understanding, as incomprehensible to human beings.')

child sexual abuse in Australia toward an ethic: (1) concerned with protecting children, (2) aware of the effects of child sexual abuse as well as how its institutions enable both abuse and cover-up, and (3) inclined to believe and sympathise with victims rather than discrediting them because of legalistic frameworks of evidence.

The Royal Commission, after reframing Australian public discourse, presented recommendations to institutions across Australia evidencing deep learning from the collected evidence. To extend Croft's 'monster' analogy, the institutions (governments, religious institutions, schools, other child-facing institutions), having been recast as the true monsters, and the Royal Commission provided them with instructions that, if followed, can turn them into 'good' monsters and allies in the cause of protecting children. As allies, the Royal Commission assured institutions that, by exerting their existing control over 'the design and operation of the organizational setting,' child-facing organisations are well placed to implement changes that will make abuse less likely.[995] For these recommendations to actually have the desired impact, they need, in simple terms, to be (1) good recommendations (2) that are actually implemented. With respect to the recommendations being good, Ben Mathews makes the point that, '[f]ailure to adopt theoretically sound strategies to overcome implementation barriers will jeopardize reform and compromise reduction of institutional child sexual abuse.'[996] Mathews uses public health and regulatory theory to consider optimal forms of regulation for the purposes of reducing incidence of child sexual abuse in institutional settings, the 'emerging consensus on measures to prevent, identify and respond,' and applies lessons from both to suggest particular recommendations for the Royal Commission to adopt.[997] Among Mathews recommendations is the promotion of 'community participation and ownership' of new structures and policies in order to 'heighten the likelihood of compliance and sustained cultural change.'[998]

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[995] Crofts (n 982), 100

> Whereas employment screening for example focuses on who the likely abuser may be, organizations in fact have by far the greatest leverage over the design and operation of the organizational setting itself. Situational prevention essentially involves modifying aspects of a specific organizational setting with the aim of making abuse-related behaviors 1) more likely to be detected and stopped; 2) more difficult and inconvenient to enact; 3) less permissible; and 4) less rewarding; and to 5) identify and remove factors that may precipitate abuse-related motivations. Situational prevention has featured in the Royal Commission's work and seems to have strong intuitive appeal among organizational leaders, albeit that its rationale and methodology are often not well understood.

[996] Ben Mathews, 'Optimising Implementation of Reforms to Better Prevent and Respond to Child Sexual Abuse in Institutions: Insights from Public Health, Regulatory Theory, and Australia's Royal Commission,' (2017) 74 *Child Abuse & Neglect*, 86.
[997] Ibid, 94.
[998] Ibid.

One way that the Royal Commission showed dedication to community participation and ownership as a goal was by engaging with communities across Australia to gather relevant information to help craft recommendations for institutions and governments.[999] The Royal Commission ultimately issued 400 recommendations for different Australian institutions, which are collated and presented in its final report.[1000] These recommendations were broad in scope and ambitious in reach. It had recommendations for the federal government, including the establishment of a national office for child safety, the development of a national framework to prevent child sexual abuse, and the creation of a portfolio overseeing policy relevant to childhood. It had recommendations for state and territory governments, including the adoption of policies and creation of agencies aimed at child protection, to take care to implement child protection policies in places of detention and other institutions engaged in child-related work, and to implement training and other programs, in consultation with communities, to create the kind of cultural change require to truly protect children. It also had recommendations for non-government institutions, including the Catholic Church and other religious institutions. Among these was the recommendation that the rite of confession be modified to permit (or require) a priest receiving a confession from someone who has abused a child or children to report the confession to secular authorities. This caused significant controversy in Australia and among Catholics around the world.[1001]

The Royal Commission's recommendations were broadly praised by many practitioners and experts in child protection. Joe Tucci and Monique Bom of the Australian Childhood Foundation, for example, praised the Royal Commission's for its demonstration of deep understanding of that institutional child sexual abuse is more likely when: (1) 'those with power over children are not questioned or sanctioned', (2) 'when that power is

[999] Royal Commission Final Report: *Volume 17, Beyond the Royal Commission*, pg 3. The full list of recommendations is available in the Executive Summary.
[1000] Ibid.
[1001] ABC Radio Melbourne, 'Melbourne Catholic Archbishop Peter Comensoli would choose jail over breaking confessional seal.' *ABC News* (online 14 August 2019); Olivia Colombo, 'Perspective: Seal of Confession Laws,' *The Torch* (online 27 November 2019) <https://bctorch.com/2019/11/27/perspective-seal-of-confession-laws/>; Frank Brennan, 'Circumscribing the Seal of the Confessional,' *Eureka Street* (online 20 August 2018) <https://www.eurekastreet.com.au/article/circumscribing-the-seal-of-the-confessional>; Michael A Peters, 'Child sexual abuse: The final report of the Australian Royal Commission into institutional responses to child sexual abuse,' (2019) 51(3) *Educational Philosophy and Theory*, 233.

unchecked and perceived to be all pervasive', and (3) 'when justice for the most vulnerable is replaced with institutional self-protection.'[1002]

Most of the Royal Commission's recommendations have had indeed been adopted, at least in some form, across Australia. The Royal Commission's final report included a list of developments to law and policy across Australia that were put in place during the life of the Royal Commission in response to its findings.[1003] These included, as discussed in Chapter 6, changes to law related to statutes of limitation, the duty of institutions to provide a safe environment for children, and provide litigants with a proper defendant, including abolishing the Ellis Defence. They also included new legislation implementing reportable conduct schemes, child safe standards, and modernised and simplified rules related to criminal sexual offenses relating to children.[1004] New policies have been adopted by institutions across Australian social life: sporting, schools, religious organisations, scouting, medical facilities, and residential care.[1005] Finally, people were actually prosecuted as a result of evidence revealed to the Royal Commission. 'As of 31 July 2017, the Royal Commission had made 2,552 referrals to police, and police had laid charges in a number of these cases.'[1006] Pell himself was the subject of a prosecution that drew intense interest from the Australian public.[1007]

It is too soon to assess the effects of policies adopted after the Royal Commission. It is notable, however, that many of the practical outcomes attributed to the Royal Commission are likely to inure to the benefit of children and society today, and thus go beyond any form of redress or retribution that the other three legal systems considered here are capable of. Real change and a better future for children is at the heart of what most victims want. Victims and experts largely agree that nothing can completely heal the trauma of child abuse or redress its harm, and thus a focus on effective prevention of future abuse is imperative. Prevention is an impact that matters. In this, the Royal Commission may prove itself to be the most responsive

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[1002] Tucci and Blom (n 982),

> . . . child serving organisations understand that children are active agents in their own right. They build processes through which children actively and regularly are listened to. Their feedback is sought about the way that services and activities are set up and implemented. They give value to children experience being influential for themselves and for other children.

[1003] Royal Commission Final Report: *Volume 17, Beyond the Royal Commission*, 'Appendix A: Developments during the life of the Royal Commission.'
[1004] Ibid.
[1005] Ibid.
[1006] Ibid, page 98.
[1007] Davey (n 950)

of the four legal systems studied here. It has made actual improvement in the area those most impacted says is most important.

VI. CONCLUSION: THE ROYAL COMMISSION AS QUASI-RESPONSIVE

Royal commissions play an important, highly politicized role in Australian public life with the power to shape public opinion, influence legislative decision-making, and the potential to make tangible changes in legal and social orders across Australia. With few fixed features other than the government's role in appointment and defining terms of reference and a remarkably strong subpoena power, they have been instituted to investigate the concerns of the day since Australia's federation. The authorizing and governing legislation leaves appointed commissioners a great deal of flexibility in organizing and conducting investigations, reflecting an understanding that royal commissions may investigate such a wide variety of topics that flexibility is desirable. As with bankruptcy, royal commission have not embedded the interests of the 'haves' – instead, as the Royal Commission demonstrated, they are capable of putting aside protections of the powerful embedded in other legal orders and work to counter forces of domination. Royal commission often see powerful entities as the subjects of investigations, even though, as ad hoc mechanisms, they have little doctrine or procedure that carries through from one commission to the next.

Unlike the other systems studied in this thesis, the Royal Commission is not meant to address the particular circumstances of individuals, but to investigate and make recommendations for the problems of a society. Its purpose is political in the sense that it is intended to investigate and ultimately change policy, polity, people, and institutions. The Royal Commission's final report reflects its view that the problem of child sexual abuse in institutional settings is structural and pervasive, that its impacts across society are profound, and that redressing harm, reforming legal process, helping victims, identifying risk factors, prevention, and other efforts to improve the future will take significant and sustained effort and investment by stakeholders across society. Its recommendations, and the diverse array of actors and institutions called upon to institute change reflects a nuanced and comprehensive approach to a complex problem.

To say that royal commissions are political is not to dismiss them as political theatre—they are political in that they provide guidance for policy or other problems facing the nation. They are not intended to resolve personal disputes or determine the guilt or innocence of any party accused of a crime or other wrongdoing. The purposes of each royal commission are set forth in the letters patent under which it is authorized, but they tend to relate to the

establishment of an official narrative of events leading to a tragedy or other scandalous event, investigate political, industrial, or social activity for potential problems or wrongdoing, and usually consider some kind of reform. During the Royal Commission's tenure, the Commonwealth government also appointed royal commissions to investigate a home insulation program, trade union governance and corruption, the child protection and youth detention systems of the Northern Territory, and misconduct in the banking, superannuation and financial services industry.

Although the Royal Commission, of the four systems discussed in the thesis, is the most openly committed to substantive justice, one weakness comes from not including stakeholders as deliberative partners. Without giving stakeholders votes alongside voice, the system's potential for substantive justice is limited. Chapter 4, on Ballarat and Gallup, highlights the ways that intersecting lines of social and political orders impact stakeholder capacity to access justice, and also that people in different places may have different needs, even if they are seeking redress for the same kind of harm. People involved in the decisions that impact them can advocate for their own needs, if only they have enough leverage. While voice may make justice more accessible, the best way for people to receive justice that is meaningful to them is for them to have leverage to obtain it.

Furthermore, as discussed above, the Royal Commission's report is ultimately a recommendation. All state, territory and federal governments, and the major churches involved have signed up for an official redress scheme, but the scheme that went into effect is not exactly what was recommended. It has been criticized for, among other things, capping the amount that can be awarded to a victim at a lower amount than what the Royal Commission recommended and denying redress payments to any victim convicted of certain crimes. Survivor advocacy groups criticise this restriction, pointing to the high rates of children abused in care, saying that if the officials in whose care children were placed had protected them from sexual and other forms of violence, the children may not have later committed crime.[1008] This particularly troubling given the 722 private sessions held with

[1008] 'Child sex abuse redress scheme to cap payments at $150,000 and exclude some criminals,' *ABC News* (online 26 Oct 2017) <http://www.abc.net.au/news/2017-10-26/sex-offenders-to-be-excluded-from-child-abuse-redress-scheme/9087256>.

> Care Leavers Network (CLAN) CEO Leonie Sheedy condemned the selective inclusion. "They were once children and they deserve redress just like any other care leaver who was sexually abused in an orphanage, children's home or foster home," she said. "If the churches and charities and the State Governments had looked after us properly, those care leavers would not have committed crimes against society. "They're at fault and everybody should get compensation even if it's a reduced amount for people who come under this category."

survivors in prisons, who could legitimately have expected that their sharing their stories might mean that people including themselves would eventually have a means of redress. Although the Royal Commission is listening to victims and their voices are being heard, without political will, if legislatures and courts fail to act on any of its recommendations, victims might reasonably ask what purpose it serves to be heard.

The process ultimately deferred specific determinations about individual stakeholders' rights and responsibilities often by referring cases to prosecution, but the wealth of information provided a solid base upon which to make determinations about the best way to redress harms and reshape Australian society to protect children. Partly because no institution was unfairly singled out, the complicity of large swaths of Australian society in protecting abusers was made clear, as the overall purpose of reforming society to prevent future abuse requires not necessarily the identification of a blameworthy party, but the identification and acknowledgement of blameworthy patterns of behaviour. The Royal Commission was an independent inquiry, without a direct means by which actors could pursue their own interests. Actors considered stakeholders in other legal systems are effectively witnesses to the Royal Commission, and have no capacity to shape the process, decision-making, or ultimate results other than to the extent the commissioners, and later legislators, determine to adopt their preferences and recommendations. The sophisticated and informed approach to victims, and the purposive nature of the process bears many characteristics of responsive law. It also provides insight into the co-constitutive relationship between legal and social orders – a social movement lead to its appointment, which in turn shifted the public narrative and led to reforms of doctrinal law.

The last chapter of the thesis, next, seeks to bring together the threads of the argument, review the main lessons from each chapter, and consider whether any further conclusions can be drawn. It will compare the four legal systems directly, looking at purpose, doctrine, procedure, and practicalities to test the earlier conclusions about those systems as repressive, autonomous, or (quasi) responsive law and consider what they tell us about real law. The final section of the thesis reflects on these lessons and what they suggest about how a truly responsive legal system would work against domination by empowering the vulnerable to effect their own goals – and how the Selznickian ideal of effective belonging can help responsive legal systems resist the forces that recreate patterns of domination across social orders.

CHAPTER 9: CONCLUSION

I. JUDGING THE CHURCH, JUDGING CORPORATIONS

This thesis has used an NLR approach to consider what the problem of clerical child sexual abuse reveals about legal systems, law as it is practiced, lived, theorised, and understood in its context. By seeking to understand how legal systems work to resolve problems, it reveals how real law emerges from the relationships between legal and social orders. It also provides insight into responsiveness in law, how responsive legal systems would approach complex problems, and provides tangible examples of responsiveness in action.

As discussed in Chapter 1, the problem of holding the Catholic Church accountable for clerical child sexual abuse is complex. Mass torts, where an institution or corporation is responsible for some large-scale harm with wide-reaching ramifications often have high transaction costs for victims to seek justice. But this is a mass tort complicated by the unique structure and social positioning of the Catholic Church, legal protections for religious organisations, the intentional nature of sexual abuse, the unique vulnerabilities of childhood, and the severity of the resulting harm. The problem of child sexual abuse is not simply a problem of individual bad actors but one of social institutions, like the Catholic Church and governments around the world, which have enabled, covered up, and feigned ignorance of abuse. There is broad agreement in both the United States and Australia that the Church ought to be held accountable for these histories, and for changing the future.

The hierarchical, yet complicated, relationships between organisations within the Church; the ways in which the status of religious organisations under state law impacts legal proceedings; and the social power of the Church in communities all contribute complications with holding the Church (or particular organisations within it) to account. Many inside and outside of the Church see the Church as a whole as bearing responsibility for bishops' moving known abusers around and allowing them to continue abusing—but also for other kinds of harm. As discussed in Chapter 5, theologies of sexuality and clericalism are described by (some) insiders and outsiders alike as contributors to victim trauma. Others see the Church's social power and support for patriarchal norms as contributing to cases where families and communities do not believe victims, punish victims for reporting, and to a culture of silence that enables and emboldens abusers. Despite the apparent similarities across the world, the Church's social, political, and historic roles and relationships with local communities mean that the harms, effects, and capacities of legal systems to address those harms and effects, differ in each particular place, as the social orders over which the Church and the relevant

legal orders claim jurisdiction shape real law in those places. There are no easy answers to the problem of clerical child sexual abuse, and there are no easy means to compensate for the ways that power and privilege amplify harms affecting the most vulnerable.

By narrowing the focus to child sexual abuse in Catholic dioceses and unpacking the scope of law being used in response, this thesis offers a way to think differently about ways of holding organisations accountable for harms to individuals, in part because the complexity of the problem brings out weaknesses and strengths of legal systems. In addition, the thesis demonstrates a way of understanding legal systems as they resolve disputes between individuals and large, powerful organisations. By situating the study in multiple aspects of legal systems operating in two rural dioceses in common law countries, each of which having been subject to multiple legal proceedings arising out of clerical child sexual abuse, it also challenges the sociolegal tendency to distinguish between 'law on the books' and 'law in action.' Instead, this analysis shows how understanding how different legal systems approach a problem also provides insight into how real law takes shape in practice. The two case studies illuminate how real law is constitutive with the social orders that it, in turn, also help define and construct legal systems. This places my project within the emerging NLR tradition – demonstrating how doctrinal and empirical means together can illuminate differences between legal systems. As this thesis has shown, it is possible for legal systems to be purposive, to have doctrinal flexibility, and to facilitate effective participation of stakeholders according to their interest in outcomes, rather than their capacity to finance litigation. That being said, none of the systems studied can be described as wholly responsive. Truly responsive mechanisms would be capable of countering dynamics of power between stakeholders, as well as departing from the adversarial models of dispute resolution canon and common law both represent. Both Chapter 11 and the Royal Commission demonstrate some aspects of responsive law, and as such, present models that provide glimpses of responsive law in practice.

Understanding how responsive law can work is important not just for responding to clerical child sexual abuse. The Church is hardly the only large, complex organisation to bear responsibility for significant harm to people and communities. There is probably no organisation in the world that is truly comparable to the Church in terms of impact on human history, and the nature of religion means that individuals suffering harms through the Church may experience those harms as qualitatively different from other harms. However, other

organisations, or what Christian List and Philip Pettit might call group agents,[1009] can and do cause significant harm. Corporations and other organisations are called to be held accountable for damage to the environment, harmful products, anti-competitive strategies, inhumane or dishonest employment practices, and countless other harmful practices. The uniqueness of the harms of clerical child sexual abuse does not detract from the utility of the problem for informing a discussion of how to hold organisations accountable for wrongdoing. On the contrary, as this thesis has shown, its complexity highlights and magnifies strengths and weaknesses of legal systems, showing how they can serve to replicate and amplify patterns of domination and vulnerability or facilitate empowerment.

The significance, meanings, kinds of wrongdoing, and other qualitative aspects of harms caused by organisations, as well as theories under which organisations can be held culpable exist across a wide range.[1010] Tort law is used to hold manufacturers accountable for hazardous products or by-products. Anti-trust and securities laws are intended to ensure fair play in the marketplace. All or almost all institutions of business, commerce, education, sport, art, recreation, entertainment, politics, and other aspects of human life see scandals of abuse, violence, deceit, fraud, and other failings that give rise to claims against the organisation.

Many observers have noted how difficult it is for individuals to hold large organisations accountable through presently available means.[1011] Class actions, corporate criminal liability, and claims in tort are frequently stymied procedurally, or victims are disappointed in recoveries limited by statute or forced into arbitration on an individual rather than collective basis.[1012] Furthermore, most harms involve physical, emotional, or spiritual pain, the loss of a loved one, anxiety, risk of future harm or disease, as well as time, energy,

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[1009] Christian List & Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press, 2011), 173.

[1010] See, e.g. Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993); William S Laufer, 'Corporate Culpability and the Limits of Law' (1996) 6 *Business Ethics Quarterly* 311; William Robert Thomas, *How and Why should the Criminal Law Punish Corporations?* (ProQuest Dissertations Publishing, 2015).

[1011] See, e.g. A Grear and B H Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape' (2015) 15 *Human Rights Law Review* 21; Peter Muchlinski 'The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World' (2011) 18 *Indiana Journal of Global Legal Studies* 665.

[1012] Trends such as those noted by Supreme Court Justice Ruth Bader Ginsburg in dissent in a recent decision about the right of employees to bring a collective action against their employer in contravention of a clause in their employment contracts requiring disputes be resolved through individual arbitration have narrowed the capacity of plaintiffs to use legal process to hold corporations to account. *Epiq Systems Corp v. Lewis*, 137 S.Ct. 809 (2017) (Ginsburg, J. dissenting)

and emotional burdens.[1013] It is this diversity of harms that makes effective participation and empowerment through legal process so important, as demonstrated by Chapter 7. Through the plans emerging from the Diocesan Debtors' bankruptcy case, we can see how providing victims with active roles in decision-making gives them leverage to seek remedies meaningful to them, as opposed to having judges or juries determine remedies.

In general, in common law systems, remedies available through actions against corporations are generally expressed in money. But money can only partially compensate for what victims have lost. The value of apologies, the establishment of an official narrative of truth about some instance of wrongdoing, and other non-monetary remedies and forms of redress is apparent for victims of clerical child sexual abuse, but other kinds of harm can also benefit from redress not being limited to money. One can be financially compensated for experiencing physical pain, changes to medical or ability status, the loss of loved ones, and many other kinds of harms, and under the law it might be said that victims have been made whole, but few victims of significant non-financial harms would say that money ever truly made them whole. Money damages means different things to different people, but victims also have an interest in being vindicated, in being heard, and in feeling accepted and supported by their communities.[1014] While legal systems like tort might offer some kinds of vindication, a truly responsive system would facilitate participants seeking what they want – and not being limited in remedy by rigid rules of autonomous systems.

II. JUDGING THE CHURCH AND A NEW VISION OF RESPONSIVE LAW

The lessons drawn from the legal systems examined in this thesis allow for a reimagined vision of Selznick's concept of responsive law. Selznick argued that 'justice requires a responsive legal order,'[1015] and that responsiveness requires legal systems to be purposive in seeking substantive justice. The essence of the republican ideal is that good policy is that which advances freedom as non-domination; deft checks and balances against arbitrary power are keys to republican freedom from domination.[1016] Responsive law is a way that this ideal can be manifested, and in the context of individuals seeking justice from

[1013] See, e.g. Joseph E. Stiglitz, 'Government Failure vs. Market Failure: Principles of Regulation,' Balleisen, Edward J. and David A. Moss eds., *Government and Markets: Toward a New Theory of Regulation* (Cambridge University Press, 2010),

[1014] Holder and Daly (n 10).
[1015] Selznick (n 145), 463.
[1016] Braithwaite, John, 'Relational Republican Regulation' (2013) 7 *Regulation & Governance* 124, (citing Pettit, (n 155)).

organisations that have harmed them, this thesis has provided concrete examples of responsive law in action. In order to make these examples useful for future research on improving legal responses to harmful behaviour by large organisations, it is useful to highlight responsive attributes as they manifest in legal systems' multiple aspects.

Using the dioceses of Ballarat and Gallup as sites for this study has allowed for insight on how to build from a Selznickian approach while taking seriously the critical call to attend to the way law impacts marginalised people within social orders. Some might read Selznick as attributing poverty to weak morality, and dismissing the idea of deference 'if the institution in question has little or no potential for self-regulation'.[1017] Whether or not that would be an accurate view of Selznick's opinion is outside of the scope of this thesis, but questioning the moral capacity of vulnerable people fails to appreciate the ways in which intersecting forms of social domination produce dysfunction in vulnerable communities, and acts to reinforce domination. These forces mean that some people are more vulnerable to predation, face additional hurdles to bringing civil claims or having their allegations taken seriously, all while being denigrated as less deserving of redress. Law cannot require the same level of 'self-help' from all members of an unequal society and call itself responsive. Instead, responsive law should seek and encourage stakeholder participation, with a great deal of flexibility in the form in which that participation may take, and a consultative process that enables effective participation on the basis of interest in dispute resolution, rather than one that leaves disinterested parties with decision-making authority.

Truly responsive legal systems require: (1) embedded knowledge of social realities in multiple aspects of law, (2) a purposive approach, (3) procedural flexibility, (4) the deliberate and effective inclusion of impacted stakeholders in legal processes, and (5) a normative agenda of countering domination and accounting for social disparities that impact capacity to further litigant interests through legal proceedings. The thesis shows how bankruptcy and the Royal Commission each have some but not all of these attributes; enough that they can both be characterised as quasi-responsive law. True responsiveness, however, requires that these attributes be embedded across multiple aspects of law. Instead, bankruptcy's embedded purpose is not dedicated to substantive justice but resolving economic issues. The Royal Commission's resting decision-making authority with appointed commissioners and elected officials leaves victims without leverage to effect their own wishes, evidencing its autonomous roots. As examples of real law in action, we can see how shortcomings are not

[1017] Selznick (n 145), 470

necessarily the result of social forces of domination exerting power, as suggested by the 'gap' concept embraced in much of sociolegal literature, but rather how the interests of the powerful have been embedded in aspects of law overlooked by scholars.

A. *Responsive Purpose*

As discussed in Chapter 3, each legal system has a purpose and an internal theory, which determine how it constructs legal problems. For those who engage with processes in search of justice after clerical sexual abuse, the legal theories on which these systems operate can enable or foreclose whether the justice they seek is possible. Legal theories identify the kinds of problems a system will address and the kind of justice available. Purpose informs the kinds of cases that a legal system concerns itself with, and the ideas of right and wrong that help decisions get made. By considering the purposes of each of four legal systems in responding to a complex problem, we can then consider the lessons about what purposes a responsive system might have. While Nonet and Selznick emphasised that a responsive system would be purposive, the systems studied here demonstrate that it is important that the purpose be to produce substantive justice and the production of a narrative of truth and moral judgement.

As a progenitor of the feudal legal systems that Nonet and Selznick used as a model for their description of repressive law, canon law's application in the context of clerical child sexual abuse is classically repressive. As the internal law of the Catholic Church, and unlike *Towards Healing* or the *Dallas Charter*, it is not designed to facilitate resolution of disputes between the Church and individuals who interact with it. It is more like a constitution or a corporate charter, setting the rules for relationships, decision-making, and status of stakeholders within the Church. Chapter 5 traces the history of the prohibition against clerical sexual abuse to its roots in patriarchal norms and taboos against sexual contact between males. Clerical child sexual abuse is theorised in canon law as a problem of ritual impurity and violations of obligations to the Church. This self-referential theory of harm is designed to protect the institution and its authority.

Tort, or the law of civil wrongs, as discussed in Chapter 6, is rooted in ideas about providing remedy for harms, and by so doing, reducing the likelihood of future harms. Even as there is no shortage of research on the various failures of tort law regimes to serve interests of substantive justice, its failures in the context of clerical child sexual abuse are glaring. First, any real chance of recovery requires connecting disembodied organisations with the embodied actions of individuals. Only recently in Australia and a few other jurisdictions have

there been new theories of liability based on a duty of care that institutions owe to children in their care. Typically, dioceses can only be held responsible under theories of negligence or as parties responsible for the conduct of priests or religious working for them. The particular history of the Catholic Church and secular states, including the earlier history traced in Chapter 5, has allowed Catholic organisations to embed their interests in law, including the corporate law theories that define diocesan ontology for purposes of state law. Tort law's entire premise is to provide a means of private redress for harm — it is a system by which private parties may accuse another of committing some wrong, whether intentional or negligent, that caused harm, to secure both vindication and redress should the case be resolved in the plaintiff's favour.

Bankruptcy law, as was detailed in Chapter 7, has dual goals of a fresh start for debtors and equitable treatment for creditors. These goals, while frequently in tension with each other, are both largely justified in terms of public policy to further communities' overall economic interests and normative ideals of equity and rehabilitation. Traditionalist bankruptcy theorists link the fresh start idea with religious ideas of forgiveness, which in Jewish and Christian traditions are grounded in the Hebrew Scriptures' call for jubilee years. Jubilee years, like bankruptcy, can be described as social programs for responding to unsustainable debt. The philosophical connections between bankruptcy theory and Catholic teachings might lead to a naïve hope that the secular ritual of bankruptcy might inspire meaningful forms of confession and apology by dioceses. Instead, the contrast highlights the main theoretical difference between secular approaches to unsustainable debt and religious ideas of sin and forgiveness – the question of moral judgment. Bankruptcy attaches social stigma to the failure to pay debt but does not distinguish between debts on the basis of the morality of their creation, but on their status as, for example, secured or unsecured. By contrast, sinners seeking forgiveness through Catholic traditions are required to reflect on the wrongfulness of their behaviour. The ritual of Confession helps to reinforce and condemn certain 'sinful' behaviour.

As discussed in Chapter 7, proceduralist theory has led to the dominance of a creditors' bargain concept that presupposes the voluntariness of creditors' financial interests in debtors' estates, and to a model of bankruptcy that assumes the opportunity to, ex ante, decide whether to extend credit or engage in trade with a debtor. While some proceduralist theorists suggest that tort creditors should be treated differently from other (voluntary) unsecured creditors, recognising that there is a moral difference between a trade creditor and a tort victim, they simultaneously argue for a view of bankruptcy that assumes all creditors

chose the circumstances that led to their being owed a debt. Nevertheless, the proliferation of bankruptcy cases resulting from mass tort, whether asbestos manufacturers, medical device companies, energy companies, pharmaceutical companies, scouting and sporting organisations, or the Diocesan Debtors has led to the development of a bankruptcy jurisprudence of mass tort. But, as discussed below, the focus of this jurisprudence is on procedure, and is not concerned with condemning the tortious action itself. While bankruptcy's focus on problem-solving may be evidence of its purposive approach, furthering the argument that bankruptcy is quasi-responsive, it is an a-moral approach to tort, limiting its responsive capacity. This means that victims filing claims in Diocesan Debtor cases are unlikely to see a public accounting of the diocese's wrongdoing. By contrast, the Royal Commission's mission of truth-telling and defining wrongfulness of institutional action is integral to its theory and function in Australian society.

Chapter 8 discussed royal commissions as the premier investigative mechanism in Australian politics and government, and the importance of their investigative and truth-telling function to the Australian public. The reputation royal commissions have as the means of shaping the official narrative, and social understandings of events led to advocates and survivors calling for what eventually became the Royal Commission. Despite limitations of its terms of reference, the Royal Commission's purpose is to investigate the problem of sexual abuse in institutional contexts as a large social and political problem, one which requires the marshalling of resources from diverse stakeholders across society. The Royal Commission effectively communicated condemnation of both Catholic and non-Catholic institutions for their failures in responding to their clergy and employees abusing vulnerable children. Its findings led to the establishment of a redress scheme which would include ex gratia payments as intended 'to provide a tangible recognition of the seriousness of the hurt and injury that a survivor has suffered.'[1018]

The Royal Commission is unique among the four legal systems in the degree to which its theory is specifically relevant to clerical child sexual abuse, even as it is also broader in terms of its goals. It does not seek to resolve an identified dispute between specific parties but to shape social policy for the entire nation and beyond with the strength of its research program and broad recommendations for reform, including recommendations for canon law reform. Its whole purpose is connected to the production of knowledge and establishment of an official narrative of truth, even as it is cautioned to take care that its work 'does not

[1018] Royal Commission Redress and Civil Litigation Report (n 625).

prejudice current or future criminal or civil proceedings or other contemporaneous inquiries.'[1019]

Without a narrative establishing an official truth, those seeking vindication are likely to be left unsatisfied. By 'vindication' I am drawing on Duff's discussion of the criminal trial, and how a formal or community-accepted determination about the wrongness of certain conduct, and communication of the community's disapproval of that conduct serves to simultaneously communicate acceptance and belief in victims' truth-telling.[1020] Vindication is more than a determination of moral culpability, for victims of child sexual abuse; it is also a statement of about victims' innocence. The kind of knowledge or truth a legal system produces, and the priority placed on truth production are a function of its purpose. The Royal Commission's fundamental purpose is the production of knowledge on which future policy-making decisions and legal proceedings can be based. Between the research it commissioned, the public hearings it held, and the reports it issued, its determination of facts and evaluation of data involving individuals, institutions, and Australian society more generally aid it to meet its primary purpose of informing future policy. A truly responsive system should have, as a purpose, the production of a narrative of truth, making a determination of right and wrong with respect to its subject matter.

B. *Responsive Doctrine*

It is notable that both systems identified as quasi-responsive in this thesis have relatively little doctrine, which has been discussed along-side their procedure because of the porous boundary between doctrine and procedure in both systems. Selznick, in *The Moral Commonwealth*, described autonomous law as rule-centred, while '[r]esponsiveness begins with *outreach and empowerment*.'[1021] Outreach and empowerment was a particular strength of the Royal Commission. Autonomous systems rely on doctrine to maintain the separation between law and politics, whereby decision-making is reduced to a process of analysing events according to defined rules. Selznick points to the rise of impact litigation in the era of the Warren Court in the United States as an example of responsive law in action.[1022]

> The capacity of law to deliver justice depends on the range of interest it acknowledges. All must have effective (as well as formal) access to the legal system, and the law must be open to new claims of right. In this century we have seen substantial movement in both directions. Labor and civil rights

[1019] Royal Commission Terms of Reference (n 870).
[1020] RA Duff, 'Responsibility, Restoration, and Retribution' in M Tonry (ed.) *Retributivism has a past: has it a future?* (New York: Oxford University Press, 2011), 63.
[1021] Selznick (n 145) 465.
[1022] Ibid at 467-470, comparing public law with traditional private law concerns.

> legislation; legal services for the poor; environmental and consumer protection: all have greatly expanded the reach of justice.[1023]

This suggests that responsive law should not have rigid, inflexible doctrine, but rather that a responsive system's doctrine would be purposive and flexible, and that substantive justice, rather than rigid conformance with black-letter law, be the driving motivation of decision-making.

Canon law prohibits priests and religious from engaging in sexual activity with anyone and has specific law prohibiting their sexual behaviour with minors and other vulnerable people. Chapter 5 traces the history of canon law's prohibition on priests and religious engaging in sexual activity with boys, codification of prohibitions of sexual abuse against minors of either gender in the 1917 Pio-Benedictine Code and the 1983 Code, including recent revisions responding to scandals of sexual abuse across the globe.

Chapter 6 explains how judges have endorsed theories of equitable tolling for statutes of limitation, vicarious liability, and the existence of a duty to protect, while lawmakers have changed statutes of limitation, created new rights of action for victims of abuse, and changed evidentiary and procedural rules to accommodate the prosecution of claims of child sexual abuse. Tort law provides causes of action that allow for recovery for those sexually abused as children, although it does not specifically address abuse by a cleric. These laws, like canon law, have been shaped by changes to understandings of child sexual abuse over recent decades and in response to activism calling for such changes.

As discussed in Chapter 1, across the globe, tribunals and lawmakers have, at various points in recent decades, determined that some aspect of doctrinal law relating to child sexual abuse needed to change. Since the 1970's, awareness and new understandings of child sexual abuse as a social problem has increased, bringing to light the significance of the harms to victims and its prevalence. As discussed in Chapter 2, one of the distinctions between NLR and earlier movements of legal realists is the seriousness with which NLR scholars bring doctrine back in. Early legal realists pushed back against legal positivism by discounting the value of doctrine and focused their analysis on law in action. They took very sceptically law's claims of doctrinal determination. By contrast, doctrine in NLR scholarship is understood more as an independent variable, a critical part of the co-constitutive relationship between law and society. Doctrine is meaningful, but perhaps not as determinative as positivist theories would suggest.

[1023] Ibid.

While both canon law and tort have developed significant doctrinal law that specifically addresses child sexual abuse or clerical sexual abuse of children, the Royal Commission and bankruptcy take their definitions of child sexual abuse largely from criminal or civil (tort) law. Doctrine in bankruptcy and the Royal Commission is notably sparse or concerned with fair process more than the particulars of wrongdoing. As discussed in Chapter 7, claims can be filed in a bankruptcy case on the basis of an existing legal dispute or cause of action, regardless of whether the debtor agrees a valid claim exists, and regardless of whether any formal action has been taken. In practice, in the Diocesan Debtor cases, a large percentage of the claims filed alleging a debt arising out of child sexual abuse had not previously been filed in a court. But the basis of these claims is tort law—the claims are filed to assert that the claimant holds a cause of action in tort. But the bankruptcy court does not have jurisdiction to resolve questions about the validity of the allegation. Those are resolved either through a process agreed to by the parties or by the court of general jurisdiction otherwise capable of hearing the claim.[1024] The bankruptcy court does not make determinations of law relating specifically to child sexual abuse—its focus is on the resolution of a dispute between stakeholders as to the appropriate allocation of assets forming the bankruptcy estate.

The Royal Commission's purpose is investigatory, and its findings are not binding on courts making determinations of violations of criminal or civil law. As discussed in more detail in Chapter 8, the specific terms of reference issued to the Royal Commission is not doctrine, and while it defined the term 'child', it did not define the term 'child sexual abuse'. The Royal Commission's final recommendations included multiple admonishments for federal, state, and territory governments across Australia to adopt the same definitions for child sexual abuse and related legal concepts for purposes of law enforcement, data collection, and child protection efforts.[1025]

The social advocacy that Selznick admires and clearly hopes leads to truly responsive law may have been stymied by civil law procedure rooted in common law tradition that, like the tort law that is so difficult for victims of child sexual abuse to navigate, does not facilitate ordinary people's leverage in their dealings with governments and corporations. Truly responsive law must do more than just make it theoretically possible for ordinary people to access justice, it must actively work to facilitate participation by vulnerable members of

[1024] See *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).
[1025] Royal Commission into Institutional Responses to Child Sexual Abuse, *Recommendations* (Commonwealth of Australia, 2015)7.10, 12.1, 12.3, 12.15.

society and find ways to ensure peoples' leverage in negotiating solutions is relative to their interest in a problem more than it is to their capacity to pay for legal services. Common law systems make judges or juries decision-makers. A responsive system would encourage negotiated solutions and consensus-building among stakeholders. A responsive system would recognise the plurality of interests in a social or legal problem and would facilitate the effective participation of all stakeholders in proportion to their interests in the outcome. As will be discussed in the next section, the Royal Commission worked to ensure their process was accessible across Australian society, while bankruptcy can give impacted parties votes in a negotiated process of dispute resolution. Taken together they demonstrate how a responsive legal system might embrace a form of doctrine that is flexible and process-oriented, rather than fixed.

C. *Responsive Procedure and Practice*

A key take-away from this thesis is that deliberative, relational, and flexible proceedings are capable of counteracting forces of domination and fairly governing disputes between individuals and organisations. Such proceedings may have rules that provide parties and officials involved with flexibility and adaptability of process. The freedom to make determinations about how to conduct legal proceedings and having a range of tools from which to choose gives stakeholders the means to reach equitable resolutions are keys to responsiveness. But it matters who can access this flexibility — are judges trusted to identify the right time to use flexible procedures, and what role do stakeholders have in these determinations? Bankruptcy judges, as discussed in Chapter 7, are empowered by statute to grant requests by parties or to act on their own to 'tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.'[1026] As discussed in Chapter 8, royal commissions empower the appointed commissioners to design and conduct their inquiries in many respects as they see fit. This flexibility enables the purposive approach that Selznick identifies as an essence of responsiveness.

Writing in 1992, Selznick praised the public law model for giving ordinary people access to the benefit of law and a mechanism to wield their own power through law.[1027] But by that point, the conservative backlash to civil rights legislation and the Warren court had already begun. The history of how legislative and judicial victories of the mid-twentieth

[1026] *Bankruptcy Code* 11 U.S.C. § 105(a).
[1027] Selznick (n 145) 464-465.

century have been weakened by repeat players and powerful interests curtailing the scope of law and pushing courts toward more and more conservative interpretations is outside the scope of this thesis, but well-documented.[1028] The vulnerabilities of the mid-twentieth century legal reforms that Selznick praised do not necessarily implicate the theory of responsive law. If responsive law is defined by its purposive normativity and participatory approach, then it must also empower effective participation and the capacity to defend against capture by private interests. Both bankruptcy and the Royal Commission demonstrate (in their own ways) how systems can be designed to facilitate effective participation and deal with logistical problems.[1029]

Of particular relevance to cases involving clerical child sexual abuse, the procedural aspects of the legal systems significantly impact the degree to which victims are made visible through the process, and the power they have in decision-making. Restorative theory suggests that legal systems which attend to and respect victim voice may benefit all stakeholders and overall justice goals.[1030] The unique harms discussed in Chapter 1 frequently result in victims feeling disrespected, under-valued, and not listened-to. Thus, within the important realm of procedure, attending to victim experience facilitates their participation, and directly impacts the system's credibility with advocates and the public. The legal systems studied here demonstrate a variety of approaches to procedure. In some, victim's voices are central to the resolution or process, and in others, that is not the case.

In canon law, at one end of the spectrum, the victim is almost entirely removed from the process. As discussed in detail in Chapter 5, the bishop initiates and prosecutes a case of clerical child sexual abuse, and its adjudication is overseen by the powerful Congregation for the Doctrine of the Faith. Victims' roles are akin to the role of victims in classic criminal law in common law countries —a witness to a crime against the state (or Church in this instance).

[1028] William Kolasky, 'The Warren Court: A Distant Mirror: Part One - The Chief: Earl Warren' (2019) 33 Antitrust 81; Anthony E. Cook, 'The Moynihan Report and the Neo-Conservative Backlash to the Civil Rights Movement' (2016) 8 Geo. J. L. & Mod. Critical Race Persp. 1; Christopher W. Schmidt, 'Beyond Backlash: Conservatism and the Civil Rights Movement' (2016) 56 Am. J. Legal Hist. 179; Barry C. Feld, 'Race, Politics, and Juvenile Justice: The Warren Court and the Conservative Backlash' (203) 87 Minn. L. Rev. 1447; Edward Lazarus, Scott Lemieux , Robert Post , Jeffrey Rosen, Reva Siegel & Roger Wilkins, 'Examining Backlash and Attacks on Landmark Decisions from Brown to Roe to Goodridge' (2008) 2 Advance 149.

[1029] Robyn Holder, *Just Interests: Victims, Citizens and the Potential for Justice* (Elgar Studies in Law and Society, 2018)

[1030] Restorative justice is justice that heals. Its method is to develop and work to heal the relationships between the participants, to communicate respect for the humanity of all stakeholders while holding wrongdoers accountable for harmful behaviour. It stands for the proposition that a system's focus on the victim and the attention paid to victim needs and concerns is better for victims and helps wrongdoers to accept that their behaviour caused harm, take responsibility for making amends, and changing future behaviour. See, e.g. John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002)

Significant criticism of the Vatican's response to the scandal of child sexual abuse is centred on victim voice and power. The United Nations Committee on the Rights of the Child, for example, reported its concerns that canon law might impose an obligation of silence on victims of abuse; that Church organisations were requiring silence as a condition of settlement agreements in civil law; and that Church leaders were disparaging victims by questioning their credibility.[1031] The obligations placed on them by canon law, especially those that have been identified as contributing to its repressive character, may be part of the reason that Church leaders took some of these actions even outside of the canon law context.

Tort law, in theory, provides voice to victims through their control of the process. The plaintiff/victim decides whether to bring a claim, negotiate a settlement with the defendant(s), and settle (or not) at any point in the process. A plaintiff has the right to put on a case, to subpoena documents relevant to the case from the defendant, and to present evidence supporting their allegations. As discussed in Chapter 6, however, this theory of tort is often subsumed within the process—the case is more likely to turn on questions of limitations, equitable tolling, pleading standards, or evidentiary issues than it is on questions about whether or not abuse took place. Tort law pays attention to victim experience, insofar as the entire case centres on their presentation of their case. However, this often means that victims tell their stories multiple times in unfriendly settings, including being cross-examined about their experience by lawyers for the defendant(s) and their insurer(s). It has been described as 'retraumatising', or 'abusive' to be a plaintiff in a case against a Catholic diocese.[1032] For all that, victims infrequently get their 'day in court'; rather they get a deal that trades money for silence negotiated between their lawyer and the church's lawyer. Testimony before the Royal Commission and other forums describes, from a victim/plaintiff perspective, how deals between lawyers, churches and insurers silenced them. Similar problems are encountered in tort law in the United States. Claims in the United States have resulted in far higher settlements and awards, though still at a level few regard as proportionate to the harm.[1033]

A responsive system would do things differently from both canon law and tort – it would work to relieve burdens of participation. In the context of child sexual abuse, among other things, this means making it less difficult for victims to tell their stories, and to be conscious to difficulties resulting from the particular wrong they allege.

[1031] United Nations Committee on the Rights of the Child (n 75).
[1032] Balboni (n 811).
[1033] See, e.g. Balboni and Bishop (n 57).

Chapter 7 explained how procedural rules facilitating informed and productive negotiation among all relevant stakeholders, and the bankruptcy judge's broad discretion to fit procedural rules to accommodate the practical realities of individual cases may have facilitated better settlement terms than have been negotiated in any other legal proceeding. Chapter 8 discussed how the Royal Commission's authority to devise its own procedural rules in accordance with its understanding of the most efficient and effective way to gather, synthesize, and report on data and evidence allowed for a remarkably broad and deep inquiry into social, organisational, institutional, psychological, theological, criminological, and historical understandings of child sexual abuse.

Bankruptcy does little to amplify the voices of victims who want to tell their stories, to have those stories validated and be vindicated. But it does not silence them. The bankruptcy court is very unlikely to hold evidentiary hearings or make findings about the facts or truth of allegations of tortious action underlying a claim against the bankruptcy estate. It does not have the authority to make final determinations in causes of action not directly related to the bankruptcy case without consent.[1034] In these cases, however, a procedural system adept at responding to unique problems in business or industry has been able to listen to victim voices and adjust procedure to accommodate victim needs and interests. Bankruptcy judges provide times at hearings to allow victims to speak, almost all confirmed bankruptcy plans included provisions requiring the diocese or order to provide forums for people to tell their stories, and the lawyers representing victims spoke with media and issued releases telling the stories their clients wanted told publicly. Through their representative members on the committee of unsecured creditors, victims' preferences were heard and they had leverage in decision-making despite the kind of resource gap that frequently undermines plaintiff power in tort cases, but the experience in Gallup suggests that vindication may not necessarily come alongside achievement of other litigation goals. Indeed, the procedural realities of bankruptcy law often put victims in a fulcrum position, whereby in a remarkable moment of justice system ju-jitsu the weapon of leverage is handed to the weak.

As is discussed in more detail in Chapter 7, the process results in a counterbalance to what is typically a gap in resources between a victim and the Church. Victims' participation in the bankruptcy case does not require them to have significant resources. Because the counsel for the committee of unsecured debtors is paid through the bankruptcy estate, by the debtor (diocese in these cases), all parties have an incentive to negotiate, but a victim's

[1034] 28 U.S.C. §§ 157; *Wellness International Network, Ltd., et al. v. Sharif*, 135 S. Ct. 1932 (2015).

inability to pay for a lawyer or sudden emergency does not impact a decision about what kind of settlement is acceptable in the way it does for a claim brought in tort. The debtor who hopes to preserve its resources and reorganize rather than liquidate is incentivised to settle disputes with the committee quickly because the debtor pays for the committee's counsel. Victims also benefit from negotiating as a group.

Responsive law can be responsive to opportunities to turn an individual grievance into a moment of collective action that empowers all members of the collective, and that helps turn a what C. Wright Mills calls private trouble' into a 'public issue'.[1035] By doing so, victims together occupy what Clifford Shearing and colleagues call a node for governing action.[1036] As a node within the bankruptcy case, they occupy the fulcrum position and have genuine power to shape the outcome of the legal process. This is responsive capability from which other legal systems might learn. Among other benefits to working together as a committee is the likelihood of higher average payments — no one will take a smaller payment because personal circumstances require money sooner, raising the average payment for all. Victims in these cases also benefit from the kind of insider knowledge, relationships, and strategy that repeat players in large bankruptcy cases develop in a system that is designed to facilitate a negotiated settlement among multiple parties with divergent interests.

This is not to say that the process is entirely healing or attentive to victims. In Gallup, the Committee of Unsecured Creditors (led by five victims and advised by both local plaintiffs' attorneys and experienced bankruptcy counsel) effectively negotiated a settlement with the Diocese and its insurers that left them with a plan for a trustee to administer significant financial settlements, apologies, and other symbolic measures of apology—much, but not all, of what they wanted. One member of the creditors' committee in Gallup told me in an interview about feeling as if lawyers (plaintiffs' lawyers and bankruptcy counsel) dominated conversations, which may have had a silencing impact or influenced the committee's decision-making process. Victims spoke at the confirmation hearing about accepting the plan even though it did not provide for the transparency they wanted from the diocese. They wanted the diocese to release its records, but decided to accept the plan despite

[1035] C. Wright Mills, *The Politics of Truth Selected Writings of C. Wright Mills*, ed John Summers (Oxford University Press, 2008).
[1036] Jennifer Wood, Clifford Shearing, and Jan Froestad, 'Restorative Justice and Nodal Governance,' (2011) 35(1) *International Journal of Comparative and Applied Criminal Justice* 1-18 ('Nodes are entities that apply distinct perspectives, experiences, and resources in efforts to solve problems and influence events in a social system'.)

that, because they wanted to put the case to an end.[1037] Those speaking out were satisfied that they had been able to get concessions from both the diocese and its insurers, although disappointed that they did not get the vindication and transparency they wanted. The process did not provide them with a means of having their stories credited publicly, except in the ways they were able to negotiate through the plan process.

If bankruptcy has the effect of empowering victims, this effect is, as discussed in Chapter 7, not the purpose of chapter 11. While equitable treatment of creditors is one of the goals of bankruptcy, it was not necessarily contemplated that creditors would be primarily victims of intentional torts like child sexual abuse. The Royal Commission, on the other hand, made specific recommendations about victim empowerment through support for advocacy groups, and through its consultation process. The RC recommendations also go to victim empowerment through support for collective organisation in advocacy groups. And the RC directly offered collective empowerment to victims through its RC legal theory of consultation and voice.

The Royal Commission listened to victim voice and vindicated victims in ways both private and public. The process was designed to give victims a chance to speak and be heard, and the Commissioners paid careful attention to what they said. One of the very first acts of the Commissioners was to give victims options about how they wanted to present their stories. While public hearings were controlled by the commission and counsel assisting, victims could submit their stories via private testimony, submit a statement via text or digital format, or even to share artwork through the Message to Australia. Between accepting letters and other submissions, including anonymous ones, travelling around the country for private hearings, and interviewing victims and Survivors at public hearings, the Royal Commission ensured that thousands of people who wanted to tell their stories were able to do so, and that their stories were heard and attended to.[1038] The Message to Australia shared with Australian libraries at the concluding hearing of the Royal Commission was a tangible demonstration of

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[1037] Hardin-Burrola (n 391).

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[1038] Royal Commission into Institutional Responses to Child Sexual Abuse, *Preface and Executive Summary* (Commonwealth of Australia, 2015),

> By the time our work is completed we expect to have heard from more than 16,000 people within our Terms of Reference. We expect to have spoken with over 8,000 people in private sessions and received 1,000 written accounts. We have held 57 public hearings and have published 59 research reports. We also conducted 35 policy roundtables. We have reviewed allegations of sexual abuse in more than 4,000 institutions.

the seriousness with which the Commissioners and the Royal Commission took the words of victims.[1039]

The Royal Commission's ability to empower victims was limited, however. Jodi Death argues that by listening to and validating victim stories, commissions of inquiry empower them.[1040] But, as acknowledged on its website and in its Final Report, the Royal Commission's recommendations left to Parliament and the Australian state governments whether they would provide victims with a resolution, including the implementation of a redress scheme or significant policy changes. In this case they did, although that has not always been true for other royal commissions, as discussed in Chapter 8. Ultimately, this question rests on what it means to be empowered. If it means to feel respected as a citizen whose concerns are taken seriously, then commissions of inquiry like the Royal Commission indeed empower victims. But, if it means the power to effectuate some tangible change, whether the payment of damages, delivery of an apology, gesture of contrition, or to compel some disclosure or other act, royal commissions cannot usually empower victims directly. The Royal Commission harnessed the power of the state to compel disclosure of institutional records, which is a demand of most victims and largely serves their interests, but power to initiate or compel material redress remained in the hands of the state and the Church, and victims' voices were steps removed from the rooms where decisions were really made.

Between the Royal Commission and bankruptcy, it is possible to glimpse how a truly responsive system might operate. A responsive legal system would incorporate the voices and facilitate the participation of impacted parties, not just as evidence for third-party decision-makers, but in the decision-making itself. It would be flexible and purposive, so that rigid rules do not stand in the way of substantive justice. Responsive systems should also be alive to the forces of domination within social orders and intentionally facilitate the effective participation of stakeholders in way that alleviate or counter the effects of those forces. They would ensure that capacity to finance litigation would not be determinative of capacity to advocate for interests within the system.

Both the Royal Commission and Chapter 11 bankruptcy incorporate and listen to victim voice, at least in comparison to canon law and civil litigation. Both bankruptcy and the Royal Commission also have flexible procedures, where accommodations can be made in

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[1039] Nour Haydar and staff, 'Child sexual abuse royal commission hands over stories of survivors in book 'too heavy to lift,' *ABC News* (Australia, (online 13 December, 2017) <http://www.abc.net.au/news/2017-12-14/child-sex-abuse-royal-commission-final-hearing/9257944>.

[1040] Death (n 89).

response the particular realities of a given situation. In both cases, tribunals have been able to incorporate ways to pay attention to victims. The Commissioners on the Royal Commission were authorized specifically to ensure that the process accommodated victim needs, and it was effectively designed to listen to victims and ensure their voices are preserved and have impact on policy recommendations. Bankruptcy courts are courts of equity, and Chapter 11 specifically is designed to allow courts to change procedures to respond to uniquely challenging circumstances.[1041] In the Diocesan Debtor cases, that flexibility has allowed, in some cases, for a relatively amicable process that provides good results for all stakeholders. In more contested cases, like Gallup, the relative strength of the creditors' committee provides some procedural counterbalance to prevent limited resources for litigation from being determinative, and victims' votes for, or against, a plan of reorganization ensure they have credible leverage in negotiating its terms.

Both the Royal Commission and Chapter 11 seek to resolve relatively large numbers of claims, rather than allegations against individuals or brought by a single victim or a small group of victims. The Royal Commission stands out for its strong powers of subpoena and resulting ability to shape public narratives, and its influence on policy is considerable, even if it did not have the power to effect action in individual cases. Chapter 11 bankruptcy stands out for its deliberative solution seeking, and forward-looking process but lack of authority to validate or vindicate claims. Neither system addresses the problem of child sexual abuse through doctrinal law though the Royal Commission recommended doctrinal law reforms, including recommendations for criminal, civil, and even canon law. But with rules that allow tribunals to accommodate needs of stakeholders, both these systems demonstrate ways in which victims can be empowered in ways that neither common law tort or nor canon law have been able to do. Yet despite victim-centred procedures, neither is seen as fundamentally unfair or devoid of due process in the treatment of Church organisations.

III. IMPLICATIONS: REAL LAW AND THE CHARACTER OF LEGAL SYSTEMS

Legal systems responding to the problem of clerical child sexual abuse illustrates how the character of these systems implicates real law in practice. As discussed in Chapter 2, part of the project of NLR is to consider the lived experience of law while taking law on the books seriously. This thesis demonstrates one way of taking law on the books seriously within the

[1041] See, e.g. JM Goffman, MA McDermott, K Ramlo, 'American Bankruptcy Reform and Creativity Prompt the *In re Blue Bird Body Company* One-Day Pre-Packaged Plan of Reorganization,' *Expedited Debt Restructuring. An International Comparative Analysis*, Rodrigo Olivares-Caminal, ed., (Kluwer Law International, 2007).

NLR project, and in doing so shows that real law lives as it is experienced by stakeholders, as it is practiced by professionals, and as it is written. Real law cannot be separated from its social context, but constructs and is constructed by the social orders in which it exists. By considering multiple aspects of law, rather than taking a perspective built just from doctrinal law or just the outputs of law's operation, I have shown how stakeholder goals and interests are advanced or stymied through formal justifications and process-based rationales, through theories of law or doctrine that is forged from normative ideals embedded in law over centuries, and from the physical, economic, and social barriers that exist in particular places.

There are a number of potential ways to compare or analyse legal systems and how they approach dispute-resolution and other social or legal problems. One might consider rates of compensation for victims, rates of case resolution, or measures of stakeholder satisfaction.[1042] These kinds of studies consider, essentially, the outputs of legal systems. This thesis's focus on aspects of law takes a different approach, and although it allows for some comparisons like these, it also considers the inputs as well as the process that produce the outputs. Social and legal orders have developed alongside each other, each influencing and constructing the other. The aspects that I have analysed in this context help make this development and the co-constitutive relationships between legal and social realms visible. Purposes of legal systems and the legal theories that bring these purposes to life are artefacts of social need, developed over time as a product of public imagination, professional reasoning, and the interests of powerful stakeholders. Doctrine is not static, but drafted, changed, and interpreted by people living within the social orders it is designed to regulate. Procedure and the logistics of practice are the work and creation of local lawyers and judges, while the logistics of pursuing or defending actions are deeply dependent on social and physical positioning of stakeholders. Together, these (and other) aspects of law are real law.

Survivor advocacy groups identify truth-telling, the importance of being believed, and a recognition that they were innocent and were wronged as key interests of most victims of clerical child sexual abuse. This desire for validation has been reflected in academic literature and commissions of inquiry. As discussed in Chapter 8, the Royal Commission has been widely praised for, among other things, changing the scope of the public conversation in Australia. Survivors report feeling validated, and even those who did not participate in the

[1042] See, e.g. Magdalena Flatscher-Thöni, Andrea M. Leiter and Hannes Winner, 'Pricing Damages for Pain and Suffering in Court: The Impact of the Valuation Method' (2013) 10 *Journal of Empirical Legal Studies* 104; Cross, Frank and Charles Silver, 'In Texas, Life is Cheap' (2006) 59 *Vanderbilt Law Review* 1873; Simmons, Walter and Rosemarie Emanuele, 'Male and Female Recoveries in Medical Malpractice Cases' (2004) 62 *Review of Social Economy* 83.

Royal Commission report positive feelings knowing that there is a public narrative establishing the wrongfulness of child sexual abuse and increasing the likelihood of victims being believed. Strang and Sherman's empirical conclusions about symbolic reparation being more important than material reparation to most victims across types of crime give context to the importance of these feelings to victims.[1043]

The assessment of the Royal Commission as quasi-responsive rests in no small part on its capacity for narrative-building and impact on the broader society. And bankruptcy's lack of capacity to weave such a narrative is a large part of its not being fully responsive. It may have been restorative in many ways, but it failed to re-story the problem as the Royal Commission did. Michel Foucault's paradigm-shifting work, laying bare the relationships between knowledge and power, and the importance of the production of truth and knowledge as part of larger systems of social control helps to explain some of the Royal Commission's success.[1044] Regimes of power are inextricably linked to systems designed to pursue truth and knowledge production. The truths determined by canon and tort law, the narratives established by the Royal Commission, and the way such fact-finding is not relevant to the resolution of bankruptcy cases demonstrates how different legal systems play different kinds of roles in social and legal orders. In doing so, they enable the production of different truths. The narrative power of the Royal Commission is a large part of its impact on changing understandings in Australian society, which changes are reported to be of critical significance to victims.[1045]

The significant differences between Ballarat and Gallup call attention to how overlapping patterns of social and political domination can limit the potential for substantive justice. These are unique places, with historical, social and political realities that impact the way child sexual abuse by Catholic priests has been redressed, and what people in those places want and expect from the Church going forward. Ballarat's relative wealth, and the Catholic community's insulation within the larger community created conditions that allowed a few men with power to ignore and subjugate the needs of vulnerable children, such that even a police officer was unable to bring rapists to justice. Yet, in more recent years, as people in Ballarat became less religious, and through the intervention of a state-level

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[1043] Strang and Sherman (n 838)
[1044] Foucault (n 561).
[1045] Davey, Melissa, "'It Was Us Against Everyone": How Abuse Survivors Will Keep Pushing for Change,' *The Guardian* (online 14 December 2017) <https://www.theguardian.com/australia-news/2017/dec/14/it-was-us-against-everyone-how-abuse-survivors-will-keep-pushing-for-change>.

investigation and then the Royal Commission, public opinion shifted, shaped by narratives of belief in survivors and disapproval of the Church's response to them.

As discussed in Chapter 8, changes to doctrinal law and new regulation aimed at child protection have followed the Royal Commission and the shift in public perception. Gallup, with a history of successive colonisations and deep poverty, religiosity, and mix of Indigenous and legacies of multiple settler-colonial projects, is a place where some children are extraordinarily vulnerable to predation, and where there are many high hurdles that a victim seeking justice must overcome. Although, as discussed in Chapter 7, the diocese's bankruptcy case resulted in payments for more victims than might otherwise have been paid, and in a number of non-monetary concessions, the religiosity of the area, combined with a relative lack of interest by the wider public and the diocese's reliance on support from powerful community stakeholders allowed the diocese to provide half-hearted apologies, leaving many victims unsatisfied.

Thus, even though I have described both bankruptcy and the Royal Commission as quasi-responsive, the social context shapes the response to the systems, demonstrating the connectedness of real law within both legal and social orders. Just as Chapters 5 and 6 on canon and tort demonstrate that reforms to doctrine do not change the overall character of those legal systems, Chapters 7 and 8 demonstrate that for the responsiveness of a legal system to be effective, there needs to be adequate community buy-in. The Royal Commission's production of a narrative did not just give victims a sense of vindication, it also fostered community support for the process, giving it social legitimacy that the bankruptcy process in Gallup lacked. Real law cannot be separated from its context, because that context contributes to its character just as its text, history, procedure, and traditions. Law emerges from these aspects as they become mobilised through practice, and while reforms can improve the character of a legal system, the development of a truly responsive system requires more than just a change to doctrine – it requires community support, a reimagining of legal purposes, and grounded understandings of legal processes, the logistics of practice, and logistics of participating in legal processes across social and political landscapes.

When it comes to holding organisations accountable, bankruptcy and the Royal Commission, taken together, point to some ways responding to power imbalances can be accomplished through law. For example, responsive legal systems might facilitate and encourage multi-party deliberation and negotiated solutions by shifting parties' negotiating leverage, attending carefully to the interests of individuals facing or experiencing harm or domination, and allowing for escalating sanctions for bad faith, continued wrongdoing, or

similar wrongful intransigence. A truly responsive legal system would ensure that the flexibility of proceedings was used not just by people who have listened to those who are most impacted by them, but that stakeholders themselves are empowered to participate effectively in decision-making. The Royal Commission demonstrates that better legal responses to problems of organisational accountability are possible with purposive approaches dedicated to providing substantive justice and determinations of moral responsibility can be effective at providing vindication even if fulsome redress is not feasible. Determining the character of legal systems by considering their multiple aspects demonstrates thus that responsiveness is possible but cannot be accomplished through piecemeal efforts to reform existing systems.

This thesis, by identifying ways that different legal systems demonstrate responsiveness and the co-constitutive relationships between legal and social orders, points to the need for a comprehensive approach to law reform if responsiveness is to be the goal. Simply changing the doctrine, as we see in canon and tort law, does not change the overall repressive or autonomous character of legal systems. Instead, responsiveness is encouraged through responsive characteristics built into legal theories, doctrine, and procedure, and with deliberate attention to how legal systems work in context.

BIBLIOGRAPHY

I. ARTICLES/BOOKS/REPORTS

'Scathing UN Report Demands Vatican "Immediately" Act against Child Sexual Abuse,' *ABC News* (online, 6 February 2014) <http://www.abc.net.au/news/2014-02-05/scathing-un-report-demands-vatican-act-against-child-sex-abuse/5241300>

'Child sex abuse redress scheme to cap payments at $150,000 and exclude some criminals,' *ABC News* (Online 26 Oct 2017) <http://www.abc.net.au/news/2017-10-26/sex-offenders-to-be-excluded-from-child-abuse-redress-scheme/9087256>.

'What is George Pell's Job at the Vatican?' *ABC News* (online, 29 June 2017) <https://www.abc.net.au/news/2017-06-29/what-is-george-pells-job-at-the-vactican/8663256>

ABC Radio Melbourne, 'Melbourne Catholic Archbishop Peter Comensoli would choose jail over breaking confessional seal.' *ABC News* (online 14 August 2019)

Adams, David Wallace, *Education for Extinction* (University of Oklahoma Press, 1995)

Adhikari, Mohamed, *Genocide on Settler Frontiers: When Hunter-Gatherers and Commercial Stock Farmers Clash* (Oxford Press, 2015)

Albert, Theodore C, 'The Insolvency Law of Ancient Rome' (2006) 28 *California Bankruptcy Journal* 365.

Albuquerque Journal 'Diocese gives AG files on accused priests – "Clearly, grave mistatkes were made," bishop says,' 12 February 2019, Page A7.

Allais, Lucy. "Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission." Philosophy & Public Affairs 39, no. 4 (2011): 331-63

Allen Jr, John J, 'Sex Abuse Ruling in Los Angeles Doesn't Affect Vatican, Attorney Says,' *National Catholic Reporter* (online, 2 March 2011) https://www.ncronline.org/blogs/ncr-today/sex-abuse-ruling-los-angeles-doesnt-affect-vatican-attorney-says

Allen Jr, John J, 'Politics of Baby Bishops' School: "It's the Universality, Stupid!" *The Crux* (online, 7 October 2016) <https://cruxnow.com/analysis/2016/10/politics-baby-bishops-school-universality-stupid/>.

Anderson, Stephanie, 'Royal Commission into Sexual Abuse: Who are the Brothers of St John of God?', *ABC News* (online, 6 Feb 2017) <http://www.abc.net.au/news/2017-02-06/who-are-the-brothers-of-st-john-of-god/8245306>.

Anderson, C Colt, 'When Magisterium Becomes Imperium: Peter Damian on the Accountability of Bishops for Scandal' (2004) 65 *Theological Studies* 741

Anthony, Thalia, 'Deaths in custody: 25 years after the royal commission, we've gone backwards,' *The Conversation* (online 13 April, 2016) <https://theconversation.com/deaths-in-custody-25-years-after-the-royal-commission-weve-gone-backwards-57109>

Ariès, Philippe, *Centuries of Childhood: a Social History of Family Life*, tr Johnathan Cape (Vintage Books/Random House 1962)

Aroney, Nicholas, 'The constitutional first principles of royal commissions,' Scott Prasser and Helen Tracey (eds), *Royal Commissions & Public Inquiries: Practice & Potential*, (Connor Court Publishing, 2014)

Aroney, Nicholas, 'A Power "Singular and Eccentrical": Royal Commissions and Executive Power after Williams' (2014) 25(2) *Public Law Review*, 99

Associated Press, 'Catholic Diocese of Phoenix Settles Sex-Abuse Claim', *Arizona Daily Star* (online, 27 December 2006) <http://tucson.com/news/catholic-diocese-of-phoenix-settles-sex-abuse-claim/article_d86e391d-b6d2-5cba-9cf3-04732ed03043.html>

Astbury, Jill, 'Child Sexual Abuse in the General Community and Clergy-Perpetrated Child Sexual Abuse: A Review Paper prepared for the Australian Psychological Society to inform an APS Response to the Royal Commission into Institutional Responses to Child Sexual Abuse' (Review Paper, Australian Psychological Society, July 2013) 5.

Atiyah, Patrick, *Accidents, Compensation and the Law* (Weidenfeld and Nicholson, 1970)

Report of Dr Rodger Austin JCD STL, Canon Law, Prepared for submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, available at: https://www.childabuseroyalcommission.gov.au/document-library.

Australian Bureau of Statistics, 'Census of Population and Housing: Reflecting Australia — Stories from the Census, 2016,' *Australian Bureau of Statistics* (Web Page, 28 June 2017) <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Article~80>.

Australian Law Reform Commission (ALRC), Making inquiries: a new statutory framework, Report, 111, ALRC, Sydney, October 2009

Ayres, Ian and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992)

Baca, Joseph M, *Constant Reminder: A Memoir of Priest Abuse and Recovery* (CreateSpace Independent Publishing Platform, 2013)

Baker, DJ (Jan), John Wm (Jack) Butler and Mark A McDermott, 'Corporate Governance of Troubled Companies and the Role of Restructuring Counsel' (2007) 63 *The Business Lawyer* 855

Baird, Douglas G, ‘Bankruptcy’s Uncontested Axioms’ (1998) 108 *Yale Law Journal* 573

Baird, Douglas G and Robert K Rasmussen, ‘Antibankruptcy’ (2010) 119 *Yale Law Journal* 648

Baird, Douglas G and Robert K Rasmussen, ‘Private Debt and the Missing Lever of Corporate Governance’ (2005) 154 *University of Pennsylvania Law Review* 1209

Balboni, Jennifer M, and Donna M Bishop, ‘Transformative Justice: Survivor Perspectives on Clergy Sexual Abuse Litigation’ (2010) 13(2) *Contemporary Justice Review* 133

Balboni, Jennifer M, *Clergy Sexual Abuse Litigation: Survivors Seeking Justice* (First Forum Press, 2011)

Barker, Debra K, ‘Kill the Indian, Save the Child: Cultural Genocide and the Boarding School’ in Dane Anthony Morrison (ed), *American Indian Studies: An Interdisciplinary Approach to Contemporary Issues* (Peter Lang, 1997) 47

Barth, J, et al, ‘The Current Prevalence of Child Sexual Abuse Worldwide: A Systematic Review and Meta-Analysis’ (2013) 58(3) *International Journal of Public Health* 469, 470.

Bartholomew, Christine P, "Exorcising the Clergy Privilege," Virginia Law Review 103, no. 6 (October 2017) 1015

Basberg, Cecilie Neumann and Iver B Neumann, *Power, Culture and Situated Research Methodology: Autobiography, Field, Text* (Palgrave Macmillan, 2018)

Basberg, Cecilie Neumann and Iver B Neumann, ‘Pre-Field Autobiographic Situatedness, In-Field Situatedness, Post-Field Text Situatedness’ in Cecilie Basberg Neumann and Iver B Neumann (eds), *Power, Culture and Situated Research Methodology: Autobiography, Field, Text* (Palgrave Macmillan, 2018)

Bates, Frank ‘Comparative Common Law: A Justification’ (1981) 14 *The Comparative and International Law Journal of Southern Africa* 259.

Bauman, Richard, ‘Commentary: Indirect Indexicality, Identity, Performance‘ (2005) 15(1) *Journal of Linguistic Anthropology* 145

Bazzana, Giovanni Battista, ‘“Basileia” and Debt Relief: The Forgiveness of Debts in the Lord's Prayer in the Light of Documentary Papyri’ (2011) 73 *The Catholic Biblical Quarterly* 511

Beal, John P, ‘Doing What One Can: Canon Law and Clerical Sexual Misconduct,’ (1992) 52 *The Jurist* 642

Beal, John P, ‘The 1962 Instruction *Crimen sollicitationis*; Caught Red-Handed or Handed a Red Herring?’ (2007) 41 *Studia Canonica* 199

Becker, Mary E, ‘The Abuse Excuse and Patriarchal Narratives’ (1998) 92 *Northwestern University Law Review,* 1459

Beckett, Katherine, ‘Culture and the Politics of Signification: The Case of Child Sexual Abuse’ (1996) 43 *Social Problems* 57.

Benkert Marianne, and Thomas Doyle, ‘Clericalism, Religious Duress and Its Psychological Impact on Victims of Clergy Sexual Abuse’ (2009) 58 *Pastoral Psychology* 223.

Bennett, Cheryl Redhorse, ‘Another Type of Hate Crime: Violence against American Indian Women in Reservation Border Towns’ in Marianne O Nielsen and Karen Jarratt-Snider (eds), *Crime and Social Justice in Indian Country* (University of Arizona Press, 2018)

Benson, Michael L,‘Emotions and Adjudication: Status Degradation among White-Collar Criminals’ (1990) 7(3) *Justice Quarterly* 515

Bergquist, Patrick, *The Long Dark Winter’s Night: Reflections of a Priest in a Time of Pain and Privilege* (Liturgical Press, 2010).

Berkovitch, Ellen et al, ‘Dark Canyon: Sexual Abuse and Secrecy in the Archdiocese of Santa Fe. Part 1,’ KSFR, Santa Fe Community College (Online 19 September 2017) <https://www.ksfr.org/post/dark-canyon-sexual-abuse-and-secrecy-archdiocese-santa-fe-part-1-0>.

Berkovitch, Ellen et al, ‘Dark Canyon: Trust and Betrayal in the Northern New Mexico Church,’ KSFR, Santa Fe Community College (Online 11 October 2017) <https://www.ksfr.org/post/dark-canyon-trust-and-betrayal-northern-new-mexico-church>.

Berkovitch, Ellen et al, ‘Dark Canyon Episode Nine: The Diocese of Gallup,’ KSFR, Santa Fe Community College (Online 14 December 2017) <https://www.ksfr.org/post/dark-canyon-episode-nine-diocese-gallup>.

Berkovitch, Ellen et al, ‘Dark Canyon: Powers Vested, Powers Abused,’ KSFR, Santa Fe Community College (Online 7 November 2017) <https://www.ksfr.org/post/dark-canyon-powers-vested-powers-abused>.

Berman, Harold J, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983)

Berns, Lois and Katherine van Wormer. "Sexual Traumatization by Priests: What Is the Effect on Spirituality?" *USA Today* 131, no. 2688 (2002): 30-32.

Bishop Accountability. ‘Rev. Clement A. Hageman of the Corpus Christi Diocese: His File from the Diocese of Gallup’, *Bishop Accountability.org* (Web Page) <http://www.bishop-accountability.org/docs/corpus_christi/hageman/>

Bishop Accountability.org, ‘Rev. Clement A. Hageman of the Corpus Christi Diocese: His File from the Diocese of Gallup’, *Bishop Accountability.org* (Web Page) <http://www.bishop-accountability.org/docs/corpus_christi/hageman/Hageman_Rev_Clement_A_1940s_DOG_00240_00273.pdf>

Blackstone, William, *Commentaries on the Law of England* (Lippincott Company, 1893); 21 Am. Jur. 2D Criminal Law § 1 (1998)

Blackstone, William, *Commentaries on the Law of England* (University of Chicago Press, 1979) vol 3

Blakemore, Tamara et al, 'The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence.' (2017) 74 *Child Abuse & Neglect* 35.

Block-Lieb, Susan, 'The Logic and Limits of Contract Bankruptcy' (2001) 2001 *University of Illinois Law Review* 503

Boakye, Kofi E, 'Culture and Nondisclosure of Child Sexual Abuse in Ghana: A Theoretical and Empirical Exploration' (2009) 34(4) *Law & Social Inquiry* 951

Bolen, Rebecca M, *Child Sexual Abuse Its Scope and Our Failure*. 1st ed. 2002. ed., 2002, p 21-22.

Bolen, Rebecca M, and Maria Scannapieco, 'Prevalence of Child Sexual Abuse: A Corrective Metanalysis' (1999) 73(3) *Social Service Review* 281

Bolitho, Jane, and Karen Freeman, 'The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms' (Research Report, Royal Commission into Institutional Responses to Child Sexual Abuse, March 2016)

Bottan, Nicolas L, and Ricardo Perez-Truglia, 'Losing My Religion: The Effects of Religious Scandals on Religious Participation and Charitable Giving' (2015) 129 *Journal of Public Economics* 106

Boucher, Anna, 'Power in Elite Interviewing: Lessons from Feminist Studies for Political Science' (2017) 62 *Women's Studies International Forum* 99

Boswell, John, *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)

Boswell, Susan, Patricia Williams, James Stang, Victor Vilaplana, Marci Hamilton, *The Church in Chapter 11: The Lessons of the Catholic Diocese Cases*, ABI Conference Presentation (April 2008)

Boxall, Hayley, Tomison, Adam M., Author, Hulme, Shann, Australia. Royal Commission into Institutional Responses to Child Sexual Abuse, Issuing Body, and Australian Institute of Criminology. Historical Review of Sexual Offence and Child Sexual Abuse Legislation in Australia: 1788-2013. Special Report (Australian Institute of Criminology); 7. 2014.

Braithwaite, John. *Not Just Desserts: A Republican Theory of Criminal Justice* (Oxford University Press, 1990)

Braithwaite, John. 'The New Regulatory State and the Transformation of Criminology,' (2000) 40(2) *Crimin*, 222

Braithwaite, John. *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002)

Braithwaite, John, 'The Essence of Responsive Regulation'(2011) 44(3) *University of British Columbia Law Review*, 475.

Braithwaite, John, 'Relational Republican Regulation' (2013) 7 *Regulation & Governance* 124

Braithwaite, Valerie, 'Security and Harmony Value Orientations and their Roles in Attitude Formation and Change' (2009) 20 *Psychological Inquiry* 162.

Braithwaite, Valerie, 'Criminal Prosecution within Responsive Regulatory Practice' (2010) 9 *Criminology & Public Policy* 515.

Brennan, Frank, 'Cardinal Pell, his lawyers and the Royal Commission,' *Eureka Street* (online 22 November 2015)

Frank Brennan, 'Circumscribing the Seal of the Confessional,' *Eureka Street* (online 20 August 2018) <https://www.eurekastreet.com.au/article/circumscribing-the-seal-of-the-confessional>

Bresie, Amanda, 'Mother Katharine Drexel's Benevolent Empire: The Bureau of Catholic Indian Missions and the Education of Native Americans, 1885-1935' (2014) 32(3) *U.S. Catholic Historian* 1

Briere, John, and Marsha Runtz, 'Childhood Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment' (1993) 8(3) *Journal of Interpersonal Violence* 312, 312.

Briggs, Charles L, *Learning How to Ask: A Socioloinguistic Appraisal of the Role of the Interview in Social Science Research* (Cambridge University Press, 1986) 104

Brown, Michelle, 'Catholic Church Ellis Defence Scrapped in "Momentous Day" for Abuse Survivors,' *ABC News* (online 1 January 2019) <https://www.abc.net.au/news/2019-01-01/catholic-church-ellis-defence-scrapped-from-new-years-day/10675890>.

Brown, S Todd, 'Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation' (2013) 23 *Widener Law Journal* 299

Bryce, Ian. 'Child Abuse Royal Commission - a Personal Perspective,' *The Australian Humanist* no. 126 (2017): 20-21

Budiselik, William, Frances Crawford, and Donna Chung, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse: Dreaming of Child Safe Organisations?' *Soc. Sci*. 2014, 3, 565-583.

Buelt Edward L, and Charles Goldberg, 'Canon Law & Civil Law Interface: Diocesan Corporations' (1995) 36 Catholic Law 69, 70–81

Burford, Gale, and Paul Adams ‘Restorative justice, responsive regulation and social work’ (2004) 1 *Journal of Sociology & Social Welfare* 31

Burns, S J, and Robert I (eds), *Las Siete Partidas*, tr Samuel Parsons Scott (University of Pennsylvania Press, 2012) vol 5

Butler, Mark, ‘Pedophile Priest Michael Charles Glennon Dies in Jail’, *Herald Sun* (online, 1 January, 2014)

Byrne, Mal, and Tindall Gask Bentley ‘After the Royal Commission, Will Churches and Governments Do the Right Thing?’ *In Daily* (online, 20 December, 2017) <https://indaily.com.au/opinion/2017/12/20/after-the-royal-commission-will-churches-and-governments-do-the-right-thing/>

Cafardi, Nicholas P, ‘Discovering the Secret Archives: Evidentiary Privileges for Church Records’ (1993) 10 *Journal of Law and Religion* 95

Cahir, Fred, *Black Gold Aboriginal People on the Goldfields of Victoria, 1850–1870* (Australian National University E Press, 2012)

Calabresi, Guido, *The Cost of Accidents: A Legal and Economic Analysis* (1970)

Calavita, Kitty, *Invitation to Law & Society*, University of Chicago Press (2010)

Cane, Peter, ‘Distributive Justice and Tort Law’ (2001) 4 *NZ Law Review* 401

Cane, Peter, ‘Reforming Tort Law in Australia: A Personal Perspective’ (2003) 27 Melb. U. L. Rev. 649

Cane, Peter, ‘Searching for United States Tort Law in the Antipodes’ (2011) 38 *Pepperdine Law Review* 257, 282

Catholic News Agency, ‘Bishop Emeritus of Gallup Donald E. Pelotte Dies at 64’ *Catholic News Agency* (online, 8 January 2010) <https://www.catholicnewsagency.com/news/bishop_emeritus_of_gallup_donald_e._pelotte_dies_at_64>.

Carmella, Angela C, ‘Constitutional Arguments in Church Bankruptcies: Why Judicial Discourse about Religion Matters’ (2005) 29 *Seton Hall Legislative Journal* 435

Carroll, Stephen J, et al, *Asbestos Litigation* (RAND Corporation, 2005) 151–5

Cashmore, Judy, and Rita Shackel, *The Long-Term Effects of Child Sexual Abuse* (Commonwealth of Australia, 2013)

Cashmore, Judy, et al, ‘The Characteristics of Reports to the Police of Child Sexual Abuse and the Likelihood of Cases Proceeding to Prosecution After Delays in Reporting,’ (2017) 74 *Child Abuse & Neglect* 74 (2017) 49

Cheit, Ross F, *The Witch-Hunt Narrative: Politics, Psychology, and the Sexual Abuse of Children* (Oxford 2014).

Child, Brenda, *Boarding School Seasons: American Indian Families, 1900–1940* (University of Nebraska Press, 1998)

Chopko, Mark E, 'An Overview on the Parish and the Civil Law' (2007) 67 *The Jurist* 194

Cicognani, Amleto G, *Canon Law*, Second Revised Edition Authorized English Version of *Ius Canonicum* (Maryland: Newman, 1934)

Clark, Stuart, and Christina Harris, 'The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?' (2008) 32 *Melbourne University Law Review* 775

Clancy, Michael, 'Olmsted Bringing Changes to Diocese, Liberals Concerned, Conservatives Cheer', *Bishop Accountability.org* (Web Page, 3 May 2004) <http://www.bishop-accountability.org/news2004_01_06/2004_05_03_Clansy_OlmstedBringing.htm>.

Clancy, Michael, 'Suits Allege Sex Abuse by Ariz. Priests', *The Arizona Republic* (online, 25 June 2013) <http://archive.azcentral.com/news/arizona/articles/20130625suits-allege-sex-abuse-by-ariz-priests.html>

Credlin, Peta, 'Collision of Beliefs,' *The Courier Mail* (3 March 2019)

Coblentz, Jessica, and Brianne A.B. Jacobs, 'Mary Daly's The Church and the Second Sex after Fifty Years of US Catholic Feminist Theology' (2018) 79 *Theological Studies* 543

Coughlin, John J, 'The Clergy Sexual Abuse Crisis and the Spirit of Canon Law' (2003) 44 *Boston College Law Review* 977

Collins, Craig, 'Pericles was a Plumber: Towards Resolving the Liberal and Vocational Dichotomy in Legal Education,' Ian Morley and Mira Crouch (eds), *Knowledge as Value: Illumination through Critical Prisms*. 2008

Colton, Hannah, 'Bankruptcy Of the Archdiocese Of Santa Fe: The Basics,' *KUNM*, University of New Mexico (Online 20 Dec 2018) <https://www.kunm.org/post/bankruptcy-archdiocese-santa-fe-basics>.

Colton, Hannah, 'AG: Church And State Must 'Come Clean' About Clergy Abuse,' *KUNM*, University of New Mexico (Online 20 Dec 2018) < https://www.kunm.org/post/ag-church-and-state-must-come-clean-about-clergy-abuse>.

Colombo, Olivia, 'Perspective: Seal of Confession Laws,' *The Torch* (online 27 November 2019) <https://bctorch.com/2019/11/27/perspective-seal-of-confession-laws/>

Cook, Anthony E, 'The Moynihan Report and the Neo-Conservative Backlash to the Civil Rights Movement,'(2016) 8 Geo. J. L. & Mod. Critical Race Persp. 1

Courtin, Judith, 'Sexual Assault and the Catholic Church: Are Victims Finding Justice?' (PhD Thesis, Monash University Faculty of Law, 2015)

Crenshaw, Kimberle, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) *1989 University of Chicago Legal Forum* 139

Crofts, P, ‘Monsters and Horror in the Australian Royal Commission into Institutional Responses to Child Sexual Abuse’ (2018) 30(1) *Law & Literature*, 123

Cross, Frank B, 'The New Legal Realism and Statutory Interpretation' (2013) 1 *The Theory and Practice of Legislation* 129

Cross, Frank and Charles Silver, 'In Texas, Life is Cheap' (2006) 59 *Vanderbilt Law Review* 1873

Cunningham, Hugh, *Children and Childhood in Western Society since 1500* (Longman, 1995)

Curtis-Fawley, Sarah and Kathleen Daly, ‘Gendered Violence and Restorative Justice: The Views of Victim Advocates’ (2005) 11(5) *Violence Against Women* 603

Dagan, Hanoch, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press, 2013)

Dagan, Hanoch, ‘Normative Jurisprudence and Legal Realism’ (2014) 64 *University of Toronto Law Journal*

Dagan, Hanoch and Roy Kreitner, ‘The New Legal Realism and The Realist View of Law’ (2018) 43 *Law & Social Inquiry* 528

Daly, Brendan ‘Priestly Celibacy: The Obligations of Continence and Celibacy for Priests’ (2009) 4 *Compass* 20

Daly, Kathleen, *Redressing Institutional Abuse of Children* (Palgrave Macmillan Limited, 2014)

Daly, Kathleen, ‘Sexual Violence and Victims' Justice Interests’ in Estelle Zinsstag and Marie Keenan (eds), *Sexual Violence and Restorative justice: Legal, Social and Therapeutic Dimensions* (Routledge, 2017)

Daly, Kathleen, Inequalities of Redress: Australia’s National Redress Scheme for Institutional Abuse of Children, (2018) 42(2) *Journal of Australian Studies*, 204

Daly, Kathleen,and Juliet Davis, ‘National Redress Scheme for child sexual abuse protects institutions at the expense of justice for survivors,’ *The Conversation*, (online 7 March 2019) https://theconversation.com/national-redress-scheme-for-child-sexual-abuse-protects-institutions-at-the-expense-of-justice-for-survivors-112954>

Damian, Peter, *Book of Gomorrah*, tr Pierre J Payer (Wilfrid Laurier University Press, 1982)

‘Dark Canyon Episode Nine: The Diocese of Gallup’, *Dark Canyon* (KSFR 100.1FM Santa Fe Public Radio, 14 December 2017)

Davey, Melissa, ‘Commission challenges bishop’s claims he was unaware of priest’s child abuse,’ *The Guardian* (Online 11 December 2015) <https://www.theguardian.com/australia-news/2015/dec/11/commission-challenges-bishops-claims-he-was-unaware-of-priests-child-abuse>

Davey, Melissa, ‘George Pell Cleared to Give Sex Abuse Royal Commission Evidence by Video Link,’ *The Guardian* (online 8 February 2016) <https://www.theguardian.com/australia-news/2016/feb/08/george-pell-cleared-to-give-sex-abuse-royal-commission-evidence-by-video-link>.

Davey, Melissa, “‘They Had Nowhere to Hide”: Abuse Survivors Praise Commission for Shaking Institutions,’ *The Guardian* (online 1 April 2017) <https://www.theguardian.com/australia-news/2017/apr/01/nowhere-to-hide-abuse-survivors-praise-commission-shaking-institutions>

Davey, Melissa, “‘It Was Us Against Everyone”: How Abuse Survivors Will Keep Pushing for Change,’ *The Guardian* (online 14 December 2017) <https://www.theguardian.com/australia-news/2017/dec/14/it-was-us-against-everyone-how-abuse-survivors-will-keep-pushing-for-change>

Davey, Melissa, ‘George Pell: Australian Cardinal Released From Jail After High Court Quashes Child Sexual Abuse Conviction,’ *The Guardian* (online, 7 April 2020) <https://www.theguardian.com/australia-news/2020/apr/07/cardinal-george-pell-conviction-quashed-australia-high-court-freed-jail-appeal-upheld>

Davitt, Christina, ‘Whose Steeple Is It? Defining the Limits of the Debtor's Estate in the Religious Bankruptcy Context’ (2005) 29 *Seton Hall Legislative Journal* 531

Death, Jodi, *Governing Child Abuse Voices and Victimisation: The Use of Public Inquiry into Child Sexual Abuse in Christian Institutions* (Routledge, 2018).

De Felice, Damiano and Sabine Michalowski (ed.), Corporate Accountability in the Context of Transitional Justice' (2014) 14 *Human Rights Law Review* 576

Delaney, Brigid, ‘The stories of the broken men of Ballarat have unleashed compassion on a national scale,’ *The Guardian* (online 2 March 2016) <https://www.theguardian.com/commentisfree/2016/mar/02/the-stories-of-the-broken-men-of-ballarat-have-unleashed-compassion-on-a-national-scale>

Delaney, Elizabeth M, ‘Canonical Implications of the Response of the Catholic Church in Australia to Child Sexual Abuse’ (PhD Thesis, 2004)

Dog, Mary Crow and Richard Erodes, *Lakota Woman* (Harper Perennial, 1991)

Dolbee, Sandi, ‘Two Judges Share How They Guided Church Case’, *Bishop Accountability.org* (Article, 29 January 2008) <http://www.bishop-accountability.org/news2008/01_02/2008_01_29_Dolbee_TwoJudges.htm>.

Dolbee, Sandi and Mark Sauer, ‘Judge’s Tears, Rebuke Close Case’, *Bishop Accountability.org* (Article, 2 November 2007:

Donahue Jr, Charles, ‘A Crisis of Law? Reflections on the Church and the Law over the Centuries’ (2005) 65 *The Jurist* 1

Domingues, Felipe, ‘Expert Says Abuse of Power at Root of Sexual Abuse Crisis in Church’, *Crux* (online, 26 April 2018 <https://cruxnow.com/interviews/2018/04/26/expert-says-abuse-of-power-at-root-of-sexual-abuse-crisis-in-church/>.

Dooley, Eugene A, *Persons and Juridical Personalities in Canon Law*, 4 Jurist 405, 432 (1944)

Downes, Colin M, ‘Appointing Chapter 11 Trustees in Reorganizations of Religious Institutions’ *2015) 101 *Virginia Law Review* 2225

Doyle, Thomas P, ‘Clericalism: Enabler of Clergy Sexual Abuse’ (2006) 54 *Pastoral Psychology* 189

Dubber, Markus D, ‘The Comparative History and Theory of Corporate Criminal Liability’ *New Criminal Law Review: An International and Interdisciplinary Journal* 16, no. 2 (2013): 203-40.

Dublin Archdiocese: Commission of Investigation, *Report into the Catholic Archdiocese of Dublin* (Report, 2009) ch 4 (‘Murphy Report’)

Duff, RA, ‘Repairing Harms and Answering for Wrongs’ in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 212

Duff, RA, 'Responsibility, Restoration, and Retribution' in M. Tonry (ed.) *Retributivism has a past: has it a future?* (pp. 63-85). New York: Oxford University Press, 2011

Earhart, Becky, et al, ‘Judges’ Delivery of Ground Rules to Child Witnesses in Australian Courts,’ (2017) 74 *Child Abuse & Neglect*, 62

Eburn, M and S Dovers ‘Learning Lessons from Disasters: Alternatives to Royal Commissions and Other Quasi-Judicial Inquiries’(2015) 74 *Australian Journal of Public Administration*, 495

‘The Vultures Take Wing: Investing in Distress’. *The Economist* (31 March 2007) 77–8

Edelman, Meredith, ‘An Unexpected Path: Bankruptcy, Justice, and Intersecting Identities in the Catholic Sexual Abuse Scandals’ (2015) 41 *Australian Feminist Law Journal* 271

Ely, John Hart, ‘The Irrepressible Myth of Erie’ (1974) 87 Harv. L. Rev. 693

Enochs, Ross, ‘The Franciscan Mission to the Navajos: Mission Method and Indigenous Religion, 1898-1940’ (2006) 92 *The Catholic Historical Review* 46

Evans, Karen, *Maintaining Community in the Information Age : The Importance of Trust, Place and Situated Knowledge* (New York: Palgrave Macmillan, 2004)

2014 Native Youth Report, Executive Office of the President of the United States of America, (online December 2014) <https://obamawhitehouse.archives.gov/sites/default/files/docs/20141129nativeyouthreport_final.pdf>

Faggioli, Massimo, *A Council for the Global Church: Receiving Vatican II in History* (Augsburg Fortress Publishers, 2015) 1–10

Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Non-Government Organisations* (Family and Community Development Committee, 2013) vol 1, v.

Feld, Barry C, 'Race, Politics, and Juvenile Justice: The Warren Court and the Conservative Backlash,' (2003) 87 *Minn. L. Rev.* 1447

Feely, Malcolm M, 'Law, Legitimacy, and Symbols: An Expanded View of Law and Society in Transition' (1979) 77 *Michigan Law Review* 899

Fisse, Brent and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993)

Flatscher-Thöni, Magdalena, Andrea M. Leiter and Hannes Winner, 'Pricing Damages for Pain and Suffering in Court: The Impact of the Valuation Method' (2013) 10 *Journal of Empirical Legal Studies* 104

Ford, Carolyn, 'Commission of Care: The Royal Commission into Institutional Responses to Child Sexual Abuse Brought Innovative Special Measures to Its Five-Year Inquiry,' (2018) 92(12) *Law Institute Journal*, 20

Formicola, Jo Renee, 'The Further Legal Consequence of Catholic Clerical Sexual Abuse' (2007) 49 *Journal of Church and State* 445

Forsyth, Miranda, 'Activating the Powers of Law in the South Pacific', forthcoming

Foucault, Michel, *Discipline and Punish: The Birth of the Prison,* tr Alan Sheridan (Allen Lane, 1977)

Foucault, Michel, *Power,* tr James D Faubion (London: Allen Lane, 2001)

Foucault, Michel, *Abnormal: Lectures at the College de France*, tr G Burchell (Verso, 2003)

Frantzen, Allen J, 'The Penitentials Attributed to Bede' (1983) 58 *Speculum* 573

Fremot-Smith, Marion R, *Governing Nonprofit Organizations: Federal and State Law and Regulation* (Belknap Press, 2004)

Freyd, Jennifer J, et al, 'The Science of Child Sexual Abuse' (2005) Apr 22, *Science* 501; World Health Organization, *World Report on Violence and Health* (World Health Organisation, 2002)

Frosch, Dan, 'Accusations of Abuse by Priest Dating to Early 1940s', *The New York Times* (online, 10 July 2011) <http://www.nytimes.com/2011/07/11/us/11priest.html>

Galanter, Marc, 'Why the "haves" Come out Ahead: Speculations on the Setting and Limits of Legal Change' (Working Paper No. 7, Yale Law School. Program in Law and Modernization, 1972)

Gallicho, Grant, 'Vatican Responds to UN Report on Sexual Abuse', *Commonweal* (online, 7 February 2014) <https://www.commonwealmagazine.org/blog/vatican-responds-un-report-sexual-abuse>.

Gallagher, Katherine, 'Pope's Attitude is Little Different Than His Predecessors', *New York Times Opinion Page* (Article, 14 October 2015) <https://www.nytimes.com/roomfordebate/2015/10/14/the-pope-and-the-sex-abuse-scandal?smid=tw-share>.

Gallen, James. 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10(2) International Journal of Transitional Justice 332

Gaunce, Nicholas M and Robert Luther III, 'Deliver Us From Evil: Why Bankruptcy Judges May Properly Rely on the Free Exercise Clause & RFRA to Protect Church Property from the Grasps of Tort-Creditors' (2008) 43 *Valparaiso University Law Review* 641

Gaustad, Edwin S, *A Documentary History of Religion in America to the Civil War* (Eerdmans Publishing Company, 1993)

Gauthier, Albert, *Roman Law and its Contribution to the Development of Canon Law* (Ottawa: St Paul University, 1996) 3-15

Garth, B and J Sterling, 'From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State' (1998) 32(2) *Law & Society Review* 409

Editorial, *Gallup Independent*, Nov. 23, 2015

Gehres, Ed, 'Argument Analysis: Is Tribal Court Civil Jurisdiction over Non-Indians Truly a Constitutional Issue, or One of Settled Precedent?', *SCOTUSblog* (Blog post, 8 December 2015) <http://www.scotusblog.com/2015/12/argument-analysis-is-tribal-court-civil-jurisdiction-over-non-indians-truly-a-constitutional-issue-or-one-of-settled-precedent/>.

Gehres, Ed, 'Opinion Analysis: Dollar General, the Court's Longest Pending Case of the 2015 Term is a Four-Four Per Curiam Opinion', *SCOTUSblog* (Blog post, 25 June 2016) <http://www.scotusblog.com/2016/06/opinion-analysis-dollar-general-the-courts-longest-pending-case-of-the-2015-term-is-a-four-four-per-curiam-opinion/>.

Genestal, R R (1908). 'Les Origines du Privilege Clerical' (1908) 32 *Nouvelle Revue Historique de Droit Francais et Etranger* 161

George, Tracey E, Mitu Gulati, and Ann C. McGinley, 'The New Old Legal Realism,' (2011) 105 Nw. U. L. Rev. 689

Geske, Janine, 'Restorative Justice and the Sex Abuse Scandal in the Catholic Church' (2007) 8 *Cardozo Journal of Conflict Resolution* 651

Gilson, Stuart C., 'Bankruptcy Boards, Banks, and Blockholders: Evidence on Changes in Corporate Ownership and Control when Firms Default' (1990) 27 *Journal of Financial Economics* 355

Gjelten, Tom, 'The Clergy Abuse Crisis Has Cost The Catholic Church $3 Billion,' *NPR* (Online 18 August 2018) <https://www.npr.org/2018/08/18/639698062/the-clergy-abuse-crisis-has-cost-the-catholic-church-3-billion>

Gleeson, Kate, 'Why the Continuous Failures in Justice for Australian Victims and Survivors of Catholic Clerical Child Sexual Abuse?' (2016) 28(2) *Current Issues in Criminal Justice* 239

Gleeson, Kate, 'Exceptional Sexual Harms: The Catholic Church and Child Sexual Abuse Claims in Australia' (2018) 27(6) *Social & Legal Studies* 734

Gliddon, Greg, 'Ballarat an "Epicenter" of Institutional Child Abuse' *The Ballarat Courier* (27 June 2018)

Glouberman, Sholom and Brenda Zimmerman, 'Complicated and Complex Systems: What Would Successful Reform of Medicare Look Like?' (Discussion Paper No 8, Commission on the Future of Health Care in Canada, Ottawa)

Goffman, JM, MA McDermott, and K Ramlo, 'American Bankruptcy Reform and Creativity Prompt the *In re Blue Bird Body Company* One-Day Pre-Packaged Plan of Reorganization,' *Expedited Debt Restructuring. An International Comparative Analysis*, Rodrigo Olivares-Caminal, (ed) (Kluwer Law International, 2007)

Goldberg, John CP, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 *Yale Law Journal* 524

Goldberg, John CP and Benjamin C Zipursky, 'Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette' (2013) 88 *Indiana Law Journal* 569

Golding, Frank, 'Sexual Abuse as the Core Transgression of Childhood Innocence: Unintended Consequences for Care Leavers,' (2018) 42(2) *Journal of Australian Studies* 191

Golding, Frank, 'Problems with Records and Recordkeeping Practices Are Not Confined to the Past: A Challenge from the Royal Commission into Institutional Responses to Child Sexual Abuse,' (2019) *Archival Science* 1

Gómez, Laura E, 'Race, Colonialsim, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico' (2000) 34 *Law & Society Review* 1129

Gómez, Laura E, ‘Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico’ (2005) 25 *Chicano-Latino Law Review* 9

Goodstein, Laurie, ‘For Nuncio Accused of Abuse, Dominicans Want Justice at Home, Not Abroad’, *The New York Times* (online, 23 August 2014)

Grammich, Clifford, et al, ‘U.S. Religion Census: Religious Congregations & Membership Study’ (Census, Association of Statisticians of American Religious Bodies, 2010)

Graveson, RH, ‘The Task of Comparative Law in Common Law Systems’ (1959) 34 *Indiana Law Journal* 571

Grear, A and B H Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape' (2015) 15 *Human Rights Law Review* 21

Green, Thomas J, ‘Clerical Sexual Abuse of Minors: Some Canonical Reflections’ (2003) 63 *The Jurist* 366

Green, Thomas J, ‘CDF Circular Letter on Episcopal Conference Guidelines for Cases of Clerical Sexual Abuse of Minors: Some Initial Observations’ (2013) 73 *The Jurist* 151

Greenhouse, Carol J, *Praying for Justice: Faith, Order, and Community in an American Town* (Cornell University Press, 1986)

Greenhouse, Carol J, Barbara Yngvesson and David M Engel, *Law and Community in Three American Towns* (Cornell University Press, 1994)

Griffin, Laura, ‘Victims of child sex abuse still face significant legal barriers suing churches – here’s why,’ *The Conversation* (online 13 November 2019) <https://theconversation.com/victims-of-child-sex-abuse-still-face-significant-legal-barriers-suing-churches-heres-why-126510>

Gross, Karen, ‘Finding Some Trees But Missing the Forest’ (2004) 12 *American Bankruptcy Institute Law Review* 203

Grossman, Joel B, Herbert M Kritzer, and Stewart Macaulay, ‘Do the "haves" Still Come out Ahead? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988’ (1999) 33(4) *Law & Society Review* 803

Grover, Hannah, ‘Former Farmington Priest Allegedly Sexually Abused Children, Covered up Abuse for Other Priest’, *Bishop Accountability.org* (Web Page, 5 September 5, 2013) <http://www.bishop-accountability.org/news2013/09_10/2013_09_05_Grover_FormerFarmington.htm>

Guerzoni, Michael Andre and Hannah Graham, ‘Catholic Church Responses to Clergy-Child Sexual Abuse and Mandatory Reporting Exemptions in Victoria, Australia: A Discursive Critique’ (2015) 4(4) *International Journal for Crime, Justice and Social Democracy* 58

Guido, Joseph J, 'A Unique Betrayal: Clergy Sexual Abuse in the Context of the Catholic Religious Tradition' (2008) 17 *Journal of Child Sexual Abuse* 255

Gunningham, Neil and Darren Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 133

Gutiérrez, Ramón A, 'Honor Ideology, Marriage Negotiation and Class-Gender Domination in New Mexico 1690–1846' (1985) 12 *Latin American Perspectives* 81

Hamilton, Marci, 'The Barriers to a National Inquiry into Child Sexual Abuse in the United States' (2017) 74 *Child Abuse & Neglect* 107

Hamilton, Marci, *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press, 2008)

Hamilton, Marci, 'We Can Take on the Catholic Church for Covering Up Child Sex Abuse. Here's How', *Fortune*, (Commentary, 16 August 2018) <http://fortune.com/2018/08/16/catholic-church-child-abuse-pennsylvania/>

Haraway, Donna, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1998) 14(3) *Feminist Studies* 575

Hardin-Burrola, Elizabeth, 'Local Panel Names Sexually Abusive Priests: Public Asked to Contact Board with Questions and Concerns', *Bishop Accountability.org* (Web Page, 20 May 2003) <http://www.bishop-accountability.org/news3/2003_05_20_Hardin_LocalPanel_James_M_Burns_5.htm>

Hardin-Burrola, Elizabeth, 'Bishop Apologizes for Abuse: Pelotte Speaks to Winslow Parishioners', *Bishop Accountability.org* (Web Page, 20 September 2005) <http://www.bishop-accountability.org/news13/2005_09_20_HardinBurrola_BishopApologizes_Clement_Hageman_ETC_1.htm>

Hardin-Burrola, Elizabeth, 'Bishop Talks with Victims of Abuse: Outreach to Native Victims is Discussed', *Bishop Accountability.org* (Web Page, 9 May 2005) <http://www.bishop-accountability.org/news13/2005_05_09_HardinBurrola_BishopTalks_Clement_Hageman_ETC_2.htm>

Hardin-Burrola, Elizabeth, 'What Caused Pelotte's Injury? Catholic Bishop Insists He Wasn't "Beat Up"', *Bishop Accountability.org* (Web Page, 30 July 2007) <http://www.bishop-accountability.org/news2007/07_08/2007_07_30_Hardin_WhatCaused.htm>

Hardin-Burrola, Elizabeth, 'Pope Steps in, Phoenix Bishop Appointed As Temporary Head of Gallup Diocese' *Bishop Accountability.org* (Web Page, 4 January 2008) <http://www.bishop-accountability.org/news2008/01_02/2008_01_04_HardinBurrola_PopeSteps.htm>

Hardin-Burrola, Elizabeth, 'Third Priest Sex Abuse Lawsuit Filed' *Bishop Accountability.org* (Web Page, 13 May 2009) <http://www.bishop-accountability.org/news2009/05_06/2009_05_13_HardinBurrola_ThirdPriest.htm>

Hardin-Burrola, Elizabeth, ‘Diocese of Gallup to File Bankruptcy: Mounting Clergy Sex Abuse Legal Claims Spark Chapter 11 Reorganization’, Bishop Accountability.org (Article, 3 September 2013) <http://www.bishop-accountability.org/news5/2013_09_03_Hardin_Burrola_Diocese_of_Gallup.htm>

Hardin-Burrola, Elizabeth, ‘Lujan Quits Gallup Diocese As Chancellor’, *Bishop Accountability.org* (Web Page, 19 March 2009) <http://www.bishop-accountability.org/news2009/03_04/2009_03_19_HardinBurrola_LujanQuits.htm>

Hardin-Burrola, Elizabeth, ‘Local Clergy-abuse Survivor Writes Memoir’ *Bishop Accountability.org* (Web Page, 8 November 2011) <http://www.bishop-accountability.org/news2011/11_12/2011_11_11_HardinBurrola_LocalClergyabuse.htm>

Hardin-Burrola, Elizabeth, ‘Gallup Diocese Hit with 10 More Sex Abuse Lawsuits’, *Bishop Accountability.org* (Web Page, 20 June 2013) <http://www.bishop-accountability.org/news2013/05_06/2013_06_20_HardinBurrola_GallupDiocese.htm>

Hardin-Burrola, Elizabeth, ‘Diocese of Gallup to File Bankruptcy: Mounting Clergy Sex Abuse Legal Claims Spark Chapter 11 Reorganization,’ *Bishop Accountability.org* (Article, 3 September 2013)

Hardin-Burrola, Elizabeth, ‘Did Diocese’s Auctioneer Mislead Bankruptcy Judge?’, *Bishop Accountability.org* (Article, 14 October 2015) <http://www.bishop-accountability.org/news66/2015_10_14_Hardin-Burrola_Did_dioceses.htm>

Hardin-Burrola, Elizabeth, ‘Diocese to Accept Liability, Apologize?: Reorganization Plan Includes Amends for Sex Abuse Victims’ *Bishop Accountability.org* (Article, 14 May 2016)

Hardin-Burrola, Elizabeth, ‘Bishop Apologizes: Bankruptcy Judge Confirms Reorganization Plan’ *Bishop Accountability.org*, (Article, 22 June 2016)

Hardin-Burrola, Elizabeth, ‘Diocese Apologizes; Healing Services Still Delayed,’ *Bishop Accountability.otg* (Article, 18 March 2017)

Harding, Sandra G, *Whose Science? Whose Knowledge?: Thinking from Women's Lives* (Open University Press, 1991)

Harner, Michelle M, ‘Trends in Distressed Debt Investing: An Empirical Study of Investors’ Objectives’ (2008) 16 *American Bankruptcy Institute Law Review* 69

Harris, Nathan, 'Reintegrative Shaming, Shame, and Criminal Justice' (2006) 62 *Journal of Social Issues* 327

Hastings, Adrian, (ed), *A World History of Christianity* (William B Eerdmans Publishing Company, 1999)

Haydar, Nour and staff, ‘Child sexual abuse royal commission hands over stories of survivors in book 'too heavy to lift,’ *ABC News* (Australia, (online 13 December, 2017) <http://www.abc.net.au/news/2017-12-14/child-sex-abuse-royal-commission-final-hearing/9257944>

Hershovitz, Scott, 'Harry Potter and the Trouble with Tort Theory' (2010) 63 Stan. L. Rev. 67

Hogan, Jr, Edward A, 'A Modern Problem on the Privilege of the Confessional' (1951) 6(1) Loyola Law Review 1

Holder, Robyn L. and Kathleen Daly, 'Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors' (2018) 24 *International Review of Victimology* 25

Holder, Robyn. *Just Interests: Victims, Citizens and the Potential for Justice* (Elgar Studies in Law and Society, 2018)

Hong, Seung-Hun and Jong-sung You, 'Limits of Regulatory Responsiveness: Democratic Credentials of Responsive Regulation: Limits of Regulatory Responsiveness' (2018) 12(3) *Regulation & Governance* 413

Horning, Megan, 'Border Town Bullies: The Bad Auto Deal and Subprime Lending Problem Among Navajo Nation Car Buyers,' *NLG Review* (Webpage 20117) <https://www.nlg.org/nlg-review/article/border-town-bullies-the-bad-auto-deal-and-subprime-lending-problem-among-navajo-nation-car-buyers/>

Hoskisson, Tamora M., 'The Making of the Modern Mormon: Politics, Discourse, and Power in the Mormon Church, 1945–54' (PhD Thesis, Northern Arizona University, 2009)

Huneeus, Alexandra, 'Human Rights between Jurisprudence and Social Science' (2015)28(2) *Leiden Journal of International Law* 255

Hurd, Nicole, 'The Master Art of a Saint: Katharine Drexel and Her Theology of Education' (PhD Thesis, University of Virginia, 2002)

Hutchinson, Terry, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review* 130

Innes, Stephanie, 'Diocese Abuse Victims Speak as Bankruptcy Case Nears End' *Bishop Accountability.org* (Article, 10 July 2005)

Irvine, Judith T., 'Commentary: Knots and Tears in the Interdiscursive Fabric' (2005) 15(1) *Journal of Linguistic Anthropology* 72

Ison, Terence, *The Forensic Lottery: A Critique on tort Liability as a System of Personal Injury Compensation* (Staples Press, 1967)

Jackson, Thomas H., 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 *Yale Law Journal* 857

Johnston, Chris, 'Ballarat Christian Brothers headmaster 'can't recall' abuse,' *The Age*, (online 23 February 2016) <https://www.theage.com.au/national/victoria/ballarat-christian-brothers-headmaster-cant-recall-abuse-20160223-gn1kf1.html>

Jones, Adele D, and Ena Trotman Jemmott, 'Status, Privilege and Gender Inequality: Cultures of Male Impunity and Entitlement in the Sexual Abuse of Children: Perspectives from a Caribbean Study' (2016) 59 *International Social Work* 836

Jones, Dale E, et al, *Religious Congregations and Membership in the United States 2000: An Enumeration by Region, State and Country Based on Data Reported for 149 Religious Bodies* (Glenmary Research Center, 2002)

Jones, Timothy Willem, 'Sin, Silence and States of Denial: Canon Law and the 'Discovery' of Child Sexual Abuse,' (2015) 41(2) *Australian Feminist Law Journal* 237

Jones, Timothy W, 'Royal commission recommends sweeping reforms for Catholic Church to end child abuse,' *The Conversation*, (online 15 December 2017) <https://theconversation.com/royal-commission-recommends-sweeping-reforms-for-catholic-church-to-end-child-abuse-89141>

Jones, Timothy Willem and Clare Wright, 'The Goldfields' Sabbath: A Postsecular Analysis of Social Cohesion and Social Control on the Ballarat Goldfields, 1854' (2019) 43(4) *Journal of Religious History*.

Jordan, Elizabeth, 'Reconciling Women: A Feminist Reading of the History of Confession in the Roman Catholic Tradition' (1999) 14 *Australian Feminist Studies* 303

Johnson, Annysa, 'Chair of Archdiocese's Creditors Panel: Members Agonized Over Settlement', *Milwaukee-Wisconsin Journal Sentinel* (online, 5 August 2015)

Kaufman, K.L. et al., 2019. 'Recommendations for Preventing Child Sexual Abuse in Youth-Serving Organizations: Implications From an Australian Royal Commission Review of the Literature,' (2019) 34(20) *Journal of Interpersonal Violence*, 4199

Kearney, Christine, 'Vatican advises bishops it's "not necessarily" their duty to always report abuse to authorities,' ABC News (Australia) (Online 12 February 2016) < https://www.abc.net.au/news/2016-02-12/anger-over-vatican-bishop-training/7164636>

Keating, Gregory C, 'Is There Really No Liability Without Fault?: A Critique of Goldberg & Zipursky' (2017) 15 *Jerusalem Journal of Legal Studies* 152

Kettler, Donald J, Letter to Creditors, 21 December 2009.

King, Charlotte, 'Violent and Sexually "Defective": What the Royal Commission Taught Us about the Christian Brothers' *ABC Ballarat* (online, 21 December 2017)

Kinney, Bishops' Meeting, 'NCCB Establishes Committee on Sexual Abuse,' *Origins* 23/7 (July 1, 1993) 104-105

Knoll, Corina, 'He Sued Over a Priest's Abuse. Then the Diocese Filed for Bankruptcy', *The New York Times* (online, 26 September 2019)

Kawashima, Robert S., 'The Jubilee Year and the Return of Cosmic Purity' (2003) 65 *The Catholic Biblical Quarterly* 370

Kempe, CH, Silverman FN, Steele BF, Droegemueller W, Silver HK, 'The Battered-Child Syndrome' (1962) 181(1) *JAMA* 17

Keenan, Marie, *Child Sexual Abuse and the Catholic Church Gender, Power, and Organizational Culture*, New York: Oxford University Press, 2011

Kezar, Adrianna, 'Transformational Elite Interviews: Principles and Problems' (2003) 9 *Qualitative Inquiry* 395

Kirchgaessner, Stephani, 'Pell Says Meeting with Australian Abuse Survivors was "Hard and Honest,"' *The Guardian* (online 4 March 2016) <https://www.theguardian.com/australia-news/2016/mar/03/cardinal-pell-meeting-australia-abuse-survivors>

Kline, Paul M., Robert Mcmackin and Edna Lezotte, 'The Impact of the Clergy Abuse Scandal on Parish Communities' (2008) 17 *Journal of Child Sexual Abuse* 290

Klug, Heinz, and Sally Engle Merry, 'Introduction' in Stewart Macaulay et al (eds), *The New Legal Realism* (Cambridge University Press, 2016) vol 2, 1

Koffler, Judith, 'Dionysus in Bankruptcy Land' (1975) 7 *Rutgers Camden Law Journal* 655

Kolasky, William, 'The Warren Court: A Distant Mirror: Part One - The Chief: Earl Warren,' (2019) 33 *Antitrust* 81

Koska, Geeta, 'Corporate Accountability in Times of Transition: The Role of Restorative Justice in the South African Truth and Reconciliation Commission' (2016) 4 *Restorative Justice* 41

Kroeze, I, 'Legal Research Methodology and the Dream of Interdisciplinary' (2013) 16 *Potchefstroome Elektroniese Regsblad* 35

Krygier, Martin, 'Walls and Bridges: A Comment on Philip Selznick's "The Moral Commonwealth"' (1994) 82 *California Law Review* 473

Krygier, Martin, *Philip Selznick Ideals in the World* (Stanford Law Books, 2012)

Kuennen, Tamara L, 'Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence' (2010) *Brigham Young University Law Review* 515

Kuney, George W, 'Hijacking Chapter 11' (2004) 21 *Emory Bankruptcy Developments Journal* 19

Kuo, Shih-Ya, Dennis Longmire and Steven J. Cuvelier, 'An Empirical Assessment of the Process of Restorative Justice' (2010) 38 *Journal of Criminal Justice* 318

Kurki, Milja. 'Stretching Situated Knowledge: From Standpoint Epistemology to Cosmology and Back Again,' *Millennium - Journal of International Studies* 43, no. 3 (2015): 779-97.

Laeuchli, Samuel, *Power and Sexuality: The Emergency of Canon Law at the Synod of Elvira* (Temple University Press, 1972)

Landers, Jonathan M, 'Reflections on Loan-to-Own Trends' (2007) 26 *American Bankruptcy Institute Law Review* 44–6

Lauch, Scott, and Allison Retka, 'Choosing Morals and Money: Plaintiffs Settle with Diocese of Kansas City-St. Joseph', *Bishop Accountability.org* (Article, 1 September 2008)

Laufer, William S, 'Corporate Culpability and the Limits of Law' (1996) 6 *Business Ethics Quarterly* 311

Lazarus, Edward, et al, 'Examining Backlash and Attacks on Landmark Decisions from Brown to Roe to Goodridge,' (2008) 2 *Advance* 149

LeCarner, Thomas Micahel, 'Dollars and Sense: Economies of Forgiveness in Antebellum American Law, Literature, and Culture' (Phd Thesis, University of Colorado, 2014)

Lecompte, Janet, 'Coronado and Conquest' (1989) 64 *New Mexico Historical Review* 279

Legg, Michael J., 'The United States Deposition — Time for Adoption in Australian Civil Procedure?' (2007) 31 *Melbourne University Law Review* 146

Lempert, Richard, 'Calavita's Invitation to Law & Society: Introduction to the Symposium,' (2014) 39 Law & Soc. Inquiry 204

Leurs, Koen, 'Feminist Data Studies: Using Digital Methods for Ethical, Reflexive and Situated Socio-Cultural Research' (2017) 115(1) *Feminist Review* 130

Lewis, Terri, et al, 'Does the Impact of Child Sexual Abuse Differ from Maltreated but Non-Sexually Abused Children? A Prospective Examination of the Impact of Child Sexual Abuse on Internalizing and Externalizing Behavior Problems' (2016) 51 *Child Abuse & Neglect* 31

Levi, Michael, 'Suite Justice or Sweet Charity? Some Explorations of Shaming and Incapacitating Business Fraudsters' (2002) 4(2) *Punishment & Society* 147

Levy, Ron and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2017)

Leyser, Conrad, 'Cities of the Plain: The Rhetoric of Sodomy in Peter Damian's "Book of Gomorrah"' (1995) 86 *Romanic Review* 191

Lichtenstein, Mark S., and Matthew W Cheney, 'Riding the Fulcrum Seesaw: How Hedge Funds will Change the Dynamics of Future Bankruptcies' (2008) 24 *New Jersey Law Journal*

Lierman, Steven, 'Law as a Complex Adaptive System: The Importance of Convergence in a Multi-Layered Legal Order' (2014) 21 *Maastricht Journal of European and Comparative Law* 611, 612

Lipson, Jonathan, 'When Churches Fail: The Diocesan Debtor Dilemmas' (2005) 79 *Southern California Law Review* 363

Lipson, Jonathan C., ‘Debt and Democracy: Towards a Constitutional Theory of Bankruptcy’ (2007) 83 *Notre Dame Law Review* 605

Lipson, Jonathan C., ‘The Shadow Bankruptcy System’ (2009) 89 *Boston University Law Review* 1609

Lipson, Jonathan C., ‘Governance in the Breach: Controlling Creditor Opportunism’ (2010) 84 *Southern California Law Review* 1035

Lipson, Jonathan C., ‘Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy’ (2016) 6 *Harvard Business Law Review* 239

List, Christian and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press, 2011)

Liu, Sida, ‘Law's Social Forms: A Powerless Approach to the Sociology of Law’ (2015) 40(1) *Law & Social Inquiry* 1

Llewellyn, Karl N., A Realistic Jurisprudence-The Next Step, 30 COLUM. L. REV. 431 (1930)

Lomawaima, K Tsiannia, *They Called it Prairie Light: The Story of Chilocco Indian School* (University of Oklahoma Press, 1993)

LoPucki, Lynn M., ‘The Trouble with Chapter 11’ (1993) *Wisconsin Law Review* 729
M Löschnig-Gspandi, ‘Corporations, Crime and Restorative Justice’ in Elmar G M Weitekamp and Hans-Jurgen Kerner (eds), *Restorative Justice in Context: International Practice and Directions* (Willan Publishing, 2003) 145

LoPucki, Lynn M. and William C Whitford, ‘Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies’ (1993) 141 *University of Pennsylvania Law Review* 669

Lyon, Tom and Raymond LaManga, *The History of Children’s Hearsay: From Old Bailey to PostDavis*, 82 Ind. L. J. 1029, 1030-1031 (2007)

MacMahon, Paul, ‘Proceduralism, Civil Justice, and American Legal Thought,’ (2012) 34 *University of Pennsylvania Journal of International Law* 545

Masehela, Boledi and Venitha Pillay, ‘Shrouds of Silence: A Case Study of Sexual Abuse in Schools in the Limpopo Province in South Africa (2014) 32(3) *Perspectives in Education* 22

Maher, Michael J, Linda M Sever and Shaun Pichler, ‘How Catholic College Students Think about Homosexuality: The Connection between Authority and Sexuality’ (2008) 55(3) *Journal of Homosexuality* 325

Main, Thomas O, ‘The Procedural Foundation of Substantive Law’ (2010) 87 *Washington University Law Review* 801

Mann, Bruce H, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Harvard University Press, 2002)

Mann, Ronald J, *Bankruptcy and the U.S. Supreme Court* (Cambridge University Press, 2017)

Marcinak, Daniel J, 'Separation of Church and Estate: On Excluding Parish Assets from the Bankruptcy Estate of a Diocese Organized as a Corporation Sole' (2005) 55 *Catholic University Law Review* 583

Margolis, Eric, 'Looking at Discipline, Looking at Labour: Photographic Representations of Indian Boarding Schools' (2004) 19(1) *Visual Studies* 72

Markell, Bruce A., et al, 'Transcript of the Dedication Ceremony for the Conrad B Duberstein Bankruptcy Courthouse: Roundtable Discussion: Religious Organizations Filing for Bankruptcy' (2005) 13 *American Bankruptcy Institute Law Review* 25

Marr, David, 'George Pell Wasn't Much Interested in Stories of Abuse by Priests. Which was Lucky for His Career,' *The Guardian* (online 1 March 2016) <https://www.theguardian.com/australia-news/2016/mar/01/george-pell-wasnt-much-interested-in-stories-of-abuse-by-priests-which-was-lucky-for-his-career>

Marr, David, 'We Learned About George Pell's Pain. But What About the Children,' *The Guardian* (online 3 March 2016) <https://www.theguardian.com/australia-news/2016/mar/03/we-learned-about-george-pells-pain-but-what-about-the-children>

Marr, David, 'Grappling with Rome: David Marr's Lessons from the Royal Commission', *The Guardian* (online, 12 December 2017) <https://www.theguardian.com/australia-news/2017/dec/13/grappling-with-rome-david-marrs-lessons-from-the-royal-commission>

Marshall, Konrad 'Cardinal George Pell: Ballarat reacts to testimony characterised by memory loss,' *The Age* (online 29 February 2016) <https://www.theage.com.au/national/victoria/cardinal-george-pell-ballarat-reacts-to-testimony-characterised-by-memory-loss-20160229-gn65yi.html>

Martin, Vivian B, 'Using Popular and Academic Literature as Data for Formal Grounded Theory,' Antony Bryant, and Kathy Charmaz (eds) *The SAGE Handbook of Current Developments in Grounded Theory* (SAGE Publications, 2019)

Mathews, Ben, 'Royal commission faces challenges but provides an opportunity for change,' *The Conversation*, (online 14 January 2013)

Mathews, Ben, 'Optimising Implementation of Reforms to Better Prevent and Respond to Child Sexual Abuse in Institutions: Insights from Public Health, Regulatory Theory, and Australia's Royal Commission,' (2017) 74 *Child Abuse & Neglect*, 86

McAleese, Mary, *Quo Vadis? Collegiality in the Code of Canon Law* (Columba Press, 2012)

McBeth, Sally, *Ethnic Identity and the Boarding School Experience of West Central Oklahoma American Indians* (University Press of America, 1983)

McCann, Michael, ‘Preface to “The New Legal Realism, *Volumes I and II*”’ in Stewart Macaulay et al (eds) *The New Legal Realism* (Cambridge University Press, 2016) xiii

McCarthy, Joanne, ‘John Pirona’s Suicide in 2012 Was an “Important Cog” that Led to a Royal Commission, Said His Father,’ *Newcastle Herald* (online, 20 October 2018) <https://www.newcastleherald.com.au/story/5706527/too-much-pain-the-family-tragedy-behind-a-royal-commission-and-national-apology>

McDonnell, Kilian. 'Feminist Mariologies: Heteronomy/ Subordination and the Scandal of Christology', *Theological Studies*, vol. 66/no. 3, (2005)

McKenzie, Troy A., ‘The Mass Tort Bankruptcy: A Pre-History’ (2012) 5 *Journal of Tort Law* 59

McKinnon, John, *Report on a Survey of the Religious Attitudes of the Diocese of Ballarat* (Diocese of Ballarat, 1973)

McPhillips, Kathleen, ‘Traumatic Isolation: Institutional Stigma and the Australian Royal Commission into Institutional Responses to Child Sexual Abuse,’ (2018) 20:2 *Health and History*, 75

McGarry, Patsy, ‘Marie Collins Resigns from Vatican Child Protection Body’, The Irish Times (online, 1 March 2017) <https://www.irishtimes.com/news/social-affairs/religion-and-beliefs/marie-collins-resigns-from-vatican-child-protection-body-1.2993428 >

McSweeny, Bill, ‘The Priesthood in Sociological Theory’ (1974) 21 *Social Compass* 5

de la Merced, Michael J., ‘Harvey R. Miller, Renowned Bankruptcy Lawyer, Dies at 82’, *New York Times* (online, 27 April 2015) <https://www.nytimes.com/2015/04/28/business/harvey-r-miller-renowned-bankruptcy-lawyer-dies-at-82.html>

Milavec, Aaron, *The Didache: Text, Translation, Analysis, and Commentary* (Liturgical Press, 2003)

Montoya, Isaiah, ‘Remembering the “Pueblo Training School”’, *Navajo Times* (online, 9 July 2009) <http://www.navajotimes.com/entertainment/2009/0709/070909remembering.php>.

Merriam, Charles Edward, *Political Power: Its Composition and Incidence* (Mc Graw-Hill, 1934

Merry, Sally Engle, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (University of Chicago Press, 1990)

Merry, Sally Engle, ‘Legal Pluralism’ (1988) 22(5) *Law & Soc'y Rev* 869

Merry, Sally Engle, *Colonizing Hawai’i: The Cultural Power of Law* (Princeton University Press 1999)

Merry, Sally Engle, ‘Legal Pluralism and Legal Culture: Mapping the Terrain’ in Brian Z Tamanaha, Caroline Sage, and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012) 66

Merton, Robert King and Marjorie Fiske Lowenthal, *The Focused Interview: A Manual of Problems and Procedures* (Free Press, 1956)

Mertz, Elizabeth, ‘Introduction: New Legal Realism: Law and Social Science in the New Millennium’ in Stewart Macaulay et al (eds) *The New Legal Realism* (Cambridge University Press, 2016) vol 1

Milavec, Aaron, *The Didache: Text, Translation, Analysis, and Commentary* (Liturgical Press, 2003)

Milgate, Michael, ‘The Politics of Sodomy and Legal Process R v Pons Hugh de Ampurias (1311)’ (2006) 66 *The Jurist* 483

Miller, Harvey R. and Shai Y Waisman, ‘Is Chapter 11 Bankrupt?’ (2005) 47 *Boston College Law Review* 129

Mills, C. Wright, *The Politics of Truth Selected Writings of C. Wright Mills,* ed John Summers (Oxford University Press, 2008)

Mills, David, ‘In His Book of Gomorrah, an Eleventh-Century Book We'd Bet a Small Amount of Money is Not Read in Any Seminary of any Sort in America, but which has Appeared in a New Edition from Wilfrid Laurier University Press in Canada, St. Peter Damian Applies “The Surgery of Words” to Those Who Should Have Said Something and Didn't’ (2014) *First Things: A Monthly Journal of Religion and Public Life* 66

Milroy, H, ‘Learnings from the Royal Commission Into Institutional Responses to Child Sexual Abuse and its Application to Psychiatry’ (2017) 51(s1) *Australian And New Zealand Journal Of Psychiatry*, 4

Minow, Martha, ‘Archetypal Legal Scholarship: A Field Guide’ (2013) 63 *Journal of Legal Education* 65

Miranda, Charles and Victoria Craw, ‘Royal Commission expected to recall Bishop Mulkearns as Cardinal Pell begins day three of testimony in Rome,’ *News.com* (online 2 March 2016) <https://www.news.com.au/national/courts-law/royal-commission-expected-to-recall-bishop-mulkearns-as-cardinal-pell-beings-day-three-of-testimony-in-rome/news-story/a230f195dea5fa730ce1776f72b2340f>

Molot, Jonathan T., ‘How US Procedure Skews Tort Law Incentives’ (1997) 73 *Indiana Law Journal* 59

Moor, Jeffrey Hunter, ‘Protection against the Discovery or Disclosure of Church Documents and Records’ (1999) 39 *The Catholic Lawyer* 27

Moore, Sally Falk, ‘Law and social change: the semi-autonomous social field as an appropriate subject of study’ (1978) *Law as Process: An anthropological approach*

Moreton-Robinson, Aileen, ‘Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty’ (2009) 15 *Cultural Studies Review* 61

Morss, John R., ‘The International Legal Status of the Vatican/Holy See Complex’ (2015) 26(4) *European Journal of International Law* 927

Morton, Sarah, ‘Getting Evidence into Action to Tackle Institutional Child Abuse,’ (2017) 74 *Child Abuse & Neglect*, 111

Muchlinski, Peter, 'The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World' (2011) 18 *Indiana Journal of Global Legal Studies* 665

Murphy, Kristina, and Nathan Harris, ‘Shaming, Shame and Recidivism’ (2007) 47(6) *British Journal of Criminology* 900

Murray, Cecilia, ‘Katharine Drexel: Learning to Love the Poor’ (2006) 9(3) *Catholic Education: A Journal of Inquiry and Practice* 307

Nadelmann, Kurt H, ‘On the Origin of the Bankruptcy Clause’ (1957) 1 *The American Journal of Legal History* 215

Narayan, Uma, ‘Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism.’ (1998) 13(2) Hypatia 86

National Archives, ‘Navigating Record Group 75: BIA Schools’, *National Archives* (Web Page, 13 September 2018) <http://www.archives.gov/research/native-americans/bia-guide/schools.html>

Neuhaus, Richard John. "In Preparation for Lent This Year, a Number of Bishops Issued Impressive Pastoral Letters Calling for Renewed Practice of the Sacrament of Reconciliation--or, as Most Catholics Will Likely Continued to Call It, Confession. (While We're At It)." First Things: A Monthly Journal of Religion and Public Life, no. 173 (2007) 67

Neuner, Lynn K. and Sheila M. Brodbeck, *Asbestos Bankruptcy Cases; NEWS; Insurance Coverage Law Bulletin Insurance Coverage Law Bulletin January 2006* Pg. 1 Vol. 4 No. 12

‘Transcript: Read the PM’s Full Statement on the Child Sex Abuse Royal Commission,’ *Newcastle Herald* (online 12 November 2012) <http://www.theherald.com.au/story/969662/transcript-read-the-pms-full-statement-on-the-child-sex-abuse-royalcommission/>

Newman, Daniel, ‘Attitudes to Justice in a Rural Community’ (2016) *36 Legal Studies* 591

Newsom, Kimmery and Karen Myers-Bowman, ‘“I Am Not A Victim. I Am A Survivor”: Resilience as a Journey for Female Survivors of Child Sexual Abuse,’ (2017) 26(8) Journal of Child Sexual Abuse, 927

Noll, Douglas E and Linda Harvey, 'Restorative Mediation: The Application of Restorative Justice Practice and Philosophy to Clergy Sexual Abuse Cases' (2008) 17 *Journal of Child Sexual Abuse* 377

Nonet, Philippe, and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Octagon Books, 1978)

Nourse, Victoria, and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory' (2009) 95(1) *Cornell Law Review* 61

NRSV Bible

Nungent, Janna Satz, 'A Higher Authority: The Viability of Third Party Tort Actions against a Religious Instituion Grounded on Sexual Misconduct by a Member of the Clergy (2002) 30 *Florida State University law Review* 957

Oates, Kim, 'The Royal Commission into Child Sexual Abuse: A Beginning, Not an End' (2018) 54(3) *Journal of Paediatrics and Child Health*, 221

Ohlheiser, Abby, 'The Vatican Defrocked 848 Priests For Child Abuse in the Past 10 Years' *The Atlantic* (online, 6 May 2014) <https://www.theatlantic.com/international/archive/2014/05/the-vatican-defrocked-848-priests-for-child-abuse-in-the-past-10-years/361821/>

Olick, Jeffrey K, *The Politics of Regret: On Collective Memory and Historical Responsibility* (New York: Routledge, 2007)

Olmstead, James M, 'Bankruptcy a Commercial Regulation' (1902) 15 *Harvard Law Review* 829

O'Reilly James T., and Margaret S P Chalmers, *The Clergy Sex Abuse Crisis and the Legal Responses* (Oxford University Press, 2014)

O'Reilly, James T., *The Clergy Sex Abuse Crisis and the Legal Responses* (Oxford University Press, 2014)

Örsy, Ladislas, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Liturgical Press, 1992) 145

Palmer, Donald and Valerie Feldman, 'Toward a More Comprehensive Analysis of the Role of Organizational Culture in Child Sexual Abuse in Institutional Contexts,' (2017) 74 *Child Abuse & Neglect* 23

Pargament, Kenneth I, Nichole A Murray-Swank and Annette Mahoney, 'Problem and Solution: The Spiritual Dimension of Clergy Sexual Abuse and its Impact on Survivors' (2008) 17 *Journal of Child Sexual Abuse* 397

Parker, Christine, *Just Lawyers Regulation and Access to Justice* (Oxford Socio-legal Studies. Oxford; New York: Oxford University Press, 1999)

Parker, Christine, 'Restorative Justice in Business Regulation? the Australian Competition and Consumer Commissions use of Enforceable Undertakings' (2004) 67 *The Modern Law Review* 209

Parker, Christine, 'The "Compliance" Trap: the Moral Message in Responsive Regulatory Enforcement,' (2006) 40(3) *Law & Society Review*

Parker, Julie Faith, 'Blaming Eve Alone: Translation, Omission, and Implications of המע in Genesis 3:6b.' (2013) 132(4) *Journal of Biblical Literature*, 729

Parkinson, Patrick, 'Child Sexual Abuse and the Churches: A Story of Moral Failure?' (2014) 26(1) *Current Issues in Criminal Justice* 119

Parks, Gregory Scott, 'Toward Critical Race Realism' (2008) 17 *Cornell Journal of Law and Public Policy* 683

Pascoe, Susan, 'The 2009 Victorian Bushfires Royal Commission: Lessons for the Conduct of Inquiries in Australia' The Australian Journal of Public Administration, vol. 69, no. 4, pp. 392

Pastrana, Antonio, 'Navigating the Intersectional Imagination: Race, Sexuality, and Power' (PhD Thesis, The City University of New York, 2008)

Pasura, Dominic, et al, 'Competing Meanings of Childhood and the Social Construction of Child Sexual Abuse in the Caribbean' (2013) 20 *Childhood* 200

Pavlakis, Dean, 'Reputation and the Sexual Abuse of Boys: Changing Norms in Late-Nineteenth-Century Britain' (2014) 17 *Men and Masculinities* 325

Peters, Anne, 'The Competition between Legal Orders' (2014) 3(1) *International Law Research* 45

Peters, Michael A, 'Child sexual abuse: The final report of the Australian Royal Commission into institutional responses to child sexual abuse,' (2019) 51(3) *Educational Philosophy and Theory*, 233

Pettit, Philip, *Republicanism: A Theory of Freedom and Government* (Clarendon Press, 1997)

Pettit, Philip, Deniz Ozyildiz and Benjamin Boudou, 'Two Fallacies about Corporations' (2014) 56 *Raisons Politiques* 5

Pike, Amanda M., 'Discovering Records Beneath the Robes: Canonical Protection and Civil Resurrection of the Boston Archdiocese Secret Archives' (2010) 19 *Journal of Information Ethics* 86

Pitt, Helen, 'Royal Commission's message to Australia,' *The Sydney Morning Herald* (online, 14 December 2017) <https://www.smh.com.au/national/royal-commissions-message-to-australia-20171214-h04fin.html>

Podmore, Zak, ‘Broadband Internet Access Coming to Navajo Nation Communities in San Juan County’, *The Salt Lake Tribune* (online, 15 November 2019) <https://www.sltrib.com/news/2019/11/15/broadband-internet-access/>

Professional Standards Office, ‘Towards Healing’, *Professional Standards Office: Catholic Church Queensland* (Web Page, 2017) <http://psoqld.catholic.net.au/documents/towardshealing.html>

Public Broadcasting Service ‘The Silence,’ (2011) *Frontline* (Web Page) https://www.pbs.org/wgbh/pages/frontline/the-silence/2011

Plank, Thomas E., ‘Bankruptcy and Federalism’ (2002) 71 *Fordham Law Review* 1063

Pliner, Patricia, Kirk R Blankstein and Irwin M Spigel (eds), *Perception of Emotion in Self and Others* (Springer US, 1979)

Porter, Katherine, and Deborah Thorne, ‘The Failure of Bankruptcy's Fresh Start’ (2006) 92 *Cornell Law Review* 67

Posner, Richard, ‘Instrumental and Noninstrumental Theories of Tort Law’ (2013) 88 *Indiana Law Journal* 469

Potts, David, ‘Arizona Case Note: Engler v. Gulf Interstate Engineering, Inc. and the Role of Control in Vicarious Liability’ (2012) 54 *Arizona Law Review* 1157

Prasser, Scott, ‘When Should Royal Commissions be Appointed’? (2005) *Public Administration Today* 57

Prasser, Scott and Helen Tracey, ‘History, trends and key issues—the story so far . . .’ Scott Prasser and Helen Tracey (eds) *Royal Commissions & Public Inquiries: Practice & Potential*, (2014)

Priya, Kumar Ravi, ‘Using Constructivist Grounded Theory Methodology: Studying Suffering and Healing as a Case Example,’ Antony Bryant, and Kathy Charmaz (eds) *The SAGE Handbook of Current Developments in Grounded Theory* (SAGE Publications, 2019)

Provost, James H., ‘Some Canonical Considerations Relative to Clerical Sexual Misconduct’ (1992) 52 *Jurist* 615

Pruitt, Lisa R., & Beth A Colgan, ‘Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense’ (2010) 51 *Arizona Law Review* 219

Pruitt, Lisa R., and Bradley E Showman, ‘Law Stretched Thin: Access to Justice in Rural America’ (2014) 59 *South Dakota Law Review* 466

Potter, Harry, ‘Becket and Criminous Clergy’ in Harry Potter (ed) *Law, Liberty and the Constitution: A Brief History of the Common Law* (Cambridge University Press, 2015)

Pound, Roscoe, *An Introduction to the Philosophy of Law* (Yale University Press, 1922)

Quinn, Mae C., 'Feminist Legal Realism' (2012) 35 *Harvard Journal of Law & Gender* 1

Ransley, Janet, 'Public Inquiries into Political Wrongdoing,' *Royal Commissions & Public Inquiries: Practice & Potential,* Scott Prasser and Helen Tracey (eds) (2014)

Rasmussen, Robert K, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1992) 71 *Texas Law Reveiw* 51

Rasmussen, Robert K, 'An Essay on Optimal Bankruptcy Rules and Social Justice' (1994) 1 *University of Illinois Law Review* 1

Rasmussen, Robert K and David A Skeel, Jr, 'The Economic Analysis of Corporate Bankruptcy Law' (1995) 3 *American Bankruptcy Institute Law Review* 85

Rather, Dan, 'Spiritually Bankrupt', *Dan Rather Reports* (HDNet, 30 July 2013)

Rogers, Alisdair, Noel Castree, and Rob Kitchin. 'Situated Knowledge,' *A Dictionary of Human Geography,* 2013, A Dictionary of Human Geography

Rohde, Marie, 'Milwaukee Archdiocese's Settlement Plan Stuns Sex Abuse Victims', *National Catholic Reporter* (5 August 2015)

Rohde, Marie, 'Judge Approves Milwaukee Archdiocese's Plan to Emerge from Bankruptcy' *National Catholic Reporter* (online, 10 November 2015) <https://www.ncronline.org/news/accountability/judge-approves-milwaukee-archdioceses-plan-emerge-bankruptcy>

Rotstein, Arthur H, 'Tucson Diocese Bankruptcy Effectively over a Year Later' *Bishop Accountability.org* (Article, 18 September 2005)

Reid Jr, Charles J and John Witte Jr, 'In the Steps of Gratian: Writing the History of Canon Law in the 1990s' (1999) 48 *Emory Law Journal* 647

Reilly, Marie T, 'Appendix A: Case Information', *Catholic Dioceses in Bankruptcy* (Chart, September 2019)

Reilly, Marie T, 'Catholic Dioceses in Bankruptcy' (2019) 49 *Seton Hall Law Review* 871.

Reitsema, AM and H Grietens, 'Is Anybody Listening? The Literature on the Dialogical Process of Child Sexual Abuse Disclosure Reviewed' (2016) 17(3) *Trauma, Violence & Abuse* 330

Renati, Charles G, 'Prescription and Derogation from Prescription in Sexual Abuse of Minor Cases', (2007) 67 *The Jurist: Studies in Church Law and Ministry* 503

Reyhner, John Allan, 'Indian Boarding Schools', *California Indian Education* (Web Page, 2008) <http://www.californiaindianeducation.org/indian_boarding_schools/>

Rheinstein, Max, (ed), *Max Weber on Law in Economy and Society* (Harvard University Press, 1954)

Roberts, Ron, et al, 'The Effects of Child Sexual Abuse in Later Family Life; Mental Health, Parenting and Adjustment of Offspring' (2004) 28(5) *Child Abuse & Neglect* 525

Roberts, Julian V and Renate M. Mohr, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Buffalo, 1994)

Robertson, Kathleen R., Dark Days for the Church: Canon Law and the Response of the Roman Catholic Church to the Sex Abuse Scandals, (2005) 4 *Wash. U. Global Stud. L. Rev.* 161

Rossetti, Stephen J, 'The Impact of Child Sexual Abuse on Attitudes toward God and the Catholic Church' (1995) 19(12) *Child Abuse & Neglect*, 1469

Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (Commonwealth of Australia, 2014)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (Consultation Paper, Royal Commission into Institutional Responses to Child Sexual Abuse, January 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made With Respect to Catholic Church Institutions in Australia* (Commonwealth of Australia, 2017)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Preface and Executive Summary* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Terms of Reference* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Commissioners* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Our Inquiry* (Commonwealth of Australia 2017)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Particular institutions* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Understanding Child Sexual Abuse in Institutional Contexts* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim report* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Support and Treatment* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Beyond the Royal Commission* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Recommendations* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study 04: The Towards Healing Process* (Commonwealth of Australia 2017)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 8: Mr. John Ellis's Experience of the Towards Healing Process and Civil Litigation* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study 11: Christian Brothers* (Commonwealth of Australia 2014)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 13: Marist Brothers* (Commonwealth of Australia, 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 16: The Melbourne Response* (Commonwealth of Australia 2015)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 28: Catholic Church Authorities in Ballarat* (Commonwealth of Australia 2017)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 35: Catholic Archdiocese of Melbourne* (Commonwealth of Australia, 2017)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 50: Institutional Review of Catholic Church Authorities* (Commonwealth of Australia 2017)

Ruether, Rosemary Radford, *Women and Redemption: A Theological History* (Fortress Press, 1998)

Russell, Andrew B, 'Enduring Communities: The Nikkei in New Mexico', *Discover Nikkei: Japanese Migrants and their Descendants* (online, 30 April 2008) <http://www.discovernikkei.org/en/journal/2008/4/30/enduring-communities/>

Rustad, Michael L, 'Twenty-First-Century Tort Theories: The Internalist/Externalist Debate' (2013) 88 *Ind. L.J.* 419

Ryan, Denis and Peter Hoysted, *Unholy Trinity: The Hunt for the Paedophile Priest Monsignor John Day* (Allen & Unwin, 2013)

‘Vatican Defrocked 848 Priests for Abuse’, *SBS News* (online, 7 May 2014) <https://www.sbs.com.au/news/vatican-defrocked-848-priests-for-abuse>

Sansone, Randy A, Amy R. Kelley and Jeremy S. Forbis, 'Abuse in Childhood and Religious/Spiritual Status in Adulthood among Internal Medicine Outpatients' (2013) 52 *Journal of Religion and Health* 1085

Salter, Michael, ‘Royal commission provides a vital blueprint for justice for sex abuse victims – now it’s time to act,’ *The Conversation* (online 15 August, 2017) <https://theconversation.com/royal-commission-provides-a-vital-blueprint-for-justice-for-sex-abuse-victims-now-its-time-to-act-82491>

Salter, Michael, ‘The transitional space of public inquiries: The case of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse,’ (2019) *Australian and New Zealand Journal of Criminology,* 1

Saunders, Rev. William, ‘The Meaning of the Terms Nun, Sister, Monk, Priest, and Brother’, *Catholic Education Resource Centre* (Article, 2003) <http://www.catholiceducation.org/en/culture/catholic-contributions/the-meaning-of-the-terms-nun-sister-monk-priest-and-brother.html>

SBS News, ‘Child Protection Campaigner Hits Out at PM’ *SBS News* (online 21 July 2017) <https://www.sbs.com.au/news/child-protection-campaigner-hits-out-at-pm>

Schelle, Caroline, ‘Ballarat Sexual Abuse Survivor Phil Nagle Hails New Compensation Rules’, The Courier (online, 14 June 20019) <https://www.thecourier.com.au/story/6218005/its-a-great-day-ballarat-abuse-survivor-hails-new-compensation-rules/>

Schmidt, Christopher W, ‘Beyond Backlash: Conservatism and the Civil Rights Movement,’ (2016) 56 *Am. J. Legal Hist.* 179

Servants of the Paraclete, ‘Founding of the Congregation’ *Servants of the Paraclete* (Web Page, 2010) <http://www.theservants.org/WhoWeAre/FoundingoftheCongregation.aspx>

Sherman, Lawrence W. et al, 'Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review' (2015) 31 *Journal of Quantitative Criminology* 1

Short, Michael, ‘Hell on Earth: Judy Courtin Says the Rape of Children by Catholic Priests is Best Dealt with by a Royal Commission’, *The Sydney Morning Herald* (online, 25 June 2012)

Simmons, Walter and Rosemarie Emanuele, 'Male and Female Recoveries in Medical Malpractice Cases' (2004) 62 *Review of Social Economy* 83

‘Bravehearts founder hits out at PM’, *SkyNews,* 21 July 2017

Smallbone, Stephen, ‘The Impact of Australia’s Royal Commission on Child- and Youth-Serving Organizations,’ (2017) 74 *Child Abuse & Neglect,* 99

Smith, Anna V, '"Win-Loss Is Still Pretty Bad": Tribes Falter at Supreme Court', *Indianz.com* (online, 9 August, 2018) <https://www.indianz.com/News/2018/08/09/winloss-is-still-pretty-bad-tribes-falte.asp>

Schwarcz, Steven L, 'Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach' (2000) 85 *Cornell Law Review* 956

Scott, Kathryn D, 'Childhood Sexual Abuse: Impact on a Community's Mental Health Status' (1992) 16 *Childhood Abuse and Neglect* 282

Selznick, Philip, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press, 1992)

Shaffer, Gregory, 'New Legal Realism's Rejoinder' (2015) 28 *Leiden Journal of International* Law 479

Shaffer, Gregory, 'New Legal Realism and International Law' in Stewart Macaulay et al (eds) *The New Legal Realism, vol 2* (Cambridge University Press, 2016)

Shahar, Ido, 'State, Society and the Relations Between Them: Implications for the Study of Legal Pluralism' (2008) 9 *Theoretical Inquiries in Law* 417

Shea, Diane J, 'Effects of Sexual Abuse by Catholic Priests on Adults Victimized as Children' (2008) 15(3) *Sexual Addiction & Compulsivity* 250

Shelley, William P, Jacob C Cohn and Joseph A Arnold, 'The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update — Judicial and Legislative Developments and Other Changes in the Landscape Since 2008' (2014) 23 *Widener Law Journal* 675

Silink, Allison and Pamela Stewart, 'Tort Law Reform to Improve Access to Compensation for Survivors of Institutional Child Sexual Abuse' (2016) 39 *University of New South Wales Law Journal* 553

Sivagrunathan, Marudan, et al 'Barriers and facilitators affecting self-disclosure among male survivors of child sexual abuse: The service providers' perspective,' (2018) *Child Abuse & Neglect*

Skeel, David, 'Rethinking the Line Between Corporate Law and Corporate Bankruptcy' (1994) 72 *Texas Law Review* 471

Skeel, Jr David A, 'Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship' (1999) 113 *Harvard Law Review* 1075

Skeel, Jr David A, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton University Press, 2001)

Skeel, Jr David A, '"Sovereignty" Issues and the Church Bankruptcy Cases' (2005) 29 *Seton Hall Legislative Journal* 345

Sköld, Johanna, and Shurlee Swain (eds), *Apologies and the Legacy of Abuse of Children in 'Care'* (Palgrave Macmillian, 2015)

Skolnick, JH, 'Legacies of Legal Realism: The Sociology of Criminal Law and Criminal Justice' (2012) 8 *Annual Review of Law and Social Science* 1

Smart, Carol, 'Reconsidering the Recent History of Child Sexual Abuse, 1910-1960' (2000) 29 *Journal of Social Policy* 55

Smaal, Yorick, 'Historical Perspectives on Child Sexual Abuse, Part 1' (2013) 11 *History Compass* 702.

Smaal, Yorick, 'Historical Perspectives on Child Sexual Abuse, Part 2' (2013) 11 *History Compass* 715.

Smith, Douglas G, 'Resolution of Mass Tort Claims in the Bankruptcy System' (2008) 41 *UC Davis Law Review* 1613

Snowden, Monique L, 'Bettering Her Education and Widening Her Sphere: Betwixt and between Coeducational Experiences' (2011) 17 *Qualitative Inquiry* 930

Spender, Peta, 'Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability' (2003) 25 *Sydney Law Review* 223

Steele, Paul D, 'Child Sexual Abuse among Socially Marginalized Groups: Cultural and Governmental Influences Perpetuating Maltreatment in American Indian Country' (2009) *Forum on Public Policy: A Journal of the Oxford Round Table*

Stephen, Henry John, *New Commentaries on the Laws of England: Partly Founded on Blackstone* (Butterworth, 4th ed, 1858)

Stewart, Pam and Anita Stuhmcke, *Australian Principles of Tort Law, 3rd Edition*, The Federation Press, Sydney 2012

Stovel, Laura, *Long Road Home: Building Reconciliation and Trust in Post-War Sierra Leone* (Intersentia, 2010)

Strang, H, and J Braithwaite (eds) (2000) *Restorative Justice: Philosophy to Practice*. Aldershot: Dartmouth

Strang, Heather and Lawrence W Sherman, 'The Practice of Restorative Justice: Repairing the Harm: Victims and Restorative Justice,' (2003) *Utah Law Review*, 15

Streeton, Rosemarie, Mary Cooke, and Jackie Campbell, 'Researching the Researchers: Using a Snowballing Technique,' (2004) 12(1) *Nurse Researcher,* 35

Stewart, Georgina, 'What does 'indigenous' mean, for me?' (2018) 50(8) *Educational Philosophy and Theory* 740

Stiglitz, Joseph E. 'Government Failure vs. Market Failure: Principles of Regulation,' Balleisen, Edward J and David A Moss eds., *Government and Markets: Toward a New Theory of Regulation* (Cambridge University Press, 2010)

Sullivan, Teresa A, Elizabeth Warren and Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (Beard Books, 1999)

Sunstein, Cass R, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733

Spalding, Andrew B, 'Restorative Justice for Multinational Corporations' (2015) 76 *Ohio State Law Journal* 357

Spicer, Edward Holland, *Cycles of Conquest; the Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533–1960* (University of Arizona Press, 1962)

Stoltenborgh, Marije, et al, 'A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World' (2011) 16(2) *Child Maltreatment* 79

Swain, Shurlee, Royal Commission into Institutional Responses to Child Sexual Abuse. Sydney. Royal Commission into Institutional Responses to Child Sexual Abuse, *History of inquiries reviewing institutions providing care for children* (Commonwealth of Australia, 2014)

Salter, Michael, 'Royal commission provides a vital blueprint for justice for sex abuse victims – now it's time to act,' *The Conversation* (online 15 August, 2017) <https://theconversation.com/royal-commission-provides-a-vital-blueprint-for-justice-for-sex-abuse-victims-now-its-time-to-act-82491>

Salter, Michael, The transitional space of public inquiries: The case of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse,' (2019) *Australian and New Zealand Journal of Criminology*

Saunders, Rev. William, 'The Meaning of the Terms Nun, Sister, Monk, Priest, and Brother', *Catholic Education Resource Centre* (Article, 2003) <http://www.catholiceducation.org/en/culture/catholic-contributions/the-meaning-of-the-terms-nun-sister-monk-priest-and-brother.html>

Schelle, Caroline, 'Ballarat Sexual Abuse Survivor Phil Nagle Hails New Compensation Rules', *The Courier* (online, 14 June 20019) <https://www.thecourier.com.au/story/6218005/its-a-great-day-ballarat-abuse-survivor-hails-new-compensation-rules/>

Servants of the Paraclete, 'Founding of the Congregation' *Servants of the Paraclete* (Web Page, 2010) <http://www.theservants.org/WhoWeAre/FoundingoftheCongregation.aspx>

Short, Michael, 'Hell on Earth: Judy Courtin Says the Rape of Children by Catholic Priests is Best Dealt with by a Royal Commission', *The Sydney Morning Herald* (online, 25 June 2012)

SkyNews 'Bravehearts founder hits out at PM', 21 July 2017

Smith, Anna V, '"Win-Loss Is Still Pretty Bad": Tribes Falter at Supreme Court', *Indianz.com* (online, 9 August, 2018) <https://www.indianz.com/News/2018/08/09/winloss-is-still-pretty-bad-tribes-falte.asp>

St Michael Indian School, 'Home', *St Michael Indian School* (Web Page, 2019) <http://www.stmichaelindianschool.org>

St Michael Indian School, 'Learn More About Us', *St Michael Indian School* (Web Page, 2019) <https://www.stmichaelindianschool.org/learn_more_about_us.php>

Tammeus, Bill, 'Thomas J. Olmsted: Portrait of a 'Policy-Driven' Bishop' *National Catholic Reporter* (online, 3 June 2010) <https://www.ncronline.org/news/people/thomas-j-olmsted-portrait-policy-driven-bishop>

Tailor, Ketan, et al, 'Child Sexual Abuse and Adult Religious Life: Challenges of Theory and Method' (2014) 23 *Journal of Child Sexual Abuse* 865

Tamanaha, Brian Z, 'Law's Evolving Emergent Phenomena: From Rules of Social Intercourse to Rule of Law Society' (Research Paper No 18-03-03, Washington University St Louis Legal Studies, 31 March 2018)

Tamanaha, Brian Z, 'Functions of the Rule of Law,' Legal Studies Research Paper Series, Paper No. 18-01-01

Tanton, Robert, Dominic Peel and Yogi Vidyattama, 'Every suburb Every town: Poverty in Victoria,' (November 2018) National Centre for Social and Economic Modelling

Tapsell, Kieran *Potiphar's Wife The Vatican's Secret and Child Sexual Abuse* (ATF Press, 2014)

Telethon Kids Institute, 'Aboriginal and Torres Strait Islander Children and Child Sexual Abuse in Institutional Contexts,' (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, July 2017)

'Vatican Refused to Sack Priest Convicted of Child Sex Abuse, Documents Show,' *The Guardian* (online, 14 December 2015) <https://www.theguardian.com/australia-news/2015/dec/14/vatican-refused-to-sack-priest-convicted-of-child-sex-abuse-documents-show>

Thomas, William Robert, *How and Why should the Criminal Law Punish Corporations?* (ProQuest Dissertations Publishing, 2015)

Tishelman, Amy C and Lisa A Fontes, 'Religion in Child Sexual Abuse Forensic Interviews' (2017) 63 *Child Abuse & Neglect* 120

Tomlins, Christopher, 'Bucking the Party Line: Calavita's Invitation to Law and Society (In Which the Author Is Invited to a Party Where He Encounters Many Old and Familiar Faces, Becomes Argumentative, Stays up too Late, and Finally Departs in Search of New Adventures)' (2014) 39 *Law & Soc. Inquiry* 226

Tolhurst, Kevin, ‘We have already had countless bushfire inquiries. What good will it do to have another?’ *The Conversation* (online 16 January 2020) <https://theconversation.com/we-have-already-had-countless-bushfire-inquiries-what-good-will-it-do-to-have-another-129896>

Trennert, Robert A, *The Phoenix Indian School: Forced Assimilation in Arizona, 1891–1935* (University of Oklahoma Press, 1988)

Tucci, J & M Blom, 2019. ‘“These were terrible years. no love or kindness, no safety or warmth” Reflections on the outcomes of the Royal Commission into Institutional Responses to child Sexual Abuse in Australia.’ (2019) 20(4) *Journal of Trauma & Dissociation*, 373

Twining, William, ‘Legal R/realism and Jurisprudence: Ten Theses’ in Stewart Macaulay et al (eds), *The New Legal Realism vol. 1* (Cambridge University Press, 2016) 121

Uyttebrouck, Olivier, ‘Gallup Diocese Bankruptcy Raises Question of How Many More Victims There Are’, *Bishop Accountability.org* (Web Page, 14 December 2013) <http://www.bishop-accountability.org/news2013/11_12/2013_12_14_Uyttebrouck_GallupDiocese.htm>

Uyttebrouck, Olivier, ‘Diocese Removes “Accused” Priest’, *Albuquerque Journal* (online, 30 January 2014) <https://www.abqjournal.com/344994/diocese-removes-accused-priest.html>

Verdú, Daniel, ‘El Reponsable de las Finanzas del Vaticano Acusado de Abusos Sexuales,’ *El Pais* (online, 29 June 2017) <https://elpais.com/internacional/2017/06/29/actualidad/1498696127_063244.html>

Umbreit, Mark, Janine Geske and Ted Lewis, ‘Restorative Justice Impact on Multinational Corporations?: A Response to Andrew Brady Spalding’s Article’ (2015) 76 *Ohio State Law Journal Furthermore* 41

Umphrey, Martha Merrill, ‘Introduction’ (2004) 38 *Law & Soc’y Rev.* 833

Unger, Roberto M, *Law in Modern Society* (New York: Free Press, 1976)

University of Wisconsin-Madison, ‘Statistics as to Indian Schools’, *University of Wisconsin-Madison* (Web Page) <http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep99p1/reference/history.annrep99p1.i0035.pdf>

Valinãs, Marta and Laura Stovel, ‘Restorative Justice After Mass Violence: Opportunities and Risks for Children and Youth’ (Innocenti Working Paper IWP 2010-15, Innocenti Research Centre, June 2010)

Valverde, Mariana, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015) 31

Van Camp, Tinneke and Jo-Anne Wemmers, 'Victim Satisfaction with Restorative Justice: More than Simply Procedural Justice' (2013) 19 *International Review of Victimology* 117

Van Drunen, Leonard D, ’Debt, Risk, and Grace’ (2015) 18 *Journal of Markets and Morality* 61

van Wormer, Katherine, and Lois Berns, ‘The Impact of Priest Sexual Abuse: Female Survivors’ Narratives,’ (2004) 19 *Affilia* 53

von Hefele, Karl Joseph et al, *Histoire Des Conciles d'Après Les Documents Originaux* (Ulan Press, 2012) (Letouzey et Ane, Nouv. traduction francaise faite sur la 2. allemande, cor. et augm. de notes critiques et bibliographiques ed, 1907)

Victorian Law Reform Commission, *Sexual Offences: Final Report* (Victorian Law Reform Commission, 2004)

Viney, Liam, ‘Tim Minchin’s Come Home Cardinal Pell is a Pitch-Perfect Protest Song,’ *The Conversation* (online 18 February 2016) <https://theconversation.com/tim-minchins-come-home-cardinal-pell-is-a-pitch-perfect-protest-song-54945>

Warren, Elizabeth, ‘The Untenable Case for Repeal of Chapter 11’ (1992) 102 *Yale Law Journal* 437

Warren, Elizabeth, ‘Bankruptcy Policymaking in an Imperfect World’ (1993) 92 *Michigan Law Review* 336

Weatherred, Jane Long, 'Child Sexual Abuse and the Media: A Literature Review' (2015) 24 *Journal of Child Sexual Abuse* 16

Weber, Max ‘Politics as a Vocation,’ in H H Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Oxford University Press, 1946)

Welch, John R, and Robert C Brauchli, ‘“Subject to the Right of the Secretary of the Interior”: the White Mountain Apache Reclamation of the Fort Apache and Theodore Roosevelt School Historic District’, (2010) 25(1) *Wicazo Sa Review* 47

Wells, Catharine Pierce, ‘Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy’ (2004) 29 *Seton Hall Legislative Journal* 375

White, Bruce H, J Thomas Beckett and Brian M Rothschild, ’Digging Out of a Hole: Reorganizations and Workouts in the Mining and Hydrocarbon Sectors’ (2016) *Journal of Rocky Mountain Mineral Law Foundation* 354

Wisniewski, Mary, ‘America’s Poorest Diocese Set to File for Chapter 11 Bankruptcy Amid Sex Abuse Claims,’ *NBC News* (online, 4 September 2013) <https://www.nbcnews.com/news/us-news/americas-poorest-diocese-set-file-chapter-11-bankruptcy-amid-sex-flna8C11071499>

Wright, Katie and Shurlee Swain, ‘Speaking the Unspeakable, Naming the Unnameable: The Royal Commission into Institutional Responses to Child Sexual Abuse’ (2018) 42(2) *Journal of Australian Studies*, 139

Wright, K, Swain, S, and Sköld, J, 'The Age of Inquiry: A global mapping of institutional abuse inquiries' (Web Resource, Melbourne: La Trobe University, 2017)

Winfield, Nicole, 'Why Top Vatican Cardinal Will Now Testify about Sex Abuse in Australia', *Christian Science Monitor* (online, 27 February 2016) <www.csmonitor.com/World/Europe/2016/0227/Why-top-Vatican-cardinal-will-now-testify-about-sex-abuse-in-Australia>

William Bramwell Withers, *History of Ballarat and Some Ballarat Reminiscences* (Ballarat Heritage Services, 1999)

Wirenius, John F, 'Command and Coercion: Clerical Immunity, Scandal, and the Sex Abuse Crisis in the Roman Catholic Church' (2011-12) 27(2) *Journal of Law and Religion*, 423

Whiteman, Hilary, Anna Coren and Jo Shelley, 'Pell's Hometown Ballarat at the Center of Australia's Sex Abuse Scandal' *CNN* (online, 24 March, 2019) <https://edition.cnn.com/2019/03/23/australia/george-pell-ballarat-catholic-abuse-intl/index.html>

Wong, Jennifer S, et al, 'Can at-Risk Youth be Diverted from Crime?: A Meta-Analysis of Restorative Diversion Programs' (2016) 43 *Criminal Justice and Behavior* 1310

Wood, Jennifer, Clifford Shearing, and Jan Froestad, 'Restorative Justice and Nodal Governance,' (2011) 35(1) *International Journal of Comparative and Applied Criminal Justice* 1

Wright, Katie, 'Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' (2017) 74 *Child Abuse & Neglect* 10

Yngvesson, Barbara, *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court* (Routledge, 1993)

Zhou, Naaman, '"He Was a Witness of Truth": Why the Judges Decided Cardinal George Pell Was Guilty', *The Guardian Australia* (online, 21 August 2019) <https://www.theguardian.com/australia-news/2019/aug/21/he-was-a-witness-of-truth-why-the-judges-decided-cardinal-george-pell-was-guilty>

Zoll, Rachel, 'Court Lets Vatican-Sex Abuse lawsuit move forward', *KPCC* (Article, 29 June 2010) <http://www.scpr.org/news/2010/06/28/16653/court-lets-vatican-sex-abuse-lawsuit-move-forward/>

Zwartz, Barney, 'Catholic Response 'unChristlike'', *The Age (Melbourne, Australia)* (online, 2013)

II. CASES, PLEADINGS, AND OTHER LEGAL DOCUMENTS

A. *United Nations*

United Nations Committee on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, CRC/C/VAT/CO/2 (31 January 2014)

B. *Australia*

Sorby v Commonwealth of Australia (1983) 46 ALR 237 (Gibbs CJ)

Dr Rodger Austin JCD STL, *Report of Dr Rodger Joseph Austin JCD STL in the Matter of John Andrew Ellis v His Eminence Cardinal George Pell &The Trustees of the Roman Catholic Archidiocese of Sydney & Ors* (Exhibit CCI.0087.00009.0306, 5 September 2005)

Blake v JR Perry Nominees Pty Ltd (2012) 38 VR 123

Trustees of the Roman Catholic Church v Ellis (2007) 70 NSWLR 565

Transcript of Proceedings, *Ellis v The Trustees of the Roman Catholic Church for the Archdiocese for Sydney* [2007] HCA

Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25 at 53-55 (Gibbs CJ), 69-73 (Stephen J), 94-95 (Mason J), 105 (Murphy J), 119-120 (Aickin J), 129-132 (Wilson J), 158-162 (Brennan J)

Pyrenees Shire Council v Day (1998) 192 CLR 330

C. *United States*

(a) Federal

Advocate Health Care Network v Stapleton, 137 SCt 1652 (2017)

In Re: Roman Catholic Church of the Diocese of Gallup, a New Mexico Corporation Sole (United States Bankruptcy Court District of New Mexico, No. 13-13676-t11, Doc. 19, 12 Nov 2013)

Ohio v Clark, 576 U.S. [ ] (2015)

Wellness International Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015)

Montana v. United States, 450 U.S. 544 (1981)

Epiq Systems Corp v. Lewis, 137 S.Ct. 809 (2017)

Tercero v Roman Catholic Diocese of Norwich, 48 P 3d 50 (2002)

Moya v. Roman Catholic Church of the Diocese of Gallup, et al., CV-2010-00713 (AZ, 2010)

Narney v Daniels, 846 P 2d 347 (1992)

Engler v Gulf Interstate Engineering, Inc, 280 P3d 599 (Ariz, 2012)

Doe v Archdiocese of Portland, 717 F Supp 2d 1120 (D Or 2010)

'Third Amended and Restated Disclosure Statement In Support of Debtor's and the Official Committee of Unsecured Creditors' Third Amended and Restated Joint Plan of Reorganization for Catholic Bishop of Northern Alaska Dated December 16, 2009,' *Catholic Bishop of Northern Alaska*, Chapter 11 Case, USBC D. Alaska, Case No. 08-00110-DMD

Oliphant v Suquamish Indian Tribe, 435 US 191 (1978)

Roman Catholic Church of the Diocese of Tucson, 'Third Amended and Restated Disclosure Statement Regarding Plan of Reorganization Dated May 25, 2005', Submission in *Re: Roman Catholic Church of the Diocese of Tucson*, 4-bk-04-04721-JMM, 25 May 2005

In re Roman Catholic Church of the Diocese of Gallup, No. 13-13676 (Bankr, D.N.M.), 'Debtors' Plan of Reorganization Dated March 21, 2016,'

United States v. Wheeler, 435 U.S. 313 (1978)

Doe BF v Diocese of Gallup, et al (Navajo Nation SC, No SC-CV-06-10, 9 September 2011).

Iowa Mut Ins Co v LaPlante, 480 US 9,18 (1987)

Strate v A-1 Contractors, 520 US 438 (1997)

Nevada v Hicks, 533 US 353

Dolgencorp, Inc v Miss Band of Choctaw Indians, 746 F3d 167

Comm of Tort Litigants v Catholic Diocese of Spokane, 364 B.R. 81 (ED Wash, 2006)

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

Grogan v Garner, 498 US 79 (1991)

Local Loan Co v Hunt, 292 US 234 (1934)

In re Gibson Group, Inc, 66 F3d 1436 (6th Cir, 1995)

Listecki v Official Committee of Unsecured Creditors, 780 F. 3d 731, (7th Cir., 2015)

Menard-Sanford v Mabey (In re A.H. Robins Co.) (1989, CA4 Va) 880 F2d 694, 1 Fourth Cir & Dist Col Bankr Ct Rep 212, 19 BCD 997, CCH Bankr L Rptr P 72955

In re American Hardwoods (1989, CA9 Or) 885 F2d 621, 19 BCD 1354, CCH Bankr L Rptr P 73130) and cert den (1989) 493 US 959, 107 L Ed 2d 362, 110 S Ct 376

In re Greate Bay Hotel & Casino, Inc. (2000, BC DC NJ) 251 BR 213)

In re Johns-Manville Corp, 517 F 3d 52, 57 (2nd Cir, 2008)

In re The Archdiocese of Saint Paul and Minneapolis, Case No 15-30125, United States Bankruptcy Court, District of Minnesota, 'Notice of Hearing and Motion for Order Appointing a Creditors' Committee of Parishes' Doc No. 144, pg. 12. (dated 18 Mar 2015)

In re Roman Catholic Church of the Diocese of Gallup, No. 13-13675-t11, 'New Mexico Property and Casualty Insurance Guaranty Corporation's Statement in Connection with November 10, 2015 Status Conference' Docket No. 479 (9 Nov 2015)

In re Roman Catholic Church of the Diocese of Gallup, No. 13-13675-t11, Exhibit H to Plan of Reorganization,' Docket No. 554-8 (21 April 2016)

Gomes v Roman Catholic Church of the Dioceses of Tucson (*In re Roman Catholic Church of Diocese of Tucson*), BAP No AZ 07-1409 (9th Cir BAP, 2008)

Soto-Rios v Banco Popular de P R , 662 F 3d 112 (1st Cir, 2011)
Tort Claimants Comm v Roman Catholic Archbishop (In re Roman Catholic Archbishop), 335 BR 842 (Bankr D Or, 2005)

(b) Arizona

Doe v Roman Catholic Church of the Diocese of Gallup, et al., Complaint, CV 2013-361 (Ariz. Superior Court, Cononino County, Dated May 28, 2013

(c) Navajo Nation

John Doe CB v. Diocese of Gallup et al., Complaint, No. WR-CV-208-09 (Navajo Nation District Court, District of Window Rock, Arizona, dated 12 May, 2009

(d) New Mexico

McCauley v Ray, 80 NM 171, 180 (NM 1968)

III. LEGISLATION AND COMMENTARY

A. *Australia*

Royal Commissions Act 1902

Limitation of Actions Amendment (Child Abuse) Act 2015 (Vic)

Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, 9 August 2017, Schedule 5—Royal Commissions

National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018, available at https://www.legislation.gov.au/Details/F2018L00969

Neilsen, Mary Anne and Kirsty Magarey, Royal Commissions Amendment Bill 2013, *Law and Bills Digest* (Bills Digest no. 83 2012–13, 7 March 2013)

B. *Holy See*

John P Beal, James A Corden and Thomas J Corden, *New Commentary on the Code of Canon Law* (Paulist Press, 2000) 155

Pope Paul VI, 'Decree Concerning the Pastoral Office of Bishops in the Church Christus Dominus Proclaimed by His Holiness, Pope Paul VI on October 28, 1965' *The Holy See* (Web Page, 28 October 1965) <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651028_christus-dominus_en.html>

'Code of Canon Law' *The Holy See*

Code of Canon Law 1917

C. *United States of America*

Navajo Courts, 'Title 7 Navajo Nation Code Courts and Procedure' § 204 A

United States Federal Rules of Bankruptcy Procedure

Supreme Sacred Congregation of the Holy Office, *Instruction on the Manner of Proceedings in Causes Involving the Crime of Solicitation* (Instruction, 1962) [73]

New Mexico Statutes § 37-1-30 (1995)

New Mexico Statutes § 37-1-30 (2017)

United States Constitution

Bankruptcy Code, 11 USCS prec § 101, et seq.

28 U.S.C. §§ 157

D. *UK*

Benefit of the Clergy Act 1575 (UK) 18 Eliz, I c 7

IV. OTHER

Ahasteen, Jack, *Navajo Times* (3 April 2014) editorial cartoon.

Anglican Church Submission for Consultation paper: Redress and civil litigation, Royal Commission into Institutional Responses to Child Sexual Abuse, 'Document Library', Royal Archdiocese of Melbourne, 'Archidioecesis Melburnensis', *Archdiocese of Melbourne* (Web Page) <http://www.catholic-hierarchy.org/diocese/dmelb.html>

Archdiocese of Santa Fe. "About the Archdiocese of Santa Fe." Retrieved May 16 2016, from http://www.archdiocesesantafe.org/AboutASF/AboutASF.html

Australian Catholic Bishops Conference, 'Let Us Pray The Our Father' *The Catholic Church in Australia* (Web Page, 2019) <https://www.catholic.org.au/prayers/the-our-father>

Bishop Accountability.org, 'Who We Are', *Bishop Accountability.org* (Web Page, 28 July 2014) <http://www.bishop-accountability.org/Who_We_Are>

Bishop Accountability.org, 'Settlements and Monetary Awards in Civil Suits', *Bishop Accountability.org* (Web Page, 28 July 2014) <http://www.bishop-accountability.org/settlements/>

Bishop Accountability, 'Diocese of Gallup NM', *Bishop Accountability* (Web Page, 30 November 2003) <http://www.bishop-accountability.org/usccb/natureandscope/dioceses/gallupnm.htm>

Bishop Accountability.org, 'Database of Publicly Accused Priests in the United States', *Bishop Accountability.org* (Web Page) <http://bishop-accountability.org/priestdb/PriestDBbylastName-H.html>

Bishops' Committee on Canonical Affairs Task Force, 'A Resource for Canonical Processes for the Resolution of Complaints of Clerical Sexual Abuse of Minors' (Holy See, 2003)

Catechism of the Catholic Church, Section 3:2, http://www.vatican.va/archive/ccc_css/archive/catechism/command.htm

Catholic Diocese of Ballarat, 'Our History', *Catholic Diocese of Ballarat* (Web Page, 2014) <https://www.ballarat.catholic.org.au/our-diocese/dsp-default.cfm?loadref=134>

Catholic Diocese of Ballarat, 'Our Diocese: Bishop Paul Bird', *Catholic Diocese of Ballarat* (Web Page, 2014) https://www.ballarat.catholic.org.au/our-diocese/dsp-default.cfm?loadref=129

Catholic Hierarchy, 'Bishop Bernard Theodore', *Catholic Hierarchy* (Web Page) <http://www.catholic-hierarchy.org/bishop/bespelage.html>

Catholic Hierarchy, 'Bishop Donald Edmond Pelotte, S.S.S.', *Catholic Hierarchy* (Web Page) <http://www.catholic-hierarchy.org/bishop/bpelotte.html>

Catholic Online, 'BI. Pius IX', Catholic Online (Web Page, 2019) <https://www.catholic.org/saints/saint.php?saint_id=7634>

Commonwealth of Australia, 'Redress and Civil Litigation' (Consultation Paper, Royal Commission into Institutional Responses to Child Sexual Abuse, January 2015)

Diocese of Gallup, 'About', *Diocese of Gallup* (Web Page, 2019) <http://dioceseofgallup.org/about/our-history/>

Center for Constitutional Rights, ‘SNAP v. the Pope, et al.’ (Web Page, 13 September 2011) <https://ccrjustice.org/home/what-we-do/our-cases/snap-v-pope-et-al>

Christian Brothers Oceania Province, ‘Our History’, *Edmund Rice* (Web Page, 2019) <http://www.edmundrice.org/our-history.html>

Coldrey, Barry M, *Papers of Barry Coldrey, circa 1950–2009* (1950–2009)

Diocese of Gallup, ‘About Our Bishop,’ *Diocese of Gallup* (Web Page, 2019) <https://dioceseofgallup.org/about/our-bishop/>

Diocese of Gallup, ‘Credibly Accused List’, *Diocese of Gallup* (Web Page, 2 August 2019) <http://dioceseofgallup.org/youth-protection/credibly-accused-list/>

Diocese of Gallup, ‘History of the Diocese of Gallup,’ *Diocese of Gallup* (Web Page, 2019) <https://dioceseofgallup.org/about/our-history/>

Diocese of Gallup, ‘Pope Pius XII Forms Gallup Diocese,’ *Diocese of Gallup* (Web Page, 2019) http://www.dioceseofgallup.org/history.html

Diocese of Phoenix, ‘About the Diocese of Phoenix’, *Diocese of Phoenix* (Web Page, 2019) <https://dphx.org/about/>

Diocese of Wilmington website, ‘Non-Monetary Settlement Undertakings’, *Diocese of Wilmington* (Web Page, 2019) <https://www.cdow.org/non-monetary-settlement-undertakings/>

Farragutful, Wikimedia user, ‘File: Ecclesiastical Province of Santa Fe Map.png’, *Wikimedia Commons* (Web Page, 11 September 2018) <https://commons.wikimedia.org/wiki/File:Ecclesiastical_Province_of_Santa_Fe_map.png>

Hageman, Clement, ‘Rev. Clement Hageman: 1927–1975’, *Bishop Accountability.org* (Letter, 15 July, 1975) <http://www.bishop-accountability.org/docs/corpus_christi/hageman/Hageman_Rev_Clement_A.pdf>

John XXIII (Address, 25 January 1959)

John Paul II *General Audience*, July 17, 1993, in *L’Osservatore Romano*, July 21, 1993, 11

John Paul II, ‘Apostolic Letter; Tertio Millennio Adveniente of his Holiness Pope John Paul II to the Bishops, Clergy and Lay Faithful on Preparation for the Jubilee of the year 2000’, (Letter, 10 November 1994) <http://www.vatican.va/content/john-paul-ii/en/apost_letters/1994/documents/hf_jp-ii_apl_19941110_tertio-millennio-adveniente.html>

Holy See Press Office, ‘The Pontifical Yearbook 017 and the “Annuarium Statisticum Ecclesiae” 2015, 06.04.2017’, *Summary of Bulletin: Holy See Press Office* (Bulletin, 6 April 2017) <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2017/04/06/170406e.html>

Knowmore Submission for Consultation paper: Redress and civil litigation, Royal Commission into Institutional Responses to Child Sexual Abuse, 'Document Library', Royal Commission into Institutional Responses to Child Sexual Abuse (Web Page) < https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Redress%20and%20civil%20litigation%20-%20Submission%20-%2087%20knowmore.pdf>

The Kumeyaay Information Village & Website, 'History of Indian Boarding Schools', *The Kumeyaay Information Village & Website* (Web Page) <http://www.kumeyaay.info/history/History_Indian_Boarding_Schools.pdf>

Levada, William and Luis F Ladaria, 'Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuses of Minors Perpetrated by Clerics', *The Holy See* (Circular, 3 May 2011) <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_en.html>.

Manuelito, Sharon, Letter to Editor of Navajo Times, dated 9 October 2014 Window Rock, Arizona

Minchin, Tim, 'Come Home (Cardinal Pell) – Tim Minchin' (YouTube, 16 February 2016) 00:00:00-00:04:49 <https://www.youtube.com/watch?v=EtHOmforqxk>.

National Archives, 'H.R. 357', *National Archives* (Web Page, 24 July 2019) <https://www.archives.gov/legislative/features/nm-az-statehood/hr357.html>

National Archives, 'S.J.Res. 57', *National Archives* (Web Page, 24 July 2019) <https://www.archives.gov/legislative/features/nm-az-statehood/sjres57.html>

Nicol, Michelle, 'Send Ballarat Survivors to Rome' (gofundme, 17 March 1016) <https://www.gofundme.com/f/sendballarattorome>

Pachulski Stang Ziehl & Jones, 'Representative Cases', *Pachulski Stang Ziehl & Jones* (Web Page, 2020) <http://www.pszjlaw.com/results.html>

Paul Vl, Encyclical, Priestly Celibacy, Sacerdotalis caelibatus, 24 June,1967, no.s 14-15, St. Paul

Pelotte, Donald E, 'The Call to be a Bishop in a Native American Diocese', *Proceedings of the Catholic Theological Society of America* (Web Page, 2007) <https://ejournals.bc.edu/ojs/index.php/ctsa/article/viewFile/4901/4379>

Royal Commission into Institutional Responses to Child Sexual Abuse, 'Document Library', Royal Commission into Institutional Responses to Child Sexual Abuse (Web Page) <https://www.childabuseroyalcommission.gov.au/document-library>

Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Studies*, including transcripts, statements, and exhibits

St Michael Indian School, ‘Home’, *St Michael Indian School* (Web Page, 2019) <http://www.stmichaelindianschool.org>

Truth Justice Healing Council, ‘Towards Healing’, *Truth Justice Healing Council* (Web Page, 2019) <http://tjhcouncil.org.au/support/towards-healing.aspx>

In re Roman Catholic Church of the Diocese of Gallup, No. 13-13676 (Bankr, D.N.M.) Confirmation Hearing held 21 March 2016, Document 543 (audio).

United States Congress, *The Effect of Bankruptcy Cases of Several Asbestos Companies on the Compensation of Asbestos Victims: Hearing before the Subcommittee on Labor Standards of the Committee on Education and Labor, House of Representatives, Ninety-Eighth Congress, First Session, Hearing Held in Washington, D.C., on February 10, 1983* (US Government Publishing Office, 1983)

Victorian Aboriginal Child Care Agency Submission for Consultation paper: Redress and civil litigation, Royal Commission into Institutional Responses to Child Sexual Abuse, ‘Document Library’, Royal Commission into Institutional Responses to Child Sexual Abuse (Web Page) <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%2036%20Victorian%20Aboriginal%20Child%20Care%20Agency%20%28VACCA%29.pdf >

Victorian Government, ‘Welcome to Country and Acknowledgments Map’, *Aboriginal Cultural Heritage and Information System* (Web Page) <https://achris.vic.gov.au/weave/wca.html>

Wall, Patrick J, ‘Happy Anniversary, Holy See: It’s been 50 years!’, *Patrick J Wall* (Blog Post, 29 June 2012) <https://patrickjwall.wordpress.com/2012/06/29/happy-anniversary-holy-see-its-been-50-years/>

Wall, James, ‘Do Good and Avoid Evil,’ blog, letter read to all masses in the diocese the weekend of November 3 and 4, 2014, http://dioceseofgallup.org/bishopwallblog/117/