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## Introduction

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# INTRODUCTION

JOHN H. GARVEY\*

Clergy sexual abuse is the most serious legal and moral problem facing the Catholic Church today. It would be hard to overstate the harm to victims, the discredit to the priesthood, the loss of moral authority by the institution, or the scope of the potential financial liability. It behooves us as lawyers to think clearly about this problem. Let me begin by stating a few points that I think are clear, or not worth fighting over.

First, the Church should give its attention first and foremost to the victims of this abuse. It is bound by norms of charity, and it should show contrition and repentance for its misdeeds. This is not the way other corporations behave, but the Church is not like other corporations.

Second, there is no creditable legal argument that priests who engage in this kind of behavior deserve any better treatment at the hands of the law than ordinary criminals and tortfeasors. They should go to jail for their crimes and pay compensation to the limits of their ability.

Third, the Church should cooperate with civil authorities in the identification and punishment of criminal clergy, as the Boston Archdiocese has recently begun to do.

There are, however, a number of difficult legal questions that arise from this scandal, and the articles presented in this special issue examine some of them. At bottom they concern the legal liability of the institutional Church (the archdiocese of Boston, the diocese of Fall River), not of the offending priests (people like James Porter, John Geoghan, and Paul Shanley). Five questions strike me as particularly difficult:

*Tort.* What is the theory of tort liability, the standard of fault, and the standard of proof? Are there effective statutory limitations on liability?

*Criminal Law.* Can the bishops, or the institutional church, be held criminally liable? Under what theory?

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*Evidence.* In a civil or criminal case against the diocese, what evidence within the church is privileged against discovery or use at trial? Should it be necessary to abandon the priest-penitent privilege to gather evidence in these cases?

*Bankruptcy.* If, as seems likely, civil cases are successful and return large judgments against a diocese, can it go bankrupt?

All of these questions are at bottom First Amendment questions. The outside limits on tort and criminal liability, as well as the limits on discovery and proof, will be determined by the strength of our commitment to religious liberty—just as in defamation law the limits on tort liability, discovery, and proof are determined by our commitment to the freedom of speech and press.

I said that there were five questions, and the fifth is not a First Amendment question because it arises in a different legal system. Because the Church did such a poor job of policing sexual misconduct a decade ago, it has no credibility on the subject today. It will be judged harshly if it ever again makes the mistake of leaving an offending priest in place. This in turn means that the Church must now lean toward assuming the worst about any accused priest, regardless how old or unreliable the evidence. This is unfair to accused priests, and I repeat that it is the Church's own misdeeds that lead her to treat them so. What sort of protection should the system of canon law give these priests?

I think you will find that this Symposium Issue is an original and unusually thoughtful effort to explore these questions and others like them.