

Articles

Enhanced Accountability: The Catholic Church's Unfinished Business

By STEPHEN M. BAINBRIDGE*

THE SUMMER OF 2018 brought the Roman Catholic Church priest sex abuse scandal back onto newspaper front pages some sixteen years after the scandal first broke.¹ Once again, Church leaders were obliged to apologize for the failures not only by their subordinates but also, in many cases, failures by their fellow bishops.² In June 2018, Pope Francis removed former Archbishop of Washington, D.C., Cardinal Theodore McCarrick from public ministry in the midst of allegations that McCarrick had sexually abused both minors and adult seminarians.³ In July, McCarrick resigned from the College of Cardinals, becoming the first Cardinal to resign over sex abuse allegations.⁴

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1. See Julie Zauzmer et al., “Wasted Our Lives”: Catholic sex abuse scandals again prompt a crisis of faith, WASH. POST (Aug. 19, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/19/wasted-our-lives-catholic-sex-abuse-scandals-again-prompt-a-crisis-of-faith/?noredirect=on&utm_term=.e2e47af5d7de [https://perma.cc/D68Q-3N48] (“It has been a painful summer for faithful Catholics.”). In addition to events in the United States, the summer also saw “an investigation into widespread abuse in Chile and a cardinal on trial in Australia.” *Id.*

2. See Mark Pattison, *USCCB president seeks papal audience, answers to former nuncio’s questions*, CATH. SPIRIT (Aug. 27, 2018), <http://thecatholicspirit.com/news/nation-and-world/usccb-president-seeks-papal-audience-answers-to-former-nuncios-questions/> [https://perma.cc/DCN8-6Z9P] (“Cardinal DiNardo again apologized to abuse survivors and their families.”).

3. Elisabetta Povoledo & Sharon Otterman, *Cardinal Theodore McCarrick Resigns Amid Sexual Abuse Scandal*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/world/europe/cardinal-theodore-mccarrick-resigns.html> [https://perma.cc/VV7Q-Q9RR].

4. *Id.*

In August, a Pennsylvania grand jury issued a report claiming that priests in six of the state's eight Catholic dioceses had abused over a thousand minors over a seventy-year period.⁵ While all of the abuse cases documented by the grand jury are odious, far too many are nauseatingly stomach-churning.⁶ The report further alleged that diocesan

5. Laurie Goodstein & Sharon Otterman, *Catholic Priests Abused 1,000 Children in Pennsylvania, Report Says*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html> [<https://perma.cc/9CKR-M52Q>].

A diocese is defined in Catholic canon law as the “portion of the people of God which is entrusted for pastoral care to a bishop.” 1983 CODE c.369. In practice, the dioceses are the geographic regions into which the Church is divided for administrative purposes. In practice, each and every diocese is sub-divided into distinct parts or parishes. 1983 CODE c.374, § 1. An archdiocese “is generally a DIOCESE whose bishop exercises metropolitan authority within a province composed of the archdiocese and several suffragan dioceses; occasionally such a diocese stands by itself outside the provincial structure.” 1 NEW CATHOLIC ENCYCLOPEDIA 634 (The Catholic Univ. of Am. Ed., 2d ed. 2003). The title of archbishop is bestowed, inter alia, on a “metropolitan,” i.e., “the head of an ecclesiastical Province (or regional group of dioceses), and it may be said that today in the West every metropolitan is an archbishop,” and “the diocesan bishop of a diocese that is outside any ecclesiastical province but itself is not a metropolitan.” *Id.* at 632–33.

Catholic priests are categorized as either diocesan or religious depending on the Church authority to which they are responsible. Diocesan priests work in parishes, schools, or other Catholic institutions as assigned by the bishop of their diocese. Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887, 919 (2010). Religious priests belong to a religious order, such as the Jesuits, Dominicans, or Franciscans, and are not geographically committed to a single diocese. *Id.* Of the various Catholic officials alleged to have committed sexual abuses, 69.4% were diocesan priests and 22.1% were religious order priests. See *infra* note 14, at 42. The remaining alleged abusers included deacons, bishops, seminarians, and others. *Id.*

The terms Vatican, “Apostolic See,” or “Holy See” refer generally to the Pope and the various executive, legislative and judicial offices of the Roman Curia, which act in the Pope’s name and by his authority. See 1983 CODE cc.360–61. The Holy See is “a sui generis entity which has acquired an international legal status similar to a state under customary international law.” Anne Hsiu-An Hsiao, Comment, *Is China’s Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force Under International Law?*, 32 NEW ENG. L. REV. 715, 724–25 (1998). According to Catholic canon law, the Pope is “the head of the college of bishops, the Vicar of Christ, and the pastor of the universal Church on earth. By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely.” 1983 CODE c.331. In U.S. law, the Pope is regarded as the head of state of the Vatican. See *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272 (S.D. Tex. 2005) (holding that Pope Benedict XVI, as head of the Holy See, was entitled to head-of-state immunity from suit).

6. See OFFICE OF ATT’Y GEN. COMMW. OF PA., REPORT I OF THE 40TH STATEWIDE INVESTIGATING GRAND JURY (Redacted) (2018), <https://www.attorneygeneral.gov/report/> [<https://perma.cc/K8BC-8GNM>] [hereinafter GRAND JURY REPORT]:

There was the priest, for example, who raped a seven-year-old girl – while he was visiting her in the hospital after she’d had her tonsils out. Or the priest who made a nine-year-old give him oral sex, then rinsed out the boy’s mouth with holy water to purify him. Or the boy who drank some juice at his priest’s house and woke up the next morning bleeding from his rectum, unable to remember anything from the night before.

officials, including bishops and archbishops, had covered up abuse cases and enabled abusers.⁷ As the Pennsylvania grand jury reported:

[I]n the Diocese of Erie, despite a priest's admission to assaulting at least a dozen young boys, the bishop wrote to thank him for "all that you have done for God's people. . . . The Lord, who sees in private, will reward." Another priest confessed to anal and oral rape of at least 15 boys, as young as seven years old. The bishop later met with the abuser to commend him as "a person of candor and sincerity," and to compliment him "for the progress he has made" in controlling his "addiction."⁸

Later in August 2018, Archbishop Carlo Maria Viganò, former Papal Nuncio to the United States, alleged that Pope Francis had known about the allegations against Cardinal McCarrick as early as 2013.⁹ Viganò also claimed that numerous other high Church officials were involved in the coverup.¹⁰

The revelations of 2018 were the latest eruption of a scandal that first came to light in January 2002, when the Boston Globe's first report brought to light the problem of priestly sex abuse in American Roman Catholic Church.¹¹ In the wake of those reports, the United States Conference of Catholic Bishops (USCCB)¹² commissioned the John Jay College of Criminal Justice to conduct a comprehensive study

7. Goodstein & Otterman, *supra* note 5.

8. GRAND JURY REPORT, *supra* note 6, at 4.

9. See Jason Horowitz, *Pope Francis Long Knew of Cardinal's Abuse and Must Resign*, *Archbishop Says*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/26/world/europe/pope-ireland-sexual-abuse-letter-vigano.html> [<https://perma.cc/Y45Z-UHMT>].

10. See Nicole Winfield, *Pope on McCarrick claims: "I won't say a word about it."*, ASSOCIATED PRESS (Aug. 26, 2018), <https://www.apnews.com/ad7d52030c90472eafeacef7ba2d9d39> [<https://perma.cc/XG4X-NZW7>] (reporting that Viganò's "letter identifies by name the Vatican cardinals and U.S. archbishops who were informed about the McCarrick affair").

11. See Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 126 n.1 (2003):

On January 6, 2002, the Boston Globe began its reporting of files made public in litigation over the alleged liability of the Archdiocese of Boston for the misconduct of John Geoghan, a defrocked priest of the Archdiocese. Those files had been subject to a confidentiality order. When the judge who issued the confidentiality, order was promoted to the Court of Appeals, the Boston Globe renewed its request to lift the order before the new judge, Judge Constance M. Sweeney. Judge Sweeney granted the Globe's request and those files, as well as files from dozens of other cases released by Judge Sweeney, have been the fodder for daily stories since January 6, 2002.

The scandal is not simply an American problem, of course, as abuse allegations have been made in many countries. See Melanie Black, Comment, *The Unusual Sovereign State: The Foreign Sovereign Immunities Act and Litigation Against the Holy See for Its Role in the Global Priest Sexual Abuse Scandal*, 27 WIS. INT'L L.J. 299, 306 (2009) ("The scandal touched archdioceses across the globe, from Ireland to the United States, to Mexico, and Malawi.").

12. Canon law provides:

of the problem (“John Jay Survey”).¹³ It found that sexual abuse of minors had been rampant in the American Catholic Church for decades, with thousands of priests being implicated.¹⁴ Many of these cases were reported to the Church hierarchy but were frequently swept under the rug by a hierarchy committed to secrecy.¹⁵ In addition to criminal indictments of many priestly abusers, numerous victims filed civil claims against the Church. It is estimated that the Church has paid out almost \$4 billion in judgments and settlements in sex abuse cases since the 1980s.¹⁶ At least a dozen Catholic dioceses filed for bankruptcy protection, claiming they could not afford to pay all of the claims against them.¹⁷

A conference of bishops, a permanent institution, is a group of bishops of some nation or certain territory who jointly exercise certain pastoral functions for the Christian faithful of their territory in order to promote the greater good which the Church offers to humanity, especially through forms and programs of the apostolate fittingly adapted to the circumstances of time and place, according to the norm of law.

1983 CODE c.447. The USCCB is the conference for the United States. *See About USCCB*, U.S. CONF. OF CATHOLIC BISHOPS, <http://www.usccb.org/about/> [<https://perma.cc/NQ57-MTZ6>].

13. JOHN JAY COLL. OF CRIMINAL JUSTICE, *THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950-2002* 3 (2004), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf> [<https://perma.cc/M3HJ-3JE3>].

14. See Ruth Jones, *The Extrajudicial Resolution of Sexual Abuse Cases: Can the Church be a Resource for Survivors?*, 38 SUFFOLK U.L. REV. 351, 352–53 (2005):

The survey disclosed that the abuse in the Church was widespread, “affecting more than 95% of dioceses and approximately 60% of religious communities.” There were allegations of abuse made against “4.0% (4,392) of priests who were active between 1950 and 2002,” and 10,667 individuals made allegations of abuse by priests.

15. See John M. Breen, *Justice and Jesuit Legal Education: A Critique*, 36 LOY. U. CHI. L.J. 383, 416 (2005) (“[T]he criminal acts of some priests and the wanton neglect and even deliberate cover-up of those acts by certain bishops and religious superiors.”).

16. See Rosa Flores et al., *\$3.8 billion paid in lawsuits and claims over sex abuse allegations in Catholic Church since 1980s, group says*, CNN (Aug. 27, 2018, 12:00 AM), <https://www.cnn.com/2018/08/24/us/catholic-church-abuse-payments/index.html> [<https://perma.cc/9AVV-P9LD>].

17. Justin Baumgartner, Comment, *Remedying Scandal: Pooling the Assets of Catholic Entities to Pay Off Tort Creditors Through Substantive Consolidation in a Bankruptcy Proceeding*, 18 RUTGERS J.L. & RELIGION 388, 388 (2017) (“Over the last dozen years, twelve Catholic dioceses and archdioceses have filed for bankruptcy protection.”). See generally Stephen M. Bainbridge & Aaron H. Cole, *The Bishop’s Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal*, 46 J. CATH. LEGAL STUD. 65, 67 (2007).

In 2002, the USCCB adopted the *Charter for the Protection of Children and Young People* (“Dallas Charter”),¹⁸ which was intended to set out agreed upon principles for preventing priestly sexual abuse and to mandate annual reports by an outside auditor on the progress being made to combat it.¹⁹ The annual report, issued pursuant to that directive in 2017, recognized that progress had been made but emphasized that the auditors had found an atmosphere of “general complacency” in many dioceses.²⁰ Perhaps, as a result of such complacency, the 2017 annual report also reported that:

As is evident in the fact that new allegations continue to be reported each year, including from current minors, sexual abuse is not a problem of the past. While the vast majority of abuse reported today within the Church is of a historical nature, that does not mean it should no longer concern us. Even one allegation of sexual abuse from a current minor within the Church means we must improve. We cannot simply remain stagnant in our victim/survivor outreach and child protection efforts.²¹

Considering this documented need for further reforms, this Article proposes that the Church look to corporate governance compliance programs for inspiration.

Part I of this Article details the ongoing cost to the Church and society of priestly sex abuse, thereby highlighting the need for reform. Part II discusses the mechanisms by which reform could be effectuated.

18. U.S. CONF. OF CATH. BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE, PROMISE TO PROTECT PLEDGE TO HEAL 2 (rev. ed. June 2018), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/Charter-for-the-Protection-of-Children-and-Young-People-2018-final.pdf> [<https://perma.cc/7LZV-J9G3>] [hereinafter DALLAS CHARTER]. For a very detailed examination of the charter, see Raymond C. O’Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 408–56 (2004).

19. *Who We Are*, U.S. CONF. OF CATHOLIC BISHOPS, <http://www.usccb.org/about/child-and-youth-protection/who-we-are.cfm> [<https://perma.cc/4XYX-59RV>].

20. SECRETARIAT OF CHILD AND YOUTH PROTECTION ET AL., 2017 ANNUAL REPORT FINDINGS AND RECOMMENDATIONS: REPORT ON THE IMPLEMENTATION OF THE CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE vii (May 2018), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/2017-Report.pdf> [<https://perma.cc/W8NS-WQ83>] [hereinafter 2017 REPORT].

21. 2017 REPORT, *supra* note 20, at 9. Although much of the misconduct set out in the 2018 Pennsylvania grand jury report involved conduct that occurred before the 2002 reforms, new cases continue to arise. See Andy Sheehan, *301 ‘Predator Priests’ Named In Pa. Grand Jury Sex Abuse Report: ‘They Were Raping Little Boys & Girls’*, KDKA 2 CBS PITTSBURGH (Aug. 14, 2018, 11:05 PM), <https://pittsburgh.cbslocal.com/2018/08/14/pennsylvania-diocese-sex-abuse-grand-jury-report-released/> [<https://perma.cc/9R32-QUMV>] (“While most of the cases are old and the clergy accused are retired or deceased, just two weeks ago . . . Father Tomas Sweeney of the Greensburg Diocese . . . pled guilty to indecent assault.”).

ated, including changing canon law where necessary. Part III lays out the reform proposals.

Specifically, Part III proposes that the Church amend the Dallas Charter to create a formalized system for laity to report allegations, again drawing on corporate compliance programs by way of analogy. It also proposes that the Church adopt whistleblower protection rules analogous to those used in corporate compliance programs to encourage reporting of misconduct, especially in cases of misconduct by high Church officials. Next, it proposes a mandatory up-the-ladder reporting system in which priests and religious who become aware of sexual misconduct allegations against diocesan employees, priests, deacons, or bishops—whether they involve abuse of minors or consensual affairs between adults—should report those allegations to the next highest level of Church authority.²² If that authority fails to take reasonable steps to respond to the allegations, the whistleblower should go over that authority's head to report to the next highest level and so on.

Whistleblowing programs are an essential element of any governance and compliance program,²³ but they are hardly sufficient in this context. As the Pennsylvania grand jury report demonstrates, the laity were reporting abuse allegations to the Church but the hierarchy buried those reports in secret files.²⁴ The ultimate problem, thus, is not so much the lack of reporting, as it were the lack of action after the report.²⁵ Accordingly, Part III's principal proposal is the creation of both diocesan and national disciplinary bodies led by expert lay members as the ultimate authorities in sex abuse cases. The proposal draws

22. It may often be the case that priests will learn of sexual misconduct when administering the sacrament of reconciliation. Whether the canon law seal of the confessional or the secular priest-penitent privilege should be eliminated so as to permit whistleblowing by priests to whom a penitent confesses sexual misconduct or abuse is beyond the scope of this Article. Compare Kari Mercer Dalton, *The Priest-Penitent Privilege v. Child Abuse Reporting Statutes: How to Avoid the Conflict and Serve Society*, 18 WIDENER L. REV. 1 (2012) (arguing that states should “[e]xclude priests as mandatory reporters in child abuse reporting statutes”), with Julie M. Arnold, Note, *“Divine” Justice and the Lack of Secular Intervention: Abrogating the Clergy-Communicant Privilege in Mandatory Reporting Statutes to Combat Child Sexual Abuse*, 42 VAL. U. L. REV. 849, 902 (2008) (arguing in favor of “amending current mandatory reporting statutes to abrogate the clergy-communicant privilege for the narrow purpose of reporting suspected abuse”).

23. See *infra* text accompanying note 149 (discussing the importance of whistleblowing as an element of governance and compliance programs).

24. See GRAND JURY REPORT, *supra* note 6, at 169 (“The Dioceses’ focus on secrecy often left even the Dioceses’ own investigators in the dark”).

25. See *id.* at 277 (noting a case in which “decades of knowledge and inaction” “left children in danger”).

an analogy between these bodies and corporate audit committees and argues that certain aspects of how audit committee functions can be usefully adapted to the proposed review bodies.

I. The Costs of Sexual Misconduct by Priests

The Church has experienced substantial economic costs as a result of the abuse scandal, with payouts of almost \$4 billion to date.²⁶ Those funds could have been used to advance the Church's many activities, including charities that benefit not just Catholics, but all of society.²⁷ The ongoing threat of litigation, moreover, threatens to deter the Church from engaging in ministerial activities perceived as creating liability exposure.²⁸

In addition, any tally of the effects of the scandal must include important nonpecuniary costs. For purposes of organizational analysis, the Church can be analogized to a business offering a service to consumers in a competitive market. Obviously, the Church does not think of itself as a business offering services to customers. Recasting a problem in economic terms, however, is a standard move in law and economics scholarship.²⁹ The specific claim here is that an economic model of the relationship between the Church and its members pro-

26. See Flores et al., *supra* note 16.

27. See generally Bainbridge & Cole, *supra* note 17, at 100 (discussing the impact of sex abuse payouts on the Church's missions).

28. See EDWARD M. GAFFNEY, JR. & PHILIP C. SORENSON, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS viii–ix (Howard R. Griffin ed., 1984) (“Both church and society will suffer if the continuation of ministries prompted by compassion—ministries often involving risks—is stopped short by the nervous calculation of legal liabilities.”). The extent to which the financial consequences of the scandal have impaired the Church's ability to provide such services is unclear. Although the amounts involved are significant in absolute terms, they are relatively modest in comparison to Church assets and revenues. The Economist, for example, estimated “that annual spending by the [American Catholic] church and entities owned by the church was around \$170 billion in 2010,” which dwarfs the payouts to date. *The Catholic church in America: Earthly concerns*, ECONOMIST (Aug. 12, 2012), <https://www.economist.com/briefing/2012/08/18/earthly-concerns> [<https://perma.cc/5SSH-MXR4>]. The Economist noted, however, that “settlements are made by individual dioceses and religious orders, whose pockets are less deep than those of the church as a whole.” *Id.*

29. STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 18–19 (2002):

Law and economics . . . is the school of jurisprudence in which the tools of microeconomic analysis are used to study law. Those who practice economic analysis [of law] have a deceptively simple task. They translate some legal doctrine into economic terms. They then apply a few basic tools of neoclassical microeconomics—cost benefit analysis, collective action theory, decisionmaking under uncertainty, risk aversion, and the like—to the problem. Finally, they translate the result back into legal terms.

vides an analogy useful in understanding the scandal and the reaction to it.³⁰ In such models, it is standard to treat believers as consumers.³¹

Accordingly, society can think of the Church—in compliance with the Great Commission³²—as offering both its current and prospective customers “information about and guidance toward the attainment of eternal salvation.”³³ Because a customer cannot “take salvation for a test drive, nor get a sneak peak of heaven (or hell) and return to tell about it,” salvation is a credence good in economic terms.³⁴ A credence good is defined as one whose quality cannot readily be determined by the consumer “by inspection or even use, so that he has to take its quality ‘on faith.’”³⁵ Such goods have high purchase costs but their quality is very costly to determine either pre- or post-purchase, which means that their utility to the consumer cannot be accurately measured.³⁶ In addition to eternal salvation, examples include medical care (because the typical patient lacks the knowledge to assess the quality of care received) and automobiles (because the average purchaser is not an expert mechanic).³⁷ Instead of weighing the quality of the good, consumers base their purchase decisions on the reputation and credibility of the credence good’s seller.³⁸

The sex abuse scandal is a particularly serious problem in this regard because the obligation of celibacy³⁹ is one of the principal ways

30. See, e.g., ROBERT B. EKELUND ET AL., SACRED TRUST: THE MEDIEVAL CHURCH AS AN ECONOMIC FIRM 26 (1996) (describing “[t]he Church as a provider of private goods—that is, goods and services that were ‘purchased’ in something resembling a market context”).

31. See, e.g., Robert B. Ekelund, Jr. & Robert F. Hébert, *Interest Groups, Public Choice and the Economics of Religion*, 142 PUB. CHOICE 429, 433 (2010) (examining the Reformation as an example of the economic phenomenon by which “consumers tend to switch their purchases whenever a competitor offers a lower price for a similar product”).

32. See Robbie F. Castleman, *The Last Word: The Great Commission: Ecclesiology*, 32 THEMELIOS 68, 2–3 (2007).

33. EKELUND ET AL., *supra* note 30, at 26.

34. *Id.* at 27.

35. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1489 (1999).

36. See MEN-ANDRI BENZ, STRATEGIES IN MARKETS FOR EXPERIENCE AND CREDENCE GOODS 2 (2007).

37. See EKELUND ET AL., *supra* note 30, at 26–27 (discussing the examples). Dreyhaupt offers “health services, legal advises [sic], and child day care, religious and spiritual guidance,” as examples of credence goods. BENZ, *supra* note 36, at 2.

38. See EKELUND ET AL., *supra* note 30, at 26–27 (discussing the role of credibility and reputation in credence good purchasing decisions).

39. As a technical matter, Roman Catholic canon law requires priests and other clerics to “observe perfect and perpetual continence,” which binds them “to celibacy.” 1983 CODE C.277, §1. Before a candidate for the priesthood may be admitted to the order of the permanent diaconate, the candidate must “have assumed the obligation of celibacy in the prescribed rite publicly before God and the Church or have made perpetual vows in a

in which the Catholic Church has sought to validate the quality of its service.⁴⁰ Most of the Church's customers interact with it mainly through their parish priest, making their perception of the Church, as a whole, largely dependent on their perception of that priest.⁴¹ By precluding faithful priests from having children, celibacy reduces their incentives to transfer Church assets to their heirs, which was a serious problem before the Church mandated celibacy.⁴² In addition, celibacy ensures that the priest's time, effort, and loyalty are not divided between his duties to the Church and his family.⁴³ Most importantly, however, as Pope Benedict XVI explained, celibacy sends a strong signal that the priest believes in the reality of salvation:

The renunciation of marriage and family is thus to be understood in terms of this vision: I renounce what, humanly speaking, is not only the most normal but also the most important thing. I forgo bringing forth further life on the tree of life, and I live in the faith that my land is really God—and so I make it easier for others, also, to believe that there is a kingdom of heaven. I bear witness to Jesus Christ, to the Gospel, not only with words, but also with this specific mode of existence, and I place my life in this form at his disposal.⁴⁴

Celibacy is thus a highly credible signal about the priest's own beliefs, because “[o]nly those who honestly believe in the kingdom of heaven are able to forego what is considered to be an important element and a pleasure of real life.”⁴⁵

religious institute.” 1983 CODE c.1037. Candidates for the priesthood who are members of a religious order will have previously vowed “to remain a chaste celibate” as part of their formation within the order. CANON LAW SOC'Y OF AMERICA NEW COMMENTARY ON THE CODE OF CANON LAW 1217 (John P. Beal et al. eds., 2000). Diocesan priests will undertake the “obligation of perpetual celibacy” as part of their “ordination rite itself.” *Id.*

40. See BENZ, *supra* note 36, at 48 (arguing that celibacy “allows the church to signal credibly its religious position to believers”). This is not to deny that the Church had theological reasons for imposing celibacy. See Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1194–95 (1990) (“Brundage argues that one of the primary reasons underlying the movement towards clerical celibacy during the high Middle Ages was the fear of the pollutive nature of sex.”).

41. See BENZ, *supra* note 36, at 53 (discussing the role of priests in the production of religion as a credence good).

42. See EKELUND ET AL., *supra* note 30, at 33 (discussing the economic function of celibacy).

43. See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. Chi. L. Rev. 133, 164 n.78 (1996) (observing that the “Catholic Church's celibacy requirement for priests” ensures that their loyalty is “not divided between the Church and any children.”).

44. BENZ, *supra* note 36, at 53–54 (quoting the Pope).

45. *Id.* at 54.

The scandal makes clear that some substantial percentage of Catholic priests have been unfaithful to their obligation of celibacy.⁴⁶ Because it can be extremely difficult for lay parishioners to determine whether their local parish priest has breached that duty,⁴⁷ moreover, the scandal calls into question the credibility of all priests. The scandal thus strikes at the heart of the Church's ability to successfully market the credence good at the heart of its mission.⁴⁸

Put another way, by reducing the Church's credibility and blemishing its reputation, the scandal makes consumers less willing to purchase the Church's main offering. The Church is thus impaired from carrying out its task of saving souls and, if one believes the Church's teaching on eternity, at unimaginable cost to the lost. As George Weigel explained:

Everlasting life is offered to us sacramentally at every Mass. That is what we believe; that is why we remain in the Church; and that is why we must all bend every effort, from our distinct states of life in the Mystical Body of Christ, to reform what must be reformed so that others may know and love the Lord Jesus and experience the life-giving fruits of friendship with him. The Church's current crisis is a crisis of fidelity and a crisis of holiness, a crisis of infidelity and a crisis of sin. It is also a crisis of evangelization, for shepherds with-

46. See Jones, *supra* note 14 (discussing studies of the frequency of priestly sexual misconduct).

47. See A. W. RICHARD SIPES, A SECRET WORLD: SEXUALITY AND THE SEARCH FOR CELIBACY 5 (1990) (reporting a study finding that "[e]ven priests who know 'hundreds and hundreds of priests' often do not know the sexual/celibate adjustment of even their closest friends").

48. Although sexual abuse of children is particularly abhorrent, it should be noted that the problem of priestly sexual misconduct also includes cases of both consensual and non-consensual sexual activity involving adult priests and adult partners or victims. The John Jay Survey summarized a number of studies of such priestly sexual misconduct, all of which deemed it to be problematic in varying degrees. JOHN JAY COLL. OF CRIMINAL JUSTICE, *supra* note 13, at 161-62. One of the cited studies found that 27.8% of a sample of 1,322 priests reported sexual relationships with adult females. *Id.* at 161. Another concluded that 20-40% of priests had engaged in sexual misconduct with adults. *Id.* Such misconduct poses serious problems for the Church. Even consensual sexual contact by priests with adults creates potential sexual harassment liability for the Church, for example. See, e.g., *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999) (holding that a Title VII claim could be brought by a former seminary novice alleging sexual harassment by his religious superiors); see also *Babcock v. Frank*, 729 F. Supp. 279, 287 (S.D.N.Y. 1990) (finding that a previous consensual sexual relationship between the parties did not preclude a Title VII sexual harassment claim based on unwelcome physical and verbal sexual advances). In addition, of course, any sexual activity by priests with any partner violates the priest's obligation of celibacy. See 1983 CODE c.277, § 1 ("Clerics are obliged to observe perfect and perpetual continence for the sake of the kingdom of heaven and therefore are bound to celibacy.").

out credibility impede the proclamation of the Gospel—which, as the other headlines of the day suggest, the world badly needs.⁴⁹

While it is impossible to measure those spiritual costs, there is considerable contemporary and temporal evidence that the scandal has negatively impacted the Church’s credibility. In the post-2002 environment, for example, donations from parishioners were estimated to have fallen by “as much as 20%,” with some portion of the drop off attributable to a reluctance “to donate money that will go to clearing up the damage done by predatory priests.”⁵⁰ In sum, as Bishop Barron observed, over and above the tragic human toll, the scandal has “crippled the Church financially, undercut vocations, caused people to lose confidence in Christianity, dramatically compromised attempts at evangelization, etc., etc.”⁵¹

II. Effecting Reform

A. The Problem of the Bishops

In the early days of the Church, bishops were sometimes referred to as Princes of the Church,⁵² which remains an apt description, but was more often used in the Roman Catholic Church to describe cardinals.⁵³ The doctrinal basis for a bishop’s power arises out of the apostolic succession; i.e., their position as successors to the original twelve apostles of Jesus Christ. “The Bishops . . . succeed the apostles”⁵⁴ and it was “[t]o the apostles and their successors [that] Christ

49. George Weigel, *WHY WE STAY, AND THE VIGANÒ TESTIMONY*, FIRST THINGS (Aug. 28, 2018), https://www.firstthings.com/web-exclusives/2018/08/why-we-stay-and-the-vigan-testimony?mod=article_inline [<https://perma.cc/9VX8-72CJ>]. See also 2017 REPORT, *supra* note 20, at 51 (“The loss of trust that is often the consequence of such abuse becomes even more tragic when it leads to a loss of the faith that we have a sacred duty to foster.”).

50. *The Catholic church in America: Earthly concerns*, *supra* note 28, at 18.

51. Robert Barron, *THE MCCARRICK MESS*, WORD ON FIRE (Aug. 09, 2018), <https://www.wordonfire.org/resources/article/the-mccarrick-mess/5873/> [<https://perma.cc/H4YU-5AY7>].

52. See WILLIAM STAUNTON, *A DICTIONARY OF THE CHURCH* 73 (1839) (noting that “Princes of the Church” was among the titles given only to Bishops in the “primitive Church”).

53. Phil Lawler, *No more ‘princes of the Church’—the Pope’s new model for the College of Cardinals*, CATHOLICCULTURE.ORG (Jan. 05, 2015), <https://www.catholicculture.org/commentary/otn.cfm?id=1069> [<https://perma.cc/3T6F-LEP2>].

54. See LIBRERIA EDITRICE VATICANA, *CATECHISM OF THE CATHOLIC CHURCH* ¶ 938 (2d ed. 1997).

. . . entrusted the office of teaching, sanctifying and governing in his name and by his power.”⁵⁵

A bishop governs a definite territory, known as a “particular church” or “diocese.”⁵⁶ A bishop within his diocese “has all ordinary, proper and immediate power.”⁵⁷ The diocesan bishop thus possesses legislative, executive and judicial power.⁵⁸ The Bishop thus wields essentially unilateral power within his assigned diocese. National conferences, such as the USCCB, lack competency to mandate particular practices or to hold Bishops accountable.⁵⁹ “Only the Pope has juridical and disciplinary powers in regard to bishops.”⁶⁰

As a result of these limitations, the Dallas Charter lacks accountability mechanisms to ensure that all Bishops and their dioceses are fully compliant with the Dallas Charter. Instead, while the Bishops in office at that time agreed to comply with the charter, compliance is effectively voluntary.⁶¹ Given the revelations in 2018, however, some Bishops have even acknowledged that many of the laity have lost confidence and trust in the hierarchy.⁶² Doubts about the effectiveness of voluntary compliance are further justified by the 2017 Report which found that, fifteen years after adoption of the Dallas Charter, there were still compliance issues that needed to be addressed. Out of sixty-one dioceses that participated in on-site audits in 2017, three were not

55. *Id.* ¶ 873; *see also id.* ¶ 881 (“This pastoral office of Peter and the other apostles . . . is continued by the bishops under the primacy of the Pope.”).

56. 1983 CODE c.368 (“Particular churches in which and from which exists the . . . Catholic Church are first of all dioceses.”).

57. 1983 CODE c.381, § 1.

58. 1983 CODE c.391, § 1. In addition to the Bishop in charge of a given diocese, one or more auxiliary bishops may be appointed, but they lack the right of succession. 1983 CODE c.403, § 1. Under canon law, their role is primarily consultative. *See* 1983 CODE c.407, § 2 (“In considering matters of major importance, especially of a pastoral character, a diocesan bishop is to wish to consult the auxiliary bishops before others.”).

59. *See* Barron, *supra* note 51 (“The United States Conference of Catholic Bishops (USCCB) has no juridical or canonical authority to discipline bishops.”). Canon law places quite sharp limits on the powers of national conferences of bishops. *See* 1983 CODE c.455, § 1 (“A conference of bishops can only issue general decrees in cases where universal law has prescribed it or a special mandate of the Apostolic See has established it either *motu proprio* or at the request of the conference itself.”).

60. Barron, *supra* note 51. *See also* 1983 Code c.1405, § 1 (stating that “[i]t is the right of the Roman Pontiff himself alone to judge,” *inter alia*, “in penal cases, Bishops.”).

61. THOMAS G. PLANTE & KATHLEEN L. MCCHESENEY, *SEXUAL ABUSE IN THE CATHOLIC CHURCH: A DECADE OF CRISIS, 2002-2012* 248 (Thomas G. Plante & Kathleen L. McChesney eds. 2011) (noting that “Bishops who ignored the *Charter’s* suggested guidelines, child-protection policies, and best practices suffered no consequence or benefit of fraternal correction”).

62. *See, e.g.*, Barron, *supra* note 51 (noting that the USCCB “has, at the moment, very little credibility.”).

in full compliance with the charter.⁶³ Less than half of U.S. dioceses perform parish audits, which is a serious problem because parish audits are “the only way to verify compliance with the Charter.”⁶⁴ In a few rare cases, bishops have even refused to participate in the annual audit process itself.⁶⁵

Reliance on voluntary self-enforcement is fundamentally inconsistent with creating effective constraints on agency costs in any organizational setting. Corporate governance and compliance programs do not give managers the option to comply or not; they mandate compliance.⁶⁶ This practice follows from the U.S. Sentencing Guidelines, which provide for a penalty mitigation if an organization convicted of a crime had an effective compliance and ethics program.⁶⁷ The Sentencing Guidelines require that the organization “shall” meet various requirements, such as establishing “standards and procedures to prevent and detect criminal conduct.”⁶⁸ In addition, the commentary to the Sentencing Guidelines makes it clear that an effective compliance program must include disciplinary mechanisms.⁶⁹

The Sentencing Guidelines are not mandatory and, moreover, only come into play if an organization faces criminal charges. The Guidelines, however, have been a highly influential motivator for corporate governance and compliance reform. Chancellor Allen’s well-known *Caremark* decision laid the legal foundation for the directors’ duty to ensure that their corporation has adequate legal compliance programs.⁷⁰ He emphasized the role of the Guidelines in providing

63. 2017 REPORT, *supra* note 20, at vi.

64. *Id.*

65. See, e.g., PLANTE & MCCHESENEY, *supra* note 61, at 78 n.6 (discussing refusal by the Bishop of Lincoln to participate).

66. See GEOFFREY PARSONS MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 238 (2d ed. 2017) (quoting remarks of a former Assistant Attorney General to the effect that “[a] company should implement mechanisms designed to enforce its compliance code”).

67. U.S. SENTENCING GUIDELINES MANUAL chp. 8, introductory cmt. (U.S. SENTENCING COMM’N 2016), <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8#NaN> [<https://perma.cc/2L59-852J>].

68. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(1) (U.S. SENTENCING COMM’N 2016), <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8#NaN> [<https://perma.cc/2L59-852J>].

69. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. 5 (U.S. SENTENCING COMM’N 2016), <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8#NaN> [<https://perma.cc/2L59-852J>]. (“Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.”).

70. See *In re Great Lakes Comnet, Inc.*, 586 B.R. 718, 726 (Bankr. W.D. Mich. 2018) (describing *Caremark* as the “seminal case on director oversight in Delaware”).

“powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts.”⁷¹ The Guidelines thus served as one of the developments he cited as justifying recognizing the board of directors’ “duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists”⁷²

Mandatory, rather than voluntary compliance, is thus a core feature of corporate governance. Accordingly, if reforms are to be truly credible, the canon law rights of bishops ought to be amended so that the Church can follow the corporate model and mandate compliance with both the existing Dallas Charter and the additional requirements proposed herein. In particular, as we shall see, canon law ought to be changed to create more effective mechanisms to hold the bishops accountable. National conferences, such as the USCCB, should be empowered to issue mandatory governance and compliance requirements and create mechanisms for disciplining prelates who fail to comply.

B. Methods of Effecting Reform

There are several ways the reforms proposed herein could be effectuated. First, if given a special mandate from the Vatican, which can be issued “either *motu proprio*⁷³ or at the request of the conference

71. *In re Caremark Intern. Inc. Derivative Litig.*, 698 A.2d 959, 969 (Del. Ch. 1996).

72. *Id.* at 970. See Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 987 (1999) (explaining that Chancellor Allen pointed to the “powerful incentives” provided by the Sentencing Guidelines and argued “that ‘any rational person attempting in good faith to meet an organizational governance responsibility’ must take those incentives into account”). Professor Barnard further notes that Chancellor Allen could have cited other federal statutes in support of his decision, “including the Foreign Corrupt Practices Act of 1977 (FCPA), the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA), and the Private Securities Litigation Reform Act of 1995 (PSLRA),” all of which “also impose obligations on companies to have in place data gathering and reporting programs aimed at specific forms of misconduct.” *Id.* at 989. In addition, one might now add the mandatory compliance and governance provisions imposed by Sarbanes-Oxley and Dodd-Frank. See James J. Park, *The Limits of the Right to Sell and the Rise of Federal Corporate Law*, 70 OKLA. L. REV. 159, 160–61 (2017) (“The federal securities laws have been amended through statutes such as the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), which contain mandates relating to corporate governance.”).

73. *Motu proprio* is a letter “addressed by the Pope either to the Church at large or to some part of it or to some particular persons, which has been written on his personal initiative and bears his personal signature.” THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 1127 (F.L. Cross & E.A. Livingstone eds., 1990).

itself,”⁷⁴ the USCCB could issue decrees establishing the reforms. Those decrees must be passed by a two-thirds vote and they are not binding until they have been reviewed by the Vatican.⁷⁵ The special mandate is essential because, absent it, “the competence of each diocesan bishop remains intact, nor is a conference or its president able to act in the name of all the bishops unless each and every bishop has given consent.”⁷⁶

Another alternative, albeit one that has very rarely been used in the United States,⁷⁷ is the plenary council. Such a council would consist of representatives of all the dioceses in the country.⁷⁸ Such a council can be called by the conference of bishops but would require Vatican approval.⁷⁹ In addition, the Vatican would have to approve the selection of the presiding officer.⁸⁰ Once called into existence, a plenary council has broad legislative authority, albeit subject to Vatican approval of its work:

A particular council, for its own territory, takes care that provision is made for the pastoral needs of the people of God and possesses the power of governance, especially legislative power, so that, always without prejudice to the universal law of the Church, it is able to decide what seems opportune for the increase of the faith, the organization of common pastoral action, and the regulation of morals and of the common ecclesiastical discipline which is to be observed, promoted, and protected.

When a particular council has ended, the president is to take care that all the acts of the council are sent to the Apostolic. Decrees issued by a council are not to be promulgated until the Apostolic has reviewed them. It is for the council itself to define the manner of promulgation of the decrees and the time when the promulgated decrees begin to oblige.⁸¹

Although plenary synods have been little used in the United States, there is a recent precedent from Australia where a plenary synod was held in 2000 to address the priestly sex abuse crisis in that

74. 1983 CODE c.455, § 1.

75. *See id.* § 2.

76. *Id.* § 4.

77. Charles Collins, *Calls grow for ‘extraordinary synod’ in response to abuse crisis*, CRUX (Sept. 2, 2018), <https://cruxnow.com/vatican/2018/09/02/calls-grow-for-extraordinary-synod-in-response-to-abuse-crisis/> [<https://perma.cc/W4RW-M4PX>] (explaining “[t]here hasn’t been a plenary council in the United States in over 130 years,” with only three having been held in the 19th Century).

78. *See, e.g.*, JAMES A. CORIDEN, AN INTRODUCTION TO CANON LAW 99 (rev. ed. 2004) (explaining the different Catholic dioceses and their roles).

79. 1983 CODE c.439, § 1.

80. 1983 CODE c.441.

81. 1983 CODE cc.445–46.

country.⁸² A singular advantage of the plenary synod model is that the membership extends beyond the bishops to include superiors of religious orders, leaders of Catholic universities, seminary rectors, “and other members of the Christian faithful.”⁸³ Granted, only the bishops have a deliberative vote at such a synod, but the other participants—including the laity—have a “consultative vote.”⁸⁴ As such, the plenary synod provides a more credible mechanism for the Church to put forward reforms, since those reforms will have been openly—albeit, non-bindingly—subjected to a lay vote.

A third alternative, which some in the hierarchy have suggested, would be for the Pope to call a global Synod of the Bishops.⁸⁵ For reference:

The synod of bishops is a group of bishops who have been chosen from different regions of the world and meet together at fixed times to foster closer unity between the Roman Pontiff and bishops, to assist the Roman Pontiff with their counsel in the preservation and growth of faith and morals, in the observance and strengthening of ecclesiastical discipline, and to consider questions pertaining to the activity of the Church in the world.

It is for the synod of bishops to discuss the questions for consideration and express its wishes but not to resolve them or issue decrees about them unless, in certain cases, the Roman Pontiff has endowed it with deliberative power, in which case he ratifies the decisions of the synod.

The synod of bishops is directly subject to the authority of the Roman Pontiff.⁸⁶

Canon law contemplates two types of synods: ordinary and extraordinary. An ordinary synod consists of bishops selected by the national conferences, as well as others appointed directly by the Pope, and others chosen by virtue of their church office.⁸⁷ An extraordinary synod is comprised of bishops appointed by the Pope and others chosen by virtue of their church office.⁸⁸ In contrast to the ordinary synod, preparation for which is laborious and lengthy,⁸⁹ the extraordi-

82. Collins, *supra* note 77.

83. 1983 CODE c.443, § 1.

84. 1983 CODE c.439, §§ 3–4.

85. See Collins, *supra* note 77.

86. 1983 CODE c.344.

87. 1983 CODE c.346, § 1.

88. See *id.* § 2.

89. See THOMAS J. REESE, *INSIDE THE VATICAN: THE POLITICS AND ORGANIZATION OF THE CATHOLIC CHURCH* 43 (1998) (noting that the frequency of ordinary synods was extended from one every two years to one every four years, because “the bishops felt it was impossible to prepare for and digest the work of the synods so quickly”).

nary synod is available to treat affairs which require a speedy solution.⁹⁰ In either case, the laity has no vote in the synod, although the Church sometimes holds pre-synod symposiums at which lay experts may give presentations.⁹¹ Indeed, unless the Pope has endowed the synod with legislative power, even the bishops' role is limited to "discuss[ing] the questions for consideration and express[ing] its wishes but not to resolve them or issue decrees about them."⁹² As noted above, moreover, even if the Pope has done so, he must ratify the decisions of the synod before they take effect.

In sum, a plenary council of the Church in the United States seems the best approach for effecting change. It explicitly contemplates lay participation. It can focus on the unique aspects of the problem in the United States, while also offering models for other countries afflicted by priestly sex abuses scandals. Granted, the decisions of a plenary council must be reviewed and approved by the Vatican, but it presumably would be difficult for the Pope to ignore the voice of the American Church so uniquely and forcefully expressed.

C. Amending Canon Law

The Code of Canon Law is not carved into unchanging stone. Throughout the first millennium of the Church's history, various papal and conciliar decrees began laying the legal groundwork on which modern canon law was built.⁹³ Those precedents were organized and systematized in the twelfth and thirteenth centuries, producing not just one but a number of collections of canon law.⁹⁴ It was not until 1917, however, that Pope Benedict XV promulgated the first formal Code of Canon law, which swept aside all earlier compilations.⁹⁵

In 1959, having recognized that the 1917 Code was outdated, Pope John XXIII initiated the process of revising and updating the Code.⁹⁶ The process was extremely slow, and the revised Code was not formally promulgated until 1983. Oddly, the revised Code contains no provision for future revision or amendment.⁹⁷ In 1988, however, Pope John Paul II's apostolic letter, *Ad Tuendam Fidem*, announced amendments to a number of canons dealing with the obligation to uphold

90. See 1983 CODE c.346, § 2.

91. REESE, *supra* note 89, at 52.

92. 1983 CODE c.343.

93. See CORIDEN, *supra* note 78, at 11–17 (reviewing first millennium developments).

94. See *id.* at 18–19.

95. See *id.* at 28.

96. See *id.* at 29.

97. See *id.*

the truth of the Magisterium.⁹⁸ A precedent thus exists for the Vatican to effect necessary changes in canon law if requested to do so by a plenary council.

III. Proposals for Improving the Dallas Charter

Implementation of the Dallas Charter seems to have significantly reduced the level of priestly sexual misconduct (or, at least, abuse of minors), but the revelations of Summer 2018 suggest that further enhancements of the charter are appropriate to ensure that abusers and their enablers no longer have a place in the Church hierarchy.⁹⁹ At bottom, however, the scandal poses a problem familiar to law and economics scholars of corporate law; namely, the agency costs associated with employee loyalty.¹⁰⁰ Corporate lawyers and governance experts have developed compliance programs specifically to address those costs.¹⁰¹ Several of these seem apt tools for the Church. Some may require changes in current canon law to be fully effectuated, however, using the procedures outlined in the preceding section.

A useful starting point for identifying possible reform is to compare the charter to the U.S. Sentencing Guidelines. As we have seen, the Guidelines have been very influential in the development of modern corporate governance and compliance structures and processes.¹⁰² The latter is generally regarded as the baseline against which compliance programs are measured.¹⁰³ As such, the Guidelines

98. John Paul II, *Apostolic Letter Motu Proprio AD TUENDAM FIDEM, by which certain norms are inserted into the Code of Canon Law and into the Code of Canons of the Eastern Churches*, THE HOLY SEE (1998), http://w2.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_30061998_ad-tuendam-fidem.html [https://perma.cc/E84H-6SJF].

99. See *supra* notes 3–4 and accompanying text (discussing ongoing sexual misconduct within the Church).

100. See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 565 n.88 (2003) (“Agency costs are defined as the sum of the monitoring and bonding costs, plus any residual loss, incurred to prevent shirking by agents.”).

101. See D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201, 232 (2012) (“Agency costs provide a theoretical tool to create appropriate mechanisms for changing processes and to provide incentives to create effective compliance programs.”).

102. See *supra* notes 66–72 and accompanying text (discussing influence of the Guidelines on corporate law duties of directors).

103. See *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 969 (Del. Ch. 1996) (“The Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts.”); Paul Fiorelli & Ann Marie Tracey, *Why Comply? Organizational Guidelines Offer A Safer Harbor in the*

provide a useful model from which the Church can borrow to build a more effective governance and compliance program.¹⁰⁴ In addition, other sources, such as the requirements imposed by the Sarbanes-Oxley Act are widely used to inform corporate governance and compliance programs.

A. Adding a Confidential Reporting System to the Dallas Charter

The Sentencing Guidelines require an organization “to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation” in order to qualify for the penalty mitigation available to organizations with an effective compliance program.¹⁰⁵ Likewise, section 301 of the Sarbanes-Oxley Act codified a governance best practice by requiring that the audit committee of every reporting company establish a process for receiving, documenting, and processing complaints about the company’s accounting, internal controls, or auditing.¹⁰⁶ The process must provide for confidential and anonymous submission of employee complaints about questionable accounting or auditing matters.¹⁰⁷

Article 2 of the Dallas Charter calls for a reporting system, but it is limited in important ways compared to the corporate model:

Dioceses/eparchies are to have policies and procedures in place to respond promptly to any allegation where there is reason to believe

Storm, 32 J. CORP. L. 467, 467 (2007) (arguing that the guidelines “are considered the ‘gold standard’ for evaluating internal corporate compliance programs”). Note, however, that some commentators have criticized the Sentencing Guidelines for rewarding organizations for compliance measures, including measures—such as ethics codes—that have not been shown to impact the level of illegal behavior. See, e.g., Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U.L.Q. 487, 487 (2003); see also D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 821 (2013) (“By ignoring the Guidelines and providing cosmetic compliance, a company increases the potential payoff from illegal activity (by keeping both its compliance costs and risk of detection low), while increasing the benefit from its illegal behavior.”).

104. See Philip A. Wellner, Comment, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 500 (2005) (arguing that “the Sentencing Guidelines present a . . . detailed model of an effective compliance program”); see also H. Lowell Brown, *The Corporate Director’s Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1, 145 (2001) (“Although there does not appear to be a model compliance program endorsed by the various federal agencies, many of the compliance measures imposed by administrative agreements have followed the formula for an effective compliance program set forth in the Federal Sentencing Guidelines.”).

105. U.S. Sentencing Guidelines, *supra* note 67, § 8B2.1(b)(5).

106. 15 U.S.C.A. § 78j-1(m) (West).

107. *Id.*

that sexual abuse of a minor has occurred. Dioceses/eparchies are to have a competent person or persons to coordinate assistance for the immediate pastoral care of persons who report having been sexually abused as minors by clergy or other church personnel. The procedures for those making a complaint are to be readily available in printed form and other media in the principal languages in which the liturgy is celebrated in the diocese/eparchy and be the subject of public announcements at least annually.¹⁰⁸

Note that the charter is limited to allegations involving minors and does not specify whether the procedures should include an anonymous tip line. The Archdiocese of Los Angeles has set up a tip line and its policy states that it will accept anonymous tips, but the Archdiocese encourages tipsters to leave their name on grounds that “it is a great help in finding the truth of a situation if it is possible to speak with you directly.”¹⁰⁹ In addition, the Archdiocese policy does not accept anonymous tips with respect to “suspected sexual misconduct of an Archdiocesan or parish/parish school minister, employee or volunteer with another adult.”¹¹⁰ On the other hand, unlike corporate tip line policies, the Archdiocese’s process is not limited to tips by employees of the organization.

Anonymous hotlines may legitimately be criticized as encouraging excessive unmeritorious allegations that divert attention and resources from more focused ways of preventing misconduct.¹¹¹ Yet, they also encourage persons who might fear—whether legitimately or not—retaliation to alerted authorities.¹¹² Retaliation is common in the corporate sector, with some surveys reporting that over 50% of

108. DALLAS CHARTER, *supra* note 18, at 9. An eparchy is the functional equivalent of a diocese in the Eastern Catholic Churches. See Kathleen R. Robertson, Comment, *Dark Days for the Church: Canon Law and the Response of the Roman Catholic Church to the Sex Abuse Scandals*, 4 WASH. U. GLOBAL STUD. L. REV. 161, 185 n.69 (2005) (“An eparchy is the name for the Eastern Catholic Church’s dioceses.”). In turn, the Eastern Catholic Churches are Orthodox churches that accept the authority of the Pope. See George A. Maloney, S.J., *Eastern Catholic Churches in America*, in THE ENCYCLOPEDIA OF AMERICAN HISTORY 471–72 (Michael Glazer & Thomas J. Shelley eds. 1997) (discussing reunion of these churches with the Pope).

109. *Making a Report of Misconduct*, ARCHDIOCESE OF L.A., <http://www.la-archdiocese.org/org/protecting/vam/pages/report.aspx> [<https://perma.cc/4LLC-FRWD>].

110. *Id.*

111. See, e.g., Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 67 (2014) (making this argument with respect to publicly funded child abuse hotlines).

112. See Jason Blevins & Brian Patrick Green, *Examining Foreign Corrupt Practices Act Compliance Issues*, 2013 WL 1402300 (“Anonymous and confidential reporting systems reduce the fear of (and actual retaliation for) whistleblowers.”). Accordingly, “hotlines and confidential counsel are common methods to protect whistleblower identities.” *Id.*

whistleblowers experienced some form of retaliation.¹¹³ Not surprisingly in light of that evidence, studies consistently demonstrate that individuals are more willing to blow the whistle if they may do so anonymously.¹¹⁴ Given that there have been a number of reported incidents of bishops retaliating against those who come forward with allegations of sexual misconduct,¹¹⁵ coupled with the reluctance of many in the laity to challenge a priest's authority, the Dallas Charter's failure to require an anonymous tip line covering all forms of sexual misconduct is a glaring omission that requires rectification.¹¹⁶

113. See Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 B.Y.U. L. REV. 1107, 1130 (2006) ("Some surveys report that well over half of whistleblowers experience some sort of retaliation.").

114. See *id.* at 1143 n.168 (stating that "studies consistently demonstrate that individuals are more willing to state a dissenting viewpoint if they can do so anonymously").

115. See, e.g., *Aligwekwe v. Holder*, 345 Fed. Appx. 915 (5th Cir. 2009) (reporting case of a Nigerian nun seeking asylum claiming she had been sexually harassed and experienced retaliation by her bishop); *Coach Scores Touchdown With \$4M Settlement*, 17 No. 10 EMP. PRAC. LIABILITY VERDICTS AND SETTLEMENTS 16, 16 (2016) (discussing the Diocese of Sacramento settled claims by football coach that he was fired in retaliation for reporting sexual abuses cases at Catholic school); Michael J. Brody, *Playground Resurfacing and Religious Arbitration are Very Similar Activities: Trinity Lutheran Church as Applied to Religious Arbitration*, 18 RUTGERS J. L. & RELIGION 298, 305 (2017) ("The Catholic Church has used a variety of different means to convince alleged victims and whistleblowers to keep such matters within Church disciplinary channels."); Jean Hopfensperger, *Lawsuit accuses Minnesota bishop of coercion in clergy abuse case*, STAR TRIBUNE (May 10, 2017, 5:36 AM), <http://www.startribune.com/minnesota-bishop-named-in-abuse-lawsuit/421744243/> [<https://perma.cc/V55Z-2MDV>] ("Vasek claims that Crookston Bishop Michael Hoepfner threatened to undermine his religious work and his son's if he didn't retract a clergy abuse claim."); Daniel J. Wakin, *Catholic Priest Who Aids Church Sexual Abuse Victims Loses Job as Military Chaplain*, N.Y. TIMES (Apr. 29, 2004), <https://www.nytimes.com/2004/04/29/us/catholic-priest-who-aids-church-sexual-abuse-victims-loses-job-military-chaplain.html?mtrref=perma.cc&gwh=3BD41F1AD842C205DD01A43346C69676&gwt=pay> [<https://perma.cc/XZ96-ZMCS>] (reporting cases in which victims alleged that a priest was reassigned "in retaliation by the church hierarchy").

116. On September 19, 2018, the USCCB announced that its Administrative Committee had:

Approved the establishment of a third-party reporting system that will receive confidentially, by phone and online, complaints of sexual abuse of minors by a bishop and sexual harassment of or sexual misconduct with adults by a bishop and will direct those complaints to the appropriate ecclesiastical authority and, as required by applicable law, to civil authorities.

U.S. Conference of Catholic Bishops' Administrative Committee Statement on Sex Abuse Scandals; Committee Releases Actions to be Taken Within Its Authority, U.S. CONFERENCE OF CATHOLIC BISHOPS (Sept. 19, 2018), <http://www.usccb.org/news/2018/18-152.cfm> [<https://perma.cc/3KNW-LBKV>].

B. Adding Whistleblower Protections to the Dallas Charter

In addition to providing for anonymous tip lines, Sarbanes-Oxley also provides protections against retaliation for whistleblowers who go public with their allegations. Section 806 of the act provides that no public company may “discharge, demote, suspend, threaten, harass, or in any other manner discriminate” who engages in specified protected activities.¹¹⁷ Such protected activities include “[p]roviding information to, or otherwise assisting, an investigation of wire, mail, or bank fraud, or any other federal law on fraud against shareholders, or other securities law violations” and “[f]iling, testifying, participating in, or otherwise assisting in any legal proceeding involving fraud or other securities violations by the company.”¹¹⁸ Section 806 further authorizes whistleblowers who experience retaliation to sue for “back pay, reinstatement, and compensatory damages from the company.”¹¹⁹

Even before Sarbanes-Oxley became law, some companies had voluntarily adopted Codes of Ethics which treated whistleblowing as

117. 18 U.S.C.A. § 1514A(a).

118. STEPHEN M. BAINBRIDGE, *THE COMPLETE GUIDE TO SARBANES-OXLEY: UNDERSTANDING HOW SARBANES-OXLEY AFFECTS YOUR BUSINESS* 100 (2007).

In order to encourage whistle blowing, the Department of Labor has issued an interpretation of § 806 pursuant to which an employee who reports conduct he or she reasonably believes is a violation of one of the covered federal fraud or securities laws is engaged in protected activity even if subsequent investigation proves the employee was wrong. This makes sense, of course. Would employees come forward with charges of serious misconduct if they know they can be fired if they turn out to have made a mistake? On the other hand, however, it means companies likely will face many more whistle-blowing complaints. *Id.* at 100–01.

119. *Id.* at 102. In addition to the civil action authorized by § 806, Congress’ determination to protect whistleblowers from retaliation is further demonstrated by the act’s inclusion of criminal sanctions for retaliation:

SOX § 1107 creates a criminal penalty of up to ten years imprisonment and/or a fine of up to \$250,000 on anyone who intentionally retaliates against a whistleblower by taking “any action harmful to any person, including interference with the lawful employment or livelihood of any person.” Along with the document destruction prohibition discussed in the preceding section, this is one of the two SOX provisions directly applicable to nonprofit organizations and closely held corporations. *Id.*

As noted, § 1107 applies to nonprofit organizations, but it is limited to cases in which the whistleblower provided “to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense.” 18 U.S.C. § 1513(e) (2018). Some states have statutes offering similar protections. *See, e.g.,* Keefe v. Youngstown Diocese of the Catholic Church, 698 N.E.2d 1009, 1011 (Ohio App. 5th Dist. 1997) (“Ohio’s ‘Whistleblower Act,’ establishes guidelines by which an employee can bring to the attention of the employer or appropriate authorities illegal activity by either the employer or a co-employee without being discharged.”).

an important part of the companies' internal control and risk management processes and promised whistleblowers protection from retaliation.¹²⁰ Such Codes are now mandatory for public corporations.¹²¹ Many modern corporate ethics codes, however, voluntarily offer employees even stronger protections than those mandated by federal law.¹²²

The National Council of Nonprofits has promulgated a sample whistleblower protection policy that sets out a detailed set of procedures that nonprofits can use to provide whistleblower protection comparable to that offered by corporate ethics codes.¹²³ The policy encourages "employees and others to raise serious concerns internally" and states that it is "the responsibility of all board members, officers, employees and volunteers to report concerns about violations of {Organization's name}'s code of ethics or suspected violations of law or regulations that govern {Organization's name}'s operations."¹²⁴ The policy states that an employee who retaliates against a whistleblower "is subject to discipline up to and including termination of employment."¹²⁵ It further lays out a reporting process, identifies a compliance officer charged with ensuring that reports are adequately investigated, and various other elements.¹²⁶

The Dallas Charter contains no such protections for whistleblowers. The Church, therefore, should voluntarily amend the charter to incorporate the National Council of Nonprofits' sample policy or something closely akin to it. Not only would doing so enhance the Church's credibility, but it would help stave off possible legislative or judicial imposition of such requirements on the Church. Although the constitutionality of such government action to protect whistleblowers from retaliation by the Church or its agents is beyond the scope of this Article, it should be noted that a number of com-

120. See Richard Moberly & Lindsey E. Wylie, *An Empirical Study of Whistleblower Policies in United States Corporate Codes of Ethics*, in WHISTLEBLOWING AND DEMOCRATIC VALUES 27, 35 (David Lewis & Wim Vandekerckhove eds., 2011) (ebook), [http://whistleblowers.dk/ArkivPDF/whistleblowing_and_democratic_values_3rd_jan\(1\).pdf](http://whistleblowers.dk/ArkivPDF/whistleblowing_and_democratic_values_3rd_jan(1).pdf) [https://perma.cc/29SR-7HWK].

121. *Id.* at 31.

122. See *id.* at 43.

123. *Sample Whistleblower Protection Policy*, NAT'L COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/sites/default/files/Sample%20WhistleblowerPolicy%202.2010.pdf> [https://perma.cc/AW5F-DWMF].

124. *Id.*

125. *Id.*

126. *Id.*

mentators have argued that federal and state whistleblower laws should be fully applied to the Church.¹²⁷

C. Adding Mandatory Up-the-Ladder Reporting to the Dallas Charter

The legal approach to whistleblowing typically has focused on protecting and/or rewarding whistleblowers who voluntarily come forward with allegations of wrongdoing.¹²⁸ Proposals for mandatory whistleblowing have generally faced strenuous opposition.¹²⁹ An important precedent for imposing mandatory whistleblowing does exist, however, in the legal ethics rules imposed by federal securities law.¹³⁰

1. The Sarbanes-Oxley Precedent

Section 307 of the Sarbanes-Oxley Act required the SEC to: [I]ssue rules . . . setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence . . . requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised

127. See, e.g., Andrew Donovan, Comment, *Freedom of Breach: The Ministerial Exception Applied to Contract Claims*, 63 DEPAUL L. REV. 1063, 1090 (2014) (arguing that creation of “a precedent, effectively holding that whistleblower protection laws insulate an employee from only nonreligious employer retaliation, would be against public policy”); See also, e.g., Symposium, *Smith and Women’s Equality*, 32 CARDOZO L. REV. 1831, 1854 (2011) (“If women’s and children’s rights are to be protected, the courts and the law must be on the side of the whistleblowers and not on the side of church autonomy to break the law.”).

128. See Elizabeth C. Tippet, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL’Y J. 1, 2 (2007) (“Both anti-retaliation remedies and reward-based approaches to whistleblowing rely upon voluntary acts of disclosure.”).

129. See *id.* at 2–3 (noting that “employment law scholars have been almost universally opposed to mandatory whistleblowing, comparing it to Nazi Germany, Stalinist Russia, and McCarthyism.”).

130. See *id.* at 3 (“Punitive approaches to whistleblowing are no longer a matter of mere conjecture . . . with the passage of the Sarbanes-Oxley Act.”). The question of whether, as a matter of public policy and constitutional law, the priest-penitent privilege should exempt priests from secular mandatory child abuse reporting statutes is beyond the scope of this article. See *supra* note 22 and accompanying text (citing authorities on both sides of that issue).

solely of directors not employed . . . by the issuer, or to the board of directors.¹³¹

In compliance with Congress' command, in January 2003, the SEC promulgated the so-called "Part 205" attorney conduct regulations, whose centerpiece is an up-the-ladder reporting requirement.¹³² In effect, section 307 thus made it mandatory for attorneys practicing before the SEC to internally blow the whistle on client misconduct under certain circumstances.

Part 205 applies to any lawyer who is "appearing and practicing before the Commission in the representation of an issuer."¹³³ In turn, "appearing and practicing" is defined very broadly.¹³⁴ As observed elsewhere, this definition likely will encompass many lawyers who do not regard themselves as securities lawyers.¹³⁵

When a lawyer who appears and practices before the SEC "becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer" the lawyer's initial duty is to report such evidence "up the ladder" to the issuer's general counsel or chief executive officer.¹³⁶ Unless the reporting lawyer "reasonably believes that [that officer] has provided an appropriate re-

131. 15 U.S.C.A. § 7245 (2002) (West).

132. 17 C.F.R. §§ 205.1–205.7 (2018).

133. 17 C.F.R. § 205.2 (2018).

134. In pertinent part, the regulations state:

Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document.

Id. § 205.2(a)(1)(iii).

The release in which the SEC adopted the Part 205 Regulations states:

[A]n attorney's preparation of a document (such as a contract) which he or she never intended or had notice would be submitted to the Commission, or incorporated into a document submitted to the Commission, but which subsequently is submitted to the Commission as an exhibit to or in connection with a filing, does not constitute 'appearing and practicing' before the Commission.

Final Rule: Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185 (Jan. 29, 2003), <http://www.sec.gov/rules/final/33-8185.htm> [<https://perma.cc/M45B-HAEW>].

135. See Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 313 (2004) (discussing the meaning of "appearing and practicing" as defined and used in the Part 205 Regulations).

136. Specifically, the rule states:

If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof)

sponse within a reasonable time, the attorney shall report the evidence of a material violation to” the audit committee of the board of directors, subject to various exceptions and alternatives.¹³⁷ As former Senator John Edwards observed during the Congressional debate over Section 307, the goal is to give lawyers a very “simple” obligation: “You report the violation. If the violation isn’t addressed properly, then you go to the board.”¹³⁸

The Part 205 Regulations are intended to create an “early warning system” about management wrongdoing through mandatory attorney disclosures to independent directors “who might otherwise, due to their limited involvement in day-to-day corporate operations, fail to identify potential problems.”¹³⁹ The regulations, however, do not provide guidance as to what the lawyer should do if the issuer’s audit committee does not undertake a reasonable response to the violation.

In the administrative process leading up to the adoption of Part 205, the SEC considered a requirement that the lawyer make a noisy withdrawal in that case but opted not to do so.¹⁴⁰ If adopted, the noisy withdrawal rule would have required reporting lawyers to determine whether the issuer’s audit committee made an “appropriate response within a reasonable time” to the lawyer’s report, and if not, whether the violation had caused or was likely to cause a “substantial injury” to the financial interests or property of the issuer or investors.¹⁴¹ In-house counsel would be obliged to cease participation in the matter giving rise to the violation.¹⁴² Outside legal counsel would have been obliged to “withdraw forthwith from representing the issuer,” and inform both the issuer and the SEC that the attorney was withdrawing for “professional considerations.”¹⁴³ Both in-house and outside lawyers also would have been obliged to notify the SEC that if any docu-

or to both the issuer’s chief legal officer and its chief executive officer (or the equivalents thereof) forthwith.

17 C.F.R. § 205.3(b)(1) (2018).

137. 17 C.F.R. § 205.3(b)(3).

138. 148 CONG. REC. S65524 (daily ed. July 10, 2002) (statement of Sen. Edwards).

139. Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1112 (2003).

140. Press Release, SEC, SEC Adopts Attorney Conduct Rule Under Sarbanes-Oxley Act (Jan. 23, 2003), <http://www.sec.gov/news/press/2003-13.htm> [<https://perma.cc/USC7-TNK6>].

141. SEC v. Spiegel, Inc., No. Civ.A. 03 C 1685 2003 WL 22176223, at *44 (N.D. Ill. Sept. 15, 2003).

142. *Id.*

143. *Id.* See United States v. Beckman, 787 F.3d 466, 481 n.7 (8th Cir. 2015) (citing testimony that a “noisy withdrawal letter” “is a letter you send to a client when you are withdrawing as their counsel and you want the reasons to be readily apparent”).

ment the lawyer had assisted in preparing might be materially false or misleading.¹⁴⁴

The legal profession's longstanding ethical tradition of protecting client confidences made the noisy withdrawal proposal highly controversial, even though the legal profession long has recognized limited circumstances in which an attorney need not protect such confidences when necessary to avoid assisting the client in committing criminal or tortious acts.¹⁴⁵ In effect, by requiring the withdrawing lawyer to use the specified formula ("for professional reasons"), a noisy withdrawal requirement would have allowed the lawyer to blow the whistle on the client while not revealing any specific client confidences.¹⁴⁶ It seems reasonable to assume that the SEC would have investigated noisy withdrawals with great interest. Considering the strenuous opposition to the noisy withdrawal requirement by the bar, however, the SEC ultimately decided not to go forward with it.¹⁴⁷

The unique nature of the lawyer-client relationship calls into question the viability of a mere up-the-ladder reporting requirement, arguing that it would have been more effective if coupled with the proposed but non-adopted noisy withdrawal requirement.¹⁴⁸

In assessing the likely impact of Sarbanes-Oxley section 307 on legal ethics and derivatively on business ethics, it is critical to differentiate the reporting up-the-ladder requirement contemplated by section 307 from the noisy withdrawal requirement considered by the SEC. The latter would have had a much more direct impact on corporate accountability than the former. A noisy withdrawal directly calls the corporation to the attention of regulators and the plaintiffs' bar; hence, the threat of withdrawing noisily would give legal counsel a powerful tool by which to affect client decision making. In contrast, a reporting up-the-ladder requirement precludes client misconduct only if the higher authority takes action. In the case of Enron, it seems

144. *Spiegel, Inc.*, 2003 WL 22176223, at *44.

145. See DongJu Song, *The Laws of Securities Lawyering After Sarbanes-Oxley*, 53 DUKE L.J. 257, 278 (2003) ("Noisy withdrawal has its strongest roots in the Model Rules, as it is essentially a compromise between a lawyer's ethical duty of client confidentiality and his duty to avoid assisting a client in a criminal or fraudulent course of action.").

146. See *id.* (suggesting that noisy withdrawal "is a highly artificial device that effectively informs third parties that the client may be engaged in questionable activity while permitting the lawyer to technically maintain client confidences").

147. See Tippet, *supra* note 128, at 12 (discussing the bar's opposition to the proposal and the SEC decision to shelve it).

148. See Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 U. ST. THOMAS L.J. 909, 912 n.23 (2004).

likely that the board of directors knew most of what the lawyers knew, but nevertheless failed to take action.¹⁴⁹

2. The Pros and Cons of Mandatory Whistleblowing

Outside the legal profession, adopting an up-the-ladder reporting process applicable to all of an organization's employees is increasingly recognized as an important corporate governance best practice.¹⁵⁰ Whether some or all employees should be required to blow the whistle on misconduct, however, is controversial.¹⁵¹ Mandatory whistleblowing programs nevertheless are becoming more common.¹⁵²

Indeed, some commentators argue that mandatory whistleblowing—such as the up-the-ladder reporting requirement under Sarbanes-Oxley—is a necessary element of a governance and compliance program both because of the limitations of voluntary whistleblowing and the benefits of a mandatory program. As to the former, voluntary whistleblower programs—even when supplemented by protections for whistleblowers—do not eliminate retaliation, especially subtle forms such as social stigmatization.¹⁵³ Voluntary whistleblowing programs also are often designed to protect workers from retaliation but lack mechanisms for ensuring that the person to

149. *Id.* See also Fisch & Rosen, *supra* note 139, at 1112 (“The expectation of Sarbanes-Oxley is that [corporate] decisionmakers, upon learning of corporate misconduct, will intervene to stop or prevent the wrongdoing. . . . Accordingly, much of the value of the reporting up requirement relies on the level of response of other corporate actors.”).

150. See, e.g., FREDERICK D. LIPMAN & L. KEITH LIPMAN, CORPORATE GOVERNANCE BEST PRACTICES: STRATEGIES FOR PUBLIC, PRIVATE AND NOT-FOR-PROFIT ORGANIZATIONS 21 (2006) (arguing that corporations should provide both “positive and negative incentives to employees to report legal risks and wrongdoing ‘up the ladder’”); ALAN S. GUTTERMAN, BUSINESS TRANSACTIONS SOLUTIONS § 331:22, Westlaw (database updated January 2019) (arguing that organizations should create expectations that “all employees will promptly and fully disclose all relevant information ‘up the ladder’”); Larry Catá Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327, 370 (2004) (“Employees of public corporations increasingly . . . are encouraged to act as guardians of good behavior by their superiors.”).

151. See *supra* note 129 and accompanying text (discussing controversy).

152. See Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act “Bounty Hunting”*, 45 CONN. L. REV. 483, 532 (2012) (“For example, most companies require as a condition of employment that their employees commit to helping monitor and report potential securities violations internally.”).

153. See Tippet, *supra* note 128, at 16–21 (discussing limits of voluntary whistleblowing).

whom the report is made conducts an adequate investigation and undertakes appropriate remedial measures if necessary.¹⁵⁴

Mandatory whistleblowing programs contemplate some form of sanctioning for employees who fail to report misconduct to their superiors.¹⁵⁵ By thus enhancing the incentives to report misconduct,¹⁵⁶ such programs can provide benefits for both the organization and society at large.¹⁵⁷ In particular, it enables the organization to intervene at an early stage, possibly reducing the impact of the wrongdoing.¹⁵⁸ It may also deter misconduct in the first place, by increasing the probability that misconduct will be reported.¹⁵⁹

On the other hand, mandatory whistleblowing also has important costs. It can erode trust within the organization, thereby undermining a critical social lubricant that promotes organizational efficiency.¹⁶⁰ It creates “suspicion and disharmony,” “spreading disunity and creating conflict.”¹⁶¹ Some members of the organization “will no longer be willing to engage with one another in a collegiate or open fashion,” which “could precipitate the development of a negative working culture.”¹⁶²

154. *See id.* at 26–27 (discussing employer incentives to investigate whistleblowing allegations).

155. *See id.* at 30.

156. *See id.* at 45 (“Imposing liabilities on fiduciaries forces them to internalize the costs of inaction, giving them an incentive to act every time they witness wrongdoing.”).

157. *See generally* MARCIA P. MICELI & JANET P. NEAR, *BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES* 9–15 (1992) (discussing costs and benefits of whistleblowing).

158. *See id.* at 11 (observing that whistleblowing can serve “as an early alarm signal”).

159. *See* Terance D. Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct*, 64 *SOC. INQUIRY* 322, 341 (1994) (arguing that whistleblowing “does not have to result in a criminal conviction or civil finding of fault to be successful in reducing organizational misconduct” because “the mere threat of public exposure from whistleblowers may be sufficient to curtail criminal actions”).

160. On the value of trust, *see* Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 *MO. L. REV.* 1111, 1153–54 (2007) (“Trust is a social lubricant, stabilizer and predictor of cooperation. It promotes associational and economic prosperity.”); Fiona M. Kay & John Hagan, *Building Trust: Social Capital, Distributive Justice, and Loyalty to the Firm*, 28 *L. & SOC. INQUIRY* 483, 509 (2003) (“In the practice of law, trust serves as a social lubricant in the work relations of firm lawyers and an anchor for the cultural solidarity of the firm.”).

161. Jerry M. Flint, *G.M.’s Chief Scores Critics of Business*, *N.Y. TIMES* (Mar. 26, 1971), <https://www.nytimes.com/1971/03/26/archives/gms-chief-scores-critics-of-business-gm-head-scores-business.html> [<https://perma.cc/GFF4-XSN9>]. *See also* Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 *GEO. L.J.* 285, 309 (2004) (arguing that internal surveillance programs can induce “risk-aversion and frustration that stem from the fear that one will be incorrectly second-guessed”).

162. Jayne Hewitt, *Is Whistle-Blowing Now Mandatory? The Impact of Mandatory Reporting Law on Trust Relationships in Health Care*, 21 *J.L. & MED.* 82, 96 (2013). Conversely, of

Whistleblowing also can weaken hierarchical structures by encouraging employees to challenge authority.¹⁶³ This tends to reduce organizational efficiency and competence by encouraging mutual suspicion, discouraging organizational loyalty, and lowering morale.¹⁶⁴

On balance, however, a recent study suggests that firms with active internal whistleblower systems outperform those without them. Firms making effective use of internal whistleblowing systems tend to be more profitable than those that do not do so.¹⁶⁵ Firms that do not make effective use of such systems are more likely to exhibit earnings management and to have weaker corporate governance in general.¹⁶⁶ The authors conclude that such systems help management identify and resolve problems before they become a costly crisis.¹⁶⁷

3. Adding Mandatory Whistleblowing to the Dallas Charter

Given that mandatory internal whistleblowing on balance is beneficial, it should be an essential part of reforming the Dallas Charter. Because mandatory internal whistleblowing has significant costs as well as benefits, however, it may be desirable to use a hybrid system in which some members of the Church hierarchy must report up the ladder, while others may do so on a voluntary basis. Specifically, this Article proposes that priests and members of religious orders be subject to mandatory internal whistleblowing, while non-clerical employees be encouraged but not required to report up the ladder.

Priests and members of religious orders will often be in the best position to know when their colleagues are engaged in sexual abuse and, moreover, are directly adversely affected by abuse:

Aside from actual victims of abusive priests and the bishops who covered up for them, parish priests are the ones who suffer the most from this kind of corruption. They often know what's going

course, witnessing misconduct by a colleague can also “lead to erosion of trust” within the organization. *Id.* at 98.

163. MICELI & NEAR, *supra* note 157, at 9. *See also* Peter F. Drucker, *What is “Business Ethics,”* 63 PUB. INT. 18, 33 (1981) (“‘Whistle-blowing,’ after all, is simply another word for ‘informing.’ . . . For under ‘whistle-blowing,’ under the regime of the ‘informer,’ no mutual trust, no interdependencies, and no ethics are possible.”).

164. *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 333 (1992) (acknowledging the potential for “a loss of group identity, loyalty, and morale, and a consequent loss of efficiency” while also recognizing countervailing considerations).

165. STEPHEN STUBBEN & KYLE T. WELCH, EVIDENCE ON THE USE AND EFFICACY OF INTERNAL WHISTLEBLOWING SYSTEMS 28–29 (2018), <https://ssrn.com/abstract=3273589> [<https://perma.cc/HY3S-UWB8>].

166. *Id.*

167. *Id.*

on in the upper reaches of the Church's administration but feel that they can't say anything. Many also fear that their people—the laity—believe that they are complicit in the corruption, even though they aren't.¹⁶⁸

In addition, while priests are subject to some risk of retaliation—such as being moved to a less desirable parish or even removed from parish work entirely—the difficulty inherent in laicizing someone who has taken Holy Orders gives them a certain amount of protection that ordinary employees lack.¹⁶⁹

D. Changing the Tone at the Top by Changing Who is at the Top

Having the right tone at the top of an organization is critical to establishing a proper culture of compliance within the organization, but when the organization's leadership has lost credibility, achieving that correct tone requires replacing those at the top.¹⁷⁰ Accordingly, this section proposes shifting responsibility for investigating and adjudicating sexual misconduct cases from the extant system of Church tribunals overseen by the diocesan bishop to an independent review board. It further proposes the creation of a national review board under the auspices of the USCCB to investigate and adjudicate charges against bishops of sexual misconduct or enabling of abusers. Finally, this section draws on an analogy to corporate audit committees to suggest certain features that should be incorporated into these bodies to insure their independence and competence.

These proposals will run afoul of current canon law. They offend the canons on the limited powers of national conferences,¹⁷¹ the extensive powers and rights of diocesan bishops who answer only to the Pope,¹⁷² and role of tribunals, bishops, and the Vatican in conducting

168. Rod Dreher, *Uncle Ted & The Grand Inquisitor*, AM. CONSERVATIVE (June 22, 2018, 10:11 AM), <https://www.theamericanconservative.com/dreher/uncle-ted-mccartick-and-the-grand-inquisitor/> [https://perma.cc/ERJ3-5RYT].

169. See generally JAMES T. O'REILLY & MARGARET S. P. CHALMERS, *THE CLERGY SEX ABUSE CRISIS AND THE LEGAL RESPONSES* 258–59 (2014) (describing canon law process for involuntary laicization).

170. See *infra* text accompanying note 179.

171. See *supra* note 59 (describing the limited powers of a national conference).

172. Barron, *supra* note 51 (discussing rights and powers of diocesan bishops).

investigations and trials.¹⁷³ As we have seen, however, canon law can be changed.¹⁷⁴

1. The Importance of Setting the Right Tone at the Top

As the Sentencing Guidelines recognize, organizational culture is critical to ensuring compliance.¹⁷⁵ “A compliant organization is one that has a significant internal commitment, backed up by genuine norms and standards, to obey the law for its own sake and not merely as a means to avoid penalties.”¹⁷⁶ Such an organization develops a culture of compliance, which pervades the organization.¹⁷⁷

A company can signal its commitment to compliance, for example, by appointing a high-level officer to head up a compliance office and giving that person both the resources necessary to conduct her job effectively and access to the chief executive officer or the board audit committee. Swift and thoroughgoing responses to compliance violations also signal tone at the top. If a company launches an investigation, conducts it with integrity, and administers punishments as warranted by the facts, these actions will become known throughout the firm.¹⁷⁸

Setting the right tone at the top is thus essential but also insufficient because change must be internalized by everyone in the organization.¹⁷⁹

173. See O'Brien, *supra* note 18, at 424–25 (discussing how the drafters of the Dallas Charter were constrained by the canon law rules governing tribunals). When the Dallas Charter was being drafted, the drafters considered focusing on secular enforcement, but the Vatican insisted that the charter “assert the primacy of Church run tribunals on the basis that the bishops’ proposal would violate canon law.” Laura Russell, Comment, *Pursuing Criminal Liability for the Church and Its Decision Makers for Their Role in Priest Sexual Abuse*, 81 WASH. U. L.Q. 885, 892 (2003).

174. Russell, *supra* note 173.

175. The guidelines emphasize the need for creating an organizational culture that encourages ethical conduct and a commitment to compliance. *U.S. Sentencing Guidelines*, *supra* note 67, § 8B2.1(a)(2). This requires that the organization exercise due diligence to prevent and detect misconduct. *Id.* § 8.B2.1(a)(1).

176. MILLER, *supra* note 66, at 199.

177. See *id.* at 198–99 (describing the process of creating a culture of compliance).

178. *Id.* at 197–98.

179. *Id.* at 198–99. “The phrase [tone at the top] is understood generally as a corporation’s perceived attitude and overall culture with regards to following the law. . . . It involves the idea that, no matter how many auditors and compliance officials are on a company’s payroll, the attitudes of its management are far more important when it comes to questions of whether the organization followed the law.” Andrew Walker, Comment, *Why Shouldn’t We Protect Internal Whistleblowers? Exploring Justifications for the Asadi Decision*, 90 N.Y.U. L. REV. 1761, 1781 (2015).

In the business world, a corporation's CEO is responsible in the first instance for setting the appropriate tone at the top.¹⁸⁰ In the post-Sarbanes-Oxley governance world, however, the audit committee has an increasingly important role in maintaining the appropriate tone at the top.¹⁸¹ The heightened importance of the audit committee role is especially highlighted by the requirement in the Part 205 Regulations. The attorney is authorized and required to report to the client's audit committee not only when the client's CLO or CEO fails to give a reasonable response to the evidence presented by the lawyer, but also when the lawyer "reasonably believes that it would be futile to report evidence of a material violation to" the CLO and CEO.¹⁸² The audit committee provides an independent body far less likely to be involved in wrongdoing or to have conflicted interests that prevent them from investigating potential violations.¹⁸³ By assigning ultimate responsibility to such a body, Congress seemingly concluded that sometimes achieving a proper tone at the top requires changes at the top.¹⁸⁴

The same is true of the Roman Catholic Church today. The Dallas Charter currently provides that each diocese should have a review board with a majority comprised of independent lay persons but limits the board's function to being "a confidential consultative body to the bishop/eparch."¹⁸⁵ The revelations of Summer 2018, however, call into question the effectiveness of such bodies and, moreover, the pub-

180. The Corporate Laws Committee, ABA Section of Business Law, *Corporate Director's Guidebook—Sixth Edition*, 66 BUS. LAW. 975, 1037 (2011) ("The CEO will establish in large part the "tone at the top" for legal compliance and ethical standards.").

181. See Seletha R. Butler, "Financial Expert": A Subtle Blow to the Pool and Current Pipeline of Women on Corporate Boards, 14 GEO. J. GENDER & L. 1, 13 (2013) ("A practical function of the audit committee is to assist in establishing the "tone at the top" regarding the need to have high ethics, integrity, and accuracy in financial reporting standards for the public company."); Kevin Iurato, Comment, *Warning! A Position on the Audit Committee Could Mean Greater Exposure to Liability: The Problems with Applying a Heightened Standard of Care to the Corporate Audit Committee*, 30 STETSON L. REV. 977, 1014 (2001) ("In its practical guide for audit committees, the NACD suggests that '[a]udit committees should encourage a "tone at the top" that conveys basic values of ethical integrity as well as legal compliance and strong financial reporting and control.'").

182. 17 C.F.R. § 205.3(b)(4) (2018).

183. Cf. Cynthia A. Williams, *Icarus on Steroids*, 94 GEO. L.J. 1197, 1218–19 (2006) (book review) (identifying Sarbanes-Oxley provisions that should "reduce auditor conflicts of interest").

184. In response to an SEC enforcement action involving the Bristol-Myers Squibb Company (BMS), took numerous steps to improve compliance at its Chinese subsidiary, including "replacing certain BMS China officers as part of an overall effort to enhance 'tone at the top' and a culture of compliance." In the Matter of Bristol-Myers Squibb Company, Exchange Act Release No. 34-76073, 112 SEC Docket 3285 (Oct. 5, 2015).

185. DALLAS CHARTER, *supra* note 18, at 9.

lic's trust in the current review process. Indeed, even some bishops acknowledge that the laity—and society at large—have lost confidence in them to do the right thing.¹⁸⁶ The absence of such confidence seriously undermines both the external credibility of the Church and discourages creating an internal culture of compliance.

2. Changing the Top: Diocesan Review Boards

In order to effect the necessary change at the top, it seems appropriate to take responsibility away from Church tribunals and diocesan bishops. Instead, each diocese should install a committee with at least a majority comprised of independent laity with exclusive power to review charges of sexual misconduct and to authorize such committees to take both internal disciplinary measures and to notify civil authorities when appropriate.

One of the criticisms of the original version of the Dallas Charter was that it wholly lacked a mechanism for punishing abusers.¹⁸⁷ As subsequently revised, the charter added the following reference to the prospect of an investigation and adjudication by a church tribunal:

In every case involving canonical penalties, the processes provided for in canon law must be observed, and the various provisions of canon law must be considered. Unless the Congregation for the Doctrine of the Faith, having been notified, calls the case to itself because of special circumstances, it will direct the diocesan bishop/eparch to proceed. If the case would otherwise be barred by prescription, because sexual abuse of a minor is a grave offense, the bishop/eparch may apply to the Congregation for the Doctrine of the Faith for a derogation from the prescription, while indicating relevant grave reasons. For the sake of canonical due process, the accused is to be encouraged to retain the assistance of civil and

186. See *supra* text accompanying note 62. Recognizing that improper conduct by those at the top of the corporate hierarchy pervasively harms compliance efforts throughout the organization, some governance and compliance programs have shifted from emphasizing the need to set the appropriate tone at the top to an emphasis on conduct at the top. See Stuart Freedman, *Conduct at the Middle—An Important Resource for Compliance Officers: How Compliance Officers Can Partner with Front-Line Supervisors*, 20 J. HEALTH CARE COMPLIANCE 45, 46 (2018) (“Earlier [government] guidance documents have used the term ‘tone at the top,’ but now the language has been changed to ‘conduct at the top’ with the implication that leadership behavior is what really matters.”). Leadership must not only talk the talk, but also walk the walk. See *id.* (noting that the emphasis in the federal compliance guidance suggests that “the behavior or ‘walking the walk’ is more important than just the words or ‘talking the talk’”).

187. See O’Brien, *supra* note 18, at 454 (“One of the objections to the Charter and the original norms was the absence of canonical procedures guaranteed to any cleric subject to disciplinary penalties.”).

canonical counsel. When necessary, the diocese/eparchy will supply canonical counsel to a priest.¹⁸⁸

This process has been criticized because Church tribunals are exclusively staffed by priests, which calls into question their independence and impartiality.¹⁸⁹ As one commentator noted, “Church tribunals consisting of priests, Vatican congregations, and Church canon law may contribute to a perception of clericalism and perhaps obfuscation.”¹⁹⁰ Such criticisms appear well taken given that the claimed purpose of the charter reforms “was to move towards openness, lay involvement at every stage of the process, accountability, and a judicial process similar to what occurs in American courts,” all of which is called into question by tribunals staffed exclusively by clerics, operating in secrecy, and pursuant to canon law and Vatican dictates.¹⁹¹ In addition, Church tribunals lack the expertise necessary to investigate and adjudicate sex abuse cases, because they are, “‘in actual practice’ almost exclusively occupied with matrimonial cases.”¹⁹²

3. A New, Empowered National Review Committee

The proposed diocesan review boards would replace the existing Church tribunals as the final authority over sex abuse cases within a diocese. Given the considerable powers possessed by a diocesan bishop and the extent to which the bishops were involved in covering up misconduct, however, the diocesan review bodies should be supplemented by a new national committee under the auspices of the USCCB to hear cases in which the alleged misconduct was committed or enabled by a sitting bishop. As prominent Catholic journalist John Allen observed, “what happens when a bishop or other Church superior is accused of covering up the crime - who would investigate, what process would be followed, and what punishment might be imposed remain great unknowns.”¹⁹³ To be sure, the Dallas Charter required

188. DALLAS CHARTER, *supra* note 18, at 24.

189. O’Brien, *supra* note 18, at 455–56 n.632 (discussing problems posed by the nature of tribunal staffing).

190. *Id.* at 425.

191. *Id.* at 456. See also Laurie Goodstein, *BISHOPS PASS PLAN TO FORM TRIBUNALS IN SEX ABUSE CASES*, N.Y. TIMES (Nov. 14, 2002), <https://www.nytimes.com/2002/11/14/us/bishops-pass-plan-to-form-tribunals-in-sex-abuse-cases.html?mtrref=perma.cc&gwh=DCEDFA1B61508C383014B3BC1DA92DFB&gwt=pay> [<https://perma.cc/67U9-M9GG>] (describing process by which priests accused of sexual abuse by church tribunals are judged by bishops who serve as the “jury, judge and executioner”).

192. CORIDEN, *supra* note 78, at 194.

193. John L. Allen, Jr., *Why Francis’s child protection summit may be highest-stakes gamble of his Papacy*, CRUX (Sept. 13, 2018), <https://cruxnow.com/news-analysis/2018/09/13/why->

the formation of both “a National Review Board and an Office of Child and Youth Protection.”¹⁹⁴ The National Review Board’s responsibilities, however, do not include acting as an investigatory body or a tribunal.¹⁹⁵ The resulting “gap in accountability is an open secret, and it’s the most prominent single point that advocacy groups and other critics make when they want to argue that the Church still hasn’t cleaned up its act.”¹⁹⁶

This proposal is an extension of one made by Bishop Robert Barron to deal with the charges against Cardinal McCarrick:

I would suggest (as a lowly back-bencher auxiliary) that the bishops of the United States—all of us—petition the Holy Father to form a team, made up mostly of faithful lay Catholics skilled in forensic investigation, and to empower them to have access to all of the relevant documentation and financial records. Their task should be to determine how Archbishop McCarrick managed, despite his widespread reputation for iniquity, to rise through the ranks of the hierarchy and to continue, in his retirement years, to function as a roving ambassador for the Church and to have a disproportionate influence on the appointment of bishops. They should ask the ecclesial version of Sen. Howard Baker’s famous questions: “What did the responsible parties know and when did they know it?”¹⁹⁷

Just as the corporate scandals that preceded the adoption of Sarbanes-Oxley could not have been adequately addressed by a one-time investigation of what happened at Enron, notwithstanding the importance of that investigation, the widespread and ongoing nature of the sexual misconduct scandal within the Church requires setting up permanent equivalents of corporate audit committees.

franciss-child-protection-summit-may-be-highest-stakes-gamble-of-his-papacy/ [https://perma.cc/Y5N6-3S67].

194. O’Brien, *supra* note 18, at 404.

195. *See id.* at 426 (listing the board’s responsibilities). Likewise, the Office for Child and Youth Protection’s duties do not include conducting investigations or functioning as a tribunal. *See id.* at 427 (listing the office’s responsibilities).

196. Allen, *supra* note 193.

197. Barron, *supra* note 51. Bishop Barron’s reference to the controversy over Archbishop McCarrick raises a major failing of the Church’s current charter framework. The Sentencing Guidelines require the organization to use “reasonable efforts” to exclude from high level positions any individuals the organization knew or should have known has engaged in unethical or illegal activities. *Sentencing Guidelines*, *supra* note 67, § 8B2.1(b)(3). In theory, the Dallas Charter provides “that for even a single act of sexual abuse of a minor—whenever it occurred—which is admitted or established after an appropriate process in accord with canon law, the offending priest or deacon is to be permanently removed from ministry and, if warranted, dismissed from the clerical state.” DALLAS CHARTER, *supra* note 18, at 11. In practice, however, the events of Summer 2018 suggest that serial offenders remained in ministry even at the highest levels of the Church. *See supra* notes 3–21 and accompanying text (discussing events of the Summer of 2018).

4. Drawing on the Audit Committee Analogy

Post-Sarbanes-Oxley, audit committees have had several critical features, all of which should be adopted by the Church to strengthen the proposed diocesan and national review bodies and thus address the criticisms of the current system discussed above. First, they are comprised exclusively of independent directors.¹⁹⁸ The logic of this requirement is readily apparent, as it is widely believed to help ensure that the committee members are neither beholden to or otherwise compromised by relationship with the company and senior management.¹⁹⁹ In Bishop Barron's proposal, as with the Dallas Charter, the proposed review panel merely has a majority of independent lay members.²⁰⁰ Although there are critics of audit committee independence requirements,²⁰¹ there is considerable evidence that audit committee independence is beneficial in preventing organizational misconduct:

Numerous studies support the notion that more independence on audit committees improves financial reporting, just as does more independence on the board as a whole. For example, Krishnan finds that increasing the independence of audit committees reduces internal control problems. At least six other studies conclude that more independent audit committees tend to reduce earnings management. Other studies find that more independence on an audit committee tends to translate into fewer earnings restatements, less fraud, fewer SEC enforcement actions, and less illicit opinion shopping. Bryan and colleagues find that firms with active and independent audit committees tend to have greater earnings transparency and informativeness, consistent with the theory and requirements of SOX. Overall, more independent audit committees tend to translate into better auditing, more informative and credible earnings disclosure, and other benefits.²⁰²

198. See 15 U.S.C. § 78j-1(m)(3)(A) (2012) ("Each member of the audit committee of the issuer shall be a member of the board of directors of the issuer and shall otherwise be independent.").

199. See *infra* note 202 and accompanying text.

200. See *id.* The Dallas Charter provides that "[t]he majority of its members are to be lay persons not in the employ of the diocese/eparchy." DALLAS CHARTER, *supra* note 18, at 9.

201. See, e.g., Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1529–33 (2005) (arguing that independent director requirement for audit committees are ineffective).

202. Robert A. Prentice & David B. Spence, *Sarbanes-Oxley As Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1843, 1872–75 (2007).

By way of analogy, greater independence for the diocesan review board should translate into better performance by the panel and enhance the panel's credibility,²⁰³ which in turn redounds to the benefit of the diocese and the Church as whole by enhancing their credibility.²⁰⁴ Ideally, the Dallas Charter therefore should be amended to require that the review board be entirely independent. If it is deemed desirable that there be some members of the board who have taken Holy Orders,²⁰⁵ they should be selected from other dioceses or be members of a religious order not subject to the direct authority of the bishop of the local diocese to insure their independence from the local hierarchy.

In addition, the definition of independence used in the Dallas Charter merely requires that the panel members not be diocesan employees, which pales by comparison to the far more extensive and detailed independence requirements imposed on audit committee members. At New York Stock Exchange (NYSE) listed companies, for example, audit committee members must meet the general standards applicable to all directors claimed to be independent and, "in the absence of an applicable exemption, [SEC] Rule 10A-3(b)(1)."²⁰⁶ The former generally requires that the board has no material relationship with the issuer and lays out five relationships that preclude a director from being deemed independent.²⁰⁷ In addition to employment and other compensated relationships, the enumerated relationships include being a partner or employee of the issuer's independent auditing firm, being an executive officer of vendors or customers doing a specified amount of business with the issuer, and having immediate

203. See Margaret M. Blair, *Boards of Directors as Mediating Hierarchs*, 38 SEATTLE U.L. REV. 297, 329 (2015) (noting that "the presence of independent directors on boards, especially if they serve on audit committees, is associated with reduced incidence of financial or accounting misbehavior"). See also Karyn R. Vanderwarren, *Financial Accountability in Charitable Organizations: Mandating an Audit Committee Function*, 77 CHI.-KENT L. REV. 963, 981-82 (2002) (arguing that "audit committee members should exhibit independence in performing their duties to enhance the credibility of the committee").

204. See Harvey Gelb, *Corporate Governance and the Independence Myth*, 6 WYO. L. REV. 129, 150 (2006) (quoting investment fund manager TIAA as stating that "[t]he credibility of the corporation will depend in part on the vigorous demonstration of independence by the committees and its chairs").

205. See CATECHISM OF THE CATHOLIC CHURCH ¶ 1536 ("Holy Orders is the sacrament through which the mission entrusted by Christ to his apostles continues to be exercised in the Church until the end of time: thus it is the sacrament of apostolic ministry. It includes three degrees: episcopate, presbyterate, and diaconate.").

206. NYSE, LISTED COMPANY MANUAL § 303A.07(a) (2013).

207. See *id.* § 303A.02.

family members in such relationships.²⁰⁸ The latter provides that an audit committee member may not “accept any consulting, advisory, or other compensatory fee from the issuer,” other than for standard director fees, or “be an affiliated person of the issuer or any subsidiary thereof.”²⁰⁹ Even if the critics of such requirements are correct that they do not enhance firm value,²¹⁰ at least as a matter of optics the credibility of the processes contemplated by the Dallas Charter would be enhanced if the review panel had enhanced independence. Improved optics, after all, have value in and of themselves. In light of the ongoing nature of the sexual misconduct issue, the newly empowered review panel proposed herein—like Caesar’s proverbial wife—needs to be above reproach.

Second, audit committees are required to be staffed by persons with relevant expertise. It would do no good for the audit committee to be comprised of independent members, after all, if those members lack the expertise to—at a minimum—read and understand financial statements.²¹¹ Accordingly, under the NYSE listed company standards, all audit committee members must be “financially literate” and at least one committee member must have “accounting or related financial expertise.”²¹² Just so, the review panel should have members with expertise in investigations of sex abuse and with church operations.²¹³

Third, as required by SEC Rule 10a-3, audit committees “must have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.”²¹⁴ This is an essential aid to the audit committee’s role because of the substantial need such committees have for unbiased and impartial legal advice.²¹⁵ If audit committees tried to rely on in-house legal counsel or an outside law firm that provides legal services to the company on a regular basis,

208. *See id.*

209. 18 U.S.C. § 78j-1(m)(3)(B) (2012).

210. *See supra* text accompanying note 198.

211. *See Romano, supra* note 201, at 1532 (citing studies finding “that complete independence is less significant than expertise with respect to the relation between audit committee composition and accounting statement quality.”).

212. NYSE, Listed Company Manual § 303A.07(a) cmt.

213. Recall that Bishop Barron’s proposed investigatory committee that would include laity “skilled in forensic investigation.” *See supra* text accompanying note 48 (quoting Bishop Barron’s proposal).

214. 17 C.F.R. § 240.10A-3(b)(4) (2018).

215. *See* Geoffrey C. Hazard, Jr. & Edward B. Rock, *A New Player in the Boardroom: The Emergence of the Independent Directors’ Counsel*, 59 BUS. LAW. 1389, 1396 (2004) (arguing that “the amount of legal counseling generated by the Audit Committee in particular, and the independent directors in general, has reached a level where directors will seek special counsel and lawyers will specialize in providing such counsel”).

the committee would be relying on lawyers who have inherent conflicts of interest and considerable incentives to favor management.²¹⁶ For similar reasons, the diocesan and national review boards proposed herein likewise should have access to independent legal counsel and, when appropriate, other advisors.

IV. Reviewing Current Guidelines by the Episcopal Conferences

In February 2019, shortly before this Article went to press, the Vatican held a Meeting on the Protection of Minors in the Church, which was a global gathering of Church leaders to discuss the sex abuse scandals.²¹⁷ The summit was never intended to be a legislative event that would result in specific reforms, but rather was described by Pope Francis as “a ‘catechesis’ on the problem of abuse aimed at bishops who do not understand the issue or what they should do in response to abuse.”²¹⁸ Not surprisingly, no new regulations or prohibitions emerged from the Meeting. Instead, Pope Francis’s concluding address announced that the Church would begin developing new legislation guided by eight principles.²¹⁹ The fifth of these principles is the one most pertinent for purposes of this article:

Strengthening and reviewing guidelines by Episcopal Conferences. In other words, reaffirming the need for bishops to be united in the application of parameters that serve as rules and not simply indications. Rules, not simply indications. No abuse should ever be covered up (as was often the case in the past) or not taken sufficiently seriously, since the covering up of abuses favours [sic] the spread of evil and adds a further level of scandal. Also and in particular, developing new and effective approaches for prevention in all institutions and in every sphere of ecclesial activity.²²⁰

216. See Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 U. ST. THOMAS L.J. 909, 918 (2004) (discussing the incentives that a corporation’s lawyers have “to overlook management wrongdoing”).

217. Pope Francis, *Meeting on “The Protection of Minors in the Church” – Inaugural introduction of the Holy Father Francis*, THE HOLY SEE (Feb. 21, 2019), <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/02/21/190221b.html> [<https://perma.cc/LL7C-UNU4>].

218. Thomas Reese, *There are still bishops who don’t understand abuse crisis*, NAT’L CATH. REP. (Jan. 31, 2019), <https://www.ncronline.org/news/accountability/signs-times/there-are-still-bishops-who-dont-understand-abuse-crisis> [<https://perma.cc/2WWM-JCKX>].

219. Pope Francis, *Meeting on “The Protection of Minors in the Church” – The Holy Father Francis’ concluding address at the Meeting on “The Protection of Minors in the Church”*, THE HOLY SEE (Feb. 24, 2019), <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/02/24/190224c.html> [<https://perma.cc/5FRQ-XLJE>].

220. *Id.*

This statement appears to have two implications of particular significance for present purposes. First, it suggests the Vatican may allow individual national conferences to develop their own rules as befits their local situation. Second, it also suggests that none of the proposals advanced herein—including those relating to discipline of bishops—have been foreclosed.

As the Meeting's title suggests, the Pope and Vatican leaders appear to be focused exclusively on the problem of sexual abuse of minors. There was no discussion of the closely related problems of sexual abuse of vulnerable adults and consensual sexual relationships by priests with adults, both of which this Article argues also must be addressed. On the other hand, nothing emerged from the Meeting to preclude national conferences from addressing this problem and the recommendations made herein with regard to them are therefore still valid.

Looking forward, one reform model likely to get serious consideration by the USCCB is the "Metropolitan Model" proposed by Cardinal Blase Cupich, Archbishop of Chicago, who is widely regarded as a close ally of Pope Francis.²²¹ In a presentation to the Meeting, Cupich set forth a number of principles that he believed should guide the Church as it reforms.²²² Of special relevance to the agenda proposed by this Article, Cardinal Cupich affirmed "affirmation that every member of the Church has an essential role in helping the Church to eliminate the horrific reality of clergy sexual abuse."²²³ The Cardinal's Metropolitan Model therefore includes a role for the laity in all accountability processes,²²⁴ which is consistent with the proposals made herein.

Of at least equal importance, Cardinal Cupich recognized "the systematic failures in holding clerics of all rank responsible" and the resulting need for "accountability within the college of bishops."²²⁵ He thereupon proposed several specific reforms aimed directly at holding bishops accountable. In many respects, those proposals are

221. See Céline Hoyeau, *Cardinal Blase Cupich, voice of the pope in the United States*, LACROIX INT'L (Jan. 23, 2019), <https://international.la-croix.com/news/cardinal-blase-cupich-voice-of-the-pope-in-the-united-states/9292> [<https://perma.cc/3J8B-8XAN>].

222. Blase Cupich, *Synodality: Jointly Responsible*, HOLY SEE PRESS OFFICE (Feb. 22, 2019), https://www.pbc2019.org/fileadmin/user_upload/presentations/22feb/22_Feb_2_Cardinal_Cupich_PBC_ING-.pdf [<https://perma.cc/8KZ5-JAA8>].

223. *Id.* at 4.

224. See *id.* at 5 ("We must unswervingly incorporate broad lay participation into every effort to identify and construct structures of accountability for the prevention of clergy sexual abuse.").

225. *Id.* at 6.

consistent with the recommendations made by this Article. For example, Cardinal Cupich proposed a prohibition on retaliation against the person reporting such an allegation should be adopted,²²⁶ which would permit the sort of whistleblower protections proposed herein. Likewise, he calls for lay involvement “in the process from beginning to end,”²²⁷ as does this Article.

Cardinal Cupich’s proposed accountability mechanism, however, differs in some critical respects from the proposals made by this Article. First, his proposals are limited to developing new mechanisms for holding bishops accountable.²²⁸ This is a necessary but not sufficient reform. Instead, as this Article suggests, the Church should undertake major reforms of the rules governing sexual misconduct at all levels and by all Church personnel.

Second, the Cardinal suggests that allegations of misconduct against a bishop be referred to the metropolitan of the accused bishop,²²⁹ rather than to a national review board of the sort contemplated herein. The metropolitan’s powers also would be far more limited than those this Article proposes granting to the national review board. The metropolitan would require approval from the Vatican before initiating an investigation.²³⁰ Upon completion of the investigation, the metropolitan would forward his findings to the Vatican.²³¹ The final decision of whether to take disciplinary action and the nature of that discipline would rest with the Vatican.

Cardinal Cupich’s model has a number of disadvantages when compared to the national review board proposed herein. First, in

226. *Id.* at 11.

227. *Id.*

228. *See id.* at 10 (proposing “clear procedural steps that are both rooted in the traditions and structures of the Church, but at the same time fulfill modern needs to identify and investigate potentially illicit conduct by bishops”).

229. *Id.* at 9–10. An episcopal province is a grouping of three to ten geographically contiguous dioceses. *See* JAMES A. CORIDEN, AN INTRODUCTION TO CANON LAW 87 (rev. ed. 2004) (describing the nature of a province). Each province has an archdiocese, which is typically the largest or oldest city in the province. *Id.* In addition to serving as bishop of his own archdiocese, the archbishop also serves as metropolitan of the province. *Id.* Canon law gives the metropolitan limited supervisory powers with respect to the suffragan dioceses within his province. *Id.* Importantly, however, canon law provides that “[w]here circumstances demand it, the Apostolic See can endow a metropolitan with special functions and power to be determined in particular law.” 1983 CODE c.436, § 2. It is that provision that appears to allow the expansion of the metropolitan’s powers proposed by cardinal Cupich.

230. Cupich, *supra* note 222, at 11 (“If the allegation has even the semblance of truth, which the Metropolitan should be free to determine with the help of lay experts, the Metropolitan can request from the Holy See authorization to investigate.”). Notice that the metropolitan “can” request authorization but is not obliged to do so. *See id.*

231. *Id.* at 12.

modern times the role of a metropolitan has been reduced to a virtual irrelevancy.²³² It therefore seems likely that many Church members are unfamiliar with the role and function of a metropolitan. The metropolitan model therefore may not do much to restore confidence in the Church. Second, although the metropolitan model purportedly contemplates lay participation, it appears that contemplates the laity's role being limited to experts who will act as assistants to the metropolitan.²³³ The laity thus will continue to be denied a decision-making role in the accountability process. Instead, Cardinal Cupich's proposal leaves decision-making power in the hands of those authorities that Church members trust least; namely, the bishops and the Vatican hierarchy.

Assigning primary responsibility for investigated claims against a bishop to that bishop's metropolitan is especially problematic, because "metropolitan archbishops often have a lot of say in who becomes bishops in their province."²³⁴ Church members likely will lack confidence in the metropolitan's ability to be objective with respect to someone who likely will be regarded as a protégé, friend, or ally of the metropolitan.²³⁵

The relationship between a metropolitan and his suffragan bishops becomes even more problematic when it is the metropolitan himself who is the accused. In such cases, Cardinal Cupich's proposal contemplates that the senior suffragan bishop in the province would be responsible for conducting the investigation.²³⁶ Yet, why would the laity trust a protégé and subordinate of the metropolitan to conduct a fair and impartial investigation? In the corporate world, after all, we don't ask a Vice President to investigate allegations against the CEO. Instead, we ask the board of directors to do so.

In sum, as Charles Collins observed, "The biggest problem facing the [proposal] is the lack of trust people have in the bishops right now. The national review panel originally proposed by the U.S. bish-

232. See CORIDEN, *supra* note 78, at 87 (noting that although provinces had an important governance role in the Middle Ages, "their authority and influence" have been eroded to the point "that now they are largely irrelevant").

233. See Cupich, *supra* note 222, at 11 ("After the Metropolitan receives authorization he should gather all relevant information expeditiously, in collaboration with lay experts . . .").

234. Charles Collins, "Metropolitan Model" May Not Answer Question of Abusive Bishops, CRUX (Mar. 1, 2019), <https://cruxnow.com/news-analysis/2019/03/01/metropolitan-model-may-not-answer-question-of-abusive-bishops/> [<https://perma.cc/J9VU-M599>].

235. *Id.*

236. *Id.*

ops was an acknowledgement of this fact. The 'metropolitan model' is, in effect, the bishops saying, 'Don't worry. You can trust us.'²³⁷

As Ronald Reagan famously observed, however, "trust but verify." The proposals made in this Article provide the necessary verification by taking the investigatory and disciplinary processes out of the hands of local bishops and assigning them to a national panel with lay members and are thus far more likely to restore confidence in the Church.

V. Conclusion

The Roman Catholic Church's sexual abuse scandal has had tragic costs for its victims and has significantly undermined the Church's credibility as a moral authority. In economic terms, the scandal has significantly reduced the value of the Church's principal credence good, with untold costs. Even the Church hierarchy now seems to have accepted the need for further reform. Accordingly, this Article has drawn on corporate governance and compliance analogies for ideas to strengthen the Church's regime for preventing and punishing sexual misconduct by priests and other Church agents.

237. *Id.*