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Moral Certainty in Uncertain Times: The Importance of Standards of Proof When Responding to Accusations of Clerical Misconduct

Introduction

The standard of moral certainty under canon law (c. 1608), required for determinations of guilt in either judicial processes or extra-judicial procedures, enjoys a long and rich history in canonical science. In the current climate, however, the venerable standard of moral certainty is often effectively ignored in cases involving accusations of clerical misconduct. Given the widespread practice of publishing the names of accused clerics, significantly lower standards of proof appear to be applied with great regularity. This article seeks to bring to the fore the often overlooked situation of accused clergy today and the importance of standards of proof under both civil and canon law. Some twenty years after the Dallas Charter, it is opportune to analyze current praxis in light of established canonical tradition.

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1. The Kevin Spacey Saga

The recent and internationally notorious case involving the famous actor Kevin Spacey provides a contemporary backdrop for a discussion on standards of proof. In the span of a few short weeks in the fall of 2017, Spacey went from an international renowned actor to a pariah in the wake of allegations that he had sexually molested a 14-year-old boy, the actor Anthony Rapp.[1] Unfortunately for Spacey, that autumn marked the meteoric rise of the "#MeToo" movement, sparked by the sexual assault allegations involving the infamous Hollywood producer Harvey Weinstein. After an avalanche of negative news stories, Spacey's career, finances, and even personal liberty were at risk. Thanks to an anonymous reporting regime set up by one of Spacey's former employers, a London theater known as the Old Vic, some two dozen young men made other accusations.[2] Then, on December 24, 2018, Spacey was charged with the indecent assault of a teenager in Massachusetts, a felony.[3]

In early 2019, however, the tide began to turn. The criminal case in Massachusetts against Spacey completely unraveled as the alleged victim's story changed and exculpatory evidence emerged. On July 17, 2019, the criminal charges were formally dropped.[4] Three years after that, in October 2022, Anthony Rapp lost his $40 million civil lawsuit against Spacey when a New York jury found that Spacey did

1. Adam B. Vary, "Actor Anthony Rapp: Kevin Spacey Made A Sexual Advance Toward Me When I Was 14," *BuzzFeed*, October 29, 2017: https://www.buzzfeednews.com/article/adambvary/anthony-rapp-kevin-spacey-made-sexual-advance-when-i-was-14.

2. Chris Francescani, "The rise and fall of Kevin Spacey: A timeline of sexual assault allegations," *ABC News*, June 3, 2019: https://abcnews.go.com/US/rise-fall-kevin-spacey-timeline-sexual-assault-allegations/story?id=63420983.

3. Sonia Rao, "Kevin Spacey faces a felony charge for alleged sexual assault," *Washington Post*, December 24, 2018: https://www.washingtonpost.com/arts-entertainment/2018/12/24/kevin-spacey-faces-felony-charge-allegedly-sexually-assaulting-teenager/.

4. Julia Jacobs, "Sexual Assault Charge Against Kevin Spacey is Dropped," *New York Times*, July 17, 2019: https://www.nytimes.com/2019/07/17/arts/kevin-spacey-sexual-assault-case.html.

not, in fact, molest the 14-year old Rapp.[5] Then, in July 2023, a jury in England found Spacey not guilty of multiple sexual assault charges stemming from his time as artistic director of the Old Vic.[6]

Kevin Spacey, as a famous actor, enjoyed both wealth and fame before he was falsely accused six years ago. He could pay talented lawyers to successfully defend him in the many lawsuits filed against him, winning them all, and he could afford the expensive criminal defense attorneys who ultimately kept him out of jail. When he aired a seemingly strange but very telling video in December 2018, he could count on millions of viewers to watch his thinly veiled attempt to tell his side of the story.[7] Many others who find themselves accused of misconduct are not so fortunate. Catholic clergy, for example, almost always lack the considerable resources that Spacey had to defend himself. They also face something that Kevin Spacey did not have to contend with: the current system in which abuse allegations are handled within the Catholic Church in the United States.

2. The Plight of Accused Catholic Clergy

The failings of much of the Catholic episcopacy in the United States in the 1970s and 1980s regarding sexual abuse are well known. Too often, many of the bishops, relying on their own cadre of experts, trusted the advice of the mental health professionals they consulted instead of the legal tools available to them under canon law. This resulted in the placing of very sick or broken men who had done unspeakably evil things back into ministry.[8] We are now familiar with the tragic stories of the many victims who were harmed by such conduct.

5. Julia Jacobs and Nate Schweber, "Kevin Spacey is Cleared of Anthony Rapp's Battery Claim," *New York Times*, October 20, 2022: https://www.nytimes.com/2022/10/20/arts/television/kevin-spacey-verdict-anthony-rapp.html.

6. Herb Scribner, "Kevin Spacey acquitted in U.K. sexual assault trial," *Washington Post*, July 26, 2023: https://www.washingtonpost.com/arts-entertainment/2023/07/26/kevin-spacey-uk-verdict-sexual-assault/.

7. Kevin Spacey, "Let Me Be Frank," December 24, 2018, YouTube video: https://www.youtube.com/watch?v=JZveA-NAIDI.

8. Nicholas Cafardi, *Before Dallas: The U.S. Bishops' Response to Clergy Sexual Abuse of Children* (New York: Paulist Press, 2008).

Radical change to address this was the intent of the so-called Dallas Charter,[9] the agreement adopted by the US bishops at their annual meeting, held in Dallas in 2002, just months after damaging articles in *The Boston Globe* helped fuel an international firestorm of criticism against the Catholic Church.[10] The dramatic and relatively rapid response on the part of the bishops, ultimately approved by the Holy See as particular law for the United States, was intended to assure a wary public that the days of "looking the other way" when it came to sexual abuse of minors in the Church were over. While much progress has certainly been made on that score, including a sharp decrease in the number of recent reports of child sexual abuse,[11] there is undoubtedly a growing and serious concern that the basic human rights of priests and deacons in the United States are not being respected when it comes to accusations of wrongdoing.[12]

9. The original version of *The Charter for the Protection of Children and Young People*, frequently referred to as "the Dallas Charter," was first released by the USCCB in June 2002: "The Dallas Charter," *United States Conference of Catholic Bishops*, accessed October 16, 2023, https://www.usccb.org/topics/catholic-safeguards/dallas-charter. It specifically refers to preventing the sexual abuse of minors but has had an impact on the way other accusations are handled as well.

10. Michael Rezendes, "Church allowed abuse by priest for years," *Boston Globe*, January 6, 2002: https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/ story.html.

11. See United States Conference of Catholic Bishops, *2022 Annual Report: Findings and Recommendations* (Washington, DC: United States Conference of Catholic Bishops, 2023) vi: https://cdn.ymaws.com/usccb.site-ym.com/resource/group/156ofod7-fee7-4aff-afd2-4cfo76a24943/resource_toolbox/2022_cyp_annual_report.final.pdf (hereafter *2022 Annual Report*). The report remarks that "much has been accomplished to create safe environments for children, young people, and the people of God as a whole" and notes a continuation of the "downward trend in total allegations," with 82% of the 2,704 allegations in the last reporting year coming from "attorneys regarding allegations of abuse from many years ago."

12. See, e.g., John J. Coughlin, *Canon Law: A Comparative Study with Anglo-American Legal Theory* (New York: Oxford University Press, 2011) 72–74; Thomas G. Guarino, "The Dark Side of the Dallas Charter," *First Things*, October 2, 2019: https://www.firstthings.com/web-exclusives/2019/10/the-dark-side-of-the-dallas-charter; David A. Shaneyfelt and Joseph P. Maher, "Sacrificing Priests on the Altar of Insurance," *Homiletic and Pastoral Review*, February 24, 2015: https://www.hprweb.com/2015/02/sacrificing-priests-on-the-altar-of-insurance; Luis Navarro, "A General Canonical Backgrounder for Interpreting the USCCB Essential Norms in the Context of the Evolution of Canonical Penal Law," in *Towards Future*

Take, as an example, a fictional composite drawn from actual cases I have encountered as an advocate for priests over the last two years.[13] Monsignor Jones, a well-respected priest with decades of faithful service in various parishes within his archdiocese, receives a call one Monday morning from the archdiocesan vicar for clergy asking him to come to a meeting at the chancery the next day. When he asks what the meeting is about, Monsignor Jones is told that he will find out when he arrives. Growing a bit worried, Monsignor asks if he should bring an attorney or at least a priest friend to the meeting. The vicar for clergy assures Monsignor that such a step would be unnecessarily adversarial and recommends that he should come alone.

When Monsignor Jones enters the meeting room Tuesday morning, he is surprised to see not only the vicar for clergy, but also the vicar general, the human resources director, the safe environment coordinator, the chancellor, and two members of the prestigious law firm that represents the archdiocese. Stunned, the senior priest asks if there is some kind of problem. Indeed there is, as it turns out. Monsignor is notified that at least one accusation of sexual misconduct has been made against him, however he is not told the nature of the allegation nor the name of the accusers. He is only given a rough estimate of the time frame in which the alleged malfeasance was to have occurred: some time during the 1980s, which included his assignment as a teacher of high school theology.

In order to prevent scandal, Monsignor is told that it has been strongly urged by the archbishop himself that he should voluntarily

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Developments in Penal Law: U.S. Theory and Practice, ed. Patricia M. Dugan (Montreal: Wilson & Lafleur, 2010) 197–238; Joaquín Llobell, "The Balance of the Interests of Victims and the Rights of the Accused: The Right to Equal Process," in *The Penal Process and the Protection of Rights in Canon Law*, ed. Patricia M. Dugan (Montreal: Wilson & Lafleur, 2005) 67–127 (hereafter *The Penal Process and the Protection of Rights*); Ladislas Örsy, "Bishops' Norms: Commentary and Evaluation," *Boston College Law Review* 44 (2003) 999–1029; Avery Dulles, "Rights of accused priests: Toward a revision of the Dallas charter and the essential norms," *America*, June 21, 2004: https://www.americamagazine.org/issue/488/article/rights-accused-priests.

13. A similar summary was included in my article in the *Tulsa Law Review*: Michael J. Mazza, "Defending a Cleric's Right to Reputation and the Sexual Abuse Scandal in the Catholic Church," *Tulsa Law Review* 58 (2023) 77–97: https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=3295&context=tlr.

and immediately resign his office as pastor, "at least for the time being." As a precautionary measure during the initial investigation into the complaint, Monsignor must absent himself from all archdiocesan property, including the rectory in which he is living and which contains all of his personal belongings. Next, Monsignor is told that he is being sent to an inpatient mental health facility (one well-known for treating troubled priests) for an evaluation that is likely to take anywhere from three to six months. There is no reason to worry, he is assured, because the archdiocese will be paying for everything. They will also be covering the weekend Masses at the parish, issuing an announcement to be read from the pulpit, placed in the bulletin, and posted on the parish website stating that Monsignor has been put on administrative leave because an accusation of sexual misconduct "that is not manifestly false or frivolous" has been made against him.

Such communications, Monsignor is informed, should in no way be taken as an indication of his guilt or innocence. Nevertheless, in the interest of "transparency,"[14] the archdiocese has already committed itself to making these statements, along with the usual invitation to all victims of abuse to call the police to report any crimes and to call the archdiocesan victim assistance coordinator if they find themselves in need of pastoral care. Lastly, Monsignor is told that he will soon be contacted by a former FBI agent who has been hired by the archdiocese's legal counsel to conduct an investigation into the claims. He is told to make sure to cooperate fully with this investigation so that "the truth may be known." Monsignor asks again if he should secure either civil or canonical legal counsel, but he is told that such a move is not yet necessary, as there is no formal process against him. In addition, he is cautioned that any effort to interfere with or delay the investigation is not likely to be viewed positively by the Archdiocesan Review Board, the group of five lay people that

14. For a defense of the practice of posting names of accused clerics on the internet in the interest of "transparency," see Diane L. Barr, "Transparency vs. Privacy? Civil and Canonical Issues Regarding Releasing Lists of 'Credibly Accused' Clerics," *CLSA Proceedings* 83 (2022) 38–51. For a counter-argument, see Michael J. Mazza, "*Bona Fama* in an Age of 'Transparency': Publishing Lists of 'Credibly Accused' Clerics," *The Jurist* 78 (2022) 445–476.

will eventually review the findings of the investigator some six to nine months out. In the meantime, Monsignor will be placed on an inactive payroll status, meaning that he will be receiving the same pay as a priest who is not on an active assignment, such as a retired priest or one who is on sick leave.

The case described above, while a fictional composite, is fairly representative of the plight of many accused Catholic clerics today. Some priests fare better, others worse. Some, like the fictional Monsignor Jones, are caught completely off-guard by the anonymous accusations against them, and they are thus very confident in their categorical denials of the conduct alleged. Other clerics might know perfectly well (or at least suspect) the source of a particular accusation against them. Generally speaking, the number of accusations involving recent sexual abuse of minors by active priests continues to decline; more than half of such accusations made against Catholic clergy during the last audit year were leveled against men who were already dead, with the misconduct alleged to have occurred decades earlier.[15] Some accusations involve conduct that is at least arguably constitutive of either a civil or a canonical crime (e.g., certain kinds of sexual or financial misconduct). Many other accusations deal with conduct that is not criminal in nature, neither civilly nor canonically. For example, personality conflicts stemming from the inevitable tensions within a parish or school setting can lead to employment complaints; a young priest's immaturity or job-related stress can lead him to take refuge in alcohol or in unhealthy relationships; ideological battles or clerical envy can trigger vague accusations such as "boundary violations" that are aimed at ousting a perceived enemy.

None of this should come as a surprise to Catholics familiar with the failings of the first disciples or the struggles the Church has had through the centuries. In establishing his Church, the Lord knew full well that he was entrusting the sacred deposit of faith and the means of salvation to a group of fragile human beings, whose sins would often serve as a stumbling block to others and would impede the Church's effectiveness in the world.[16] This is one reason why the Church has always had some kind of provision for penal law, dating

15. *2022 Annual Report*, 18.

16. See Luke 17:1.

back as far as the Gospel teaching about fraternal correction[17] and St. Paul's injunction to the Corinthians to expel from their midst someone who had committed incest.[18] In other words, while all sin is harmful, certain kinds of sin were considered to be so destructive of the social fabric of the ecclesial community that they were labeled as crimes. Those who committed such crimes needed to be punished so that they would realize the error of their ways and amend their lives. The goal of the Church's penal law has always been, in an ultimate sense, the salvation of souls, including the restoration of justice, the reform of the sinner, and the repair of scandal.[19]

3. The Evolution of Procedural Law

Thus we arrive at the link connecting the two stories with which this article began—namely, how the story of the famous actor Kevin Spacey is related to the experience of an accused Catholic priest such as the fictional Monsignor Jones, and how both stories relate to the concept of a "standard of proof." Both narratives relate that Spacey and Jones stood accused of behavior that polite society claims to abhor; both were subject to the lightning-quick judgment of others; both were immediately stigmatized and shunned, regardless of whether they were in fact innocent of the charge. But what if they were guilty? How is society supposed to judge between innocence and guilt?

Legal historians have analyzed how, in various times and places, human communities have arrived at decisions regarding criminal culpability. Yale professor James Q. Whitman, in his 2008 book *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*,[20] shows that as a general matter, criminal trials before the modern period were not so much concerned with determining *facts* (i.e., who did what to whom and when) as much as they were interested

17. See Matt 18:15–20.

18. See 1 Cor 5:2.

19. See 1983 *CIC* c. 1311 §2.

20. James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008) 3–5, 18–19. Whitman argues throughout his book that "reasonable doubt" was not, in fact, originally a "standard of proof" as much as it was an instrument designed to provide "moral comfort" for those engaged in the task of passing judgment on others.

in assigning *moral responsibility* for a guilty verdict. In an age of smaller communities, Whitman argues, anonymous crime was much less common than it is today. But in an age of blood vengeance (where the guilty person's relatives could make life unpleasant for those who had found him guilty) and in eras in which many people were wary about sitting in judgment of another person in light of the Gospel warning not to judge one's neighbor[21] (let alone sentencing him to death for a crime), the ruling authorities were forced to develop techniques for helping people (both judges and juries) to arrive at guilty verdicts.

A dreadful but very common option for some early medieval societies was the "ordeal" (the *iudicium Dei*), in which a person, whose guilt had been largely already established by eyewitnesses or even by his own confession, was subjected to some kind of physical torment such as being cast into a body of water or subjected to fire. If the accused died as a result of the ordeal, those who had judged him could take a certain kind of comfort in the fact that it was not they who had killed him, but a just divine authority. If he happened to survive the ordeal, on the other hand, the accused was generally allowed back into the community as having proved his honor. A slightly more refined version of the ordeal was made available to people of higher status, who could refute an allegation of wrongdoing by means of a "purgative oath." Such a technique, clearly born of a different epoch than ours, was intended to demonstrate the sincerity of the denial. Everyone would know that by formally denying the charge in public, the accused would be imperiling his immortal soul if he were lying.[22]

The Church eventually helped put an end to ordeals, not only because they were seen as irrational, but because they represented audacious sins, tempting God by essentially daring him to perform miracles.[23] Ordeals also posed a problem for those who wanted to put an end to occult sexual crimes of the clergy, insofar as they were part of a criminal prosecution regime that demanded an accusation

21. See Matt 7:1.

22. See Whitman, 59–63.

23. Finbarr McAuley, "Canon Law and the End of the Ordeal," *Oxford Journal of Legal Studies* 26 (2006) 473–513, at 477–484.

by a victim or a witness before someone could be condemned. This obviously presented obstacles when trying to prosecute crimes such as clerical concubinage, a reality that did not often lend itself to such direct evidence.[24] When the lawyer-Pope Innocent III included a specific injunction against clerical participation in ordeals in the legislation of the Fourth Lateran Council in 1215,[25] there was a clear momentum in favor of better alternatives to the *iudicium Dei*. Two different systems emerged. Legal historians have discussed the many reasons why an *adversarial* system developed in England, a regime relying on impartial judges, independent juries, and active prosecutors acting in the name of the crown, with an express acknowledgement of due process.[26] Meanwhile, on the European continent, an *inquisitorial* system developed in which judges took a more active role in the prosecution of the case, yet always within the context of a system of justice that sought to guarantee the basic human rights of the accused.[27] This latter system, of course, is the one largely employed in the canonical system.

The development by the Catholic Church in the twelfth and thirteenth centuries of the *ordo iuris* (also referred to as the *ordo iudiciarius* or the *ordo iudiciorum*) represented a landmark achievement in the history of law and in the ordering of human society.[28] Given that some of its features were drawn not only from ecclesiastical sources but also from Roman law of late antiquity, the system is also fairly denominated "romano-canonical procedure."[29] The good tree of the

24. James A. Brundage, "Full and Partial Proof in Classical Canonical Procedure," *The Jurist* 67 (2007) 58–71, at 61: https://muse.jhu.edu/article/610257/pdf.

25. Fourth Lateran Council, c. 18, November 11, 1215 (X 3.50.9), cited in McAuley, 473.

26. See, e.g., Whitman, 126–157. See also Max Crema and Lawrence B. Solum, "The Original Meaning of 'Due Process of Law' in the Fifth Amendment," *Virginia Law Review* 108 (2022) 447–535, at 470, noting, *inter alia*, that the Six Statutes enacted in England during the reign of King Edward III in the mid-fourteenth century, which built upon the foundation laid by the Magna Carta a century before in 1215, contain the first use of "due process of law" in English law.

27. See, e.g., Whitman, 97–124. See also Melodie H. Eichbauer, "Medieval Inquisitorial Procedure: Procedural Rights and the Question of Due Process in the 13th Century," *History Compass* 12 (2014) 72–83.

28. Brundage, 58.

29. Ibid.

ordo iuris became known by its abundant good fruits, including such bedrock principles known today as due process, the presumption of innocence, and the privilege against self-incrimina-tion.[30] One of the most important characteristics of the new procedural regime was its devotion to the concept that wrongdoers could only be punished after their guilt had been conclusively *proved*;[31] in other words, a person could not be subjected to a penalty unless and until a judge had been convinced in his own mind of the judgment rendered.[32]

4. Stages of Certainty

The standard of proof required for guilty convictions under canon law in the twelfth century was high: "clearer than the light of the midday sun" (*luce meridiana clariores*).[33] Beyond that, "full proof" (*plena probatio*) generally required the testimony of two unimpeachable witnesses. As such testimony was often difficult to obtain, frustration grew as odious criminal conduct such as clerical concubinage went unchecked. Pope Innocent III, not easily deterred from his program of reform, once wrote that it was "in the public interest that crimes not remain unpunished."[34] His efforts to revise criminal procedure continued through a series of decretals, rendering criminal trials easier to initiate and making criminal convictions easier to obtain.[35] Nevertheless, basic principles of the *ordo iuris* were observed: the defendant must be summoned, informed of the charges against him, and given the opportunity to defend himself. The accused must be informed of those who had offered testimony against him and what they had

30. Ibid., 59. See also Kenneth Pennington, "Innocent Until Proven Guilty: The Origins of a Legal Maxim," in *The Penal Process and the Protection of Rights*, 45–66. This is not to say, however, that each of those principles was understood in the 15th century in the same way as they are in the 21st century.

31. Brundage, 60.

32. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983) 251.

33. Whitman, 100.

34. X 5.39.35: "Respondemus, quod, cum praelati excessus corrigere debeant subditorum, et publicae utilitatis intersit, ne crimina remaneant impunita, et per impunitatis audaciam fiant qui nequem fuerant nequiores, non solum possunt. . . ."

35. Brundage, 69.

alleged. He must also be given the opportunity to object and rebut the evidence against him. The rationale for such provisions was self-evident: "lest the suppression of the names of a hostile witness or the exclusion of exceptions [i.e., defenses] present an insolent person with the chance to bear false witness."[36]

Pope Innocent III, while developing criminal canonical procedure, never strayed from the well-established principle of both law and morality regarding *doubt*, which had been laid down centuries earlier by his predecessor Pope Saint Gregory the Great (590–604) and captured by Gratian in his *Decretum* (c. 1140): "It is a grave and unseemly business to give a judgment that purports to be certain when the matter is doubtful" ("Grave satis est et indecens, ut in re dubia certa detur sententia").[37] Gratian added a corresponding principle, which had already been proposed by Saint Ivo of Chartres: "Things that are not proved through certain evidence are not to be believed" ("Non credantur que certis iudiciis non demonstrantur").[38]

Such principles provided the foundation of a four-level canonical structure regarding levels of certainty: *doubt*, *suspicion*, *opinion*, and *moral certitude*.[39] As articulated by the great medieval canonist Bartolus de Saxoferrato (1313–1357) and inspired by theologians' musings on the four stages between ignorance and moral certainty, at the first of these four levels stands the notion of "doubt." Strictly speaking, this level does not involve any degree of certitude whatever, but merely opens the door to inquiry. "Suspicion" is next, signifying that the mind of the judge is already leaning in a certain direction, though not justified by sufficient evidence to dislodge the initial doubt to any real degree. Once the judge is in possession of "strong arguments," his mind could be said to have reached the level of "opinion," signifying that his mind had obtained more secure knowledge than it had had on either of the two previous levels, but that it is still not secure enough to completely dispel any reasonable doubt. The fourth and highest level of certitude is labeled "moral certitude,"

36. Ibid., 70.

37. C. 11 q. 3 c. 74. See also Whitman, 118.

38. C. 11 q. 3 c. 75. See also Whitman, 118.

39. Mirjan Damaška, *Evaluation of Evidence: Pre-Modern and Modern Approaches* (Cambridge: Cambridge University Press, 2019) 33.

allowing the judge to "firmly adhere to one part without any doubt as to something contrary."[40]

Another illustration of this structure is provided by Prosper Farinacci, a sixteenth century legal scholar, who applies the first three of these four levels of certainty to a practical example in his work *Practice and Theory of Criminal Law*:

> At times the judge, faced with the evidence presented before him, feels doubt, now leaning to the one party, now to the other, and his mind is not able to come down on one side, as when the proofs are equal or there is some obscurity about them. Now after this period of doubting, the judge begins to incline to one party more than the other. At that point, doubt ends, and suspicion begins. And if this suspicion is the result of grave proofs [*si ista suspicio oritur ex gravibus indiciis*], then suspicion ends, and opinion begins. . . . Now properly speaking, we say that the judge "doubts" when no reason or cause is present [*quando nulla adest ratio, nullaque causa*], which inclines him more to one party than the other . . . and a person is "in doubt" when his mind does not incline more to the plaintiff than it does to the defendant. But if after doubting, the judge is moved by some piece of evidence or argument to lean in the direction of the other party, then he is no longer said to "doubt" but to "have a suspicion."[41]

5. The Sources of Moral Certitude in the 1917 Code

The concept of moral certainty appeared in the first codification of canon law in 1917 as part of the requirements for the pronouncement of any judicial sentence as articulated in canon 1869.[42] In listing the sources for this canon, Cardinal Pietro Gasparri relied on both long-revered canons in the *Decretum* and on curial pronouncements of rel-

40. Ibid.

41. Prosper Farinacci, *Praxis et Theoricae Criminalis Partis Primae Tomus Secundus* (Lyon: Sumptibus Iacobi Cardon, 1634) 157 (*De Indiciis & Tortura*, Tit. V, q. xxxvi, nos. 5, 6, 9), quoted in Whitman, 120.

42. See 1917 *CIC* c. 1869. See also Judith Hahn, "Moral Certitude: Merits and Demerits of the Standard of Proof Applied in Roman Catholic Jurisprudence," *Oxford Journal of Law and Religion* 8 (2019) 300–325.

atively recent origin.[43] He included, for example, one of the canons already cited above—namely, the famous injunction of Pope Saint Gregory the Great that it was "a grave and unseemly business" to render a judgment purporting to be certain on a matter that was, in reality, doubtful.[44] Also included were ten canons of question 1 in Cause 2 of the *Decreti Pars Secunda*,[45] all providing clear support for the same general proposition. Canon 1 of question 1 in Causa 2 stated that passing judgment on anyone was impossible ("non possumus") unless that person was either convicted or had voluntarily confessed.[46] Canon 12 of the same question and cause quotes from a famous letter of Saint Augustine,[47] in which the Bishop of Hippo had recounted his own struggles in assigning guilt in a case involving two disputing parties, effectively asserting that it would be wrong to arrive at a judgment purporting to be certain while the cause was still under consideration.[48]

In addition to these classical sources, Gasparri listed as sources two instructions from congregations within the Holy See: one from June 6, 1880 by the Sacred Congregation of Bishops and Regulars and the other from 1883 by the Sacred Congregation for the Propagation of the Faith. The first document[49] contained specific pro-

43. *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus*, ed. Pietro Gasparri (Vatican: Typis Polyglottis Vaticanis, 1933) 523.

44. C. 11 q. 3 c. 74.

45. C. 2 q. 1 cc. 1–3, 5, 10–13, 18, 20.

46. C. 2 q. 1 c. 1 ("Nos in quemquam sententiam ferre non possumus, nisi aut convictum, aut sponte confessum").

47. Augustine, Epistola LXXVIII, in *Patrologiae Latinae Tomus*, ed. Jacques-Paul Migne (Paris: Ateliers catholiques, 1865) 33:267–272.

48. C. 2 q. 1 c. 12: "Nomen presbiteri propterea non ausus sum de numero collegarum eius vel supprimere vel delere, ne divine potestati, sub cuius examine causa adhuc pendet, facere viderer iniuriam, si illius iudicium meo vellem iudicio prevenire. Quod nec in negotiis secularibus iudices faciunt, quando ad maiorem potestatem dubitatio defertur, ut pendente relatione aliquid audeant commutare. In episcoporum quoque concilio constitutum est, nullum clericum, qui nondum convictus est, suspendi a communione debere, nisi ad causam suam examinandam se non presentaverit."

49. Sacred Congregation of Bishops and Regulars, instruction, June 11, 1880: *Collectanea S.C. de Prop. Fide*, 2:1534. This same document is also contained in the *ASS* 13 (1880) 324–336, with an Italian translation alongside the Latin original.

visions for the proper exercise of juridical power, including one describing the demanding standard of legal proof necessary to find someone guilty of a crime: "Ad retinendam in specie culpabilitatem accusati opus est probatione legali, quae talia continere debet elementa, ut veritatem evincat, aut saltem inducat moralem certitudinem, remoto in contrarium quovis rationabili dubio."[50] This last phrase indicates a rough equivalence between the traditional concept of moral certainty and the familiar phrase in secular parlance "beyond a reasonable doubt."

The second instruction,[51] relating to the manner in which criminal and disciplinary cases involving clerics from the United States of America were to be handled, followed up on an instruction that had been given five years before. With respect to establishing legal guilt, the instruction provided that "legal proof" (*probatio legalis*) was necessary, which must be evident when "the truth truly demonstrated shines forth" or at least when a "moral conviction is induced beyond any reasonable doubt to the contrary."[52]

6. Papal Magisterium on Moral Certainty

After the 1917 code was promulgated, canonical jurisprudence continued to benefit from, among other sources, the annual papal allocutions to the Roman Rota, the juridic value of which is not to be discounted.[53] Two popes in particular expanded upon the meaning and significance of the moral certainty standard by means of their Rotal addresses. Of particular note is the famous address by Pope

50. The Italian translation in the *Acta Sanctae Sedis* reads as follows: "A ritenere poi in specie la colpabilità dell'imputato è necessario di averne la prova legale, che deve contenere tali elementi da dimostrare la verità, o almeno da indurre una morale convinzione, rimosso ogni ragionevole dubbio in contrario."

51. Sacred Congregation for the Propagation of the Faith, instruction, 1883: in *Collectanea S.C. de Prop. Fide*, 2:1586.

52. Number 16 of the document provides as follows: "Ad admittendam vero rei culpabilitatem necessaria est probatio legalis, quae iis momentis constare debet, quibus veritas vere demonstrata elucescat, vel saltem moralis convictio inducatur quocumque rationabili dubio oppositi remoto."

53. See Giuseppe Comotti, "Considerazioni circa il valore giuridico delle allocuzioni del Pontefice alla Rota romana," *Ius Ecclesiae* 16 (2004) 3–20.

Pius XII to the Roman Rota in October 1942,[54] in which he discussed the various "degrees" of certitude.

In this address, Pope Pius XII first describes "absolute certainty," in which every possible doubt regarding the truth of a fact and the groundlessness of the contrary is totally excluded. Such absolute certainty, however, is not necessary to pronounce judgment, given that at times it is simply impossible to obtain. Thus, he explains, it would be unfair to expect such a degree of certainty from either the parties or the judge. It would also have the practical effect of incapacitating the system of justice. On the other side of the ledger is "probability or near certainty," which does not provide a sufficient basis for a judicial ruling because "it does not exclude all reasonable doubt and leaves a well-founded fear of error."

Between these two "extremes," Pius XII writes, stands "moral certainty." It is characterized, on the positive side, by "the exclusion of well-founded or reasonable doubt" and is thus readily distinguishable from the state of "quasi-certainty." On the negative side, it still allows for the "absolute possibility of the contrary" and is thus distinct from the aforementioned "absolute certainty." Moral certainty is sufficient for a fair judgment, the pope continues, even if in a particular circumstance absolute certainty could ultimately be achieved either by direct or indirect means. Employing the standard of moral certainty is the only path forward, the pope notes, for the orderly, timely, and efficient administration of justice.

Pope Pius XII went on to acknowledge that at times moral certainty is reached only upon the consideration of the *sum* of the *indicia* and evidence rather than on individual pieces. This consideration, however, does not involve simply adding up a series of probabilities and then calling it certainty; that would represent an illegitimate transition from one species of intellectual activity to another. Rather, this mental process involves recognizing that the "simultaneous presence of all these individual clues and proofs can have a sufficient foundation only in the existence of a common source or basis from which

54. See Pius XII, address to the Roman Rota, October 1, 1942: *AAS* 34 (1942) 338–343. The presentation was given in Italian, and no official translation into another language appears to have been made. The English translation presented here is my own.

they derive, namely, in objective truth and reality." Such certainty emanates, then, from the wise application of the reliable principle of "sufficient reason."

Pius XII also cautions that this certainty is "objective," based on objective grounds, and not purely a subjective concept, involving "merely personal feelings or opinions." In order to ensure the objectivity of this certainty, the pope stresses the requirements of procedural law, making specific reference to the need to adhere to the well-established rules of inquiry and evidence then captured in Title 10 of Book IV of the 1917 code. He points to the need for certain proofs, corroborations of evidence, and offices such as the notary, the promoter of justice, and the defender of the bond as all playing an important role in the determination of an "objectively grounded moral certainty as to the reality of the fact." Of particular interest is the pope's observation that a judge could never legitimately claim that he had *personally* reached moral certainty but could not declare so in his official capacity based on the acts and proofs before him. Such an equivocation would weaken the trust that the people must have in the system of justice.

Some forty years later, Pope John Paul II revisited the topic of moral certainty in his 1980 address to the Rota, emphasizing the standard's high demands and citing the advice of Saint Gregory the Great: "The unconsidered shall not be rashly judged." The pope recalled the important intervention made by Pope Pius XII in 1942 on the topic, and he specifically noted how the arguments of the others involved in the judicial process (including defense advocates) actually aid the judges in their difficult, delicate, and important work of finding the truth and arriving at a truly just judgment.[55]

In summary, we see that the canonical standard of "moral certainty" is indeed very high, comparable to the secular standard of "beyond a reasonable doubt."[56] It is the canonical standard which is to be applied by judges who determine, at the end of a formal process (whether judicial or administrative), the matter to be decided. Canon

55. John Paul II, address to the Roman Rota, February 4, 1980: *AAS* 72 (1980) 172–178, at nn. 5–6.

56. The concept of "beyond a reasonable doubt" is explained in greater detail below; see section 10.5.

1608 §§1–2 of the 1983 code states that before a judge can reach "moral certainty," he "must derive this certitude from the acts and the proofs" (*ex actis et probatis*), meaning only that evidence which was properly brought before him during a canonical process that is conducted according to the rule of law.[57] This means that not only must the judge properly weigh evidence according to the applicable canonical norms (e.g., cc. 1526–1586) and basic legal principles (e.g., the presumption of innocence, the applicability of periods of prescription, proportionality, the non-retroactive nature of a penal law), but that fundamental natural human rights must be respected (e.g., the exercise of the right of defense with competent legal counsel). The quest for moral certainty is a serious one with grave consequences not only for those who are judged, but for the one who is doing the judging.

7. The *Iter* of an Accusation

In recent years, especially after the adoption of the Dallas Charter in 2002, a confusing array of various standards of judgment have been introduced into ecclesial circles. Bitter public controversies have sometimes resulted, especially as they relate to the publication of names of the accused on internet websites.[58] To the extent that a

57. *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (Vatican City: Libreria Editrice Vaticana, 1983), c. 1608 §§1–2: "§ 1. Ad pronuntiationem cuiuslibet sententiae requiritur in iudicis animo moralis certitudo circa rem sententia definiendam. § 2. Hanc certitudinem iudex haurire debet ex actis et probatis." English translation from *Code of Canon Law. Latin-English Edition: New English Translation* (Washington, DC: CLSA, 2012). All subsequent English translations from this code will be taken from this source unless otherwise indicated. Canon 1342 §1 of the recently revised Book VI makes clear that moral certainty is also required when imposing or declaring a penalty by means of an extrajudicial decree.

58. See, e.g., John Panicker, "Family of Jesuit priest files canon law appeal to Vatican over accused priests list," *NewsWest9*, February 12, 2019: https://www.newswest9.com/article/news/local/family-of-jesuit-priest-files-canon-law-appeal-to-vatican-over-accused-priests-list/513-8c19d294-a6b0-4070-bdc3-3fc0de955ce8; Robert Patrick, "St. Louis priest gets apology from anti-abuse group; suit against police is dismissed," *St. Louis Post-Dispatch*, November 27, 2017: https://www.stltoday.com/news/local/crime-and-courts/st-louis-priest-gets-apology-from-anti-abuse-group-suit-against-police-is-dismissed/article_becocc90-6d17-50a8-9610-932dd20fda59.html;

man has either confessed to a crime or been found guilty of the same, any damage to his reputation is largely his own fault. Nor is it required that moral certitude be attained before any kind of juridical action be taken. Rather, the point is that thousands of real men, not just fictional characters like Monsignor Jones, daily face a risk that their reputations will be destroyed in the blink of an eye by a far less demanding standard than "moral certainty." A look at the chronology of an accusation will help illustrate the point.

When an accusation is made against a priest, his "ordinary" (generally a bishop if the priest is a diocesan priest or a religious superior if the priest is a member of an institute of consecrated life or society of apostolic life)[59] is required under canon 1717 to evaluate the accusation. Canon 1717 §1 provides that "whenever the Ordinary receives information, which has at least the semblance of truth [*saltem veri similem*], about an offence, he is to enquire carefully, either personally or through some suitable person, about the facts and circumstances, and about the imputability of the offence, unless this enquiry would appear to be entirely superfluous."[60] What exactly is meant by *saltem veri similem* is a matter of debate.[61] Some noted canonists have described it as "much less than probable," given that the intentionally low standard is intended only to weed

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Jameson Cook and Jamie Cook, "Suspended priest seeks return following favorable ruling from Vatican," *Royal Oak Tribune*, April 29, 2021 (discussing August 2020 lawsuit of archdiocesan priest Fr. Eduard Perrone against a fellow-archdiocesan priest, Msgr. G. Michael Bugarin, in Wayne County, Michigan).

Despite significant hurdles for falsely accused clergy wishing to seek relief in civil court by filing defamation lawsuits, such claims are not out of the realm of possibility. See, e.g., *In re Diocese of Lubbock*, 624 S.W.3d 506 (Tex. 2021) (Boyd, J., dissenting) (listing over a dozen state and federal cases in support of the proposition that defamation lawsuits in ecclesial contexts are not necessarily barred by the ecclesiastical abstention doctrine under First Amendment jurisprudence and case law).

59. See 1983 *CIC* c. 134 §1.

60. 1983 *CIC* c. 1717 §1: "Quoties Ordinarius notitiam, saltem veri similem, habet de delicto, caute inquirat, per se vel per aliam idoneam personam, circa facta et circumstantias et circa imputabilitatem, nisi haec inquisitio omnino superflua videatur."

61. See R. Lucien Millette, "An Analysis of the Preliminary Investigation in Light of the Rights of the Accused," *The Jurist* 75 (2015) 109–195, at 139–140.

out claims that appear to be manifestly false or frivolous.[62] As we saw in the fictional case of Monsignor Jones, however, even such a low standard can sometimes trigger public announcements in practice, despite what canon 1717 §2 provides about how "care must be taken" (*cavendum est*) throughout the preliminary investigation for the good name of all involved.

After having received the *notitia criminis* (also known as the *notitia de delicto*) and after having evaluated it according to the standard set forth in canon 1717, the ordinary is to decide whether to initiate a process (whether judicial or extrajudicial) to impose or declare a penalty and whether this would be expedient given the aims of penal law.[63] Thus, as has been suggested by the American canonist Reverend Luke Millette, it might be helpful to consider the assessment of an allegation in two distinct but related steps. First, there is an initial evaluation "in a black and white manner" of the overall credibility of the allegation; this involves asking questions such as whether it is even possible for the event(s) to have occurred and whether a canonical crime even appears to be involved. After this initial review, the allegation is evaluated according to the "semblance of truth" standard, exploring, by means of the canon 1717 preliminary investigation, any "gray area" that remains after the initial assessment.[64]

In many American dioceses and religious orders, however, this "preliminary investigation," is, in practice, far from "preliminary." Investigations are often outsourced to independent investigation firms staffed by former law enforcement officers, who spend great amounts of time and money in extensive investigations that can take several months. As a result, at the conclusion of such thorough investigations, dioceses or religious orders often pledge themselves to publishing the names of the men under investigation as having

62. See Velasio De Paolis and Davide Cito, *Le sanzioni nella Chiesa* (Rome: Urbaniana University Press, 2008) 235 ("molto meno che probabile e ancor meno che certa").

63. See 1983 *CIC* c. 1718 §1.

64. Millette, 143.

been accused of a "substantiated"[65] or "credible"[66] claim in the interest of "transparency." In the absence of any reference to either a judicial or administrative canonical process on such internet postings, one is left to assume that no such process occurred and that the "preliminary investigation" has instead supplanted the actual trial called for under the law, despite the fact that by no means can a one-sided investigation provide for the safeguarding of the fundamental rights of the accused.

Other English-speaking countries have had to deal with accusations of clerical sexual misconduct,[67] of course, and it is instructive for our purposes to see how boldly the Church in New Zealand has treated the question of standards of proof in a canonical preliminary investigation. Under *Te Houhanga Rongo—A Path to Healing* (2020),[68] a set of principles and procedures approved by the six bishops of the country and many religious orders serving therein,[69] an allegation of misconduct against a "Respondent" is first investigated by an "Independent Investigator." Throughout the investiga-

65. The current website for the Archdiocese of St. Paul-Minneapolis, to take one example, lists "individuals with substantiated claims against them," defining a "substantiated claim" as "one for which sufficient evidence exists to establish reasonable grounds to believe that the alleged abuse occurred." See "Disclosures regarding clergy sexual abuse of minors," *Archdiocese of Saint Paul & Minneapolis*, accessed October 21, 2023, https://safe-environment.archspm.org/accountability/clergy-disclosures.

66. The current website for the Diocese of Oakland, for example, lists the names of priests "credibly accused" of the sexual abuse of a minor, noting that while "there is no standard definition for a 'credible accusation,'" one of the criteria used to assess credibility is whether "after review of the reasonably available, relevant information, there is reason to believe the allegation is more likely than not to be true." See "Credible Accusations": https://oakdiocese.org/credible-accusations.

67. See, e.g., Canadian Conference of Catholic Bishops, *Protecting Minors from Sexual Abuse* (Ottawa: CCCB Publications, 2018). Section 4.7, at 98, provides that in accord with canon law and the *Canadian Charter of Rights and Freedoms*, any accused person is presumed innocent until the contrary is proven in accordance with the norms of law, "in a fair and public hearing by an independent and impartial tribunal."

68. National Office for Professional Standards, The Catholic Church in Aotearoa New Zealand, *Te Houhanga Rongo—A Path to Healing*, February 2020: https://safeguarding.catholic.org.nz/wp-content/uploads/2020/02/A-Path-to-Healing.Edition-Feb-2020.pdf.

69. Ibid., Appendices 1 and 2.

tion, if it is determined that the person to be investigated is to be "placed on leave or directed into non-contact duties," the policies provide that "this will be managed confidentially," and that "it is important that no public statements are made at this time by any of the parties."[70] Upon the conclusion of the investigation, the complaint is then weighed by a "Complaints Assessment Committee" on the "balance of probabilities."[71] The Committee then makes a recommendation to the bishop or congregational leader whether the complaint should be "upheld."[72] If it is, the "Respondent" is then referred to as an "Offender," even though *no canonical process has yet been undertaken*, and a recommendation is made that he be *dismissed* from his religious institute, if the person is a member of one.[73] If the "Offender" is a diocesan cleric, on the other hand, a "request" may be made by the relevant Church authority that the person "apply to return to the lay state" *or* that a canonical penal process be commenced.[74]

8. The Crisis of "Credibility"

The word "credibility" is seldom used in canonical language, appearing but once in the 1983 code, as "credibilitate" in canon 1678 §1 with respect to the believability of the parties in a matrimonial process. Nevertheless, the term frequently appears in public announcements concerning accused clerics today.[75] The lack of a generally accepted definition raises significant concerns. In the USCCB's 2016 Annual Report on Child and Youth Protection, for instance, the words "credible" and "credibility" are not defined, despite being used over four dozen times. Under the paragraph heading "Determination of Credibility," one reads only that "every diocese and eparchy follows a process to determine the credibility of any allegation of clergy sexual abuse, as set forth in canon law and the *Charter for the Protection*

70. Ibid., Form 2: Respondent's Information Sheet, point 14.

71. Ibid., Art. 3.61.

72. Ibid., Art. 3.62.

73. Ibid., Art. 3.79(b).

74. Ibid., Art. 3.68.

75. See https://www.bishop-accountability.org (listing several dozens of priests "credibly" accused).

of Children and Young People."[76] Elsewhere in the 2016 Report the related term "substantiated" is defined as describing "an allegation for which there is enough evidence to prove that the abuse occurred,"[77] though no explanation is given for whether there is any relation between "substantiated" and "credible." The definition provided for "unsubstantiated," meanwhile, states only that an unsubstantiated allegation is one "for which enough evidence exists to prove that the abuse did not occur."[78]

One year later, in 2017, the drafters of the USCCB annual report began defining the term "substantiated" in this way: "'Substantiated' describes an allegation for which the diocese/eparchy has completed an investigation and the allegation has been deemed credible/true based upon the evidence gathered through the investigation."[79] Such verbiage appears to raise more questions than it answers, such as whether the words "credible" and "true" now mean the same thing, whether they instead represent different positions on a sliding scale, or whether the word "credible" has morphed from its etymological meaning—tied to being capable of belief—to being employed now as a synonym for reality itself. If this is so, how does one respond when faced with people who appear to be quite "credible" but who assert completely contradictory versions of events, such as witnesses? Further, if "substantiated" is now equivalent to "true," but by definition has been limited to the "evidence gathered through the investigation," then what is to be gained by a subsequent canonical process, whether judicial or administrative? Another troubling question is what effect all this uncertainty about standards is having on the morale of the thousands of priests and deacons working in the United States.[80]

76. USCCB, *2016 Annual Report: Findings and Recommendations* (April 2012), 38, available at https://www.usccb.org/issues-and-action/child-and-youth-protection/upload/2016-Annual-Report.pdf.

77. Ibid., 10.

78. Ibid.

79. USCCB, *2017 Annual Report: Findings and Recommendations* (April 2012), 23, available at https://www.usccb.org/issues-and-action/child-and-youth-protection/upload/2017-Report.pdf.

80. See, e.g., Brandon Vaidyanathan et al., "Well-being, Trust, and Policy in a Time of Crisis: Highlights from the National Study of Catholic Priests," *The Catholic*

One notable exception to the widespread use of the "credible" standard is the Archdiocese of Boston, which began listing in August 2011 the names of clergy accused of child sexual abuse. In explaining his decision not to use the vague term "credible," Sean Cardinal O'Malley stated that the word "can have a variety of meanings," including anything from "'plausible' but not proven, to 'more likely than not' (the standard used in civil cases), to the high standard used for convictions in criminal and canonical cases ('beyond a reasonable doubt/subject to 'moral certitude')."[81] Judging from the ubiquity of the word "credible" on Catholic websites, the Cardinal's nuanced and critical view of it appears to place him in a minority position, at least at present. For it is clear that not everyone is deterred from using key terms despite the lack of a consistent and coherent definition of them.

One civil law firm, for instance, hired by an American archdiocese to survey its priest personnel files, produced in 2019 a comprehensive report on sexual abuse allegations in the archdiocese, listing the names of almost a dozen priests with a "substantiated allegation of abuse of a minor."[82] The authors admitted to having "grappled with a difficult question" when compiling the report—namely, what "standard of proof" should be used when deciding whether to publish the name of a particular priest. After consulting the practices of other dioceses that had issued similar reports of "accused clergy," the law firm found that there was "no widely accepted standard of proof," and that dioceses had employed markedly different concepts of key criteria such as "credible."[83]

Project, October 2022: https://catholicproject.catholic.edu/wp-content/uploads/2022/10/Catholic-Project-Final.pdf (noting that 82% of the 3,500 American priests surveyed reported that they "regularly fear" being falsely accused of sexual abuse).

81. "Cardinal's Decision Regarding the Archdiocese of Boston's Publication with Respect to its Clergy Accused of Sexual Abuse of a Child," *Archdiocese of Boston*, August 25, 2011: available at https://www.bostoncatholic.org/protecting-children-word-welcome/cardinals-decision-regarding-archdiocese-bostons-publication-respect-its-clergy-accused-sexual.

82. "Report to the Archdiocese of Oklahoma City: Independent Investigation of Allegations of Sexual Abuse of Minors 1960–2018, *McAfee & Taft Professional Corporation*, October 3, 2019: https://archokcreport.com/wp-content/uploads/2019/10/OKC_Archdiocese_Report_FINAL.pdf.

83. Ibid., 4.

In describing their reliance on the standard of "substantiated," the law firm acknowledged its discomfort with the possibility they were facilitating rash judgments, thus violating the right of an accused person "not to be convicted in the court of public opinion with due process and without just cause." The lawyers went so far as to make a frank admission: "As attorneys, we are mindful of the power of accusation, especially in this context where the mere accusation of sexual abuse of a minor can have serious and lasting consequences for that person, both reputational and otherwise (even when the accusation is later proven to be unfounded in a court of law). We are sensitive to the fact that including a person's name in the list contained in this Report may subject that person to such consequences."[84]

Despite this stated reluctance, the report did in fact employ a standard far lower than the one required under either civil or canon law for the imposition of a penalty. The "evidence" used in determining whether an accusation was "substantiated" included such items as whether a settlement had ever been paid to the accuser, whether more than one accusation had been made against the same man, and whether the ministry of the accused had ever been restricted in the wake of an initial investigation.[85]

None of these three named circumstances, of course, is dispositive. The Apostolic Signatura recently ruled that in no way may the simple payment of a settlement be construed as an admission of guilt.[86] If a settlement is paid, even for a minimal "nuisance" amount, friends and relatives of the successful claimant might well file their own claim, and if the accusation is publicized, other allegations are likely to follow. Given the common contemporary practice of placing severe restrictions on priests almost from the moment an accusation is made, one wonders how much relevance such a fact has in determining guilt.

84. Ibid., 5.

85. Ibid.

86. Supreme Tribunal of the Apostolic Signatura, definitive sentence *c.* Stankiewicz, prot. n. 52041/16 CA, January 26, 2019: *Ius Canonicum* 63 (2023) 381–400, at 389–390. No. 8 of the sentence includes the following phrase, in English, echoing the severe reproach ("acriter improbat") by the Congregation for the Doctrine of the Faith of an assessor who posited that such a settlement was evidently indicative of guilt: "One might question whether this assessor is aware of the nature of financial settlements in [the country at issue]."

One explanation for the law firm's difficulty in arriving at a more appropriate standard of proof than "substantiated" might have been their willful rejection of canon law, which they freely admitted in their report: "Our firm is not trained, licensed, or versed in Canon Law, and our attorneys are not Canonists. As such, neither our independent investigation nor this Report give any weight, consideration, or credence to any of the requirements, obligations, or protections afforded by Canon Law."[87]

9. "Established Allegations"

Another standard often employed in the current environment is captured in the curious phrase "established allegation," frequently used by religious orders operating within the United States. The neologism can fairly be described as oxymoronic insofar as it attempts to modify "allegation"—a word which by definition signifies only an as yet unproven statement or accusation—with the adjective "established," which means something demonstrated or proven as "stable." In any event, despite the plain language of canon 1717 regarding the precursory nature of a preliminary investigation, religious orders routinely post on the internet the names of accused priests who were somehow judged without any formal canonical process. One province, for example, states that an "established allegation" is "based upon the facts and circumstances, [where] there is objective certainty that the accusation is true and that an incident of sexual abuse of a minor has occurred."[88] It continues: "Established Allegation is not based upon a 'preponderance of the evidence,' i.e., more likely to be true than not, which may be established by 51% or more of the evidence. Established Allegation is in keeping with the canonical standard of 'moral certitude' which states that major superior recognizes that the contrary [that the allegation is false] may be possible, but is highly unlikely or so improbable, that the major superior has no substantive fear that the allegation is false."[89]

87. Ibid., 49.

88. See Congregation of the Mission, The Vincentians Western Province, "Safe Environment Resources," Praesidium Accreditation Standards, 2020: https://www.vincentian.org/wp-content/uploads/2023/05/Accreditation-Standards_Religious_0720docx.docx-Accreditation_Standards_for_Religious_Institutes_2020.pdf.

89. Ibid.

One notices in this disclosure the use of the phrase "moral certitude" but without reference to any canonical process. What follows is another example of the same phenomenon used by a different religious order, with some subtle variations in the disclosure that do not seem to add any more clarity:

> For the purposes of this list, a finding of credibility of an allegation of sexual abuse of a minor is based on a belief, with moral certitude, after careful investigation and review by professionals, that an incident of sexual abuse of a minor or vulnerable adult occurred, or probably occurred, with the possibility that it did not occur being highly unlikely. "Moral certitude" in this context means a high degree of probability, but short of absolute certainty. As such, inclusion on this list does not imply the allegations are true and correct or that the accused individual has been found guilty of a crime or liable for civil claims.[90]

Recent published statements from the Dicastery for the Doctrine of the Faith (DDF) offer helpful guidance on the moral certitude standard and its relation to preliminary investigations and the publishing of lists. In the most recent iteration of its *Vademecum* providing counsel on the processing of allegations involving grave delicts, the DDF explains why "moral certainty" cannot be obtained by means of a preliminary investigation: "It must always be kept in mind that the preliminary investigation is not a trial, nor does it seek to attain moral certitude as to whether the alleged events occurred. It serves (a) to gather data useful for a more detailed examination of the *notitia de delicto*; and (b) to determine the plausibility of the report, that is, to determine that which is called *fumus delicti*, namely the sufficient basis both in law and in fact so as to consider the accusation as having the semblance of truth."[91]

90. "List of Jesuits with Credible Accusations of Sexual Abuse of a Minor," *Jesuits USA Central and Southern Province*, February 8, 2023: https://www.jesuitscentralsouthern.org/about-us/protecting-children/list-of-jesuits-with-credible-accusations-of-sexual-abuse-of-a-minor.

91. Dicastery for the Doctrine of the Faith, *Vademecum* on certain points of procedure in treating cases of sexual abuse of minors committed by clerics, Ver. 2.0, June 5, 2022: *Communicationes* 54 (2022) 161–193, no. 33; English translation https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_en.html.

It may be argued that "moral certainty" might be achieved in ways other than through a formal canonical process. If, for example, in the face of overwhelming physical evidence of his guilt, an accused priest freely and knowingly pleads guilty to criminal charges to avoid a stiffer sentence, it is possible that a superior may arrive at a decision to the degree of moral certainty that the accused is guilty of the charged offense. Nevertheless, this article has discussed the serious moral, legal, and practical problems with claiming to have reached "moral certitude" without a formal legal process. This is so not because of some talismanic quality of procedural requirements, but because the intensive nature of the fact-finding enterprise, coupled with the back and forth of legal argumentation within a structured environment where fundamental human rights are respected, is a time-tested tool by which rational but flawed men can adjudicate criminal matters, assign culpability, punish offenders, and work to build a more just society.

Settling for much less than what the high standard of moral certainty demands is especially harmful when the consequence of deciding such momentous questions leads to publishing on the internet the names of the accused. A man who has been unjustly labeled as having a "credible," "substantiated," or "established" accusation of sexual abuse against him can suffer serious and long-standing damage, not to mention his family, friends, and the people he has served as a priest of Jesus Christ. Having one's name published on the internet in this way can only be seen as a form of punishment, and an especially severe one at that.[92] It is fair to ask why some Cath-

92. The Pennsylvania Supreme Court, for example, recently held that the listing of names of certain sex offenders on a state's public internet website was punitive. *Commonwealth v. Muniz*, 164 A.3d 1189, 1213 (Pa. 2017): "We consider SORNA's publication provisions—when viewed in the context of our current internet-based world—to be comparable to shaming punishments." A related issue is whether publishing the names of offenders has any deterrent effect on crime rates. See Bob Edward Vásquez et al., "The Influence of Sex Offender Registration and Notification Laws in the United States: A Time Series Analysis," *Crime & Delinquency* 54/2 (April 2008) 175–192. At least one study suggests that the practice of publishing names can lead to an *increase* in certain crimes, owing to the greater alienation of offenders, who because of stressors and stigma find themselves unable to reintegrate into society and thus become more prone to reoffend. See Naomi J. Freeman, "The Public Safety Impact of Community Notification Laws: Rearrest of Convicted Sex Offenders," *Crime & Delinquency* 58/4 (July 2012) 539–564.

olics professing public disdain for capital punishment appear to be regularly executing the functional equivalent of death sentences on accused clerics. After all, a person accused of such conduct may find it difficult to land employment, to locate a place to live, to deal with the mental and physical consequences of international ignominy, or to take any part at all in a society that vilifies those even suspected of such base conduct.[93] Yet how can a man be so punished without having been found guilty beyond a reasonable doubt?

Not to be underestimated are the eminently foreseeable risks posed by such disclosure in the current environment, in which voracious media hungry for salacious details against the Catholic Church may simply disregard whatever qualifiers, disclaimers, or nuances appear in the announcement. For instance, when the Colorado State Attorney General office published its 2019 report on clergy sexual abuse, the standard applied when determining whether an accusation was "substantiated" was merely "more likely than not," far below the "beyond a reasonable doubt" standard necessary for criminal convictions.[94] Nevertheless, a local plaintiff's law firm wasted no time in declaring that the priests named in the report "have been identified as perpetrators of sexual abuse" and that the accused were "collectively guilty" of sexually abusing over 200 children over a 70-year period.[95] Similarly, when the Michigan Department of Attorney General announced its report of alleged sexual abuse in the Diocese of Marquette in 2022, it admitted that the allegations in the report "do not reflect a determination by the Department that the allegations

93. See Carolyn Hoyle, Naomi-Ellen Speechley, and Ros Burnett, *The Impact of Being Wrongly Accused of Abuse in Occupations of Trust: Victim's Voices* (Oxford: University of Oxford Centre for Criminology, 2016), https://www.law.ox.ac.uk/sites/files/oxlaw/the_impact_of_being_wrongly_accused_of_abuse_hoyle_speechley_burnett_final_26_may.pdf.

94. Chuck Murphy, "What's Inside the Colorado Attorney General's Special Report on Catholic Clergy Sexual Abuse," *Colorado Public Radio News*, October 23, 2019: https://www.cpr.org/2019/10/23/whats-inside-the-colorado-attorney-generals-special-report-on-catholic-clergy-sexual-abuse. The "more likely than not" standard is articulated on p. 4 of the Special Master's Report.

95. "List of Colorado Catholic Priests Accused of Childhood Sexual Abuse," *Denver Trial Lawyers*, accessed on November 14, 2023, https://www.denvertriallawyers.com/list-of-colorado-catholic-priests-accused-of-chi.

are credible or otherwise substantiated," even adding that the accused were "presumed innocent unless and until proven guilty."[96] Such subtle distinctions were likely lost on the general public, however, especially in light of widely circulated news reports containing the Attorney General's boast that the report provided a "voice to those who have suffered in silence for so long and shines a light on those alleged offenders who escaped punishment for their crimes by hiding in the shadows."[97]

It is important to emphasize here that various offices within the Holy See have specifically and repeatedly cautioned against the prejudicial practice of publishing the names of accused clerics, including by means of (1) a 2016 letter critical of the practice by the Pontifical Council for Legislative Texts,[98] (2) one of the 14 "Reflection Points" offered at the February 2019 Meeting on the Protection of Minors in the Church,[99] and (3) the DDF's 2022 *Vademecum*, which specifically warns that, "especially in cases where public statements must be made,"

> great caution should be exercised in providing information about the facts. Statements should be brief and concise, avoiding clamorous announcements, refraining completely from any premature judgment about the guilt or innocence of the person accused (since this is to be established only by an eventual penal process aimed at verifying the basis of the accusa-

96. Michigan Department of Attorney General, "AG Nessel Releases Report of Alleged Abuse at Marquette Catholic Diocese," October 27, 2022: https://www.michigan.gov/ag/news/press-releases/2022/10/27/ag-nessel-releases-report-of-alleged-abuse-at-marquette-catholic-diocese. The Report named 44 priests, 32 of whom were known or presumed to be dead.

97. Logan Kassuba, "New Report Details Abuse Allegations At Marquette Catholic Diocese," *9and10 News* (a CBS affiliate in Michigan), October 27, 2022: https://www.9and10news.com/2022/10/27/new-report-details-abuse-allegations-at-marquette-catholic-diocese.

98. "Pontifical Council for Legislative Texts. Prot. N. 15512/2016. PCLT On Clergy Disclosure," September 15, 2016: *Eastern Legal Thought* 13 (2017) 13–16.

99. Holy See Press Office, Summary of Bulletin, "Meeting on 'The Protection of Minors in the Church'—Reflection points, 21.02.2019," https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/02/21/190221f.html, at no. 14: "Therefore, it is necessary to prevent the lists of the accused being published, even by the dioceses, before the preliminary investigation and the definitive condemnation."

> tion), and respecting any desire for privacy expressed by the alleged victims. Since, as stated above, in this phase the possible guilt of the accused person has yet to be established, all care should be taken to avoid—in public statements or private communication—any affirmation made in the name of the Church, the institute or society, or on one's own behalf, that could constitute an anticipation of judgment on the merits of the facts.[100]

Most recently, the (now) Dicastery for Legislative Texts, in its User Guide to Book VI, dated May 31, 2023, affirms: "It is necessary to *absolutely avoid* any inopportune or illicit dissemination of information to the public (such as press releases) that could jeopardize subsequent investigations or damage the person's reputation and presumption of innocence" (emphasis in original).[101] The User Guide goes on to explain that there is a "duty of justice to protect the good name of the persons involved" in a preliminary investigation and that the accused enjoys the presumption of innocence. "These principles must, consequently, guide the various steps to be taken during the preliminary investigation and, in particular, guide the way news is communicated to the media. [. . .] An imprudent management of the news could constitute in certain cases the delict referred to in can. 1390 §2, the duty of reparation also having to be taken into account."[102]

An analogy may prove helpful here, applying civil law principles to the ecclesial reality of preliminary investigations. Suppose that Herman is one of the several citizens of Massachusetts who is selected for jury duty in the criminal trial of Kevin Spacey. On the first day of trial, Herman is expecting to hear the witnesses and to see the evidence regarding the alleged sexual crimes of Mr. Spacey. Herman is surprised, however, to learn that Kevin Spacey's legal team

100. *Vademecum* 45–46. See also Francis, motu proprio *Vos estis lux mundi*, March 25, 2023: *Communicationes* 55 (2023) 48–58 (hereafter *VELM*). Art. 5 §2 calls for the protection of the "good name and the privacy of the persons involved" in any investigation into sexual abuse allegations covered by *VELM*.

101. Dicastery for Legislative Texts, *Penal Sanctions in the Church. User guide for Book VI of the Code of Canon Law*, May 31, 2023: https://www.delegumtextibus.va/content/dam/testilegislativi/TESTI%20NORMATIVI/Testi%20Norm%20CIC./Libro%20VI/LibroVIsussidio/Penal%20sanctions%20User%20guide.pdf, no. 180.

102. Ibid. 193.

has not been invited to the trial, and thus will not have the opportunity to present a single piece of evidence or call a single witness in defense of Mr. Spacey. What would we conclude about Herman if, at the end of the "trial," and despite the fact that Kevin Spacey was not allowed to exercise his natural human right to self-defense throughout, Herman nevertheless arrives at a verdict of guilt "beyond a reasonable doubt"? Would our opinion of Herman change if he were impaneled on the jury hearing the *civil* claims against Mr. Spacey, where the standard of proof is lower than "beyond a reasonable doubt"?

10. Secular Standards of Proof

Mention has already been made of several standards of proof operative in the secular sphere. Describing and evaluating the secular standards presently operative in the United States, even in a brief and general way, will help demonstrate what is at risk in the Church today if and to the extent that the important concept of moral certainty is weakened or abandoned altogether, especially in cases involving accusations of clerical malfeasance. Keeping in view the different purposes and nature of the civil and canonical spheres, from a scientific perspective, comparing and contrasting the different standards of proof is instructive and illuminating.

10.1. Reasonable Suspicion

At the lowest level of certainty in secular terms, just above plain doubt, stands the notion of "reasonable suspicion." This is the standard that police officers must meet when making a traffic stop or when they stop and frisk a pedestrian.[103] In other words, in order for such a brief yet involuntary stop to be viewed as legal, the law enforcement personnel must have a reasonable, articulable suspicion—which has to be something more than an "unarticulated hunch"—that the person is involved in criminal activity. Is this the level best associated with the initial and very basic assessment of accusations against clergy, such that if there is at least some *indicium* of the possibility of "something wrong," the accusation can be scrutinized under a canon 1717 prelim-

103. *Terry v. Ohio*, 392 U.S. 1 (1968).

inary investigation? If so, one could hardly justify publicizing the names of those merely "suspected" given the extremely low threshold as well as the prejudicial effects of publication.

10.2. Probable Cause

Up one level from reasonable suspicion is "probable cause."[104] If the first level of certainty asks what a reasonable person might *suspect*, this second level asks what a reasonable person might *believe*. Arrests, searches, and search warrants generally require at least probable cause, lest they run afoul of the Fourth Amendment to the US Constitution. This level of certainty generally requires at least a reasonable basis for believing that a crime may have been committed (for an arrest) or when evidence of a crime is present in the place to be searched (for a search). Probable cause is often mentioned in connection with grand juries, whose work is done in secret, acting as shields against arbitrary allegations of wrongdoing by ensuring that serious accusations are made only upon the considered judgment of a representative body of ordinary citizens acting according to the rule of law. Grand juries do not decide whether the accused is guilty; they merely decide whether there is *probable cause* to believe that a crime occurred and *probable cause* to believe that the person accused committed that crime. This is because of the deliberately one-sided nature of grand jury proceedings. Only the prosecutor—not the defense—gets to address the grand jury. All of the important safeguards of justice are saved for the *real* trial that comes only after the grand jury has performed its important task.

Given that grand juries decide *only* whether there is enough evidence to proceed to the next stage in the judicial process, perhaps this second level of secular proof is the best one to describe the situation after a preliminary investigation has been concluded. In other words, perhaps the level of "probable cause" provides a helpful (albeit secular) reference point for the *saltem veri similem* standard contained in canon 1717. At the end of a properly conducted and truly preliminary investigation, if there appear to be more *indicia* that some canonical crime may have occurred, if a *fumus delicti* exists, it seems

104. *Illinois v. Gates*, 462 U.S. 213 (1983).

proper that church authorities proceed to the next level of the procedure. Given the relatively low standard of "probable cause," it is hardly just to routinely publish on the world wide web the names of those as having been merely "accused," however that word is modified, especially without substantial disclosure emphasizing the right of the accused to be presumed innocent, and without any thought about the quasi-permanent nature of internet databases.[105]

10.3. Substantial Evidence and Preponderance of the Evidence

Moving up the ladder of certainty, we next encounter "substantial evidence,"[106] a standard used in cases involving review of a decision by an administrative agency. According to the pertinent US Supreme Court decision on the matter, substantial evidence means "more than a mere scintilla," meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." At or around the level of substantial evidence is a widely used standard in civil cases known as the "preponderance of the evidence."[107] This asks whether the issue to be decided is "more likely than not." If numerical percentages were assigned to these various levels of certainty, with 0% as the level of doubt and 100% as the level of absolute certainty, the "preponderance of the evidence" standard would likely register at 51%.

This standard was famously the one by which the family of Ron Goldman won a civil verdict against O.J. Simpson for the wrongful death of Mr. Goldman in 1997, some fourteen months after Simpson was acquitted of the murder of Mr. Goldman and Ms. Nicole Brown

105. See, e.g., Romayne Smith Fullerton and Maggie Jones Patterson, *Murder in our Midst: Comparing Crime Coverage Ethics in an Age of Globalized News* (Oxford: Oxford University Press, 2021) (discussing, inter alia, the moral issues related to publishing the names of those merely accused of crimes). This work presents ten years' worth of research on the various ways different cultures treat the question of making public the names of people merely accused of crimes, employing a three-part classification: (i) "protectors" who do not publish (the Netherlands, Sweden, and Germany), (ii) "watchdogs" who do publish (Canada, the US, the UK, and Ireland), and (iii) "ambivalents" (Italy, Spain, and Portugal) who officially try to protect the reputation of the accused but whose press corps seem to routinely skirt the official legal requirements.

106. *Richardson v. Perales*, 402 U.S. 389 (1971).

107. See, e.g., *Madison v. Geier*, 135 N.W.2d 761 (Wis. 1965) (distinguishing various standards of proof).

Simpson in a famous criminal trial, the standard for which a conviction was, of course, "beyond a reasonable doubt."[108] Given what has been already discussed, it is not immediately clear that there would be any obvious canonical corollary to this "preponderance of the evidence" standard. It appears to be at once both too high for the initial determinations relevant to canon 1717 and much too low for a judgment in a penal matter. It would also appear to fall somewhere between the concepts of "suspicion" and "opinion" in the classical moral/canonical four-part structure discussed earlier.

10.4. Clear and Convincing

A mid-level standard of proof—above "preponderance of the evidence" but below "beyond a reasonable doubt"—is known as the "clear and convincing" standard. This is a slightly more demanding standard than "more likely than not," and it is used when deciding matters such as those related to restraining orders, parental rights, probate, and conservatorships. It generally requires that the factfinder have an "abiding conviction" that the truth of the factual contentions are "highly probable."[109] Judging from some of the announcements made online in light of an "established allegation" against a cleric, it appears at least possible that those who have decided to publish the names of their confreres might indeed be operating on this level of certainty. Whether that conclusion is warranted, let alone just, is an important question to consider. "Clear and convincing" is not nearly as exacting a standard as "beyond a reasonable doubt" or "moral certainty" but seems to arise only to the level of "opinion" in the classical moral/canonical four-part structure. Could it be, then, that the truncated concept of "moral certainty" contained in some media statements is neither *moral* nor *certain*?

10.5. Beyond a Reasonable Doubt

The most demanding standard of proof, of course, is the well-known "beyond a reasonable doubt" standard, established not in the words

108. B. Drummond Ayres Jr., "Civil Jury Finds Simpson Liable in Pair of Killings," *The New York Times*, February 5, 1997: https://www.nytimes.com/1997/02/05/us/civil-jury-finds-simpson-liable-in-pair-of-killings.html.

109. *Colorado v. New Mexico*, 467 U.S. 310 (1984).

of the US Constitution but rather by means of a US Supreme Court case in 1970, *In re Winship*,[110] which held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[111] As was mentioned above, the legal historian James Q. Whitman has made a convincing case that the "reasonable doubt" standard was never meant to serve as a standard of proof as much as it was developed to encourage reluctant jurors to render guilty verdicts by carefully defining the scope of their determination. In any event, it is widely thought that the "beyond a reasonable doubt" standard represents a secular equivalent to the canonical notion of "moral certainty."[112]

10.6. The Relationship Between Civil and Canonical Standards and Ends

One final comment needs to be made concerning secular standards and ecclesial realities. Very often dioceses and religious orders refuse to take any canonical action on an allegation until all risk of secular litigation (criminal or civil) is over, on the basis that they do not want to be accused of interfering with such proceedings. This argument may have some merit in special circumstances (e.g., where a church entity lacks the investigative tools necessary to discover sensitive crimes), but to remain inert as a general rule is problematic on the level of both theory and practice.

On the level of theory, the civil and canonical realms have their own ends and means, as amply illustrated by the various standards

110. 397 U.S. 358 (1970).

111. Ibid., 364.

112. See generally Henry L. Chambers, "Reasonable Certainty and Reasonable Doubt," *Marquette Law Review* 81/3 (1998) 655–704. On an interesting side note, the US military applies the "beyond a reasonable doubt" standard in its courts-martial proceedings, even during "summary courts-martial," abbreviated proceedings aimed at promptly adjudicating minor offenses. See *Manual for Courts-Martial, United States* (2019 edition), Joint Service Committee on Military Justice, Rules 918, 1301, and 1304. Reasonable doubt is defined in Rule 918 as "doubt based on reason and common sense." It is "not mere conjecture; it is an honest, conscientious doubt suggested by the evidence, or lack of it, in the case. An absolute or mathematical certainty is not required."

of proof. While the state is supposed to aim at protecting the common good in a temporal sense with recourse to coercive police power, the Church is obligated to foster the salvation of souls, almost exclusively through spiritual means of persuasion and through appropriate options under canon law. Simply abdicating that sacred obligation for what could be an extended period by refusing to take action on an accusation against a priest betrays either vincible ignorance of this obligation or a lack of commitment to carrying it out.[113] Civil corporations routinely have to navigate these waters when a complaint is made against one of their employees when the nature of the complaint raises the possibility of criminal or civil liability. If secular businesses can figure that out, it is reasonable to expect the Church to be able to do so as well, especially when aided by competent lay people.[114]

As a practical matter, an accused priest named in a lawsuit could wait for many *years* before the matter is resolved, given the large amount of litigation in US courts and legal developments such as extended statutes of limitation. Pope Francis famously lamented in 2014 about the intolerable delays that many lay people experience when seeking a declaration of nullity.[115] If a period of "years" is too long for lay persons to have to wait to receive a judicial determination of their status, it seems only fair to expect a prompt determination of priest disciplinary cases as well. It is simply unconscionable to expect priests to wait for long and indeterminate periods of time before taking any action whatsoever, and it is difficult not to notice the comparatively strict timing requirements of *Vos estis lux mundi*

113. I note in this regard that no. 66 of the DDF's 2022 *Vademecum* points out that "an unjustified delay in the preliminary investigation may constitute an act of negligence on the part of the ecclesiastical authority," and that art. 1(b) of *VELM* prohibits "actions or omissions intended to interfere with or avoid civil investigations or canonical investigations, whether administrative or penal."

114. See, e.g., *Internal Corporate Investigations*, ed. Brad D. Brian et al., 4th ed. (Chicago: ABA Book Publishing, 2018) (discussing, *inter alia*, the coordination between internal corporate investigations and the parallel criminal or civil proceedings that may arise). See also 1983 *CIC* cc. 228 §2; 512 §1.

115. See Francis, discourse, November 5, 2014: *AAS* 106 (2014) 864–865; https://www.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141105_tribunale-rota-romana.html.

(for accusations involving bishops) and the lack of such requirements for priests and deacons.[116] Canon 221 §1 provides that Christ's faithful have the right to lawfully vindicate and defend their rights before the competent ecclesiastical forum in accordance with the law. Excessive delays either mean that that right is simply an empty formula or that the Church does not have a functioning system of justice. There is simply no alternative.

Conclusion

In a fast-paced and secular society like ours, rash judgments are routinely made with little or no fear of the temporal or spiritual consequences. The societal rush to judgment in the accusations involving Kevin Spacey provide more than sufficient evidence of this. When Spacey's cases actually went to trial, however, and were put before the factfinders on juries, he emerged victorious, no matter what standard of proof he faced.

In the wake of the clerical sex abuse crisis, Catholic clergy who are accused of sexual misconduct appear at least as vulnerable as stigmatized pariahs like Kevin Spacey, and they are just as likely to be prejudged as guilty before all the facts are gathered. Yet, as this article has shown, some Catholic dioceses and religious orders all too often appear to be rushing to judgment, condemning men without sufficient due process and taking punitive actions (like publishing names on the internet) without having first reached the requisite level of moral certainty demanded by canon law and fundamental principles of justice. Such practices, it must be said, express not only a worrying disregard for the rule of law, but threaten the integrity of the Church's entire juridical system and, by extension, the Church's mission to the world. The concept of standards of proof is one of the many time-honored legal institutions that past generations have created, nurtured, and passed down to us. We neglect such wisdom at our peril.

116. Art. 15 of the 2023 *VELM* provides that, with respect to allegations against bishops, the competent dicastery is to provide within 30 days of receiving the report appropriate instructions on how to proceed with the case, and that the investigation itself is generally to be completed in "short order" (the time period had been specified as 90 days in the original version of *VELM*).

ABSTRACT

Recent high profile civil and criminal trials in the United States and elsewhere have reinforced the importance of due process in an age of snap judgments. Similarly, Catholic priests accused of misconduct often seem to be assumed guilty until proven innocent, even within the Church, despite the principle of the presumption of innocence, now contained in canon 1321 §1, and the moral certainty standard of proof in canon 1608. This article reviews the various standards of proof under both civil and canon law, discusses their origin, and highlights their fundamental importance in the current environment. It also scrutinizes the use of certain inferior substitutes to moral certainty currently being employed in canon 1717 preliminary investigations and in decisions to publish the names of accused clerics. Through the lens of well-known secular standards of proof such as "reasonable suspicion," "probable cause," "clear and convincing," and "beyond a reasonable doubt," the article aims to bring more clarity to an environment that stands in need of more precise and uniform language.