

The Scandal of Secrecy

Canon Law & the Sexual-abuse Crisis

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In 1922, the Vatican issued norms for handling the canonical crime of the sexual abuse of minors by priests. The document was revised in 1962, and remained in force until 2001. Why did so few bishops know about it?

According to Blackstone's *Commentaries on the Laws of England*, in the first century A.D., the Roman emperor Caligula "wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people." Twelve centuries after Caligula, Thomas Aquinas wrote that "promulgation is necessary if a law is to have binding force" (*Summa theologiae*). Secret laws—laws never made known to the people who are bound by them—are not effective laws.

To no small degree, the sexual-abuse crisis has been exacerbated because of secret laws. In 1922, the Sacred Congregation of the Holy Office published the instruction "On the Method of Proceeding in Cases of Solicitation," which was approved by Pius XI and signed by Merry del Val, Cardinal Secretary of the Holy Office. The Vatican's Polyglot Press printed the document, but it was never officially promulgated in a useful way. In fact, the first page of the instruction says it is to be "diligently kept in the secret archives of the [diocesan] curia for internal use, and is not to be published or commented on in any canonical commentary." While the instruction is addressed to "All Patriarchs, Archbishops, Bishops, and Other Local Ordinaries, including of the Oriental Rites," it was evidently not circulated to them. Instead, the text was available by request to bishops who needed to know its contents to deal with such crimes.

Forty years later, in 1962, the Holy Office reissued the instruction with minor changes. Pope John XXIII approved the revised text, and the secretary of the Holy Office, Cardinal Alfredo Ottaviani, signed it. Again, the first page says that the document is to be "diligently kept in the secret archives of the [diocesan] curia for internal use, and is not to be published or commented on in any canonical commentary." Again, the instruction is addressed to "All Patriarchs, Archbishops, Bishops, and Other Local Ordinaries, including of the Oriental Rites." And again, the only bishops who received it were those who contacted

the Holy See about the crimes covered by the instruction who were then sent a copy. Although there had been a plan to distribute the document to the bishops attending the Second Vatican Council, that never happened.

What canonical crimes are covered by the instruction? As the title indicates, the document deals almost entirely with "solicitation." In canonical parlance, that is the crime of a priest soliciting sex in the confessional. It has been a canonical crime for centuries.

But in section numbered 72 in both the 1922 and the '62 versions, the text reads, "What is established herein on the crime of solicitation is also valid, *mutatis mutandis*, for the worst crime (*crimen pessimum*)." The worst crime is defined in section 73 as "obscene behavior with pre-adolescent children of either sex or with brute animals."

What was established "herein" on the crime of solicitation? One thing the document established was that the Holy Office had jurisdiction over these crimes, and was, in this document, telling local bishops how to handle them. More than anything, the instruction is a dry statement of the rules of criminal procedure that apply when a priest has been accused of solicitation. And that what the Holy Office says about the crime of solicitation also applies to the crime of the sexual abuse of children by a priest.

The 1962 instruction has become known in the press as *Crimen sollicitationis* where it has had a life of its own. In 2003, plaintiffs' attorneys Daniel J. Shea and Carmen Durso sent a copy of this newly uncovered "secret" Vatican document to the U.S. Attorney in Boston, alleging that *Crimen* provided proof that the Vatican had orchestrated a worldwide cover-up of clergy sexual abuse of children. Shea said that *Crimen* was "not just a smoking gun but a nuclear bombshell." The story made headlines around the world.

The attorney was undoubtedly referring to No. 11 of *Crimen* which, he alleged, "shows that the Vatican has been providing instruction to all the bishops in the United States to obstruct justice. That's called criminal conspiracy." In fact, No. 11 of *Crimen* does say that the church's internal legal process regarding crimes reserved to the Holy Office is covered by the Holy Office secret, now called the pontifical secret. But that's all the secrecy requirement covers: the internal church legal process, not the crime itself. It does not prevent victims, their families, or even church officials from reporting a civil crime to the civil authorities or to the media (as guidelines posted to the Vatican Web site now recommend).

By 2003, when this "smoking gun" hit the media, *Crimen* was hardly a "secret." Its existence had been discussed openly two years earlier, first by Pope John

Paul II in his April 2001 motu proprio *Sacramentorum sanctitatis tutela* ("On Safeguarding the Sanctity of the Sacraments"), and again by then-Cardinal Joseph Ratzinger in his May 2001 letter, *De delictis gravioribus*, ("On More Serious Crimes"), which was a follow-up to John Paul's letter. John Paul's motu proprio affirmed the jurisdiction of the CDF over certain more serious crimes against the sacraments, including the sexual abuse of children by clergy. Both documents were immediately posted on the Vatican's Web site.

The exaggerations of plaintiffs' lawyers aside, the deeper ecclesial question is: where was *Crimen* during the outbreak of clergy sexual abuse in the 1980s and '90s in the United States? Based on canon 1362 in the 1983 Code of Canon Law, canonists were advising U.S. bishops that there was a five-year canonical statute of limitations for starting diocesan penal trials against accused priests. Since it takes children a long time to process sexual abuse when it happens to them, the short five-year statute ruled out canonical trials against priests in many—if not most—cases.

But in his May 2001 letter, Ratzinger wrote that *Crimen* was *hucusque vigens*, Latin for "in force until now." John Paul II also implied as much regarding *Crimen* in his April 2001 motu proprio. So during the outbreak of sexual violence against children, if *Crimen* was in force, there was no five-year statute of limitations, because, according to canon law, crimes that fall under the jurisdiction of the CDF are not subject to the statute of limitations.

To make matters more complicated, in the late 1980s the U.S. bishops began asking the Vatican to change the five year statute, recognizing it as too short to catch many perpetrators of sexual abuse. The Vatican seemed reluctant to do so. Only after six years of discussion—in 1994—did Rome grant the U.S. bishops a longer statute: ten years after the victim turned eighteen.

What was the need for all that back-and-forth between the U.S. bishops and the Holy See if all the Vatican had to do was give *Crimen* to the U.S. bishops and say, "Here, use this. Report the allegation to CDF and let them handle it. Crimes under the jurisdiction of CDF are not covered by the five-year statute of limitations"?

There is no easy answer to this conundrum. While Vatican officials were discussing a longer statute of limitations, they undoubtedly believed that canon 1362's five-year statute applied. Whatever can be said about the labyrinthine thought processes that occur within the halls of the Apostolic Palace, those people aren't stupid—and they aren't careless. If they felt a need to negotiate a longer statute with the U.S. bishops, they must have been convinced that the shorter five-year statute of the 1983 Code of Canon Law applied.

So what accounts for the *hucusque vigens* description of *Crimen* in Ratzinger's May 2001 letter? From what can be deduced from published reports, there seems to have been a power struggle going on between Cardinal Dario Castrillon Hoyos, prefect of the Congregation for Clergy and Ratzinger at the CDF over which congregation had competency in the matter of clergy who had sexually abused minors. Add to that brew Castrillon Hoyos's well-known praise of a bishop who shielded an abusive priest; Ratzinger's belief that such men were a disgrace to the priesthood; the fact that that Castrillon's congregation was inclined to go light on accused priests while the CDF was much more a dispenser of justice. Then add an elderly pope who had to choose between the two.

Ratzinger and CDF won that battle, but the Vatican could not be so indiscreet as to announce this to the world, at least not under the rules of bureaucratic *bella figura*. So when the decision was made and Ratzinger got the ball, Rome didn't want to embarrass Castrillon. Therefore they simply said *hucusque vigens*—CDF always had this competency. Don't you remember *Crimen*?

Whether the CDF knew it had this authority at the time is doubtful. There is every reason to believe that the CDF's canonists thought that the 1983 Code of Canon Law replaced *Crimen*, and that the office no longer had that authority. In the history of *Crimen* appended to the changes in *Sacramentorum sanctitatis tutela* announced by the Vatican earlier this month, the CDF admits as much. Its history says that, after the 1983 Code, local diocesan tribunals (which would have been subject to the short five-year statute) had competency over the crime of sexual abuse by priests, that appeals from judicial sentences imposing penalties on the priest-abuser went to the Rota (the highest appellate court), and that appeals from administrative decrees imposing penalties went to the Congregation for Clergy. CDF leaves itself out of the loop.

So the 2001 reordering of the law by Pope John Paul II in *Sacramentorum sanctitatis tutela* really did give jurisdiction *back* to CDF. But instead of clearly saying so, the Vatican evidently thought it more important to maintain the bureaucratic illusion that nothing had changed. And that has caused added confusion.

There are lessons to be learned here for those who want to learn. First of all, no legal system or system of governance can be effective when its highest value is secrecy. *Crimen sollicitationis* was never promulgated in any meaningful way. Second, when changes are made in the law, or in legal competencies, the revision needs to be clearly announced and explained—even when the explanation brings to light the fact that the legal system was not functioning properly before. Insisting that nothing has changed when it obviously has exalts secrecy over legal effectiveness. Secret laws serve no one.