

DUE PROCESS FOR ACCUSED PRIESTS

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Psychologist Daniel Kahneman won the Nobel Prize in Economics in 2002 for his work on a phenomenon in psychology and marketing called "availability bias." Kahneman demonstrated the human tendency to give a proposition validity just by how easily it comes to mind. An uncorroborated statement can be widely seen as true merely because the media has repeated it.

Also in 2002, the Catholic clergy sex abuse scandal swept out of Boston to dominate news headlines across the country. Many commentators writing on the scandal have, knowingly or not, employed availability bias to justify draconian revisions in law and policy. The revelations of priestly scandal have evolved a number of examples of availability bias—snippets of ostensible fact repeated so often in the news media that they assume the visage of unassailable truth.

Among these is a claim that civil statutes of limitations for victims of sexual abuse to sue for monetary compensation must be extended or discarded. The claim that "victims of sexual abuse require years or decades to recognize they were abused and report it" is classic availability bias. This mantra has bolstered the interests of self-serving contingency lawyers and various agenda-driven groups using the scandal for their own ends, but the premise lacks both context and proof.

The prison system in which I have spent the last 14 years houses nearly 3,000 prisoners. Estimates of those convicted of sexual offenses range from 25 to 40 percent. This translates

into a population of up to 1,200 sexual offenders in this one prison with thousands more in the state's parole system or otherwise monitored by the state as registered sex offenders.

Three among these thousands of convicted men are Catholic priests, one accused a few months after claimed offenses in the early 1990s while the other two faced charges from decades ago.

The thousands of other men convicted of sexual abuse are accused parents, grandparents, step-parents, foster parents, uncles, teachers, ministers, scout leaders, and so on, and for them the typical time lapse between abuse and the victim reporting it was measured in weeks or months, not years—and certainly not decades. There is simply no evidence to support the claim that victims of sexual abuse require decades to come forward. With but rare exceptions, only Catholic priests face the daunting and sometimes hopeless task of defending themselves against sex abuse claims that are many years or decades old.

So what sets the accusers of priests apart from other claimants? The John Jay study commissioned by the U.S. Bishops revealed that the highest percentage of accusers of Catholic priests came forward not in the 1960s to 1980s when the abuse was claimed to have occurred, but between 2002 and 2004 when Catholic dioceses entered, or were forced into, mediated or “blanket” settlements.

The quality of due process for priests accused during mediated settlements is highly suspect. A New Hampshire contingency lawyer recently brought forward his fifth round of mediated settlement demands. During his first round of mediated settlements in 2002—in which 28 priests of the Diocese of Manchester were accused in claims alleging abuse between the 1950s and 1980s—the news media announced a \$5.5 million settlement. The claimants' lawyer, seemingly inviting his next round of plaintiffs, described the settlement process with the

Manchester diocese: "During settlement negotiations, diocesan officials did not press for details such as dates and allegations for every claim. I've never seen anything like it." (NH Union Leader, Nov. 27, 2002). "Some victims made claims in the last month, and because of the timing of negotiations, gained closure in just a matter of days." (Nashua Telegraph, Nov. 27, 2002).

That lawyer's contingency fee for the first of what would evolve into five rounds of mediated settlements was estimated to be in excess of \$1.8 million. At the time this first mediated settlement was reached in 2002, New Hampshire newspapers reported that at the attorney's and claimants' request, the diocese agreed not to disclose their names, the details of abuse, or the amounts of individual settlements.

In contrast, the names of the accused priests—many of whom were deceased—were publicized by the Diocese in a press release. Despite the contingency lawyer's widely reported amazement that \$5.5 million was handed over with no details or corroboration elicited by the diocese, the claims were labeled "credible" by virtue of being settled. Priests who declared the claims against them to be bogus—and who, in two cases, insisted that they never even met these newest accusers—were excluded from the settlement process and never informed that a settlement had taken place. The priests' names were then submitted to the Vatican as the subjects of credible allegations of abuse. The possible penal actions—for which there is no opportunity for defense or appeal—include possible administrative dismissal from the priesthood, but without any of the usual vestiges of justice such as a discovery process, a presumption of innocence, or even a trial.

The U.S. bishops have rightly campaigned against so-called "window legislation" proposed in a number of states to extend or remove civil statutes of limitations, and then retroactively apply the extension so that Catholic Church entities can be sued while public institutions—e.g. public

schools—remain exempt. Such legislated “windows” would allow lawsuits to proceed long after the statutes allowing them have expired. The mantra chanted in support of such legislation is that victims cannot report abuse for many years or decades. The premise is baseless, and the proposed legislation has but one target, the Catholic Church.

Catholic dioceses and institutions are entirely justified in opposing such duplicitous laws. At the same time, however, many in the Church have demanded of our bishops—and, sadly, with some success—that they lobby the Holy See for dispensation from “prescription”—the statute of limitations in canon law—so that accused priests can be removed from ministry, and even dismissed without trial from the clerical state—decades after the Church’s own statute of limitations has expired. As Archbishop Charles Chaput has wisely cautioned, “Statutes of Limitations exist in legal systems to promote justice, not hinder it.” (First Things, May 2006).

The mediated settlement process has continued year by year since the explosions of 2002. To date, the U.S. Church has lost \$2.6 billion in abuse claims, but are the ongoing claims just? In the 1990s, the Haworth Maltreatment and Trauma Press published a trade journal for personal injury lawyers entitled *Sexual Abuse Litigation: A Practical Recourse for Attorneys, Clinicians and Advocates*. The book is a manual for obtaining profit from sexual abuse claims. One chapter, for example, is entitled “The Needle in the Haystack: Uncovering Insurance Coverage in Sexual Abuse Litigation.” Each chapter concludes with a list of “practice tips” describing in detail the most effective ways to find and sue deeper pockets than those of the alleged molesters themselves.

The “practice tips” address ways to claim negligent supervision of clergy (especially Catholic priests), to present claims in ways that will circumvent existing civil statutes of limitations, and in using the power of the state to bolster civil claims with simultaneous criminal

prosecution. The book also includes a number of ways to bring claims while avoiding quagmires such as controversial “repressed and recovered memory” by claiming newly discovered injuries instead of newly discovered memories. In a chapter that seems to be a harbinger of what was to come for the Catholic Church, the book describes ways to manipulate media coverage to pressure institutions into mediated settlements without an in-depth discovery process or even filing a claim in a court of law. Sound familiar?

The “mass mediation” precedent for settlement of claims against Catholic priests was first established in 1992 when the insurers for the Diocese of Fall River, Massachusetts, sought to end some 80 lawsuits involving Fr. James Porter in claims alleged to have occurred up to three decades previously. At the time, insurers tried to deny coverage of the decades-old claims that were beginning to emerge around the country. The insurers took the position that bishops and dioceses had prior knowledge of the history of most of the priests accused in the 1990s. Despite obtaining the files, the insurers ended up providing coverage because the written records simply did not support the insurers’ own availability bias, i.e., that the bishops knew of the abuse and covered it up. The majority of the claims, the insurers found, surfaced for the first time as money was being demanded, and not when the abuse was alleged to have occurred.

The relationship between insurance coverage and claims against priests is certainly clear in the historical record of this issue over the last 20 years. Insurers of Catholic dioceses ceased to provide coverage for claims alleged to have occurred after 1990 or so, but could not deny the coverage retroactively into the 1960s, 1970s and 1980s. It is an interesting note that the lowest percentage of claims against priests were alleged to have occurred subsequent to 1990 when insurance coverage came to an official halt. As the Howarth book cited above makes clear, “insurance” is spelled s-e-t-t-

l-e-m-e-n-t. Only a few commentators have cited the inherent danger mediated settlements have posed to priests, and can pose to the Catholic Church in the wake of “window legislation.”

Yet another example of availability bias is the widely held belief that no one would claim to have been sexually abused just for money—not even for lots of money, and not even when few questions are asked. Remembering the shocking false claims for compensation after the 9/11 attacks, I put the proposition to my fellow prisoners. Would any of them consider falsely accusing a priest for money? It got a good laugh—and then a reminder that I am surrounded by men who have taken lives for far less money than what was gained by those who took my reputation and freedom.

Fr. Gordon MacRae is in prison for claims alleged to have occurred in 1983, and for which he maintains his innocence.