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If the Pope Is Infallible, Why Does He Need Lawyers?

Bill Piatt
St. Mary's University School of Law, bpiatt@stmarytx.edu

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BILL PIATT*

"The Pope is not an oracle." Pope Benedict XVI[1]

I. INTRODUCTION

One of the most widely misunderstood teachings of the Catholic Church involves the doctrine of papal infallibility.[2] As a theological matter, papal infallibility is quite narrow. It does not mean the Pope cannot sin.[3] It does not mean the Pope cannot make errors in his administration of the Church. It does not mean the Pope cannot err during ordinary discussions of theological matters.[4] The widespread misconception that all Catholics must believe their Pope cannot make mistakes helped create resentment against Catholics for centuries.[5] In the United States, this resentment took the form of physical attacks, political exclusion, and virulent anti-Catholic propaganda.[6] The next section of the Article will examine the extent of such resentment.[7]

While the Catholic Church is no longer under direct physical attack, contemporaneous efforts seek to hold the Pope and the Church civilly and criminally liable in various contexts.[8] Most recently, sexual abuse allegations prompted domestic and international attempts to hold the Pope

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* Professor of law and former Dean (1998–2007), St. Mary's University School of Law. I would like to thank my research assistants, Sean Cohen and Jonathan Greiner. I would also like to thank Maria Vega for her clerical and technical assistance.

[1] JOHN THAVIS, THE VATICAN DIARIES: A BEHIND-THE-SCENES LOOK AT THE POWER, PERSONALITIES AND POLITICS AT THE HEART OF THE CATHOLIC CHURCH 305 (2014).

[2] *See* discussion *infra* Part II.

[3] *See* BILL PIATT, CATHOLIC LEGAL PERSPECTIVES 3–5 (2d ed. 2014).

[4] *See id.*

[5] Robert Lockwood, *The Evolution of Anti-Catholicism in the United States*, *in* ANTI-CATHOLICISM IN AMERICAN CULTURE 15, 21 (Robert Lockwood ed., 2000).

[6] *Id.* at 29.

[7] *See* discussion *infra* Part II.A.

[8] *The Catholic Church and Child Abuse: Looming Shadows*, ECONOMIST (May 17, 2014), http://www.economist.com/news/international/21602248-bid-hold-catholic-leadership-responsible-paedophile-priests-looming-shadows.

and his Church accountable to civil authorities.[9] Papal infallibility offers no insulation from these attempts.

Under some circumstances, however, the Pope acting as the head of the Catholic religion in implementing theological practices of the Catholic Church is afforded civil protection.[10] As will be discussed, these matters are extremely complicated. The Pope needs legal representation in these situations, particularly in light of the lingering resentment some hold against the papacy and the Vatican.

While invoking papal infallibility in theological matters provides limited insulation from private claims, another—legal—doctrine affords additional protection. That doctrine involves the "head of state" and related immunity against private civil claims recognized under international law.[11] Part III of this Article will explore the efforts to hold the Pope liable for civil torts in the United States, and the application of this "head of state" immunity to these claims.[12]

What if the attempt to pursue an action against the Pope and Vatican is brought not by individual litigants in a civil arena, but rather, by another nation or body of nations against the nation-state that is the Vatican? It is apparent that the Pope needs counsel and representation in these arenas as well. Some international efforts directly challenge the religious teachings of the Church, even on a subject covered by a papal infallibility pronouncement.[13]

Who then provides the representation? And how are those attorneys selected? After examining the doctrine of papal infallibility, its political equivalent in the "head of state" immunity, and the unique status of the Holy See, an attempt will be made to identify those who provide—and will provide—the Pope with legal representation.[14] To do this, this Article will enter some murky areas of theology, politics, law, and sometimes plain old human bureaucracy and disorganization.

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[9] *Id.*

[10] *See* discussion *infra* Part III.

[11] *See* discussion *infra* Parts III.A, III.C.

[12] *See* discussion *infra* Part III.C.

[13] *See Vatican 'Must Immediately Remove' Child Abusers - UN*, BBC (Feb. 5, 2014 11:36 PM), http://www.bbc.com/news/world-europe-26044852.

[14] *See* discussion *infra* Part IV.

II. PAPAL INFALLIBILITY

A. Some Historical Perspective and Resentment

The first "murky" area, as promised in the Introduction, involves the history of the infallibility doctrine. As Brian Tierney, a noted historian has observed, the development of the doctrine of infallibility has a long, complicated, and contradictory background.[15] Adding to the complication is that "[t]here is no authoritative or agreed list of the infallible pronouncements made before 1870."[16]

One scholar, August Hasler, addressed the controversy surrounding the development of the dogma. He notes that supporters of papal infallibility within the Church argued that an infallible leader was necessary to prevent error in matters of faith and to prevent fragmentation.[17] Opponents argued that papal infallibility would create a double, and perhaps contradictory, infallibility of both the Church and Pope.[18] In any event, papal infallibility was not asserted by the Pope during the Church's first millennia.[19] It gradually came to be formally implemented as a response to both external and internal pressure challenging the authority of the Church.[20] Another scholar, Peter Chirico, argues that papal infallibility was adopted as a defensive posture by the Church to protect against threats from Protestants, atheists, and secularists.[21]

Regardless, the Catholic Church adopted the doctrine and enforced it from the mid-1300s.[22] The Church felt so strongly about this view that Martin Luther was excommunicated, in part, for his refusal to recant his assertion that neither Popes nor Church councils were infallible.[23] The refusal by Protestants thereafter to accept papal infallibility, even as it was

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[15] BRIAN TIERNEY, ORIGINS OF PAPAL INFALLIBILITY, 1150 –1350: A STUDY ON THE CONCEPTS OF INFALLIBILITY, SOVEREIGNTY AND TRADITION IN THE MIDDLE AGES 273–81 (1972).

[16] *Id.* at 3.

[17] AUGUST BERNHARD HASLER, HOW THE POPE BECAME INFALLIBLE 172 (Peter Heinegg trans., 1981).

[18] *Id.*

[19] *Id.* at 8–9.

[20] *Id.* at 38–44.

[21] PETER CHIRICO, INFALLIBILITY: THE CROSSROADS OF DOCTRINE xiv (1983).

[22] *See generally* TIERNEY, *supra* note 15.

[23] RICHARD MARIUS, LUTHER 85 (1975). Luther elaborated on his objections to papal infallibility in Part II, Article IV of his "Smalcald Articles," published in 1537. *Available at* http://bookofconcord.org/smalcald.php (last visited Feb. 17, 2014).

widely misunderstood by Catholics and Protestants alike, led to theological differences, legal disputes within the United States, and even to intense acts of violence within this country during the 1800s.[24]

Anti-Catholic resentment, based in large part on mistrust of the role of the Pope, found its way into the fabric of the American legal system. The framers of the Constitution sought to preserve religious liberties from actions of the federal government.[25] The Constitution of the United States guaranteed that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[26] To further prohibit the federal government from infringing upon the religious liberties of its citizens, the First Amendment to the Constitution provided that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[27]

The religious liberty guaranteed by the First Amendment, however, initially operated as a limitation only on the action of the federal government and not of the states.[28] As a result, many of the overt and covert anti-Catholic provisions in the laws and constitutions of the states remained in effect well into the 19th century.[29] For example, until 1844, the New Jersey Constitution implicitly protected civil rights of Protestants but not Catholics:

> [N]o Protestant inhabitant of this colony shall be denied the enjoyment of any civil right merely on account of his religious principles, but that all persons professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the

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[24] LOU BALDWIN, *Pious Prejudice: Catholicism and the American Press Over Three Centuries*, *in* ANTI-CATHOLICISM IN AMERICAN CULTURE 55, 64 (Robert P. Lockwood ed., 2000).

[25] *See* U.S. CONST. amend. I.

[26] U.S. CONST. art. VI, cl. 3.

[27] U.S. CONST. amend. I.

[28] *See* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1706, 1713 (1991).

[29] *See* Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45 (2004).

> Legislature, and shall fully and freely enjoy every privilege and immunity enjoyed by others their fellow-subjects.[30]

New Jersey's Constitution was amended in 1844 to provide that: "no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right merely on account of his religious principles."[31]

It was not until 1877 that New Hampshire allowed Catholics to hold office in that state.[32] A person of no less prominence than John Jay was able to include language in the New York Constitution prohibiting foreign-born Catholics from becoming citizens unless they would first "renounce all allegiance to the Pope in matters ecclesiastical."[33] This language remained in place until 1821.[34] Jay went on to serve as Chief Justice of the Supreme Court of the United States.[35]

The attempts to remove anti-Catholic provisions from state laws were hindered by the early Federalist Party.[36]

> "[The early Federalists] strove to preserve the political ascendency of Protestantism in the States both by Federal legislation affecting the naturalization of emigrants and by preventing legislation in their respective States for the relief of Catholics from their religious disabilities, which was necessary to give effect to the liberal spirit and purpose of the Constitution."[37]

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[30] *New Jersey—Catholic Encyclopedia*, CATHOLIC ONLINE, http://www.catholic.org/encyclopedia/view.php?id=8420 (last visited Mar. 2, 2015) (citations omitted) (referencing the Provincial Congress held at Burlington on July 2, 1776 and quoting the First Constitution of the State of New Jersey).

[31] *See id.* (citations omitted) (indicating a proposed amendment to the Constitution, from a convention in Trenton, was ratified on 13 Aug. 13, 1844).

[32] *New Hampshire—Catholic Encyclopedia*, CATHOLIC ONLINE, http://www.catholic.org/encyclopedia/view.php?id=8418 (last visited Mar. 2, 2015) (citations omitted).

[33] *Knownothingism*, CATHOLIC ENCYCLOPEDIA, http://www.newadvent.org/cathen/08677a.htm (last visited Mar. 2, 2015).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* (quoting U.S. CATHOLIC HISTORICAL SOC'Y, HISTORICAL RECORDS AND STUDIES VOLUME III 95 (1904)).

Even as the legal obstacles directed at Catholics began to be removed, or perhaps in part because of that action, resentment against Catholics and their allegiance to the Pope intensified in other areas.[38]

In addition to state-sanctioned resentment against Catholics, many newspapers were published in New England to warn about the "evils of Popery."[39] Catholics and the Pope were regularly denounced from the pulpit by Protestant preachers.[40] The angry anti-Catholic and anti-papacy rhetoric turned to violence.[41] Anti-Catholic rioting took place in 1844 in Philadelphia.[42] The Bishop of Philadelphia closed all Catholic churches on May 12, 1844 after St. Augustine's Church and St. Michael's Church were burned to the ground.[43] Protestants set fire to Catholic homes, and they shot and killed Catholics on their doorsteps.[44] Anti-Catholic fervor resulted in the creation of the "National Council of the United States of North America."[45] Members were sworn to secrecy and required to answer any inquiries about the organization with: "I don't know."[46] As a result, the party came to be known as the "Knownothings."[47] Membership was only open to native-born Protestant citizens who were not married to a Catholic.[48] Knownothings were required by oath to "not vote, nor give your influence for any man for any office in the gift of the people, unless he be an American-born citizen, in favor of Americans ruling America, nor if he be a Roman Catholic."[49] As ridiculous as this oath might seem today, the activities of the Knownothings were effective and deadly serious.

By 1855, Knownothing governors held office in Connecticut, New Hampshire, and Rhode Island.[50] In December 1855, seventy-five Knownothing members were elected to the 35th Congress.[51] Their

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[38] *Knownothingism, supra* note 33.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *See id.*

activities, however, were not limited to political endeavors.[52] In 1851, Knownothings attacked a convent in Providence, Rhode Island.[53] The civil authorities refused to provide assistance.[54] As a result, Bishop O'Reilly organized a contingent of Irish parishioners to physically protect the convent from attack.[55] Other attacks occurred in Cincinnati in 1853 and in Newark in 1854.[56] Houses of Irish Catholics were attacked as was St. Ann's Church in Manchester, New Hampshire in 1854.[57] A mob set fire to a church in Bath Maine.[58] Churches in Sydney and Massillon, Ohio were also attacked.[59] A church in Endorser, Massachusetts was destroyed.[60] Other attacks occurred in Norwalk, Connecticut and at the church of St. Peter and Paul in Brooklyn.[61]

In 1855, Knownothings agitated a crowd in Louisville to the extent that the ensuing riot—on August 5, 1855—became known as bloody Monday.[62] Bishop Spalding wrote, "We have just passed through a reign of terror surpassed only by the Philadelphia riots. Nearly one hundred poor Irish have been butchered or burned and some twenty houses have been consumed in the flames. The City authorities, all Knownothings, looked calmly on and they are now endeavoring to lay the blame on the Catholics."[63]

One incident in particular highlights the resentment in this country against the Pope. In 1853, the Pope sent a papal "Nuncio" (representative) to the United States.[64] Hostile demonstrations against him, some including bloodshed, took place in Boston, Baltimore, St. Louis, Wheeling, and Cincinnati.[65] Some six hundred armed men marched to the cathedral in

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[52] *Id.*

[53] *Id.*

[54] *Id.* The Knownothing attackers dispersed after finding the convent guarded by the Catholic defenders. *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* (quoting J. L. SPALDING, The LIFE OF THE MOST REV. M. J. SPALDING, D.D. ARCHBISHOP OF BALTIMORE 185 (1873)).

[64] *Id.*

[65] *Id.*

Cincinnati, intending to burn it, and to hang the Nuncio.[66] In this case, police acted to disperse the mob in an exchange of gunfire.[67]

The resentment and violence that Catholics, particularly Irish-American Catholics, experienced led many to have serious concerns about the nation to which they immigrated. During the war with Mexico, one group of Irish-American Catholic soldiers, seeing the destruction of the Catholic communities in Mexico by the United States, went over to the side of the enemy.[68] The St. Patrick's Battalion, as the group became known, fought with Mexican forces against the United States.[69] Ultimately, many of them were captured and executed as deserters.[70]

Eventually the Irish Catholic immigrants became assimilated. The Civil War placed other issues at the forefront. Many Irish Catholics enlisted in the armed forces of the United States during the Civil War,[71] and much of the anti-Catholic rhetoric and violence subsided.[72] Anti-Pope and anti-Catholic resentment, however, never completely went away.

B. Contemporary View of Infallibility

1. Vatican I's Explanation

On July 18, 1870 Vatican Council I formally announced the doctrine of infallibility:

> Therefore faithfully adhering to the tradition received from the beginning of the Christian faith, . . . We teach and define that it is a dogma divinely revealed: that the Roman Pontiff, when he speaks *ex cathedra*, that is, when in discharge of the office of Pastor and Doctor of all Christians, by virtue of his supreme Apostolic authority defines a doctrine regarding faith or morals to be held by the Universal Church, by the divine assistance promised to him in blessed Peter, is possessed of that infallibility with which the divine Redeemer willed that His Church should

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[66] *Id.*

[67] *Id.*

[68] Christopher Minster, *The Saint Patrick's Battalion*, ABOUT.COM, http://latinamericanhistory.about.com/od/Mexican-AmericanWar/a/The-Saint-Patricks-Battalion.htm (last visited Mar. 2, 2015).

[69] *Id.*

[70] *Id.*

[71] *Knownothingism*, *supra* note 33.

[72] *Id.*

> be endowed for defining doctrine regarding faith or morals: and that therefore such definitions of the Roman Pontiff are irreformable of themselves, and not from the consent of the Church. (Vatican Council I, July 18, 180)[73]

While "[p]ronouncements by the Pope reflect the ultimate authority within the Catholic Church[,]. . . . [n]ot all such messages are delivered with the force of a mandatory interpretation. The *Catechism of the Catholic Church* (Catechism) offers this summary"[74]:

> 891 "The Roman Pontiff, head of the college of bishops, enjoys this infallibility in virtue of his office, when, as supreme pastor and teacher of all the faithful—who confirms his brethren in the faith—he proclaims by a definitive act a doctrine pertaining to faith or morals . . . . The infallibility promised to the Church is also present in the body of bishops when, together with Peter's successor, they exercise the supreme Magisterium," above all in an Ecumenical Council. When the Church through its supreme Magisterium proposes a doctrine "for belief as being divinely revealed," and as the teaching of Christ, the definitions "must be adhered to with the obedience of faith." This infallibility extends as far as the deposit of divine Revelation itself.[75]

In other words, not every pronouncement of the pope is regarded as infallible.[76] "A summary of the doctrine of papal infallibility, stamped under '*Nihil Obstat*' and '*Imprimatur*,' including the teaching that it also belongs to the bishops within the Church under some circumstances, is set forth at Catholic Answers."[77]

2. Vatican II's Explanation

Vatican II's explanation of the doctrine of infallibility is put best by a segment which appears in "Catholic Answers" with an imprimatur by Bishop Robert H. Brom:

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[73] TIERNEY, *supra* note 15, at 1.

[74] BILL PIATT, CATHOLIC LEGAL PERSPECTIVES 4 (2d ed. 2014).

[75] CATECHISM OF THE CATHOLIC CHURCH 235–36 (2d ed. 2001), *available at* http://www.usccb.org/beliefs-and-teachings/what-we-believe/catechism/catechism-of-the-catholic-church/epub/index.cfm.

[76] *See id.*

[77] PIATT, *supra* note 74, at 4.

> [A]lthough the individual bishops do not enjoy the prerogative of infallibility, they can nevertheless proclaim Christ's doctrine infallibly. This is so, even when they are dispersed around the world, provided that while maintaining the bond of unity among themselves and with Peter's successor, and while teaching authentically on a matter of faith or morals, they concur in a single viewpoint as the one which must be held conclusively. This authority is even more clearly verified when, gathered together in an ecumenical council, they are teachers and judges of faith and morals for the universal Church. Their definitions must then be adhered to with the submission of faith (Lumen Gentium 25).
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> Infallibility belongs in a special way to the pope as head of the bishops (Matt. 16:17–19; John 21:15–17). As Vatican II remarked, it is a charism the pope "enjoys in virtue of his office, when, as the supreme shepherd and teacher of all the faithful, who confirms his brethren in their faith (Luke 22:32), he proclaims by a definitive act some doctrine of faith or morals. Therefore his definitions, of themselves, and not from the consent of the Church, are justly held irreformable, for they are pronounced with the assistance of the Holy Spirit, an assistance promised to him in blessed Peter."
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> The infallibility of the pope is not a doctrine that suddenly appeared in Church teaching; rather, it is a doctrine which was implicit in the early Church. It is only our understanding of infallibility which has developed and been more clearly understood over time. In fact, the doctrine of infallibility is implicit in these Petrine texts: John 21:15–17 ("Feed my sheep . . ."), Luke 22:32 ("I have prayed for you that your faith may not fail"), and Matthew 16:18 ("You are Peter . . .").[78]

Under what circumstances are such pronouncements issued? "An infallible pronouncement—whether made by the pope alone or by an ecumenical council—usually is made only when some doctrine has been

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[78] Robert H. Brom, *Papal Infallibility*, CATHOLIC ANSWERS (Aug. 10, 2004), http://www.catholic.com/tracts/papal-infallibility.

called into question. Most doctrines have never been doubted by the large majority of Catholics."[79] A complete explanation of the doctrine can be found in the Decree of the First Vatican Council.[80] And, a very understandable approach to the issue is that of Dr. Jeffrey Mirus, a contributor to EWTN.[81]

There is some confusion among Catholics and non-Catholics alike regarding the issue of papal infallibility. Some important considerations, as explained on the "Catholic Answers" website,[82] include the realities that infallibility does not mean that the Pope cannot sin.[83] It is not a charism exclusively belonging to the Pope; it also resides in the body of bishops (but not individual bishops).[84] Popes may disagree with each other on unofficial announcements concerning morals and faith without violating the infallibility doctrine because that doctrine only applies to the formal, official teachings of the Church.[85] Similarly, the doctrine does not preclude Popes from disagreeing with each other on disciplinary decisions.[86] The doctrine does not mean that the Pope automatically knows the "truth" regarding a theological matter, he must learn what is true through study, reflection and prayer—the same way his fellow members of the Church do.[87] As Pope, with the ability to consult with the bishops of the Church and role as the head of the Church, he has a distinct advantage. Moreover, Catholics teach that the Pope is precluded from officially teaching error by the Holy Spirit.[88]

> According to Father John Leies, it is relatively simple to identify statements issued under the infallibility doctrine. Those statements, which are relatively rare, are issued under a heading of "solemn form" or "*ex cathedra*,"

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[79] *Id.*

[80] DECREES OF THE ECUMENICAL COUNCILS (*CONCILIORUM OECUMENICORUM DECRETA*), vol. 2, First Vatican Council, Session IV, Jul. 18, 1870-First Dogmatic Constitution on the Church of Christ, Ch. 4, 812–16 (Norman P. Tanner, SJ ed., 1990), *available at* http://www.papalencyclicals.net/Councils/ecum20.htm#SESSION (last visited May 18, 2015).

[81] Jeffrey Mirus, *Papal Infallibility*, EWTN, http://www.ewtn.com/faith/teachings/papac2.htm (last visited May 18, 2015).

[82] *See* Brom, *supra* note 78.

[83] *See id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

> literally "from the chair." They are issued only by ecumenical councils or by the Pope after communion with the bishops. Vatican I issued only one and it is the infallibility doctrine itself. That decree was presented on July 18, 1870 . . . .[89]

There have been very few such pronouncements. An important pronouncement, relevant to Part III, involves the issue of abortion.[90] On March 25, 1995, Pope John Paul II announced: "I declare that direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being."[91]

C. Anti-Catholic/Anti-Pope Rhetoric Continues

The resentment against the misunderstood role of the Pope and his Church continues in the United States. According to Robert P. Lockwood, "[Anti-Catholisim] is not only America's most persistent prejudice but also its most accepted."[92] "Anti-Catholicism is deeply embedded in the fabric of America—so much so that Harvard historian Arthur Schlesinger, Sr., once termed it 'the deepest bias in the history of the American people.'"[93] Rick Hinshaw observed:

> Not a day goes by that the Catholic League is not confronted by ridicule of Catholic practices, defamation of that which Catholics hold sacred, and even blatant challenges to the basic rights of Catholics in America. Moreover—even as social pressures and government regulations are aggressively employed to extinguish other expressions of hate—anti-Catholic bigotry is defended and even celebrated as a legitimate exercise of free speech.[94]

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[89] PIATT, *supra* note 74, at 5.

[90] POPE JOHN PAUL II, EVANGELIUM VITAE: ON THE VALUE AND INVIOLABILITY OF HUMAN LIFE 63 (Mar. 25, 1995), *available at* http://www.catholic-pages.com/documents/evangelium_vitae.pdf.

[91] *Id.* at 63, 108.

[92] Robert P. Lockwood, *Introduction*, *in* ANTI-CATHOLICISM IN AMERICAN CULTURE 5, 5 (Robert P. Lockwood ed., 2000).

[93] Rick Hinshaw, *Anti-Catholicism Today*, *in* ANTI-CATHOLICISM IN AMERICAN CULTURE 89, 89 (Robert P. Lockwood ed., 2000).

[94] *Id.*

A study of the coverage of matters related to the Catholic Church by national media outlets concludes: "On most controversies involving Catholic teachings, the Church came out on the losing side of the issue debate reported in the media."[95] "[L]ong-term trends in the coverage have been unfavorable to the Church. Over time, official Church teachings were reported less frequently and were challenged more often when they did appear."[96] In Andrew M. Greeley's book *An Ugly Little Secret*, he discusses unexposed prejudice in American life that is termed "Anti-Catholic nativism."[97]

In his book, *The New Anti-Catholicism*, Philip Jenkins points out the anti-Catholicism which arose after September 11, 2001:

> [P]olitical leaders, the mass media, and civil liberties groups allied to resist attacks on Islam. Any public remark suggesting that Islam was intrinsically connected with violence and terrorism was deemed racist, prejudiced, and unacceptable, while sporadic assaults on Muslim institutions met with widespread condemnation. As with anti-Semitism, public opinion was expected to reject any attempt to denounce a religion on the grounds of the misdeeds of some of its members. Commonly, this kind of bigotry is seen as a fundamental betrayal of American values. . . . Ironically, the September massacres resulted in some remarkable tirades not against the religion of Islam but against Catholicism, though the actual Catholic linkage to the attacks was nonexistent. In the *New York Press*, Michelangelo Signorile somehow used Islamist fanatic Osama bin Laden as a means of denouncing "the gay-bashing Pope." John Paul, too, was 'another omnipotent religious zealot, one who equally condemns us Western sinners and incites violence with his incendiary rhetoric. . . . [The Pope was a] Christian fundamentalist extraordinaire and a man who inspires thugs across the globe who commit hate crimes against homosexuals, a form of terrorism if

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[95] Linda S. Lichter et al., *Media Coverage of the Catholic Church—Executive Summary, 1991 Report*, *in* ANTI-CATHOLICISM IN AMERICAN CULTURE 151, 152 (Robert P. Lockwood ed., 2000).

[96] *Id.* at 153.

[97] ANDREW M. GREELEY, AN UGLY LITTLE SECRET: ANTI-CATHOLICISM IN NORTH AMERICA 2 (1977).

> there ever was one. Signorile later included the Catholic cardinals among the religious right who constituted "the real American Taliban."[98]

The Pope bashing continues, even by respected media outlets and Presidential advisors. As noted below, in Part III.B, misunderstandings and ignorance of the Church's position regarding the use of condoms led a New York Times editorial in 2009 to announce that the Pope "deserves no credence when he distorts scientific findings."[99] Harry Knox, who soon thereafter became an advisor to President Obama, claimed that the Pope was "hurting people in the name of Jesus."[100] The internet is replete with attacks on the Pope and his infallibility.[101] The vitriol that continues to be directed at the Pope is reminiscent of the rhetoric of the "Knownothings."

III. "HEAD OF STATE" (WHAT STATE?) IMMUNITY

A. Church, State, or Both?

Is the Pope the head of a nation, a religion, or both? The answers produce significant legal consequences. If the Pope qualifies as a head of state, he is immune from civil liability[102] and effectively becomes "infallible" in a very real, legal sense. Those seeking to hold him and his Church liable in a civil or criminal court see a structure that is different from the view that the pope urges courts and the United Nations to adopt.[103] First, consider what visitors to the Vatican observe.

On a trip to Rome during the summer of 2014, my wife and I stayed at a beautiful little hotel almost directly across the street from the entrance to the Vatican Museum. From our third floor vantage point, we could observe the hustle below as tourists lined up to wait for up to several hours to enter

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[98] PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE 9 (2003).

[99] *See* THAVIS, *supra* note 1, at 257.

[100] *Id.*

[101] *See, e.g.*, Rand Winburn, *Lechery in the Church of Rome Exposed*, ICONBUSTERS.COM, http://www.iconbusters.com/iconbusters/htm/sex_crimes/sex_crimes. html (last visited Mar. 3, 2015); Peter De Rosa, *The Hillarious History of Papal Infallibility*, JESUSWOULDBEFURIOUS.COM, http://jesuswouldbefurious.org/Catholic/papalinfallibility.html (last visited Mar. 3, 2015).

[102] *See* Philip Pullella, *Pope Immunity: Vatican Will Protect Benedict from Sexual Abuse Prosecution*, HUFFINGTON POST (Feb. 17, 2013, 10:10PM), http://www.huffington post.com/2013/02/17/pope-immunity_n_2708518.html.

[103] *Id.*

the vast museum. Those pilgrims who preferred not to wait in the long lines outside could pay a "skip the line" guide who could lead them directly to the entrance. Once inside, however, there was no skipping the crush of tourists moving slowly from room to room through some of the most interesting collections in the world. This hustle produces some very real benefits to the Vatican and is critical to its functioning. Most of the operating revenue of the Vatican government is derived from those fees and sales at the museum (and presumably from a portion of the "skip the line" fees collected by the guides).[104] The rest of the cost of governance is generated by the other minor commercial ventures including the sale of postage, coins, and from the sales in the Vatican stores.[105] (For obvious reasons, I hesitate to comment upon the profit that might be earned by the Vatican's money exchange, located within the gift shop area.)

There were also vendors gathered outside the entrance offering scarves, religious items, hats, t-shirts, and other items to the tourists. During the heat of the day, cold bottles of water were a big seller. The pace was frenetic, and the money quickly changed hands. The walls of the Vatican loomed above the pilgrims and hawkers. Behind those walls—in what are now the Vatican Gardens—the emperor Nero once held magnificent parties, lighting the outdoor events with the bodies of Christians burning on high poles.[106] St. Peter was crucified here.[107] A basilica was built in 329 AD by the Emperor Constantine, and it was expanded into what is now St. Peter's basilica in the 1500s.[108] But the building of the new Cathedral was not without tremendous cost. Martin Luther objected to the raising of money from the poor, particularly by the selling of indulgences, to build a vast cathedral and was subsequently excommunicated.[109]

St. Peter's Cathedral is magnificent; the surrounding walls and gardens are beautiful; and the Museum contains a trove of historical collections. It is not the architecture, the collections, nor even the secular history that draws millions of visitors to this tiny enclave in the middle of Rome each year. It is tiny—we ran around the entire Vatican City, which consists of less than

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[104] *See* THAVIS, *supra* note 1, at 120.

[105] *Id.*

[106] FLORENCE EDYTHE BLAKE-HEDGES, THE STORY OF THE CATACOMBS, 34–35 (1909).

[107] *History*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/monumenti/basilica-di-s-pietro/storia.paginate.1.html (last visited Mar. 3, 2015).

[108] *Id.*

[109] *See* WORKS OF MARTIN LUTHER 29–38 (Adolph Spaeth et al. trans. & eds., 1915), *available at* http://bookofconcord.org/95theses.php.

109 acres,[110] in fifteen minutes or so. Rather, the fact that it is the seat of the Pope and of the Catholic Church, that accounts for the draw.[111] So is this beautiful little enclave a nation, or just the headquarters of a religion? Is the Pope only a spiritual leader, albeit of a billion people, or is he also the sovereign head of a state? As one might imagine, the answers to these questions carry significant legal and international consequences. The pope's lawyers press for an interpretation and characterization that most benefits the Church in any given situation, while his detractors and their lawyers take the opposite approach in trying to pry financial and political concessions from him.

How is the Vatican viewed by other observers? One organization, "Catholics for Choice," is very much opposed to the church's position on abortion.[112] Undoubtedly, this perspective influences the way that organization views the legal categorization of the Pope and Church. In its publication *The Catholic Church at the United Nations: Church or State?*, Catholics for Choice argue that none of the three entities known as Vatican City, the Holy See, or the Roman Catholic Church fulfills the requirements for being characterized as a nation.[113] This same organization argues the temporal government of the Church is referred to as the Holy See.[114] The Holy See includes the Pope and the Roman Curia (administrative entity of the Vatican and the Church).[115] Catholics for Choice further identifies Vatican City as the "temporal location of both the Holy See and the headquarters of the Roman Catholic Church."[116]

Catholics for Choice argue that none of these entities can be considered a state under the United Nations' requirements for a state,[117] as defined in the Montevideo Convention on the Rights and Duties of States, Article 1.

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[110] *See* CATHOLICS FOR CHOICE, THE CATHOLIC CHURCH AT THE UNITED NATIONS: CHURCH OR STATE? 2 (2013), [hereinafter CATHOLICS FOR Choice], *available at* http://www.catholicsforchoice.org/topics/ politics/documents/CFC_See_Change_2013.pdf.

[111] Stephanie Rosenbloom, *How to See the New Pope in Rome*, N.Y. TIMES, Apr. 23, 2013, http://www.nytimes.com/2013/04/28/travel/how-to-see-the-new-pope-in-rome.html ?_r=0.

[112] *Abortion*, CATHOLICS FOR CHOICE, http://www.catholicsforchoice.org/topics/ abortion/default.asp (last visited May 12, 2015).

[113] CATHOLICS FOR CHOICE, *supra* note 110, at 2.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 2.

[117] *Id.*

That Convention requires that a state have a defined territory.[118] It requires that a state have a government, ability to enter into relations with other states, and a permanent population.[119] The organization notes that the population of Vatican City is less than 600 citizens, mostly employees, and Vatican City citizenship terminates when a citizen moves out of its confines.[120] It notes that unlike most other countries, Vatican City citizenship is not obtained by being born in the territory or by inheritance.[121] Catholics for Choice argue that as a result, Vatican City should not be allowed to participate in the United Nations as a state.[122]

The United Nations, however, takes a different view. In April 1964, the Holy See was designated a Nonmember State Permanent Observer to the United Nations by then United Nations Secretary General U Thant.[123] Since 2004, the Holy See has been able to intervene in debates at the U.N., circulate its documents to members, and engage in formal replies.[124] The Holy See indicates it does not want full member status because it would not want to participate in the military defense obligations required of members.[125]

The Holy See became a Permanent Observer at the Organization of America States in 1978 and a full member of the World Trade Organization in 1997.[126] The Catholics for Choice publication contains an extensive history of the international involvement of the Vatican, including the fixation of its current territory through its 1870 agreement with Italy.[127] Catholics for Choice argues that no other religion has the status of a state.[128] It believes its own church—the Catholic Church—should not either, but its conclusions seem more oriented toward the goal of depriving the Catholic Church of an international forum to present its religious views, including its teaching that abortion is a moral wrong.[129]

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[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 21.
[123] *Id.* at 5.
[124] *Id.*
[125] *Id.* at 4.
[126] *Id.* at 5.
[127] *Id.*
[128] *Id.* at 4.
[129] *Id.* at 11.

How does the American legal system view the status of these three entities? The United States Court of Appeals for the Second Circuit concluded in 2013: "The Vatican State is the territory over which the Holy See of the Roman Catholic Church exercises sovereignty."[130] For purposes of the Foreign Sovereign Immunities Act (FSIA),[131] discussed below, courts determined the Holy See is to be treated as a foreign sovereign.[132] Some commentators and critics struggle with these characterizations, but it is clear that for both domestic and international law purposes the Holy See is a recognized sovereign nation—albeit a tiny one.[133] Although its physical size is small, the one billion adherents to the Catholic faith worldwide[134] substantiate its role as a nation.

B. Governance and Confusion

Just because the Holy See is a nation, however, does not mean that its governance is similar to that of any other country. While the Pope is the head of the Church, his role, the roles of the Cardinals, and the roles of those in the administration of the Vatican are often operating in an unusually disjointed fashion.[135] One commentator identifies, "an amazing lack of internal communication and coordination in the Roman Curia, which operates more as a network of jealous bureaucratic enclaves than as a cohesive force in the church's evangelizing mission.[136]" Thavis makes this point by identifying many situations where this is the case.[137] One in particular, involving the Church's position on the use of condoms, illustrates not only the bureaucratic murkiness but the external misperceptions and misrepresentations of the Pope's views by the press.[138]

Thavis notes that as of 2003, despite the public impression, no pope, speaking on behalf of the church, "had ever indicated that using condoms to prevent AIDS was morally wrong, . . . the . . . Catechism of the Catholic Church was silent on the matter and . . . the whole question remained a gray

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[130] MAGI XXI, Inc. v. Stato Della Citta Del Vaticano, 714 F.3d 714, 718 (2d Cir. 2013).

[131] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

[132] *See MAGI XXI*, 714 F.3d at 718; Doe v. Holy See, 557 F.3d 1066, 1098 (9th Cir. 2009); O'Bryan v. Holy See, 556 F.3d 361, 369 (6th Cir. 2009).

[133] *MAGI XXI*, 714 F.3d at 718; *Doe*, 557 F.3d at 1098; *O'Bryan*, 556 F.3d at 369.

[134] CATHOLICS FOR CHOICE, *supra* note 110, at 2.

[135] *See* THAVIS, *supra* note 1, at 5.

[136] *Id.* at 4.

[137] *See id.* at 4–6.

[138] *Id.* at 251–60.

area."[139] Some Cardinals were quoted as stating the use of condoms was inherently wrong,[140] those position statements were misunderstood by the press to represent the position of the entire Church.[141]

In 2009, Pope Benedict took a trip to Africa.[142] Meeting with the press on the flight, he fielded a question about whether the Church's position on AIDS was "unrealistic and ineffective."[143] In a relatively lengthy response, the Pope stated that distributing condoms makes the problem worse without a spiritual dimension.[144] The Pope, admittedly, never addressed the issue of whether the use of condoms to prevent the spread of disease was immoral. Nonetheless, journalists ran headlines worldwide attacking the Pope for banning condoms.[145] For example, a New York Times editorial severely criticized him by stating the Pope "deserves no credence when he distorts scientific findings."[146] Harry Knox, who soon thereafter became an advisor to President Obama, claimed that the Pope was "hurting people in the name of Jesus."[147] Meanwhile, the Pope's public relations officials within his Secretariat of State attempted to clarify the Pope's remarks.[148] They cited Edward C. Green of the Harvard Center for Population in Development Studies, who reported that "the best evidence we have supports the pope's comments" in that condoms led to riskier behavior involving multiple partners.[149]

In 2010, Pope Benedict again criticized overreliance on the use of condoms to stop HIV/AIDS.[150] He did note, however, that under some circumstances the use of a condom might actually be the morally correct action.[151] A sexual transaction involving a prostitute was one example.[152]

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[139] *Id.* at 252.

[140] *Id.* at 252–54.

[141] *Id.* at 252.

[142] *Id.* at 256.

[143] *Id.*

[144] *Id.*

[145] *Id.*; *Pope Visits Africa, Reaffirms Ban on Condoms*, CNN (Mar. 18, 2009), http://edition.cnn.com/2009/WORLD/africa/03/17/cameroon.pope/index.html?iref=topnews.

[146] THAVIS, *supra* note 1, at 257 (quoting Editorial, *The Pope on Condoms and AIDS*, N.Y. TIMES, Mar. 18, 2009, at A26).

[147] *Id.*

[148] *Id.*

[149] *Id.* at 258.

[150] *Id.*

[151] *Id.*

[152] *Id.*

The Pope was asked, "Are you saying, then, that the Catholic Church is actually not opposed in principle to the use of condoms?"[153] Pope Benedict responded: "She of course does not regard it as a real or moral solution, but, in this or that case, there can be nonetheless, in the intention of reducing the risk of infection, a first step in a movement toward a different way, a more human way, of living sexuality."[154] The Pope was repeating what his own theologians quietly concluded for years in internal discussions that had not filtered out of the Vatican.[155] Liberals praised the "change" in the Church's position.[156] Conservatives condemned it.[157] What started as a theological work in progress within the Vatican became an illustration of the murkiness inherent within the workings of the church, the misunderstandings of the pronouncements by some church officials, and even the misunderstanding of the role of the Pope.

C. Attempts to Hold the Holy See Liable in the Sex Abuse Scandal

Over the last two decades, the Catholic Church within the United States witnessed a scandal involving the sexual abuse of children by its priests along with the alleged cover ups of those wrongful activities by bishops and other church officials.[158] The extent of these horrible acts has led various archdioceses, dioceses, religious orders, and individuals to pay out more than $3 billion in judgments and settlements over the last few years.[159] The largest of these include the Diocese of Los Angeles ($660 million, 2007), San Diego (approximately $200 million, 2007), Oregon Province of Jesuits (approximately $150 million, 2011), Orange County, California ($100 million, 2004), and Boston (approximately $85 million, 2003).[160] In these cases, the defendants were represented by counsel selected by the Archdioceses, the religious orders, and their insurers.[161]

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[153] *Id.*

[154] *Id.*

[155] *Id.* at 259.

[156] *Id.*

[157] *Id.*

[158] *Sexual Abuse by U.S. Catholic Clergy Settlements and Monetary Awards in Civil Suits*, BISHOPACCOUNTABILITY.ORG, http://www.bishop-accountability.org/settlements/ (last visited Mar. 3, 2015).

[159] *Id.*

[160] *Id.*

[161] Jack Hammel, *The Role of the Diocesan In-House Counsel Attorney*, *in* RESTORING TRUST: A PASTORAL RESPONSE TO SEXUAL ABUSE 1–2 (1994), *available at*

In addition to the pursuit of these cases against individual priests, bishops, and archdioceses within the United States, plaintiffs sought to pursue actions against the Pope himself.[162] A judgment against the Pope and the Holy See would produce a deeper pocket for recovery, and it would have a much greater impact upon the Church itself. Litigants, thus far, have encountered the obstacle of the Foreign Sovereign Immunities Act (FSIA).[163] That act grants foreign sovereigns immunity from liability and also from the jurisdiction of courts in the United States.[164] The Holy See is considered to be a foreign state under the FSIA.[165] The Holy See cannot be sued under the FSIA even if plaintiffs allege that it is acting as a non-sovereign association or as the head of an international religious organization.[166]

The FSIA does allow, however, for jurisdiction of American courts over the Holy See under certain narrow exceptions set out in 28 U.S.C. § 1605(a).[167] One important exception, relevant in the sex abuse liability cases, precludes immunity in cases where "money damages are sought against a foreign state for personal injury . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."[168] The foreign sovereign retains its immunity if the tortious act was either "based upon the exercise or performance or the failure to exercise or perform a discretionary function."[169]

In the *O'Bryan* case, plaintiffs relied on a 1962 Policy of the Holy See requiring bishops to impose secrecy on the handling of sexual abuse allegations.[170] According to the plaintiffs, the policy was secret until 2003.[171] The *O'Bryan* court held that the promulgation of the Policy

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http://www.bishopaccountability.org/reports/1994_11_NCCB_Restoring_Trust/rt94_complete_optimized.pdf.

[162] Luiza Olcszczuk, *Sex Abuse Victims Sue Pope at International Criminal Court*, CP WORLD (Sep. 14, 2011, 12:01 AM), http://www.christianpost.com/news/sex-abuse-victims-sue-pope-at-international-criminal-court-55563/.

[163] *See* 28 U.S.C. § 1602 (2012).

[164] § 1604.

[165] O'Bryan v. Holy See, 556 F.3d 361, 373 (6th Cir. 2008).

[166] *Id.*

[167] *See* § 1605(a).

[168] § 1605(a)(5).

[169] § 1605(a)(5)(A).

[170] *O'Bryan*, 556 F.3d at 370.

[171] *Id.*

occurred abroad, and therefore, the claim against the Holy See could not proceed under the FSIA.[172] While the claim would not survive against the Holy See for its own failures to warn or report (which would have occurred abroad),[173] the claim against the Holy See for tortious supervisory conduct by its employees in the U.S. would fall within the exception to the FSIA, and it would, therefore, be within the jurisdiction of a U.S. court.[174] The case was eventually dismissed.[175]

In another case, *Doe v. Holy See*,[176] the Ninth Circuit held that there was no jurisdiction over the Holy See for negligent hiring and retention of an allegedly abusive priest under the discretionary acts exception to the FSIA.[177] However, the Court determined that the Holy See would not be immune from a tort claim where the allegation was that the priest was an "employee" of a foreign state acting within the scope of his employment.[178] The case was remanded to the trial court where discovery was limited.[179] A more recent decision, however, prevented the federal judiciary from reviewing a determination by the Holy See regarding whether someone is or is not a member of a religious order within the Roman Catholic Church.[180]

Other barriers to bringing an action against the pope, or the Vatican are also in place. In a matter unrelated to the sex abuse allegations against the Holy See, the 7th Circuit ruled that the FSIA does not apply to heads of states.[181] Any immunity to be granted to such a head of state relies upon the determination of such by the Executive Branch of the U.S. government.[182] Yet, it is difficult to see a set of circumstances where an American President would waive this immunity and allow an action to proceed against the Pope. And in a case where victims of crimes committed during World War II sued, among others, the Vatican Bank and the Franciscan Order—alleging that those entities collaborated with the Nazis in depriving them of their

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[172] *Id.* at 387.

[173] *Id.* at 388.

[174] *Id.*

[175] Jacob William Neu, *"Workers of God": The Holy See's Liability for Clerical Sexual Abuse*, 63 VAND. L. REV. 1507, 1518 (2010).

[176] 557 F.3d 1066 (9th Cir. 2009).

[177] *Id.* at 1069.

[178] *Id.* at 1083.

[179] *See* Doe v. Holy See, No. CV 02-430-MO, 2011 WL 1541275, at *1 (D. Or. Apr. 21, 2011).

[180] McCarthy v. Fuller, 714 F.3d 971, 978 (7th Cir. 2013).

[181] Ye v. Zemin, 383 F.3d 620, 625 (7th Cir. 2004).

[182] *See id.*

property, the Ninth Circuit declined to hear the case.[183] The Ninth Circuit determined that those claims were non-justiciable political questions given the war power was vested in the President and Executive Branch, and courts could not intrude on policy determinations made by the Executive not to prosecute those defendants.[184] It appears the Pope is not always infallible, but the Pope is very likely going to continue to remain immune from American judicial proceedings.

The obstacles for litigants in the sex abuse matters caused a reaction against the notion of granting any immunity to the Holy See and the Pope.[185] Criticism originated from both outside and within the Church. Catholics for Choice explicitly call for removing the Holy See's and Pope's recognition as a nation sovereign.[186] Indeed, Catholics for Choice even allude to the imposition of criminal responsibility on the Pope.[187]

D. International Action Against the Vatican

The role of the Holy See as a nation, with the Pope as its head, is a double-edged sword for the Church. As a nation, the Holy See signed onto treaties of the United Nations protecting children and against torture.[188] Both of these treaties require reports from its signatories regarding

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[183] Alperin v. Vatican Bank, 410 F.3d 532, 538, 562 (9th Cir. 2005).

[184] *Id.* at 559.

[185] *See* Neu, *supra* note 175, at 1508; Dina Aversano, Comment, *Can the Pope Be a Defendant in American Courts? The Grant of Head of State Immunity and the Judiciary's Role to Answer this Question*, 18 PACE INT'L L. REV. 495, 496 (2006); Geoffrey Robertson, *Put the Pope in the Dock*, GUARDIAN (Apr. 2, 2010, 3:30 PM), http://www.theguardian.com/commentisfree/libertycentral/2010/apr/02/pope-legal-immunity-international-law; Philip Pullella, *Pope Will Have Security, Immunity by Remaining in the Vatican*, REUTERS (Feb. 15, 2013, 1:59 PM), http://www.reuters.com/article/2013/02/15 /us-pope-resignation-immunity-idUSBRE91E0ZI20130215; Eamonn McCann, *Why the Vatican's Diplomatic Immunity Days Are Numbered*, BELEFAST TELEGRAPH (Sept. 8, 2010), http://www.belfasttelegraph.co.uk/opinion/columnists/eamonn-mccann/why-the-vaticans-diplomatic-immunity-days-are-numbered-28557346.html; Lucian C. Martinez, Jr., *Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?*, 44 TEX. INT'L L. J. 123, 123 (2008).

[186] *See* CATHOLICS FOR CHOICE, *supra* note 110, at 19, 21.

[187] *See id.* at 18.

[188] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), *available at* http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf.

implementation of the treaties.[189] In 2013, United Nations Committee on the Rights of the Child publicized the Vatican's alleged violations of the U.N. Convention on the Rights of the Child.[190] In addition to requiring the Vatican to provide "detailed information on all cases of child sexual abuse committed by members of the clergy, brothers and nuns," the Vatican was requested to identify how it was responding to perpetrators and victims of abuse; the Vatican was required to report on other matters related to the scandal.[191]

In May 2014, the Vatican provided details regarding how it addressed the issue of child sexual abuse.[192] Since 2004, the Vatican identified more than 3,400 sexual abuse cases.[193] Eight hundred forty-eight priests were expelled, and 2,572 clergy members received other sanctions according to Archbishop Silvano Tomasi, who serves as the permanent Observer of the Vatican to the United Nations.[194] The Vatican also promised that it would learn from these mistakes.[195] By doing so, it likely opened itself to additional civil liability under the anti-torture and child protection treaties of the United Nations.[196] Prior to 2010, the Vatican did not require its bishops to report abuse to civil authorities.[197] According to Tomasi, that policy changed.[198]

The United Nations Committee on the Rights of the Child also criticized the Catholic Church's prohibition regarding abortion, birth control, premarital sex, and its stand on homosexuality.[199] The Committee stated:

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[189] Meredith Somers, *U.N. Finally gets Action . . . from the Pope as Vatican Forced to Reveal Punishment for Pedophiles*, WASH. TIMES, May 6, 2014, http://www.washingtontimes.com/news/2014/may/6/vatican-reveals-punishments-pedophile-priests-firs/?page=all.

[190] *U.N. Asks Vatican to Account for Every Abuse Allegation it has Received*, CATHOLIC HERALD, July 12, 2013, http://www.catholicherald.co.uk/news/2013/07/12/un-asks-vatican-to-account-for-every-abuse-allegation-it-has-received.

[191] *Id.*

[192] *See* Somers, *supra* note 189.

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] Comm. on the Rights of the Child, Concluding Observations on the Second Report of the Holy See adopted at its 65th Sess., Jan. 13–31, 2014, ¶ 55, Doc. CRC/C/VAT/CO/2 (Feb. 24, 2014), *available at* http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/ CRC_C_VAT_CO_2_16302_E.pdf.

> 55. The Committee urges the Holy See to review its position on abortion, which places obvious risks on the life and health of pregnant girls, and to amend Canon 1398 relating to abortion with a view to identifying circumstances under which access to abortion services may be permitted.[200]

Recall that the prohibition against abortion was issued as an *ex cathedra* pronouncement, under the full weight of the Church's infallibility doctrine, as noted above in part I of this Article.[201] Thus, the U.N. Committee chose to directly challenge the position of the Pope and the Catholic Church on a religious matter of deep import and concern to the Church.[202] That action led the Vatican to counterattack with the assertion that the United Nations was violating its own religious freedom guarantees as set forth in the Universal Declaration of Human Rights by the United Nations.[203] The Vatican stated, "[t]he Holy See takes note of the concluding observations . . . which will be submitted to a thorough study and examination . . . according to international law and practice."[204] However, it added that the Church "regrets to see in some points of the concluding observations an attempt to interfere with Catholic Church teaching on the dignity of human person and in the exercise of religious freedom," and the Church "reiterates its commitment to defending and protecting the rights of the child . . . according to the moral and religious values offered by Catholic doctrine."[205]

In an Op-Ed piece published in the New York Times on February 11, 2014, Paul Vallely noted that contrary to the implications of the United Nations report, the Vatican took "significant steps" to address the scandal.[206]

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[200] *Id.*

[201] POPE JOHN PAUL II, *supra* note 90.

[202] *See id.*

[203] Article 2 of Universal Declaration of Human Rights provides: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, natural or social origin, property, birth, or other status." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Article 18 provides: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." *Id.*

[204] *Vatican 'Must Immediately Remove' Child Abusers—UN*, BBC (Feb. 5, 2014 11:36 PM), http://www.bbc.com/news/world-europe-26044852.

[205] *Id.*

[206] Paul Vallely, *Vatican Missteps and U.N. Blunders*, N.Y. TIMES, Feb. 11, 2014, http://www.nytimes.com/2014/02/12/opinion/vatican-missteps-and-un-blunders.html?_r=0.

For example, the Vatican insisted, since 2001, that all child abuse matters be handled in Rome.[207] By 2010, however, Pope Benedict changed this position and ordered dioceses to "report suspect priest to the police and order local bishops to draw up new guidelines to protect children."[208] Valley believes that the attempt by the U.N. Committee to attack Church doctrine was a mistake because it takes the focus away from the abuse scandal and might tend to make some Vatican insiders attempt to circle the wagons against external pressures to combat the horrors of child abuse.[209]

The attention this scandal garnered is unlikely to recede. Among the 400,000 priests and 5,000 bishops serving the 1.196 billion Catholics worldwide, approximately 400 abuse cases are being reported to and handled by the Vatican each year.[210] The attempts by Catholics for Choice and others to remove the Vatican's recognition as a state,—effectively expelling it from the U.N. reporting required from signatories to its conventions—appears to be counterproductive to the goal of reducing child abuse. In any event, it highlights the Pope's and Vatican's need for legal and diplomatic counsel.

IV. THE POPE'S LAWYERS

Each diocese or archdiocese in the Catholic Church in the United States selects its own counsel to represent it and its employees in church-related matters.[211] The United States Conference of Catholic Bishops in Washington DC maintains a staff of attorneys who assist the Conference in legal matters and in preparing position statements.[212] Within the Vatican itself, matters of church law or canon law are handled by canon lawyers trained at the Vatican or the Catholic University of America.[213] Regarding

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[207] *Id.*

[208] *Id.* The reluctance of the Catholic Church to turn alleged abusers over to civil authorities might have roots in the Talmudic prohibition of "mesirah," which is the turning over of one Jew by another to civil authorities. "Mesirah" was meant to protect Jews and the entire Jewish community from anti-Semitic governments. "Mesirah" still has some adherents today. Rachel Aviv, *The Outcasts*, NEW YORKER, Nov. 10, 2014, at 46.

[209] *See* Vallely, *supra* note 206.

[210] *See* Somers, *supra* note 189.

[211] Christopher Beam, *Obejction, Your Holiness!*, SLATE, (Apr. 1, 2010, 2:45 PM), http://www.slate.com/articles/news_and_politics/explainer/2010/04/objection_your_holiness.html.

[212] General Counsel, U.S. CONF. CATHOLIC BISHOPS, http://www.usccb.org/about/general-counsel/ (last visited Mar. 10, 2015).

[213] *See* Beam, *supra* note 211.

the equivalent of diplomatic relations, those matters are handled by the Secretariat of State office within the Vatican, and as of this writing, by the Most Rev. Bernadito C. Auza, the Apostolic Nuncio and Permanent Observer of the Hole See to the United Nations and to the Organization of American States.[214] Archbishop Auza was appointed to these positions by the Pope in July 2014.[215]

How is counsel selected to represent the Holy See in the United States? Once again, a somewhat murky realm must be entered. In the past five years, the main attorney for the Holy See in the United States has been Jeffrey Lena.[216] Lena is a solo practitioner, and was the main—and often only—attorney representing the Holy See in a number of cases cited throughout this Article.[217]

His office is in Berkeley, California.[218] Lena graduated from the University of California at Santa Cruz in 1982.[219] In 1986 he obtained his MA degree at the University of California at Berkeley in history.[220] In 1988 he married a woman from Milan, Italy and enrolled in a PhD program in history, but he never completed his thesis.[221] He began teaching history at the University of Maryland and at Berkeley.[222] In 1993, however, Lena enrolled in Hastings College of the Law.[223] He became friends with one of the law faculty members, Ugo Mattei.[224] Lena transferred to Berkeley and also studied at the University of Milan.[225] In 1996 Lena graduated from law school and returned to Italy to serve as a visiting professor.[226]

How did Lena become the Pope's lawyer? In 2000, while he was teaching at the University of Turin, he was asked for his opinion and advice

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[214] *The Permanent Observer*, HOLY SEE MISSION, http://www.holyseemission.org/about/the-permenant-observer.aspx (last visited Mar. 10, 2015).

[215] *Id.*

[216] Jason Horowitz, *Jeffrey Lena: California lawyer is the voice of the Vatican, Pope Benedict in U.S. court*, WASH. POST, Apr. 19, 2010, at C1.

[217] *Id.* at C1, C9.

[218] *Id.* at C9.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

regarding the Alperin suit, which had just been filed in San Francisco.[227] He later identified "academic and professional associations in Italy" as the link which landed him the role as the Pope's lawyer.[228] Lena repeatedly declines to provide any additional information regarding those professional associations.[229] Professor Mattei claimed to be the connection.[230] The two have since had a falling out.[231] Another writer suggests that the contact was an Italian attorney by the name of Franzo Grande Stevens.[232] So, it is unclear—and likely will remain unclear—exactly how Mr. Lena came to be the Pope's attorney.

While the overwhelming number of lawsuits against the Holy See in the United States were handled and are being handled by Mr. Lena, he is not the only advocate for the Pope in this country. Another attorney, Mr. David Dunn of the law firm of Hogan Lovells, LLP of New York, represented the Holy See in the case of *Magi XXI, Inc.*[233] When a research assistant on this Article, Sean Cohen, asked Mr. Dunn in October 2014 how he was selected to handle this case, Mr. Dunn hesitated. He would only indicate that he was appointed by referral through another lawyer in Rome. He did not go into any other detail. When Mr. Dunn was asked how other attorneys were selected to represent the Pope in the United States, he guessed that it was done through local cardinals and other members of the hierarchy, but he could not and would not confirm this. He said he did not take part in the hiring process of any other attorneys.

The author of this Article made numerous direct and indirect attempts to determine who is selecting the Pope's lawyers in the United States to no avail. Throughout 2014, we communicated with various Church officials, both inside the United States and inside the Vatican. The persons with whom we communicated did not know how the Vatican's lawyers were selected and did not know who would know. The lengthy records of these attempts are on file. Finally, this author attempted to set up a face-to-face meeting with Vatican representatives within the Secretariat of State at the Vatican in July 2014. After clearing several levels of security within the Vatican, I met with an official who told me that all of the people I needed to

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[227] Nicole Winfield, *Jeffrey Lena, Lawyer for Pope, Talks About His Role*, HUFFINGTON POST (June 17, 2010 5:12 AM), http://www.huffingtonpost.com/2010/04/18/jeffrey-lena-lawyer-for-pope_n_541835.html (last visited Mar. 10, 2015).

[228] Horowitz, *supra* note 216, at C9.

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] Winfield, *supra* note 227.

[233] MAGI XXI, Inc. v. Stato Della Citta del Vaticano, 714 F.3d 714, 717 (2d Cir. 2013).

speak with were on vacation. He did, however, wish me well in my endeavors.

Of course, there are very good reasons for the Vatican to maintain a protective stance regarding these matters. As a result of its willingness to concede errors in the handling of child abuse cases, the Holy See now faces potential liability in lawsuits brought directly against it and perhaps even against the Pope. It does not seem likely that plaintiffs will give up on their attempts. The Church does not need to allow external interference or pressure in the selection process of its counsel, upon those who would select the Pope's lawyers, or upon the lawyers themselves. After all, Jeffrey Lena received threats directed against him because of his role defending the Pope and the Holy See.[234] Regardless of the silence surrounding the process, several things do seem certain as the Pope chooses his attorneys. First, the religious beliefs of these attorneys do not seem relevant. Lena himself was never asked by anyone at the Vatican about his faith before his selection as counsel.[235] Second, the litigation victories that Mr. Lena, Mr. Dunn and others obtained on behalf of their client indicate that whether or not outsiders understand the selection process employed by the Vatican in selection of its attorneys, the process works very well.

V. CONCLUSION

Why does the Pope need lawyers? His role in the direction of his Church is under attack both historically and presently. That role is and has been misunderstood. His Church and its current and former adherents in the United States are the victims of physical assaults and the objects of verbal attacks.[236] Some of the moral positions of his Church, particularly its views on abortion, fly in the face of the temporal decisions of governments and individuals.[237] He has deep pockets. His Church witnessed horrible wrongs committed by those in the roles of spiritual leaders within his Church. His Church reacted too slowly and has since admitted its mistakes.[238] Calls to strip the pope of immunity and his nation of its nation status come from

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[234] Winfield, *supra* note 227.

[235] *Id.*

[236] *See* JENKINS, *supra* note 98, at 31–33.

[237] *See id.* at 70–75.

[238] Letter from His Holiness Pope Benedict XVI to the Bishops of the Catholic Church (Mar. 10, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=101789591.

many—even from those within his own ranks.[239] He makes mistakes, just like the rest of us. And like the rest of us, he sometimes needs the assistance of a good lawyer.

[239] Paisley Dodds, *Pope's Immunity Could be Challenged in Britain*, NBC NEWS (Apr. 4, 2010 12:22 PM), http://www.nbcnews.com/id/36167166/ns/world_news-europe/t/popes-immunity-could-be-challenged-britain/#.VM1U_i6At2g.