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Rev. Bertram F. Griffin

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THE REASSIGNMENT OR NONASSIGNMENT OF A CLERIC WHO HAS BEEN PROFESSIONALLY EVALUATED AND TREATED FOR SEXUAL MISCONDUCT WITH MINORS: CANONICAL CONSIDERATIONS†

REV. BERTRAM F. GRIFFIN

INTRODUCTION

This article reviews the canonical institutions and procedures which bishops must consider when they are confronted with the questions concerning the reassignment of a particular cleric who has been treated for sexual misconduct with minors.¹ Three major issues will be examined in this article:

- I. The right of a cleric to ministry and/or financial support by the Church.

† This article originally appeared in a similar format in *The Jurist*. See 51 JURIST 326 (1991).

¹ The issue of sexual misconduct by priests has recently been the subject of nationwide attention. See generally Canice Connors, *Priests and Pedophilia: A Silence that Needs Breaking?*, 166 Am. 400 (1992); see also Aric Press et al., *Priests and Abuse*, NEWSWEEK, Aug. 16, 1993, at 42; Elizabeth Taylor, *The Secrets of St. Lawrence*, TIME, June 7, 1993, at 44; Jeffrey L. Sheler, *The Unpardonable Sin*, U.S. NEWS & WORLD REPORT, Nov. 16, 1991, at 94.

II. The canonical considerations in the reassignment of a cleric who has been treated for sexual misconduct with minors and has been professionally evaluated as suitable for ministry under certain conditions.

III. The canonical options when a cleric is professionally evaluated and judged to be unsuitable for ministry under any condition.

The focus of this particular article is limited to secular clerics who are incardinated in a particular church or diocese.² It should be noted that a bishop has no obligation to assign to ministry an extern cleric who is incardinated in another diocese or religious institute.³ Moreover, it should be noted that a bishop can remove a religious cleric from diocesan assignment after notifying a religious superior,⁴ and can prohibit the cleric from remaining in his diocese for only the most serious reasons.⁵

I. THE RIGHT OF A CLERIC TO MINISTRY AND/OR SUPPORT BY THE CHURCH

A determination of a pedophile cleric's status in his diocese requires a broad examination of the relationship between the Church and its clerics. A secular cleric is incardinated into a particular church⁶ for the service of that church.⁷ For promotion to the order of diaconate or presbyterate, the candidate testifies "that he will devote himself perpetually to the ecclesiastical ministry"⁸

The requirements of Canon 269, which deals with incardination, illustrate the mutuality of the diocese-cleric relationship. A diocesan

² Secular clergy are sacred ministers who report directly to the diocesan bishop as distinguished from "religious clergy" who are members of specific religious communities. OUR SUNDAY VISITOR'S CATHOLIC ENCYCLOPEDIA 223 (Reverend Peter M.J. Stravinskias, Ph.D., S.T.L. ed., 1991) [hereinafter SUNDAY ENCYCLOPEDIA]. They are "the usual parish priests." THE MARYKNOLL CATHOLIC DICTIONARY 518 (Albert J. Nevins, M.M. ed., 1965).

³ See THE CODE OF CANON LAW: A TEXT AND COMMENTARY 193-94 (James A. Coriden et al., eds., 1985) [hereinafter 1983 CODE]. 1983 CODE c.267 deals with the permanent transfer of clergy members. *Id.* § 1 requires the cleric who is already incardinated into a particular church to obtain letters of excardination and incardination, respectively to be incardinated into a new church. *Id.* at 193; see also 1983 CODE c.269, at 195-96 (describing when a diocesan is to allow the incardination of a cleric). The commentary following c.269 observes that "[i]ncardination is not to be granted until amendment of life has been established over an appropriate period of time." *Id.* at 196.

⁴ *Id.* 1983 CODE c.682 § 2, at 510-11.

⁵ *Id.* c.679, at 509. For a discussion of the possible reasons for taking such action, see accompanying commentary. *Id.*

⁶ *Id.* at 315-16. Canon 368 describes particular churches. According to the commentary, "[i]n the fullest and proper canonical sense the term 'particular church' means the diocese" *Id.* at 316.

⁷ *Id.* c.266 § 1, at 192.

⁸ See *id.* c.1036, at 727-28. The commentary following this canon emphasizes the importance of the candidate's intention and the need for adequate preparation for a commitment to religious life. *Id.* at 728.

bishop is instructed not to allow the incardination⁹ of a cleric from another particular church or institute unless the following circumstances exist: (1) "the necessity or advantage of his own particular church demands it, with due regard for the prescriptions of the law concerning the decent support of clerics;" and (2) "the cleric has declared in writing to the same diocesan bishop that he wishes to be dedicated to the service of the new particular church in accord with the norm of law."¹⁰

A. *Right to Ministry*

As demonstrated, incardination is a juridic bond between the cleric and the particular church which is based on a lifelong commitment to serve the Church.¹¹ This bond gives rise to a set of mutual rights and obligations on the part of the Church and the cleric.¹² For example, a particular church has a right to the services of the cleric, whereas clerics are "bound to undertake and faithfully fulfill a duty which has been entrusted to them by their ordinary."¹³ Thus, there is an implicit, correlative right of a cleric to receive an office or ministry in a particular church, unless he is legitimately impeded.¹⁴ This correlative right and obligation is perpetual, unless legitimately impeded, and is exclusive, at least for presbyterial and transitional deacons.¹⁵

Canon 286 forbids clerics from conducting business or trade without the permission of "legitimate ecclesiastical authority"¹⁶ under penalty of ecclesiastical sanction.¹⁷ Moreover, all clerics are bound to reside in their dioceses and to be available for service absent at least the "presumed permission" of their ordinary.¹⁸

B. *Remuneration for Ministry*

While a particular church enjoys the right to the service of a cleric unless legitimately impeded, it has the correlative obligation to provide

⁹ Incardination is defined as "[t]he canonical act whereby a cleric is attached to a diocese or religious community and subjected to the authority of its ordinary." SUNDAY ENCYCLOPEDIA, *supra* note 2, at 505. Canon 265 requires that all clerics be incardinated into some specific church or religious institute; no "transient" clerics are permitted. 1983 CODE c.265.

¹⁰ 1983 CODE c.269, at 195.

¹¹ *See id.* c.265 and commentary at 191-92.

¹² *See id.* at 198-200 (delineating obligations and rights of clerics).

¹³ 1983 CODE c.274 § 2, at 202.

¹⁴ *Id.*

¹⁵ Transitional deacons are those who ultimately become priests. SUNDAY ENCYCLOPEDIA, *supra* note 2, at 286.

¹⁶ 1983 CODE c.286, at 226.

¹⁷ *See id.* and commentary at 226-27. Only permanent deacons may conduct trade or business in addition to their service to the church. *Id.* c.288, at 228.

¹⁸ *Id.* c.283 § 1, at 219.

the cleric with "decent support."¹⁹ In addition, Canon 281 provides that "[w]hen clerics dedicate themselves to the ecclesiastical ministry they deserve a remuneration which is consistent with their condition in accord with the nature of their responsibilities and with the conditions of time and place . . . [which] should enable them to provide for the needs of their own life and for the equitable payment of those whose services they need."²⁰

C. Decent Support

Canon 384 requires the diocesan bishop to provide for the "decent support and social assistance" of the clergy.²¹ This "decent support" is provided by virtue of incardination and is distinct from remuneration for ministry.

Clerics who suffer from illness, incapacity, or old age have the right to the social assistance required by them to meet their needs.²² Hence, a pastor who must be removed from office is to be given another assignment if appropriate, or he will be provided with a pension.²³

If a cleric is penalized by the Church, but is not dismissed, the Church must ensure that his "decent support" be maintained.²⁴ Only in situations where a cleric is dismissed from the clerical state does this "obligation-right" relationship cease. However, even in the cases of dismissal, the ordinary is encouraged to care for the cleric if he "is truly in need due to the penalty."²⁵

In summary, a secular cleric is incardinated for the perpetual service of a particular church unless legitimately impeded. The cleric also has the right to exercise this commitment and is obliged to accept whatever office, ministry or ministerial function he has been assigned. He has the right to appropriate remuneration and still retains the right to receive decent support so long as he is an incardinated cleric. This right remains even though he is impeded from service by illness, old age, senility, or any other reason.

¹⁹ See 1983 CODE cc.384 & 1274, at 326 & 871.

²⁰ *Id.* c.281 § 1, at 216.

²¹ *Id.* c.384, at 326.

²² *Id.* c.281 § 2, at 216.

²³ *Id.* c.1746, at 1042. See also Canon 195 which states that "[i]f a person is removed from an office which is the source of financial support, not by the law itself, but by a decree of the competent authority, this same authority is to take care such support is seen to for a suitable time, unless it is provided otherwise." *Id.* at 112.

²⁴ *Id.* c.1350 § 1, at 914.

²⁵ *Id.* § 2.

II. REASSIGNMENT AFTER PROFESSIONAL EVALUATION AND TREATMENT FOR SEXUAL MISCONDUCT WITH MINORS

Assuming that a cleric has been professionally treated for pedophilia and is returned to his diocese with the professional recommendation that he is suitable for ministry under certain conditions, several canonical issues emerge. First, the evaluation regarding suitability for ministry and the recommendations for on-going treatment (including monitored supervision, residence, participation in a recovery support group, therapy, etc.) should be received in writing from the therapist or treatment center. A written canonical precept,²⁶ based on the written evaluation, should enforce this therapy as a condition of continued ministry.

The precept should also enforce recommendations regarding the cleric's future contact with minors. Canon 277, which regards the celibacy requirement, requires that clerics act prudently "in associating with persons whose company could endanger their obligation to observe continence or could cause scandal for the faithful."²⁷ Section three of Canon 277, authorizes the diocesan bishop to establish certain policies and to decide those cases which are related to this requirement.²⁸ Recommendations that a pedophile cleric avoid being alone with minors should be canonically enforced by a precept specifically directed to the cleric.

The bishop might well be advised to attach a penalty, in addition to removal from the conditioned ministry, to the precept in case of violation by the cleric. Canons 1317-1319 regulate penal precepts. It can certainly be argued that penalties for violation of such a precept are "truly necessary to provide for more suitably ecclesiastical discipline" and thus are appropriate according to Canon 1317.²⁹ Violations of precepts which forbid improper contact with minors would likely cause "more serious scandal," which would justify the imposition of an automatic penalty by the diocesan bishop pursuant to Canon 1318.³⁰ Such penalty might in-

²⁶ Canon 49 defines an individual precept as "a decree directly and legitimately enjoining a determined person or persons to do or to omit something, especially concerning the urging of the observance of a law." 1983 CODE c.49, at 53. Under Canon 35, one possessing "executive power" may issue an individual precept. *Id.* c.35 at 48. The commentary accompanying Canon 35 describes a precept as "an order issued to individuals, rather than to the community as a whole, obliging them as a law." 1983 CODE at 49.

²⁷ 1983 CODE c.277 § 2, at 209. The commentary following this canon observes that in the 1917 Code this provision expressly governed the cleric's associations with women. *Id.* at 211. The language of the 1983 Code is more general, recognizing the potential for improper association with males, as the text notes, and perhaps with children as well. *Id.*

²⁸ 1983 CODE c.277 § 3, at 209.

²⁹ *Id.* c.1317, at 899.

³⁰ *Id.* c.1318, at 900.

volve suspension, interdiction or excommunication.³¹ The bishop may not, however, threaten dismissal from the clerical state or any other perpetual expiatory penalty by a penal precept.³²

The diocesan bishop must also determine whether he should disclose the cleric's past sexual misconduct. Therapists and treatment centers sometimes advise such disclosure to the leadership or to the members of a parish or institution where the cleric is to be assigned.³³ However, Canon 220 prohibits the unlawful damaging of a person's "good reputation" and the violation of his or her right to privacy.³⁴ Thus, the disclosure of the dysfunction or disorder of a pedophile cleric must be legitimate. Accordingly, the norms on administrative decrees and recourse should be followed.³⁵ In some cases the cleric may choose to forgo his ministry rather than agree to full disclosure. In other cases, the disclosure itself may render ministry in that particular parish or institution impossible. Moreover, in some cases the disclosure has already been made by the press and/or the civil court.

A critical aspect of the canonical question is the type of ministry the cleric may be suited for in the future. Section one of Canon 149 requires that persons promoted to an ecclesiastical office be "suitable" — they must be "endowed with those qualities which are required for the office in question by universal or particular law"³⁶ For example, the office of pastor requires "integrity of morals" and a candidate's suitability for the office must be clearly evident.³⁷ Therefore, the bishop should consult with others including the vicar forane, or dean, and certain presbyters and lay members of the Christian faithful before making his decision.³⁸

For instance, in appointing a parochial vicar, the bishop ordinarily consults with the pastor and the vicar forane. Yet, certain chaplaincies or administrative positions which provide little contact with minors may be more appropriate ministries for pedophile priests than parish assignments.

Although a cleric has a right to ministry, this right is limited by suitability of the cleric and the pastoral needs of the Church. Consequently,

³¹ See 1983 CODE, *supra* note 3, at 906-09 for descriptions of these individual censures or penalties, which deprive offenders of ecclesiastical goods until they cease the offensive conduct.

³² See *supra* note 29, at 899 & 1983 CODE c.1319, § 1 at 900.

³³ See Press, *supra* note 1 (disclosures may be needed to prevent pedophilic clerics from concealing their histories of sexual misconduct, creating the risk of a repeat offender).

³⁴ 1983 CODE c.220, at 152-53.

³⁵ See *id.* cc.50-58, at 53-56 (governing administrative decrees).

³⁶ 1983 CODE c.149 § 1, at 100.

³⁷ *Id.* c.521, §§ 2, 3, at 421-22.

³⁸ *Id.* c.524, at 424. See accompanying commentary for a description of these inquiries. *Id.*

the bishop is not required to create an office or ministry where no suitable position is available for a particular cleric.³⁹

Finally, while reassignment may be possible in some cases, the requirements and risks involved may exceed the resources of a specific diocese. Thus, the diocesan bishop must weigh all the circumstances in light of the supreme law of the Church — “the salvation of souls.”⁴⁰ In so doing, the bishop may need to seek the assistance of other particular churches in providing appropriate ministerial opportunities for the cleric who has been judged suitable for limited ministry under specific conditions.

III. CANONICAL OPTIONS WHEN A CLERIC IS PROFESSIONALLY JUDGED NOT SUITABLE FOR MINISTRY UNDER ANY CONDITIONS

The juridic bond⁴¹ and concomitant obligations shared by the cleric and the Church⁴² may be modified or extinguished if the former has been professionally diagnosed as unsuitable for ministry due to pedophilic tendencies. As set forth in the following discussion, several outcomes normally arise.

A. *Voluntary Withdrawal from Ministry and/or Clerical State*

First, the cleric may choose to voluntarily retire from his office or ministry while remaining a cleric. The cleric retains the right to social assistance,⁴³ and if his withdrawal is accepted, he has a right to a full or partial pension in accordance with diocesan norms.⁴⁴

Second, the cleric may request to rejoin the laity.⁴⁵ Removal from the clerical state, however, does not include a recanting of the vow of

³⁹ See 1983 CODE c.269, at 195-96 and accompanying text.

⁴⁰ See *id.* c.1752, at 1044 (“[T]he salvation of souls is always the supreme law of the Church.”).

⁴¹ See 1983 CODE cc.269, 274, § 2, 1036 at 195, 202 & 727-28 (discussing requirement that clerics be bound to service of the church). “This obligation flows from the fact of incardination and the commitment to serve the diocese . . .” *Id.* at 204 (footnote omitted).

⁴² See generally *id.* cc.273-289, 384, at 202-29 & 326 (listing rights and obligations of clerics).

⁴³ This is so because the church frames the cleric’s pedophilic relationship as an “illness” within the purview of canon law. 1983 CODE c.281 § 2, at 216.

⁴⁴ See *id.* c.1746, at 1042 (describing provision following removal).

⁴⁵ “A cleric . . . loses the clerical state . . . by a receipt of the Apostolic See which is granted . . . to deacons only for serious reasons and to presbyters only for the most serious reasons.” *Id.* c.290, at 229. Laicization entails the loss of all rights and obligations which pertain to the clerical state. See *id.* c.292, at 236 and accompanying commentary. It is the Church’s experience that the Holy See readily responds to requests for laicization when the bishop’s sworn statements are accompanied by a summary of criminal action taken by the state, and/or any psychiatric evaluations recommending the withdrawal from ministry. See *id.* cc.59-75, at 56-62 (describing nature of and procedure surrounding rescripts).

celibacy.⁴⁶ Pope John Paul II has commented on the importance of chastity and noted that "a dispensation from celibacy . . . [cannot] be considered . . . some quasi-automatic summary administrative process."⁴⁷ However, if after reviewing a cleric's position, the ordinary deems such measures proper, "he is to prohibit petitioner from the exercise of orders *ad cautelam* (as a precautionary measure) unless he judges that their exercise is really necessary to protect the reputation of the priest or to foster the good of the community."⁴⁸ The prohibition⁴⁹ is both disciplinary and pastoral in nature, but is not a formal canonical suspension.

Finally, there is a growing tendency among priests and deacons to "voluntarily resign" from ministry⁵⁰ without seeking recourse to the Apostolic See for a rescript of laicization.⁵¹ This withdrawal normally takes the form of a "gentlemen's agreement" whereby the cleric agrees not to seek support from his particular church and to refrain from ministry. In return, the bishop consents not to sanction the cleric or to demand his further compliance. The established terms are often vague and implicit in the cleric's duties.⁵² It is advised, therefore, that the cleric's standing in the diocese be clarified in writing along with a prohibition to exercise sacred ministry. This final measure, however, is not recommended and should not become the standard practice of the dioceses.

There are situations, though, where a cleric refuses to petition for laicization. In situations where this occurs, the bishop cannot reassign him and is reluctant to expose the individual to the penal process.

⁴⁶ See *id.* at 234. "[C]anon 291 has definitively determined that one who is laicized is still bound by celibacy unless specifically released by the Holy See." *Id.* For a discussion of the policy of the Holy See regarding dispensations from celibacy, see *id.* at 232-35.

⁴⁷ *New Vatican Norms for Laicization*, ORIGINS (National Catholic News Service, Washington D.C.), Nov. 6, 1980, at 335.

⁴⁸ *Id.* at 336 (listing procedural norms of the Congregation of the Doctrine of the Faith). These measures are still used by the Congregation for Divine Worship and the Discipline of the Sacraments which now handles dispensations from obligations of sacred ordination. See CATH. ALMANAC 147 (Felician A. Foy & Rose M. Avata eds., 1993). See also, 1983 CODE cc. 85-93, at 65-68 (describing dispensations).

⁴⁹ See 1983 CODE c.51, at 53 ("A decree should be issued in writing . . ."). Experience indicates that this prohibition may encompass celebrating mass in a private setting. It is suggested that restrictions immediately be established for self-admitted or convicted pedophiles who seek dispensation from celibacy.

⁵⁰ A cleric absent from ministry for an indeterminate period of time may, by prescription, waive or lose certain spiritual rights. See *id.* c.197 and cmts., at 112.

⁵¹ See *supra* note 48 and accompanying text.

⁵² See 1983 CODE cc.290, 292, at 229, 236. As canon law does not provide for laicization absent recourse to the Apostolic See, a cleric in these proceedings remains barred from entering into a valid marriage. *Id.* As a corollary, with voluntary resignation, the priest or deacon legally remains a cleric, incardinated in his particular church. See *id.* c.291 and cmts., at 229-30. See also *supra* note 50 (discussing that certain spiritual rights may be lost by prescriptions).

As a possible solution, the bishop may negotiate a written accord whereby the cleric agrees not to demand support from the Church or perform his ministerial duties as though he was seeking laicization.⁵³ In return, the bishop might offer remuneration, including, but not limited to, severance pay, the cost of retraining in another job or profession, and temporary medical benefits. Provisions for the cleric's retirement would still be available to him if applicable.⁵⁴ The cleric should be instructed that if he seeks to minister elsewhere, the diocesan bishop will forward all information on his diagnosis, treatment, and recommendation to the "benevolent bishop."⁵⁵

B. Declaration of an Impediment to the Exercise of Orders

The bishop may declare a cleric impeded from the exercise of orders⁵⁶ when he is afflicted with "some form of insanity or other psychic defect due to which, after consultation with experts, he is judged incapable of rightly carrying out the ministry"⁵⁷ The cleric may, however, return to ministry if the ordinary, after consulting with an expert, deems such action prudent.⁵⁸ If the cleric is permitted to return, the diocesan

⁵³ *Id.* This accord could take the form of a disciplinary prohibition. *See supra* notes 48 and 49 and accompanying text. It may have a penalty attached with it in accordance with the norms on penal precepts. *See* 1983 Code cc.1313-20, at 898-900 (discussing penal law and penal precepts).

⁵⁴ *Id.* cc.281, 384, at 216, 326.

⁵⁵ *See id.* cc.267, § 1, 269, n.2, at 193, 195 (requiring that diocesan bishop confer with bishop of host church before cleric may be incardinated).

⁵⁶ *Id.* c.1044 § 2, at 731.

⁵⁷ *Id.* c.1041, n.1 at 729. He would not, however, lose his right to "a decent support." *See id.* cc.290, 384, at 229, 326.

This declaration is an administrative act. *Id.* c.48, at 52. Therefore, the procedures outlined in Canons 50-58 must be followed. *Id.* cc.50-58, at 53-56.

An investigation must be conducted and all "necessary information and proofs" collected. *Id.* c.50, at 53. Experts, including therapists and canonical and civil-law advisors, should be consulted. *Id.* c.1574, at 986. The rights of all affected parties demand due consideration. *Id.* c.50, at 53. The decree must be communicated to the cleric in writing or by reading the document to him in the presence of two witnesses or a notary. *Id.* cc.54, 55, at 54. The decree is deemed communicated if the cleric is cited to appear but fails to do so. *Id.* c.56, at 55.

The cleric may seek recourse in accordance with Canons 1732-39. The cleric first must seek a revocation or an amending of the decree, in writing, from his bishop. Implicit in this petition is a request for suspension of the decree. *Id.* Recourse must be sought within ten days of notice of the decree. *Id.* c.1734 § 2. If sought, the bishop then has ten days to revoke or amend the decree or deny the petition; if he fails to act within thirty days, the time for recourse runs from the thirtieth day. *Id.* c.1735, at 1032. The petitioner may seek recourse, via the diocesan bishop, to the Apostolic See within fifteen days from the publication of the decree. *Id.* c.1737 §§ 1-2, at 1033. He always has a right to an "advocate or procurator." *Id.* c.1738, at 1033-34.

⁵⁸ *Id.* c.1044 § 2, at 731.

bishop has the authority to issue "specific norms" in matters of clerical celibacy and continence and to pass judgment in particular cases concerning the observance of this obligation.⁵⁹ Any restrictions proposed by the therapists regarding this matter should be made in writing and should be enforced by an individual precept.⁶⁰

C. Penal Sanctions

Although the Code recommends therapeutic and pastoral measures,⁶¹ occasions arise where penal sanctions must be imposed; that is, when "scandal cannot sufficiently be repaired . . . justice . . . sufficiently restored," or the accused adequately reformed via warnings, rebukes, and/or "other ways of pastoral care . . ."⁶² Given the scope of this article, a complete review of penal procedures is inappropriate. There are, however, several canonical and penal issues that arise within the context of pedophile clerics.

1. Purpose of the Penal Process

The ultimate purpose of Canon law is "the salvation of souls." It deals not only with rights and obligations in the Church but also with *communio*⁶³ and with the structures for official ministries.⁶⁴ In contrast, the penal law is particularly concerned with the abuse of ministry. Penal procedures not only protect the rights of individuals, but also endeavor to protect and restore *communio*.

The penal process is secondary to the accused's reform, the restoration of justice, and the reparation of scandal.⁶⁵ Its goals, *inter alia*, are to restore justice by making appropriate amends to the victim and the victim's family,⁶⁶ to rehabilitate the offender,⁶⁷ and to reconcile him with the Church.⁶⁸ The Church itself also seeks to balance the accused's

⁵⁹ *Id.* c.277 § 3, at 209.

⁶⁰ *Id.* cc.35, 49, at 48, 53. A cleric is bound by these precepts or he risks being subjected to further penalties. *Id.* c.1321 § 2, at 901.

⁶¹ *See id.* c.1341, at 911 (only after pastoral avenues of care have been exhausted can ordinary set in motion imposition of penalties).

⁶² *Id.*

⁶³ *Communio* is defined as a "[m]utual participation (in rights, ownership, etc.), association, sharing." OXFORD LATIN DICTIONARY 369 (1969).

⁶⁴ CATHOLIC ENCYCLOPEDIA 644 (Rev. Peter M.J. Stravinskis ed., 1991). The Ministries may be defined as the various efforts within the church, be it minister, person or layman. *See id.* *See also id.* at 164-65 (defining "Canon Law" as including liturgical norms . . . as well as other laws enacted by the Popes . . .).

⁶⁵ *See supra* notes 29 and 61 and accompanying text.

⁶⁶ *See id.* c.1729, at 1027-28 (discussing action for reparation of damages).

⁶⁷ *See supra* note 61 and accompanying text.

⁶⁸ *See id.* c.1344 and cmts., at 912-13 (describing judicial and administrative discretion regarding penalty imposition).

rights⁶⁹ and the possible threat to Church order,⁷⁰ as well as to protect the innocent's reputation and to defend him against false charges.⁷¹

Where an accused denies the accusation and where any impropriety and allegations "at least seem to be true of an offense,"⁷² the ordinary has several alternatives.⁷³ First, he may require psychological evaluation and treatment.⁷⁴ Second, he may admonish a cleric who is in the "proximate occasion of committing an offense"⁷⁵ and impose a "penance" on him.⁷⁶ The ordinary may likewise admonish a cleric and dictate penance where there is "serious suspicion" of an offense.⁷⁷ Finally, he may impose either an individual⁷⁸ or penal precept⁷⁹ requiring, for example, the cleric to avoid certain persons or places,⁸⁰ or to accept a program of monitoring.

2. Completing the Investigation

In cases where penal procedures have reached the above mentioned stages, the cleric generally has already been evaluated and treated for pedophilia. The cleric has confessed to the offenses or at least agreed to seek counseling and the investigation may be suspended. If the Church seeks penal sanctions, the suspended investigation must be reopened and completed. A complete investigation generally involves the following procedures:

- (1) A detailed statement by the alleged victim and/or the alleged victim's parents;
- (2) follow-up statements by other possible victims if identified by the original accuser;
- (3) statements by character witnesses who are familiar with the alleged victim and the cleric as to the character of the accuser and any possible false denunciation;
- (4) statements by witnesses as to the alleged facts or to the character or imput-

⁶⁹ See *id.* c.1598 cmts., at 991 (trying to balance confidentiality rights of two parties).

⁷⁰ See *id.* cc.1455, 1470, at 961-62 & 964 (stating that utmost discipline and confidentiality is to be observed in all trials and tribunals).

⁷¹ *Id.* cc.220, 1717 § 2, at 152-53 & 1024.

⁷² See *id.* c.1321 § 1, at 901. (Where allegations are denied and investigations prove inconclusive, proof can often only be established when a pattern of offenses emerge).

⁷³ *Id.* cc.1717-18, at 1024. In all cases, records should be maintained in the secret archives unless they prove to be necessary for further penal action. *Id.* c.1719, at 1025.

⁷⁴ See *id.* c.1574, at 986 (stating that services of experts must be used to establish or clarify a fact).

⁷⁵ *Id.* c.1339 § 1, at 910.

⁷⁶ *Id.* c.1340.

⁷⁷ See *supra* note 75.

⁷⁸ See *supra* note 60.

⁷⁹ See 1983 CODE cc.1311, 1320, at 897, 900 (describing power of Church and local ordinary to punish and penalize).

⁸⁰ *Id.* cc.277, §§ 2-3, 278, § 3, at 209, 211.

ability⁸¹ of the accused cleric; (5) a search of the secret archives for any record of previous offenses or allegations against the accused;⁸² (if the accused ministered in other dioceses, their secret archives should also be searched);⁸³ and (6) the cleric's response to the accusations, if one is provided, prior to citation for penal proceedings.

The investigation is usually conducted in secrecy so as to avoid unnecessary damage to the good name of either party.⁸⁴ The Code assumes that the accused is unaware of the investigation until he is asked to respond to it or the results are filed without action.⁸⁵

In pedophilia cases, however, the allegations sometimes become public before the Church can investigate. Sometimes civil investigations are often completed, and civil charges brought, before the Church acts. Moreover, in some cases the Church's failure to act promptly has led to the publication of an entire series of offenses. In order to curb publicity and to protect the alleged victim, the Church must confront the cleric immediately, before an adequate investigation can be completed. If the cleric confesses, he may enter treatment and the Church may immediately compensate the victim. Consequently, the file can be completed with any civil judicial documents and with the reports from the evaluation and treatment center. If penalties are in order,⁸⁶ the Church may issue a decree stating:

(1) that the alternatives prescribed by the Code⁸⁷ have been explored and dismissed because scandal cannot be "sufficiently repaired," justice restored, or the accused reformed,⁸⁸ without the imposition of penalties;⁸⁹ (2) that a judicial or administrative procedure should or should not be followed; or (3) that the process for inflicting or declaring a penalty be set in motion.

81 "Imputability" refers to the degree of moral responsibility attributable to an individual's actions. Full imputability emanates from deliberate actions, but can be limited by ignorance, fear, passion, habits, violence, and mental disorder. See JOHN A. HARDON, MODERN CATHOLIC DICTIONARY 271 (1980).

82 1983 CODE c.1719. According to Canon 1719, records are to be kept "in the secret archive of the curia if they are not necessary for the penal process." *Id.*

83 Archives are generally kept at the diocesan level. See THE MARYKNOLL CATHOLIC DICTIONARY, *supra* note 2, at 455-56.

84 See *supra* note 71.

85 1983 CODE c.1720, at 1025. The ordinary "is to inform the accused about the accusation" if he intends to issue a decree in the matter. *Id.* The accused is also to be notified if a "judicial penal process" is initiated. See 1983 CODE cc.1721-23, at 1025-26.

86 See 1983 CODE c.1347 § 1, at 913 (outlining conditions for a censure).

87 See *id.* c.1341, at 911. Canon 1341 states that the ordinary is to start a judicial or an administrative procedure for the imposition or declaration of penalties, only as a last resort, when all other "pastoral" means of correction has been exhausted. *Id.*

88 See 1983 CODE c.1729, at 1027-28 (providing conditions for an action for damages).

89 See *supra* note 86.

3. Citation

When the investigation is complete and a decision to invoke penal procedures is made, the cleric is cited to appear before the bishop or ordinary.⁹⁰ He is not put under oath⁹¹ but is asked in general if he is willing to confess to the alleged offense. If he does not confess⁹² he is gradually confronted with the accusations point by point and asked to respond to them. He may be given a period of time in which to respond and an advocate will be appointed by the judge if he does not choose one.⁹³

If the offense is proven and penalties are requested, a tribunal of three judges imposes the penalties of excommunication or dismissal from the clerical state.⁹⁴ A single judge is then required to impose a perpetual penalty.⁹⁵ If the penalty in the law is indeterminate, the judge may not impose perpetual penalties in any case.⁹⁶ Other penalties may also be imposed by an extra judicial decree whenever "just causes preclude a judicial process."⁹⁷

4. The Question of "Administrative Leave"

The Code permits an administrative prohibition at any stage in the process in order to preclude scandal, to protect the freedom of witnesses (or victims), and to safeguard the course of justice.⁹⁸ Such prohibitions include: removal from ministry or office, requiring the cleric to reside in or avoid a given place or territory, and prohibiting him from public participation in the Eucharist.⁹⁹ Before such actions are taken, the ordinary must consult with the promoter of justice¹⁰⁰ and summon the accused.¹⁰¹ All administrative prohibitions are temporary. In other words, they are revoked "if the reason (for imposing them) ceases," and they are automatically extinguished at the close of the penal process.¹⁰²

Since the Code presumes that the investigation is secret,¹⁰³ administrative leave becomes an option only after the accused is cited for the

⁹⁰ See *id.* c.1722, at 1026 (stating that ordinary, at any stage in penal process, can set restrictions on the accused's functions as cleric).

⁹¹ 1983 CODE 1728 § 2, at 1027.

⁹² *Id.*

⁹³ *Id.* at 1723 § 2, at 1026.

⁹⁴ *Id.* c.1425 §§ 1, 2, at 955.

⁹⁵ See *id.* c.1342 § 2, at 911 ("Perpetual penalties cannot be imposed by a decree . . .").

⁹⁶ 1983 CODE c.1349, at 914.

⁹⁷ *Id.* c.1342 § 1, at 911.

⁹⁸ *Id.* c.1722, at 1026.

⁹⁹ *Id.*

¹⁰⁰ A "promoter of justice" is appointed by an ordinary to represent the bishop by acting as judge in a diocesan tribunal. HARDON, *supra* note 81, at 465-66.

¹⁰¹ 1983 CODE c.1722 and cmts., at 1026.

¹⁰² *Id.*

¹⁰³ See *supra* notes 69-70 and accompanying text.

first time. However, if the accusation is made public before citation occurs, the bishop may wish to confront the cleric immediately. In such cases, it may be argued that administrative prohibitions could be imposed during the investigation phase, provided that the accused has been summoned and the judge is consulted. The bishop may at least impose a precept requiring the accused to reside in or refrain from residing in a certain place or territory during the investigation.¹⁰⁴ He might also require the accused to avoid contact with certain persons during the investigation.¹⁰⁵

5. Unresolved Questions

The statute of limitations in Church law is somewhat simplistic, if not naive, in comparison with similar provisions in American civil law. Criminal actions for Sixth Commandment offenses by clerics, including those committed in public or involving minors younger than sixteen, are extinguished after five years.¹⁰⁶ The prescriptive period begins on the date of the offense or, if the offense is "continuous or habitual," on the day it ceases.¹⁰⁷ In American civil law, the statute of limitations is often tolled until the minor reaches the age of majority or until the minor is first able to face the reality of the offense.¹⁰⁸

Due to such a paucity of case law or commentary, there are many gray areas in the interpretation of Church law. Open questions include:

1. Is compulsive pedophilia a "habitual" offense within the remains of the canon? If so, does prescription begin when the pedophilic activity ceases or when the compulsion is treated and under control?
2. When publicity is part of the definition of an offense, does the prescription period begin when the offense becomes public or upon commission?
3. Offenses reserved to the Sacred Congregation for the Doctrine of the Faith follow the internal norms of the congregation even regarding statutes of limitation.¹⁰⁹ Prior to the 1983 Code, serious sexual offenses committed by a cleric with another man or with a prepubescent were referred to the Congregation, or Holy Office as it was then called. The new law in PASTOR BONUS states that the Congregation examines "more serious crimes against morals which have been reported to it

¹⁰⁴ See *supra* note 90 and accompanying text.

¹⁰⁵ *Id.* at c.277 § 2, at 209. The diocesan bishop has power to issue specific norms concerning association with persons whose company could endanger the obligation to "observe continence" or lead to scandal for the faithful. *Id.* § 3.

¹⁰⁶ *Id.* at cc.1362 § 1, 1395, § 2, at 919, 929.

¹⁰⁷ *Id.* c.1362 § 2, at 919.

¹⁰⁸ See, e.g., CAL. CIV. PROC. CODE § 352 (Deering 1993); *Mary D. v. John D.*, 264 Cal. Rptr. 633 (1989); *DeRose v. Carswell*, 242 Cal. Rptr. 368 (1987); *Meiers-Post v. Schafer*, 427 N.W.2d 606 (Mich. 1988).

¹⁰⁹ See *supra* note 106.

and, where necessary, proceeds to the declaration or imposition of canonical sanctions according to the norms of common or proper law." If the five year prescription for criminal action has lapsed, can pedophilia charges still be referred to the Congregation? Can the Congregation apply its own standard of prescription to these cases prior to diocesan penal action?

4. In some of the more serious cases, dismissal from the clerical state may be the only remedy sufficient to protect potential victims and to repair scandal. Yet, it is argued that the diminished imputability present in many of these cases precludes the option of dismissal.¹¹⁰ On the other hand, punishment can be intensified for those who abuse a position of authority in order to commit an offense.¹¹¹ Do these canons conflict with one another?

CONCLUSION

Voluntary laicization and dismissal from the clerical state are the only outcomes that free dioceses from all obligations of justice toward the cleric. Even a cleric perpetually excluded from ministry must be provided with decent support and benefits.

In cases of laicization, Roman congregations presently insist that local procedures be followed; diocesan requests for administrative laicization have not been granted by the Holy See. Whether Rome would grant administrative laicization in cases referred to the Congregation for the Doctrine of the Faith remains to be seen.

¹¹⁰ See *id.* at c.1324, § 1.

[T]he penalty set by law or precept must be tempered or a penance substituted in its place if the offense was committed . . . in the serious heat of passion which did not precede and impede all deliberation of mind and consent of will as long as the passion itself had not been voluntarily stirred up or fostered . . . *Id.* Thus, if pedophilia is seen as a compulsion involving a limited exercise of the will, Canon 1324 would call for diminished penalties. *Id.*

¹¹¹ *Id.* c.1326 § 1, at 904.

