A Study of Canon Law: Dismissal From the Clerical State in Cases of Sexual Misconduct

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A STUDY OF CANON LAW:
DISMISSAL FROM THE CLERICAL
STATE IN CASES OF SEXUAL
MISCONDUCT

MSGR. JOHN A. ALESANDRO

I. BACKGROUND

This article specifically addresses the case of a priest who is
guilty of sexually abusing a minor and whom the diocesan bishop
considers such a danger to children that he should not in any
way function as a priest. Such a priest may seek a dispensation
from the Holy See to be returned to the lay state.1 There are
occasions, however, where, for various reasons, the priest refuses
to make a voluntary petition to the Holy See. The bishops of the

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judicial process of dismissal, and drafted the N.C.C.B. document Canonical Delicts
Involving Sexual Misconduct and Dismissal from the Clerical State.

1 See 1983 CODE c.290. "Sacred ordination once validly received never becomes
invalid. A cleric, however, loses the clerical state ... by a rescript of the Apostolic
See; this rescript, however, is granted by the Apostolic See to deacons for only grave
reasons and to priests for only the gravest of reasons." Id. See also THE CODE OF
CANON LAW: A TEXT AND COMMENTARY (James A. Coriden et al. eds., 1985); Rev.
Bertram F. Griffin, The Reassignment or Nonassignment of a Clerk Who Has Been
Professionally Evaluated and Treated for Sexual Misconduct with Minors:
Canonical Considerations, 35 CATH. LAW. 295, 301-03 (1992) [originally published in
51 JURIST 326 (1991)].

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United States have been struggling to resolve such a matter in a canonically acceptable manner. Most bishops have been loath to invoke the process in the Code of Canon Law for the punitive dismissal of the priest from the clerical state. In some cases, however, use of the process has become a necessity.

A. Administrative Approaches

1. Administrative Penal Procedure

For several years, the perception of some bishops seemed to indicate that what was needed in lieu of the judicial penal process was an administrative process of dismissal from the clerical state. Conversations were held at various levels within

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2 See Introduction to THE CODE OF CANON LAW: A TEXT AND COMMENTARY, supra note 1, at 1-22. The Code of Canon Law has developed from the Church's need for a systematic means to administer ecclesiastical and juridic law. Id. at 1, 11. In 325 A.D. the Council of Nicaea, the first of the Church's ecumenical councils, combined pastoral practices and fundamental ecclesial norms into rules called "canons." Id. at 1-2. Throughout the centuries, the Church sought to meet the changing needs of the parishes and to enforce the traditional church disciplines. The Church accommodated these needs by updating and adding to "canon law." Id. at 2. In 1917 all the laws of the Latin Catholic Church were combined and organized in an official volume of legislation, known as the 1917 Code of Canon Law. John A. Alesandro, Introduction to THE CANON LAW: A TEXT AND COMMENTARY, at 4.

The 1917 Code was revised in 1983 to conform to the changing focus of the Catholic Church as identified by the Second Vatican Council. The purpose of the revised Code includes defining and protecting the rights and obligations of the church members in their relationships with each other and the church. JAMES A. CORDEN, AN INTRODUCTION TO CANON LAW, 35-36 (1991). The 1983 Code of Canon Law is divided into seven sections: General Norms, The People of God, The Teaching Function, The Sanctifying Function, Temporal Goods of the Church, Sanctions in the Church, and Procedures. Id. at 38-39. The Code consists of 1,752 canons that represent the law for the Latin Church. Id. at 39-40. While the Code does not contain all of the norms of the Catholic Church, all additional church norms must accord with the ones in the Code. Id. at 40-41.

3 The same process is used to dismiss a temporary or permanent deacon from the clerical state, but this article focuses on priests. In fact, this article concentrates specifically on diocesan priests since priests who are members of religious institutes are already subject to dismissal from their religious institute (1983 CODE cc.695-703, 746). Although the matter is controverted, it seems that dismissal from a religious institute effectively leaves a priest, who was formerly a religious within the clerical state, without any institutional connection and therefore prohibited from functioning as a priest unless incorporated, at least temporarily, into some other religious institute (1983 CODE cc.695, 701). See James H. Provost, Some Canonical Considerations Relative to Clerical Sexual Misconduct, 52 JURIST 615, 625-626 (1992).

4 See Karen Ann Ballotta, Losing Its Soul: How the Cipolla Case Limits the
DISMISSAL FROM THE CLERICAL STATE

the National Conference of Catholic Bishops ("NCCB") and between representatives of the NCCB and the Apostolic See. The goal was to streamline the cumbersome judicial process required by the Code whenever a priest faced the severe and permanent penalty of dismissal for a canonical delict by placing it in the hands of the diocesan bishop. They viewed the predicament as a pastorally devastating situation which required immediate and decisive action: "removal of the priest from the priesthood" — or, more properly, "removal of the priest from the clerical state."?

While various proposals were submitted, it was difficult to come to an accord on an appropriate procedure which would protect all the rights of those involved: the priest, the Church,

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Catholic Church's Ability to Discipline Sexually Abusive Priests, 43 EMORY L.J. 1431, 1439 (1994) (stating that bishops are dissatisfied with current canonical system's ability to provide viable options for bishops to discipline sexually abusive priests). Without guidance from the Vatican, bishops have attempted to establish procedures to use when a priest is accused of sexual assault. Bishops have tried to institute procedures that will meet the needs of the Church, the accused cleric, and the victim. Id. at 1438-40. The National Conference of Catholic Bishops (NCCB) recommends that dioceses, upon finding that allegations are supported by sufficient evidence, relieve the cleric of his ministerial duties and refer him for medical evaluation and therapy. Id. at 1438-39 n.32. Until the canonical penal process is expedited or modified, bishops will seek an administrative process to curtail an accused cleric's ministry. Id. at 1444.

5 After various meetings concerning sex abuse, the NCCB asked the Vatican to approve changes in church law to expedite the dismissal of guilty clerics. See Larry B. Stammer, Bishops Seek Easier Dismissal of Priests, L.A. TIMES, Nov. 18, 1993, at A12 (arguing that Church law should be changed since current appeal process drags out removal of clerics for years); see also Judith Lynn Howard, Bishops Act Against Clergy Sex Abuse; Prelates Want Easier Means to Remove Offenders, DALLAS MORNING NEWS, Nov. 20, 1993, at 37A (discussing bishops petitioning Holy See to change canon law to help shorten laicization of clerics).

6 See John P. Beal, Doing What One Can: Canon Law and Clerical Sexual Misconduct, 52 JURIST 642, 647 (1992). The options the canon law offers for dealing with clerics who are guilty of sexual misconduct are not "palatable; none is easy; and none solves all the problems that are apt to arise as a result of cases of this kind." Id. at 672.

7 The phrase "removal from the priesthood" can be misleading. A priest, once ordained, remains validly ordained. Nothing can undo his ordination nor in this sense remove him from the "priesthood" as such (1983 CODE c.290). Thus, any priest, even if excommunicated would be permitted to absolve a penitent who is in danger of death (1983 CODE c.976). But the rights and duties of priests, their juridical incorporation into the Church, and their commission to function as priests in the name of the Church are all legal concepts which are gathered together under the rubric of "clerical state." The more precise term therefore is to remove or dismiss someone from the "clerical state," not from the "priesthood."
the bishop and the community. Besides the bishops' perception of a pastoral need for a definitive separation of the priest from the clerical state, diocesan attorneys advised bishops of the potential liability for future wrongful acts of such a priest if the diocese chose to maintain a supervisory relationship with that priest. To allow the priest to continue in any sort of official assignment, or to permit him to function in his ministry, even simply to house him for therapy and to support him financially, could be considered indicia of a supervisory relationship. Because a diocesan bishop has the responsibility to provide both support and social assistance for a suspended priest, attorneys for the Church prefer to see a more definitive separation of the priest from the diocese, i.e., his complete removal from the clerical state and his return to the lay state.

Thus, the goal of streamlining for many bishops was to formulate an administrative process aimed not merely at

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8 Litigation against hierarchical churches for the actions of its clerics is common. See generally Mark E. Chopko, Ascending Liability of Religious Entities for the Actions of Others, 17 AM. J. TRIAL ADVOC. 289, 294-95 (1993) (indicating "that civil responsibility may follow ecclesial discipline as it moves through the various layers of the organization until it resides in that entity which has both the juridic power and civil duty to answer for the actions of individuals or organizations at a lower level."); David Briggs, Sex Abuse Cases Have Church Reeling, Crisis: Catholic Dioceses Across U.S. Prepare to Pay Tens, If Not Hundreds of Millions of Dollars in Legal Fees and Reparations, L.A. TIMES, Jan. 29, 1994, at B4 (estimating that costs of clerical sex abuse scandals in United States range upwards of half billion dollars). See Griffin, supra note 1, at 296-98 (discussing distinctions among right to ministry, remuneration for ministry, and decent support); see also Provost, supra note 3, at 631-33 (discussing Church's support of clergy); Chopko, supra note 8, at 310-27 (discussing respondeat superior and various negligence bases for liability); Nicholas Cafardi, Stones Instead of Bread: Sexually Abusive Priests in Ministry, 27 STUDIA CANONICA 145, 160-163 (1993) (discussing Church's relationship to priests); John Does 1-9 v. CompCare, Inc., 763 P.2d 1237, 1244 (Wash. App. 1988) (holding that Washington Supreme Court has personal jurisdiction over diocese). There is disagreement in the civil courts concerning the degree of vicarious liability of a bishop for actions of a priest. Compare Stevens v. Bishop of Fresno, 123 Cal.Rptr. 171 (Ct. App. 1975) (concluding that priest was agent of corporation solely and acted within scope of agency at time of collision) with Ambrosio v. Price, 495 F. Supp. 381, 385 (D. Neb. 1979) (holding that plaintiff could not recover from priest's employer).

9 1983 CODE c.384. See Rev. John P. Beal, Administrative Leave: Canon 1722 Revisited, 27 STUDIA CANONICA 293, 294-96 (1993). In response to complaints of clerical sexual misconduct, the bishops have tried withdrawing the cleric from his residence and barring him from public ministry. This has been referred to as "administrative leave." Id. at 294-95. However, this administrative process does not necessarily comport with the Code which provides for leave from ministerial duties only after an official penal investigation has been initiated. Id. at 295-96.
improving procedural efficiencies, but providing a decision-making standard and apparatus by which the diocesan bishop would dismiss the priest based on pastoral necessity. The vision by canon lawyers, however, of an administrative process, was the imposition of the penalty of dismissal from the clerical state by the diocesan bishop in a non-judicial manner, but with due process protections for the priest. In other words, by using the word “administrative,” many bishops were looking for a “non-penal” procedure.

2. Administrative Non-Penal Removal

It soon became apparent that while a judicial procedure may be cumbersome and, more importantly, may remove the ultimate decision from the diocesan bishop to a collegiate tribunal of three qualified priest-judges, simply converting the judicial penal process into an administrative penal process would not provide diocesan bishops with what they were seeking. There were more fundamental canonical realities which made the penal process a clumsy and often inapplicable way of separating the priest from the clerical state.

While continuing to develop a suitable process to meet the pastoral situation in the United States, the NCCB recognized that the judicial procedure, as well as the very nature of dismissal from the clerical state as a canonically imposed penalty, was problematic. Furthermore, the five-year statute of limitations ruled out dismissal in many cases which came to light at a later time—a frequent occurrence.\footnote{1983 CODE c.1362 §1. "A criminal action is extinguished by prescription after three years, except for ... an action arising from any of the offenses mentioned in cann. 1394, 1395, 1397, 1398, which is extinguished after five years ...." Id. Canon 1395 creates penalties for clerics who sexually abuse a minor. See Stammer, supra note 5, at A12 (reporting NCCB petitioned Vatican to extend five-year statute of limitations for filing charges against priest offenders: suggesting older charges may be brought as long as victim brings them before twenty-third birthday; proposing that diocesan bishop could take action within two years of hearing credible accusation of sexual abuse).}

The fact that the canonical delict for abusing a minor defined the minor as under sixteen years of age seemed minimalist in states where state criminal codes used an older age.\footnote{See, e.g., N.Y. PENAL LAW §130.05 (McKinney 1987); N.Y. PENAL LAW §260.10 (McKinney 1996); see also Howard, supra note 5, at 37A (reporting proposals to change statute of limitations would bring canon law more in line with age for}
importantly, there seemed to be a rather prevalent opinion that the psychopathology suffered by such priests almost automatically exempted them from the penalty insofar as the imposition of dismissal requires “full” imputability, not merely “grave” imputability.  

Accordingly, the NCCB proposed not “dismissal,” but administrative “removal,” from the clerical state. The pastoral facts and circumstances, past, present and future (e.g., likelihood of recidivism), would determine whether grounds for removal existed. Thus, in 1992, the NCCB’s Canonical Affairs Committee developed for discussion purposes a process modelled on the administrative removal from the pastorate.  

Although the proposed process could not be initiated unless there was proof that the priest had committed a canonically-proscribed offense, it was not a penal process. There was no statute of limitations, and the reasons for or against removal balanced both the gravity of the harm and need for correction, reparation and restoration of justice with practical judgments about the feasibility of the priest’s continued ministry in any form as well as his potential danger to others. The central basis for removing the cleric is analogous to the reason for administrative removal of a pastor. Removal would result if the cleric’s ministry had become permanently harmful (noxium) to the Church or completely ineffective (inefficax) in any reasonable ecclesial situation because of his past acts and if, all things considered, his continued ministry in any form whatsoever would represent a grave danger to the Church.

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13 1983 CODE c.1324 §1, 10°. Canon 1324 states, “The perpetrator of a violation is not exempted from penalty, but the penalty prescribed in the law or precept must be diminished, or in penance substituted in its place, if the offense was committed by...one who acted without full imputability, provided it remained grave.” Id.

14 1983 CODE cc.1740-47. These canons discuss the procedure for the removal or transfer of pastors. The diocesan bishop has the power to remove a pastor if his ministry has become harmful or ineffective. Id. at c.1740. A pastor can be removed for acting in a way that harms the ecclesiastical communion, for permanent illness, for loss of good name, for violating parochial duties, and for poor administration of temporal goods. Id. at c.1741. The Bishop should discuss the reasons for removing a pastor with two other pastors and thereafter try to persuade the pastor to resign. Id. at c.1742. If the pastor will not resign, the Bishop should issue a decree of removal and ensure that the pastor’s next assignment is a suitable one. Id. at cc.1744, 1746.

15 See Canonical Affairs Committee, Draft of Special Norms for Administrative
The determination of the gravity and permanence of such a situation would take into consideration factors such as the following:

a) whether the cleric's acts resulted from a persistent mental or physical disease or defect, rendering him unsuitable to carry out the duties of a cleric, and, even with appropriate treatment, it is reasonably foreseen that the cleric will not be able to carry out his ministry without grave danger of harm to the Church.

b) whether the cleric has lost his good reputation among upright and good members of the Christian faithful and among the public at large, or his behavior has given rise to an aversion which cannot be dispelled.

c) whether the cleric's acts have seriously damaged the good reputation of other clerics, or of the clerical state in general or have caused serious scandal which, it is reasonably foreseen, will persist or even increase if the cleric continues to exercise his ministry.

d) whether the behavior of the cleric has already exposed ecclesiastical juridic persons and ecclesiastical authority to severe financial liability or, without his permanent disassociation from the Church, the ecclesiastical patrimony of the entities which would otherwise be responsible for him will be placed in serious jeopardy.  

This was not merely a procedurally administrative approach, but substantially an administrative approach. The procedural aspect of the proposed process was quasi-judicial in nature. Though essentially administrative, the procedure provided notice, opportunity to be heard, use of official priest-advisors, discovery, right to canonical counsel, right of recourse, and other elements of due process. More significantly, however, the act itself had substantively become an administrative act of

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*Removal of a Cleric from the Clerical State, May 1, 1992, Norm 1 [unpublished].*  
When, for the reasons stated in Norm 2, the ministry of a diocesan cleric has become permanently harmful to the Church or completely ineffective and his continued ministry represents a grave danger to the Church, the cleric may be administratively removed from the clerical state by the diocesan bishop of his diocese of incardination in accordance with the procedure found in Norms 2-14.

*Id.*  

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16 1992 Draft, Norm 3.

17 See 1992 Draft, Norms 4, 6, 7, 8, 11, 14 for examples of norms dealing with due process drafted for discussion purposes.
the bishop, rather than a penalty for violating a canonical delict.

The proposed process was not well received. Some canon lawyers in the United States criticized the process on the basis that, despite the due process protections, the process could be too easily abused. This radically new approach also met with significant resistance within the Roman Curia.

B. Judicial Approach

A series of meetings by representatives of the NCCB and Curial officials failed to produce agreement on an administrative approach. In May 1993, after consulting with representatives of the United States hierarchy, the Holy Father instructed that a small commission, consisting of a bishop and two canonists from the Apostolic See and similar personnel from the NCCB, be appointed to study the judicial process.

1. Papal Joint Commission

This ad hoc joint commission, established by the Holy See, met in Rome on June 14-15, 1993. Its purpose was “to study how to apply the universal canonical norms governing judicial process to the particular situation of the United States regarding the well-known problem.” The small working group analyzed the various provisions in canon law which were applicable to the situation, noting the possibility of derogations from the law which the NCCB might wish to propose to the Holy See, and interpreted how canon law should be applied to cases of clerics who have sexually abused a minor.

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18 See generally, Beal, supra note 10, at 315 (resorting to administrative process threatens balance between rights of community and rights of accused individual).
19 The activities of this Commission were widely publicized. See, e.g., Gustav Niebuhr, Pope Acts on Sex Abuse—Panel to Speed Ouster of Offending Priests, WASH. POST, June 22, 1993, at A1.
20 The members of the ad hoc joint commission were: Bishop Julian Herranz Casado, Secretary of the Pontifical Council for the Interpretation of Legislative Texts; Archbishop Adam J. Maida, Archbishop of Detroit; Msgr. John A. Alessandro, Chancellor of the Diocese of Rockville Centre; Msgr. Raymond L. Burke, Defender of the Bond of the Apostolic Signatura, Rome; Rev. Velasio de Paolis, Professor at the Pontifical Gregorian University, Rome; Rev. John V. Dolciamore, Professor at Mundelein Seminary, Chicago.
The Canonical Affairs Committee of the NCCB was charged with the task of studying the proposals and moving things along. The committee undertook to develop a document capable of providing practical guidelines on the use of the judicial process which addressed the principal questions tending to arise in such cases. From the joint commission’s report, the committee drew potential derogations of the law in this area which might facilitate the use of the judicial process.

2. Derogations of the Law for Dioceses Within the NCCB

The proposed derogations were adopted by an overwhelming vote of the conference of bishops in November 1993 and sent to the Holy See for consideration and approval. During the next few months, the proposals were examined and commented upon by various Curial dicasteries. On April 12-13, 1994, the joint commission then studied the derogations and comments in order to prepare a final report and recommendation for consideration by the Holy See.

a. Raising the Age in Canon 1395, §2 From Below Sixteen to Below Eighteen

This proposal sought to change a substantive element of the delict of sexual abuse of a “minor” by redefining the term to mean any person under the age of eighteen. While state criminal codes vary as to what the age below which the capacity for consent to sexual acts is presumed to be lacking, it was felt that the canonical element should not be linked to local civil legislation and should not vary from state to state. Some bishops felt that the limitation of such a delict to those under sixteen years of age set the cut off at too early an age. They concluded that a cleric should be liable for dismissal for committing any sexual act with a young person not yet eighteen, which is the general canonical age of majority. Since age is an element of the delict itself, the proposed derogation by the Holy See is prospective in nature, not retroactive. On April 25, 1994, the Holy Father approved the proposed change in age, effective

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24 1983 CODE c.97, §1.
b. Period of Prescription (cc.1362, 1395)

In canon law, the state law concept of a period set by a statute of limitations is called the period of prescription. Once the period expires, the criminal action to impose a penalty for commission of the delict is extinguished. Its operation is similar to a bar resulting from the statute of limitations although, unlike state law, it is not merely an affirmative defense; the action simply cannot be brought. Currently, the prescription for the delict of sexual abuse of a minor is five years from the most recent delictual act. This is two years longer than the standard period of prescription.

In November 1993, the bishops voted to request that two additional periods of prescription supplement the five-year period:

i) the period from the commission of the delict until the day the victim who was sexually abused as a minor has completed his or her twenty-third year of age;

ii) two years after the diocesan bishop of the cleric's diocese of incardination first "receives information, which has at least the semblance of truth" that the cleric has sexually abused a minor, if more than five years have passed since the most recent offense and the victim is older than twenty-three.29

25 "With regard to can. 1395, §2: this norm is to be applied to delicts committed with any minor as defined in can. 97, §1, and not only with a minor under sixteen years of age." Secretariat of State, Rescript from Audience of His Holiness, N. 346.053, 4/25/94 [hereinafter 4/25/94 Rescript].

26 See, e.g., 1983 CODE c.1362, §§ 1, 2° (stating periods of prescription of criminal action); 1983 CODE c.1363, §§ 1, 2 (delineating period of prescription of penal action).

27 1983 CODE c.1362, §§ 1, 2° (stating that action due to offense mentioned in c.1395, violation of clerical chastity, has prescription of five years).

28 1983 CODE c.1362, §1 ("A criminal action is extinguished by prescription in three years ....").

29 See Stammer, supra note 5, at 12.

30 Id.

31 1983 CODE c.1717, §1.

32 Stammer, supra note 5, at 12. This last addition would afford the diocesan bishop two years after the duty of canon 1717 to investigate when matters first arise. During that discovery period, the action could be brought even if the first two periods had already expired. Conversely, if the information received by the diocesan bishop was not acted upon or the investigation was inconclusive, this period would
Each of the three periods would be independent of the other two. For the action to be time-barred, all three must have expired prior to the citation of the accused. Prescription, like the civil law statute of limitations, is fundamentally procedural. It is not an element of the delict; it affects only the judicial remedy. Accordingly, the bishops requested that the change be made retroactive, applying to all processes commenced after its approval, even though the acts giving rise to the delict occurred before that date.33

These proposed derogations would change the period of prescription dramatically, particularly the two-year discovery window expressed above and the retroactive nature of the changes. Concern was expressed about these two, more extreme departures from canonical practice.34 In discussing the proposals, an alternative approach emerged: the possibility of extending the period beyond five years (possibly to ten years), but keeping it fixed in nature. It was also suggested that a window linked to denunciation should not be free-floating, but in the form of an “extension” of the statute of limitations at the end of the stated period if it had not yet expired.

On the other hand, the proposal’s idea of “tolling” the period until the minor completes his or her eighteenth year of age met with greater acceptance. It could easily happen that a minor might be prevented from bringing such delicts to the attention of the authorities by parents unwilling to raise such an issue, by the dominance of the perpetrator of the delict, or simply by the minor’s immaturity. The strategy of tolling, familiar in state law, was also viewed as a basis for some retroactivity, at least with regards to the proposed derogation described above.35

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33 While a retroactive change would permit bishops to address newly-discovered delicts, one must keep in mind that the bringing of a penal action would still require a formal decision by the diocesan bishop, as well as the filing of an accusatory libellus by the Promoter of Justice. Moreover, if the action is brought the collegiate tribunal, in determining whether dismissal would be an appropriate penalty, would be required to take into account the length of time which had elapsed since the delict was committed.
34 See Richard Vara, Bishops to Urge Vatican to Ease Laws in Ousting Abusive Priests, HOUS. CHRON., Nov. 18, 1993, at 15.
In the end, the lengthening of the statute of limitations and the procedural devices of tolling and extension were used to develop an alternative to the NCCB proposal. This alternative, approved by the Holy Father on April 25, 1994, has different prospective and retroactive effects.

i) Prospectively. Where sexual delicts are committed against a minor on or after April 25, 1994, the promoter of justice may not bring an action for dismissal from the clerical state on the basis of canon 1395, §2 if the following periods have expired:

(1) The minor in question has completed his or her twenty-eighth year of age.

(2) At least one year has passed from the denunciation of the delict, provided that the denunciation was made before the minor completed his or her twenty-eighth year of age.\(^{36}\)

If both conditions have occurred prior to the citation of the accused, the action is time-barred. Effectively speaking, this statute of limitations represents a variable period dependent on the age of the minor at the time of the delict. If the minor were ten years old at the time of the most recent act, the cleric would be subject to the penalty for eighteen years (plus an extension of no more than one year if the denunciation did not occur until the minor in question was twenty-seven years of age). On the other hand, if the minor were seventeen years old at the time of the most recent act, the statute of limitations would expire in eleven years (plus any applicable extension if denunciation were during the last year of the period).

This new statute of limitations is applicable to all delicts committed from April 25, 1994 until April 24, 1999, unless the Holy See modifies the five-year probationary period of the derogation.\(^{37}\)

ii) Retroactively. The above-described change in the statute of limitations is not retroactive. It applies only to offenses committed on or after April 25, 1994. Nonetheless, the Holy Father promulgated a transitory norm affecting some delicts committed prior to April 25, 1994. Such delicts with a minor (i.e., one under sixteen years of age) are deemed to be actionable by criminal process until the minor in question completes his or

\(^{36}\) 4/25/94 Rescript.

\(^{37}\) Id.
her twenty-third year of age.\textsuperscript{38}

Practically speaking, the transitory norm retroactively “tolls” the applicable five-year statute of limitations in effect at the time of the commission of the delict (no matter how old the minor was at the time) until the minor in question has reached the age of majority, at which time the five-year period begins to run. For example, if the minor were precisely ten years old at the time of the most recent act, the transitory norm would consider the delict punishable for thirteen years, whereas, if the victim were fifteen years of age at the time of the delict, the action would not be deemed to be extinguished for eight years.

c. Appeal By the Defendant Or the Promoter of Justice At the Local Level

When a diocesan tribunal hands down a sentence in any case, including a penal action, appeal can normally be taken either to the competent metropolitan\textsuperscript{39} or regional appellate tribunal,\textsuperscript{40} or to the Roman Rota.\textsuperscript{41} In November, 1993, the bishops voted to request the Holy See to grant such local appellate tribunals exclusive competency to hear appeals of second instance cases involving dismissal from the clerical state for sexual abuse of a minor.\textsuperscript{42} However, if there was a reversal by the second instance tribunal, or, if in the case of two conforming sentences, where a third instance appeal was permissible because of new and serious proofs and arguments, a third instance appeal would go to the Rota.\textsuperscript{43}

This proposed derogation met considerable opposition. There is a long tradition of maintaining every person’s right to

\begin{footnotes}
38 Id.
39 1983 CODE c.1438, §1.
40 1983 CODE c.1445, §3, 2°. If a single tribunal of first instance has been established for several dioceses, the conference of bishops must establish a tribunal of second instance with the approval of the Apostolic See unless these dioceses all belong to the same Archdiocese. Id.
41 1983 CODE c.1443 (“The ordinary tribunal established by the Roman Pontiff to receive appeals is the Roman Rota”).
42 Robin Edwards, Bishops Weather Storm, Address Family Issues, NAT'L CATH. REF., Dec. 3, 1993, at 3. This would alter the present situation in which the Roman Rota hears appeals which have been adjudicated by the ordinary tribunals of the first instance. See 1983 CODE c.1444, §1, 1.
43 See 1983 CODE c.1644, §1.
44 See 1983 CODE c.1444, §1, 2.
\end{footnotes}
appeal to the Holy See in second instance. While such appeals, directly to Rome, may often be lodged purely for dilatory motives, there may be less radical ways of addressing such situations. Dialogue with Roman authorities about a speedier resolution of such appeals, or the possibility of establishing one or more regional appellate tribunals in the United States to hear appeals in penal cases, might be just as effective in avoiding dilatory tactics as limiting the Roman Rota to third instance. The Holy Father rejected the proposal of the NCCB in this area, leaving in place the traditional right of appeal to either the competent local appellate tribunal or the Roman Rota.

3. NCCB Instruction

Besides the development and proposal of changes with respect to procedural law, the Canonical Affairs Committee published a document to assist diocesan bishops and their tribunal personnel in applying the judicial process for dismissal from the clerical state. The document seeks to clarify the steps in the process and address questions which would tend to arise in a case of sexual abuse of a minor, including the important element of imputability. Some of the points treated in the NCCB instruction will be considered in the remainder of this article, particularly insofar as they may be of special interest to diocesan attorneys.

II. CANON 1395

Because of the cleric's special rights, duties, and privileges, in particular, his obligation to live a life of celibate chastity, canon law singles him out and allows his sexual misconduct with a minor to be punished canonically while a lay person who commits the same acts is not subject to similar ecclesiastical penalties. Canon 1395 states the elements of the delict and the potential infliction of the penalty of dismissal from the clerical state.

Canon 1395.

§1. Outside the case mentioned in can. 1394, a cleric who lives in concubinage or a cleric who remains in another external sin.

against the sixth commandment of the Decalogue which produces scandal is to be punished with a suspension; and if such a cleric persists in such an offense after having been admonished, other penalties can be added gradually including dismissal from the clerical state.

§2. If a cleric has otherwise committed an offense against the sixth commandment of the Decalogue with force or threats or publicly or with a minor below the age of sixteen, the cleric is to be punished with just penalties, including dismissal from the clerical state if the case warrants it.

The two paragraphs of canon 1395 apply to a number of situations. The first paragraph addresses sexual misconduct of a persistent kind: those living in concubinage or some other ongoing scandalous external sin against the sixth commandment, such as cohabiting with a homosexual partner or similarly engaging in a connected series of scandalous homosexual or heterosexual acts comparable to cohabitation. These cases normally begin with the imposition of suspension. The persistence of the cleric in the prohibited way of life transforms the offense into one in which an expiatory penalty, like dismissal, rather than a medicinal penalty, like suspension, may be the only effective way of dealing with the situation.

The second paragraph applies to a cleric whose violation of the sixth commandment has been aggravated by especially heinous circumstances: a sexual offense against another perpetrated by the use of force or threats, such as an act of rape against a woman or a man, even if the victim is not a minor; a sexual offense committed in some sort of public manner, such as an act of exposure or lewd conduct in public, even if no minor is involved (e.g., between consenting adults); a sexual offense with a young man or young woman who is not yet sixteen years of age, even if committed secretly and without any physical force or threats.46

Notice that a sexual offense violative of §2 need not be a complete act of intercourse, nor should the term be equated with the definitions of sexual abuse or other sexual crimes in civil law.47 The norm is whether the act in question is an external act

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46 As noted above, "below sixteen" has been raised to "below eighteen" for all acts committed on or after April 25, 1994. See 4/25/94 Rescript, supra note 25.
47 See N.Y. PENAL LAW §130.00 (McKinney 1994) (defining sex offense terms).
which qualifies as an objectively grave violation of the Sixth Commandment.\textsuperscript{48} We are not speaking here about imputability or \textit{mens rea}. This is an element of the \textit{actus reus}. If there is doubt about whether a specific act fulfills this definition, the writings of recognized moral theologians and the testimony of recognized experts must be used to resolve the doubt.

The sexual offenses specified in §2, if continued after a warning, may be punished by a censure, such as suspension. The difference from §1, however, is that, even without persistence, such acts are punishable by expiatory penalties,\textsuperscript{49} including dismissal from the clerical state if the circumstances warrant it. Of course, the individual facts must be carefully weighed to determine whether the delict in question rises to the level that calls for a permanent expiatory penalty.\textsuperscript{50}

In this regard, one must bear in mind that sexual abuse of a minor may not be a solitary offense; there may be multiple delicts subject to punishment. The same act may implicate various delicts, such as where the cleric has elicited the cooperation of a minor through threats of violence or has sexually abused the minor by the use of physical force. In other cases, the act of sexual misconduct may be inter-connected with other delicts, such as solicitation during confession to sin against the Sixth Commandment,\textsuperscript{51} violation of the seal of confession,\textsuperscript{52} or

\textsuperscript{48} \textit{See} Exodus 20:14 ("Thou shalt not commit adultery.").

\textsuperscript{49} \textit{See} 1983 CODE c.1312, §1 (stating that penal sanctions in Church consist of medicinal penalties and expiatory penalties). Expiatory penalties deprive a believer of some spiritual or temporal good in order to repair the damage caused by the offender. 1983 CODE c.1312, §2; \textit{The Code of Canon Law: A Text and Commentary, supra} note 1, at 897-98.

\textsuperscript{50} A medicinal penalty seeks principally the reformation and reconciliation of the wrongdoer. It must always involve some sort of canonical warning prior to imposition. Upon sufficient repentance and reparation, the penalty is remitted. By its nature, therefore, it is temporally indefinite. \textit{See The Code of Canon Law: A Text and Commentary, supra} note 1, at 897-98.

An expiatory penalty like dismissal, on the other hand, seeks principally to redress the situation caused by the wrongful act. Thus, the initiation of the process of dismissal does not require the cleric's disregard or disobedience of prior admonishments or other acts of correction. The critical issue is not whether the cleric has been warned to cease and desist and has persisted in his offense (although repeated violations after such warnings would clearly strengthen the case for dismissal), but whether the heinousness of the delict is such as to warrant dismissal. \textit{Id.} at 897-98.

\textsuperscript{51} 1983 CODE c.1387.

\textsuperscript{52} \textit{See} 1983 CODE c.1388, §1.
abuse of office.\textsuperscript{53}

III. INITIAL INVESTIGATION AND DETERMINATION

Before initiating the process of dismissal, the diocesan bishop must be reasonably certain of two facts. First, it must be determined that the cleric is guilty of the canonical delict in question, even though the establishment of such a fact in a judicial proceeding may be difficult and may not prove to be successful. Second, assuming that proof of guilt will be successful, the diocesan bishop must be reasonably certain that the canonical imposition of a penalty, which may include dismissal from the clerical state, is the appropriate method of dealing with the overall pastoral situation. Thus, the preliminary investigation and initiatory decree are extremely important steps.\textsuperscript{54}

A. Investigation (cc. 1717-1719)

The canons require very little substance to impose the duty of investigation on the bishop. If the information “at least seems to be true of an offense, he shall cautiously inquire personally or through another suitable person about the facts and circumstances and about imputability.”\textsuperscript{55} Any such preliminary information is to be kept in the secret archives unless it is

\textsuperscript{53} See 1983 CODE c.1389, §1 (stating that one who abuses ecclesiastical power or function is to be punished in accord with seriousness of act or omission).

\textsuperscript{54} See Francis G. Morrisey, Procedures to be Applied in Cases of Alleged Sexual Misconduct by a Priest, 26 STUDIA CANONICA 39, 56-63 (1992) (proposing that two goals of concluding procedures for inquiry prescribed by canon 1717, should be determining whether there are reasonable or probable grounds for believing priest was involved in sexual misconduct and whether Church should proceed with disciplinary action against priest).

As a response to requests from Canadian Conference of Catholic Bishops in 1990, a work group of the Canadian Bishops Ad Hoc Commission on Sexual Abuse prepared a document which proposed various procedures detailing what should be done when situations of sexual abuse arose. \textit{Id. at 40}. Proposals of the work group included appointing a committee to conduct any preliminary investigation, careful adherence to canonical norms in order to protect the accused priests rights, and taking steps to ensure confidentiality of records. \textit{Id. at 44, 47}. It should be noted that the proposals of the Commission did not constitute an official document. \textit{Id. at 41}. Rather, they were prepared to assist the Church in addressing issues not covered by canon law. \textit{Id.}

\textsuperscript{55} 1983 CODE c.1717, §1.
needed for a penal process.56

The investigation must be careful from the start to protect the reputation of all persons involved.57 This concern applies at every stage of any process, whether administrative or judicial.58 Furthermore, any diocesan official who may be needed as a judge in a penal process should have nothing to do with the investigation.59 Nor should the diocesan bishop himself conduct the investigation.60

Some have suggested that psychiatric experts should be included in the investigation process.61 Resorting to the opinions of such experts should not substitute for effective investigation.

56 Id. c.1719.
57 See 1983 CODE c.1717, §2 (stating care must be taken to avoid endangering someone's "good name").
58 See Provost, supra note 3, at 627-28 (noting canon law requires that privacy of victim, his or her family, and clergyman are to be protected by church). Canon law allows for both administrative and penal procedures to address allegations of sexual misconduct by the clergy. Id. at 628. Regardless of which channel is utilized in an investigation of sexual misconduct, the proceedings must be carried out quickly while providing safeguards for the victim, the accused, and the community. Id.; see Beal, supra note 6, at 651-55 (noting both administrative and penal process should be conducted with "sensitivity and discretion" to protect both victim and accused cleric).
59 1983 CODE c.1717, §3.
60 See Morrisey, supra note 54, at 49 (noting that Canadian Bishop's Ad Hoc Commission on Sexual Abuse proposed that due to potential for conflict diocesan bishop or major superior who personally receives allegation of sexual abuse should not be involved in inquiry); see also Beal, supra note 6, at 647-48 (noting that although canon 1717 gives diocesan bishop authority to personally conduct investigation, it may be better for another to conduct inquiry). A diocesan bishop may lack the requisite skills to conduct an investigation. Id. at 648. Furthermore, a bishop's high profile in the community may also attract unwarranted publicity, and a bishop conducting an investigation may have to testify against his cleric in a criminal trial. Id.
61 See Rev. Jerome E. Paulson, The Clinical and Canonical Considerations in Cases of Pedophilia: The Bishop's Role, 22 STUDIA CANONICA 77, 122 (1988) (proposing that when cleric is accused investigator should meet with parents and suggest that child be interviewed by mental health professional "familiar with problems of children in [the child's] age group"). It has also been argued that a committee comprised of experts in various fields should conduct the investigation into a cleric's sexual misconduct. See Beal, supra note 6, at 651 (noting that Canadian Conference of Catholic Bishops proposed that team of interdisciplinary experts organized under diocesan bishop should conduct investigation). The Canadian Bishop's Ad Hoc Commission on Sexual Abuse suggested that the committee should be comprised of the priest appointed by the bishop to conduct the inquiry, a canonist, a criminal lawyer, a civil lawyer, and a person licensed and experienced in the treatment of sexual abuse victims, pedophilia and similar illnesses. Morrisey, supra note 54, at 48, 50.
While a "work-up" by a professional counsellor or clinic may divulge propensities for misconduct, it does not of itself demonstrate whether the acts upon which dismissal would be based in fact occurred.\footnote{In fact, "[t]here [have been] numerous cases, not as well publicized as those where sexual misconduct did indeed occur, where careful investigation has determined that the accused cleric did not commit the offense alleged." Beal, supra note 6, at 653.}

The investigator is free to use any legitimate means to uncover the truth or falsity of the allegations and is to present all findings to the bishop.\footnote{See 1983 Code c.1718, §1.} In this regard, it should be noted that the investigator "has the same powers and obligations as an auditor"\footnote{1983 Code c.1717, §3.} and should observe the procedural norms of canons 1558-1571 so far as applicable.\footnote{Canons 1558-1571 prescribe the procedures for the examination of witnesses in trials conducted under canon law. For example, the sections delineate how and where witnesses should be examined, who may be present when witnesses are questioned, how many witnesses should be introduced, and when witnesses may be excluded from the penal process. 1983 Code c.1558-1571.}

In pursuing this task, the investigator must balance a healthy skepticism with respect for others. Clerics are in a position where they are subject to false accusations. Such an eventuality and the damage to the cleric's good reputation should not be dismissed\footnote{See 1983 Code c.220 (stating that no one is permitted to unlawfully damage "good reputation" of another); see also Beal, supra note 6, at 653 ("When an accusation of sexual misconduct is made public, [a] cleric's career in ministry may be destroyed whether he is guilty or not.").} and must be given appropriate consideration. On the other hand, it is also difficult to bring and maintain an accusation against a cleric, especially where the alleged victim is a child and the cleric makes a forceful denial of the accusation. The investigator must make it easy for the child and his or her parents to share the information needed to determine the truth of the matter and to assess the seriousness of the misconduct.

The investigation should include a search of the archives (including the secret archives) of the dioceses (and religious institutes, if applicable) where the accused cleric has served in order to determine if previous accusations were made against the cleric.\footnote{Beal, supra note 6, at 657.} The credibility of the accuser and of the accusation itself should also be assessed.
B. Determination (c.1718)

If the investigation has collected sufficient evidence to make a determination, the bishop must decide the following:

i) Does the cleric's conduct represent a basis for initiating a penal process? In other words, has the cleric in fact committed a canonically-imputable delict?

ii) If so, is it still possible to initiate a timely penal process?

iii) If so, is it expedient to initiate a penal process?

With respect to this last point, canon 1341 indicates that, when considering a response to misconduct, a bishop must be equally concerned with repairing the harm caused by the scandal, restoring justice, and reforming the accused cleric.68

IV. OPTIONS OTHER THAN PENALTIES

There are less drastic non-penal and penal options which may be more appropriate where there is good reason to believe that the cleric is guilty but the evidence is insufficient, or where the nature of the proven misconduct does not warrant dismissal.69

A. Administrative Actions of a Non-penal Nature

Certain administrative non-penal actions are possible even prior to the issuance of the initiatory decree of canon 1718.70 If, in the particular case, such administrative approaches are not feasible at the outset, they may still emerge as viable options

68 Only after the bishop determines that these three goals cannot be sufficiently met may he provide for a judicial or administrative procedure or impose penalties on the cleric. 1983 CODE c.1341.

69 See Beal, supra note 6, at 661-66 (noting canonical options that may be available to bishop when cleric is accused include proposing administrative leave to accused cleric, or imposing it once penal process has begun, restricting rights enjoyed by cleric as member of ministry, monitoring cleric's activity within parish, or persuading cleric to undergo professional evaluation or treatment). When a cleric has engaged in sexual misconduct and cannot be reassigned, the bishop may decide to impede him from the exercise of orders, or convince him to retire or take a leave of absence and refrain from exercising his ministry. Id. at 672-75.

70 Once an investigation is completed, the investigator must report the findings of the inquiry to the bishop. THE CODE OF CANON LAW: A TEXT AND COMMENTARY, supra note 1, at 1024. Upon receiving the report, the bishop will issue a decree stating whether, based on the evidence, the penal process of the Church can be initiated. See 1983 CODE c.1718 (stating that when evidence is sufficient bishop decides whether to begin penal process and may revoke this decree upon finding of contrary evidence).
during the prosecution of a judicial process or even after its conclusion.

1. Dispensation from Presbyteral Celibacy (cc.290-293)

The cleric might voluntarily petition the Holy See for a dispensation from the obligations attached to orders and a return to the lay state. The granting of such a dispensation is a favor rather than a penal action. It differs essentially from penal dismissal from the clerical state, not only because it is non-penal in nature, but because the papal dispensation frees the cleric from the obligation of celibacy, unlike judicial dismissal.71

Once the cleric submits the petition to the ordinary, he is to be removed from the exercise of sacred orders in accord with the Apostolic norms for the instruction of such a petition.72 This removal remains in effect until a final disposition of the petition is made by the Holy See.

While the voluntary submission of a petition for a dispensation does not prevent the initiation of a penal process for dismissal from the clerical state, the latter should normally be stayed until a decision on the cleric's petition is forthcoming from the Holy See. Conversely, a negative response by the Holy See to the cleric's petition does not prohibit initiation of the penal judicial process, and the details of the petition and its rejection should be introduced into the case for consideration by the tribunal regarding the appropriateness of a penalty.

2. Declaration of an Impediment to Exercise of Orders (c.1044)

Canon 1041, 1° states that a person who labors under some form of insanity or other psychic infirmity may, upon consultation with experts, be found to be unfit for properly carrying out the ministry (inhabilis iudicatur ad ministerium rite impleendum).73 Such a person is, under canon 1044, §2, 2° impeded from exercising his orders until his ordinary, upon

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71 See 1983 CODE c.291 (stating that dispensation from the obligation of celibacy can be granted by Roman Pontiff alone).

72 See Decrees and Decisions, 41 JURIST 219, 226 (1981) (declaring once bishop receives petition and decides to act further, he must prohibit petitioner from exercising orders).

73 1983 CODE c.1041, §1.
consultation with an expert, concludes that the impediment has ceased and permits him to return to active ministry in an unrestricted or appropriately restricted form.\textsuperscript{74}

The impediment cannot be declared until the person has been judged to be unfit to carry out the ministry properly, and such unfitness must result from the psychic infirmity.\textsuperscript{75} If a cleric is determined to suffer from pedophilia or ephebophilia to the extent that his own ministry becomes a true danger to children, he may be judged \textit{inhabilis} and declared to be unfit by his bishop.\textsuperscript{76}

This declaration does not remove the cleric from the clerical state. He still enjoys certain rights of the clerical state, including the right to decent support, and he is bound by its obligations, at least those which he is capable of fulfilling. Furthermore, if rehabilitation is successful, and the diocesan bishop, after consulting with experts, determines that the cleric's ministry no longer presents a danger to others, the bishop may then permit him to exercise orders again.\textsuperscript{77}

Declaring the existence of an impediment to the exercise of orders based on psychic defect is an administrative disciplinary (i.e., non-penal) act. In positing the act, however, due process must be followed, and the bishop is expected to rely on two qualified advisors to assist him in reaching his final decision.\textsuperscript{78}

\textsuperscript{74} 1983 CODE c.1044, §2, 2; Griffin, \textit{supra} note 1, at 303-04.

\textsuperscript{75} See Beal, \textit{supra} note 6, at 673 (noting diocesan bishop must solicit opinion of experts regarding disorder and its impact on cleric's ability to minister before declaring impediment). \textit{Compare} 1983 CODE c.1040 (stating only impediments that exist are those listed in canon) \textit{with} 1983 CODE c.1044, §2 (listing person illegitimately receiving orders while impeded from doing so and persons affiliated with some physic defect as only person impeded from exercising orders).

\textsuperscript{76} See Beal, \textit{supra} note 6, at 672-73 (noting that pedophilia and other similar sexual disorders qualify as "psychic defects" for which cleric can be impeded from exercising orders by bishop).

\textsuperscript{77} See L.M. Lothstein, \textit{Can a Sexually Addicted Priest Return to the Ministry after Treatment? Psychological Issues and Possible Forensic Solutions,} 34 CATH. LAW. 89, 89-90 (1991) (noting many priests who have committed sexual abuse have successfully returned to ministry). The author's article was based in part on a clinical study conducted at a psychiatric hospital to which clergy from all over the United States were referred for treatment. \textit{Id.} at 90. The author noted that 60% of priests treated at the treatment center, and similar centers, were successfully returned to active ministry. \textit{Id.} at 110. Only a limited number of cases in which priests returned to the ministry proved to be unsuccessful. \textit{Id.}

\textsuperscript{78} See Beal, \textit{supra} note 6, at 673 (noting bishop may utilize aid of two assessors in evaluating evidence against accused cleric and rendering decree).
DISMISSAL FROM THE CLERICAL STATE

The cleric has a right of recourse against the bishop's decree in accordance with the usual norms for administrative acts. This recourse, however, unlike the recourse against the administrative imposition of a canonical penalty, does not suspend the effects of the decree.

B. Penal Remedies and Penances (cc.1339-1340)

Besides these administrative disciplinary actions, there are certain penal remedies and penances that are not strictly canonical penalties such as the fraternal correction of the cleric, or a reprimand of the cleric (public or private). In addition, other pastoral remedies exist such as admonishing or warning the cleric about his behavior, imposing a penance to be performed by the cleric—even a public penance if the delict was not occult, attaching a specific penalty to a legitimate order (precept)—the violation of which can then be punished as warned, and removing or restricting diocesan pastoral faculties—e.g., the faculty to hear confessions (c. 974, §1), the faculty to preach (c. 764), and the delegation to officiate at marriages (c. 1111). Any of these penal remedies and penances can be imposed by a simple decree of the bishop. This applies in a special way to the office of pastor (cf. cc.528-530).

V. PENALTIES OTHER THAN DISMISSAL (cc.1331-1338)

Besides administrative disciplinary actions, penal remedies, and penances, there are medicinal and expiatory penalties.

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79 1983 CODE cc.1732-1739.
80 Id. c.1341.
81 See id. c.1339, §2 (stating bishop can correct cleric in way appropriate to particular circumstances).
82 Id. c.1339, §1.
83 Id. c.1340.
84 1983 CODE c.1319. Note, however, that certain faculties are incorporated into an ecclesiastical office and may not simply be removed or restricted by a simple administrative decree.
85 Id. c.1342, §1.
86 The bishop has discretion to apply penalties. JAMES A. CORIDEN, AN INTRODUCTION TO CANON LAW 175 (1991). The purpose of expiatory penalties is to repair harm to the community and serve as a deterrence to others. Id. at 176. Such penalties may include deprivation of offices or powers or a prohibition on their exercise. Id. at 176-77. Medicinal penalties are aimed at healing or curing the offender. Id. at 177. Excommunication, interdict, and suspension are the three medicinal penalties. Id.
which, though truly penal in nature, do not rise to the level of permanent dismissal from the clerical state. These penalties may be imposed by an episcopal administrative decree provided that they are not imposed perpetually. Additionally, the cleric's fundamental due process rights established by the administrative penal process in canon 1720 must be recognized. Accordingly, administrative imposition of a canonical penalty, even a temporary one, is subject to recourse on the part of the cleric suspending the effect of the decree until a final determination is made on the recourse.

A. Censures (cc.1331-1335)

Before a censure is imposed by episcopal decree, there must be a canonical warning regarding the potential penalty and an opportunity for the priest to withdraw from contumacy and repent. Usually the canonical warning is made directly to the cleric in question, outlining precisely what behavior gave rise to the censure. This warning, however, may also be incorporated into diocesan law.

87 1983 CODE c.1342, §2.
88 Canon 1720 outlines the process to be followed in imposing or declaring a censure or temporary expiatory penalty by administrative decree:
(1) The bishop is to inform the cleric about the accusation and the evidence collected to date. He must give the cleric an opportunity to explain his actions and defend himself against the accusation. A basic component of the right of defense is the cleric's right to be advised by a canon lawyer at all stages of the process. If the cleric is unwilling to cooperate. The bishop should formally summon him to appear before him. If the cleric fails to comply, the bishop may then proceed.
(2) The bishop is to consider carefully all the evidence and arguments in consultation with two qualified advisors.
(3) If the bishop has reached moral certitude that the delict is proved and the canonical statute of limitations has not expired, he is to issue the administrative decree imposing the censure or temporary expiatory penalty. The decree should state his reasons in law, and in fact, for imposing the penalty. All of the exempting, mitigating and aggravating factors and the other norms found in canons 1321-1327 and 1342-1350 are to be observed in drawing up and issuing the decree.
89 1983 CODE c.1720.
90 Id. c.1353.
91 Id. c.1347, §1 (authorizing “at least” one warning and granting time for cleric to withdraw and repent).
92 In addition to the self-executing (latae sententiae) censures contained in the code, particular diocesan law can establish self-executing censures for “scandalous offenses or those acts which can not be punished effectively by inflicting penalties.”
Individualized penal precepts threatening censures can also be helpful in addressing situations where clerics persist in scandalous or other prohibited behavior. In such cases, precepts may be issued which threaten the imposition of specific penalties. Particular law can also establish censures for various sexual delicts to further specify the provisions in the code.

Once imposed, all censures, as medicinal penalties, perdure until withdrawal from contumacy occurs. Withdrawal from contumacy involves the acts of truly repenting the offense and making "suitable reparation for damages and scandal or at least seriously promis[ing] to do so."

However, using a censure to bring about the cleric's compliance is a limited remedy. For example, expressly ordering a cleric to seek psychiatric help under threat of canonical penalty, while theoretically possible, hardly ever works and may even be counterproductive. Such an order may violate the cleric's right to privacy, and, unless information from the psychiatric intervention is freely released by the cleric with no hint of coercion, its admissibility in a future judicial process of dismissal may run afoul of the cleric's right not to be forced "to confess" or "take an oath."

B. Temporary Expiatory Penalties (cc. 1336-1338)

Besides censures, there are also expiatory penalties which the bishop may temporarily impose. The bishop may:

1) order the cleric to live in or move away from "a certain place or territory;"
2) remove the cleric from his pastoral office;
iii) withdraw the cleric's rights, privileges and faculties, including those granted to the cleric by reason of the law or his pastoral office;\textsuperscript{59}
   iv) prohibit the cleric from exercising his ministry together, or partially, or in a particular place (this may even involve a prohibition from celebrating Mass privately);\textsuperscript{100}
   v) transfer the cleric to another office.\textsuperscript{101}

If the bishop concludes that one of the above-mentioned expiatory penalties should be imposed permanently, such a penalty cannot be imposed by episcopal decree, but must be imposed only by way of the judicial process.\textsuperscript{102}

VI. THE JUDICIAL PROCESS TO DISMISS FROM THE CLERICAL STATE

If none of the above remedies is feasible or effective, which might very well be determined at the outset, the bishop may initiate the judicial process to dismiss the cleric from the clerical state. Without becoming too immersed in procedural and evidentiary details, the following points concerning the judicial penal process might be of interest to diocesan attorneys.\textsuperscript{103}

A. General Norms (cc.1400-1665, 1721-1728)

Analogous to some state criminal procedures which rely heavily on civil procedure, the judicial penal process is governed by the canons for trials in general\textsuperscript{104} and ordinary contentious trials.\textsuperscript{105} These general norms are specialized by the norms applied to cases involving the public good as well as those governing the penal process.\textsuperscript{106}

\textsuperscript{59} Id.
\textsuperscript{100} Id. c.1336, §1, 3°. The bishop cannot deprive the cleric of the “power of orders,” but may only prohibit the cleric from exercising his ministry. Id. c.1338, §2.
\textsuperscript{101} Id. c.1336, §1, 4°.
\textsuperscript{102} 1983 CODE c.1342, §2.
\textsuperscript{103} For the remainder of this article, we shall assume: (1) that we are dealing with a serious violation of canon 1395, §2 by a cleric’s sexual abuse of a minor; (2) that, considering all the circumstances, is good reason to dismiss the accused from the clerical state; (3) that the bishop has issued an initiatory decree mandated by canon 1718 to commence the judicial process.
\textsuperscript{104} 1983 CODE cc.1400-1500.
\textsuperscript{105} Id. cc.1501-1670.
\textsuperscript{106} Id. c.1728, §1 (authorizing application of special norms, canons 1721-1728, in penal cases that concern “public good”).
B. Initiatory Decree (c. 1718)

Prior to issuing the initiatory decree which sets the process in motion, the bishop should consult with at least two or more qualified canon lawyers concerning the presence of the necessary requisites for bringing the accusation (including the timeliness required by the statute of limitations), the prospects for a successful prosecution (including a consideration of the accused's imputability), and the expediency, under the circumstances, of imposing a permanent expiatory penalty.  

C. Personnel

1. Promoter of Justice (cc.1430-1436)

The promoter of justice is a key figure in the process, functioning as the prosecutor of the penal case. Like a plaintiff in a contentious case, the promoter brings the action, educes evidence, argues the case, and appeals the sentence when necessary. If the office of promoter of justice is vacant or the promoter is otherwise unavailable or inappropriate, the diocesan bishop may appoint an *ad hoc* promoter of justice. While there is disagreement as to whether the promoter must be a priest, it is probably more advisable for the promoter (and the notary) to be priests unless a particularly knowledgeable and prudent deacon or lay person is available to serve as promoter.

The promoter's principal duty is to seek justice. His concern is the public good. Like a state district attorney, the promoter shall not prosecute if he decides that there is no basis for the prosecution. The same disinterested approach should mark the acts of the preliminary investigator.

There is a parallel with most American civil jurisdictions. Police conduct a preliminary investigation to establish probable cause and make an arrest. After the arrest, the investigation is quickly brought to the prosecutor's office. Working with the

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107 1983 CODE c.1718, §§1-3.
108 Id. c.1430 (authorizing appointments of Promoters for "contentious cases in which the public good could be at stake and for penal cases").
109 Id. c.1436, §2.
110 1983 CODE c.1724, §1 recognizes that the Promoter may renounce the instance even after the trial has commenced if the ordinary consents.
police or with its own investigators, the prosecutor builds the case without violating the rights of the accused. This is the role of the promoter.

In canonical practice, it is probably more judicious to have another diocesan official conduct the preliminary investigation and bring matters to the attention of the promoter of justice when it is clear that a judicial process is warranted and desirable. However, there is nothing to prevent the promoter from conducting a deeper investigation in order to obtain additional evidence needed to prove the allegations and justify the requested penalty.\footnote{For a licentiate dissertation on the Promoter of Justice see Thomas T. Brundage, The Promoter of Justice Under the 1983 Code (1992), on deposit in John K. Mullen of Denver Memorial Library, The Catholic University of America, Washington, DC 20064 (photocopies obtainable).}

2. Collegiate Tribunal (cc.1419-1464)

Canon law calls for a collegiate tribunal of three judges in penal cases where dismissal from the clerical state is a possibility.\footnote{1983 CODE c.1425, §1, 20.} If the case is considered especially difficult, the bishop may entrust it to a collegiate tribunal of five judges.\footnote{Id. c.1425, §2.} The American option permitting the use of a single judge in matrimonial cases, while technically applicable, should not be used in these cases.

The praeses should be the judicial vicar or an adjutant judicial vicar;\footnote{Id. c.1426, §2 (authorizing judicial vicars to preside over collegiate tribunals).} if these are not available, it must be a cleric. The other judges must simply fulfill the requirements of the law.\footnote{Id. c.1421, §§2, 3 (allowing lay persons with canon law experience to be appointed to the tribunal).} In practice, however, it is probably more advisable for all three judges to be priests.

A judge who is appointed as a member of the collegiate tribunal must recuse himself if he holds any personal bias for or against the accused.\footnote{Id. c.1448, §1. The same holds true for the Promoter of Justice and any assessor or auditor used in the case. Id. at §2.} Awareness of public facts regarding the case which are generally known by priests or others in the diocese does not necessarily warrant recusal.

A bishop may appoint ad hoc judges to the tribunal from
outside the diocese. This approach might avoid unnecessary questions about bias and may also permit the bishop to obtain the services of judges (or a promoter of justice) who have greater expertise and experience regarding these rare cases. The NCCB and the Canon Law Society of America can be consulted to obtain the names of canonists qualified to serve in such a capacity.

3. Advocate (cc.1481-1490, 1723)

When the accused is cited, the judge invites him to appoint an advocate.\(^{117}\) If the accused fails to act in a timely fashion, the judge has the duty to name a competent advocate prior to the joinder of issues and the named advocate will function in this capacity as long as the accused has not yet personally appointed an advocate.\(^{118}\) The advocate appointed by the accused, or the advocate appointed \textit{ex officio} by the judge, must fulfill the requisites of canon 1483,\(^{119}\) but is not required to be a priest.\(^{120}\)

4. Notary (c. 1437)

A priest-notary must be present during each processual act and must notarize the written acts.\(^{121}\) The chancellor or vice-chancellor, if he is a priest and is not acting in some other capacity in the trial, may serve as the notary, or the bishop may appoint another priest as notary \textit{ad hoc}\(^{122}\) provided that he has a

\(^{117}\) 1983 CODE c.1481, §1.

\(^{118}\) Id. c.1723, §§1-2 (authorizing judges to appoint cleric's advocates as required by c.1481, §1).

\(^{119}\) The advocate must be: a) 18 years of age; b) of good reputation; c) a Catholic (unless the bishop permits otherwise); and d) possessing a doctorate in canon law unless the bishop is convinced that the advocate is expert in canon law. 1983 CODE c.1483.

\(^{120}\) See generally John B. Hesch, \textit{The Right of the Accused Person to an Advocate in a Penal Trial}, 52 JURIST 723 (1992) (interpreting present and former code sections applying to accused priest's right to advocate); see also 1983 Code of Canon Law Ann. §1483 annot. (Wilson E. Lafleur 1993) (stating code implies women are also allowed to be advocates).

\(^{121}\) 1983 CODE c.483, §2 (priests must act as notaries when "the reputation of a priest can be called into question.").

\(^{122}\) See THE CODE OF CANON LAW: A TEXT AND COMMENTARY, supra note 1, at 394. A priest can be appointed as a notary if no priest holds the office, even if the appointment is for only one case. Id.

\(^{119}\) See also 1983 CODE c.482 (determining procedure for appointment of chancellors); c.471 (stating obligation of secrecy assumed by anyone accepting office of notary); c.484 (describing duties of notaries).
good reputation and is above reproach. 123

D. Introducing the Case

1. Submission of the Libellus (cc.1501-1505)

Pursuant to the decree initiating the process, the bishop delivers to the promoter of justice all the information obtained in the preliminary investigation in order to assist him in drawing up a libellus of accusation to be presented in writing to a competent judge. 124 The promoter of justice should normally present this accusatory instrument to a competent judge within five days from his receipt of the acts of the prior investigation unless further investigation is warranted. 125

2. Admission or Rejection of the Libellus (cc.1501-1506)

Upon receipt of the libellus by a judge, the tribunal should be constituted and the libellus accepted or rejected by the tribunal within one month or ten days after a demand has been made. 126

E. Citation of the Accused: Commencement of the Action (cc.1507-1512)

The citation of the accused (or the de facto appearance of the accused and the promoter before the tribunal [c. 1507, §3]) represents the commencement of the first instance action. 127 If the accused refuses to accept the citation or prevents it from being delivered, he is deemed to have been legitimately cited. 128

Since the action is commenced by the citation of the accused,

123 See 1983 CODE c.483, §2.
124 Id. c.1721, §1.
125 Id. Canon 1504 specifies the content of the libellus. The libellus must:
1° express before which judge the case is being introduced, what is being petitioned and by whom the petition is being made;
2° indicate the basis for the petitioner's right and at least in general the facts and proof which will be used to prove what has been alleged;
3° be signed by the petitioner ... adding the day, month and year, as well as the address of the petitioner ... for the purpose of receiving the acts;
4° indicate the domicile or quasi-domicile of the respondent.
126 1983 CODE c.1504.
127 Id. c.1506.
128 1983 CODE c.1507 ("The prosecution of a suit begins with the citation ... ").
129 Id. c.1510.
the statute of limitations during which the action may be interposed continues to run until a valid citation occurs. This is an extremely important point when attempting to preclude a defense that the action is time-barred. Neither the initiatory decree of the bishop to set the judicial process in motion nor the submission of a libellus by the promoter of justice nor even the decree admitting the libellus suffices to stop the running of the statute of limitations. If the statute of limitations has expired prior to the citation of the accused, the action will be time-barred.

On the other hand, even if the accused cleric’s whereabouts are unknown, a penal process may be initiated. Normally, such circumstances would qualify as the recalcitrance addressed by canon 1510, the basis for deeming him cited and declaring him absent.

F. Administrative Leave of Absence (c. 1722)

Once the diocesan bishop has completed the preliminary investigation and has issued the initiatory decree to initiate the judicial (or administrative) process, he may, after consulting the promoter of justice and citing the accused, bar the cleric from exercising public ministry during the course of the penal process, impose or forbid the cleric’s residence in a given place or territory, or even prohibit the cleric’s public participation in the

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129 1983 CODE c.1512. ("Once the citation has been legitimately communicated or the parties have appeared before the judge to pursue the case ... prescription is interrupted unless otherwise provided."). See also THE CODE OF CANON LAW: A TEXT AND COMMENTARY, supra note 1, at 973:

Prescription is interrupted when the trial officially opens, either because the apprising of the respondent about the claim of the petitioner dissipates the respondent's good faith ..., or simply because the law considers it fair that prescription be interrupted during a trial, especially in order to avoid the possibility of the full term of prescription reaching maturity during the course of the trial.

Id. 130 Criminal action by church courts is extinguished by prescription of five years for offenses against the sixth commandment. 1983 CODE c.1362, §1. See also id. c.1362, §2 ("Prescription starts on the day the offense was committed or on the day when it ceased if the offense is continuous or habitual."). See generally Griffin, supra note 1, at 308 (comparing the statute of limitations in church law with American civil law).

131 1983 CODE c.1510. "A respondent who refuses to accept the document of citation, or who prevents its arrival is considered as having been legitimately cited." Id.
Such a prohibition may be issued to preclude scandal, to protect the freedom of witnesses, or to safeguard the course of justice. Moreover, unlike the usual recourse against the administrative imposition of a canonical penalty, recourse against the administrative leave of canon 1722 is not suspensive of the effects of the decree.

G. Joinder of Issues (cc.1513-1516)

The joinder of issues should make it clear that the tribunal is being asked to answer two questions. The first question is concerned with whether the accused is guilty under canon law of the specific delict(s) with which he is charged. The second question deals with the appropriate punishment. If guilty, the issue is whether the accused should be dismissed from the clerical state or, in the alternative, if some other type of penalty should be imposed.

H. Prosecution of the Case (cc.1517-1597)

The canonical method of prosecuting the case is not an adversary method; it is akin to the inquisitorial method found in civil law countries. The judge has a great deal of discretion

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132 1983 CODE c.1722; Griffin, supra note 1, at 307 ("Before such actions are taken, the ordinary must consult with the Promoter of Justice and summon the accused."). All administrative prohibitions are temporary and they are automatically extinguished at the close of the penal process. Id. at 307-08. See also Bertram Griffin, Imposition of Administrative Leave Against an Accused, ROMAN REPLIES AND CLSA ADVISORY OPINIONS 103-08 (Washington, D.C.: CLSA 1988); Beal, supra note 10, at 293 (detailing canonical arguments advanced in support of policies calling for prompt withdrawal of cleric from his assignment and barring him from public ministry as soon as denunciation is received).

133 1983 CODE c.1722.

134 See Id. c.1736 (specifying situations in which decree does not take effect until after recourse is settled). Any recourse against a penal decree has suspensive effect. Id. c.1353. "The present Code has also expunged the previous Code's explicit refusal to grant any legal remedy against the imposition of 'administrative leave'.... Now an affected cleric can lodge a hierarchical recourse against the Ordinary's decree imposing 'administrative leave.'" Beal, supra note 10, at 309. See also THE CODE OF CANON LAW: A TEXT AND COMMENTARY, supra note 1, at 1033 (stating that "if a given recourse does not have suspensive effect, the author of the decree may voluntarily suspend it while considering the petition for its withdrawal or modification.").

concerning the discovery and admission of evidence. The instruction of the case can normally be done by one of the judges of the collegiate tribunal who then reports to the others, and the tribunal can carry out some of its activity outside its own seat.

The accused is never required to give testimony or other information in a penal case. He can flatly deny the allegations without saying anything more. It is for the promoter of justice to prove the allegations concerning the violation of the penal law, the imputability of the violation and the appropriateness of the penalty. If the accused decides to write or speak, he has the right to do so last, either personally or through an advocate or procurator. Even so, the accused is not bound to confess his offense and he cannot be required to take an oath. Thus, if the accused agrees to testify under oath, he cannot be asked under oath to confess. On the other hand, if in his testimony he voluntarily confesses to the promoter's allegations, either totally or partially, such testimony is admissible.

If the accused has already been subject to civil proceedings, either in a criminal trial or in a civil action for damages and or an injunction, a certification of the civil court's judgment is
Circumstantial evidence is truly indispensable in a penal case whenever the proof relies principally on the judicial confession of the accused or declarations made by him outside of the judicial proceedings. Confessions and admissions of the accused, even if voluntarily given, are not dispositive. They are admissible but “complete probative force cannot be attributed to them unless other elements are present which thoroughly corroborate them.” This rule is somewhat similar to the requirement in some state criminal procedures for corroboration of the accused’s confession by extrinsic proof of the corpus delicti.

Expert testimony can be helpful to the tribunal and is admissible provided that the qualifications of the experts are clearly established and their testimony is truly necessary for interpreting the facts. Experts are particularly helpful in accessing the imputability of the accused.

If a prospective witness is less than fourteen years old, the child cannot testify unless the judge issues a decree declaring such a hearing expedient.

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142 1983 CODE c.1540, §2.
143 See Beal, supra note 6, at 659 (finding that filing charges in civil court does not “eliminate the need for a preliminary investigation to prepare for a possible canonical process in the future”).
144 In this regard, it is very important for the tribunal to determine the various standards of proof used by the civil court. In a civil action, the proof is usually only the fair preponderance of the evidence, although at times the court may require more proof, perhaps rising to the level of clear and convincing evidence. In a criminal proceeding, all courts require that the elements of the crime be proven beyond a reasonable doubt, which probably comes closest to the canonical concept of moral certitude. Even in criminal proceedings, however, certain facts which may not be elements of the crime charged may be proved based on a lesser standard. See Beal, supra note 6, at 659.
146 See CODE OF CANON LAW ANNOTATED, supra note 138, at 977 (defining expert as “one whose knowledge, experience, or art, makes him an authoritative specialist in a particular field”).
147 1983 CODE c.1550, §1.
about who will be present when the child offers testimony.\textsuperscript{148}

All priests, whether the accused himself or simply witnesses, are prohibited from testifying about anything made known to them by reason of sacramental confession even if the penitent himself requests that they testify about the matter. Nor is the testimony of anyone who may have overheard statements made on the occasion of confession admissible in any way to prove the truth of such statements.\textsuperscript{149}

\textit{I. Publication of the Acts and Conclusion of the Case (cc.1598-1606)}

Once the promoter and the accused have had a reasonable opportunity to supplement the acts previously published, the judge issues the usual decree concluding the case.\textsuperscript{150} The decree of conclusion should normally be issued no more than ten days after the decree of the publication of the acts.\textsuperscript{151}

\textit{J. Judgment and Sentence (cc.1607-1618)}

The judgment must arise from the acts of the case itself and from the evidence submitted.\textsuperscript{152} An individual judge is not permitted to base his decision on any personal knowledge he may have about the issues.\textsuperscript{153} If, at any stage of the process, a judge determines that his personal knowledge about a material fact would bias his decision in any way, he has the duty to recuse.

\textsuperscript{148} See 1983 CODE c.1559.

\textsuperscript{149} 1983 CODE c.1550, §2 (determining that priests are incapable of being witnesses, in respect of "everything which has become known to them by reason of sacramental confession, even if the penitent requests their manifestation ...."). Moreover, anything that may in any way have been heard by anyone on the occasion of confession, cannot be accepted even as an indication of the truth. \textit{Id.} "The sacramental seal is inviolable" and "[t]his prohibition is so absolute that nothing heard by anyone during a confession may be accepted, not even as an indication of the truth." \textsc{Code of Canon Law Annotated, supra} note 138, at 965.

\textsuperscript{150} 1983 CODE c.1599, §1 ("When everything pertinent to the production of proofs has been completed, it is time for the conclusion of the case"); \textit{Id.} §2 ("The conclusion takes place whenever the parties declare that they have nothing more to add, or the time set by the judge for proposing proofs has expired, or the judge declares that the case is sufficiently instructed"). \textit{Id.} §3 ("The judge is to issue a decree that the conclusion of the case has been completed, in whatever manner it took place.").

\textsuperscript{151} Id. c.1598, §§1-2.

\textsuperscript{152} 1983 CODE c.1608, §2.

\textsuperscript{153} \textit{Id.} c.1608, §2; see also c.1448, §1.
himself and withdraw. The sentence must settle the controversy by answering the questions stated in the joinder of issues as originally decreed or later amended.

K. Renunciation (c. 1724)

The promoter has the right to renounce the action at the order of, or with the consent of, the bishop who decreed that the action should be brought. If the accused has not been declared absent from the trial, the consent of the accused is also required for the tribunal to accept the promoter's renunciation of the instance. Therefore, if the promoter concludes during the prosecution that the allegations are false or cannot be proven and seeks to extinguish the action, the accused has the right to insist that the action proceed and a sentence be published declaring him not guilty.

L. Appeal (cc.1619-1640)

If the accused has been found guilty and the penalty of dismissal has been imposed, the lodging of an appeal by the accused within the prescribed time limit suspends the effect of the penalty until the appeal is decided. Because an appeal to the second instance tribunal is not mandatory, it is the choice of the accused and the promoter of justice. If invoked, the right must be exercised within fifteen available days (tempus utile) from notification of the publication of the sentence. All incidental cases should be decided together with the principal case so that separate appeals against interlocutory sentences and resolutions of incidental questions do not delay the

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154 Id. c.1448, §2 (stating that promoter of justice, defender of the bond, assessor, and auditor must disqualify themselves under same circumstances); Id. c.1449, §1 (allowing that if judge does not withdraw, affected party may lodge objection against him); Id. c.1461 (stating that same rules hold true at any stage of case where judge becomes aware of his incompetence).
155 1983 CODE c.1611, 1°.
156 Id. c.1724, §1.
157 Id. c.1724, §2.
158 Id. c.1524, §3 (specifies that a valid renunciation must be made in writing and must be communicated to the other party who must accept it, or at least not attack it, and must be admitted by the judge).
159 Id. c.1353.
160 Id. c.1628.
161 Id. c.1630, §1.
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process. Thus, all are handled together in the one appeal.

If a finding of guilt and the imposition of dismissal from the clerical state is upheld by the appellate tribunal, or there has been no legitimate appeal by the guilty party within the prescribed time limit, the tribunal of first instance orders that the sentence be executed and that the guilty party be given notice. The bishop of the diocese in which the first instance sentence was rendered then executes the sentence personally or through a delegate. At that moment, the guilty party is definitively dismissed from the clerical state.

M. Secrecy and Disposition of the Acts (cc.489, 1455)

The proceedings are conducted in a confidential manner in order to protect the reputations of all concerned, particularly that of the accused. Unlike a civil trial, presence at the examination of witnesses is limited to the judge (the entire collegiate tribunal need not be present) and the notary. Since there is no requirement that the accused or the promoter be present, they can participate only if admitted by the judge. The advocates may participate unless the judge "believes that the process must be carried on in secret because of the circumstances of things or persons." In such a case, the

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162 See id. c.1589, §1.
163 See id. c.1589, §2.
164 See id. c.1589, §3.
165 See id. c.1651 (stating that "[t]here can be no execution of a sentence prior to an executory decree of the judge in which it is stated that the sentence must be executed").
166 Id. c.1653, §1.
167 Id. c.1654, §1.
168 Id. c.1455, §3.
169 1983 CODE c.1561.
170 Id.
advocates may submit questions to the judge in advance of the examination. Similarly, even where others are present at the examination of a witness, the questioning is done by the judge unless he permits those present to pose questions directly to the witness.

The judges, the promoter, and the notary are bound *ex officio* to secrecy. Since reputations are always involved in such trials, the tribunal should bind all the witnesses, the experts, the accused, and the advocates and procurators by oath to observe secrecy.

Upon completion of the case, the acts are to be filed in the secret archives. If all appeals have been completed and the sentence executed, the acts are retained for ten years after the date of the condemnatory sentence. If the dismissed cleric should die during that period, the acts are destroyed within one year after the date of death. In either case, a brief summary of the case and the text of the definitive sentence are retained in the secret archives.

VII. IMPUTABILITY (CC.1321-1330)

As mentioned above, one of the principal objections to the judicial imposition of dismissal in cases of sexual abuse of a minor is the requirement of full imputability. There is no

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171 Id. c.1561.
172 Id.
173 1983 CODE c.1455, §1.
174 Id. c.1455, §3.
175 Id. c.489, §1.
176 Id. c.489, §2.
177 Id.
178 1983 CODE c.489, §2.
179 Imputability denotes what is necessary to establish one's guilt. In this instance full imputability means the existence of both the actus reus, the external act, and the mens rea, the mental intention. The imputability necessary for guilt under canon law is set forth in canon 1321. See Hughes, supra note 135, at 19-36; Elizabeth McDonough, A Novus Habitus Mentis for Sanctions in the Church, 48 JURIST 727-46 (1988).

The imputability necessary for guilt under canon law mirrors that of ordinary criminal law, and neither canon law nor criminal law will punish thoughts alone. 1983 CODE c.1321, §§1-2. Both, however, provide for the presumption of guilt of mind based on the actions of certain crimes. Under canon law, imputability is presumed whenever an external violation has occurred, unless facts and circumstances prove otherwise. 1983 CODE c.1321, §3.
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brightline rule. Each case is different and must be judged according to the law and the facts and circumstances demonstrated to the tribunal. The tribunal’s judgment in determining the imputability needed for imposition of dismissal must be based solely on the acts of the case and on the rules of law.\(^\text{180}\)

A. Actus Reus

Violations of canon 1395, as with all delicts, are committed solely by external acts. No one commits a delict by, nor can anyone be punished canonically for, an interior act, a tendency to criminal behavior, or a sin of thought or desire, no matter how serious.\(^\text{181}\) Thus, while the cleric’s past acts and his propensity are admissible as some evidence (particularly as to imputability and the appropriate punishment), they are no basis for the imposition of the penalty of dismissal from the clerical state without proof of the actus reus.

B. Mens Rea

Conversely, the external act alone does not suffice.\(^\text{182}\) It must be a human act, posited with sufficient internal deliberation and freedom to be gravely imputable insofar as it results from personal malice or culpability.\(^\text{183}\) Thus, unless a specific law determines otherwise, one may not be punished canonically for an act of negligence since negligence is, by definition, non-deliberate.\(^\text{184}\) Furthermore, when the accused has committed a delict with sufficiently grave imputability but is shown to have lacked full imputability, the diminution in imputability represents a basis for mitigation of the penalty.\(^\text{185}\)

C. Presumption of Imputability and Burden of Proof

Some argue that there is an inherent contradiction in

\(^\text{180}\) 1983 CODE c.1321, §2 (stating that one who has violated law or precept is bound by penalty stated therein).
\(^\text{181}\) Id. c.1321, §1.
\(^\text{182}\) Id.; but see id. §3 (stating that “[u]nless it is otherwise evident, imputability is presumed whenever an external violation has occurred.”).
\(^\text{183}\) Id. c.1321, §1.
\(^\text{184}\) 1983 CODE c.1321, §2.
\(^\text{185}\) Id. c.1324, §1, 10°.
dismissing a pedophile from the clerical state since the proof of
the accused's psychological illness, manifested by his external
violations, is itself proof of his lack of full imputability. This
facile and simplistic statement is incorrect, since it would render
the proscription of canon 1395, §2 meaningless in se, relegating
its application to some sort of imaginary cleric who, though free
of all psychological illness and disordered desire, chose, with
impeccable deliberation and freedom, to abuse a young person
sexually.

The presumption provided from canon 1321, §3 resolves the
doubt in the external forum. Once an external violation has been
proved, imputability is presumed unless otherwise evident (nisi
aliud appareat). Without evidence of facts which clearly show
that the imputability of the accused was diminished, the tribunal
must find in favor of full imputability.

While canon law has not developed jurisprudence along the
lines of the state criminal procedure debate concerning the
M'Naghten Rule and the irresistible impulse theory, it does
recognize similar rules of law in the area of psychological illness.
An illness is not to be automatically equated with lack of
personal responsibility for the external violations themselves.
Despite the illness, the accused may have been fully aware of the
nature and consequences of his actions and have possessed
sufficient freedom, in a theological sense, to be charged with not
merely grave, but full, imputability as understood in the penal

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186 See Cafardi, supra note 9, at 171-172. See also Beal, supra note 6, at 679-680.
187 1983 CODE c.1321, §3.
188 For a discussion on the presumption of imputability, see Hughes, supra note 135. Hughes may go too far, however, when he concludes that the presumption
yields not simply before contrary proof or before a probability but even before a
"possibility that it may be false" [emphasis in the original]. Id. at 34.
189 The M'Naghten Rule is a test for insanity which limits criminal responsibility
when, due to a mental disease or defect, a defendant either did not know what he or
she was doing or did not know what he or she was doing was wrong. The M'Naghten
case, decided in 1843, is the basis for most insanity defenses used today. RONALD M.
PERKINS, RONALD N. BOYCE, CRIMINAL LAW 958-968 (3d ed. 1982); see also ROBERT
F. SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL
190 Some jurisdictions which still use the M'Naghten Rule also use the "irresistible
impulse" test. A person is not guilty by reason of insanity if he or she could not
control his or her conduct due to a mental disease, even if the defendant knew what
he or she was doing was wrong. WAYNE R. LAFAVE, AUSTIN W. SCOTT, JR.,
CRIMINAL LAW 320 (2d ed 1986); see also PERKINS, supra note 189, 968-75.
law.

D. Exempting, Mitigating and Aggravating Circumstances

The tribunal must weigh all exempting, mitigating and aggravating circumstances which may have an effect on imputability and on the severity of the appropriate penalty.\textsuperscript{191} Two mitigating factors which may arise are the lack of rational behavior caused by drunkenness or some other narcotic agent or as the commission of an act in the heat of passion.\textsuperscript{192} Of course, if one is aware that drunkenness or narcotic use often leads to such acts and decides to drink or ingest such narcotics anyway, the resulting loss of the use of reason does not diminish full imputability.\textsuperscript{193} Similarly, when passion is freely stimulated or fostered by the accused, it cannot be taken into account as a mitigation of imputability.\textsuperscript{194}

Aggravating circumstances may also come to bear in deciding the imputability and severity of the penalty. The cleric may have used his position in the Church or his authority or his office to commit the offense.\textsuperscript{195} If a cleric uses his familiarity with parishioners or other youths to create situations in which such acts are committed, or, as an authority figure, exercises undue influence over the victim, the acts become even more heinous and deserving of more severe punishment, offsetting the mitigation which might otherwise be applicable.

Another common aggravating circumstance may be recidivism. When the accused, because of his own history and self-awareness, foresees what is going to happen and takes none of the precautions to avoid such acts which a reasonably prudent person would take, the resulting acts may warrant a more severe penalty. In other words, prior acts which foreseeably contribute to the occurrence of intentional acts may counteract the mitigation which might result from a lessening of freedom in regard to later acts committed by reason of some inner compulsion. One who is aware of a tendency toward a certain delict has the responsibility to take due precautions, carefully

\textsuperscript{191}1983 CODE cc.1324-1326.
\textsuperscript{192}Id. c.1324, §1, 2°-3°.
\textsuperscript{193}Id. c.1325.
\textsuperscript{194}Id.
\textsuperscript{195}Id. c.1326, §1, 2°.
monitoring the persons he associates with, his use of alcoholic beverages, his need for psychiatric therapy, the nature of the ministerial assignment he accepts. To omit such precautions can be grounds for infliction of a more severe penalty.

Finally, a cleric may be charged with multiple violations of canon 1395, §2 or other provisions of the Code. Where an ingrained pattern of behavior or several interconnected violations have occurred, the justification for dismissal from the clerical state may be extremely strong even though some psychopathology may have diminished the malice or culpability involved in some of the individual acts.

The accused's imputability is an essential element of any decision to dismiss a cleric from the clerical state. It cannot be looked upon simplistically, nor can legal rules alone settle the matter in some sort of mechanical fashion. The actual facts and circumstances of the accused cleric himself, his history, the context within which the proven acts took place, and especially the gravity of the acts must all be taken into account.¹⁹⁶

VIII. NOTE: DISMISSAL FROM THE CLERICAL STATE OR DISMISSAL FROM THE DIOCESE?

This article has addressed various approaches to the canonical dismissal of a cleric from the clerical state. The penalty would release the diocese canonically from its obligation to support the wrongdoer. If not dismissed, the cleric would remain incardinated in the diocese. There is no diocesan canonical device comparable to the dismissal of a religious priest from the religious institute.¹⁹⁷ For a diocesan priest, membership in the clerical state and incardination in the diocese are coextensive.

Nonetheless, it has been suggested that where a legitimate declaration of mental incapacity has taken place and the priest will not, in the foreseeable future, carry out any priestly ministry on behalf of the diocese, the ongoing support of the priest could be framed in terms of a “severance package.” In this way, the priest would remain a member of the clerical state and would

¹⁹⁶ For a clinical description of the variations and degrees of severity of such sexual disorders, see Peter Cimbolic, The Identification and Treatment of Sexual Disorders and the Priesthood, 52 JURIST 598 (1992).

¹⁹⁷ See discussion, supra note 1.
still be canonically incardinated in the diocese, but the usual indicia of supervision (remuneration for services, provision of housing, reimbursement of ongoing expenses, other fringe benefits connected with active priestly ministry) would be removed. While the canonical duty of decent support would be observed, it would be provided in a way that would make clear to the reasonable observer that the priest in question, at least from a practical point of view, is living an independent life and cannot be viewed as either representing the diocese in any way or as one whose priestly activities are being actively supervised by the diocese.\textsuperscript{198}

**IX. CONCLUSION**

When a cleric has sexually abused a minor, he may very well undertake a course of therapy and be successfully reintegrated into ministry, or, alternatively, he may recognize that he should no longer continue as a cleric. In the latter case, the cleric will voluntarily petition for a dispensation from the Apostolic See returning him to the lay state.

In other cases, a cleric may be falsely accused or allegations may be exaggerated. The Church calls for a thorough investigation of such accusations to make certain of the facts before any penal process is invoked.

Sometimes, however, after due investigation, it may be apparent that a cleric has sexually abused a minor, or perhaps several minors, and represents a danger to children and a harm to the entire Church community. His diocesan bishop may conclude that the cleric should not remain a member of the clerical state. Yet, such a cleric may not be willing to petition for a dispensation from presbyteral celibacy and the other obligations of orders.

In this type of situation, it may be advisable to utilize the Church's penal process for the dismissal of the accused from the clerical state. The process is designed to protect the rights of the accused as well as the rights of victims and the Church itself. It is not likely that such a process will be frequently invoked. It should not be commenced unless the diocesan bishop is reasonably certain that the cleric is guilty of the charges and

\textsuperscript{198} See Griffin, *supra* note 1, at 302.
that dismissal from the clerical state is the only appropriate remedy.

Once the bishop is convinced of this pastoral situation, however, the prosecution should go forward competently, respectfully, speedily and resolutely, to make certain that the cleric is dismissed from the clerical state and will no longer be in a position to abuse the trust which the Church, through ordination, has placed in him. The process should be followed cautiously in order to serve the threefold purpose of the Church’s penal law: to bring about the reform of the accused, to repair the harm that has been done to individual members of the Church and to the Church as a community, and to restore the torn mantle of justice for all concerned.

In the latter case, the Church has set forth a process for the dismissal of the accused from the clerical state provided that the responsibility for the canonical violation is properly proven and the penalty appropriately imposed. This process should be used. It is designed to protect the rights of the accused as well as the rights of victims and the Church itself. The diocesan bishop, the Promoter of Justice and the assigned collegiate tribunal should not shirk from their duty to apply the penal law of the Church to such pastoral situations.