

**ON THE SUITABILITY OF ESTABLISHING
CLERICAL SEXUAL ABUSE OF MINORS
(c. 1395 §2) AS AN IRREGULARITY
EX DELICTO TO THE RECEPTION
AND EXERCISE OF ORDERS**

In November 2002, the members of the United States Conference of Catholic Bishops approved particular legislation to address the burgeoning scandal of sexual abuse of minors by members of the clergy. The legislative text, now commonly referred to as the *Essential Norms*, received the required *recognitio* from the Holy See on December 8, 2002¹. Criticism of various provisions of the *Essential Norms* arose soon thereafter². Two stipulations of the Norms proved especially controversial. The first reads that «when even a single act of sexual abuse by a priest or deacon is admitted or is established

¹ The Norms were then promulgated on December 12. The official title of the new law runs: *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* [hereafter, EN]. The text, along with the letter of *recognitio*, can be found in *Promise to Protect, Pledge to Heal*, Washington (DC) 2003, 20-29.

² An extensive indication of the literature offering commentary on the legislation can be found in T.J. GREEN, «Clerical Sexual Abuse of Minors: Some Canonical Reflections», *The Jurist* 63 (2003) 366, n. 2; and 367, n. 6.

after an appropriate process in accord with canon law, the offending priest or deacon will be removed permanently from ecclesiastical ministry»³. A second contested stipulation provides that «the diocesan bishop/eparch shall exercise [the] power of governance to ensure that any priest who has committed even one act of sexual abuse of a minor as described above shall not continue in active ministry»⁴.

Various commentators on the *Essential Norms* assert that application of these two provisions of the law to specific cases results in the creation of a *de facto* irregularity for the exercise of orders, if not a type of “virtual laicization” of the cleric⁵. A priest or deacon

³ EN, 7. The universal law does not speak of the sexual abuse of minors, as do the *Essential Norms*, but of acts against the sixth commandment of the Decalogue with those under eighteen years. See c. 1395 §2, and the modification of the minimum age as found in article 4 of the apostolic letter, *Sacramentorum sanctitatis tutela*, April 30, 2001, AAS 93 (2001) 737-739. The question arises, then, as to whether or not there is a distinction between acts *contra sextum* with a minor and acts of sexual abuse. Are all acts against the sixth commandment properly speaking acts of sexual abuse? Or can a cleric commit an act against the sixth commandment – and so violate the norm of canon 1395 §2 – that is not an act of sexual abuse? The act might instead be more precisely termed sexual harassment or even non-physical sexual exploitation. The answer to this question is beyond the scope of this article. The phrase “act *contra sextum*” and “sexual abuse” will be used interchangeably for the purposes of discussing an irregularity that might arise from a violation of c. 1395 §2. At the same time, as will be noted below, resolving the debate on terminology remains a critical step prior to a possible establishment of such an irregularity.

⁴ EN, 9.

⁵ See, for instance, L. ÖRSY, «Bishops’ Norms: Commentary and Evaluation», *Boston College Law Review* 44 (2003)

who admits to past actions now categorized as sexual abuse of minors is removed from ministry and forbidden to exercise orders again with perhaps the exception of private celebration of Mass. The same would hold for a cleric who might have admitted to such acts prior to the effective date of the *Essential Norms*, even if he had been returned to public ministry subsequent to the admission, but prior to the appearance of the new law⁶.

This practice, illegitimate if applied as a *de facto* irregularity, has nonetheless raised the question as to whether or not a *de jure* impediment should be established by which the violation of canon 1395 §2 involving a minor becomes an irregularity *ex delicto* for the reception and exercise of sacred orders⁷. The

1021; A. DULLES, «Rights of Accused Priests: Toward a Revision of the Dallas Charter and the “Essential Norms”», *America* 190 (2004) 22; and T.J. GREEN, «Clerical Sexual Abuse of Minors» (cf. nt. 2), 401-402. Cf. R.E. JENKINS, «The Charter and Norms Two Years Later: Toward a Resolution of Recent Canonical Dilemmas», *Origins* 34/22 (November 11, 2004) 349-359.

⁶ That is, the Norms have been applied retroactively despite the fact that the Norms themselves do not explicitly state their provisions are retroactive. Even if they had done so, however, those provisions in the norms that constitute substantive penal law could still not constitute *ex post facto* criminal statutes (see c. 1313). In a few cases, even the allegation of an act of sexual abuse of a minor is sufficient to result in the same consequences for the cleric.

⁷ «Footnote 6 accompanying norm 9 mentions various possible administrative episcopal actions to foster the common good and address sexual abuse issues [...]. Somewhat surprisingly, however, the note does not mention declaring an impediment to the exercise of orders (c. 1044/CCEO, c. 763), a non-penal way of addressing ministerial unsuitability even if dismissal is not possible». T.J. GREEN, «Clerical Sexual Abuse of Minors» (cf. nt. 2), 419.

relevance of an answer to this question clearly extends beyond the borders of the United States. The violation of canon 1395 §2 by clerics with minors is a universal problem. Modification of the universal law might then constitute a substantial legal response on the part of the Church to the unacceptable behavior of offending clerics.

Foremost among the advantages to this idea is the rapid response to abusive acts that the irregularity would provide. Yet, there are also distinct disadvantages to creating a new irregularity *ex delicto*. It is only in light of a clear understanding of the nature and purpose of irregularities in the current law that the present question will receive proper consideration: to what extent would an irregularity constitute a juridically efficient and pastorally suitable instrument to address the commission by a cleric of an offense *contra sextum* with a minor⁸?

⁸ Some persons who commit acts of sexual abuse of minors also labor under psychological illnesses with indicators related to ephebophilia or pedophilia. Inasmuch as this is true in a particular case, the provisions of cc. 1041, 1°, 1044 §1, 1°, and 1044 §2, 2° might apply. The limitations of the applicability of these canons is 1) the presence of the condition must be established *consultis peritis*; 2) as a rule, once recovery from the illness is ascertained, the irregularity would be dispensed; and 3) the irregularity or simple impediment, as the case may be, prohibits only the exercise of ministry essentially dependent on the order in question, and only those activities of the ministry that are actually impeded by the condition. More will be said below concerning the third point. Since this article is concerned with the issue of the establishment of an irregularity *ex delicto*, it will discuss only in a cursory fashion the use of the *ex defectu* impediment mentioned here.

Accordingly, the purpose of this article is to delineate the advantages and disadvantages of establishing the crime of clerical sexual abuse of a minor (c. 1395 §2) as an irregularity *ex delicto* to the reception and exercise of orders. It will do so first by briefly summarizing the historical evolution of the legal institute of irregularity for orders. The article will then detail the nature of an irregularity in general, of an irregularity *ex delicto* in particular, the subjects of irregularities, the authority competent to establish them, the intended legal effects that ensue from incurring one, and the actual means by which one is incurred and dispensed. After these general notions treated in the first part of the article, the second part will highlight the theoretical and practical advantages and disadvantages to creating an irregularity as a means of addressing acts of the sexual abuse of minors. Lastly, it will briefly consider alternatives to the establishment of an irregularity *ex delicto*.

PART ONE

GENERAL PRINCIPLES AND CURRENT DISCIPLINE

Any new cause admitted by the Church leading to an irregularity for the reception or exercise of orders will follow the norms governing irregularities in general. Consequently, a determination of the suitability of establishing an irregularity *ex delicto* due to acts *contra sextum* requires a thorough consideration of the current discipline governing irregularities. With that in mind, the first part of this article will present the legal principles and norms that form the foundation of the discipline as provided in the Code of Canon Law.

1. Historical Background

From the earliest years of her public ministry, the Church addressed the question of what qualities are necessary for a man to be ordained to sacred orders, or to continue to exercise them once received⁹. The goal was always to safeguard the sacred ministry from those deemed unworthy of exercising it. The issue is still relevant today. From an historical perspective, then, the establishment of acts *contra sex-tum* with minors as a cause that prohibits the reception or exercise of orders is consonant with the development of the institute of irregularities in canonical doctrine and practice.

The determination of the canonical origins of an *irregularitas* similar to that found in the current Code of Canon Law (c. 1040) poses a significant challenge¹⁰. This is due largely to the fact that a

⁹ Two witnesses from the New Testament are traditionally cited as indications of the Church's concern that those engaged in official ministry be suitable for the task: 1 Timothy 3,2, and Titus 1,6. In both passages, Paul enumerates qualities a man must possess who is to be chosen as bishop, priest or deacon. The man must have a good reputation, and have been married only once (a prohibition on serial bigamy).

¹⁰ Few studies have appeared that detail the historical evolution of the legal institute of irregularity for orders. Indeed, the treatment of impediments to orders in general has received relatively little scholarly attention in recent years. The two most substantial monographs produced on the historical aspect of the topic were written immediately prior to the 1917 Code of Canon Law: C. RICHTER, *Die Anfänge der Irregularitäten bis zum ersten allgemeinen Konzil von Nicäa*, Freiburg 1901, and F. GILLMANN, «Zur Geschichte des Gebrauchs der Ausdrücke "irregularis" und "irregularitas"», *Archiv für katholisches Kir-*

clear distinction between an irregularity for orders as currently understood and other acts of ecclesiastical authority, such as suspension or dismissal from the clerical state, developed only late in the tradition. The Council of Nicaea, for instance, decreed that members of the clergy who practiced usury were to be «removed from the register of clerics»¹¹. The removal of the name from the clerical roll, or the refusal to enter it there, arguably constituted an incipient form of irregularity for orders. Similarly, St. Augustine's prohibition on ordaining monks who lacked «the integrity of a regular person» also constituted an early ministerial restriction of unsuitable candidates¹². In sum, those who did not meet the

chenrecht 91 (1911) 49-86. Gillman appropriates much of Richter's work in his initial pages. A careful, but uncritical summation of Gillman's dense study can be found in G. OESTERLÉ, «Irrégularités», in *Dictionnaire de Droit Canonique*, vol. 6, Paris 1957, 42-46. For a discussion of simple impediments in particular, see H.J. VOGELPOHL, *The Simple Impediments to Holy Orders, an Historical Synopsis and Commentary*, Washington 1945. An exceptionally brief, yet precise summary of the history of irregularities – again, initially based on Gillmann – is found in W.H. WOESTMAN, *The Sacrament of Orders and the Clerical State*, Ottawa 1999, 61-62.

¹¹ Can. 17: «Deiciatur a clero et alienus existat a regula». Further, canon 9 of Nicaea stipulates that men promoted to the order of presbyter without prior investigation into their worthiness for it, «*regula non admittit*». See F. GILLMANN, «Zur Geschichte des Gebrauchs der Ausdrücke “irregularis” und “irregularitas”» (cf. nt. 10), 49-50 for scholars who support and oppose this reading of Nicea. Gillman himself finds it dubious (53-54).

¹² In this case, due to a lack of continence in the monk. F. GILLMANN, «Zur Geschichte des Gebrauchs der Ausdrücke “irregularis” und “irregularitas”» (cf. nt. 10), 54. In Augustine's

qualifications of a *regula*, or rule for suitability for ministry, were considered *irregularis*.

Despite the ambiguity found in the first millennium with regard to the notion and use of impediments, one thing is certain: whether a specific action constituted what we would now refer to as a penalty, a disciplinary action, or simply a precautionary measure, the ultimate purpose was common to them all, to safeguard the dignity of orders and maintain reverence for the ministry arising from their exercise.

Neither Gratian's *Decretum* nor the works of the earliest commentators on it discussed the term *irregularis* under a separate rubric or title¹³. The first canonist to do so was most likely Rufinus. This twelfth century glossator commented in his *Summa* (1157-1159) on the unsuitability for ordination of a man who failed to qualify as a "*persona regularis*"¹⁴. The commission of a crime, such as participation in homicide or theft, could bring about this irregularity *delicti qualitas*. Others might suffer the same fate for

words: «Nimis dolendum, si ad tam ruinosam superbiam monachos subrigimus et tam gravi contumelia clericos dignos putamus [...] cum aliquando etiam bonus monachus vix bonum clericum faciat, si adsit ei sufficiens continentia et tamen desit instructio necessaria aut personae regularis integritas». F. GILLMANN, «Zur Geschichte des Gebrauchs der Ausdrücke "irregularis" und "irregularitas"» (cf. nt. 10), 54, n. 1.

¹³ F. GILLMANN, «Zur Geschichte des Gebrauchs der Ausdrücke "irregularis" und "irregularitas"» (cf. nt. 10), 55: «Auch "irregularis" und "irregularitas" sind dem gratianischen Dekret völlig fremd. Und das Gleiche ist von den ersten Glossatoren des Dekrets, *Paucapalea* und *Roland* zu constatieren».

¹⁴ Here Rufinus was citing Augustine's use of the phrase. See F. GILLMANN, «Zur Geschichte des Gebrauchs der Ausdrücke "irregularis" und "irregularitas"» (cf. nt. 10), 55-56.

engaging in serial bigamy or suffering from a grave physical abnormality, both of which resulted in *personae irregularitas*. Finally, other men might be deemed irregular for the reception or exercise of orders due to insufficient intellect or probity of life. The latter quality would be lacking in a man who had committed a crime but received no penalty for it, such as suspension from office. Because he still held the office, he would normally be capable of exercising the *potestas* attached to it. However, due to the loss of personal integrity resulting from his actions, he could be deemed irregular for the exercise of the power that he would otherwise legitimately enjoy¹⁵.

Subsequent canonists largely followed the line of Rufinus¹⁶. Indeed, from the end of the twelfth cen-

¹⁵ F. GILLMANN, «Zur Geschichte des Gebrauchs der Ausdrücke “irregularis” und “irregularitas”» (cf. nt. 10), 56.

¹⁶ Pierre de Blois, writing some two decades after Rufinus, distinguished between impediments to sacred orders originating in an *enormitas delicti*, *personae irregularitas*, or *minor eruditionis integritas*, with the last deficiency applying to those who were illiterate rather than simply ill instructed in the faith. F. GILLMANN, «Zur Geschichte des Gebrauchs der Ausdrücke “irregularis” und “irregularitas”» (cf. nt. 10), 60, referring to de Blois' *Speculum iuris*, c. 1 §10. Similar expressions can be found in a host of commentators, including, most notably, Huguccio. Gillmann notes: «Sehr häufig bedient sich H. der Termini “irregularis” und “irregularitas”. Einer der drei Gründe, weshalb die Sakramente der Weihen *sacramenta dignitatis* heissen, liegt nach H. Darin, dass zu den Weihen nur Würdige befördert werden, nämlich Personen ohne Verbrechen, ohne Infamie und ohne “Irregularität”, während zu den anderen Sakramenten alle ohne Unterschied zugelassen werden, sofern nicht bisweilen wegen eines Verbrechens eine Ausschlössung erfolgt».

tury, jurists regularly employed the terms *impedimentum* and *irregularitas* in a technical manner to refer to qualities present or lacking in a person that render him either temporarily or perpetually unsuitable for ordination or the exercise of orders received. Pope Innocent IV was the first Roman Pontiff expressly to use the term *irregularitas* in a consistent and specific manner; that is, as a legal institute whereby a man is prohibited from the reception or exercise of orders. At the same time, Innocent also reserved dispensation from impediments to the Roman Pontiff, and increased the number of causes that gave rise to an irregularity¹⁷. Subsequent development of the institute distributed the causes into five general categories¹⁸: those arising from a *defectus natalium* or defect in birth (illegitimacy); a *defectus corporis* or physical defect (including mental illness); a *defectus scientiae* or *fidei*, by which neophytes were barred from ordination; a defect incurred by a man who engaged in serial bigamy; and irregularities *ex delicto*, or those incurred by the commission of a gravely sinful, external act.

The historical development of the legal institute of irregularity for orders changed little in substance from the time prior to the Council of Trent until the present day. The Church, however, continued to

¹⁷ F. GILLMANN, «Zur Geschichte des Gebrauchs der Ausdrücke "irregularis" und "irregularitas"» (cf. nt. 10), 80-81. Innocent reserved dispensation from all irregularities to the Roman Pontiff.

¹⁸ See P. PAVANELLO, «Irregolarità e impedimenti a ricevere l'ordine sacro», *Quaderni di Diritto Ecclesiale* 12 (1999) 280-281.

modify the specific qualities which belonged to each of the above categories. Even the explicit division of various impediments into distinct categories varied periodically, as it did as well from the Pio-Benedictine Code to the current one. What remained constant was the necessity that a cleric possess the qualities the Church deems significant enough that their absence prohibits the lawful reception or exercise of orders. Inasmuch as the commission of certain crimes has always been counted among those qualities that result in an irregularity, the inclusion of clerical sexual abuse of minors as a cause for an irregularity would be consistent with the historical evolution of the institute.

2. The Nature of Impediments in General

2.1 *Definition*

As was the case with the 1917 Code of Canon Law, the current code contains no definition of the terms "impediment" or "irregularity"¹⁹. However, the canonical notion of impediment, apparent from its use in the code, follows that of the general notion

¹⁹ The same is the case with the Code of Canons of the Eastern Churches (see CCEO, cc. 762-768) whose provisions on impediments and irregularities substantially parallel that of the Latin Code. Relevant distinctions between the two codes will be highlighted in the second part of this article. For a brief commentary on the Eastern discipline, including the distinctions that exist between the two laws, see V.J. POSPISHIL, *Eastern Catholic Church Law*, 2nd ed., Staten Island (NY) 1996, 430-433.

of the word: that which hinders the initiation or completion of some action, in this case the reception or exercise of sacred orders. If the impediment is temporary, it is termed a simple impediment, while impediments that are perpetual are called irregularities (c. 1040)²⁰. Since the purpose of this article is to investigate irregularities in particular, a more precise definition of one is warranted.

An irregularity is «a perpetual impediment, established by ecclesiastical law out of reverence of the divine ministry, prohibiting primarily the reception of orders, and secondarily the exercise of orders received»²¹. This definition presents the essential

²⁰ The CCEO does away with the distinction between temporary and perpetual impediments, retaining only the use of the term *impediment*.

²¹ A definition offered by Cappello and based on a classic formulation still applicable today: «Irregularitas est impedimentum perpetuum, iure ecclesiastico propter reverentiam divini ministerii constitutum, prohibens primario susceptionem ordinis et secundario exercitium ordinum susceptorum». F.M. CAPPELLO, *Tractatus Canonico-Moralis de Sacramentis*, vol. 2, Rome 1935, 416. Similarly: «Irregularitas est impedimentum canonicum perpetuum prohibens ordinum susceptionem, et susceptorum exercitium, ob indecentiam vel periculum irreverentiae in sacrum ministerium». E. REGATILLO, *Ius Sacramentarium*, 2nd ed., Santander 1949, 509. Conte a Coronata briefly traces the development of the definition from the time of Suarez to its place in the 1917 Code of Canon Law: «Haec est definitio, post crism aliarum definitionem a summis theologis, ut Suarez, et canonistis, ut Gasparri, datarum, proposita a Lega. [...] Haec definitio addit definitioni datae a Suarez [...] verbum *perpetuum*, quo verbo praecipue *irregularitas* differt a simplicibus impedimentis de quibus in c. 987. Definitioni vero a Gasparri, qua irregularitas definitur: "impedimentum perpetuo prohibens collationem susceptionem cuiuscunque gradus cleri-

elements that constitute an irregularity, most especially the perpetual character that is particular to them. Once incurred, an irregularity ceases only by dispensation of it by the appropriate ecclesiastical authority. This is opposed to simple impediments, which are temporary in nature, and may cease of their own accord²². The grave matter associated with irregularities, most often the commission of a crime, demands that the irregularity remain until expressly addressed by a legitimate superior. This would be the case with the irregularity following an act *contra sextum* with a minor. It, too, would not be resolved without intervention of ecclesiastical authority.

All irregularities are of ecclesiastical law origin. They may well be connected, however remotely, with divine law, but this does not change the fact that they are essentially merely ecclesiastical laws²³.

calis et consequenter ordinum exercitium, et ideo etiam beneficii collationem-acceptationem, iure canonico constitutum ex aliquo defectu vel delicto propter reverentiam divini ministerii", aufert verba *et ideo etiam beneficii collationem-acceptationem*; quia prohibitio conferendi et acceptandi beneficium non est quid proprium et specificum irregularitatis, licet indirecte ad irregularitatem referri possit». M. CONTE A CORONATA, *Institutiones Iuris Canonici*, vol. 2, Turin 1945, 121, n. 4.

²² For instance, a married man is simply impeded from receiving orders unless he is legitimately destined to the permanent diaconate (c. 1042, 1°). Should the bond of marriage cease, through the death of the spouse or its legitimate dissolution, the impediment would cease as well.

²³ See J.M. GONZÁLEZ DEL VALLE, «De las irregularidades y de otros impedimentos», in A. MARZOA et al. (edd.), *Comentario Exegético al Código de Derecho Canónico*, Pamplona 1996, 974. The irregularity resulting from willful homicide, for instance, is related to the divine prohibition on the unjust taking of another's life.

This would hold true as well for any irregularity arising from a violation of canon 1395 §2. The fact that sexual abuse of a minor is a violation of the divine law (the sixth commandment of the Decalogue) does not alter the fact that any irregularity arising from such an act would itself constitute merely ecclesiastical law. The ecclesiastical law character of irregularities permits their dispensation by the appropriate authority. It also limits their applicability to those who are subject to ecclesiastical, as opposed to divine law²⁴.

The force of an irregularity is directed first at prohibiting the licit reception of orders²⁵. This primary goal is linked to the remote purpose of irregularities: the protection of the dignity of sacred orders. In effect, the law holds that it is better to stop a man from being ordained who is not suitable than hindering the exercise of orders once received. This includes the reception of a higher grade of order, for instance, when a priest is ordained a bishop. With the reception of orders a certain presumption in favor of their exercise arises²⁶. Only secondarily,

²⁴ Because of this, the law governing who is bound by merely ecclesiastical laws will be considered later in this article. That issue will bear on the extent to which establishing an irregularity to address sexual abuse of minors can bring effective results.

²⁵ As Wernz-Vidal puts it: «Irregularitas est impedimentum canonicum ex se directe ac primario *prohibens* acceptionem ordinum ecclesiasticorum et consequenter etiam usum eorum». F. WERNZ – P. VIDAL, *Ius Canonicum*, vol. IV, Roma 1934, 300.

²⁶ On the contrary, the right to freedom from coercion from choosing a state in life in no way entails a right to be ordained. See W.H. WOESTMAN, *The Sacrament of Orders* (cf. nt. 10), 63.

then, and more cautiously, does the institute of irregularity intend to prevent the exercise of orders received.

The inherent purpose of a legal provision bears greatly on the effect that institute will have on ecclesiastical discipline. This would be the case as well were an irregularity established to address the scandal of sexual abuse of minors by clerics. We must say more, then, on the intended purpose of irregularities within the Church's legal discipline.

2.2 Purpose

As noted briefly above, the ultimate purpose of impediments and irregularities resides in the Church's constant effort to protect the dignity of sacred orders. This in turn safeguards the divine ministry accomplished *in* and *for* the Church. The purpose is realized concretely through restricting the reception of orders, or their exercise, by those who incur an irregularity. The institute of irregularity concerns itself far less with the personal betterment or reform of the man who has incurred the irregularity than it does with protecting the order itself²⁷. There are other means at the disposal of ecclesiastical authority to address the personal issues that might give rise to or exist concomitant with an irregularity. These remedies include, among others, the exercise of executive power of governance, including the issuing of precepts, penal warnings and penances, and, as a last resort, the use of medicinal penalties.

²⁷ See F. WERNZ – P. VIDAL, *Ius Canonicum* (cf. nt. 25), 301.

Even though impediments relate to worthiness for sacred orders, this does not entail that all who are unworthy are thereby legally impeded from receiving them. A man might be unsuitable for orders for reasons other than those that give rise to legal impediments. In every case, however, where a man does incur an impediment, be it a simple impediment or an irregularity, he is considered to be unsuitable for the reception or exercise of orders. Ecclesiastical authority enjoys broad discretion with restricting the reception of orders even in cases where an impediment or irregularity might not apply. Thus, a bishop may refuse to ordain a man who engaged in abusive or even inappropriate behavior with minors, but who would not have incurred the irregularity due to the offensive activity.

It is important to note that impediments are not intended to constitute punishment for immoral or even criminal acts. Indeed, to use the institute of irregularity for this purpose would be illegitimate even if the goal is to respond to acts of clerical sexual abuse of minors. Nor are impediments meant to replace the legitimate use of executive governance by superiors who wish to restrict clerics from exercising certain ministerial functions. Indeed, the incurring of an irregularity by a cleric often necessitates further action by the superior to limit the ministry or life of the cleric. For instance, a cleric who incurs an irregularity *ex delicto* is prohibited from the exercise of sacred orders. If his superior wishes also to restrict activity associated with other offices held by the cleric, or other activity engaged in by him, such as teaching, the superior would have to exercise executive power to effect the desired restrictions.

2.3 Divisions

The Pio-Benedictine Code classified irregularities according to whether they were incurred either *ex defectu* or *ex delicto*²⁸. The first group consisted of various defects that were present in a person through no fault of his own, such as illegitimacy or physical handicaps²⁹. The second category included various actions that were incurred due to the post-baptismal, external commission of a grave personal sin³⁰. The latter division consisted of actions that were criminal according to ecclesiastical law, hence their status *ex delicto*³¹. Further divisions of irregularities, not all expressly included in the 1917 code, but admitted by canonical doctrine, included whether the irregularity incurred was total (prohibiting the exercise of all functions of sacred orders) or partial (prohibiting the exercise of some function while permitting others)³²; whether the irregularity was incurred prior to or after the reception of orders; and whether the irregularity was public or occult.

²⁸ Cann. 984-985/1917 CIC.

²⁹ «*Ex defectu*, seu carentia qualitatis ex facto inculpabili, ut ex vitio corporis; vel culpa aliena, ut illegitimitate natalium; vel ex propria, sed in qua non praecise culpa consideratur, sed indecentia inde orta, ut infamia iuris». E. REGATILLO, *Ius Sacramentarium* (cf. nt. 21), 512.

³⁰ Can. 986/1917 CIC.

³¹ «*Ex delicto*, seu culpa gravi, quae etiam deleta indecentiam inducit, ut homicidio». E. REGATILLO, *Ius Sacramentarium* (cf. nt. 21), 512.

³² For instance, a priest who habitually lacked the use of reason could exercise no function of sacred orders while a priest who had lost a thumb was irregular only for celebrating Mass.

Although the current law no longer explicitly distinguishes between irregularities *ex defectu* and those *ex delicto*³³, it incorporates the same division implicitly by including impediments from both categories in the taxative list of irregularities presented. Only one remaining irregularity for the reception or exercise of orders can be qualified as *ex defectu*. Neither physical defects nor illegitimacy are included among the irregularities in the current law. The remaining cause for the irregularity regards the mental condition of a candidate for ordination. A man incurs an irregularity who suffers from insanity or some other psychic illness that renders him incapable of fulfilling the ministry properly dependent on the order received or now exercised (c. 1041, 1°). Should the ordination take place despite the mental condition, the man would be irregular for the exercise of orders as well (c. 1044 §1, 1°). If, however, the condition appeared only after ordination, he would be simply impeded from the exercise of the order received (c. 1044 §2, 2°)³⁴.

³³ A decision to remove the specification was made by the code commission. See *Communicationes* 10 (1978) 195-203; P. PAVANELLO, «Irregolarità e impedimenti a ricevere l'ordine sacro» (cf. nt. 18), 282. As V. De Paolis has noted: «Il codice del 1917 distingueva le irregolarità *ex defectu* e le irregolarità *ex delicto*. Si è voluto eliminare esplicitamente questa distinzione; ma essa nella sostanza rimane; e pertanto è necessario richiamarla». V. DE PAOLIS, «Irregolarità», *Periodica* 88 (1999) 692, n. 11.

³⁴ The distinction is important since the simple impediment to the exercise of orders would cease once the condition that gave rise to it ceases. This would not be the case with an irregularity.

The remaining irregularities contained in the current law are to a greater or lesser degree associated with the commission of an ecclesiastical crime; they are irregularities *ex delicto* (see canon 1041, 2°-6°)³⁵. These include the offenses of apostasy, heresy or schism (c. 1364)³⁶; attempted marriage under certain conditions when bound by the irregularity of prior bond (cc. 1379, 1394 §1)³⁷; willful homicide

³⁵ The 1983 code does not explicitly refer to the two categories of irregularities. Nevertheless, the causes listed in canon 1040, 2°-6° are clearly irregularities *ex delicto* as were the comparable causes in the former code. This becomes more evident given that canon 1044, 3°, when referring back to the causes of canon 1041, qualifies them with the phrase «qui delictum commisit». As V. De Paolis remarks: «Di irregolarità *ex delicto* si parla esplicitamente nel c. 1041, 2°, ma vi rientrano anche altri fatti elencati negli altri numeri, escluso il n. 1°. Inoltre il c. 1044 §1 rinvia all'elenco del c. 1041 riferendosi esplicitamente al delitto (nn. 2°-3°). Esse esistono perché presuppongono l'esistenza di un delitto». V. DE PAOLIS, «Irregolarità» (cf. nt. 33), 692-693.

³⁶ It is worth noting that the Code Commission intentionally placed the word "delict" in canon 1041, so to emphasize that it is only when the act of apostasy, heresy or schism is criminal in nature that the irregularity is incurred. This exempts from incurring the irregularity those who, although baptized Catholic, were then *sine culpa* raised in a separated ecclesiastical communion. See *Communicationes* 10 (1978) 201; J.M. GONZÁLEZ DEL VALLE, «De las irregularidades» (cf. nt. 23), 975.

³⁷ Whether or not all instances of this irregularity are necessarily connected to a delict is a matter of debate. Certainly, the irregularity applies to clerics, whether secular or religious, and to religious in perpetual vows (c. 1394 §1). It is another question as to whether or not it constitutes a delict for a layperson who is not in perpetual vows to simulate the sacrament of matrimony. Inasmuch as the intended spouses are the ministers of the sacrament, they are theoretically capable of simulating

and procurement of or positive cooperation in abortion, malicious mutilation of self or others, and attempted suicide (cc. 1397-1398); and carrying out an act of order reserved to the episcopate or priesthood by someone not possessing the order or barred from its exercise by a declared or imposed canonical penalty (cc. 1378, 1384).

The distinction between total and partial prohibition of the exercise of orders was much more relevant to the provisions of the former code on irregularities *ex defectu corporis* than they are to the current code which contains only mental illness as such a cause. Nevertheless, the division would seem to apply to mental illnesses today as it did to physical defects under the 1917 code. For instance, a man might suffer severely from a particular mental disturbance, such as agoraphobia, or fear of crowds and open places, to the extent that it renders him unsuit-

not only the consent, but the administration of the sacrament itself. On the other hand, as Chiappetta notes when commenting on c. 1379, since the matter is doubtful, a question arises concerning the applicability of the sanction to laypersons: «Relativamente al sacramento del matrimonio, è sentenza comune che ministri del medesimo [sacrament of marriage] siano gli stessi sposi. Se pertanto uno di essi o ambedue simulano il consenso (can. 1101 §2), si avrebbe la simulazione del sacramento, attesa la inseparabilità fra contratto e sacramento, affermata nel can. 1055 §2 fra persone battezzate. Considerato, tuttavia, che un tale principio è stato rimesso in discussione da non pochi teologi e canonisti, considerato anche il fatto che, nella dottrina, non tutti ritengono che ministri della celebrazione del matrimonio siano gli sposi, si può affermare che il can. 1379 non è da applicarsi agli sposi che simulano il consenso». L. CHIAPPETTA, *Il Codice di Diritto Canonico. Commento giuridico-pastorale*, vol. 2, Rome 1996, 672.

able for celebrating the Eucharist in public. He might also function quite effectively with regard to other actions dependent on orders, but not involving crowds, such as celebrating the sacrament of penance or the anointing of the sick. In any event, the distinction between total and partial impediments does not apply to irregularities *ex delicto* which result in a total prohibition on the exercise of orders.

The final division, between irregularities that are either public or occult, applies to the current discipline on the dispensation of irregularities. The distinction will impact the suitability of establishing clerical acts *contra sextum* as an irregularity since abusive behavior often remains occult for many years after its appearance. An irregularity is deemed public if one of two conditions pertain. Either the irregularity is actually known to exist by many persons, or, even if it is not known to anyone, its existence can be proven by use of public documents attesting to the fact³⁸. Occult irregularities, on the other hand, are those either not known to exist or known by only a few persons, with little foreseeable chance of the existence being divulged, either spontaneously or through a legitimate process³⁹.

³⁸ As Wernz-Vidal puts it: «*Et publica quidem irregularitas habenda est non solum illa, quae de facto compluribus est nota, sed etiam quae actu quidem ignoratur, sed ex documentis scriptis et publicis quandocumque probari potest*». F. WERNZ – P. VIDAL, *Ius Canonicum* (cf. nt. 25), 304. For what constitutes a public document, see c. 1540 §§1-2.

³⁹ This description again follows Wernz-Vidal: «*Occulta vero merito censetur, quae a paucis cognoscitur et iis in circumstantiis, ut facile evulgari non praevideatur*». F. WERNZ – P. VIDAL, *Ius Canonicum* (cf. nt. 25), 304.

Clearly, the causes for incurring an irregularity *ex delicto* listed in the current code constitute gravely sinful actions that are seriously harmful to either a physical person or the ecclesiastical communion. It would seem difficult to argue that the clerical sexual abuse of minors would not fit into the same category. Indeed, considering the scandal to the faithful that so often arises from such acts, as well as the devastating and life-long harm it frequently brings to the victim, the violation of canon 1395 §2 might well be an ideal candidate for inclusion as an irregularity *ex delicto* as currently provided for in the Code of Canon Law. Before such a conclusion can be drawn, however, a closer inspection of the nature of irregularities *ex delicto* is necessary.

3. The Particular Character of Impediments *ex delicto*

Since clerical sexual abuse constitutes an ecclesiastical crime, the irregularity resulting from the act would be an irregularity *ex delicto*⁴⁰. This necessitates a deeper elaboration of the precise nature of irregularities that arise from the commission of a

⁴⁰ That is, unless provision were made that the new irregularity would arise by the commission of an act of abuse of a minor, even if the act were not itself a crime. More will be said on this below. The presumption of this article is that a new irregularity would follow the pattern as currently contained in the Latin code. Hence, more treatment will be given to the notion of an irregularity *ex delicto* for a violation of canon 1395 §2.

delict. Even though the source of an irregularity might be the commission of an ecclesiastical crime, penalties imposed due to the commission of crimes are quite distinct legal institutions from irregularities with diverse purposes. The differences between the two legal institutes will bear greatly on the question of the suitability of establishing an irregularity arising from a clerical act *contra sextum*⁴¹. Moreover, it is by highlighting the relevant distinctions that the nature of an irregularity *ex delicto* might best be brought to light.

Before the distinctions between penalties and irregularities are treated, a word should be said regarding their similarities. Despite the fact that the two institutes are notably diverse, they are also fundamentally connected by reason of the criminal character of an act that gives rise to both penalties and irregularities *ex delicto*. An irregularity *ex delicto* is incurred only in cases where a delict has been committed. The commission of a delict, in turn, can be established only if there has been a willful, gravely imputable, external violation of the law (see c. 1321 §1)⁴². Thus, those who habitually lack the use of reason are incapable of committing an offense

⁴¹ See V. DE PAOLIS, «Irregolarità» (cf. nt. 33), 689-724, for a masterful treatment of the distinction between the two institutions.

⁴² The code offers no definition of a delict. It does, however, provide the essential elements of one. The objective element of a delict is twofold: the commission of an external violation of a law to which a sanction has been attached. The subjective element consists in the grave imputability of the act to the perpetrator of it through malice or culpability. If these elements come together, a delict has been committed.

(c. 1322). Accordingly, they are likewise incapable of incurring an irregularity *ex delicto* as a result of the action. In brief, then, delicts and irregularities *ex delicto* are related in that both presuppose an external violation accompanied by grave imputability⁴³.

With the above in mind, we can now consider the distinctions between penalties and irregularities *ex delicto*⁴⁴. The imposition of penalties is meant either to encourage the reform of the offender or to expiate for the injustice that resulted from his or her criminal action. The former are termed medicinal penalties, while the latter are referred to as expiatory punishments (c. 1312). Both types of penalties are born of the Church's inherent and proper right to constrain the Christian faithful with sanctions (c. 1311) so to maintain order in the ecclesiastical society, and thus better fulfill her divine mission⁴⁵. Impediments to

⁴³ «Nelle irregolarità *ex delicto*, la realtà oggettiva è la semplice commissione del delitto, indipendentemente dal grado più o meno ampio di imputabilità, una volta che sia accertata l'imputabilità grave di base, necessaria per l'imputabilità di un delitto». V. DE PAOLIS, «Irregolarità» (cf. nt. 33), 695-696.

⁴⁴ The similarities between the two institutions, irregularities *ex delicto* and penal sanctions, have given rise in the past to debate on whether or not the two are more alike than different. As Oesterlé expresses it: «D'autres auteurs soutiennent que les irrégularités présentent sans aucun doute le caractère de peines au sens strict. Elles font naître un empêchement à recevoir ou à exercer les ordres en haine du délinquant, et non à cause du respect dû au ministère de l'autel». G. OESTERLÉ, «Irregolarità» (cf. nt. 10), 47-48.

⁴⁵ For more on the nature of ecclesiastical penalties, see G. MICHIELS, *De delictis et poenis. Commentarius Libri V Codicis Iuris Canonici*, vol. 2, *De poenis in genere*, Rome 1961; F. COCCOPALMERIO, «De natura iuris poenalis Ecclesiae», *Perio-*

orders, however, including irregularities *ex delicto*, do not have as their end the reform of the offender or the expiation of an injustice⁴⁶. As noted above, they are intended to protect the sacred ministry from harm due to a person's mental condition or, with violations of canon 1395 §2, further harm to the faithful through scandal or repeated malicious acts by the offender.

If a cleric violates the norm of canon 1395 §2, by committing an act against the sixth commandment with a minor, a penalty can be imposed only after an appropriate penal process has taken place. This is because such an offense does not result in a *latae sententiae* penalty, as would, for instance, positive cooperation in the procurement of an abortion (cc. 1398, 1329 §2). Rather, all penalties associated with this crime are mandatory, *ferendae sententiae* punishments. An irregularity *ex delicto*, on the other hand, arises *ipso iure*, and needs no subsequent intervention of ecclesiastical authority to declare its viability⁴⁷.

dica 65 (1976) 317-330; V. DE PAOLIS, «Aspectus theologici et iuridici in systemate poenali canonico», *Periodica* 75 (1986) 221-254; T.J. GREEN, «Penal Law: A Review of Selected Themes», *The Jurist* 50 (1990) 221-256, especially 225-238.

⁴⁶ That is not to say that either of these desirable ends might not result when a person incurs an irregularity. The point is that the purpose of the legal institute itself is not reform or expiation, but protection of the sacred ministry.

⁴⁷ A delict takes place at the time an act occurs accompanied by the essential objective and subjective elements of a crime. A subsequent penal process might publicly declare that fact, but it would not by that declaration "make" the act a delict as if had up to then been simply a type of unacceptable behavior. A crime can go unpunished for many reasons, but it

This would prove highly advantageous if an irregularity pursuant to clerical sexual abuse of minors were established inasmuch as it might more fully assure the Christian faithful that the Church takes the crime so seriously that concomitant with its commission, and without the need for any intervention of ecclesiastical authority, the cleric is prohibited from further exercise of sacred orders. On the other hand, the irregularity is incurred only if, in fact, the delict had been committed⁴⁸. If there is

remains a crime. For instance, a person who maliciously and knowingly takes the life of another perpetrates homicide. He has committed a crime even if the act is never brought before a judicial forum, and so he never suffers a penalty for the act. As far as irregularities *ex delicto* are concerned, the commission of the criminal act is sufficient to incur the irregularity. The act need not be qualified as criminal through a penal process before the effects of the irregularity bind the subject. Thus, even though a crime might go unpunished, that fact would not of itself exempt a person from the irregularity associated with the crime. In short, a man may incur occult irregularities *ex delicto*.

⁴⁸ As Woestman notes: «The 1917 Code explicitly excused the individual from an irregularity *ex delicto* if he did not commit an external grave sin. Although the present Latin code does not speak of such an exception, it seems reasonable to hold that, if a person was not guilty of a grave fault, he would not incur the irregularity». W.H. WOESTMAN, *The Sacrament of Orders* (cf. nt. 10), 79-80. Any clerical act *contra sextum* with a minor would constitute a grave fault unless an extraordinary circumstance were present that removed culpability from his actions. The presumption would be that the actions of the cleric were intended for what they were, sexual activity, and that the consequence of the action was the sexual abuse of a minor. Notably, the Eastern code retains the requirement of the Pio-Benedictine Code that acts giving rise to impediments constitute «peccata gravia et externa post baptismum perpetrata». Can. 762 §2 CCEO.

doubt as to the law or facts surrounding the case, the impediment is considered not to have been incurred.

As with the imposition of penalties, the remission of them comprises another area of distinction between penalties and irregularities. Penalties are either remitted by ecclesiastical authority or cease of their own accord after the punishment has been completed. In the case of censures, the need for reform of the offender is also relevant to the remission of the penalty⁴⁹. On the other hand, irregularities (as opposed to simple impediments) always require the intervention of ecclesiastical authority for their dispensation. This means that in cases where a priest has incurred a penalty, be it medicinal or expiatory, for the commission of an offense *contra sextum* with a minor, the irregularity that would also have been incurred by the act would remain even after the penalty ceases⁵⁰.

A priest who commits an act *contra sextum* with a minor is to be punished according to the prescriptions of the code which mandate the imposition of penalties in light of the degree of imputability present at the time the crime was perpetrated. Circumstances that might call for the infliction of a harsher or milder punishment (see cc. 1323-1327) are also to be taken into account. For instance, a perpetrator of

⁴⁹ Once the offender is repentant, remission is called for (c. 1358 §1).

⁵⁰ Again, the use of such an irregularity would constitute a significant ecclesial statement to the effect that the harm caused the sacred ministry by such an act remains even after the penal process has met its goal, reform of the offender and expiation of justice.

an act of sexual abuse would receive no penalty if it was determined that he lacked the use of reason at the time of the offense (c. 1323, 6°), or a lighter sentence if he had enjoyed only an imperfect use of reason (c. 1324 §1)⁵¹. On the contrary, a harsher penalty could be imposed if the perpetrator either committed further acts in violation of the law, or abused a position of authority in furtherance of the crime (c. 1326 §1, 1°-2°). The exercise of such penal discretion embodies the principle of proportionality whereby punishment is meant to fit both the offender and the offense so that the goal of punishment will be met in an equitable and just way: reform of the perpetrator and the restoration of justice that has been harmed by his actions.

Irregularities are not subject to the principle of proportionality. They are incurred by virtue of the act giving rise to them, and without regard to the degree of imputability present at the time of its commission, so long as the grave imputability is present necessary for a crime to have been committed⁵². This is due to the distinct purpose behind irregularities, the protection of the sacred ministry. The dig-

⁵¹ Indeed, a judge might determine that there could be «any other circumstance present» that would lessen the seriousness of the offense in a particular case (1324 §2). He could also defer punishment or even impose no punishment at all despite the preceptive language used by the code with regard to the imposition of penalties for the crime in question (c. 1344).

⁵² If the imputability was not grave to begin with, no crime can be said to have been committed even though the act in question might have been gravely objectionable from a moral perspective. A second consideration regarding the degree of imputability is made at the time a penalty is to be imposed.

nity of the ministry must be safeguarded regardless of the status of the offender or the degree to which he is liable for punishment. It can happen that extenuating circumstance might militate against the imposition of a penalty due to diminished imputability. Even if the penalty were not imposed, the irregularity would still be incurred⁵³. This would give ecclesiastical authority a means of addressing those instances where a penalty cannot be imposed (despite guilt for the crime), but some official action limiting the exercise of certain acts of public ministry is warranted⁵⁴.

One area in particular where proportionate punishment comes into play is in the effect ignorance has on such punishment⁵⁵. Ignorance exempts a person from a penalty if he was ignorant of violating a law or precept when an act was committed (c. 1323, 2°); or it diminishes the penalty to be imposed if the perpetrator was ignorant that a sanction was attached to a law or precept (c. 1324 §1, 9°)⁵⁶. None of this bears on the incurring of an irregularity since the law

⁵³ See V. DE PAOLIS, «Irregolarità» (cf. nt. 33), 701.

⁵⁴ On the other hand, ecclesiastical authority would not be able to use mitigating circumstances to alleviate burdens associated with the irregularity in those cases where the condition of the offender or offense would otherwise call for it.

⁵⁵ See V. DE PAOLIS, «Irregolarità» (cf. nt. 33), 697; J.M. GONZÁLEZ DEL VALLE, «De las irregularidades» (cf. nt. 23), 992-993.

⁵⁶ The stipulation of the code – that the ignorance be “sine culpa” – would seem difficult to sustain by a priest charged with sexual abuse of a minor. The presumption would certainly be that ignorance of such things by a priest would not be “sine culpa” (c. 15 §2). Moreover, the provision of canon 1325 is to be kept in mind, whereby certain types of ignorance do not

explicitly provides that ignorance of irregularities in no way exempts from them⁵⁷. Accordingly, a priest found guilty of the violation of canon 1395 §2, but who is exempt from a penalty or who receives a lighter one due to ignorance would not be exempt from the irregularity *ex delicto*. The purpose of irregularities, to safeguard the sacred ministry, and the nature of them, to prohibit without regard to penalization, permits their application even in cases where the person who incurs one is ignorant of the irregularity attached to the criminal act or even of the legal institute of irregularities itself.

Nor are irregularities subject to the provision of law whereby observance of a censure that prohibits the celebration of certain sacraments is suspended if it is necessary to provide the sacraments to the faithful in danger of death, or even if a member of the faithful requests a sacrament under other circumstances (see c. 1335)⁵⁸. Once an irregularity is incurred, the exercise of sacred orders is prohibited under all circumstances except the rare instance where an occult irregularity has been incurred, recourse to the appropriate authority cannot be made, and an immediate, grave harm or loss of reputation is foreseen should the exercise of orders not occur (c. 1048). In the absence of such circum-

exempt. Nor do other circumstances, such as drunkenness (or even mental disturbances) if they were brought about so as to further the offense itself. An offender cannot simply assert ignorance as a mitigating circumstance. He must establish its presence through a positive defense.

⁵⁷ Can. 1045: «Ignorantia irregularitatum atque impedimentorum ab eiusdem non eximet».

⁵⁸ See V. DE PAOLIS, «Irregolarità» (cf. nt. 33), 698.

stances, however, a request by a member of the faithful for the administration of a sacrament is not a sufficient cause to excuse observance of the prohibitions arising from an irregularity.

Perpetrators of the sexual abuse of minors often commit multiple acts of abuse against the same victim, or only one act per victim, but with multiple victims over the span of the abusive activity⁵⁹. Canonical penalties imposed as a response to these crimes would not be multiplied so long as the crimes were addressed in the same process. Three acts of abuse against a victim would receive an appropriate punishment, but not three distinct punishments⁶⁰. This is not so with irregularities. As a rule, a man incurs only one irregularity so long as there is only one reason that gave rise to it. This is so even though there may have been several manifestations of that cause (c. 1046)⁶¹. For example, a man who attempts suicide on two occasions requires

⁵⁹ This is so at least with regard to offenses committed in the United States by members of the clergy: «The allegations of sexual abuse involved a variety of sexual acts, and most of the priests involved were alleged to have committed multiple acts per victim. Indeed, much of the sexual abuse reported involved serious sexual offenses». JOHN JAY COLLEGE OF CRIMINAL JUSTICE, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002*, Washington (DC) 2004, 68.

⁶⁰ That is not to say that the punishment meted out would not be harsher than expected under ordinary circumstances due to the number of acts or victims. Several penalties can be imposed for the offenses, such as loss of office, a monetary fine and imposed residence.

⁶¹ See R.J. GEISINGER, «Orders», in J.P. BEAL (et al.), *New Commentary on the Code of Canon Law*, New York – Mahwah (NJ) 2000, 1225, for a lucid explanation of the notion of multiplication of impediments and irregularities.

only one dispensation, not two, since the cause of his being irregular is the same in each instance (attempted suicide; c. 1041, 5°). This is not the case with willful homicide or positive procurement of an abortion (c. 1041, 4°). Here the law provides that an irregularity is incurred for each discrete act; that is, the irregularity is multiplied (c. 1046). This, in turn, demands that a dispensation be sought for each of the acts, not one dispensation for the sum of them.

Given the gravity of the crime of clerical sexual abuse of minors, it would seem most appropriate that any irregularity arising from it would also be multiplied. If so, every act of abuse, whether several with one victim, or individual acts with multiple victims, would require dispensation from the appropriate ecclesiastical authority. Moreover, if dispensation were ever granted, and new allegations subsequently arose, the irregularity would again be incurred should the actions have constituted further delicts.

4. The Authority Competent to Establish Impediments

The establishment of impediments is reserved to the universal legislator. The current code stipulates as much indirectly – as did the former law – when it states that no impediment is incurred unless it is provided for in the code itself (c. 1040)⁶². Since a per-

⁶² This requirement dates back at least to Boniface VIII who stipulated: «Quum id non sit expressum in iure, laqueum non incurrit». (V, 11, 18, *in VI*°). W.H. WOESTMAN, *The Sacrament of Orders* (cf. nt. 10), 62.

son may incur only those impediments contained in universal law, the expectation is that any future impediments will also be established as universal law, and so by the supreme legislator. This precludes particular ecclesiastical law, be it diocesan or national, from establishing impediments. It also prohibits impediments from arising out of custom or even from provisions of divine law, which, as noted above, would incapacitate a man from receiving orders, but would not constitute a legal irregularity⁶³.

Assuredly, the supreme legislator could establish an additional impediment to orders that is not contained in the current code. This could be done for either a specific ecclesiastical region or conference of bishops. For instance, provision for the irregularity could be included as part of particular, national

⁶³ Chiappetta, following on Cappello (F.M. CAPPELLO, *Tractatus Canonico-Moralis de Sacramentis* [cf. nt. 21], 418), summarizes the issue precisely: «È da notare che non può darsi irregolarità o impedimento “ab homine”, ma solo “a iure”, e per giunta “a iure communi Codicis”, per cui è escluso ogni diritto particolare (diocesano, provinciale, nazionale). La costituzione degl’impedimenti e delle irregolarità canoniche in ordine alla recezione e all’esercizio degli ordini sacri è di esclusiva competenza del Romano Pontefice». L. CHIAPPETTA, *Il Codice di Diritto Canonico* (cf. nt. 37), 235. Likewise, Conte a Coronata: «Principium generale communiter admissum ex iure decretalium est irregularitates non incurri nisi fuerint in iure expressae. In iure autem intelligitur in iure canonico positivo non solum ad excludendum quolibet ius civile sed etiam ad excludendum ius divinum et ius ipsum positivum particulare». M. CONTE A CORONATA, *Institutiones Iuris Canonici* (cf. nt. 21), 123. The two most common divine law provisions that incapacitate a person from valid reception of orders are lack of baptism and female gender. See G. OESTERLÉ, «Irrégularités» (cf. nt. 10), 46.

legislation meant to address the issue of the sexual abuse of minors by members of the clergy, such as the *Essential Norms* issued by the bishops of the United States Conference of Catholic Bishops.

In the mind of this author, the establishment of a particular law impediment would carry with it several significant disadvantages that militate against further consideration of such an option. It would first require a modification of the code's provision that limits irregularities to those it contains. It would also create dilemmas for the implementation of the irregularity on a regional or national level in light of the fact that jurisdiction over the delict upon which it is based is reserved to the Congregation for the Doctrine of the Faith. Moreover, to give only one practical example, confusion might arise regarding the extent to which a particular law irregularity would bind a cleric outside of the territory where the law has force. Finally, since the issue of clerical sexual abuse of minors is a universal problem, and not one reserved to any particular region or local church, the establishment of an irregularity meant to address it should also be universal rather than particular.

5. Those Bound by Impediments to Orders

An irregularity for the reception of orders differs from an incapacity for ordination⁶⁴. A person can be legally impeded from fulfilling only acts that he or she is naturally capable of completing. No person

⁶⁴ M. CONTE A CORONATA, *Institutiones Iuris Canonici* (cf. nt. 21), 122.

may be termed irregular for the reception of sacred orders who is not, at the same time, capable of receiving valid ordination⁶⁵. Neither a non baptized man nor a woman, whether baptized or not, is capable of receiving the sacrament. Nor is a person who cannot place a human act so capable; e.g., involving the intention to be ordained⁶⁶. Thus, conditions such as female gender or lack of baptism are not impediments to orders in the strict, legal sense of the term. Rather, they impede ordination in a broad sense due to natural obstacles.

Additionally, inasmuch as non-Catholic men are not bound by merely ecclesiastical laws, they are not subject to the provisions on impediments to orders. However, once they are baptized or received into full communion, they are bound by any applicable impediments. Still, even after joining the Church

⁶⁵ See F. WERNZ – P. VIDAL, *Ius Canonicum* (cf. nt. 25), 309.

⁶⁶ A man who is afflicted with *amentia*, or insanity, would be irregular for orders if, despite the mental condition, he still possessed the requisite qualities to place the human act necessary for a valid ordination. However, if the *amentia* were such that no human act could be placed, the man would be incapable of receiving orders, not irregular for them. Klaus Lüdicke notes this distinction when commenting on canon 1041, 1°. See K. LÜDICKE, in *Münsterische Kommentar zum Codex Iuris Canonici*, Essen 1985-, at 1041/2. In the current author's view, J.M. GONZÁLEZ DEL VALLE, «De las irregularidades» (cf. nt. 23), 975, overstates Lüdicke's position that any ordination conferred on those laboring from the *amentia* mentioned in 1041, 1° is invalid. Even if Lüdicke were clearly of this opinion, it is difficult to reconcile how a classical understanding of the effects of *amentia* on the validity of juridic acts would not, in fact, lead in all cases to the invalidity of orders received by the *amens*.

such persons would not be bound by an impediment *ex delicto* since at the time of the commission of the act they would not have been subject to the ecclesiastical penal law⁶⁷.

Indeed, the current law of the Church criminalizes acts *contra sextum* with minors only when committed by clerics⁶⁸. This means that only deacons, priests, and bishops would be subject to the irregularity⁶⁹. Catholic laymen who commit such acts are not punishable by virtue of ecclesiastical law since they committed no delict⁷⁰. Since no delict was com-

⁶⁷ «Se invece si tratta di una irregolarità, che ha come presupposto il delitto, il soggetto non l'ha certamente contratta, se il fatto è avvenuto quando egli non era ancora cattolico, in quanto egli non era soggetto alle leggi penali della Chiesa». V. DE PAOLIS, «Irregolarità» (cf. nt. 33), 703. Cf. R.J. GEISINGER, «Orders» (cf. nt. 61), 1218, who likewise concludes that non Catholics are not bound by impediments *ex delicto*, but does so based on the fact that whether or not they are bound is doubtful, and in cases of doubt of law the impediment does not bind.

⁶⁸ This is a change from the former law which sanctioned lay persons who had committed acts *contra sextum* with minors under the age of sixteen: «Laici legitime damnati ob delicta contra sextum cum minoribus infra aetatem sexdecim annorum commissa, vel ob stuprum, sodomiam, incestum, lenocinium, ipso facto infames sunt, praeter alias poenas quas Ordinarius infligendas iudicaverit». Can. 2357/1917 Code.

⁶⁹ The sole bishop who would not be subject to this or any irregularity is the Roman Pontiff. An irregularity can be incurred only by someone who has a superior competent to dispense from the irregularity. The Roman Pontiff has no such superior. See F. WERNZ – P. VIDAL, *Ius Canonicum* (cf. nt. 25), 310.

⁷⁰ This would not be the case if canon 1399 were used to sanction a layman for acts of sexual abuse. Still, this would most likely complicate matters rather than alleviate the dilemma discussed here.

mitted, no irregularity *ex delicto* can be incurred. In effect, then, without a change in the law governing who is subject to the sanction for sexual abuse of minors to include lay persons, an irregularity for the reception of orders would affect only deacons and priests who are to be ordained to a higher grade of orders.

The above provisions of the law might result in the following scenario. Prior to baptism or reception into the Catholic Church, a man commits an act against the sixth commandment with a minor. The action remains occult until after he is ordained a priest, at which point the allegation is brought forward. Because the act occurred prior to baptism or reception, the priest can neither be prosecuted for a canonical crime nor be said to labor under an irregularity *ex delicto* (should one be established)⁷¹. This same would apply if the act were committed after baptism or reception, but before ordination. Thus, without other changes to the code on irregularities, something arguably not likely or advisable, the creation of such an irregularity would not itself provide ecclesiastical authority a ready means to address actions committed by deacons or priests prior to their ordination⁷².

This does not mean ecclesiastical superiors do not enjoy fairly broad discretion as to whom they

⁷¹ It would be otherwise if a series of abusive actions began prior to the man joining the Church and continued afterwards. The actions subsequent to baptism or reception might now constitute canonical crimes, and so result in his incurring an impediment *ex delicto*.

⁷² Of course, there are other remedies in the code a bishop or superior could use to address these situations.

will admit to orders. Prior to ordaining a candidate, the man's proper superior or the ordaining bishop is charged by the law itself with determining that the candidate has met the legal prerequisites to the reception of orders (see cc. 1024-1039)⁷³. If the appropriate superior concludes that such a prerequisite is lacking, the ordination should not proceed until the requirement is met. Were it to occur nonetheless, it would be illicit, but valid. The judgment to delay the reception of orders would not technically constitute an impediment to orders even though it effectively prohibits the man from receiving ordination⁷⁴.

All the same, the faithful capable of being ordained still do not have a right to be admitted to orders, even if all the legal prerequisites to ordination have been met⁷⁵. The code does recognize their

⁷³ For a recent study of the issue or worthiness for the reception of orders, see B.M. MEDINA, «Idoneidad para las sagradas órdenes», *Revista Mexicana de Derecho Canónico* 7 (2001) 7-36.

⁷⁴ See J.M. GONZÁLEZ DEL VALLE, «De las irregularidades» (cf. nt. 23), 974. Chiappetta, drawing an analogy with an ordinary's prohibition on the exercise of the *ius connubii*, asserts that such a prohibition on ordination cannot be perpetual, but only temporary (albeit indefinite), justified by a grave cause, and lasting only as long as the circumstances that gave rise to it remain. L. CHIAPPETTA, *Il Codice di Diritto Canonico* (cf. nt. 37), 418.

⁷⁵ As Aymans observes: «Dagegen besteht auch bei Erfüllung aller in der Person liegenden Voraussetzungen *kein Rechtsanspruch* auf Empfang einer sakramentalen *Weihe*. [...] Im Fall der *Weihe* sind auch unabhängig von der Person bestehende objektive Gründe zu prüfen; da die *Weihe* nicht als ein Mittel der persönlichen Heiligung, sondern als Befähigung zum

right to pursue a state in life without coercion, including the pursuit of sacred orders (c. 219). However, this right, generally interpreted as conferring broadly a right to pursue a state in life⁷⁶, is not absolute, it can be exercised only in a legitimate manner, and must likewise be moderated by ecclesiastical authority for the benefit of the Church's ministry (c. 223 §2). Such a limitation of the right to pursue this particular state in life can occur if the norms regarding the prerequisites to admission to orders have not been fulfilled (c. 1025). More importantly, though, the law also calls for limitation of the right to pursue one's state in life if the appropriate bishop finds certain qualities lacking in the candidate for ordination (c. 1029). Only those are to be admitted to orders who demonstrate sound faith, requisite intellect, sound morals, and a suitable degree of physical and psychological health. Additionally, the candidate is to enjoy a good reputation among the Christian faithful. Can a man be said to

geistlichen Dienst zu definieren ist, muß z. B. die Frage des Nutzens (cc. 269, 1025 §2) positiv geklärt sein». W. AYMANS, *Kanonisches Recht*, vol. 2, Munich 1997, 108.

⁷⁶ See, for example, J. HERVADA, «The Obligations and Rights of all Christ's Faithful», in E. CAPARROS (et al.), *Code of Canon Law Annotated*, Montreal 1993, 195, who states when commenting on canon 219: «The right to choose a state of life is, in reality, something more than immunity from coercion. [...] Perhaps the canon restricts itself to referring to immunity against coercion in order to prevent the right from being interpreted as a fundamental right to be admitted to sacred orders or to a particular institute of consecrated life. It is true that this latter right does not exist, but this does not mean that the right to choose a state of life is reduced to immunity from coercion».

possess most of these qualities who has sexually abused minors?

The discretion enjoyed by ecclesiastical superiors with regard to whether or not a man is suitable for ordination can and should be exercised whether or not an irregularity prompted by acts *contra sextum* with a minor is ever established. This is a significant, if obvious, assertion whose relevance will now be seen as we consider who are bound by the law on irregularities for the reception and exercise of orders. In short, even if a man is not bound by the law on irregularities prior to ordination, or after an order is received and the reception of a subsequent one is contemplated, the appropriate superior would still be able to defer the reception of the order due to the past commission of acts *contra sextum* with a minor⁷⁷.

6. The Effects of an Irregularity

The first and foremost effect of an irregularity is to bar a man from receiving orders. If he has already

⁷⁷ When considering the ordination of a transitional deacon to the priesthood, the provisions of canon 1030 must also be taken into account. The proper bishop or superior of the candidate may still forbid admission to the higher order. However, in such cases the reason given for the prohibition must clearly be canonical, and the candidate enjoys the right of recourse against the decision. Prior to ordination to the diaconate, a man generally does not enjoy the right of recourse against a bishop or superior's decision not to advance him to orders. The right of recourse enjoyed by deacons, however, does not indicate that the deacon now enjoys a subjective right to be ordained a priest. See J.M. GONZÁLEZ DEL VALLE, «Orders», in E. CAPARROS (et al.) *Code of Canon Law Annotated*, (cf. nt. 76), 643.

received one grade of orders, such as priesthood, he would be barred from further ordination, specifically, to the episcopate. Should he nevertheless advance to that order, he would be prohibited from its exercise as long as the irregularity perdures. Should someone bound by an irregularity receive ordination despite the presence of the impediment, the ordination would be valid, but illicit. This follows from the fact that impediments for orders, unlike those for marriage, constitute disqualifying laws that render a juridic act illicit, but not invalid⁷⁸. However, the act of conferring orders or the exercise of the order itself would be gravely illicit⁷⁹. The prohibition resulting from an irregularity is not qualified by the good faith of the one bearing the irregularity. Nor is it, as we have seen, affected by ignorance of it by the one who has incurred the irregularity.

It is critical to note that the prohibition of exercising orders once received regards only those actions dependant on an exercise of sacred orders⁸⁰.

⁷⁸ Assuredly, it is within the competence of the supreme legislator to establish an irregularity that renders ordination invalid, however unlikely this would be. See E. REGATILLO, *Ius sacramentarium* (cf. nt. 21), 509; G. OESTERLÉ, «Irregularités» (cf. nt. 10), 45.

⁷⁹ A bishop who knowingly ordains a man who is irregular for the reception of orders is open to receiving a sanction, at least theoretically speaking. See canon 1384.

⁸⁰ A position held unanimously by commentators under the former code, and by commentators under the current law as well; see V. DE PAOLIS, «Irregolarità» (cf. nt. 33), 716-717; W.H. WOESTMAN, *The Sacrament of Orders* (cf. nt. 10), 62-63, and W.H. WOESTMAN, «Too Good to Be True: A Current Interpretation of Canons 1041, 1° and 1044 §2, 2°», *Monitor Ecclesiasticus* 120 (1995) 619-629. For the opposing view, see J.P.

Actions that do not require orders for their completion are not covered by the prohibition of the irregularity. Accordingly, a large category of official eccle-

Beal, «Too Good to Be True? A Response to Professor Woestman on the Interpretation of Canons 1041, 1° and 1044 §2, 2°», *Monitor Ecclesiasticus* 121 (1996) 431-463.

The question of whether an irregularity for the exercise of orders prohibits the exercise of all ecclesiastical ministry by clerics, or only of those acts that are, in fact, essentially tied to the order in question has taken on greater relevance in recent times in light of the issue of sexual abuse of minors by clerics. The authors of the last two articles cited in this footnote tackle the matter directly. William Woestman argues the classical position as applied to 1041, 1° and 1044 §2, 2°: «In a word: according to the present Code a person is "inhabilis [...] ad ministerium rite implendum", who cannot perform the ceremonies or sacred rites for the celebration of the Eucharist or the other sacraments. An interpretation of this canon maintaining that a priest is incapable of correctly (*rite*) exercising priestly ministry because of his strong proclivity to aberrant sexual behavior – unless it would prevent him from celebrating correctly the liturgical actions – reads something into the Code that simply is not in the text. It changes the meaning from the capability of exercising ordained ministry in the strict sense to moral fitness to exercise ministry in a broad sense, i.e., ministry not requiring ordination». W.H. WOESTMAN, «Too Good to Be True», 624-625. Woestman buttresses his perspective by citing Velasio De Paolis who maintains the same position: «L'avverbio "rite" non riguarda propriamente l'aspetto morale della persona [...] ma riguarda piuttosto la ritualità, cioè il compimento e l'adempimento corretto per una valida celebrazione degli atti posti in forza dell'ordine stesso». V. DE PAOLIS, «Delitti contra il sesto comandamento», *Periodica* 82 (1993) 311-312.

John Beal, on the other hand, argues in favor of a broader reading of the canons to allow for the exclusion of a cleric from the exercise of any ecclesiastical ministry. He questions Woestman's interpretation of *rite*, and couples that criticism with a

siastical functions would be exempt from the effects of an irregularity. This would include certain acts of governance, such as the conferral of offices by a bishop, the issuing of decrees by a vicar general, and even the witnessing of marriage by a pastor⁸¹. It will also include the exercise of judicial functions, whether or not they require the use of judicial power.

An even larger category of activity that is not covered by the prohibiting effects of the irregularity would be those acts that fall under the general notion

broader reading of the word ministry: «The weakness of [Woestman's] argument is in large measure the result of his failure to devote sufficient attention to two trends in canon law during the period following the promulgation of the 1917 Code: a growing appreciation of the impact on human behavior of psychological disorders that do not deprive persons of the use of reason and a broadening of the Church understanding of the nature and scope of ordained ministry». J.P. BEAL, «Too Good to Be True?», 433.

In our mind, the impact of the debate on the current discipline regarding irregularities, including an irregularity for acts *contra sextum* should one be established, is currently negligible. Laws that restrict rights must be interpreted narrowly. The canons on irregularities clearly speak *at least* to the exercise of orders, and to the ministry associated with the order. Whether the law intends a broader prohibition so to include other ministerial acts remains a matter of debate. So long as the issue remains unsettled the narrow reading must govern the discipline.

⁸¹ «Irregularitas nullo modo impedit exercitium potestatis iurisdictionis, sed solum exercitium potestatis ordinis; unde Episcopus irregularis potest officia [...] conferre, iurisdictionem delegare, sententias et decreta administrativa emanare; parochus potest matrimonio assistere, non autem licite benedicere; etc.» M. CONTE A CORONATA, *Institutiones Iuris Canonici* (cf. nt. 21), 126.

of "ecclesiastical ministry". If a certain activity is open to a lay person, it is by definition not reserved to one in sacred orders, and so not essentially dependent on orders for its completion. A priest who is irregular for the exercise of orders would still be able to visit the sick (although not anoint them), preach, teach, function as administrator of juridic persons, and so forth. What he would not be able to do is carry out those functions that are dependent on sacred orders. This includes the administration of any and all sacraments, including the offering of Mass, either in public or privately. It would not, however, hinder the reception of the sacraments.

Indeed, as far as deacons are concerned almost all ministry engaged in by them would be exempt from the prohibition. This is because the various diaconal functions are not strictly connected to the order. If they were, permission for lay person to fulfill them would not be possible⁸². Thus, the question arises: when a deacon incurs an irregularity for the exercise of orders what is it precisely that he is now prohibited from carrying out?

⁸² De Paolis expresses the matter well: «Un atto di ordine dunque è un atto che è legato all'ordine del diaconato, del presbiterato o dell'episcopato. In realtà individuare un atto che sia legato o riservato al diaconato in quanto ordinato non è facile. In pratica tutte le facoltà che possiede il diacono possono essere compiuti anche da un laico, sia pure con i debiti permessi. Essi pertanto non sono fondati sull'ordine stesso, al punto che non siano concepibili senza l'ordine del diaconato. Per questo sia il codice precedente che l'attuale prendono in considerazione solo gli atti di ordine in relazione al presbiterato e all'episcopato». V. DE PAOLIS, «Irregolarità» (cf. nt. 33), 716.

7. The Process for Incurring and Dispensing from Irregularities

Ostensibly, an irregularity *contra sextum* with a minor, as with all irregularities, would be incurred *a iure* at the time the delict that gave rise to it occurs⁸³. The law imposes the irregularity, not ecclesiastical authority. The bishop or superior need take no further action, such as is required for the imposition of *ferendae sententiae* penalties (c. 1314), in order to assure that the effects of the irregularity are binding on the offending cleric who has incurred it by virtue of the commission of the delict. Nor is it required that the commission of the delict first be established in an appropriate forum before the irregularity takes hold⁸⁴. The purpose of penal trials is to impose penalties, not to declare whether the cleric has contracted an irregularity.

Ostensibly, dispensation from an irregularity incurred due to a violation of c. 1395 §2, would be

⁸³ Other provisions could be made by the supreme legislator with the creation of the new irregularity, such as the requirement that ecclesiastical authority declare the irregularity to have been incurred following a process, including an investigation into the act, before the effects take place.

⁸⁴ In this sense, the incurring of an irregularity and a penalty *latae sententiae* are similar. Both are incurred at the time the act was committed. A subsequent penal process would merely declare that the penalty had, in fact, been incurred. It would not impose the penalty since the law had already done so. Likewise, an irregularity *ex delicto* is incurred at the time the delict is committed. Any subsequent intervention by ecclesiastical authority would address the question of whether or not the irregularity had actually been incurred; it would not impose the irregularity.

reserved to the Holy See since the act upon which it is based constitutes a *delictum gravius*, a crime already so reserved. Moreover, the Congregation for the Doctrine of the Faith would most likely enjoy sole competence to dispense from the irregularity in the external forum since it already has exclusive competence regarding the delict⁸⁵. A petition for dispensation could be forwarded to the Congregation by either the ordinary of the cleric or by the cleric himself. In the latter case, the ordinaries of both actual domicile and of incardination, if they are distinct, would prudently be consulted for an opinion in the matter.

As opposed to the former code, the current code limits the prerogatives of a confessor with regard to dispensing irregularities for the exercise of orders⁸⁶. No longer is he able to dispense from an irregularity in certain urgent, but occult cases, with recourse to the ordinary or Apostolic Penitentiary taking place after the dispensation is granted⁸⁷. The former provision is no longer necessary since the new code itself permits the cleric to exercise orders despite the irregularity. It does so under specific condition: if the case is occult and urgent, access to the appropriate authority is not possible, and grave harm or loss of reputation might result if the order is not exercised (c. 1048). The determination as to whether these conditions apply is

⁸⁵ SST, art. 4, §1.

⁸⁶ See G. OESTERLÉ, «Irregularités» (cf. nt. 10), 57-59, for a commentary on the former discipline, and W.H. WOESTMAN, *The Sacrament of Orders* (cf. nt. 10), 83, for what follows here concerning the current law.

⁸⁷ Can. 990/1917 Code.

made by the cleric himself (since the case is occult). Recourse to the appropriate authority must still take place within one month. This can be done through the confessor, an ordinary, or even the cleric himself.

The Apostolic Penitentiary enjoys competence to dispense internal forum irregularities, including occult cases not tied to the sacramental forum⁸⁸. This competence can be exercised even in cases where another ecclesiastical authority might have previously refused the dispensation⁸⁹. One can safely assume that the Penitentiary would retain competence should a new irregularity be established. Denial of such means of resolving internal forum matters is foreign to ecclesiastical discipline, and should remain so with regard to this particular issue.

PART TWO

THE SUITABILITY OF ESTABLISHING AN IRREGULARITY *EX DELICTO*

The first part of this article presented the general principles and current legal discipline regarding irregularities for the reception and exercise of orders. It is in light of the conclusions drawn there that the benefits and drawbacks of the idea of creating an irregularity *ex delicto* for violations of canon 1395 §2, must be considered. Based on the findings of the first part of the article, the second part will now present and consider several advantages and disadvantages to the creation of a new irregularity.

⁸⁸ See *Pastor Bonus*, art. 118, and c. 1048.

⁸⁹ Can. 64.

1. The Advantages to Establishing the Irregularity

Perhaps the most obvious and yet significant advantage to the creation of an irregularity *ex delicto* for the violation of canon 1395 §2, would be the strong statement by the Church resulting from it that she wishes to protect the dignity of the ministry from the adverse consequences of the actions of those clerics who sexually abuse minors. Part and parcel of safeguarding the ministry is assuring the minors themselves, and those that care for them, that the Church tirelessly attempts to weed out from the ministry those she considers unsuitable, most especially when in response to the commission of a delict. The irregularity would emphasize that even if a man is able to convince ecclesiastical authority that he is suitable canonically to receive or exercise orders, he might still be prohibited from receiving or exercising orders if he has committed the crime⁹⁰.

Related to this advantage is another. The establishment of an irregularity *ex delicto* occurs only for

⁹⁰ As Pavanello states: «La normativa canonica relativa alle irregolarità e agli impedimenti costituisce un'ulteriore tutela rispetto al compito di discernimento dell'idoneità dei candidati affidato all'ordinario competente, sottraendo talune fattispecie di particolare gravità a una sua valutazione discrezionale. Tutta la storia di questo istituto documenta la sollecitudine della Chiesa di fissare limiti ben precisi alla discrezionalità dei singoli ordinari, cui compete la facoltà di ammettere agli ordini sacri: è significativo che la legislazione canonica in questo campo abbia avuto particolare sviluppo soprattutto nei periodi in cui più forte è stata l'esigenza di procedere alla riforma della Chiesa e della disciplina del clero». P. PAVANELLO, «Irregolarità e impedimenti a ricevere l'ordine sacro» (cf. nt. 18), 280.

those actions that, in the mind of the Church, are particularly reprehensible for their detrimental effect both on individuals and on the communion of the Church. A cleric who commits an act of abuse against a minor would be made aware of the gravity of his offense by the fact that it results in an immediate and complete prohibition on the exercise of orders, or on the admission to a higher grade of orders.

Further benefits arising from the establishment of a new irregularity arise out of the connection between irregularities *ex delicto* and penalties. The sanction established by the code for acts *contra sextum* by a cleric against a minor is a mandatory, *ferenda sententiae* just penalty. The penalty can be imposed only following a finding of guilt in an appropriate penal process. The process can consist of either a formal judicial trial, or, according to the current practice of the Congregation for the Doctrine of the Faith, an extra-judicial penal process⁹¹. Either process is complex, and usually time consuming. Under certain circumstances, the law allows the ordinary to impose certain restrictions on the cleric until the penal process has reached its conclusion (c. 1722), at which point the restrictions are to be lifted. Were an irregularity for acts *contra sextum* established, the prohibition on exercising orders would extend to a time before and after the process; that is, from the commission of the act until the dispensation from the irregularity. This presumes, of course, that the cleric did, in fact, commit the offense.

⁹¹ By grant of a special derogation from law by the Roman Pontiff to the Congregation for the Doctrine of the Faith on February 7, 2003.

Similarly, if the penal process results in a finding of guilt, but the penalty imposed is less than full restriction from the exercise of orders (including no penalty at all), the prohibitions ensuing from the irregularity would still bind the cleric. This would also be the case once the penalty ceases. If a penalty were imposed that effectively mirrored the effects of an irregularity, the same prohibitions would remain after the penalty ceased.

Nor would a cleric's ignorance of the irregularity exempt him from having incurred it. Likewise, a claim that he was ignorant of certain conditions required for the delict to be committed, such as the actual age of the person with whom he engaged in sexual behavior, would not bear on the fact that he is bound by the irregularity. The same holds for the mitigating and aggravating circumstances enumerated by the code and applied when considering appropriate punishment for a crime. As mentioned above: the principle of proportionality does not govern the institute of irregularities.

Finally, three further principles of due process would not apply to a new irregularity for acts against the sixth commandment with minors. First, the principle that forbids the punishment of a person twice for the same offense (*ne bis in idem*) is not relevant to the discipline on irregularities. Irregularities are not penalties. They envision protecting the ministry from those unworthy for it. Thus, even if a case had been dealt with in the past through a penal process, the cleric could still be bound by the effects of an irregularity, even one established subsequent to his offense and punishment. This follows inasmuch as the second principle not applicable to irregularities is that which forbids the creation of *ex post facto* crim-

inal statutes. Irregularities do not constitute criminal laws, neither substantive nor procedural. Thus, they may be applied retroactively provided express provision for this is made by the supreme legislator (c. 9). If the protection of the ministry is the primary concern of an irregularity, that concern cannot count for only some of the ministers exercising an order. Finally, irregularities are not subject to the law of prescription. Even though the time for criminal prosecution for an offense or the imposition of a penalty in response to one may have passed, the irregularity incurred by the action still binds.

In brief, the advantages to establishing an irregularity *ex delicto* for violations of canon 1395 §2, are twofold. The first is the strong statement the Church makes regarding the unsuitability for the exercise of orders of anyone who has committed an act of abuse. The second is more advantageous to those charged with resolving actual cases, including ordinaries. The irregularity would give ordinaries a legal authority for restricting ministry that is not necessarily borne of a singular administrative act issued by him against the cleric. The law itself would prohibit the exercise of the order, and independently of the many factors that must be taken into account when a penal process is used to resolve the matter⁹².

⁹² Of course, a new irregularity could be established that is effective only from the time of its declaration, not from the time of the act itself. Presumably, the irregularity would still have been incurred with the act. But the need for certainty as to its applicability could lead to a suspension of the effects until the appropriate ordinary determines through a legitimate process that it has been incurred.

2. The Disadvantages to Establishing the Irregularity

It is more difficult to determine what are disadvantages to establishing a new irregularity than it is to ascertain advantages to the idea. Most of the disadvantages discussed here can also constitute advantages when examined from a different perspective. Moreover, the form and wording of a new irregularity, should one be established, might well alleviate some of the concerns expressed here. The disadvantages highlighted in this article should be read with these cautionary remarks in mind.

The first and certainly most theoretical hindrance to the establishment of the irregularity is that it would require modification of the code through at least the addition of a cause to the enumeration of those already contained in the code. The principles behind the notion of codified law resist such modifications inasmuch as a codified legislative text is presumed to be complete and sufficient. Since its promulgation in 1983, the code has been modified only once; i.e., when the provisions of canons 750 and 1371, 1° of the Western Code and canons 598 and 1436 of the Eastern text were adjusted by the supreme legislator to account for the newly promulgated profession of faith⁹³.

⁹³ JOHN PAUL II, *Motu proprio, Ad tuendam fidem*, May 18, 1989, AAS 90 (1998) 457-461; *Origins* 28/8 (July 16, 1998) 113-116. The changes included both the addition of text to already existing canons and the modification of the other canons to account for the recently published profession of faith.

Not only would a new irregularity have to be added canon 1041, but further changes in the code would also appear necessary. Specifically, a change in the law regarding the delict of canon 1395 §2 would have to be considered. This is because the ecclesiastical law criminalizes only acts *contra sextum* with a minor committed by a cleric, not by a layperson. As a consequence, for the irregularity for reception of orders to apply to laymen who had committed such acts, the act *contra sextum* itself would have to be established as a crime no matter who perpetrated the act. Absent this change, there would be less need to establish an irregularity for the reception of orders for a violation *contra sextum* since anyone who had not yet received orders would not qualify as a cleric. Of course, such an irregularity would still apply in cases where a man had received one grade of orders and was to pass to a higher one. Had he committed the act *contra sextum* he would be prohibited from the reception of the higher order.

The irregularity could, in fact, be based on canon 1395 §2, as it now stands. The application of the irregularity would then be limited to those who have already received orders. This would alleviate some of the concern regarding modification of the code, but it would fail to expand the irregularity to an area where it is critically important: acts committed prior to ordination that should result in a prohibition to the initial reception of orders. The discretion enjoyed by a superior as to whether or not a man is suitable for ordination addresses this concern to some extent. If the ordinary discovers the man had committed acts of sexual abuse, he need not ordain him based on that legitimate cause. The downside to this is that the particular decision of an ordinary is precisely a dis-

crete determination of one ordinary. Without the establishment of an irregularity, the law of the Church cannot be said to prohibit the ordination of a man who has committed such an offense. The perpetrator may be unsuitable for ministry in the mind of one superior, but he is not irregular in the mind of the universal law (although he may be legally unsuitable).

Additionally, without such a change in universal law, the current discipline on irregularities would offer no solution to the problem of how to address the situation of clerics who had committed acts *contra sextum* with a minor prior to ordination, but whose offense was not discovered until afterwards. If the irregularity regarded only clerics, as in canon 1395 §2, a man who offended prior to ordination would not be subject to it. This means that he would not be irregular for the exercise of orders after he is ordained, at least not due to the grave action committed previously. A superior could certainly use his executive power of governance to address the matter. However, such actions are not meant to be perpetual, as are irregularities. Moreover, once ordination is received, a legal burden devolves upon the superior who wishes to limit the exercise of the ministry. His actions must be based on a legal authority admitted by the code, and follow any process demanded by the law. This would not be the case were an irregularity established that bound those who committed sexually abusive acts prior to ordination. The law itself would prohibit the exercise of the order.

Do the advantages to the establishment of an additional irregularity *ex delicto* outweigh the resistance to modifying the code a second time so to address these

concerns? Considering that two changes at least would be necessary for the irregularity to have full effect, the conclusion might be that other legal options should be explored before the relatively rare step is taken to modify the code. Are the other means provided for in the code and available to ecclesiastical authority able to achieve some of the desired ends the irregularity would bring about, but without the actual establishment of one? As we have seen, with regard to those who have not yet been ordained, the appropriate ecclesiastical superior is always free to make a prudent determination that a man is not suitable for ordination. The use of the executive power of governance, especially through the issuing of precepts, is a viable manner of regulating the activity of clerics whose behavior has resulted in harm to themselves, the ministry, or the Christian faithful.

Another disadvantage to establishing a new irregularity, one related to the first disadvantage discussed above, is that a precise understanding of what constitutes acts *contra sextum* with a minor might be lacking in current jurisprudence. This is not the case with other irregularities *ex delicto*. For instance, there is little theoretical debate as to what constitutes an act of willful homicide. If a person, through malicious intent, is both the formal and efficient cause of the death of another, that person is irregular for the reception and exercise of orders (c. 1041, 4°)⁹⁴. In common terms: it is relatively easy to determine if a person intentionally set out to kill another unjustly.

⁹⁴ Involuntary manslaughter and legitimate self-defense do not cause an irregularity since the formal element of wilful (and malicious) intent is missing from these actions.

Is it always as obvious when an act against the sixth commandment has been committed with a minor? First, we have to ask what exactly quality of act falls under the category of a sin *contra sextum* with a minor. In other words, by use of the phrase "sixth commandment" do we employ a broad reading of what qualifies as a violation or a narrow reading⁹⁵? Is it any inappropriate behavior with someone under the age of eighteen, including non-physical sexual harassment? Or do we limit the offense to unquestionable acts of abuse such as rape and sodomy?

By way of illustration, the irregularity concerning wilful homicide and procurement of abortion is not formulated to read "a sin against the fifth commandment of the Decalogue". If it had been, the causes for incurring the irregularity might increase considerably, for instance, to include involuntary and negligent homicide. Perhaps a formulation of a new irregularity for acts *contra sextum* with a minor should also be more specific, indicating the quality of act within the broader category of sins *contra sextum* that is envisioned as giving rise to the irregularity. Without a precise notion of what qualifies as abuse, any activity that is questionable might be deemed sufficient to incur an irregularity *ex delicto*

⁹⁵ For two relatively recent studies on the development of the notion of sins *contra sextum* in the Church's moral tradition, see J.S. GRABOWSKI, «Clerical Sexual Misconduct and Early Traditions Regarding the Sixth Commandment», *The Jurist* 55 (1995) 527-591; and J. TUOHEY, «The Correct Interpretation of Canon 1395: The Use of the Sixth Commandment in Moral Tradition from Trent to the Present Day», *The Jurist* 55 (1995) 592-631.

even though no delict may have been committed. If the law itself is too broad, resulting in doubt regarding its substance, the law does not bind (c. 14). Accordingly, the establishment of an irregularity to address acts *contra sextum* with a minor should leave no room for doubt as to its content.

Further, the age of some persons with whom clerics engage in inappropriate behavior is difficult to determine by the appearance of the minor. If the cleric erroneously judges that the minor is an adult, and so commits a grave sin by engaging in sexual activity with her, the cleric has incurred the irregularity even though he intentionally chose a person that he thought was an adult. The cleric may never realize that he has incurred the irregularity due to the misperception regarding the age of the minor. As a rule, doubts such as these do not come into play when considering most other irregularities *ex delicto*. A cleric will usually realize when he has murdered someone, positively assisted in the procurement of an abortion, or committed the delict of apostasy. This is not to downplay the seriousness of any inappropriate behavior a cleric might engage in with a minor, no matter how old the minor appears physically or what the inappropriate behavior consists in. The point is that the establishment of an irregularity demands that those subject to it be clear as to what acts will result in the irregularity.

The intention here is not to suggest that the formulation of a new irregularity should include any type of list, taxative or not, of what constitutes actions *contra sextum* as provided for in canon 1395 §2. Indeed, such an enumeration would soon prove insufficient as new cases whose circumstances had not been envisioned when the list was originally

crafted. As jurisprudence on these matters continues to develop the concern expressed here may dissipate considerably. Indeed, for practical purposes the dilemma concerns largely occult irregularities since public ones can be dealt with using all sources of information, and canonical processes, available to ecclesiastical authority⁹⁶.

Irregularities are by definition perpetual. If a man incurs an irregularity for either the reception or exercise of orders, it binds him indefinitely, with the irregularity ceasing only by dispensation. This might at first appear to be a distinct advantage to the establishment of an irregularity. It is, in the sense that the law states that the man who incurs an irregularity due to an act *contra sextum* with a minor will not exercise orders again until ecclesiastical authority determines otherwise. Yet, the advantage is less a blessing than might first be thought, at least for those bishops or superiors who desire a perpetual solution (and the penal process is not suitable for arriving at one).

An irregularity is more properly indefinite than perpetual. The possibility of dispensation always exists, even if it is highly unlikely it will ever be granted. The request for a dispensation can be made by the cleric himself, and it could be made to the

⁹⁶ Traditional means of resolving doubt as to whether or not an irregularity has been incurred include approaching one's confessor or other internal forum source of clarification. This approach will assist with any dilemma that arises, but it will not necessarily solve it. If the substance of the issue is vague to begin with then it will likely be so for the source approached for clarification as well.

Holy See directly, rather than through the proper ordinary. The opinion of the ordinary would certainly weigh heavily in the decision whether or not to dispense from the irregularity. But the decision to grant the dispensation would be reserved to the Holy See.

The practical consequence of the foregoing is that a particular superior, such as a diocesan bishop, would not be able to maintain that a man is perpetually barred from the exercise of sacred ministry. In theory at least, however rare in practice, the cleric might one day be dispensed from the irregularity and so legally able to exercise the ministry again. If a bishop hopes for the law to provide a means to bar a cleric perpetually from the exercise of sacred orders, without hope of a future reversal of the decision, the institute of irregularity is not necessarily the best manner by which to achieve that goal.

At the same time, we see here one instance in which the disadvantage is also a clear advantage to the establishment of an irregularity. The possibility of dispensing a cleric from the irregularity allows for the just and equitable application of the universal law to all cases that might arise, no two of which will likely include the same circumstances. It also allows an application of the principle of proportionality, if such is desired, in cases where the substance of a certain act, or the circumstances surrounding it or the perpetrator of it, call for dispensation.

Even though irregularities *ex delicto* are not subject to the principle that forbids *ex post facto* criminal laws, they still find their foundation in the penal law provisions regarding delicts. Since April 30, 2001, the Church has criminalized acts *contra sextum* by clerics with a minor below the age of eigh-

teen⁹⁷. Before that time, the age for a minor was sixteen, as provided for in canon 1395 §2. A cleric who engaged in an act *contra sextum* with someone above the minimum age limit could not be said to have committed a delict. In the same way, if an irregularity is now created regarding acts *contra sextum* with those below the age of eighteen, it would not apply to those who, in the past, engaged in acts with those who were above the minimum age at the time of the act. In other words, if the act was not a crime when committed, it cannot be made one subsequent to it. If the cleric committed no delict then, he cannot now incur an irregularity *ex delicto* because of his behavior.

A pastoral disadvantage to the establishment of an irregularity regards priests who may incur one due to a past abusive act with a minor, but who wish to enter so-called retired status. Since an irregularity prohibits all actions requiring the exercise of orders, the establishing of the irregularity based upon an offense *contra sextum* would perhaps prohibit more than what a bishop might hope for in a particular case. For example, if an offending priest agrees to "retire" from public ministry and live in a house provided for by the diocese, he would still not be able to celebrate Mass. A priest who is thus prohibited from any and all functions of orders might feel little cause for remaining in the clerical state. Of course, the Congregation for the Doctrine of the Faith might

⁹⁷ SST, art. 4, §1. By authorization of the Roman Pontiff, the age of eighteen has been applicable in the United States since April 25, 1994. See T.H. GREEN, «Clerical Sexual Abuse of Minors» (cf. nt. 2), 371.

receive a faculty to dispense the cleric from some effects of the irregularity. If this were granted, the Congregation could allow, for example, private, but not public celebration of Mass.

Another disadvantage to consider is related to the one just mentioned. Irregularities forbid only the exercise of those acts that are essentially connected to the order which a cleric is prohibited from exercising. They do not prohibit any and all ministerial activity, including judicial and executive acts. Nor does an irregularity regard other aspects of a cleric's way of life; that is, where he should live, how he should be addressed in public, etc. Because of this, an ordinary would still be required to issue executive orders limiting any or all ministry, and regulating public activity or manner of living⁹⁸. In cases where such restrictions are placed through a precept or other singular administrative act, the cleric enjoys full rights of recourse against the act (cc. 1732-1739).

Quite often cases of sexual abuse remain occult for many years following the act. If this were the case, the offending cleric could seek a dispensation from the irregularity through the Apostolic Penitentiary. But the consequences of the competence of the Apostolic Penitentiary are that the cleric who offended in the past, but whose action is now beyond the period of prescription, might be dispensed of the irregularity even as he stands beyond the possibility

⁹⁸ These would include, for instance, measures adopted by the American bishops such as the imposition of a place of residence and the prohibition on the wearing of clerical dress. See EN, 8b.

of answering for his crime in a penal process. A penal process would still be an option, however, should the Congregation for the Doctrine of the Faith chose to derogate from prescription in the particular case⁹⁹.

In occult and urgent cases, canon 1048 also allows the cleric who has incurred the irregularity to exercise the order if certain conditions apply: either grave harm or loss of reputation will result should the order not be exercised. Although this provision does not constitute a dispensation from the irregularity, it could still be seen as undermining one of the most forceful effects of the institute: the immediate prohibition on the exercise of all acts of orders. If the cleric happens to hold an ecclesiastical office requiring the public exercise of orders, like that of pastor, the presumption of the cleric might be that any refusal to administer the sacraments would, in fact, bring harm to those now deprived of them. Likewise, the loss of a good reputation due to the cessation of sacred ministry can occur more easily than not in smaller communities where the priest is the only one conferring the sacraments.

A final disadvantage to the establishment of an irregularity also concerns occult offenses. If a cleric commits an act *contra sextum* with a minor, but the offense remains concealed due to the victim's inability or reluctance to come forward with an allegation, the cleric bears a moral obligation to cease from the exercise of orders and to seek dispensation from the irregularity. The dispensation can be sought in the

⁹⁹ By grant of the Roman Pontiff to the Congregation on November 7, 2002.

non-sacramental internal forum. There is no legal obligation for the cleric to admit or confess to the offense in the external forum. It could also happen that the cleric determines on his own, and in good faith, that he did not commit the offense, and so is not bound by the irregularity. In either of these cases, the practical effects of the irregularity would not be observed. So the true force of an irregularity *ex delicto* exerts itself in public cases where a penal process has determined that the delict had been committed, and, by that fact, that the associated irregularity has been incurred¹⁰⁰.

3. Concluding Observations

In an address to American cardinals gathered in Rome to discuss the scandal of sexual abuse of minors by clergy, the Holy Father stated: «It must be absolutely clear to the Catholic faithful, and to the wider community, that Bishops and superiors are concerned, above all else, with the spiritual good of souls. People need to know that there is no place in the priesthood and religious life for those who would harm the young»¹⁰¹.

The establishment of an irregularity for the reception and exercise of orders constitutes one legal

¹⁰⁰ Which can occur even if the irregularity was dispensed in the internal forum. Once it becomes public, the issue of the irregularity must again be dealt with, this time in the external forum.

¹⁰¹ JOHN PAUL II, Address to the Cardinals of the United States, April 23, 2002, n. 3. *Origins* 31/46 (May 2, 2002) 759.

option that would go far to assure the faithful that the Church prohibits any offending cleric from exercising orders. It would convey a clear message that the act of sexual abuse of minors itself is sufficient to warrant severe consequences for the cleric. Whatever subsequent actions take place in response to an offense, including the possibility of the imposition of penalties, the fact that the offending cleric incurs an irregularity at the time of the offense would alleviate some of the burden that ecclesiastical authorities face when an immediate response is demanded of them in response to abusive acts. This would in turn allow for a more measured, second response by superiors. Moreover, the law itself, rather than a particular superior, would impose the irregularity, and so prohibit the exercise of orders. This further emphasizes the gravity of the act, but also helps to avoid a perception on the part of other clerics that the superior acts harshly or rashly when an offense occurs¹⁰².

At the same time, the creation of a new irregularity certainly would not be a solution to all the concerns ecclesiastical superiors might have when dealing with offending clerics. The irregularity might limit some of their options even as it provides for others. Most notably, the limitation of the prohibition to acts essentially connected to the order in question requires that the ordinary take further actions to restrict activities not covered by the irregularity. The occasions on which the effects of the

¹⁰² Once the irregularity becomes public, ecclesiastical authority would still be required to act, at least to declare the effects of the irregularity binding on the cleric who incurred it.

irregularity would apply are not as broad as might be expected.

Certainly, further legal possibilities should be explored even as the option for an irregularity *ex delicto* is discussed. For instance, instead of creating an irregularity *ex delicto* tied to the violation of canon 1395 §2, a broader impediment could be created, similar to the simple impediment *ex infamia* found in the former law¹⁰³. The simple impediment would result from a loss of a good reputation arising out of a judicial conviction, or from infamy of fact, such as results from the scandal to the faithful arising from abusive or even inappropriate behavior with a minor. Further, an irregularity could be established that takes effect only from the moment it is declared, and not from the moment of the act. This would allow for some type of canonical process to establish with moral certainty that the irregularity has, in fact, been incurred¹⁰⁴. Finally, the possibility of an irregularity for acts *contra sextum* that is not *ex delicto*, but *ex actu* is worthy of further consideration¹⁰⁵.

¹⁰³ Can. 987, 7°/1917 Code: «Sunt simpliciter impediti qui infamia facti laborant, dum ipsa, iudicio Ordinarii, perdurat». The simple impediment *ex infamia* was connected to the commission of a delict, due to which a bad reputation arose. The law no longer expressly provides for the vindictive penalty of *infamia iuris*.

¹⁰⁴ This presumes that no penal process has taken place in which guilt for the act *contra sextum* has already been established.

¹⁰⁵ This would eliminate the need to establish grave imputability concerning the abusive act. However, it would still require a canonical process to determine with moral certitude that the act did, in fact, occur.

In the end, the creation of a new irregularity brings both advantages and disadvantages to the ecclesiastical discipline meant to address clerical sexual abuse of minors. In the mind of this author, the establishment of an irregularity would provide an important legal instrument available to ecclesiastical authority to address acts *contra sextum* by clerics with minors. A new irregularity would not constitute a solution in itself, but neither is it meant to do so. In point of fact, the legal tools needed to resolve the few disadvantages that might accompany the new irregularity are already available to superiors. In any event, further discussion of the need for change should best occur slowly and deliberately so that the decision for or against creation of a new irregularity will be legally prudent and unquestionably just.

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