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A Critical Appraisal of *Latae Sententiae* Penalties in the 1983 *Code of Canon Law*

A DISSERTATION

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School of Religious Studies
of the Catholic University of America
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DOCTOR OF CANON LAW

by

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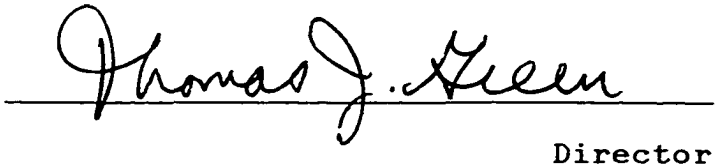
This dissertation was approved by the Reverend Thomas J. Green, J.C.D., Professor of Canon Law, as Director, the Reverend John P. Beal, J.C.D., Assistant Professor of Canon Law, and the Reverend Edward G. Pfnausch, J.C.D., Assistant Professor of Canon Law, as Readers.



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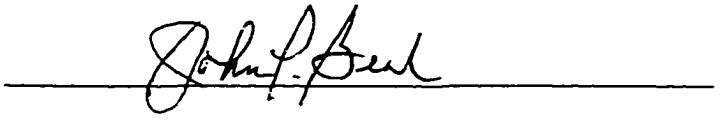

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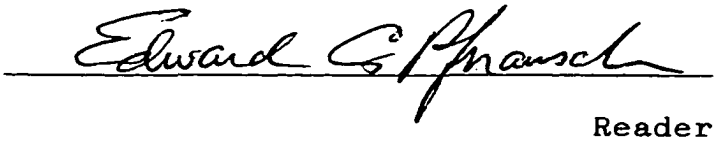

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The author dedicates his work to

the Sacred Heart of Jesus

and

the Immaculate Heart of Mary

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Introduction

The 1983 *Code of Canon Law* provides for sanctions on either a *ferendae sententiae* or *latae sententiae* basis.[1] Principle nine of the revision of the 1917 code expressed a preference for *ferendae sententiae* over *latae sententiae* penalties. Nevertheless, a reduced number of *latae sententiae* penalties is retained by the Latin Church for particularly serious offenses. On the other hand, *latae sententiae* penalties are not found in *The Code of Canons of the Eastern Churches*.

The primary purpose of this dissertation is to analyze critically the provisions for *latae sententiae* penalties in the 1983 *Code of Canon Law*. It will investigate the 1917 Latin code, the process of revising that code, the 1983 Latin code and, for the purposes of comparative analysis, the drafting and final text of the 1990 Eastern Code.

Chapter one will examine *latae sententiae* penalties in the 1917 *Code of Canon Law* as well as arguments regarding their legitimacy and appropriateness. Chapter two will explore arguments for and against such penalties during the process of revising that code as well as the nature and scope

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[1]Full references to all of the documents mentioned in the introduction will be given more logically within the body of the dissertation. For further discussion on the importance of studying penal law, see Bertram F. Griffin, "Why Study Penal Law," in *Code, Community, Ministry: Selected Studies for the Parish Minister Introducing the Code of Canon Law*, 2nd. ed., Edward G. Pfnausch, ed. (Washington, DC: Canon Law Society of America, 1992) 143-145.

of such penalties in the 1973 schema on penal law and the 1980 and 1982 schemata of the whole code. Chapter three will examine in detail *latae sententiae* penalties in the 1983 *Code of Canon Law* and relatively briefly consider the discussion of such penalties during the drafting of *The Code of Canons of the Eastern Churches*. During this inquiry the secondary sources will include selected commentators on the aforementioned texts.

As noted earlier, a major thrust of Latin penal law revision was the reduction of penalties in general and *latae sententiae* penalties in particular. The opportuneness of *latae sententiae* penalties was a matter of significant discussion during the revision process. Yet, there are still a number of *latae sententiae* penalties in the 1983 code; and the remission of some of these is reserved to the Holy See. The following issues among others merit attention: the meaning and legal effects of *latae sententiae* penalties, the interpretation of such penalties throughout the code, and the possible involvement of confessors in remitting non-declared, non-reserved *latae sententiae* penalties. Furthermore, the absence of such penalties in Eastern penal law warrants some examination. Finally, the dissertation will offer some conclusions regarding the legitimacy and opportuneness of *latae sententiae* penalties in Latin penal law.

A critical analysis of *latae sententiae* penalties will clarify the aforementioned areas of concern as the Church

seeks to implement its penal law. The dissertation will highlight the strengths and weaknesses of *latae sententiae* penalties in the hope of aiding the competent penal authorities in knowledgeably establishing, enforcing and remitting them.

CHAPTER ONE

THE *LATAE SENTENTIAE* PENALTY IN THE 1917 *CODE OF CANON LAW*

Preamble

Chapter one of this dissertation is divided into three sections. Section one is an overview of *latae sententiae* penalties in book five of the 1917 code. However, the arrangement of material in section one differs from that of book five. First, the notion of a delict and the different kinds of penalties are examined. At times all penalties are dealt with and not just *latae sententiae* penalties. However, such a discussion is necessary in order to contextualize properly the treatment of *latae sententiae* penalties. Subsequently, the author will examine *latae sententiae* penalties in terms of their establishment, application, and cessation. The aforementioned organizational triad was used in at least one commentary on delicts and penalties in the 1917 code and also in the index of the annotated version of the 1983 code.[1] Since the

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[1]For the 1917 code commentary, see "Index rerum" in Francis Roberti, *De Delictis et Poenis*, vol. 1, [Roberti] (Rome: Apollinaris, 1938) 509-512. Most of the commentaries cited in this section usually followed the 1917 code canon by canon. Roberti's commentary seemed to be the most analytical and critical of all the 1917 commentaries consulted.

For the 1983 code, see "Index analytico-alphabeticus" in *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus,*

author is interested primarily in the general theory of *latae sententiae* penalties rather than in specific instances of such penalties, he will deal solely with the canons in part one of book five on delicts in general [canons 2195-2213] and in part two on penalties in general and particular [canons 2214-2312]. Accordingly the canons in part three on penalties for specific delicts will not be examined [canons 2314-2414].

The sources for section one are the commentaries on the 1917 code. Frequently, the commentators simply restated the canons. Those commentaries that did more than restate the code often cited one another. Such an approach had an advantage and a disadvantage. The advantage of such mutual citation was that the opinions expressed by individual authors often reflected a canonical consensus. The disadvantage was that few commentaries critically appraised *latae sententiae* penalties. What critical appraisal of such penalties one finds in the commentaries is addressed in section two of the chapter, the sources of which will be discussed later as well as the author's methodology.

Section three concludes chapter one with a profile of *latae sententiae* penalties. Although sections one and two at times dealt with all penalties in order properly to contextualize *latae sententiae* penalties, section three will

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fontium annotatione et indice analytico-alphabetico auctus, (Vatican City: Liberia Editrice Vaticana, 1989) s. v. "Poena."

recapitulate only those canons that bear directly on the general notion, establishment, application, and cessation of *latae sententiae* penalties. This will facilitate a transition to chapter two on the revision of the 1917 code.

Section One

An Overview of *Latae Sententiae* Penalties in the 1917 Code of Canon Law.

Section one will address both general notions about crime and punishment and the establishement, application and cessation of *latae sententiae* penalties in the 1917 code. Initially, the author will consider the components of a crime and distinguish the kinds of penalties, i. e., censures and vindictive penalties. Then, *latae sententiae* and *ferendae sententiae* penalties will be briefly compared and contrasted.

The discussion on establishing *latae sententiae* penalties clarifies the Church's proper right to establish penalties. Subsequently it notes those authorities who could establish them and those who are subject to them. It concludes with a Tridentine warning about establishing *latae sententiae* censures in particular.

The discussion on applying *latae sententiae* penalties will begin with a consideration of those who could declare them. Those authorities had to consider not only the objective gravity of the offense and the terms of the law but also the penal imputability of the alleged offender. Only those conditions affecting moral imputability pertinent to *latae sententiae* penalties will be examined. In addition, the general rules for observing *latae sententiae* penalties and the specific norms for applying *latae*

sententiae censures and vindictive penalties will also be explored

The comments on remitting *latae sententiae* penalties will begin by noting those who have the power to do so. It will distinguish the absolution of censures from the dispensation from vindictive penalties. Particularly noteworthy are the rules for remission of *latae sententiae* penalties in urgent cases.

I. Notions And Distinctions of crime and punishment

A. Crime

A crime or a delict in the 1917 code denoted an external and morally imputable violation of ecclesiastical law to which a canonical sanction was attached at least in an indeterminate way.[2] Unless otherwise provided, what was said of crimes applied also to violations of a precept to

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[2]*Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* [*CIC* 17] (Rome: Typis Polyglottis Vaticanis, 1943) c. 2195, §1: "Nomine delicti, iure ecclesiastico, intelligitur externa et moraliter imputabilis legis violatio cui addita sit sanctio canonica saltem indeterminata." "Formerly, delict was a minor transgression, crime a graver one. This distinction is abolished by the [1917] Code." T. Lincoln Bouscaren, Adam C. Ellis and Francis N. Korth, *Canon Law: A Text and Commentary*, 4th ed.,[Bouscaren-Ellis] (Milwaukee, WI: Bruce, 1963) 858; Matthaeus Conte a Coronata, *Institutiones Iuris Canonici*, vol. 4, *De Delictis et Poenis*, 3rd. ed., [Coronata] (Rome: Marietti, 1947) 3; Ioannes Chelodi, *Ius Canonicum de Delictis et Poenis et De Iudiciis Criminalibus*, 5th ed., [Chelodi] (Trent: Libreria Moderna Editrice, 1943) 5; Roberti, 53; Arthur Vermeersch and Joseph Creusen, *Epitome Iuris Canonici*, vol. 3 6th ed., [Vermeersch-Creusen] (Malines: Dessain, 1946) 218.

which a penal sanction was attached.[3] At least three key elements in this general notion of a crime in the 1917 code warrant some attention, namely, an external violation of the law, moral imputability, and the penalty attached to the violation. All three elements affected not only the establishment, application, and cessation of penalties in general but also *latae sententiae* penalties specifically.

1. External violation of a law or precept

The first element of an ecclesiastical crime, the external violation of a law or precept, was considered by the commentators not from a philosophical but rather a canonical point of view. Every crime was a sin but not every sin was a crime.[4] The Church, as a visible and perfect society, had determined that certain sins so disturbed the social order of the ecclesial community that they had to be sanctioned.[5] However, sanctionable offenses were only those certain external transgressions established

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[3]*CIC* 17 c. 2195, §2: "Nisi ex adiunctis aliud appareat, quae dicuntur de delictis, applicantur etiam violationibus praecepti cui poenalis sanctio adnexa sit."

[4]Charles Augustine, *A Commentary on the New Code of Canon Law*, vol. 8 [Augustine] (St. Louis: B. Herder Book Co., 1922) 11; Bouscaren-Ellis, 858; Stanislaus Woywod, *A Practical Commentary on the Code of Canon Law*, vol. 2 [Woywod] (New York: Joseph P. Wagner, 1932) 401; Coronata, 6; Roberti, 53-54; Chelodi, 8-10.

[5]Vermeersch-Creusen, 217; Gommarus Michiels, *De Delictis et Poenis*, 3 vol. [Michiels] (Paris: Typis Societatis S. Joannis Evangelistae Desclée et Socii, 1961) 2:5-10.

in law and declared punishable.[6] A transgression had to be external because sanctions did not encompass internal acts; yet, "a vicious act presuppose[d] a guilty mind" of a free and reasonable agent.[7] That the Church had the right to establish sanctions will be discussed below. Furthermore, in the 1917 code, an external violation of either divine or ecclesiastical law could have resulted in an ecclesiastical sanction.

2. Moral imputability

The second element of a delict was moral imputability. There was no delict without fault; for juridic imputability presupposed moral imputability.[8] Moral imputability consisted in either *dolus* or *culpa*. *Dolus* in book five of the 1917 code was understood to be malice, that is, the deliberate will of transgressing the law.[9] *Culpa* meant the ill-considered deed which harmed another unjustly or, more

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[6]Augustine, 11; Bouscaren-Ellis, 858; Woywod, 402; Vermeersch-Creusen, 219; Roberti, 54; Chelodi, 5; Coronata, 3-5.

[7]Woywod, 402; "De manifestis quidem loquimur: secretorum autem, et judex est Deus," *Decretum Gratiani*, c. 11, D 32.

[8]Chelodi, 8: "Nullum delictum sine culpa: iuridica imputabilitas supponit imputabilitatem moralem."
Coronata following Roberti distinguishes between "imputability" and "responsibility:" "Imputabilitas est actus quo in abstracto aliquid alicui tribuimus. Responsibilitas est relatio quam agens habet ad eos ad quos rationem suae actionis reddere debet. Exempli gratia, actus Dei sunt ipsi Deo imputabiles, at Deus non est ipsorum actuum responsabilis, quia nemini rationem reddere debet." Coronata, 7; Roberti, 86-87

[9]Roberti, 89: "*Dolus* dicitur *deliberata voluntas violandi legem* (c. 2200, §1)."

often, the willful omission of due diligence in weighing the consequences of one's own actions.[10] Either condition had to be grave for moral imputability to have resulted.

3. Penalty attached to the violation of a law or precept

a) determinate and indeterminate

The third element of a delict in the 1917 code was the penalty attached to the crime. The penalty attached to the crime may have been either determinate, that is, specific, or indeterminate, that is, generic. For example, *latae sententiae* excommunications were determinate; the phrase "to be punished according to the seriousness of the fault" indicated an indeterminate penalty.[11] Before a *ferendae sententiae* censure but not a vindictive penalty could be applied, the alleged offender had to be warned.[12] On the other hand, a warning was considered given if a determinate

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[10]Roberti, 93: "Culpa dicitur *factum inconsultum quo alteri iniuste nocetur, seu cum pluribus voluntaria omissio debitae diligentiae in perpendendis effectibus propriae actionis.*"
CIC 17 c. 2199: "Imputabilitas delicti pendet ex dolo delinquentis vel eiusdem culpa in ignorantia legis violatae aut in omissione debitae diligentiae; quare omnes causae quae augent, minuunt, tollunt dolum aut culpam, eo ipso augent, minuunt, tollunt delicti imputabilitatem."

[11]An example of such an indeterminate penalty is *CIC* 17 c. 2383: "Parochus qui paroeciales libros diligenter, ad normam iuris, non conscripserit aut servaverit, a proprio Ordinario pro gravitate culpae puniatur."

[12]Augustine, 12-14; Bouscaren-Ellis, 858; Woywod, 401-402; Vermeersch-Creusen, 245; Chelodi, 30; Roberti, 325; Coronata, 156; Michiels, 2:158; Francis Wernz and Peter Vidal, *Ius Canonicum*, vol. 7 [Wernz-Vidal] (Rome: Typis Pontif. Universitatis Gregorianae, 1937) 248, n. 82.

latae sententiae penalty was attached to a law or precept. By way of exception, sanctions could be imposed due to grave scandal or the seriousness of circumstances even if no penalty were attached to the violation of the law or precept.[13] However, this was rare since normally there was neither crime nor punishment without the violation of an existing penal law.[14]

b) gravity of the law

The penalty attached to a law could help to determine its objective gravity.[15] Once again it is important to

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[13]*CIC* 17 c. 2222, §1: "Licet lex nullam sanctionem appositam habeat, legitimus tamen Superior potest illius trangressionem, etiam sine praevia poenae comminatione, aliqua iusta poena punire, si scandalum forte datum aut specialis trangressionis gravitas id ferat; secus reus puniri nequit, nisi prius monitus fuerit cum comminatione poena latae vel ferendae sententiae in casu trangressionis, et nihilominus legem violaverit."

[14]As Vermeersch-Creusen, 218, pointed out: "In qua definitione id quoque commodi est quod iudices reos pro suo arbitrio punire non possunt. Immo in iure civitatum, in quibus viget distinctio perfecta inter varias potestatis publicae species (legislativam, exsecutivam, iudicialem), urgetur principium 'nullum crimen, nulla poena, sine lege poenali.'

In Ecclesia vero, cum iidem Superiores alii plenam omnino iurisdictionem obtineant, alii saltem praecepta iurisdictionalia ferre possint, non excludenda videtur facultas puniendi violationes legis, cuius normae nulla poena addita erat, 'si scandalum forte datum aut specialis transgressionis gravitas id ferat' (c. 2222,§1).

Usus autem huius potestatis natura rei extraordinarius manebit neque inde minus necesse est ut fideles poena legibus affixa de gravitate et sequelis violationis moneantur, iudices vero in puniendis delictis normas satis stabiles et definitas sequantur."

[15]*CIC* 17 c. 2196: "Qualitas delicti desumenda est ex obiecto legis; quantitas vero dimetienda non solum ex diversa gravitate legis laesae, sed etiam ex maiore minoreve imputabilitate aut damno illato."

distinguish here between sin and crime. According to the commentators on the 1917 code, a sin might merely be an ethical transgression but a crime was an ethico-juridical transgression against the legal order, and declared punishable by law at least in general terms. A crime so disturbed the public or social order that it demanded reparation. The kind of penalty the Church attached to violations of its laws indicated the amount of social disturbance that a particular crime caused. Hence, a law with a penalty attached was considered more grave than one without such a penalty because the law or precept whose violation was sanctionable protected a more significant ecclesial value or the societal damage done was greater.[16]

c) censure or vindictive penalty

In addition, a penalty was either a censure or a vindictive penalty. A censure was a penalty by which a baptized person, delinquent and contumacious, was deprived of certain spiritual goods or goods connected with spiritual ones.[17] Once the offender had ceased to be contumacious, the censure was absolved. Although the primary object of a censure was the correction of the offender, reparation of

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[16]Wernz-Vidal, 68; Roberti, 55-56; Coronata, 12; Chelodi, 6; Augustine, 14-15; Michiels, 2:148.

[17]*CIC* 17 c. 2241, §1: "Censura est poena qua homo baptizatus, delinquens et contumax, quibusdam bonis spiritualibus vel spiritualibus adnexis privatur, donec, a contumacia recedens, absolvatur."

societal damage was not excluded as a finalty because each crime in some way disturbed the Church's public order.

On the other hand, a vindictive penalty primarily envisioned punishing the crime and repairing the violated public order of the Church, and secondarily correcting the offender. Hence, a warning was not required prior to a condemnatory sentence imposing a vindictive penalty.[18] Vindictive penalties could be either spiritual or temporal in character while censures usually entailed the deprivation of certain spiritual goods.[19] A vindictive penalty was intended to expiate a crime and did not depend for its continuing force on the cessation of contumacy but rather on the rectification of the violated socio-juridical order of the Church. Common vindictive penalties deprived all the faithful of certain goods (c. 2291) while clerical vindictive penalties concerned only delinquent clerics (c. 2298).

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[18]John Abbo and Jerome Hannan, *The Sacred Canons*, vol. 2, 2nd. ed. [Abbo-Hannan] (St. Louis: B. Herder Book Co., 1960) 814.

[19]*CIC* 17 c. 2215: "Poena ecclesiastica est privatio alicuius boni ad delinquentis correctionem et delicti punitionem a legitima auctoritate inflicta."

CIC 17 c. 2216: "In Ecclesia delinquentes plectuntur:
1° Poenis medicinalibus seu censuris;
2° Poenis vindicativis;
3° Remediis poenalibus et poenitentiis."
Roberti, 265; Augustine, 70-71; Michiels, 2:38-42; Chelodi, 23; Coronata 76-78; Wernz-Vidal, 176, Vermeersch-Creusen, 238.

d) *ferendae or latae sententiae* penalties

Moreover, a penalty could be either *ferendae sententiae*, that is, inflicted by a judge or superior or *latae sententiae*, that is, incurred by the very commission of the offense.[20] Normally, penalties were presumed to be *ferendae sententiae* while *latae sententiae* penalties had to be expressly stated in the law or precept.[21] The aforementioned presumption seemed to be due in part to the first attempt at reforming *latae sententiae* censures by the constitution *Apostolicae Sedis* promulgated by Pius IX in 1869.[22]

As the introduction to *Apostolicae Sedis* indicated, there were so many *latae sententiae* censures that clergy and laity alike questioned their validity and were perplexed

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[20]*CIC* 17 c. 2217, §1: "Poena dicitur:
1° *Determinata*, si in ipsa lege vel praecepto taxative statuta sit; *indeterminata*, si prudenti arbitrio iudicis vel Superioris relicta sit sive praeceptivis sive facultativis verbis;
2° *Latae sententiae*, si poena determinata ita sit addita legi vel praecepto ut incurratur ipso facto commissi delicti; *ferendae sententiae*, si a judice vel Superiore infligi debeat;
3° *A iure*, si poena determinata in ipsa lege statuatur, sive latae sententiae sit sive ferendae; *ab homine*, si feratur per modum praecepti peculiaris vel per sententiam iudicialem condemnatoriam, etsi in iure statuta; quare poena ferendae sententiae, legi addita, ante sententiam condemnatoriam est *a iure tantum*, postea *a iure* simul et *ab homine*, sed consideratur tanquam *ab homine*."

[21]*CIC* 17 c. 2217, §2: "Poena intelligitur semper ferendae sententiae, nisi expresse dicatur eam esse *latae sententiae* vel *ipso facto* seu *ipso iure* contrahi, vel nisi alia similia verba adhibeantur."

[22]For the text of *Apostolicae Sedis*, see Pietro Gasparri, ed., *Codicis Iuris Canonici Fontes*, vol.3 [*Fontes*] (Rome: Typis Polyglottis Vaticanis, 1933) 24-31.

about their application. While such censures served the valid function of safeguarding ecclesiastical discipline and curbing or correcting abuses, changes in times and customs had made some of such censures inappropriate or inapplicable. *Apostolicae Sedis* indicated which *latae sententiae* censures were to be retained, modified or abrogated.[23] What *Apostolicae Sedis* did for *latae sententiae* censures, the 1917 code did for the whole of the

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[23]Ibid., 24:"Apostolicae Sedis moderationi convenit, quae salubriter veterum canonum auctoritate constituta sunt, sic retinere, ut, si temporum rerumque mutatio quidpiam esse temperandum prudenti dipensatione suadeat, eadem Apostolicae Sedes congruum supremae suae potestatis remedium ac providentiam impendat. Quamobrem cum animo Nostro iampridem revolveremus, ecclesiasticas censuras, quae per modum latae sententiae, ipsoque facto incurrendae ad incolumitatem ac disciplinam ipsius Ecclesiae tutandam, effraenemque [sic] improborum licentiam coercendam et emendandam sancte per singulas aetates indictae ac promulgatae sunt, magnum ad numerum sensim excrevisse; quasdam etiam, temporibus moribusque mutatis, a fine atque causis, ob quas impositae fuerant, *vel a pristina utilitate atque opportunitate excidisse* [italics mine]; eamque ob rem non infrequentes oriri sive in iis, quibus animarum cura commissa est, sive in ipsis fidelibus dubietates, anxietates, angoresque conscientiae; Nos eiusmodi incommodis occurrere volentes, plenam earumdem recensionem fieri, Nobisque proponi iussimus, ut, diligenti adhibita consideratione, statueremus, quasnam ex illis servare ac retinere oporteret, quas vero moderari, aut abrogare congrueret."

As Adams commented, "[t]he Constitution in its reduction of the number of the automatic censures from Bull *Coena* concretely affirmed the principle and criterion which was to be at work in its entire effort at reform: the usefulness and appropriateness of these automatic penalties were to be the determining factor." Edward Adams, *The Automatic Penalty: A Chronological, Juridical Study* [Adams] (Rome: apud Pont. Universitatem S. Thomae, 1975) 68.

The constitution did not address the issue of *ferendae sententiae* penalties Obsolete *ferendae sententiae* penalties were reformed by the 1917 code.

Church's penal legislation.[24] In short, penalties were presumed to be *ferendae sententiae* unless expressly stated as *latae sententiae*.[25] We now compare and contrast briefly *latae* and *ferendae sententiae* penalties because these two notions will figure prominently in later discussions about the legitimacy and appropriateness of the former.

B. *Latae and Ferendae Sententiae* Penalties Compared and Contrasted.

1. Comparison

Certain general features of the penal system in the 1917 code applied to both *latae* and *ferendae sententiae* penalties. Thus, for both to have been operative, there had to be an external violation of a law or precept which was morally imputable and to which a penalty had been attached at least in an indeterminate way.[26] In addition, circumstances that aggravated or extenuated imputability, with some qualifications applied to both *latae* and *ferendae*

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[24]Adams, 75; Vermeersch-Creusen, 239; Roberti, 268-269, 276-283; Coronata, 79; Augustine, 74-75; Michiels, 2:50-62.

[25]Chelodi noted that *latae sententiae* penalties are "*inter odiosa odiosissima*" but like most commentators he did not explain why. At least one reason may be that *latae sententiae* penalties had been so excessive in the past and attached to almost any kind of crime that the legislator wanted to make sure that they were used only for the most odious crimes in the 1917 code. Chelodi, 23.

[26]*CIC* 17 c. 2195, §1.

sententiae penalties.[27] Generally speaking the Church had the right to establish all such penalties, and those who were responsible for their establishment and application, notably bishops, were to do so as shepherds not as tyrants (*pastores non percussores*).[28] Moreover, lower level legislators were authorized to attach a penal sanction, be it *latae* or *ferendae sententiae*, to their own laws as well as to the laws of higher authorities.[29] Finally, the only real similarity in their respective remission was the fact that both kinds of censures were absolved and both kinds of vindictive penalties were dispensed.

2. Contrast

By contrast, the most notable differences between *latae* and *ferendae sententiae* penalties affected their application and remission. In that connection *latae* and *ferendae sententiae* penalties differ in at least five ways. The first and perhaps most obvious difference is a terminological one. Second, *ferendae sententiae* penalties were inflicted by a condemnatory sentence; *latae sententiae* penalties were incurred by the very commission of the offense and might be denoted as such by a declaratory

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[27] *CIC* 17 cc. 2199-2211; c. 2218, §2; c. 2228. For example one may note that children were not immune from *ferendae sententiae* penalties according to *CIC* 17 c. 2230, but the judge or superior was to consider their tender age (*CIC* 17 c. 2204).

[28] *CIC* 17 c. 2214.

[29] *CIC* 17 c. 2220.

sentence or decree. Third, *ferendae sententiae* censures but not vindictive penalties required a canonical warning; however, the canonical warning for a *latae sententiae* censure was said to have been contained in the very law or precept to which said penalty had been attached. Fourth, the range of discretion allowed a superior or judge to impose a *ferendae sententiae* penalty or to declare a *latae sententiae* penalty differed. Fifth, the code allowed ordinaries (c. 198) a greater latitude to remit *latae sententiae* penalties; remitting *ferendae sententiae* penalties was restricted, generally speaking, to the ordinary whose court imposed the penalty or to whose court the case came by appeal. Each of the aforementioned contrasts will be considered in turn below.

a) terminology

The first contrast is in the terminology used in the 1917 code. If a penalty were specified by the law itself, it was called a determined penalty. A *latae sententiae* penalty was always a determined penalty.[30] For example, desecrating the Blessed Sacrament was punished by a *latae sententiae* excommunication.[31] However, a *ferendae*

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[30]*CIC* 17 c. 2217, §1: "Poena dicitur: 1° *Determinata*, si in ipsa lege vel praecepto taxative statuta sit; *indeterminata*, si prudenti arbitrio iudicis vel Superioris relicta sit sive praeceptivis sive facultativis."

[31]*CIC* 17 c. 2320: "Qui species consecratas abiecerit vel ad malum finem abduxerit, est suspectus de haeresi; incurrit in excommunicationem latae sententiae specialissimo modo Sedi

sententiae penalty could be either a determined penalty as just described or an undetermined penalty if it were left to the prudence of either a judge or superior to have inflict it, be it preceptive or optional terms. For example, defending condemned doctrines was punished by a preceptive determined *ferendae sententiae* penalty.[32] Fraud in a petition for a rescript was punished by an optional undetermined *ferendae sententiae* penalty.[33] Moreover, a *latae sententiae* penalty was incurred by the very commission of the offense; a *ferendae sententiae* penalty had to be inflicted by a judge or superior.[34]

The 1917 code also differentiated between an *a iure* and

Apostolicae reservatam; est ipso facto infamis, et clericus praeterea est deponendus."

[32]*CIC* 17 c. 2317: "Pertinaciter docentes vel defendentes sive publice sive privatim doctrinam, quae Apostolica Sede vel a Concilio Generali damnata quidem fuit, sed non uti formaliter haeretica, arceantur a ministerio praedicandi verbum Dei audiendive sacramentales confessiones et a quolibet docendi munere, salvis aliis poenis quas sententia damnationis forte statuerit, vel quas Ordinarius, post monitionem, necessarias ad reparandum scandalum duxerit."

[33]*CIC* 17 c. 2361: "Si quis in precibus ad rescriptum a Sede Apostolica vel a loci Ordinario impetetrandum fraude vel dolo verum reticuerit aut falsum exposuerit, potest a suo Ordinario pro culpae gravitate puniri, salvo praescripto can. 45, 1054."

[34]*CIC* 17 c. 2217, §1: "Poena dicitur:
1.° *Determinata*, si in ipsa lege vel praecepto taxative statuta sit; *indeterminata*, si prudenti arbitrio iudicis vel Superioris relicta sit sive praeceptivis sive facultativis.
2°. *Latae sententiae*, si poena determinata ita sit addita legi vel praecepto ut incurratur ipso facto commissi delicti; *ferendae sententiae*, si a iudice vel Superiore infligi debeat."

ab homine penalty.[35] A penalty was considered to have been *a iure* if a determined penalty was established by the law itself, whether it be *latae* or *ferendae sententiae*. A penalty was considered to be *ab homine* if it was imposed by way of particular precept or by a judicial condemnatory sentence, even though already established in law. Wherefore, a *ferendae sententiae* penalty attached to the law was considered *a iure* before a condemnatory sentence had been issued. After the condemnatory sentence had been issued, the *ferendae sententiae* penalty was both *a iure* and *ab homine*, but it was considered as *ab homine*. That distinction affected the remission of both *latae sententiae* and *ferendae sententiae* penalties. To repeat, penalties were understood to be *ferendae sententiae* unless the law or precept to which they were attached expressly stated that they were *latae sententiae*.[36]

b) sentence

A second contrast between *latae* and *ferendae sententiae* penalties was in the imposition or declaration of the

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[35] *CIC* 17 c. 2217, §1, 3°: "*A iure*, si poena determinata in ipsa lege statuatur, sive latae sententiae sit sive ferendae; *ab homine*, si feratur per modum praecepti peculiaris vel per sententiam iudicialem condemnatoriam, etsi in iure statuta; quare poena ferendae sententiae, legi addita, ante sententiam condemnatoriam est *a iure tantum*, postea *a iure* simul et *ab homine*, sed consideratur tanquam *ab homine*."

[36] *CIC* 17 c. 2217, §2: "Poena intelligitur semper ferendae sententiae, nisi expresse dicatur eam esse *latae sententiae* vel *ipso facto* seu *ipso iure* contrahi, vel nisi alia similia verba adhibeantur."

sanction by either a condemnatory or a declaratory sentence. As one author noted,

> In the condemnatory sentence the court itself inflicts the penalty of the law, and for that reason these penalties are called *ferendae sententiae* (penalties to be inflicted by sentence of the court). In the declaratory sentence, the law itself has already inflicted the penalty immediately on the breaking of the law, and the court in which the offender is arraigned merely declares that it has found the person guilty, and that therefore he [or she] has incurred a certain penalty of the law. These penalties are called *latae sententiae* (sentence already pronounced).[37]

c) canonical warning

The third contrast between the aforementioned penalties was the manner in which the canonical warning was issued. For *ferendae sententiae* censures, the general rule was that no penalty was to be inflicted without the threat of a canonical penalty;[38] no such warning was necessary for *ferendae sententiae* vindictive penalties.[39] Moreover, only

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[37]Woywod 1, 22. For the implications of a declaratory sentence on an excommunicated or suspended person, see *CIC 17* canons 2264, 2266, and 2284.

[38]CIC 17 c. 2233, §2: "Licet id legitime constet, si agatur de infligenda censura, reus reprehendatur ac moneatur ut a contumacia recedat ad normam can. 2242, §3, dato, si prudenti eiusdem iudicis vel Superioris arbitrio casus id ferat, congruo ad resipiscentiam tempore; contumacia persistente, censura infligi potest."

[39]*CIC* 17 c. 2222, §1: "Licet lex nullam sanctionem habeat, legitimus tamen Superior potest illius trangressionem, etiam sine praevia poenae comminatione, aliqua iusta poena punire, si scandalum forte datum aut specialis trangressionis gravitas id ferat; secus reus puniri nequit, nisi prius monitus fuerit cum comminatione poenae latae vel ferendae sententiae in casu trangressionis, et nihilominus legem violaverit." Abbo-Hannan, 814.

in the case where the crime was proven was the penalty warranted. Generally speaking, the legislator considered the faithful sufficiently warned when a law or precept had attached to it a *latae sententiae* penalty.[40] According to canon 2143, the competent authority had to issue a formal canonical warning in the presence of the chancellor or another official of the curia or in front of two witnesses or by registered letter.[41] An authentic record of the communication of the warning and its tenor was to be preserved in the acts of the case.[42] Here, the tenor of the warning would have included an admonition to the offender to stop the criminal conduct or to do penance for the committed crime as well as repair the damage and scandal done.[43] A person who evaded a warning was considered

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The aforementioned canon was a very specialized instance of a vindictive penalty.

[40]Felix Cappello, *De censuris*, 4th ed., [Cappello, *De censuris*] (Turin: Marietti, 1950) 34: "Ubi agitur de censuris *latae sententiae*, monitiones *distinctae* sive *speciales* non sunt praemittendae, nam lex vel praeceptum per se monitionem iam continent." For a standard treatment of censures see ibid.

[41]*CIC* 17 c. 2143, §1: " Quoties monitiones praescribuntur, hae fieri debent vel oretenus coram cancellario aliove officiali Curiae aut duobus testibus, vel per epistolam ad normam can. 1719."

[42]*CIC* 17 c. 2143, §2: "Peractae monitionis eiusque tenoris documentum authenticum in actis servetur."

[43]*CIC* 17 c. 2242, §2: "Si agatur de censuris ferendae sententiae, contumax est qui, non obstantibus monitionibus de quibus in can 2233, §2, a delicto non desistit vel patrati delicti poenitentiam cum debita damnorum et scandali reparatione agere detrectat; ad incurrendam vero censuram latae sententiae sufficit trangressio legis vel praecepti cui sit adnexa latae sententiae

warned.[44] As one author noted:

> Time must be given in order to await the result of the warning, and only after the term granted has expired without the desired result, may contumacy be assumed. If no criminal warning was issued, the sentence, even though valid, is unjust, and recourse or appeal is open to the censured. This warning may, but need not, be repeated.[45]

d) role of the judge or superior

The fourth contrast between penalties is the range of discretion allowed judge or superior to impose a sanction, be it *latae* or *ferendae sententiae*. If the law established a *ferendae sententiae* penalty by using optional terms, it was left to the prudence and conscience of the judge or superior to inflict it or, if the penalty was determinate, to temper it.[46] However, if the penalty were a preceptive one, then ordinarily it had to be inflicted; even then, the conscientious and prudent judge or superior might have delayed imposing it, abstained from doing so, or mitigated a fixed penalty.[47] As for *latae sententiae* penalties, their

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poena, nisi reus legitima causa ab hac excusetur."

[44]*CIC* 17 c. 2143, §3: "Qui impedit quominus monitio ad se perveniat, habeatur pro monito."

[45]Augustine, 117.

[46]*CIC* 17 c. 2223, §2: "Si lex in statuenda poena ferendae sententiae facultativis verbis utatur, committitur prudentiae et conscientiae iudicis eam infligere, vel, si poena fuerit determinata, temperare."

[47]*CIC* 17 c. 2223, §3: "Si vero lex utatur verbis praeceptivis, ordinarie poena infligenda est; sed conscientiae et prudentiae iudicis vel superioris committitur:
1.° Poenae applicationem ad tempus magis opportunum differre,

declaration was generally left to the prudence of the superior. However, if an interested party insisted or the public good demanded it, the declaratory sentence had to be issued.[48]

e) remission

The fifth contrast between penalties concerns the competent authority to remit *latae* and *ferendae sententiae* penalties.

> The Code gives faculty to Ordinaries (cfr. canon 198 on the persons comprehended by that term) to remit penalties *latae sententiae* only; the penalties *ferendae sententiae* are considered as penalties *ab homine* (cfr. canon 2217), which can be remitted only by the Ordinary whose court imposed the penalty, or the Ordinary to whose court the case came by appeal.[49]

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si ex praepropera rei punitione maiora mala eventura praevideantur;

2.° A poena infligenda abstinere, si reus perfecte fuerit emendatus, et scandalum reparaverit, aut sufficienter punitus sit vel puniendus praevideatur poenis auctoritate civili sancitis;

3.° Poenam determinatam temperare vel loco ipsius aliquod remedium poenale adhibere aut aliquam poenitentiam iniungere, si detur circumstantia imputabilitatem notabiliter minuens, vel habeatur quidem rei emendatio aut inflicta a civili auctoritate castigatio, sed iudex vel Superior opportunam praeterea ducat mitiorem aliquam punitionem."

Augustine, 73: "Preceptive or obligatory terms in general are *debet puniri, puniendus est, privandus, declarandus* or *declaretur infamis*; facultative or arbitrary terms: *pro gravitate culpae, ad arbitrium superioris*, etc."

[48]*CIC* 17 c. 2223, §4: "Poenam latae sententiae declarare generatim committitur prudentiae Superioris; sed sive ad instantiam partis cuius interest, sive bono communi ita exigente, sententia declaratoria dari debet."

[49]Woywod, 426. For authors confirming this opinion , see ibid., n. 16. However, one author noted an exception to this rule: "in an exceptional case (where the censure, though public, is not known in the particular place, or where the penitent can really be disposed by the confessor to feel the urgent need of absolution and to

II. The Establishment Of Penalties

A. The Church's proper right to establish penalties

The Church was viewed as having a constitutional and proper right independent of any human authority to coerce its delinquent subjects by both spiritual and temporal penalties.[50] As one commentary noted, "crimes that violate[d] ecclesiastical law [were] prosecuted by ecclesiastical authority as the nature of the crime, and, we may add, the nature of the Church as an autonomous society require[d]."[51] First and foremost, the 1917 code affirmed that the Church was founded by Christ as a visible autonomous society endowed with the means to achieve its appointed end.[52] "She may tolerate abuses, as she tolerated persecution but she can never allow the substantial and necessary powers she received from her founder to slip from her."[53] This power was independent of

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promise recourse to the superior) canon 2254 can be extended by necessity and analogy (cf. c. 20) to censures *ab homine* which are *ferendae sententiae*." Bouscaren-Ellis, 891-892.

[50]*CIC* 17 c. 2214, §1: "Nativum et proprium Ecclesiae ius est, independens a qualibet humana auctoritate, coercendi delinquentes sibi subditos poenis tum spritualibus tum etiam temporalibus."

[51]Augustine, 19.

[52]Ibid., 59; Michiels, 2:6-10; Coronata, 69-70.

[53]Augustine, 62. Such statements were common among the commentators, for example, see Vermeersch-Creusen, 235-236: "Quod Ecclesia ius nativum, i. e. a divino Fundatore collatum et proprium seu ab alia potestate non mutuatum et qualibet potestate independens, possidet 'devios contumacesque exteriore iudicio ac salubribus poenis coercendi atque cogendi' [Pius VI, *Auctorem*

any human power, namely, the authority of civil society.[54] At least one constitutive element of the Church was the binding character of obligations which membership imposed.[55] Thus, the Church properly used penalties as means to achieve its spiritual purpose; but since humans are composed of body and soul, the Church was not limited solely to spiritual means in dealing with her delinquent members.[56] As a consequence of the body-soul composition of humans, penalties such as excommunications were primarily spiritual weapons while temporal punishments could be those such as fines or detention in a particular place.

Not only did the 1917 code articulate the right of the Church to establish penalties but it also articulated the values that should undergird penal discipline. Bishops, in particular, were charged to be pastors not tyrants in relationship to the people committed to their care. They were to persuade, admonish, reprove, entreat, and rebuke their flocks to turn aside from evil and to strive after goodness by benevolent exhortations rather than by threats. But if a bishop were compelled to use punitive power, he

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fidei, prop. 5] est doctrina fidei."

[54]For the controversy about the Church's independence from human authority see Augustine, 61 and Chelodi, 2-3.

[55]Vermeersch-Creusen, 235-236; Wernz-Vidal, 1-16.

[56]Augustine, 61.

needed to be gentle yet firm.[57]

B. Those who establish penalties

Legislators were authorized to attach a penal sanction to their laws.[58] The purpose of attaching a penalty to a law was to challenge a delinquent to amend his or her ways, to repair violated public order and to curb further crimes.[59] Competent authorities who could establish sanctions included the pope, a diocesan bishop, an abbot, a vicar apostolic, major superiors of clerical religious institutes for their subjects, ecumenical councils, and

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[57]*CIC* 17 c. 2214, §2: "Prae oculis autem habeatur monitum Conc. Trid., sess. XII, *de ref.*, cap. I: 'Meminerint Episcopi aliique Ordinarii se pastores non percussores esse, atque ita praeesse sibi subditos oportere, ut non in eis dominentur, sed illos tamquam filios et fratres diligant elaborentque ut hortando et monendo ab illicitis deterreant, ne, ubi deliquerint, debitis eos poenis coercere cogantur; quos tamen si quid per humanam fragilitatem peccare contigerit, illa Apostoli est ab eis servanda praeceptio ut illos arguant, obsecrent, increpent in omni bonitate et patientia, cum saepe plus erga corrigendos agat benevolentia quam austeritas, plus exhortatio quam comminatio, plus caritas quam potestas; sin autem ob delicti gravitatem virga opus erit, tunc cum mansuetudine rigor, cum misericordia iudicium, cum lenitate severitas adhibenda est, ut sine asperitate disciplina, populis salutaris ac necessaria, conservetur et qui correcti fuerint, emendentur aut, si resipiscere noluerint, ceteri, salubri in eos animadversionis exemplo, a vitiis deterreantur." Vermeersch-Creusen, 236-237; Coronata, 69-70,

[58]"The legislator means [in *CIC* 17]:
a. For the whole Church, the Supreme Pontiff (cc. 218, 227);
b. For several provinces, the plenary council (c.281);
c. For one province, the provincial council (c.283);
d. For a diocese, the Bishop in the synod or out of it (c.335);
e. For a vacant see, the Vicar Capitular (cc.431, 432), or, where chapters do not exist, the Administrator appointed by the diocesan consultors (cf. c. 427)." Bouscaren-Ellis, 32. For similar lists of penal legislators see Michiels, 2:144-146; Roberti, 78-79.

[59]Michiels, 2:27-33.

Roman congregations with a mandate from the pope and a vicar general with a special mandate.[60] Those who had the power to make laws or impose precepts, could attach penalties to their laws or precepts. The aforementioned competent authorities were empowered either to attach penalties to their own or existing laws or to increase penalties already attached to divine or ecclesiastical laws if circumstances warranted it.[61] No penalty could be attached to the violation of a law unless it were specified in the law or a grievously scandalous violation of the law prompted otherwise.[62] A canonical warning was necessary for the infliction of *ferendae sententiae* censures but not necessarily for *ferendae sententiae* vindictive penalties. The law itself established a canonical warning if the

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[60] *CIC* 17 c. 2220: "§1: Qui pollent potestate leges ferendi vel praecepta imponendi, possunt quoque legi vel praecepto poenas adnectere; qui iudiciali tantum, possunt solummodo poenas, legitime statutas, ad normam iuris applicare;
"§2: Vicarius Generalis sine mandato speciali non habet potestatem infligendi poenas." See also *CIC* 17 c. 198 and Bouscaren-Ellis, 137; Chelodi, 29.

[61] *CIC* 17 c. 2221: "Legislativam habentes potestatem, possunt intra limites suae iurisdictionis, non solum legem a se vel a decessoribus latam, sed etiam, ob peculiaria rerum adiuncta, legem tam divinam, quam ecclesiaticam a superiore potestate latam, in territorio vigentem, congrua poena munire aut poenam lege statutam aggravare."

[62] *CIC* 17 c. 2222, §1: "Licet lex nullam sanctionem appositam habeat, legitimus tamen Superior potest illius trangressionem, etiam sine praevia poenae comminatione, aliqua iusta poena punire, si scandalum forte datum aut specialis trangressionis gravitas id ferat; secus reus puniri nequit, nisi prius monitus fuerit cum comminatione poenae latae vel ferendae sententiae in casu trangressionis, et nihilominus legem violaverit."

penalty attached was *latae sententiae*.

C. Those subject to penalties

As a general rule, those subject to laws or precepts were subjected to the attached penalties unless expressly exempt.[63] The universal law bound everywhere; particular law bound those who had a domicile or quasi-domicile in the respective dioceses, provinces, and countries.[64] Those exempt from penalties included the supreme legislator and cardinals unless expressly mentioned in the law. Diocesan and titular bishops were not subject to *latae sententiae* penalties of suspension or interdict unless they were expressly mentioned;[65] moreover, heads of state, their

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[63] *CIC* 17 c. 12: "Legibus mere ecclesiasticis non tenentur qui baptismum non receperunt, nec baptizati qui sufficienti rationis usu non gaudent, nec qui, licet rationis usum assecuti, septimum aetatis annum nondum expleverunt, nisi aliud iure expresse caveatur."

CIC 17 c.2226, §1: "Poenae adnexae legi aut praecepto obnoxius est qui lege aut praecepto tenetur, nisi expresse eximatur."

[64] *CIC* 17 c.13: "§1 Legibus generalis tenentur ubique terrarum omnes pro quibus latae sunt.

§2 Legibus conditis pro peculiari territorio ii subiiciuntur pro quibus latae sunt quique ibidem domicilium vel quasi-domicilium habent et simul actu commorantur, firmo praescripto can. 14."

[65] "The exemption from these penalties dates back to Pope Innocent IV (1243-1254), who granted it to Bishops in order that they might not be too readily prevented from discharging the duties of their office. Lega explained the non-inclusion of excommunication along with the penalties of suspension and interdict in this exemption of Pope Innocent IV on the ground that the penalty of excommunication at that time was inflicted only on crimes so enormous that not even the dignity of Bishops was sufficient to warrant their exemption from the incurring of the penalty of excommunication." Francis McElroy, *The Privileges of Bishops*, Canon Law Studies No. 282, (Washington, D. C.: Catholic

spouses and children were to be judged by the Roman pontiff.[66]

Exempt religious, however, were subject to the universal law and to the coercive power of the local Ordinary only to the extent that it was expressed in the law.[67] Non-exempt religious were subject to universal and particular penalties unless their approved constitutions stated otherwise regarding the ordinary.[68] *Peregrini* and *vagi* were subject to penalties according to the norms of canon 14.[69]

University of America, 1951) 59.

[66]*CIC* 17 c. 2227: "§1. Poena nonnisi a Romano Pontifice infligi aut declarari potest in eos de quibus in can 1557, §1.
§2. Nisi expresse nominentur, S. R. E. Cardinales sub lege poenali non comprehenduntur, nec Episcopi sub poenis latae sententiae suspensionis et interdicti."
CIC 17 c. 1557, §1: "Ipsius Romani Pontificis dumtaxat ius est iudicandi:
1.° Eos qui supremum tenent populorum principatum horumque filios ac filias eosve quibus ius est proxime succedendi in principatum;
2.° Patres Cardinales;
3.° Legatos Sedis Apostolicae, et in criminalibus Episcopos, etiam titulares." For those subject to penal laws, see Coronata 110-116; Roberti, 80-81; Vermeersch-Creusen, 248-249; Wernz-Vidal, 51-54.

[67]CIC 17 c. 615: "Regulares, novitiis non exclusis, sive viri sive mulieres, cum eorum domibus et ecclesiis, exceptis iis monialibus quae Superioribus regularibus non subsunt, ab Ordinarii loci iurisdictione exempti sunt, praeterquam in casibus a iure expressis." See also Augustine, 94; Bouscaren-Ellis, 301-307; Vermeersch-Creusen, I:587-589.

[68]Augustine, 95.

[69]*CIC* 17 c. 14: "§1. Peregrini:
1.° Non adstringuntur legibus particularibus sui territorii quandiu ab eo absunt, nisi aut earum trangressio in proprio

D. A warning about the establishment of *latae sententiae* censures and vindictive penalties

Censures and vindictive penalties were established by the aforementioned competent authorities. A *latae sententiae* censure was incurred by transgressing the law to which the said penalty was attached unless moral imputability was diminished. Censures, especially *latae sententiae*, and most especially excommunication, were to be established soberly and with great circumspection.[70] For, "they constitute the very nerve of ecclesiastical discipline."[71] This warning of the Council of Trent regarding the establishment of *latae sententiae* censures indirectly influenced the establishment of all *latae sententiae* penalties.

> Although the sword of excommunication is the nerve of ecclesiastical discipline and very salutary for holding the people in their duty, it is, however, to be used with moderation and great discretion, since experience teaches that if wielded rashly or for trifling reasons, it is more despised than feared and is productive of destruction rather

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territorio noceat aut leges sint personales;
2.° Neque legibus territorii in quo versantur, iis exceptis quae ordini publico consulunt, vel actuum sollemnia determinant;
3.° At legibus generalis tenentur, etiamsi hae suo in territorio non vigeant, minime vero si in loco in quo versantur non obligent.
§2. Vagi obligantur legibus tam generalibus quam particularibus quae vigent in loco in quo versantur."

[70]*CIC* 17 c. 2241, §2 "Censurae, praesertim latae sententiae, maxime excommunicatio, ne infligantur, nisi sobrie et magna cum circumspectione."

[71]Augustine, 119.

than of salvation.[72]

Although the Council of Trent (1545-1563) warned that *latae sententiae* censures were to be used sparingly, it nevertheless increased their number. In 1568, Pius V gave universal and permanent force to his predecessors' bulls *In Coena Domini* which, beginning in the thirteenth century, were issued by the popes on Holy Thursday to excommunicate certain categories of offenders. The result of the legislation of Pius V was to identify those general excommunications with the *latae sententiae* penalty and vice versa. It also gave this rather extensive penal corpus permanent legal standing. In 1770, Clement XIV stopped the practice of proclaiming the bull *In Coena Domini* on Holy Thursday but all previous general excommunications remained in force. In 1869, Pius IX issued the constitution *Apostolicae Sedis* reforming *latae sententiae* censures, which by that time had become so extensive that they could not be adequately dealt with even by professional canonists. The 1917 code reformed not only *latae sententiae* censures but

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[72]Conc. Trid. sess. XXIII, c. 3 de ref.: "'Quamvis excommunicationis gladius nervus sit ecclesiasticae disciplinae et ad continendos in officio populos valde salutaris, sobrie tamen et cum magna circumspectione exercendus est: cum experientia doceat si temere, aut levibus ex rebus incutiatur, magis contemni, quam formidari, et perniciem potius parere quam salutem.'" Roberti, 317, n. 3; trans. H. J. Schroeder, *Canons and Decrees of the Council of Trent* (St. Louis: B. Herder Book Co., 1941) 235.

For authors who quoted or cited but very rarely commented on the aformentioned passage see Cappello, *De Censuris*, 9; Coronata, 151; Vermeersch-Creusen, 259; Michiels, 3:13-17.

the whole corpus of the Church's penal legislation.[73]

Although the Tridentine text alluded to in canon 2241, §2 dealt primarily with excommunications and not with *latae sententiae* penalties in general, the historical summary outlined above indicates how excommunications and *latae sententiae* penalties had practically become synonymous. The 1917 code retained a fair number of *latae sententiae* censures and hence its commentators could not emphasize enough that *latae sententiae* censures ought to "be used sparingly and for grave, canonical and approved reasons only."[74] Those commentators rarely spelled out those reasons canonically or philosophically but rather relied on the history of the *latae sententiae* penalties for their admonitions about them.[75] As a final note, if a *latae sententiae* censure were also to be reserved, it had to be expressly stated as such in the law or precept.[76]

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[73]Michiels, 3:13-17; Adams, 33-34, 53, 73.

[74]Augustine, 119.

[75]Ibid.; Michiels, 3:13-17; Cappello, *De Censuris*, 1-10; Vermeersch-Creusen, 259; Chelodi, 39-40; Coronata, 151, n.3; Roberti, 317; Bouscaren-Ellis, 881; Woywod, 427.

[76]For at least two opinions on the reservation of *latae sententiae* censures see Cappello, *De censuris*, 60 and Augustine, 110. Cappello stated: "Fundamentum reservationis est bonum publicum, non poena, ut casus graviores scil. iudicio Superioris subiiciuntur. Unde reservationes in loco et tempore pro quibus statutae sunt, valent pro omnibus, etiam pro iis qui delictum patrarunt ubi et quando non vigebant... censura *latae sententiae* semper praesumitur non reservata, nisi in lege aut praecepto id *expresse* et *clare* dicatur." Augustine claimed that reservation was not just a matter of restricting jurisdiction but a quetion of

III. The application Of Penalties

A. Those who apply penalties

The application of *latae sententiae* penalties presupposed a careful analysis of each case by competent authorities. The analysis focused on the wording of the law and the relevance of factors affecting moral imputability. These factors may have excused, mitigated or aggravated moral imputability. Moreover, since *latae sententiae* penalties by their very definition were "self-applying,"[77] those who possibly incurred them also had to consider such factors. But first, we consider the role of the judge or superior in declaring *latae sententiae* penalties and the factors affecting moral imputability.

As already pointed out, those with the power to attach *latae sententiae* penalties to their laws or precepts were also able to apply them. A judge, on the other hand, could not establish penalties. As a rule it was left to the discretion of the superior or judge to declare a *latae*

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highlighting more odious offenses.

CIC 17 c. 2245, §4: "Censura latae sententiae non est reservata, nisi in lege vel praecepto id expresse dicatur; et in dubio sive iuris sive facti reservatio non urget."

[77]Rosalio Castillo Lara, "Algunas reflexiones sobre la futura reforma del Libro V *CIC*," [Castillo-Lara] *Salesianum* 23 (1961) 324, n. 36: "El término es improprio, porque no es el delincuente quien se aplica la pena. Es la misma ley, que a más de conminar le pena (función legislativa) contiene en sí misma, ya dictada, la sentencia y la ejecución (funció judicial), supuesta la plena realización del delito de parte del delincuente. Pero como no interviene juez ni superior es más gráfico hablar de *autoaplicaión*."

sententiae penalty. But such authorities had to declare the penalty if an interested party demanded it or the public welfare required it.[78] A judge or superior had to exercise discretion in the case of multiple penalties,[79] to observe the rules of procedure for a judicial sentence and for a particular precept[80] and to attend to those whom the code exempted from penalties.[81]

Furthermore, a judge or superior had to attend to the abrogation of laws or precepts and thus to the penalties attached to them. If a later law abrogated a former one, but the crime had been committed before the later law was passed, the crime was punishable according to law which was

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[78]*CIC* 17 c. 2223: "§4. Poenam latae sententiae declarare generatim committitur prudentiae Superioris; sed sive ad instantiam partis cuius interest, sive bono communi ita exigente, sententia declaratoria dari debet."
For the rules for inflicting *ferendae sententiae* penalties see CIC 17 c. 2223, §1-3.

[79]*CIC* 17 c. 2224: "§1. Ordinarie tot poenae quot delicta.
§2. Si tamen propter numerum delictorum nimius esset poenarum infligendarum cumulus, prudenti iudicis arbitrio relinquitur aut poenam omnium graviorem infligere, addita, si reus ferat, aliqua poenitentia vel remedio poenali, aut poenas intra aequos terminos moderari, habita ratione numeri et gravitatis delictorum.
§3. Si poena constituta sit tum in conatum delicti tum in delictum consummatum, hoc admisso, infligi tantum debet poena in consummatum delictum statuta."

[80]*CIC* 17 c. 2225: "Si poena declaretur vel infligatur per sententiam iudicialem, serventur canonum praescripta circa sententiae iudicialis pronuntiationem; si vero poena latae vel ferendae sententiae inflicta sit ad modum praecepti particularis, scripto aut coram duobus testibus ordinarie declaretur vel irrogetur, indicatas poenas causis, salvo praescripto can. 2193."

[81]*CIC* 17 c. 12 and c. 2226, §1.

more favorable to the offender.[82] However, there were two exceptions to this provision. First, a censure already contracted remained even if the former law had been abrogated.[83] Second, should a superior have gone out of office, the offender was still held by the incurred penalty, unless it was expressly stated otherwise.[84] We turn now to factors involved in the application of penalties

B. Factors in applying penalties

1. Objective element and subjective element

a) objective element

First of all, the application of penalties involved an objective element and a subjective element.[85] The objective element was the object and gravity of the law itself. The first concern in the application of penalties was the protection of the public order. Yet a judge or superior also needed to apply penalties with a sense of

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[82] *CIC* 17 c. 2226, §2: "Licet lex poenalis posterior abroget anteriori, si tamen delictum, quando lex posterior lata est, iam commissum erat, applicanda est lex reo favorabilior." For a discussion of "in poenis benignior est interpretatio facienda" (CIC 17 c. 2219, §1) see Michiels, 2:113-135 in general and 2:132-135 on *latae sententiae* penalties in particular.

[83] *CIC* 17 c. 2226, §3: "Quod si lex posterior tollat legem vel poenam tantum, haec statim cessat, nisi agatur de censuris iam contractis."

[84] *CIC* 17 c. 2226, §4: "Poena reum ubique terrarum tenet, etiam resoluto iure Superioris, nisi aliud expresse caveatur."

[85] For a discussion of the objective and subjective elements of the law, see Augustine, 76-77; Vermeersch-Creusen, 242; Chelodi, 24; Roberti, 275-276; Coronata, 94-95; Michiels 1:63-125; Wernz-Vidal, 68-69.

proportion in terms of the crime and to consider the quality and quantity of the imputability, scandal, or damage involved. In this regard, a *latae sententiae* penalty was attached to more serious crimes. Such penalties were more serious than *ferendae sententiae* penalties, be they determinate or indeterminate, since *latae sententia* penalties were incurred by the very commission of the offence without judicial or administrative intervention.[86]

b) subjective element

The subjective element to be taken into account in applying penalties concerned the status of the offender and the circumstances surrounding the offense committed. Thus a judge or superior needed to consider such factors as the age, knowledge, education, sex, condition, and the state of mind of the delinquent; the end intended; the dignity of both the offender and the offended; the time and place of the crime; the degree of passion or fear involved; the possible repentance of the delinquent and possibly curbing future crimes; other subjective elements might also be considered.[87] All of the aforementioned subjective

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[86] Roberti, 269: "Plerumque poenis latae sententiae plectuntur crimina graviora. Poena latae sententiae habenda est exceptionalis, quia praescindit a ministerio iudicis, et gravior est quam poena ferendae sententiae, quia infallibiliter incurritur eodem momento commissi criminis."

[87] *CIC* 17 c. 2218, §1: "In poenis decernendis servetur aequa proportio cum delicto, habita ratione imputabilitatis, scandali et damni; quare attendi debent non modo obiectum et gravitas legis, sed etiam aetas, scientia, institutio, sexus, conditio, status

elements will be treated in somewhat greater detail.

The aforementioned subjective elements touched upon the infliction of *ferendae sententiae* penalties or the incurring of *latae sententiae* penalties. Whatever excused from complete or grave guilt excused from either *ferendae* or *latae sententiae* penalties even in the external forum if the excuse were proved there.[88] Moreover, what was valid in the external forum was valid in the internal forum but not conversely. Cappello explained the reason for this provision. There is a threefold purpose of a censure, namely, 1) the public welfare of the Church, 2) the avenging of the crime, and 3) the reparation of scandal or damage.[89] These purposes could be more efficaciously obtained and urged if the absolution given in the internal forum were considered insufficient for the external forum.[90]

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mentis deliquentis, dignitas personae quae delicto offenditur, aut quae delictum committit, finis intentus, locus et tempus quo delictum commissum est, num ex passionis impetu vel ob gravem metum delinquens egerit, num eum delicti poenituerit eiusdemque malos effectus evitare ipse studuerit, aliaque similia."

[88]*CIC* 17 c. 2218, §2: "Non solum quae ab omni imputabilitate excusant, sed etiam quae a gravi, excusant pariter a qualibet poena tum latae tum ferendae sententiae etiam in foro externo, si pro foro externo excusatio evincatur."

[89]Cappello, *De censuris*, 2, 62.

[90]Ibid., 86: "Absolutio in foro EXTERNO valet pro *utroque* foro; data in INTERNO, valet *plene* et *absolute* pro foro *interno*; et etiam pro *externo*, licet non plene et absolute; quatenus ita absolutus, remoto scandalo, potest uti talem se habere in actibus fori externi."

c) mutual injury

Another element the judge or superior needed to consider in applying penalties was mutual injury. The fact of mutual injury might have extinguished or mitigated a penalty if it had been proportional on both sides. However, if the mutual injury had not been proportional, the penalty for the more injured party was mitigated.[91] For example, two priests might have defamed each other but since both were of the same canonical status and the injury to each was the same any penalty would be either extinguished or mitigated. Yet, if a bishop and a priest defamed one another, the more injured party could claim a mitigation of the penalty due to the inequality of their canonical status.[92]

2. The terms of the law

Not only had a judge or superior to consider the objective element and subjective element of the law, he also had to pay close attention to the terms the law employed for *latae sententiae* penalties. All penalties were presumed to be *ferendae sententiae* unless the terms "*latae sententiae*,"

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[91]*CIC* 17 c. 2218, §3: "Mutua iniuria compensatur, nisi una pars propter maiorem iniuriae ab eadem illatae gravitatem damnari debet, deminuta, si casus ferat, poena."

[92]For a discussion on canonical status within the hierarchy see, Bouscaren-Ellis, 98-100.

"*ipso iure*," "*ipso facto*" or similar terms were used.[93] However much the 1917 code strove for precision by the use of those terms, there were still some questions about the "similar terms" used to indicate *latae sententiae* penalties. Michiels did the most extensive research not only on the aforementioned explicit terms used for *latae sententiae* penalties but also on such implicit terms. He claimed that *latae sententiae* penalties were implicit if the verbs used to establish them were conjugated in the present or preterit tense.[94] Thus, the judge or superior needed to pay close

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[93]Roberti noted that *latae sententiae* penalties were indicated explicitly in the 1917 code by the terms 1) "*latae sententiae*" in canons 2319, §1, 2320, 2334, 2339, 2343, §1, 1°, §2, 1°, §3, 2345, 2347, 3°, 2350, §1, 2368, §2, 2388, §1, §2, 2392, 1°; 2) "*ipso iure*"in canons 2217, §2, 2338, §3, 2343, §1, 1°, §2, 2°, 2353, 2354, §1, 2370, 2385, 2394, 1°, 2396, 2398; 3) "*ipso facto*" in canons 2217, §1, 2°, 2232, 2314, §1, 1°, 3°, 2318, §1, 2320, 2322, 1°, 2326, 2327, 2328, 2332, 2333, 2335, 2338, §1, §2, §4, 2351, §1, §2, 2352, 2356, 2357, §1, 2360, §1, 2363, 2366, 2367, §1, 2372, 2373, 2374, 2375, 2386, 2387, 2390, §2, 2391, §1, §3, 2392, 2°, 2393, 2394, 3°, 2395, 2397, 2400, 2402, 2405, 2409, 2410 or 4) "*eo ipso*" in canons 2346 and 2381, 1°. He also noted: "Idem tenendum est cum legislator directe alloquitur delinquentes (e.g. c. 2333: '**interdictum...*incurrunt***'; c. 2371:'**suspensionem *incurrunt***';c.2339:'***contrahunt*...interdictum**'; c. 2398:'**fructus *non facti suos***'; item c. 2403." Idem., 269-270.

"[T]he following expressions certainly designate a penalty *latae sententiae*: "*noverit se esse excommunicatum*," "*habeatur tamquam excommunicatus*," "*eum excommunicatio tenet*," "*subiaceat excommunicationi*," "*maneat excommunicatus.*" Bouscaren-Ellis, 868.

[94]Michiels, 2:63-73; Also ibid., 68: "*[S]i* conjungantur cum verbo temporis praesentis vel praeteriti, habendae sunt poena l.s. certe manifestativae." Michiels goes on to explain that this is so, implicitly but undoubtedly, in the following cases: 1) "Quando verbum substantivum, quo statuitur poena, clare denotat *propriam ipsius legis* vel praecepti *auctoris actionem punitivam actualiter* (momento scilicet quo poenam statuit) *exercitam* ideoque *tempore praesenti vel praeterito* enuntiatam." Ibid., 69; 2) "*Quando verba*, quibus statuitur poena, clare adnotant legis vel praecepti poenalis

attention to the wording of a law or precept that established a *latae sententiae* penalty in order to apply it properly.

If there were a doubt, the proper meaning of the words used in the law[95] was clarified by its authoritative interpretation[96] and, in regard to penal law, its strict

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auctorem *directe alloqui delicti reum tanquam jam condemnatum et poena mulctatum.*" Ibid., 2:70; 3) "*Quando verba*, quibus statuitur poena, ipsum delicti reum immediate afficiunt et *de eo loquuntur tanquam de jam punito.*" Michiels also maintained that the tenses of the verb could be either the passive preterit or the present indicative mood, active or passive; there was some controversy about whether the present subjunctive mood and the imperative implied a *latae sententiae* penalty. Ibid., 71 [italics in original].

[95] *CIC* 17 c. 2228: "Poena lege statuta non incurritur, nisi delictum fuerit in suo genere perfectum secundum proprietatem verborum legis."
CIC 17 c. 2219: "§1. In poenis benignior est interpretatio facienda.
§2. At si dubitetur utrum poena, a Superiore competente inflicta, sit iusta, necne, poena servanda est in utroque foro, excepto casu appellationis in suspensivo.
§3. Non licet poenam de persona ad personam vel de casu ad casum producere, quamvis par adsit ratio, imo gravior, salvo tamen praescripto can. 2231."

[96] *CIC* 17 c. 17: "§1. Leges authentice interpretatur legislator eiusve successor et is cui potestas interpretandi fuerit ab eisdem commissa.
§2. Interpretatio authentica, per modum legis exhibita, eandem vim habet ac lex ipsa; et si verba legis in se certa declaret tantum, promulgatione non eget et valet retrorsum; si legem coarctet vel extendat aut dubiam explicet, non retrotrahitur et debet promulgari.
§3 Data autem per modum sententiae iudicialis aut rescripti in re peculiari, vim legis non habet et ligat tantum personas atque afficit res pro quibus data est."

interpretation.[97] As one author explained:

> If the material facts are doubtful, or if the terms of the law do not with certainty cover a certain case, the offender is not liable for the penalty of the law. If a competent superior has imposed a penalty, and the subject doubts whether the penalty is justified, he is obliged to submit to it both in conscience and in the external forum, for the stability of ecclesiastical discipline and the maintenance of law and order demand that the action of the superior be not frustrated over the doubts of his subject over the justice of the superior's action.[98]

C. Moral Imputability

Moral imputability was an important factor in imposing sanctions in general and in incurring and declaring *latae sententiae* penalties in particular.[99] "Moral imputability" meant ascribing to a free agent praise or blame for his or her deliberate acts. The deliberate act presupposed a deliberate intention.[100] The deliberate intention

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[97]*CIC* 17 c. 19: "Leges quae poenam statuunt, aut liberum iurium exercitium coarctant, aut exceptionem a lege continent, strictae subsunt interpretationi."

[98]Woywod, 415.

[99]*CIC* 17 c. 2199: "Imputabilitas delicti pendet ex dolo delinquentis vel ex eiusdem culpa in ignorantia legis violatae aut in omissione debitae diligentiae; quare omnes causae quae augent, minuunt, tollunt dolum aut culpam, eo ipso augent, minuunt, tollunt delicti imputabilitatem."

[100]"Quae vero habent notitiam, dicuntur seipsa movere, quia in eis est principium non solum ut agant, sed etiam ut agant propter finem. Et ideo cum utrumque sit ab intrinseco principio, scilicet quod agunt, et quod propter finem agunt, horum motus et actus dicuntur voluntarii. Hoc autem importat nomen *voluntarii* quod motus et actus sit a propria inclinatione; et inde est quod voluntarium dicitur esse, secundum definitionem Aristotelis, et Gregorii Nysseni, et Damasceni, non solum *cujus principium est intra*, sed cum additione *scientiae*.

presupposed full knowledge and free will. "Juridic imputability always supposes moral imputabilty, but not vice versa; and the moral imputability it presupposes is that which is the equivalent of a grave sin."[101]

1. Dolus and culpa

The imputability of a crime depended on the deliberate will of an offender to transgress the law (*dolus*)[102] or on the culpability (*culpa*)[103] arising from ignorance of the law or precept violated or from omission of due care. *Dolus* in the external forum was presumed until the contrary was proven.[104] *Dolus* presumed the perpetrator fully knew his or her offense was criminal, that the external violation of the law or precept was sanctionable, and deliberately committed it. Immunity from sanctions or at least a

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Unde cum homo maxime cognoscat finem sui operis et moveat seipsum in eius actibus maxime voluntarium invenitur." *Summa Theologiae*, 1a2ae, q. 6, a. 1 in Blackfriars, ed,. St. Thomas Aquinas, *Summa Theologiae* (New York: McGraw-Hill Book Co., 1964), vol. 17, *Psychology of Human Acts*, ed. Thomas Gilby [Blackfriars, *Summa Theologiae*],8.

[101]Abbo-Hannan, 787-788,

[102]*CIC* 17 c. 2200, §1: "Dolus heic est deliberata voluntas violandi legem, eique opponitur ex parte intellectus defectus cognitionis et ex parte voluntatis defectus libertatis."

[103]*CIC* 17 c. 2203, §1: "Si quis legem violaverit ex omissione debitae diligentiae, imputabilitas minuitur pro modo a prudenti iudice ex adiunctis determinando; quod si rem praeviderit, et nihilominus cautiones ad eam evitandam omiserit, quas diligens quivis adhibuisset, culpa est proxima dolo."

[104]*CIC* 17 c. 2200, §2: "Posita externa legis violatione, dolus in foro externo praesumitur, donec contrarium probetur."

mitigation of a sanction was granted, however, to those experiencing some defect of reason or will.

As regards the effect of moral imputability and on incurring and declaring *latae sententiae* penalties, canon 2229 provided a more detailed determination of the general principles contained in canons 2201 and 2202 on defective cognition and canon 2203 on carelessness. Furthermore canon 2230 determined more precisely the general principle on age contained in 2204. The very nature of *latae sententiae* penalties made those detailed determinations necessary because such penalties were "self-applying" and bound the delinquent *ipso facto* upon the commission of the crime without judicial or administrative intervention. Since the aforementioned canons on moral imputabilty specifically affected incurring or declaring *latae sententiae* penalties, only those canons will be examined briefly.

2. Defective Cognition

The first condition which affected moral imputability was defective cognition.[105] Defective cognition admitted of several degrees. Thus, those who actually (even if not habitually) lacked the use of reason were incapable of

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[105]For an extensive treatment of defective cognition according to the physiology and psychology of his time and its effects on imputability and the application of penalties, see Roberti, 86-147.

committing a crime.[106] Those asleep or in a frenzied or furious state of mind were not criminally imputable. Next, the law considered the habitually insane. Those who were habitually insane were presumed to be incapable of committing a crime even if they had lucid moments; and hence, they could not contract any kind of penalty including *latae sententiae* penalties.[107] The evidence of experts could help the competent authority judge if the legal presumption of imputability should stand.[108]

An offense committed in a state of voluntary intoxication was not free from some imputability, but the degree of such was less than if the same offense had been committed by a person in full control of the senses, unless intoxication was induced deliberately to commit a crime or excuse its commission. When a law had been broken in a state of involuntary intoxication, whether through drugs or alcohol, there is no imputability at all, if the intoxication deprived the person altogether of the use of reason; imputability was diminished, if the use of reason

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[106]*CIC* c. 2201, §1: "Delicti sunt incapaces qui actu carent usu rationis." Augustine, 27; Coronata, 31-33; Chelodi, 9.

[107]*CIC* 17 c. 2201, §2: "Habitualiter amentes, licet quandoque lucida intervalla habeant, vel in certis quibusdam ratiocinationibus vel actibus sani videantur, delicti tamen incapaces praesumuntur." See Vermeersch-Creusen, 226.

[108]See the rules for experts laid down under *CIC* 17 cc. 1762-1805.

had been only partially impaired.[109] That same rule applied to other mental disturbances. Moreover, weakened reason diminished but did not excuse imputability.[110] Finally, in regard to defective cognition, inculpable ignorance of the law rendered one immune from moral imputability.[111] This meant ignorance which could not have been remedied except by extraordinary means and was equivalent to either inadvertence or error regarding the external violation of the law or precept. However, ignorance of the penalty only did not excuse imputability but it did to some extent diminish it.

3. Carelessness

A second condition affecting moral imputability was carelessness. Carelessness, which was the lack of attention or the omission of due diligence in knowing the law and

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[109]*CIC* 17 c. 2201, §3: "Delictum in ebrietate voluntaria commissum aliqua imputabilitate non vacat, sed ea minor est quam cum idem delictum committitur ab eo qui sui plene compos sit, nisi tamen ebrietas apposite ad delictum patrandum vel excusandum quaesita sit; violata autem lege in ebrietate involuntaria, imputabilitas exsulat omnino, si ebrietas usum rationis adimat ex toto; minuitur, si ex parte tantum. Idem dicatur de aliis similibus mentis perturbationibus."

[110]*CIC* 17 c. 2201, §4: "Debilitas mentis delicti imputabilitatem minuit, sed non tollit omnino."

[111]*CIC* 17 c. 2202: "§1. Violatio legis ignoratae nullatenus imputatur, si ignorantia fuerit inculpabilis; secus imputabilitas minuitur plus minusve pro ignorantiae ipsius culpabilitate.
§2. Ignorantia solius poenae imputabilitatem delicti non tollit, sed aliquantum minuit.
§3. Quae de ignorantia statuuntur, valent quoque de inadvertentia et errore." Chelodi, 10; Vermeersch-Creusen, 227; Coronata, 34-35; Michiels 1: 214-216

penalties for its violation, diminished imputability.[112] After weighing the circumstances of the offender's carelessness, the competent authority was to have determined the criminal nature of an offender's action, the degree of imputability and the appropriate application of the penalty.

However, there were aggravating circumstances involving carelessness and due diligence which were gauged by two standards.[113] The first standard was the seriousness of the matter and the other was the status or dignity of the alleged offender. Hence, by reason of an offender's status or dignity, greater diligence might be required regarding an act if it could have been foreseen. For example, of all the faithful, a canon lawyer would be expected to know the law and its penalties best; and thus a breach of due diligence in knowing it could be more imputable to such an individual than to the rest of the faithful. Likewise, if the issue were a serious one, carelessness and the lack of due diligence were more imputable. For instance, if a priest to whose care the Blessed Sacrament had been committed according to canon 1269 forgot to take the proper precautions to preserve it, he would be responsible for any

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[112]*CIC* 17 c. 2203, §1: " Si quis legem violaverit ex omissione debitae diligentiae, imputabilitas minuitur pro modo a prudenti iudice ex adiunctis determinando; quod si rem praeviderit, et nihilominus cautiones ad eam evitandam omiserit, quas diligens quivis adhibuisset, culpa est proxima dolo." Michiels, 1:218-220; Vermeersch-Creusen, 227; Coronata, 27.

[113]Augustine, 35-36.

sacrilege committed to the degree that he was culpable of such negligence. By way of contrast, an accident which could neither have been foreseen nor, if foreseen, could have been avoided removed imputability.[114]

4. The effects of ignorance and other mental conditions on *latae sententiae* penalties

a) non-imputable ignorance

Canon 2229 provided a more detailed specification of the kinds of ignorance and other imputability-affecting mental conditions than did canons 2201-2203 particularly regarding incurring or declaring of *latae sententiae* penalties. The impairment of either the mind or the will excused one from a *latae sententiae* penalty. If the law used words which required full knowledge and deliberation to commit a crime, then to the degree that either the intellect or the will of the offender had been impaired, to that degree was his or her imputability diminished.[115] Hence, diminished imputability rendered the offender immune from *latae sententiae* penalties in certain circumstances.

b) imputable ignorance

By way of contrast, if the law did not use words

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[114]*CIC* 17 c. 2203, §2: "Casus fortuitus qui praevideri vel cui praeviso occurri nequit, a qualibet imputabilitate eximit."

[115]*CIC* 17 c. 2229, §2: "Si lex habeat verba: *praesumpserit, ausus fuerit, scienter, studiose, temerarie, consulto egerit* aliave similia quae plenam cognitionem ac deliberationem exigunt, quaelibet imputabilitatis imminutio sive ex parte intellectus sive ex parte voluntatis eximit a poenis latae sententiae."

denoting full knowledge and deliberation, then crass or supine ignorance of the law or only of the penalty did not excuse from *latae sententiae* penalties.[116] Crass or supine ignorance occurred when one took little or no trouble to find out about the law and its penalties and when this ignorance could have been remedied by ordinary means.[117] However ignorance which was not crass or supine excused from *latae sententiae* censures but not from *latae sententiae* vindictive penalties.[118] Finally, cultivated ignorance, fostered by one who purposely avoided learning about the the law or the penalty only in order to be able to transgress it, did not excuse from a *latae sententiae* penalty.[119]

c) other imputable mental conditions

Canon 2229 considered other factors besides certain types of ignorance that did not excuse from penalties. Drunkenness, carelessness, mental weakness, or the impetus of passion did not excuse from *latae sententiae* penalties

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[116]*CIC* 17 c. 2229, §3: "Si lex verba illa non habeat:
1.° Ignorantia legis aut etiam solius poenae, si fuerit crassa vel supina, a nulla poena latae sententiae eximit; si non fuerit crassa vel supina, excusat a medicinalibus, non autem a vindicativis latae sententiae poenis."

[117]Augustine, 32.

[118]*CIC* 17 c. 2229, §3, 1.°

[119]*CIC* 17 c. 2229: "§1 A nullis latae sententiae poenis ignorantia affectata sive legis sive solius poenae excusat, licet lex verba de quibus in §2 contineat;" see Augustine, 99; Roberti 277-278; Vermeersch-Creusen, 250-252; Coronata, 121-122; Chelodi 32-33; Michiels 2:390-398.

even if the action had been seriously culpable, diminished imputability notwithstanding.[120] Grave fear by no means excused from *latae sententiae* penalties if the crime involved either contempt of faith or of ecclesiastical authority, or public damage to souls.[121]

d) rules for interpreting moral imputablity

Swoboda pointed out that most of the commentators on canon 2229 simply repeated its provisions. Nonetheless, he argued that it was notably distinguished from those canons containing the general principles on moral imputability, otherwise the legislator would not have included it. At last one reason for the distinction concerned the effects of ignorance on applying *latae sententiae* penalties. Since an individual must decide in conscience if such a penalty were incurred upon commission of the offense, canon 2229 provided practical, simple and clear rules about its appropriate application to an individual case. Moreover, Swoboda concluded that rarely did Catholics know the penalties of the law or did pastors instruct them on these matters. Hence *latae sententiae* penalties would have been infrequently incurred due to such ignorance. Nonetheless,

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[120]*CIC* 17 c. 2229: "§3, 2.° Ebrietas, omissio debitae diligentiae, mentis debilitas, impetus passionis, si, non obstante imputabilitatis deminutione, actio sit adhuc graviter culpabilis, a poenis latae sententiae non excusant."

[121]*CIC* 17 c. 2229: "§3, 3.° Metus gravis, si delictum vergat in contemptum fidei aut ecclesiasticae auctoritatis vel in publicum animarum damnum, a poenis latae sententiae nullatenus eximit."

to protect the public good and curb abuses, pastors and bishops should instruct the faithful concerning ecclesiastical penalties should the need arise.[122]

5. Age

A third condition which tempered moral imputability was the age of the transgressor.[123] In the ecclesiastical forum the capacity to sin was presumed after the completion of age seven. This was also theoretically true for committing an offense, however positive law modified the latter age.[124] Thus, *impuberes*, that is, boys who had not completed their fourteenth year or girls who had not completed their twelfth year were not liable to *latae sententiae* penalties.[125]

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[122]Innocent Swoboda, *Ignorance in Relation to the Imputability of Delicts: An Historical Synopsis and Commentary*, Canon Law Studies No. 143, (Washington, D. C.: Catholic University of America, 1941) [Swoboda], 192-193, 200-201, 239-240. For the chapter "Effects of Ignorance upon Responsibility for *Latae Sententiae* Penalties," see ibid., 192-241. In that chapter, Swoboda for the most part examined possible cases envisioned by canon 2229. For a summary of the disputes between moralists and canonists about the relevance of ignorance to the incurring of *latae sententiae* penalties before the 1917 code, see ibid, 70-79.

[123]*CIC* 17 c. 2204: "Minor aetas, nisi aliud constet, minuit delicti imputabilitatem eoque magis ad infantiam propius accedit."

[124]Chelodi, 13: "In foro ecclesiastico capacitas *peccandi* praesumitur expleto septennio (c. 88, §3); ideo theoretice etiam *delinquendi*, et proinde soli infantes a quolibet crimine excusantur. Neque ulla est *generalis* lex positiva, quae indirecte in *minoribus* excludat imputabilitatem *iuridicam* infra certam aetatem, quatenus eos a poenis omnibus eximat." Michiels, 1:160-165.

[125]*CIC* 17 c. 2230: "Impuberes excusantur a poenis latae sententiae, et potius punitionibus educativis, quam censuris aliisve poenis gravioribus vindicativis corriganutr; puberes . . . incurruntur."

Unlike *latae sententiae* penalties which were incurred upon the commission of the offense, *ferendae sententiae* penalties were inflicted by a judge who, in applying such penalties, presumably would have taken the offender's age into account. Moreover under age offenders should have been corrected by educative punishment and not by censures or severe vindictive penalties. Since the law did not spell out what kinds of punishment would have been of educative value, the judge or ordinary would have had to devise them. Furthermore, unless the contrary were evident, youth diminished responsibility in proportion to its closeness to infancy.[126] By contrast, *puberes*, that is, boys who had completed their fourteenth year of age and girls who had completed their twelfth year of age,[127] who induced *impuberes* to commit a crime or who collaborated with them in a delict according to canon 2209, §§ 1-3, incurred the penalty determined in the law.[128] However, some

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[126]*CIC* 17 c. 88, §3: "Impubes, ante plenum septennium, dicitur infans seu puer vel parvulus et censetur non sui compos; expleto autem septennio, usum rationis habere praesumitur. Infanti assimilantur quotquot usu rationis sunt habitu destitui."

[127]*CIC* 17 c. 88, §2: "Minor, si masculus, censetur pubes a decimoquarto, si femina, a duodecimo anno completo."

[128]*CIC* 17 c. 2230: "Impuberes...corrigantur; puberes vero qui eos ad legem violandam induxerint vel cum eis in delictum concurrerint ad normam can. 2209, §§ 1-3, ipsi quidem poenam lege statutam incurrunt."
CIC 17 c. 2209: "§1. Qui communi delinquendi consilio simul physice concurrunt in delictum, omnes eodem modo rei habentur, nisi adiuncta alicuius culpabilitatem augeant vel minuant.

commentators stated that the age could safely be interpreted as fourteen for both sexes[129]; on the contrary other commentators stated that if that were the case the legislator would have expressed it as such.[130]

D. Observance of *latae sententiae* penalties

A *latae sententiae* penalty, whether medicinal or vindictive, bound the delinquent who was aware of his or her crime in both the external and internal forum. Yet, before a declaratory sentence, a delinquent was excused from observing the penalty if a loss of good reputation were involved. No one could demand the delinquent's observance of the *latae sententiae* penalty in the external forum, unless the crime were notorious with due regard for canon

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§2. In delicto quod sua natura complicem postulat, unaquaeque pars est eodem modo culpabilis, nisi ex adiunctis aliud appareat.
§3. Non solum mandans qui principalis delicti auctor, sed etiam qui ad delicti consummationem inducunt vel in hanc quoque modo concurrunt, non minorem, ceteris paribus, imputabilitatem contrahunt, quam ipse delicti exsecutor, si delictum sine eorum opera commissum non fuisset."

[129]Bouscaren-Ellis, 875: "Although the age of puberty is clearly defined in the Code as 14 for males, 12 for females (c. 88, §2), yet some authors [e. g., V-C, *Epit.*, III, n. 424. Roberti, *De Delictis et Poenis*,n. 247] arguing chiefly from sources in the old law, contend that in penal matters the age is 14 for both sexes. This opinion is becoming more common and may be safely followed; it would exempt girls under 14 from *latae sententiae* penalties."

[130]Chelodi, 13, n. 3.: "Sed ipsam validis argumentis impugnant Ojetti, Comm. II ad 88. Re vera can. 88, §2 principium omnino generale statuit, quod valere dicendum est etiam in re poenali. Ratio legis non est anima legis. Legislator quod voluit expressit."

2223, §4.[131] Even if the crime were notorious, the law left to the superior's discretion the declaration of the *latae sententiae* penalty especially when the parties involved insisted upon it or the common good called for it.[132] The point of the declaratory sentence was merely to declare that the law itself had imposed a *latae sententiae* penalty upon the commission of the offense, that the offender was imputable and that such a penalty applied.[133] Furthermore, the declaratory sentence made the penalty

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[131]*CIC* 17 c. 2232, §1: "Poena latae sententiae, sive medicinalis sive vindicative, delinquentem, qui delicti sibi sit conscius, ipso facto in utroque foro tenet; ante sententiam tamen declaratoriam a poena observanda delinquens excusatur quoties eam servare sine infamia nequit, et in foro externo ab eo eiusdem poenae observantiam exigere nemo potest, nisi delictum sit notorium, firmo praescripto can. 2223, §4."

[132]*CIC* 17 c. 2223, §4: "Poenam latae sententiae declarare generatim committitur prudentiae Superioris; sed sive ad instantiam partis cuius interest, sive bono communi ita exigente, sententia delaratoria dari debet."

[133]Wernz-Vidal, 198-199: "Pariter gravissima et acerba nimis est illa obligatio, qua quis in seipsum poenam exequi per propriam actionem teneretur, sicque idem est reus et iudex et vindex. Porro etiam in foro ecclesiastico plures sunt poenae, quae sine proprio actu eius, cui imponuntur, effectum aut saltem plenam exsecutionem non habent.

"Iam vero ex fontibus iuris satis patet legislatoris voluntatem non fuisse, ut omnes poenae latae sententiae, etsi statim a crimine patrato incurrantur, statim etiam plenam exsecutionem habeant sine interventu iudicis; nonnumquam enim legislator edicit poenam aliquam ipso facto, ipso iure, incurri *etiam nulla praemissa declaratione* [italics in original]. Quibus verbis insinuatur saltem aliquando poenam latae sententiae ante sententiam declaratoriam iudicis plenam exsecutionem non habere."

For a further discussion of the declaratory sentence see Francis Wernz, *Ius Decretalium* (Prati: Ex Officina Libraria Giachetti, Filii et Soc., 1913) 7: 71-74; Cappello, *De Censuris*, 67-68; Chelodi, 34; Coronata, 124; Michiels, 131, n 2.

retroactive to the moment of the crime's commission with due regard for canons 1703-1705 on legitimate prescription.[134]

E. Specific norms for the application of *latae sententiae* censures and vindictive penalties

1. Censures

a) contumacy

Before addressing the cessation of penalties in the 1917 code, we must consider the norms governing the specific application of *latae sententiae* censures and vindictive penalties. As noted earlier, censures, especially *latae sententiae*, and most of all excommunication, were to be inflicted soberly and with great circumspection because they were the very core of ecclesiastical discipline according to Trent.[135] Only an external, grave, and completed crime, joined to persistent, enduring, and malicious disobedience or contumacy was to be punished by a censure.[136] "It should be clearly understood that these marks of a crime must all [have] occur[red] simultaneously; if but one of them [was] lacking no censure [was] incurred."[137]

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[134]*CIC* 17 c. 2232, §2: "Sententia declaratoria poenam ad momentum commissi delicti retrotrahit."

[135]*CIC* 17 c. 2241, §2: "Censurae, praesertim latae sententiae, maxime excommunicatio, ne infligantur, nisi sobrie et magna cum circumspectione."

[136]*CIC* 17 c. 2242, §1: "Censura punitur tantummodo delictum externum, grave, consummatum, cum contumacia coniunctum; potest autem ferri censura etiam in delinquentes ignotos."

[137]Augustine, 118.

Moreover, unknown offenders could be excommunicated since the incurring of a *latae sententiae* penalty presupposed only the transgression of the law or precept to which the said penalty was attached, unless the transgressor were excused from incurring it by a legitimate cause.[138] Finally, contumacy ceased when the transgressor repented or seriously promised to repair any damage or scandal.

b) multiple censures

Not only different kinds of censures but even the same kind of censure could be multiplied in the same subject. A judge or superior would decide if *ferendae sententiae* censures were multiplied in the same subject, but since *latae sententiae* censures were incurred upon the commission of the offense, the law had to spell out how they could be multiplied. *Latae sententiae* censures were multiplied in the following ways: 1) if various offenses, to each of which a censure was attached, were committed either by the same or distinct actions; 2) if the same offense to which a censure was attached was committed repeatedly in such a manner that there were several distinct offenses; 3) if an offense which was punished with different censures by distinct superiors

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[138]*CIC* 17 c. 2242, §2: "Si agatur de censuris ferendae sententiae, contumax est qui, non obstantibus monitionibus de quibus in can, 2233, §2, a delicto non desistit vel patrati de licti poenitentiam cum debita damnorum et scandali reparatione agere detrectat; ad incurrendam vero censuram latae sententiae sufficit trangressio legis vel praecepti cui sit adnexa latae sententiae poena, nisi reus legitima causa ab hac excusetur."

were committed once or repeatedly.[139]

c) recourse and appeal

The observance of *latae sententiae* censures also raises questions about both recourse and appeal and the danger of self-defamation or self-betrayal.[140] *Latae sententiae* penalties were incurred upon the commission of the offense and did not require a judicial sentence or administrative decree to inflict them as did *ferendae sententiae* penalties. Hence there would have been no sentence to appeal or decree against which to take recourse regarding *latae sententiae* penalties.[141] This precluded unwarranted delays in the enforcement of ecclesiastical discipline. However, once a

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[139]*CIC* 17 c. 2244, §1: "Non solum diversae, sed etiam eiusdem speciei censura potest in eodem subiecto multiplicari.

§2: Censura latae sententiae multiplicatur:

1.° Si diversa delicta, quorum singula censuram secumferunt, eadem vel distincta actione committantur.

2.° Si idem delictum, censura punitum, pluries repetatur ita ut plura sint delicta distincta.

3.° Si delictum, diversis censuris a distinctis Superioribus punitum, semel aut pluries committatur."

For a discussion of multiple *latae sententiae* censures see Michiels, 3: 51-57.

[140]*CIC* 17 c. 2243: "§1. Censurae inflictae per sententiam iudicialem, statim ac latae fuerint, exsecutionem secumferunt, nec ab eis datur appellatio, nisi in devolutivo; item a censuris ad modum praecepti inflictis datur recursus, sed in devolutivo tantum.

"§2. Appellatio vero vel recursus a sententia iudiciali vel praecepto comminante censuras etiam latae sententiae nondum contractas, nec sententiam aut praeceptum nec censuras suspendunt, si agatur de re in qua ius non admittit appellationem vel recursum etiam cum effectu suspensivo; secus censuras suspendunt, firma tamen obligatione servandi id quod sententia aut praecepto mandatur, nisi reus appellationem vel recursum interposuerit non a sola poena, sed ab ipsa quoque sententia vel praecepto."

[141]Ibid.

latae sententiae censure had not only been incurred but declared, it had to be observed since the offender's excuse of self-defamation or self-betrayal had passed.[142] The excuse of self-defamation meant that no one was obliged to harm his or her good reputation by revealing that he or she had committed a delict. But that danger passed if infamy of fact was contracted. Infamy of fact was contracted when, because of the crime committed or because of corrupt morals and in the judgment of the ordinary, an offender lost his or her good reputation among upright members of the faithful.[143] Nevertheless, there was the right of appeal from the declaratory sentence. As one author noted:

> There is the right of appeal from the sentence, usually *in suspensivo*, i.e., with the effect of suspending the sentence until confirmed; but if the matter in question does not legally admit of an appeal or recourse *in suspensivo*, then the appeal has no suspensive effect. Moreover, even in appeals which have suspensive effect, it is only the *sentence* that is suspended pending the appeal; the censure, inasmuch as it was incurred *ipso facto* independently of the sentence appealed from, remains in effect.[144]

After a sentence or decree declared the *latae sententiae* censure, infamy of fact (c. 2294, §2) meant that "a person who ha[d] incurred [it] must be restrained not only

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[142]Bouscaren-Ellis, 882. For a discussion of the dangers of self-defamation and self-betrayal in observing *latae sententiae* penalties see Roberti, 280-283.

[143]Ibid., 913

[144]Ibid., 882.

from the reception of orders [c. 987, 7°], from dignities, benefices, and offices of the Church, but also from the exercise of the sacred ministry and from legal ecclesiastical acts;" yet if benefices or offices as well as their exercise were obtained, they would be valid but illicit.[145]

2. Vindictive penalties

What has been stated above concerning *latae sententiae* censures can be affirmed *mutatis mutandis* concerning *latae sententiae* vindictive penalties. Like the former, the latter *ipso facto* bound the offender who was conscious of the crime in both the internal and external forum. However, until the declaratory sentence was issued, the offender might have been excused from observing the penalty if there were a risk of infamy. Moreover, no one could make the offender observe said penalty unless the crime were notorious with due regard for canon 2223, §4, that is, unless an interested party demanded it or the public welfare required it.[146] Yet, once the criminal act had been

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[145]Woywod, 458; for a discussion on the great differences between the consequences of the infamy of law and of fact see ibid. "Infamy of law is that which is declared in the cases fixed by common law . . . .[The vindictive penalty of infamy of law in canon 2291, 4° meant that a person was] irregular, [c. 984, 5°] but in addition he is [disqualified] from obtaining ecclesiastical benefices, pensions office and dignities, from performing legal ecclesiastical acts, from discharging any ecclesiastical right of duty, and must be restrained from the sacred function of ministry." Ibid., 457.

[146]*CIC* 17 c. 2232, §1.

established and a declaratory sentence had been issued, the offender had to observe the penalty. In addition, *latae sententiae* vindictive penalties did not require a penal trial because they were incurred by the very commission of the offense.[147] Such penalties did not admit of appeal or recourse "because when the law declares a penalty to be incurred *ipso iure* [eg., canon 2343, §1, 2°: *est ipso iure infamis*] there is no recourse or appeal with suspensive effect possible."[148]

IV. The Cessation Of Penalties

In general, penalties could cease by expiation or by remission by the same authority that had established them.[149] The penalty was remitted by absolution in the

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[147]"[*CIC* 17] can. 2232 f. and can. 2290, §1 distinctly mention a vindictive penalty *latae sententiae*; wherefore we cannot agree with Eichmann, l. c., p. 109, that vindictive penalties can be inflicted only after a trial; see also Thesaurus-Giraldi, l. c., p. 1, c. 5, p. 5 who admits such a penalty *latae sententiae* especially ineligibility for office." Augustine, 237, n. 1.

[148]Augustine, 238.; Coronata and Woywod concurred with Augustine's view. Selected excerpts from their work will clarify this. See Coronata, 261: "Evidenter hoc canone [*CIC* 17 c. 2287] sermo esse non potest de poenis vindicativis latae sententiae, sed solum de poenis ferendae sententiae seu ab homine; appellatio enim est provocatio a iudice, non provocatio a lege." Woywod, 454: "From vindictive penalties *latae sententiae* inflicted by either the common or the particular law there is no appeal or recourse, because they take effect immediately upon the violation of the law to which such a penalty is attached."

[149]*CIC* 17 c. 2236, §1: "Remissio poenae sive per absolutionem, si agatur de censuris, sive per dispensationem, si de poenis vindicativis, concedi tantum potest ab eo qui poenam tulit, vel ab eius competente Superiore aut successore, vel ab eo cui haec potestas commissa est."

case of censures and by dispensation in the case of vindictive penalties. "If one has the authority to dispense from observance of a law, one can remit the penalty attached to the law in accordance with the *Regula Iuris in Sexto*, 35: 'Plus semper in se continet quod est minus.'"[150] The following observations indicate various authority figures who could remit penalties within the limits of their respective competencies.[151]

A. Those who remit penalties

1. General rule

The Roman Pontiff could absolve all censures and dispense from all vindictive penalties, even without the valid reasons required by prelates inferior to him.[152] Ordinaries could absolve or dispense from vindictive penalties which had been imposed by them and not by common law unless otherwise noted.[153] The successors of the Pontiff and ordinaries had the same powers to remit penalties as their predecessors. Furthermore, the Pontiff

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[150]Woywod, 425.

[151]For the list of authorities competent to remit penalties, see Vermeersch-Creusen, 256.

[152]*CIC* 17 c. 84; Augustine, 107, n. 2: "He needs no reason because of his plenitude of power *in foro externo*, but if the contrition or attrition required for absolution in the sacramental forum should be wanting, the absolution may be valid *in foro externo*, but without effect *in foro interno*."

[153]"*Ratione delicti* ([*CIC* 17] c. 1566, §1) the ordinary in whose diocese the crime has been committed, is competent to absolve." Augustine, 107, n. 3.

could remit penalties imposed by ordinaries, even in cases of reserved penalties according to particular law.

Next, penalties could be remitted by those commissioned to do so by a superior within the limits of their mandate. For example, just as the vicar general needed a mandate to impose sanctions so he needed a mandate to remit them.[154] Those who had the power to exempt one from the law, could also remit from the penalty attached to the law.[155] Dispensation from the universal law was usually the domain of the supreme legislator alone unless otherwise noted.[156] Finally, the judge who *ex officio* applied the penalty could not remit the penalty once it had been applied.[157] The

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[154]*CIC* 17 c. 2220, §2: "Vicarius Generalis sine mandato speciali non habet potestam infligendi poenas." Augustine, 108:"The *Vicar-General*, as he needs a special commission to inflict penalties, also needs a special commission to dispense or absolve them."

[155]CIC 17 c. 2236, §2: "Qui potest a lege eximere, potest quoque poenam legi adnexam remittere."

[156]*CIC* 17 c. 81: "A generalibus Ecclesiae legibus Ordinarii infra Romanum Pontificem dispensare nequeunt, ne in casu quidem peculiari, nisi haec potestas eisdem fuerit explicite vel implicite concessa, aut nisi difficilis sit recursus ad Sanctam Sedem et simul in mora sit periculum gravis damni, et de dispensatione agatur quae a Sede Apostolica concedi solet."

CIC 17 c. 66, §3: "Concessa facultas secumfert alias quoque potestates quae ad illius usum sunt necessariae; quare in facultate dispensandi includitur etiam potestas absolvendi a poenis ecclesiasticis, si quae forte obstent, sed ad effectum dumtaxat dispensationis consequendae."

See *CIC* 17 c. 2254 for special provisions regarding the remissions of censures below.

[157]*CIC* 17 c. 2236, §3: "Iudex qui ex officio applicat poenam a Superiore constitutam, eam semel applicatam remittere nequit."

judge was subject to the law; and once he had given his judgment, his duty was completed.

2. Exceptions

The general rule was that the authority that could establish a penalty also could remit it. However, not all ordinaries were legislators and therefore could not establish penalties. All ordinaries, that is, all those mentioned in canon 198 [158] but not their delegates,[159] could remit in public cases[160] all *latae sententiae* penalties either medicinal or vindictive, established by common law. However, there were three exceptions. The first exception dealt with cases brought into litigation (*forum contentiosum*) and the second dealt with censures reserved to the Holy See. The third exception dealt with penalties disqualifing from benefices, offices, dignities, functions

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[158]*CIC* 17 c. 198: "§1. In iure nomine *Ordinarii* intelliguntur, nisi qui expresse excipiatur, praeter Romanum Pontificem, pro suo quisque territorio Episcopus residentialis, Abbas vel Praelatus *nullius* eorumque Vicarius Generalis, Administrator, Vicarius et Perfectus Apostolicus, itemque ii qui praedictis deficientibus interim ex iuris praescripto aut ex probatis constitutionibus succedunt in regimine, pro suis vero subditis Superiores maiores.
§2. Nomine autem *Ordinarii loci* seu *locorum* veniunt omnes recensiti, exceptis Superioribus religiosis."

[159]*CIC* 17 c. 2237, §2: "In casibus vero occultis, firmo praescripto can. 2254 et 2290, potest Ordinarius poenas latae sententiae iure communi statutas per se vel per alium remittere, exceptis censuris specialissimo vel speciali modo Sedi Apostolicae reservatis." For a discussion of those who could remit *latae sententiae* penalties see Augustine, 110; Vermeersch-Creusen, 257; Roberti, 304-305; Coronata 137-140.

[160]*CIC* c. 2197, 1°.

in the church, active or passive voice; penalties of perpetual suspension or infamy of law; penalties depriving one of active or passive voice, the right of patronage, or privileges or favors granted by the Apostolic See.[161] By contrast, *ferendae sententiae* penalties were considered *ab homine* and could be remitted only by the ordinary whose court imposed the penalty or to whose court the case came on appeal[162]

For occult cases,[163] the ordinary as well as one delegated by him could remit *latae sententiae* penalties with due regard for canon 2254 on the absolution of censures and canon 2290 on the dispensation from vindictive penalties in more urgent cases.[164] An exception to this rule were the

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[161]*CIC* 17 c. 2237, §1: "In casibus publicis potest Ordinarius poenas latae sententiae iure communi statutas remittere, exceptis:
1.° Casibus ad forum contentiosum deductis;
2.° Censuris Sedi Apostolicae reservatis;
3.° Poenas inhabilitas ad beneficia, officia, dignitates, munera in Ecclesia, vocem activam et passivam eorumve privationis, suspensionis perpetuae, infamiae iuris, privationis iuris patronatus et privilegii seu gratiae a Sede Apostolica concessae." Roberti, 307-308; Coronata, 140-143; Vermeersch-Creusen, 256-257; Chelodi 36.

[162]Woywod, 426; Chelodi, 36.

[163]*CIC* 17 c. 2197, 4°: "[Delictum est] *Occultum*, quod non est publicum; *occultum materialiter*, si lateat delictum ipsum; *occultum formaliter*, si eiusdem imputabilitas."

[164]*CIC* 17 c. 2237, §2: "In casibus vero occultis, firmo praescripto can. 2254 et 2290 potest Ordinarius poenas latae sententiae iure communi statutas per se vel per alium remittere, exceptis censuris specialissimo vel speciali modo Sedi Apostolicae reservatis." Coronata, 143-144; Roberti 308-310; Vermeersch—Creusen, 221-222, 257; Chelodi, 37.

censures reserved to the Holy See *speciali modo* and *specialissimo modo*. By contrast, in public cases, the ordinary could not absolve from any censure reserved to the Holy See except by special indult.[165]

3. Conditions for remission

In addition, there were other conditions for the remission of penalties. If an absolution of a censure or a dispensation from a vindictive penalty were extorted by force or grave fear, the remission was nullified.[166] Moreover, the remission of a penalty was valid 1) whether or not the offender was present, 2) absolutely or conditionally, 3) either in both the external and internal fora or only in the internal forum.[167] If a sanction were imposed in writing, it ought to be remitted in writing, although oral remission was allowed.[168]

B. The absolution of censures and the dispensation from vindictive penalties

1. The absolution of censures

What was stated above about the cessation of penalties

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[165]*CIC* 17 c. 2237, §1, 2°.

[166]*CIC* 17 c. 2238: "Poenae remissio, vi aut metu gravi extorta, ipso iure irrita est."

[167]*CIC* 17 c. 2239, §1: "Poena valide remitti potest praesenti vel absenti, absolute vel sub conditione, in foro externo vel interno tantum."

[168]*CIC* 17 c. 2239, §2: "Licet poena etiam oretenus remitti possit, si tamen scripto inflicta fuerit, expedit ut etiam eius remissio scriptis concedatur."

in general applied to censures and vindictive penalties in particular. However, there was one major difference in the way the general rules were applied to particular cases. The difference was that censures were absolved and vindictive penalties were dispensed. As one author pointed out:

> *Absolution* is an act of judicial jurisdiction; if the penitent is rightly disposed he has a right to it; once given it cannot be revoked; it is the only means of remitting censures (cf. c. 2248, §1). *Dispensation*, on the other hand, is an act of voluntary jurisdiction; it is a favor, not a right; once given it can be revoked, because the obligation still exists radically in the law; it is one of the ways in which vindictive penalties may cease.[169]

Censures are considered first here since what could be said about them applied *mutatis mutandis* to vindictive penalties. The cessation of censures, will be discussed under the following headings: a) the reservation of jurisdiction; b) absolution under normal circumstances, in danger of death or in more urgent cases, and c) the role of the confessor in occult cases.

a) the reservation of jurisdiction

The power to remit censures, as well as sins, was sometimes reserved.[170] The reservation of a censure

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[169]Bouscaren-Ellis, 877; "*Judicial* jurisdiction means that which is exercised in the tribunal including the tribunal of penance; *voluntary* jurisdiction means simply non-judicial." Ibid, 139.

[170]Ibid., 883; *CIC* 17 c. 893: "§1. Qui ordinario iure possunt audiendi confessiones potestatem concedere aut ferre censuras, possunt quoque, excepto Vicario Capitulari et Vicario Generali sine mandato speciali, nonnullos casus ad suum avocare iudicium,

limited its absolution to certain persons or classes of persons according to canon 2245. Canon 2246, §1 mentioned three reasons why a censure could be reserved, namely the grievousness of the crime, the fitting provision of ecclesiastical discipline, the curing [*mendendi*] of the conscience of the faithful.[171] Special rules governed reserved censures.

(1) notion of reservation

Censures were either reserved or non-reserved.[172] A *ferendae sententiae* censure *ab homine* was reserved to the one who imposed the censure or issued the sentence or to his competent superior, successor or delegate. By contrast, a censure *a iure* was reserved sometimes to the Ordinary and sometimes to the Holy See.[173] Those reserved to the Holy See were distinguished as either simply, specially or most

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inferioribus absolvendi potestatem limitantes.
§2. Haec avocatio dicitur *reservatio* casuum."

[171]*CIC* 17 c. 2246, §1: "Ne reservetur censura, nisi attenta peculiari gravitate delictorum et necessitate aptius providendi disciplinae ecclesiasticae et medendi conscientiis fidelium."

[172]*CIC* 17 c. 2245, §1: "Censurae aliae sunt reservatae, aliae non reservatae."

[173]*CIC* 17 c. 2245, §2: "Censura *ab homine* est reservata ei qui censuram inflixit aut sententiae tulit, eiusve Superiori competenti, vel successori aut delegato; ex censuris vero *a iure* reservatis aliae sunt reservatae *Ordinario*, aliae *Apostolicae Sedi*."

specially reserved.[174] A *latae sententiae* penalty was not reserved unless the law or precept expressly stated that it was.[175] The reservation of a censure did not bind, however, if there were a doubt of law or of fact.[176] A reservation was to be interpreted strictly.[177] As one author notes:

> The *strict* interpretation means that the law imposing the censure is to be taken in the proper sense of the words employed without extending the meaning of the terms. If it is doubtful whether the action of the offender is covered by the law, or whether or not an excuse saves him [or her] from incurring the censure the offender is not to be considered censured.[178]

Furthermore, if the censure were reserved to the Holy See, the ordinary could not decree another censure reserved to

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[174]*CIC* 17 c. 2245, §3: "E reservatis Apostolicae Sedi aliae sunt *reservatae simpliciter*, aliae *speciali modo*, aliae *specialissimo modo*."

[175]Cappello, *De censuris*: "Reservatio *strictam* recipit interpretationem. Agitur sane de re odiosa. Porro, iuxta vulgatum adagium, *odia sunt restringenda*. Unde non licet reservationem extendere de personam ad personam vel de casu ad casum, quamvis par sit ratio, imo gravior; et ubi plures sunt doctorum sententiae, in praxi benignior est amplectenda (cc. 15, 2219, §1)." [italics in original]

[176]*CIC* 17 c. 2245, §4: "Censura latae sententiae non est reservata, nisi in lege vel praecepto id expresse dicatur; et in dubio sive iuris facti reservatio non urget."

[177]*CIC* 17 c. 2246, §2: "Reservatio strictam recipit interpretationem."

[178]Woywod, 431.

himself for the same crime.[179]

(2) effect of reservation on remitting penalities

The restriction of jurisdiction also affected the absolution of reserved censures. The competency to remit such penalties was limited by reason of territory and by reason of the censure itself. By reason of territory, the reservation of a censure in a particular territory had no force outside that territory, even if the one censured had gone outside the territory in order to obtain absolution.[180] However, a censure *ab homine* was reserved everywhere.[181] By reason of the censure itself, reservation of a censure which impeded the reception of the sacraments implied the reservation of the sin to which the censure was attached.[182] However, if anyone had been excused or absolved from a censure, the reservation of the sin ceased entirely. If a confessor, ignorant of the

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[179]*CIC* 17 c. 2247, §1: "Si censura Sedi Apostolicae reservata sit, Ordinarius nequit aliam censuram sibi reservatam in idem delictum ferre."

[180]*CIC* 17 c. 2247, §2: "Reservatio censurae in particulari territorio vim suam extra illius territorii fines non exserit, etiamsi censuratus ad absolutionem obtinendam e territorio egrediatur; censura vero ab homine est ubique locorum reservata ita ut censuratus nullibi absolvi sine debitis facultatibus possit."

[181]Ibid.

[182]*CIC* 17 c. 2246, §3: "Reservatio censurae impedientis receptionem Sacramentorum importat reservationem peccati cui censura adnexa est; verum si quis a censura excusatur vel ab eadem fuit absolutus, reservatio peccati penitus cessat."

reservation, absolved the penitent offender from the censure and sin, the absolution of the censure was valid, provided that it was not *ab homine* or reserved *specialissimo modo* to the Holy See.[183] Lawful absolution was necessary for the removal of a censure once contracted.[184] Absolution was obtained from the competent authority who imposed the censure, or his superior, successor, or delegate.[185]

b) conditions for absolution

Since the purpose of a censure was primarily the correction of the offender, once such a one was no longer contumacious or persistently disobedient, he or she could not be denied absolution.[186] However, the absolving authority figure was to determine if the transgressor's contumacy had indeed ceased.[187] According to canon 2242,

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[183]*CIC* 17 c. 2247, §3: "Si confessarius, ignorans reservationem, poenitentem a censura ac peccato absolvat, absolutio censurae valet, dummodo ne sit censura ab homine aut censura specialissimo modo Sedi Apostolicae reservata."

[184]*CIC* 17 c. 2248, §1: "Quaelibet censura, semel contracta, tollitur tantum legitima absolutione."

[185]Note 173.

[186]*CIC* 17 c. 2248, §2: "Absolutio denegari nequit cum primum delinquens a contumacia recesserit ad normam can. 2242, §3; a censura autem absolvens, potest, si res ferat, pro patrato delicto congruam vindicativam poenam vel poenitentiam infligere."

[187]*CIC* 17 c. 2242, §3: "Contumaciam desiisse dicendum est, cum reum vere delicti commissi poenituerit et simul ipse congruam satisfactionem pro damnis et scandalo dederit aut saltem serio promiserit; iudicare autem utrum poenitentia vera sit, satisfactio congrua aut eiusdem promissio seria, necne, illius est, a quo censurae absolutio petitur."

§3, the repentance necessary for absolution included the repair of scandal. The one absolving could impose a suitable vindictive penalty or penance to achieve this goal. A censure once absolved did not normally revive unless the burden imposed such as a penance or other obligation was imposed under penalty of reincidence of the censure and the obligation was not fulfilled.[188] As one author noted:

> To grant absolution from a censure under condition that, if the obligation or penance imposed is not fulfilled, the penitent shall fall back into the same censure, is equivalent to a precept imposed under threat of a censure *latae sententiae*. Consequently, only a superior who has the power to attach such a censure to his precept can absolve under such a condition unless the law gives the confessor faculty to absolve under that condition.[189]

In addition, a delinquent may have been absolved from one of multiple censures while the others remained.[190] However, if the absolution were general, then all the censures, even those concealed in good faith were absolved. Yet this general absolution of multiple censures applied neither to those reserved to the Holy See *specialissimo modo* nor to those deliberately concealed.[191]

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[188]*CIC* 17 c. 2248, §3: "Censura, per absolutionem sublata, non reviviscit, nisi in casu quo onus impositum sub poena reincidentiae impletum non fuerit."

[189]Woywod, 432.

[190]*CIC* 17 c. 2249, §1: "Si quis pluribus censuris detineatur, potest ab una absolvi, ceteris minime absolutis."

[191]*CIC* 17 c. 2249, §2: "Petens absolutionem, debet casus omnes indicare, secus absolutio valet tantum pro casu expresso; quod si absolutio, quamvis particularis petitio facta sit, fuerit

Moreover, one may have been absolved from the sin yet remained under censure. This provision presupposed that the penitent was properly disposed and no longer contumacious and that the censure itself did not prevent the reception of the sacraments.[192] On the other hand, if the censure did prevent the reception of the sacraments, then it had to be absolved before the sins were forgiven.[193]

c) differentiation of fora

Another distinction regarding all censures including *latae sententiae* censures dealt with the external forum and the internal forum, either sacramental or non-sacramental.[194] The proper ritual provided the formulas

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generalis, valet quoque pro reticitis bona fide, excepta censura specialissimo modo Sedi Apostolicae reservata, non autem pro reticitis mala fide."

[192]*CIC* c. 2250, §1: "Si agatur de censura quae non impedit Sacramentorum receptionem, censuratus, rite dispositus et a contumacia recedens, potest absolvi a peccatis, firma censura."

[193]*CIC* 17 c. 2250, §2: "Si vero agatur de censura quae impedit Sacramentorum receptionem, censuratus nequit absolvi a peccatis, nisi prius a censura absolutus fuerit."
Bouscaren-Ellis, 886: "Note that canon 2250, §2 expresses a grave prohibition, not an invalidating clause. The formula of absolution in confession first gives the absolution from censures, then from sins. But if for any reason the absolution from the censure is invalid, or is not given at all, nevertheless, provided the penitent is rightly disposed, his sins will always be forgiven, directly in the case of sins which are not reserved, indirectly in the case of sins which are reserved either ratione sui or ratione censurae." See also Augustine 147; Coronata, 178; Vermeersch-Creusen, 267-268; Cappello, *De Censuris*, 93.

[194]Concerning the fora, see Cappello, *De censuris* 85-88; Coronata, 181; Vermeersch-Creusen, 268-269; Roberti, 355-356; Chelodi, 43-44; Michiels, 3:107-109.

for the absolution of censures in sacramental forum.[195] In the non-sacramental forum any form of absolution would suffice, but even there absolution from excommunication ought to use the wording of the proper ritual.[196] In addition, if a censure were absolved in the external forum, it was also valid in the internal forum. But, if the absolution were granted in the internal forum, the absolved delinquent could act as if the absolution had also been granted in the external forum provided no scandal was involved. Yet this concession was also qualified. The superiors could continue to enforce the censure in the external forum; and it was binding on the subject until he or she had been absolved in the external forum, unless the absolution in the internal forum could be proved or, at least, legitimately presumed in the external forum.[197]

d) different circumstances of absolution

Furthermore, the 1917 code distinguished three

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[195]*CIC* 17 c. 2250, §3: "Absolutio censurae in foro sacramentali continetur in consueta forma absolutionis peccatorum in libris ritualibus praescripta; in foro non sacramentali quodlibet modo dari potest, sed ad excommunicationis absolutionem regulariter formam adhiberi convenit in eisdem libris traditam."

[196]Ibid.

[197]*CIC* 17 c. 2251: "Si absolutio censurae detur in foro externo, utrumque forum afficit: si in interno, absolutus, remoto scandalo, potest uti talem se habere etiam in actibus fori externi; sed, nisi concessio absolutionis probetur aut saltem legitime praesumatur in foro externo, censura potest a Superioribus fori externi, quibus reus parere debet, urgeri, donec absolutio in eodem foro habita fuerit."

different circumstances in which *latae sententiae* censures could be remitted, namely, danger of death, outside the danger of death, that is, in normal circumstances, and, finally, more urgent cases. Remitting *latae sententiae* censures in more urgent cases required the most attention from confessors and delinquents alike. We now deal with each situation respectively.

(1) danger of death

"[A]ny validly ordained priest, no matter what his juridical or moral standing, [could] absolve in danger of death from any sin or censure."[198] Should the offender recover, recourse to the proper authority was necessary in certain circumstances under reincidence of the censure. The proper authority for recourse for censures *ab homine* and those reserved *specialissimo modo* to the Holy See was the one who imposed the censure. For *a iure* censures reserved *specialissimo modo* to the Holy See, recourse was to the Sacred Penitentiary, to a bishop or to one who had the faculty of absolving such a censure according to canon 2254, §1. This recourse to the competent authority implied that the penitent offender would willingly and promptly carry out

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[198]Augustine, 152; Roberti 367-369; For a helpful study on *CIC* 17 cc. 2252 and 2254, see Francis Moriarty, *The Extraordinary Absolution from Censures: An Historical Synopsis and Commentary,* Canon Law Studies No. 113 [Moriarty] (Washington, DC: Catholic University of America, 1938). Moriarty is frequently cited by Michiels, 3:110-134, 147-182.

the injunction given by such authorities.[199]

(2) normal circumstances

Outside the danger of death, that is, under normal circumstances, the following persons could absolve from censures in the external and internal forum. Any confessor could absolve one from a non-reserved censure in the sacramental forum. Outside of the sacramental forum, those who had jurisdiction over the offender in the external forum or their delegates could absolve from a non-reserved censure.[200] For censures reserved *ab homine*, the person who had imposed it, his successor, superior or delegate could absolve the delinquent, even one who had transferred his or her domicile or quasi-domicile to another place.[201] For censures reserved *a iure*, absolution was granted by the authority who established the censure or to whom its absolution was reserved, their successors, competent

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[199]*CIC* 17 c. 2252: "Qui in periculo mortis constituti, a sacerdote, specialis facultatis experte, receperunt absolutionem ab aliqua censura ab homine vel a censura specialissimo modo Sedi Apostolicae reservata, tenetur, postquam convaluerint, obligatione recurrendi, sub poena reincidentiae, ad illum qui censuram tulit, si agatur de censura ab homine; ad S. Poenitentiariam vel ad Episcopum aliumve facultate praeditum, ad normam can. 2254, §1, si de censura a iure; eorumque mandatis parendi."

[200]*CIC* 17 c. 2253: "Extra mortis periculum possunt absolvere: 1.° A censura non reservata, in foro sacramentali quilibet confessarius; extra forum sacramentale quicunque iurisdictionem in foro externo habeat in reum."

[201]*CIC* 17 c. 2253, 2°: "A censura *ab homine*, ille, cui censura reservata est ad normam can. 2245, §2; ipse autem potest absolutionem concedere, etiamsi reus alio domicilium vel quasi-domicilium transtulerit."

superiors or their delegates. In this way, every ordinary could absolve his subjects from a censure reserved to a bishop or other ordinary in law; in addition, local ordinaries could absolve even travelers. Absolution from a censure reserved to the Holy See could be granted by Holy See or those to whom the faculty had been granted. Thus, a general faculty would have enabled one to absolve censures reserved to the Holy See *simpliciter*, but for those censures reserved to the Holy See either *speciali modo* or *specialissimo modo* one needed a special or most special faculty of absolving with due regard for canon 2254.[202]

(3) more urgent circumstances

Canon 2254 dealt with more urgent cases. An urgent case meant that a *latae sententiae* censure could not be observed exteriorly without grave scandal or infamy or it was hard for the penitent to remain in a state of grave sin during the time necessary for the competent authority to provide absolution. By contrast, there was no fear of such scandal or infamy regarding *ferendae sententiae* censures because the condemnatory sentence would have made them

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[202]*CIC* 17 c. 2253, 3°: "A censura *a iure reservata*, ille qui censuram constituit vel cui reservata est, eorumque successores aut competentes Superiores aut delegati. Quare a censura reservata *Episcopo* vel *Ordinario*, quilibet Ordinarius absolvere potest suos subditos, loci vero Ordinarius etiam peregrinos; a reservata *Sedi Apostolicae*, haec aliive qui absolvendi potestatem ab ea impetraverint sive generalem, si censura *simpliciter reservata* sit, sive specialem, si *reservata speciali modo*, sive denique specialissimam, si *reservata specialissimo modo*, salvo praescripto can. 2254.

notorious; moreover their remission was strictly reserved to those who had inflicted them.[203]

In such special circumstances any confessor in the sacramental forum could absolve directly the *latae sententiae* censure, no matter how it was reserved. However, he had to impose upon the offender the obligation of taking recourse, under pain of reincidence of the penalty, within one month, at least by letter or through the confessor, if it could be done without grave inconvenience, and without mentioning any names, to the Sacred Penitentiary, or to the bishop or to another superior who had the required faculty. The repentant offender was obliged to follow their orders.[204]

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[203]Roberti, 362: "Excluduntur contra omnes censurae ferendae sententiae, quae postquam irrogatae fuerint fiunt *ab homine* et stricte irroganti reservantur. Codex enim (c. 2245,§1) expresse loquitur de censuris latae sententiae, et cum agitur de recursu faciendo, nominat tantum S. Poenitentiaram vel Superiorem facultate praeditum, non illum qui censuram irrogavit (cfr. a contrario c. 2252). Ceterum in censuris *ab homine* non est timendum scandalum quia post sententiam aut publicationem praecepti fiunt notoriae; nec multum iuvat poenitenti absolutio in foro interno, cum forum externum ultro urgeat earundem exsecutionem. Tandem non potest ordo iurisdictionum tam graviter exturbari."

[204]*CIC* 17 c. 2254, §1: "In casibus urgentioribus, si nempe censurae latae sententiae exterius servari nequeant sine periculo gravis scandali vel infamiae, aut si durum sit poenitenti in statu gravis peccati permanere per tempus necessarium ut Superior competens provideat, tunc quibilet confessarius in foro sacramentali ab eisdem, quoque modo reservatis, absolvere potest, iniuncto onere recurrendi, sub poena reincidentiae, intra mensem saltem per epistolam et per confessarium, si id fieri possit sine gravi incommodo, reticito nomine, ad S. Poenitentiariam vel ad Episcopum aliumve Superiorem praeditum facultate et standi eius mandatis."

The aforementioned provision for absolution was somewhat qualified as follows. Even after recourse to the competent authority, the penitent offender could seek another confessor with the appropriate faculties and obtained absolution from at least the sin to which the censure was attached. The penitent offender was obliged to follow that confessor's injunctions and not those of the competent authority to whom he or she had made recourse by letter.[205]

However, recourse itself may have been morally impossible, for example, if neither the confessor nor the penitent offender could write. In addition, if the confessor would have been unlikely to meet him or her again, then such a case was to be judged by the former who knew the latter's circumstances. If it were morally impossible to have recourse to the competent authority, the confessor could grant absolution without the obligation of recourse, except in the case of absolving his own accomplice in a sin of impurity (c. 2367). Nevertheless, the penitent offender was obliged both to do what the law had required in his or her respective case and to make satisfaction by doing the imposed penance. Those obligations were so significant that

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[205]*CIC* 17 c. 2254, §2: "Nihil impedit quominus poenitens, etiam post acceptam, ut supra, absolutionem, facto quoque recursu ad Superiorem, alium adeat confessarium facultate praeditum, ab eoque, repetita confessione saltem delicti cum censura, consequatur absolutionem; qua obtenta, mandata ab eodem accipiat, quin teneatur postea stare aliis mandatis ex parte Superioris supervenientibus."

failure to fulfill them within the time-frame imposed by the confessor was to risk the reincidence of the censure.[206]

Finally, in summarizing the absolution of *latae sententiae* censures in more urgent cases, one author noted:

> "The faculty of every confessor to grant absolution in urgent cases extends to all censures *latae sententiae* reserved by law (*quoque modo reservatae*): it is immaterial whether they are reserved by common or by particular law, and whether they are reserved to the Holy See *simpliciter, speciali* or *specialissimo modo*, or to the Ordinary. The censures *ab homine* are excluded from the faculties of Canon 2254."[207]

2. The dispensation from vindictive penalties

Latae sententiae vindictive penalties were remitted like *latae sententiae* censures *mutatis mutandis*.[208] A *latae sententiae* vindictive penalty ceased either by its expiation or by its dispensation from a competent authority.[209] The competent authorities included the one

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[206]*CIC* 17 c. 2254, §3: "Quod si in casu aliquo extraordinario hic recursus sit moraliter impossibilis, tunc ipsemet confessarius, excepto casu quo agatur de absolutione censurae de qua in can. 2367, potest absolutionem concedere sine onere de quo supra, iniunctis tamen de iure iniungendis, et imposita congrua poenitentia et satisfactione pro censura, ita ut poenitens, nisi intra congruum tempus a confessario praefiniendum poenitentiam egerit ac satisfactionem dederit, recidat in censuram."

[207]Woywod, 438; Roberti, 362.

[208]For a helpful study in this regard, see Joseph Christ, *Dispensation from Vindicative Penalties: An Historical Conspectus and Commentary*, Canon Law Studies No. 174 [Christ] (Washington, DC: Catholic University of America, 1943).

[209]*CIC* c. 2289: "Poena vindicativa finitur eius expiatione vel dispensatione ab eo concessa qui legitimam habeat dispensandi potestatem ad normam can. 2236."

who imposed the penalty, his competent superior or their delegates.[210] However, a judge could not dispense from vindictive penalties.[211] Yet in more urgent cases confessors could suspend the observance of *latae sententiae* vindictive penalties due to a delinquent's possibly losing a good reputation or causing scandal.

Moreover, a confessor's power to suspend the observance of *latae sententiae* vindictive penalties was limited to the sacramental forum. The confessor was to oblige the penitent offender to take recourse to the proper authority either by letter and through the confessor within a month, if this could be done without serious inconvenience. Such recourse without mentioning names was to be taken to the Sacred Penitentiary or a bishop who had been granted this faculty. What they enjoined on the penitent offender was to be carried out. If in an extraordinary case recourse were impossible, then the confessor could grant the dispensation according to canon 2254, §3.[212]

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[210]*CIC* 17 c. 2236, §1-2.

[211]*CIC* 17 c. 2236, §3.

[212]*CIC* 17 c. 2290, §1: "In casibus occultis urgentioribus, si ex observatione poenae vindicativae latae sententiae, reus seipsum proderet cum infamia et scandalo, quilibet confessarius potest in foro sacramentali obligationem servandae poenae suspendere, iniuncto onere recurrendi saltem intra mensem per epistolam et per confessarium, si id fieri possit sine gravi incommodo, reticito nomine, ad S. Poenitentiariam vel ad Episcopum facultate praeditum et standi eius mandatis.

§2: Et si in aliquo casu extraordinario hic recursus sit impossibilis, tunc ipsemet confessarius potest dispensationem

Section Two

The Legitimacy and Appropriateness of *Latae Sententiae* Penalties in the 1917 *Code of Canon Law*

Section one discussed *latae sententiae* penalties in book five, parts one and two of the 1917 code. It dealt with the general notion of a delict and with penalties in general and in particular. However, section one presented little criticism of *latae sententiae* penalties. Now in section two those penalties will be appraised in terms of their legitimacy and appropriateness. The legitimacy of *latae sententiae* penalties here means their juridical justification within the framework of penal law as a modality for imposing penalties. However, to consider the legitimacy of *latae sententiae* penalties does not mean that they are somehow unlawful or that the legislator has

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concedere ad normam can. 2254, §3."

"Concerning [the observing of] vindictive penalties, it may be briefly and summarily said that canon 2254 does not at all apply to them, for they are completely provided for in canon 2290." Moriarty, 189.

However, Christ stated that there was an absence of a provision in the law for the suspension of observing occult *ferendae sententiae* vindictive penalties in urgent cases. "Consequently, if *per accidens* there is probability of infamy or scandal from the observance of any *ferendae sententiae* vindicative penalty which is occult in the sense that the penalty of the condemnatory sentence is generally unknown or unknown in the place in which the penitent is staying, canon 2290, §1, *per accidens* and by analogy, can be applied, with the corresponding obligations, of recourse to the competent superior, and of obedience to his mandates. Obviously, if the case, as a result of the condemnatory judicial sentence, becomes public, the case is beyond the scope of c. 2290 entirely." Christ, 202.

exceeded his authority or that he has enacted unjust laws.[213] In addition, the appropriateness of such penalties signifies their ability aptly to promote the mission of the Church and safeguard its true nature. Yet such an appraisal is limited by the sources which will be explained below.

Furthermore, implicit in section one were questions of the appropriateness and legitimacy of *latae sententiae* penalties. Inasmuch as the 1917 code reformed the whole preceding corpus of penal law, it implicitly appraised not only that corpus as a whole but more specifically its approach to *latae sententiae* penalties. For example, the following canons implied that *latae sententiae* penalties were very odious and therefore ought to be exceptional: canon 2217, §2 in which a law must expressly state that a penalty was incurred *latae sententiae*; canon 2229 which gave special consideration to certain subjective factors in the incurring of such penalties; and canon 2254 which made provisions for remitting *latae sententiae* censures in urgent cases. However, explicit questions about the legitimacy and appropriateness of *latae sententiae* penalties in the 1917 code are examined in section two. Such questions were

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[213]Subsequent references to the legitimacy of *latae sententiae* panalties will maintain this distinction between the penalty *per se* and the modality of its imposition. It is not unjust for the Church to impose penalties but there have been questions about the way in which they have been imposed.

evident as early as the 1869 constitution *Apostolicae Sedis*, which reformed *latae sententiae* censures. But they were especially evident in some commentaries on penal law in the 1917 code which presented arguments for and objections to *latae sententiae* penalties. Accordingly we will briefly consider that constitution before examining in somewhat greater detail the view of selected commentators on *latae sententiae* penalties in the 1917 code.

I. The apostolic constitution *Apostolicae Sedis*

On October 12, 1869, Pius IX promulgated the constitution *Apostolicae Sedis* which initiated a reform of previous papal legislation regarding *latae sententiae* censures.[214] "Applying a criterion of its own making to the entire conspectus of such penalties existing in common law, the constitution definitively reduced their number."[215] The constitution considered *latae sententiae* censures to be useful and appropriate in safeguarding ecclesiastical values.[216] "Unlike legislators of the past

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[214]*Fontes*, 3:24-31.

[215]Adams, 103.

[216]*Fontes*, 3:24: "Quamobrem cum animo Nostro iampridem revolveremus, ecclesiasticas censuras, quae per modum latae sententiae, ipsoque facto incurrendae ad incolumitatem ac disciplinam ipsius Ecclesiae tutandam, effraenemque improborum licentiam coercendam et emendandam sancte per singulas indictae ac promulgatae sunt, magnum ad numerum sensim excessive; quasdam etiam, temporibus moribusque mutatis, a fine atque causis, ob quas impositae fuerant, vel a pristina utilitate atque opportunitate excidisse."

[who] exceeded right reason by utilizing these penalties far too frequently and indiscriminately,"[217] *latae sententiae* penalties were not to be attached to trifling matters. Rather, they were to be used to punish only the most serious violations of ecclesial values.[218]

In the past, *latae sententiae* penalties had been attached not only to the most serious offenses but also to "more common crimes which would have been better punished by the ordinary channels of justice."[219] The ordering of priorities for the most serious offenses was made clear through the constitution's three categories of *latae sententiae* censures, namely excommunication, interdict and suspension and the competent authority who could absolve them. The constitution itself ranked the censures, penalties and reservations in the following way. The most serious offenses respectively were penalized by excommunications simply reserved to the Roman Pontiff, excommunications reserved to the Ordinary, unreserved excommunications, suspensions reserved to the Roman Pontiff, and interdicts.[220]

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[217]Adams, 66.

[218]Ibid, 69.

[219]Ibid., 67.

[220]*Fontes*, 3:25-30.

II. Arguments in favor of and objections to *latae sententiae* penalties

A. Sources

Our primary focus here is not the specific *latae sententiae* penalties contained in the third part of the fifth book of the 1917 code but rather the general notion of such penalties. Vermeersch-Creusen considered *latae sententiae* penalties "opportune," a term found in *Apostolicae Sedis*. However, the authors neither referred to the aforementioned constitution nor gave a reason for their choice of the term. Michiels referred to such penalties as "opportune" but also as "legitimate," a term not found in the aforementioned constitution.[221] If we use those authors' terminology, the following questions can help to focus the following discussion. Are *latae sententiae* penalties indeed legitimate? Do they have a juridical justification within the framework of penal law? Whatever may be their theoretical legitimacy, are they appropriate or useful for attaining the end of penal law, such as the reforming of offenders, restoring community order and repairing scandal? What follows is an exposition of some representative canonical opinions responding to the aforementioned questions.

We must deal with a representative rather than taxative

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[221]Vermeersch-Creusen, 239: "*De opportunitate poenarum l[atae] s[ententiae]*; Michiels, 2:50: "*Legitimitas et opportunitas poenarum latae sententiae in ecclesia.*"

sampling of canonists because some authors merely restated the pertinent passages of the 1917 code regarding *latae sententiae* penalties but argued neither for nor against their legitimacy and appropriateness. This was true for Bouscaren-Ellis, Cappello, Chelodi, Regatillo,[222] Wernz-Vidal and Woywod. The authors who argued in favor of their legitimacy and appropriateness were Augustine, Michiels, and Vermeersch-Creusen.[223] Abbo-Hannan cited Augustine's argument in its entirety but without further comment. Coronata cited both Augustine, whose argument he paraphrased in Latin and Vermeersch-Creusen. However, only one author, Roberti, questioned the appropriateness of such penalties although he recognized their legitimacy. We turn first to some of those authors who argued in favor of the legitimacy and appropriateness of *latae sententiae* penalties. Subsequently we will deal with some of Roberti's concerns in this regard.

B. Arguments in favor of *latae sententiae* penalties

Since Augustine was cited by other authors, he is worth quoting here in full:

> Why can the Church, unlike the State, inflict a penalty *latae sententiae*? It appears unjust and unworthy of a perfect society to condemn one before one is heard. But we must not forget that

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[222]Edward Regatillo, *Institutiones Iuris Canonici*, vol. 2 (Santander: Sal Terrae, 1942).

[223]These authors will be fully cited in the course of this exposition.

> the Church is a peculiar society, with a religious character that does not remain on the surface, but penetrates and encompasses the whole man. She reaches into the court of conscience. Besides, the most sacred offices might be neglected and abused without punishment because of lack of witnesses and plaintiffs, and the fear of penalty and final exposure may check malice and carelessness. Therefore the first traces of censures *latae sententiae* coincide with the spread of evil influences in the sixth and seventh century. In order to protect ecclesiastical discipline more efficaciously, this quasi self-executory remedy was found most efficient and secure. Although the Church has now formally mitigated the practice of inflicting *ipso facto* penalties by demanding a declaratory sentence in most cases (see can. 2232), it would be against the mind of the legislator to maintain that sentences called *ipso facto* have no other significance or effect than that of a serious threat.[224]

At first, Augustine seemed to concede that *latae sententiae* penalties were not legitimate and that they "appear unjust and unworthy of a perfect society" precisely because they did not conform to at least one recognized principle of law that one ought to be heard before one is condemned. Yet, he argued, *latae sententiae* penalties were legitimate because the Church is a "peculiar society" that "reache[d] into the court of conscience." In short, *latae sententiae* penalties were in accord with the true nature of the Church as a perfect and peculiar society. Furthermore, Augustine seemed to argue that the very legitimacy of *latae sententiae* penalties implied their appropriateness. For,

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[224]Augustine, 74-75. For other authors citing Augustine, see Abbo-Hannan, 2:800, n. 4 which quotes the text in full; and Coronata, 79 which paraphrases the quote in Latin.

without *latae sententiae* penalties, "the most sacred offices might be neglected and abused without punishment because of a lack of witnesses and plaintiffs."[225] Augustine's arguments in favor of the legitimacy and appropriateness of *latae sententiae* penalties raise at least two issues that are worthy of further consideration, namely, the ecclesial values *latae sententiae* penalties seek to protect and the mind of the legislator about such penalties.

1. Ecclesial values

Vermeersch-Creusen defended the appropriateness of *latae sententiae* penalties as a means of protecting ecclesial values.[226] They argued that the Church had been ordained to make humans holy. Sometimes, the Church was gravely harmed by crimes that could not be easily known. Such crimes would be the sacrilegious abuse of the Blessed Sacrament, the reading of heretical books, and the absolution of accomplices in sins against the sixth

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[225]Augustine, 74-75.

[226]Vermeersch-Creusen, 239: "In societate quae ad sanctificationem hominum instituta est, non ea semper graviora sunt delicta quae iuribus aliorum hominum nocent quaeve facilius publica fiunt. Ita, v.g. sacrilegus abusus specierum consecratarum, lectio librorum ab haereticis ad defendendam haeresim conscriptorum, absolutio complicis, plurimum sanctitati societatis christianae nocent, quin ullius iura violent.

Praeterea cum Ecclesia, pro fine suo spirituali conscientiam magis directe ligare possit et soleat, sic ad poenas quasdam obligat immediate, dummodo tamen culpa sit actus externus. Quare decet, nedum repugnet, ut fideles ac praesertim ministros suos a gravioribus quibusdam delictis deterreat, ea sanciendo poenis quas reus, etiam occultus, effugere nequeat."

See also Coronata, 79; Augustine, 74-75; Michiels, 2:50.

commandment. Moreover, since the Church could directly bind and loose sin, it could also oblige the immediate observance of penalties provided that the violation was external. Thus, it was fitting that the faithful and especially the clergy be deterred from such crimes by the burdensome penalty attached, from which not even an occult offender could flee.

2. Mind of the legislator

A second issue was the mind of the legislator consistently affirming the legitimacy of *latae sententiae* penalties, a point which was elucidated by Michiels. Undoubtedly the Church had the power to establish *latae sententiae* penalties, not only vindictive penalties but also censures. Michiels supported this statement by references to constant church practice and teaching. As regards the magisterium, he cited proposition 47 from the Bull of Pius VI, *Auctorem fidei*, of August 28, 1794:

> The proposition is false, rash, pernicious and harmfully erroneous to the power of the Church which affirms that it is necessary according to both natural and divine laws that a personal examination ought to precede either an excommunication or a suspension; and to such an extent that so called *ipso facto* sentences do not have any force other than as a serious threat without any actual effect.[227]

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[227] Michiels, 2:50: "tum *ex explicito Ecclesiae magisterio*; sufficiat afferre propositionem 47 a Pio IX [sic; it should be Pius VI] in bulla 'Auctorem fidei' d. 28 Aug. 1794 damnatam: 'Propositio quae tradit, necessarium esse juxta leges naturales et divinas, ut sive ad excommunicationem sive ad suspensionem praecedere debeat examen personale; atque adeo sententias dictas ipso facto non aliam

Without explanation, Michiels stated that *latae sententiae* penalties were specifically appropriate and at least relatively necessary for securing the Church's proper end, the salvation of souls.[228] In addition, although such penalties had been abused in the past, they were not necessarily illegitimate. He also maintained that the law providing for *latae sententiae* penalties contained a sufficient warning to a potential delinquent. Finally, the observance of such a penalty bound the delinquent in both fora even before the declaratory sentence was issued precisely because such a delinquent was condemned by the law itself envisioning such a penalty.[229]

The mind of the legislator and the safeguarding of ecclesial values were two components of Augustine's argument in favor of *latae sententiae* penalties. In sum, his argument for the legitimacy and appropriateness of such penalties made at least two points. First *latae sententiae* penalties were suitable mechanisms to protect certain important ecclesial values. Secondly such penalties were viewed by the legislator as proper penalties. We now consider some objections to *latae sententiae* penalties by

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vim habere, nisi seriae comminationis sine ullo actuali effectu: falsa, temeraria, perniciosa, Ecclesiae potestati injuriosa erronea.'" Author's translation,

[228]Michiels, 2:50.

[229]Ibid., 52.

Roberti.

C. Objections to *latae sententiae* penalties

1. A just penalty?

Roberti affirmed the usefulness of *latae sententiae* penalties, especially on account of their immediate and infallible application.[230] But he also posed some problems about them. First we consider Roberti's description of a just penalty, which is pertinent to the legitimacy of *latae sententiae* penalties. A just penalty ought to be legal, personal, proportionate, divisible, and reparable. A few words about each characteristic seem pertinent.

A penalty was *legal* if it were established by law so that it could not be determined solely by the whims of a judge. A penalty was *personal* if it bound only the delinquent and did not affect the innocent, for example, children. A penalty was *proportionate* to the delict if it sought to undo the evil effects of a crime to the extent possible. A penalty was *divisible* if it could be adapted to the delict. A penalty was *reparable* if errors could be corrected which occur easily in the administration of human

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[230]Roberti, 279: "Poenae latae sententiae quae suas procul dubio habent utilitates, praesertim ob immediatam et infallibilem applicationem (cfr. n. 225 [251-253]), nonnullis quoque scatent difficultatibus, quia in casibus occultis exhibent *periculum infamiae* et generatim redolent specialem *rigorem*, cum reus tenetur easdem in se ipsum urgere."

justice.[231] Roberti seemed to question the legitimacy of *latae sententiae* penalties according to his own description of a just penalty because they were adapted to a delict with difficulty and there frequently remained a doubt about their being incurred.[232] As for their appropriateness, *latae sententiae* penalties were fraught with difficulties. For in occult cases they risked the self-defamation of the offender and generally were characterized by a certain harshness, since the offender was bound to execute them on himself [or herself].[233]

2. Self-defamation and self-betrayal

Roberti maintained that the 1917 code presented difficulties concerning the declaration and observance of *latae sententiae* penalties. The first difficulty was the delinquent's risk of self-betrayal or self-defamation. The 1917 code decreed that the delinquent was bound to observe the penalty before the declaratory sentence if such could be done without the danger of infamy (c. 2232). That

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[231]"Ut poena sit iusta debet esse: 1) *legalis* seu a lege statuta, ita ut non possit a iudicibus pro lubitu determinari; 2) *personalis*, ita ut delinquentem tantum teneat, nec innocentes e.g. filios afficiat; 3) *proportionata* delicto, et, quantum fieri potest, eidem contraria; 4) *divisibilis* ut possit delicto accom[m]odari; 5) *reparabilis*, ut corrigi possint errores qui in administratione iustitiae humanae facile occurrunt." Roberti, 252.

[232]Roberti, 279 n. 2: "Poenae latae sententiae frequentius quoque dubium relinquunt suam irrogationem ac difficile dividuntur (cfr. n. 225 [252])."

[233]Roberti, 279.

provision affirmed the principle that no one was obliged to self-betrayal. The delinquent was bound to observe the penalty to the extent that it could be done without causing other people to wonder about it.

Another difficulty was that neither superiors nor third parties could coerce a delinquent to observe a penalty in the external forum unless the delict were notorious. Hence until the delict was notorious, it only bound the delinquent in conscience. Moreover, a notorious delict did not exclude the possibility of a declaratory sentence, which was necessary so that the effect of the penalty was applied to those who were necessarily bound by it.

However if the superior judged that the observance of the penalty was pressing in the external forum, he could prudently elicit a declaratory sentence which made the delinquent notorious by notoriety of law (c. 2197, 2°). A declaratory sentence was to be issued not only when the common good required it but also at the insistence of an interested party (c. 2223, §4). It should be noted that someone's reputation could be damaged by a declaratory sentence, and if the alleged delinquent were cleared of the charges, another declaratory sentence should state that fact.[234] The declaratory sentence which confirmed the

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[234]Roberti is unclear on this point. Certainly, a new sentence clearing someone's reputation would have to be given in a successful appeal against such a first instance declaratory sentence. However, a judge or superior had to declare a *latae*

crime made the penalty with its effects retroactive to the moment the crime was committed (c. 2232, §2) unless the effects were derived from the sentence itself.[235]

3. Undue rigor

Roberti argued that *latae sententiae* penalties were too rigorous. Such effects were more rigorous than *ferendae sententiae* penalties to the extent that all of them were "automatically" incurred upon the commission of the offense. He clarified what he meant by illustrating the effects of *latae sententiae* penalties. After the declaratory sentence had been issued, one might note the following effects. An excommunicated person was repelled from active assistance in the divine offices (c. 2259, §2) and exercised jurisdiction invalidly (c. 2264). Such a one acted invalidly as a godparent at baptism (c. 765, 2°) or at confirmation (c. 795,2°) or assisted at matrimony (c. 1095, §1, 1°). In addition, such a person was deprived of sacramentals (c. 2260, §1), the fruits of a dignity and ecclesiastical

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sententiae penalty if an interested party demanded it or the public welfare required it. For example, it could be from the outset that someone was falsely accused by an "interested party." This could have been discovered by the judge or superior and thus the first instance declaratory sentence might state that fact and thus clear a person's reputation.

[235]Roberti, 280-282; For other effects of observing the penalty, see Cappello, *De Censuris*, 67-70; Coronata, 124; Augustine, 75; *CIC* 17 cc. 2260, §1, 2261, §3, 2264, 2265, §2, 2266, 2275, 2°, 3°, 2283, 2284, 2259, §2, 2275, 1°.

funeral rites (c. 1240, §1, 2°).[236]

After a declaratory sentence, a personal interdict resulted in the following effects among others. One was to be repelled from actively assisting at divine office (c. 2275,1°). One could not be asked by the faithful to effect the sacraments or to administer the sacramentals (c. 2275, 2°). One could not validly elect (c. 167, §1, 3°), present, (c. 1470, §4) nominate or be considered for dignities, offices, pensions, functions or favors (c. 2275, 3°; 36, §2). One invalidly assisted at matrimony (c. 1095, §1, 1°). One was deprived of ecclesiastical burial (c. 1240, §1, 2°).

The suspended individual invalidly elected (c. 167, §1, 3°), presented (c. 1470, §4), and nominated others, and was considered disqualified for dignities, offices, benefices, pensions, functions and pontifical favors (c. 2238; 36,§3) and invalidly assisted at matrimony (c. 1095, §1, 1°) and exercised jurisdiction. One could not be asked by the faithful to effect the sacraments or to administer the sacramentals (c. 2284).[237]

Latae sententiae vindictive penalties were rarely applied in the 1917 code. Roberti asserted that they were

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[236]Roberti, 282.

[237]Ibid., 282-283.

"negative" penalties,[238] and thus they were attached to more notorious delicts. Or such "negative" penalties envisioned persons established in major dignities upon whom *ferendae sententiae* penalties were inflicted with more difficulty because of their significant stature in the community.[239] The following were some examples of *latae sententiae* vindictive penalties: infamy of law (cc. 2314, §1, 3°, 2320, 2328, §1, 2°, §2, 2°, 2351, §2, 2356, 2357, §1) and the disqualification from an office, benefice (c.

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[238]Ibid., 279-280: "Quoad alteram difficultatem DD. distinxerunt poenas *negativas, positivas et mixta* [italics in original]. Negativas poenas (e. g. privationes iuris quarendi, irritationes, inhabilitationes etc.) censuerunt semper suum effectum infallibiliter obtinere (ipso iure), quippe quae ad eundem urgendum nullius iudicis interventum requirerent. Positivas, quae consistunt in facto et alicuis interventum requirunt ad suam applicationem, censuerunt urgeri non posse ante sententiam declaratoriam, et desuetudine abolitas habuerunt lege contrarium statuentes [ceterum exempla rara exstabant; cfr. publicato bonorum latae sententiae in mandantes interfici per assassinos (c. 1 V. 12 in VI), in haereticos (c. 19 V. 2 in VI), etc] Tandem mixtas, quae utriusque praecedentis generis naturam participant (e. g. privationis iuris quaesiti, ob quas sublato titulo ammittebantur officia, beneficia, iurisdictio, administratio etc.) docuerunt ex consuetudine urgeri non posse nisi praemissa sententia declaratoria, exceptis censuris et irregularitatibus."

[239]The reason for "negative" penalties seems to be located in both the history of the vindictive penalty and of its manner of application. Some maintained that vindictive penalties involved only clerics in the early Church. Others claimed that this was not so and that both clerics and laity were punished by vindictive penalties. Moreover, in the early Church sanctions were imposed *ferendae sententiae*; however, gradually, *latae sententiae* penalties were introduced and usually were attached only to the most serious offenses generally involving clerics. As the preference grew for *latae sententiae* vis-à-vis *ferendae sententiae* penalties to punish delicts, so did the preference to punish clerical offenders with *latae sententiae* vindictive penalties. See Christ,"Part One: Historical Synopsis," 1-53, especially 6, 8, 15.

2390, §2) or dignity (c. 2394, 1°, 2395). Other *latae sententiae* vindictive penalties included certain deprivations such as the right to receive sacramentals (c. 2375), offices (c. 2386) or benefices (c. 2396), the right to elect (c. 2390, §2, 2391, §1) and the faculty to administer confirmation (c. 2365) and celebrate Mass (c. 2410).

Without citing specific canons, Roberti maintained that because of the severity of *latae sententiae* vindictive penalties it was easy to conclude why the 1917 code persuaded lower level prelates not to attach them to violations of their laws or precepts unless it were truly necessary.[240] We now turn to a profile of *latae sententiae* penalties in the 1917 code.

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[240]Roberti, 283.

Section Three

A Profile of *Latae Sententiae* Penalties in the 1917 *Code of Canon Law*

While the Church had previously provided for *latae sententiae* penalties in universal or particular law, the 1917 code was the first time such penalties had been logically and systematically arranged.[241] By such means, the legislator attempted to ensure their correct use, which presupposed a proper understanding of a canonical crime, imputability and the application of an appropriate penalty. First, a crime or delict was an external violation of a law or precept to which at least an indeterminate penalty was attached. If there were no external and sanctionable violation of a law or precept, no penalty could be imposed. Furthermore, *latae sententiae* penalties were attached to those offenses which most seriously breached the Church's order. Second, juridic imputability presupposed moral imputability. The moral imputability of a crime depended on the deliberate will of an offender to transgress the law (*dolus*) and/or on the culpability (*culpa*) arising from ignorance of the law or precept violated or from the omission of due care. At times the law required complete malice to incur *latae sententiae* penalties. Sometimes, certain kinds of ignorance or other mental conditions could mitigate moral imputability or excuse entirely from *latae*

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[241]Adams, 76.

sententiae penalties. At other times, aggravating circumstances could increase their severity. What follows is a recapitulation of some key aspects regarding the establishment, application and cessation of *latae sententiae* penalties in the 1917 Code with minimal comments given the prior discussion of issues.

I. The establishment of *latae sententiae* penalties.

The following questions will focus our brief comments on establishing *latae sententiae* penalties: what are they? who may establish them? who is subject to them? Canon 2217 distinguished various types of penalties. For example, a *latae sententiae* penalty was a determinate penalty. A determinate penalty was specified in the law or precept to which it was attached unlike an indeterminate penalty whose specification was left to the discretion of a judge or superior.

A *latae sententiae* penalty was considered *a iure* and incurred once the offense was committed. By contrast, a *ferendae sententiae* penalty was considered *ab homine* because it had to be inflicted either by a superior through an administrative decree or by a judge though a condemnatory sentence. In addition, all penalties were to be understood as *ferendae sententiae* and inflicted through ordinary administrative or judicial channels unless it were expressly stated otherwise.

Those who could establish any kind of penalties

according to canon 2220, §1 could establish *latae sententiae* penalties as well. Moreover, those who could make laws or impose precepts could also attach penalties to those same laws or precepts. Indirectly, canon 2241, §2 warned competent authorities to constitute *latae sententiae* penalties soberly and with great circumspection. Canon 2226, §1 provided that anyone bound by a given law or precept was also subject to the penalty attached to it unless such a one were expressly exempt. For example, canon 2227, §2 exempted from all penalties cardinals not expressly named in a penal law or precept and bishops from *latae sententiae* suspensions and interdicts. Canon 2230 excused *impuberes* from incurring *latae sententiae* penalties. We turn now to the application of *latae sententiae* penalties.

II. The application of *latae sententiae* penalties.

The following questions will focus our brief comments on applying *latae sententiae* penalties: what excused from them? what were the provisions for observing them? who declared them and how? Canon 2218, §2 indicated that whatever excused from all imputability as well as whatever excused from grave guilt equally excused from any penalty, be it *latae* or *ferendae sententiae*. Canon 2229 was a key text for determining whether one was excused from incurring a *latae sententiae* penalty. Paragraphs §1 and §2 stated that if the law contained terms denoting full cognition and deliberation, affected ignorance excepted, then any

lessening of imputability, either on the part of the intellect or will, excused from *latae sententiae* penalties. Paragraph §3 provided for three more circumstances pertinent to imputability even if the law did not contain such terms. First, ignorance of the law or also of the penalty alone excused from *latae sententiae* censures but not from *latae sententiae* vindictive penalties provided that the ignorance was not crass or supine. Second, intoxication, omission of due diligence, mental weakness, and the intensity of passion did not excuse from *latae sententiae* penalties if grave guilt still remained despite the lessening of imputability. Third, if the offense tended toward contempt of the faith or of ecclesiastical authority or toward the public harm of souls, grave fear never excused from *latae sententiae* penalties.

Canon 2232, §1 provided that anyone conscious of an offense with a *latae sententiae* penalty attached, be it medicinal or vindictive, was bound to observe it in the internal and external fora. However, the offender was excused from observing such a penalty as often as the penalty could not be observed without loss of a good reputation and provided that no declaratory sentence had intervened. Furthermore, as long as the offense were not publicly known (*notorietate facti*) and the penalty had not been declared (*notorietate iuris*), no one could coerce an offender who had incurred a *latae sententiae* penalty to

observe it in the external forum.

Canon 2223, §4 generally left it to the prudence of a superior to determine whether or not to declare a *latae sententiae* already incurred. However, such a declaratory sentence had to be issued when an interested party demanded it or the common good required it. Canon 2225 specified that if a *latae sententiae* penalty were to be declared by a judicial sentence, then all the requirements of a judicial sentence had to be observed; if a *latae sententiae* penalty had been declared by a precept, then ordinarily it had to be done in writing before two witnesses. Finally, canon 2244, §2 indicated how *latae sententiae* penalties could be multiplied in one subject. We turn now to the cessation of *latae sententiae* penalties.

III. The cessation of *latae sententiae* penalties.

The following questions will focus our brief comments on the cessation of penalties: who could remit them? how were they remitted in ordinary circumstances? how were they remitted in extraordinary circumstances? Canon 2237 provided for those who could ordinarily remit *latae sententiae* penalties established by common law. The ordinary could remit such in all public cases except those cases brought to court, censures reserved to the Holy See and penalties disqualifying one for benefices, offices, dignities, service in the Church, active and passive voice or depriving one of such prerogatives. He could also not

remit perpetual suspension, infamy of law, privation of the right of patronage or privileges or favors granted by the Apostolic See (§1). In occult cases the ordinary, either himself or through another, could remit *latae sententiae* penalties established in common law except those specially or most specially reserved to the Apostolic See (§2). Such penalties were not reserved unless the law or precept expressly indicated such; in doubt of law or fact, such reservations did not bind (c. 2245, §4).

Canon 2253 provided for the absolution of censures in ordinary circumstances including those incurred *latae sententiae*. A confessor could absolve unreserved *latae sententiae* censures in the sacramental forum but outside the sacramental forum, a priest needed the proper jurisdiction to absolve them (1°). Any ordinary could absolve both his subjects and *peregrini* in his diocese from *latae sententiae* censures reserved to himself. However, the appropriate faculty had to be obtained to absolve the different types of censures reserved to the Holy See (3°).

As regards remitting *latae sententiae* penalties in extraordinary circumstances, canon 2237, §2 referred in passing to the significant canons 2254 on censures and 2290 on vindictive penalties. Canon 2254, §1 described an urgent case as one in which a *latae sententiae* censure could not be observed without danger of grave scandal or loss of good reputation, or if it were hard for the penitent to remain in

the state of grave sin for the necessary time for the competent superior to intervene. In such instances any confessor in the sacramental forum could absolve from such a censure no matter how reserved. In addition, the confessor had to enjoin the repentant offender under pain of reincidence of the penalty to take recourse by letter within a month to the Sacred Penitentiary, to the bishop, or to another superior with faculties regarding the censure. Such a letter had to be transmitted, the name being withheld, through the confessor, with the repentant offender observing the orders of the superior when he responded. Canon 2254, §3 indicated that if such recourse were morally impossible, the confessor could grant absolution without the burden of such recourse. He had to impose an appropriate penance under pain of reincidence of the censure if the penitent did not fulfill the penance within the time specified by the confessor.

Canon 2290 on remitting *latae sententiae vindictive* penalties was analogous to canon 2254, §1 and §3 on *latae sententiae* censures. However, there were some differences. Canon 2290 applied only to occult urgent cases not to all cases. Unlike canon 2254, §1, canon 2290, §1 taxatively indicated only one possible urgent case, namely, the offender's possible self-betrayal with the concomitant risk of infamy and scandal in observing *latae sententiae* vindictive penalties. Moreover, a confessor in the

sacramental forum could only suspend observance of the penalty and not dispense from it unlike the aforementioned absolution of a censure. Also, the confessor had to enjoin the offender to take recourse to the superior by letter through the confessor and comply with the mandates received. Finally, canon 2290, §2 allowed a confessor to dispense from the penalty according to canon 2254, §3 in those extraordinary cases when recourse was morally impossible.

Finally, in danger of death, canon 2252 allowed any priest to absolve from all censures including those incurred *latae sententiae.* If the penitent recovered, recourse had to be taken to the appropriate superior, whose demands were to be met under pain of reincidence of the penalty, comparable to canon 2254, §1.

Conclusion

The profile of *latae sententiae* penalties in section three recapitulates the salient features of such penalties in section one. In section two Augustine's argument in favor of and Roberti's objections to *latae sententiae* penalties helped to focus the issue of the legitimacy and appropriateness of such penalties most sharply. On the one hand, Augustine argued that some ecclesial values were intimately related to the nature of the Church itself and reached "into the court of conscience." The most appropriate way to deal with the violation of such values was through *latae sententiae* penalties. On the other hand,

Roberti maintained that, whatever the legitimacy of *latae sententiae* penalties, their application posed certain questions of justice, they exposed persons to a real risk of self-defamation and self-betrayal and at times they were unduly rigorous.

The author thinks that the objections to *latae sententiae* penalties posed by Roberti were rather convincing. He offered five components of a working definition of a just penalty and indicated that *latae sententiae* penalties were lacking one of them, i. e., "divisibility." In short, since they were incurred on the commission of the offense, they could not as such be adapted to the delict or take into account the various grades of responsibility of the offender. Although Roberti did not call for the abolition of *latae sententiae* penalties, he claimed that they were fraught with difficulties. But the author judges that if *latae sententiae* penalties lacked an element of Roberti's definition of a just penalty, such penalties would presumably have no legitimacy, and therefore ought to be eliminated. If *latae sententiae* penalties were not legitimate, then their appropriateness or usefulness could hardly be supported.

Ecclesial values would not be jeopardized if they were not protected by *latae sententiae* penalties rather than by *ferendae sententiae* penalties. However, Michiels pointed out that the legislator defended both the legitimacy and

usefulness of *latae sententiae* penalties for safeguarding such values. Moreover, such penalties precluded the need for a personal examination by competent authority before they were incurred. Although a *latae sententiae* penalty was incurred upon the commission of the offense, the 1917 code did provide for some kind of personal examination of the delict before the penalty could be declared. Furthermore, the fact-finding inquiry required of a competent authority for both inflicting *ferendae sententiae* penalties and declaring *latae sententiae* penalties were practically equivalent in the 1917 code.

In the author's opinion, how a penalty is applied is as important as the ecclesial value it seeks to protect. In other words, how does precluding the right of self-defense, facilitated by a formal process, enhance the spiritual and moral integrity of the Church and the values it seeks to protect? Would an ecclesial value safeguarded by a *latae sententiae* penalty be any less important if *ferendae sententiae* penalties completely replaced the former penalties as a means of reforming an offender, restoring justice and repairing damage? Similar questions, issues and concerns were addressed by those charged with the revision of the 1917 Code of Canon Law inaugurated by Pope John XXIII. This will be the subject of chapter two.

CHAPTER TWO

THE *LATAE SENTENTIAE* PENALTY IN THE REVISION OF THE 1917 *CODE OF CANON LAW*

Preamble

Chapter two is divided into three sections. The first section provides a general chronology of the reform of the 1917 *Code of Canon* Law with specific reference to the 1967 synod of bishops, which approved certain basic principles to guide such a reform. The second section deals with the published opinions of various canonists who objected to or argued in favor of *latae sententiae* penalties. The third section deals with the work of the *coetus de iure poenali,* the special committee entrusted with the task of revising book V of the 1917 code. This section traces the development of the canons dealing with *latae sententiae* penalties beginning with the 1917 code, subsequently exploring the 1973 schema on penal law as distinct from 1980 and 1982 schemata on the whole law and ending with the 1983 code.[1] However, the 1983 code will be dealt with in detail only in chapter three.

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[1]Full references to these revision process documents will be given more logically at the beginning of section three.

Section One

A General Chronology of the Reform of the 1917 Code and the Consideration of *Latae Sententiae* Penalties by the 1967 Synod of Bishops.

I. General chronology of the reform of the 1917 code

On January 25, 1959, Pope John XXIII announced his intention to call an ecumenical council and to reform canon law.[2] On March 28, 1963, the pope appointed Cardinal Pietro Ciriaci to head a commission of fellow cardinals to oversee the reform of the 1917 code.[3] In hindsight the delay between the announcement of the reform of the 1917 code and the naming of commission members was advantageous because of the conciliar impact on the revision process. Just as the Second Vatican Council did not simply complete the unfinished business of the First Vatican Council, so the revision of the 1917 code meant more than simply making some terminological changes.[4] On November 6, 1963, Pope Paul VI officially designated the commission as "the Pontifical Commission for the Revision of the Code of Canon Law."[5] In

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[2]John XXIII, solemn allocution, *Questa festiva recorrenza*: *Acta Apostolicae Sedis* [*AAS*] 51 (1959) 68. See also idem., encyclical, *Ad Petri cathedram*, 29 June 1959: *AAS* 59 (1959) 498.

[3]Rodger Austin, "The History of the Revision of the Code of Canon Law," *Australasian Catholic Record* 60 (1983) 345; John Alesandro, "The Revision of the Code: a Background Study," *Studia Canonica* 24 (1990) 95.

[4]Alesandro, 96-110; Austin, 344-345; *Codex Iuris Canonici*, *"Praefatio,"* *AAS* 75 (1983) xx.

[5]Austin, 345.

April 1964 Pope Paul appointed seventy consultors to assist the commission.[6]

On May 6, 1965, after a period of relative inactivity, Cardinal Ciriaci effectively began the work of the commission.[7] He proposed dividing the revision task among several *coetus*, each of which was to specialize in a certain aspect of canon law. By the early fall of 1965, ten study groups had been set up, one of which dealt with sanctions.[8]

In the fall of 1967, the first synod of bishops convened and discussed among other things the guiding principles for the revision of canon law. As Alesandro noted: "the ten principles are more than an historical curiosity of the revision. They are useful even today in understanding the theory behind certain legal changes."[9] Principle nine dealt specifically with *latae sententiae* penalties. We will examine principle nine and some others below.

By the spring of 1972, drafts or 'schemata' of the revised canons prepared by their respective *coetus* began to

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[6]Ibid., 346.

[7]Ibid.; *Communicationes* 1 (1969) 36; 42-43.

[8]Alesandro, 104-105. The *coetus* on sanctions was maintained in the reorganization of various *coetus* into thirteen groups which occurred on May 28, 1968. See ibid., 106.

[9]Ibid., 110.

appear.[10] The schemata were sent to episcopal conferences, the Union of Superiors General in Rome, and ecclesiastical faculties. For example, the schema on penal law was distributed for consultation on December 1, 1973; and replies were to be forwarded to the code commission by March, 31, 1974. The brevity of the consultative process caused some exasperation. As Green noted, "the Code Commission's *coetus* spent nearly *seven years* working on the document prior to its being sent to the bishops and interested academic and professional bodies. It seems unreasonable to expect a serious critique within only *three months*."[11]

By 1980 the first integrated schema of the entire code was released.[12] Subsequently Pope John Paul II rejected the appeals for another general consultation on the proposed canons. Instead, he enlarged the code commission by adding to it representatives from the various episcopal conferences. Next, all of the commission members organized

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[10]Austin, 350-353; Alesandro, 111-114.

[11]Thomas Green, "The Future of Penal Law," *The Jurist* 35 [Green, "Future"] (1975) 249 [italics in original]. For a discussion of the time given for consultation and responses see Alesandro, 112; Francis Morrisey, "The Revision of the Code of Canon Law," *Studia Canonica* 12 (1978) 180-181.

[12]Alesandro, 115. See Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Schema Codicis Iuris Canonici* (Vatican City: Libreria Editrice Vaticana, 1980) [1980 Schema].

rather systematic written evaluations of the 1980 schema[13]. The written interventions of the episcopal conferences and the code commission's responses to them were published in the *Relatio*.[14] In October 1981, the final plenary session of the code commission discussed the 1980 schema, the *Relatio* and the study papers on six specialized issues.[15] However, as Green noted, "there were relatively few significant penal law developments in the *Relatio* or at the 1981 Plenarium."[16]

In the spring of 1982 a revised version of the entire code was published and then presented to Pope John Paul II.[17] The pope personally studied the text with several advisers and authorized several changes, none of which were of real consequence for *latae sententiae* penalties.[18] On

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[13]Alesandro, 115-117; Austin, 353.

[14]Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis patribus commissionis ad novissimum schema codicis iuris canonici exhibitarum, cum responsionibus a secretaria et consultoribus datis* (Rome: Typis Polyglottis Vaticanis, 1981).

[15]Alesandro, 121; Austin, 353-354. As Green noted, a discussion of Catholic membership in Masonic organizations was the only one of the six special topics at the Plenarium which dealt with penal law. See Thomas Green, "Penal Law: A Review of Selected Themes," [Green, "Review"] *The Jurist* 50 (1990) 223.

[16]Green, "Review," 223.

[17]Alesandro, 127-128. See Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Schema Codicis Iuris Canonici*, (Vatican City: Libreria Editrice Vaticana, 1982) [1982 Schema].

[18]Alesandro, 129.

January 25, 1983, twenty-four years after John XXIII's announcement of the reform of the 1917 code, John Paul II promulgated the revised Code of Canon Law for the Latin Church.[19]

II. The consideration of *latae sententiae* penalties by the 1967 synod of bishops

A. The ten guiding principles for reforming canon law

1. The ten guiding principles in general

Cardinal Felici and the central committee undertook the task of developing principles of revision,[20] which were one of five topics discussed at the 1967 synod of bishops.[21] As noted earlier, the ten principles proposed to guide the reform of the 1917 code and discussed at that Synod

> are more than an historical curiosity of the process of revision. They are useful even today in understanding the theory behind certain legal

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[19]Ibid.

[20]Alesandro, 106.

[21]The author does not exhaustively analyze the 1967 synod of bishops but rather touches only on those themes relative to *latae sententiae* penalties. Among the most complete histories of the 1967 Synod see Giovanni Caprile, *Il Sinodo dei Vescovi* [Caprile] (Rome: Edizione "La Civiltà Cattolica," 1968) 82-139. For another helpful study which is not nearly as complete as Caprile see René Laurentin, *Le Premier Synode: Histoire et Bilan* [Laurentin] (Paris: Editions du Seuil, 1968) 74-91. For studies in English see Peter Hebblethwaite, *Inside the Synod: Rome 1967* [Hebblethwaite] (New York: Paulist, 1968) 20-34 and Francis Murphy and Gary MacEoin, *Synod '67: A New Sound in Rome* [Murphy] (Milwaukee: Bruce, 1968), 52-72. For a more detailed canonical study of the synod see John Johnson, *The Synod of Bishops: An Analysis of its Legal Development*, Canon Law Studies no. 518 [Johnson], (Washington, DC: Catholic University of America, 1986) 5-42.

> changes, determining how the canons reflect the conciliar decrees through the principles, and thus interpreting the Church's universal norms faithfully and applying them properly.[22]

2. Principles pertinent to *latae sententiae* penalties

Of those ten principles, three principles dealt directly or indirectly with issues related to *latae sententiae* penalties.[23] Principle nine dealt directly with such penalties. Principles two and three dealt indirectly with such penalties. Principle two dealt with the relationship between the internal and external fora in the code. Principle three dealt with the pastoral spirit of the code. The synodal discussions provide an important locus for a critical appraisal of *latae sententiae* penalties during the revision of the 1917 code.[24] In the subsequent discussion of penal law at the 1967 synod, the author depends largely on Caprile.

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[22]Alesandro, 110. For the text of the ten principles see "Principia quae Codicis iuris canonici recognitionem digirant," in *Argumenta de quibus disceptabitur in primo generali coetu Synodali Episcoporum* Pars prior (Rome: Typis Polyglottis Vaticanis, 1967) 5-18 and "Principia quae codicis iuris canonici recognitionem digirant," *Communicationes* 1 (1969) 77-100. For a straightforward account of the principles with little comment, see Richard Cunningham, "The Principles Guiding the Revision of the Code of Canon Law," *The Jurist* 30 (1970) 447-455.

[23]For a discussion of the impact of the principles of revision guiding the reform of canon law see Alesandro, 107.

[24]"Principia quae codicis iuris canonici recognitionem digirant," *Communicationes* 1 (1969) 77-100.

B. The synodal sessions on canon law

1. *Nota informativa*

In June 1967 the synodal Fathers received the ten guiding principles for the reform of canon law. An appended "*nota informativa*" explained that since November 25, 1965 ten study groups or *coetus* had been organized to revise the 1917 code. Since May, 1966 those groups had been meeting regularly in Rome and had produced twenty-one schemata containing 383 canons, including a schema of 51 canons on delicts and penalties in general.

2. First Session: September 30, 1967

On September 30, 1967, Cardinal Felici, president of the Pontifical Commission on the Revision of the Code, reported on its work to date. Among other things, he reported on the ten guiding principles for the revision process. Quoting Paul VI, he noted that the process was to be governed by a respect for the dignity of individuals and by love, harmony and mutual respect among church members. The principles reflected the aim of the legislator to respect the nature of the Church and to maintain a spirit of love and service. Without further explanation, Cardinal Felici stated that the principles also contained new and old canonical elements: the divine constitution of the Church, those practices developed through the ages and considered immutable, the need to adapt law to the needs of the people of God, and the fact of law being inspired by Sacred

Scripture, especially the New Testament.[25]

Cardinal Felici pointed out the juridic usefulness of the code since the social nature of the Church demanded a juridical form. Quoting a November 20, 1965 discourse of Paul VI to the members of the code commission, he stated that the Church, by the will of God, was a visible society furnished with institutions necessary for its exterior progress. Canon law was among such institutions and its fundamental aim was the good of souls. Felici also noted that the legislator recognized the harshness of penal laws yet found them necessary and salutary; they ought to be applied only to serious offenses.[26]

3. Second session: October 2, 1967

Of the nineteen interventions made at the second meeting of the synodal participants on October 2, 1967, eight referred to issues relevant to *latae sententiae* penalties. Cardinal Quintero of Venezuela and Bishop Lourdousamy of India called for precision in clarifying the interrelationship of the internal and external fora, especially in penal law. Cardinal Lefèbvre of France underscored the spirit of charity and service that should characterize the law. Cardinal Landázuri Ricketts of Peru and Cardinal McCann of South Africa wanted nullifying and

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[25]Ibid., 91-92.

[26]Ibid., 92-93.

disqualifying laws, especially *latae sententiae* penalties, to be greatly reduced. Without further elaboration Bishop Marquez Toriz of Mexico observed that the division of the code, for example the book on ecclesiastical sanctions, ought to reflect the Church as sacrament and salvific mystery. Bishop Ligondé of Haiti asked that *latae sententiae* penalties and reserved cases be reduced to a minimum because they constituted a cross for confessors. Bishop Taguchi of Japan wanted penal law simplified and vindictive penalties reduced or abolished; however, a number of *latae sententiae* penalties ought to be kept lest bishops be overburdened by deciding penal cases.[27]

4. Third session: October 3, 1967

The third meeting of the synodal participants on October 3, 1967 produced twenty-two interventions of which five dealt with *latae sententiae* penalties.[28] Cardinal Quiroga y Palacios of Spain observed that *latae sententiae* penalties ought to be assigned only to extreme cases. A number of prelates called for such penalties to be abolished. Cardinal Dopfner of Germany desired that *latae sententiae* penalties be eliminated completely since in ordinary circumstances they have little effect. Bishop McEleney of the Antilles concurred with that opinion.

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[27]Ibid., 94-104. Caprile names the countries but not the archdioceses or dioceses of the speakers.

[28]Ibid., 105, 106-107, 111, 112-113, 113.

Bishop Martin of Rwanda-Burundi called for *latae sententiae* penalties to be abolished and stated that *ferendae sententiae* penalties should concentrate on the reform of the offender rather than his punishment. Bishop Arinze of Nigeria called for a review of ecclesiastical penalties and the abolition of those that were not necessary or too severe like *latae sententiae* penalties.

5. Fourth session: October 4, 1967

On October 4, 1967, eight speakers took "advantage of article thirty-three of the *Regolamento* and asked for the right to reply to points made."[29] Two of those speakers, Cardinal Ferretto, Apostolic Penitentiary and Archbishop Nicodemo of Bari, Italy addressed *latae sententiae* penalties.[30]

Cardinal Ferretto agreed with the proposal to minimize as much as possible conflicts between the external and internal fora, between sacramental and penal law. Moreover, he thought that penalties ought generally to be *ferendae sententiae*, inflicted and remitted in the external forum. However, the code ought to envision *latae sententiae* penalties in exceptional and determined cases while providing for their remission in the internal forum for the

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[29]Hebblethwaite, 26. For the text of the *Regolamento* or "Procedure for the Meeting of the Synod of Bishops" see Murphy, 193-203.

[30]For a discussion of Cardinal Ferreto's presence at the 1967 synod of bishops see Murphy, 21.

good of souls. Some offenses were so grave that they required such a penalty, reserved *specialissimo modo* to the Holy See yet absolvable in the internal forum. By such means, the end of the penalty was attained as well as the good of souls.[31]

Archbishop Nicodemo called for a review of penal law in light of the ecclesiology of Vatican II. The spirit of charity, moderation, humanity, and temperance ought to be reflected not only in the number but also in the nature of penalties. They ought to serve above all the salvation of those upon whom they are imposed; therefore, the name "vindictive penalty" ought to be eliminated. Moreover, penalties ought to be tempered and reduced to a minimum. Finally, they ought to be principally *ferendae sententiae* and inflicted and remitted in the external forum only. *Latae sententiae* penalties ought to be limited to only a few truly serious delicts and incurred only if the offender is fully morally imputable.[32]

6. The synodal consensus

a) A summary of interventions on *latae sententiae* penalties

In sum, the interventions relative to *latae sententiae* penalties touched on the relationship between the external and internal forum, the pastoral spirit of the code and the

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[31]Caprile, 117.

[32]Ibid., 120.

possible reduction or abolition of such penalties. Without further explanation and in summary fashion, Caprile stated that the interventions on the two fora highlighted the need to reduce the confusion between them, i. e. the confusion pertinent to the status of the individual before God in conscience and before the Church's juridical forum.[33] Moreover, the pastoral spirit of the code ought to be reflected in its being able to be interpreted relatively easily as a help to salvation and not as a cross for bishops and faithful.[34]

Furthermore, penal law ought to be revised and the number of canons reduced. *Latae sententiae* penalties ought to be abolished or reduced to a minimum; they should be incurred only for the most serious offenses and so regulated as to obtain the spiritual good of the offender effectively. In addition, *ferendae sententiae* penalties ought to reform the offender and be inflicted in the external forum only. Finally, such penalties as interdicts ought not to be inflicted, directly or indirectly, on those who may be innocent.[35]

b) Cardinal Felici's response

At the conclusion of the interventions, Cardinal Felici

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[33]Ibid., 123.

[34]Ibid., 124.

[35]Ibid., 129-130. For a similar summary of the interventions, see Laurentin, 82-83.

responded to the synodal participants' observations. Among other things, he said that an international convention of canonists to be held in May, 1968 would study the relationship between the external and internal forum.[36] As for the animadversions on penalties in general and *latae sententiae* penalties in particular, Felici responded that the animadversions largely corresponded to the proposed principle.[37]

c) Voting on the guiding principles pertinent to *latae sententiae* penalties

"The voting on the draft document was summarized in the *relatio* dated October 21. Like all voting at the Synod, it should strictly be regarded as a 'manifestation of opinion' but one that has a high degree of authority when it commands a majority of more than two thirds of the Synod."[38] Principle two on the interrelationship between the internal and external fora received 159 *Placet* and 28 *Placet iuxta modum* votes. Principle three on the pastoral spirit of the code received 136 *Placet* and 51 *Placet iuxta modum* votes. Principle nine on penal law received 148 *Placet* and 39

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[36]Caprile, 132. See Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Acta Conventus Internationalis Canonistarum: Romae diebus 20-25 Mai 1968 celebrati* (Rome: Typis Polyglottis Vaticanis, 1970).

[37]Caprile, 132.

[38]Hebblethwaite, 30.

Placet iuxta modum votes.[39] Laurentin noted some of the *modi* on penal law. In particular, fourteen fathers wanted *latae sententiae* penalties completely abolished. One father wanted to keep such penalties for only the most serious offenses and eight fathers wanted them to be binding in both fora. Eight fathers wanted *latae sententiae* penalties to be attached to only the following delicts: violation of the seal of the confession, eucharistic sacrilege and the absolution of an accomplice *in peccato turpi*.[40] Ironically, each of the ten principles received in excess of the two-thirds *placet* votes required for approval but the whole set of principles fell "far short of the 124 affirmative votes it needed."[41]

Due to time constraints, the synodal fathers were unable to give much of a rationale either for retaining or eliminating *latae sententiae* penalties. However, on the whole, they judged that *latae sententiae* penalties had lost much of their effectiveness in the contemporary church as a means of safeguarding ecclesial value, reforming an

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[39] *Communicationes* 1 (1969) 100. Caprile, 135-136. Hebblethwaite's tabulation of the votes concurs with Caprile except on principle nine where he included one *non placet*; see Hebblethwaite, 31-33. Alesandro concurs completely with Caprile; see Alesandro, 107-109. Laurentin reports on the voting but does not tabulate the results; see Laurentin, 87-91. Murphy reports on the voting in a general way; see Murphy, 70-71.

[40] Laurentin, 89.

[41] Johnson, 23.

offender, restoring justice and repairing damage. A rationale for retaining or eliminating *latae sententiae* penalties would have to be sought in the opinions of various canonists to which we now turn in section two.

Section Two

Objections to and Arguments in Favor of *Latae Sententiae* Penalties by Various Canonists

I. Canonists' opinions on revising *latae sententiae* penalties.

Besides the 1967 synod of bishops another important *locus* for the critical appraisal of *latae sententiae* penalties during the revision process was the published opinions of various canonists. Most of the opinions date from 1959 when Pope John XXIII announced the revision of the code. Normally they did not discuss the issue in depth but were usually expressed in two or three paragraphs within a broader consideration of penal law. DePaolis collated those opinions in a significant 1973 article dealing with the legitimacy and appropriateness of *latae sententiae* penalties,[42] organizing the sources into arguments for and objections against *latae sententiae* penalties and adding his own animadversions as well. The author basically depends on the DePaolis article for his exposition of the arguments of the various authors but also refers to some of DePaolis' and Adams' various sources.[43]

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[42]Velasio de Paolis, "De legitimitate et opportunitate poenarum latae sententiae in iure poenali canonico," *Periodica* 62 (1973) 319-373. For two other significant articles on the reform of penal law see Thomas Green, "The Future of Penal Law in the Church," [Green, "Future"] *The Jurist* 35 (1975) 212-275 and idem., "Penal Law Revisited: The Revision of the Penal Law Schema," [Green, "Revisited"] *Studia Canonica* 15 (1981) 135-198.

[43]Adams, 116-133. Adams addressed the same issues as DePaolis but did not develop them in detail as did DePaolis.

DePaolis noted at least five objections to *latae sententiae* penalties. First, they were not appropriate for punishing delinquents according to the different grades of responsibility for a delict. Second, it was difficult to determine if a *latae sententiae* penalty had been incurred, its gravity for the repentant offender and its effectiveness for the delinquent who did not care if such a penalty had been incurred or not. Third, such penalties seemed to precipitate injustices. Fourth, such penalties were formalistic. Fifth, such penalties blurred distinctions between sin and delict, between the moral and juridical orders, and between the internal and external fora. These points will be developed further in this chapter

DePaolis noted at least four arguments in favor of *latae sententiae* penalties. First, *latae sententiae* penalties highlighted the difference between civil and canon law and manifested, at least partially, that the Church is a supernatural reality. Second, such penalties conformed to the spirit of Vatican II by enabling the faithful to share in the coercive power of the Church. Third, *latae sententiae* penalties were necessary to punish occult delicts which may otherwise go unpunished. Fourth, such penalties were judged useful, just and necessary in punishing delicts and promoting justice within the Church. What follows is a summary of the objections to and arguments in favor of the legitimacy and appropriateness of *latae sententiae* penalties

in the work of various canonists.[44]

II. Objections to *latae sententiae* penalties

A. The first objection to *latae sententiae* penalties: lack of personal judicial intervention.

The first objection to *latae sententiae* penalties was that they did not sufficiently take into account the various grades of penal responsibility. In a *latae sententiae* penalty situation the legislator could not know the delinquent, the different elements of the alleged crime, and those elements possibly excusing, diminishing or aggravating moral imputability. However, if the penalty were *ferendae sententiae*, the judge or superior, before the sentence or decree was imposed, could know the delinquent, all the circumstances of the alleged delict, and the delinquent's grade of responsibility. By interviewing the delinquent,

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[44]See also Adams, 116-128, who deals with similar themes: "Post Conciliar Discussion Regarding the Automatic Penalty: A. Arguments against the automatic penalty: 1) the abstract sentence without nuance; 2) incursion, observance and the conscience of the delinquent; 3) subjectivism, lack of certainty, enervation of ecclesiastical discipline; 4) punishment of hidden crime. why?; 5) automatic penalties frustrate the basic purpose for the existence of penalties; 6) does a secretly incurred penalty adding obligations of positive law have any meaning today?; 7) the automatic penalty and the proper role of authority; 8) recommendation of those opposing the automatic penalty. B. Arguments advanced in favor of the automatic penalty: 1) the automatic penalty: unique to the church community; 2) the automatic penalty: useful, just and necessary; 3) automatic penalties are particularly consistent with the spirit of the Second Vatican Council; 4) the eminently practical character of the automatic penalty." For a brief review of the objections to and arguments in favor of *latae sententiae* penalties see, Green "Future," 224-227.

the judge or superior could apply an appropriate penalty.[45]

1. The need for judicial intervention in determining various grades of responsibility.

Ferendae sententiae penalties allowed for a personal relationship between the delinquent and the inflicting authority. Each concrete element of the alleged delict was to be weighed carefully. In addition, *ferendae sententiae* penalties were more appropriately applied than *latae sententiae* penalties or even omitted due to a delinquent's repentance.[46] DePaolis maintained that *latae sententiae* penalties implicitly needed judicial intervention in determining various grades of responsibility. In other words, such penalties needed to be declared if one were to deal with all the variables of a penal situation.

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[45]Peter Huizing, "Crime and Punishment in the Church," in *Concilium* [Huizing, "Crime and Punishment"] 28 (1967) 122; Iulian Herranz, "*De principio legalitatis in exercitio potestatis ecclesiasticae*," in *Acta Conventus internationalis canonistarum* (Rome: Typis Polyglottis Vaticanis, 1970) 237: "Necessarium quoque videtur ut poenae iudicialiter imponantur, ita ut supprimantur - vel saltem quam maxime reducantur - poenae latae sententiae. Hoc dicimus, inter alias rationes, quia iudex cognoscere potest melius quam legislator tum personam delinquentis tum adiuncta particularia facti patrati: et ideo poena a iudice melius aptari potest ad casum concretum." Adams, 116-117.

[46]DePaolis, 332. Moreover, he noted: "Tamen nimis severum iudicium Ciprotti quoad hoc argumentum: 'Non ritengo possa aver molto rilievo in diritto canonico l'obiezione, che si è pure fatta, della impossibilità di graduazione e di adattamento della pena latae sententiae secondo le varie circostanze oggettive e soggettive del delitto'[Pio Ciprotti, "Il diritto penale della Chiesa dopo il Concilio," in *Ephemerides Iuris Canonici* 26 (1970) [Ciprotti], 103, n. 15.]. Non est tantum quaestio de aptiore poena relate ad subiectum, sed etiam de efficacia poenae, quae videtur maior esse, si detur interventus ulterior auctoritatis, qui exigitur, si poena est ferendae sententiae." DePaolis, 332, n. 20.

a) Determining various grades of responsibility for incurring *latae sententiae* penalties.

(1) Various grades of responsibility

Some of the penal canons in the 1917 code indicated various grades of responsibility for incurring *latae sententiae* penalties. For example, canon 2195, §1 included moral imputability in the definition of a crime, i. e. an external violation of law to which a penalty had been attached. Canon 2218, §2 stated that whatever excused from all imputability or even grave imputability excused from *latae sententiae* and *ferendae sententiae* penalties. In addition, canon 2218, §1 indicated various subjective and objective elements that affected the incurring of any penalty including *latae sententiae* penalties.

Furthermore, penalties were to be applied proportionately as the nature of the offense, the scandal or ecclesial damage caused, and the degree of a delinquent's moral imputability required. Canon 2218 listed these factors to be taken into account by the penal authority: the age, knowledge, education, sex, state of life, and mental condition of the offender, the dignity of the person against whom the offense was committed or who committed it, the purpose intended, whether it was committed in the heat of passion or on account of grave fear, whether the delinquent repented of his crime and tried to prevent its evil effects

and other similar circumstances. Canon 2218 principally envisioned not just *ferendae sententiae* penalties *per se* but also the competent authority who had to weigh the aforementioned factors so that penalties could be justly and appropriately applied.[47]

(2) Subjective factors

DePaolis maintained that although canon 2218 principally and directly envisioned *ferendae sententiae* penalties, the subjective elements regarding moral imputability it mentioned were also envisioned by the legislator in establishing canon 2229. Canon 2229 indicated certain subjective factors to be considered in applying *latae sententiae* penalties and specified the various grades of responsibility required to incur them. Thus, affected ignorance did not excuse one from incurring a *latae sententiae* penalty; however any diminution of imputability on the part of reason or the will excused one from incurring such penalties. Furthermore, crass or supine ignorance excused from incurring *latae sententiae* censures but not *latae sententiae* vindictive penalties. Grave fear also excused from incurring certain *latae sententiae* penalties. Moreover, pre-pubescents were excused from incurring *latae sententiae* penalties according to canon 2230.[48] In short

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[47]DePaolis, 332-333.

[48]Ibid., 333-334

by specifying certain subjective factors affecting the application of *latae sententiae* penalties, the legislator implied that various grades of responsibility needed to be assessed before one incurred or declared a *latae sententiae* penalty.

b) Need for declaring authority to determine various grades of responsibility

If in establishing canon 2229 the legislator implied various grades of responsibility, then not only the delinquent but the judge or superior needed to consider them. A delinquent needed to consider them to determine if he or she had incurred a *latae sententiae* penalty. A judge or superior needed to consider them in determining whether to declare such a penalty. If the consideration of a crime's subjective elements, which was required of a judge or superior to declare a *latae sententiae* penalty, were so similar to that required to impose a *ferendae sententiae* penalty, then why maintain *latae sententiae* penalties at all? A consideration of personal judicial intervention and the purpose of the law might elucidate the question.[49]

2. Personal judicial intervention and the purpose of law

A lack of personal judicial intervention in applying

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[49]Ibid., 334-335. "Cf. v. g. can. 2207 et delicta quae recensentur in parte tertia Libri V cum relativis poenis, ubi elementa subiectiva et obiectiva saepe configurantur in determinando delicto et in statuenda poena." Ibid., 334, n. 24.

latae sententiae penalties denied a delinquent a chance to defend himself or herself. On the one hand, was the external judgment of a judge or superior more accurate than that of an offender whose conscience was to determine if a *latae sententiae* penalty had been incurred? On the other hand, might not the community through the competent penal authority more appropriately apply a penalty than leaving this determination to an individual's conscience? *Latae sententiae* penalties seemed to obscure the social dimension of sin and crime, providing for an automatic legislative reaction to an offense rather than a considered ecclesial judgment. Moreover, such penalties required a profound religious sense of the Church as the community of salvation to be effective. But that kind of religious sense rarely existed in a pluralistic, religiously indifferent, and secularist society. In such a society, personal intervention on the part of the judge or superior might be more appropriate for breaking a delinquent's contumacy than simply letting the *latae sententiae* penalty take effect. Finally, personal judicial intervention in determining the various grades of penal responsibility could more effectively achieve the purpose of penal law, namely, the reform of the offender, the restoration of church discipline

and the repairing of ecclesial damage[50].

B. The second objection to *latae sententiae* penalties: the difficulties for confessors and offenders.

1. The gravity of a *latae sententiae* penalty for a repentant offender

A second objection to *latae sententiae* penalties was that it was difficult for both delinquent and confessor to determine if they were actually incurred. Furthermore, they seemed particularly burdensome for the repentant offender and questionably effective for the delinquent for whom they posed no moral problem. Few canonists challenged this objection because in practice confessors usually remitted most *latae sententiae* penalties in the internal sacramental forum.

Yet, *latae sententiae* penalties were complicated in the 1917 code and seemed to be made by and for experts in the law and not for the ordinary confessor. In addition, the Christian faithful seemed to know little or nothing about

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[50]Valentin Ramallo, "Derecho penal canónico y libertad religiosa," *Revista Española de Derecho Canónico* 28 (1972) 11: "Si el Derecho penal se concibe como reacción social (que ha de tener, por tanto, un cierto carácter de publicidad), la noción de pena 'latae sententiae' queda muy comprometida. Aun en el caso de que responda a un hecho público, y por tanto verdaderamente delictivo - en el Códice latino vigente no es necessariamente así-, se frustra un tanto el sentido auténticamente penal si la sociedad no reacciona ante ese delicto. Es decir, si solamente se supone la reacción y se considera automáticamente al delincuente como incurso en pena, o, lo que es lo mismo, como espontánemante obligado a observar la correspondiente a tal pena. Con ello inevitablemente se traspone lo penal a un campo de nuevas obligaciones personales sin poner de relieve el medio social o jurídico en virtud del cual esa trasposición se operaría por sí misma."

latae sententiae penalties other than a vague notion that they existed and could be incurred with very serious consequences. For the sake of both the confessor and the delinquent, such penalties needed to be simplified.[51]

2. The questionable effectiveness of *latae sententiae* penalties for those for whom they pose no moral problems

Another aspect of the second objection to *latae sententiae* penalties was the attitude of the delinquent for whom incurring such penalties posed no moral problems. If *latae sententiae* penalties were questionably effective for such a delinquent, why keep them? DePaolis answered the question as follows. If the crime were at least public, then the competent authority could urge that the *latae sententiae* penalty be declared. Even if the delinquent did not repent of the delict committed, at least church discipline was respected. Moreover, the Church's coercive power was necessary if it were to maintain itself as the community of salvation. That community determined that certain criminal actions so harmed its proper nature and mission that they were destructive of the community itself. Even if the delinquent did not repent of the delict, *latae sententiae* penalties still safeguarded ecclesial values and discipline. Even if the delinquent did not care about such

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[51]Huizing, "Crime and Punishment," 122; DePaolis, 337-336; Adams, 117; René Metz, "Simple reflexions sur la réforme du droit pénal de l'église," *Revue de Droit Canonique* 18 (1969) 99-100.

penalties, they still admonished the community to avoid a given delict. Nevertheless, the full restoration of church order would occur only when the sin was absolved and the delinquent converted.[52] Given these animadversions, DePaolis stated that the question still remained: were *latae sententiae* penalties the most appropriate means of punishing delicts especially harmful to the Church's nature and mission?

C. The third objection to *latae sententiae* penalties: the risk of injustices.

1. The problems of a sense of inequity

The third objection to *latae sententiae* penalties was that they seemed to precipitate injustices. As McManus noted:

> When, in addition, compliance with a penalty *latae sententiae* is enforced in the external forum, it is impossible to avoid a sense of inequity. This can best be described by saying that the ecclesiastical authority appears to have taken advantage of his position by laying down and invoking anticipatory [*latae sententiae*] penalties. And if the image of servant authority is to be restored, such vestiges of dominance need to be eliminated from canon law. Again, the rights of the Church authority are not the issue; the use of threat and entrapment can be renounced without loss.[53]

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[52]Giuseppe Baldanza, "L'incidenza della teologia conciliare nella riforma del diritto canonico" *Monitor Ecclesiasticus* 95 (1970) 271. See DePaolis, 340, n. 36.

[53]Frederick McManus, "The Internal Forum," in *Acta Conventus Internationalis Canonistarum* (Rome: Typis Polyglottis Vaticanis, 1970) 259-260.

2. Injustice implicit in the exceptional character of *latae sententiae* penalties

There seemed to be something inherently unjust about *latae sententiae* penalties which even the 1917 code recognized by making them exceptional. For example, according to canon 2217, §2 penalties were understood to be *ferendae sententiae* unless it was expressly stated that they were *latae sententiae*. Canon 2241, §2 warned that censures, especially *latae sententiae* censures, particularly excommunications, ought to be inflicted soberly and with great circumspection. That caution to the legislator was duly grounded. Historically, *latae sententiae* penalties were abused and attached even to crimes that could have been handled in some other way. Moreover, *ferendae sententiae* penalties were marginalized to such an extent that *latae sententiae* penalties were *de facto* the only penalties in the Church. By indiscriminately attaching *latae sententiae* penalties to even less serious delicts, church authority weakened its capacity to discover in theory a more appropriate way to punish a delict, to reform the offender and to re-establish church discipline. In practice, *latae sententiae* penalties could punish delicts more easily, but they increasingly made penal law more private and were ineffective in restoring church discipline. Unfortunately, DePaolis did not elaborate or fully explain this

argument.[54]

3. Requirements of church order and discipline

DePaolis maintained that any institute could be abused and that recounting former abuses did not further the discussion about *latae sententiae* penalties. What did advance the discussion was questioning their legitimacy and appropriateness in relation to present ecclesial needs. A competent authority's ease or difficulty in punishing delicts by means of *latae sententiae* penalties in practice was not as important as considering the needs of the whole church. In addition, the proper domain of penal law was the good of the community and the restoration of order rather than the reform of the individual because if the Church desired the conversion of the offender it had means other than juridical ones or penal ones for achieving it. Such was the norm of canon 2214, §2, which called upon bishops to urge the faithful, by patience and kindness, to strive after virtue and to give up vice.[55]

D. The fourth objection to *latae sententiae* penalties: formalism

A fourth objection against *latae sententiae* penalties was that they bred a certain formalism in that the contumacious individual might never have to face the harm done to the community. Unlike *ferendae sententiae* penalties

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[54]DePaolis, 339-341.

[55]DePaolis, 343-344.

which required a judge or superior to inflict them, *latae sententiae* penalties were incurred upon the commission of the offense. Thus, there was not a personal relationship between the delinquent and the judge or superior, but rather an impersonal relationship between the delinquent and the law, between the living person and the dead letter of the law. From that it could only be deduced that *latae sententiae* penalties ought to be rare. Without the personal intervention of church authority the consequences of a penal action would not be faced, and the efficacy of the penalty would be questionable, especially in occult cases.[56]

E. The fifth objection to *latae sententiae* penalties: lack of clear distinctions between sin and delict, moral and juridical orders, internal and external fora

A fifth objection to *latae sententiae* penalties raised three related issues, namely, the rupture with the community through sin or through delict, the distinction between the moral and juridical orders, and the distinction between the internal and external fora. *Latae sententiae* penalties did not distinguish clearly between the break with the Church caused by the sin or by the delict, especially where there had been no clear distinction between the internal and external fora. Moreover such penalties did not distinguish clearly between the moral and juridical orders. That lack of clarity harmed the effectiveness of such penalties. What

[56]Ibid., 344; Adams, 119; Ramallo, 12.

the Church needed were laws as public, clear and secure as those in civil societies. The author will now consider briefly the aforementioned three related issues.

1. The distinction between sin and delict

First of all, there is the rupture with the community caused by sin and by delict. Although sin was not the same thing as a delict, there was a certain mutual relationship between them since a delict was a species of sin. Sin involved not only a rupture of the personal relationship between God and the individual but also a rupture between the sinner and the salvific community. For, it was precisely in and through the community that God made himself present in his Son Jesus Christ, who entrusted to the Church the forgiveness of sins in the Spirit. Since every sin was a break with the community, the competent minister of the community in the sacrament of penance forgave the sin according to the Church's own juridical order. The Church sought out sinners and yet at the same time recognized that certain deeds done by its own members seriously harmed its nature and mission. Such deeds damaged the individual's Christian vocation and in a certain way the whole community. The Church condemned such deeds called delicts by its own penal laws. According to canon 2195 of the 1917 code a delict had both a moral and a juridical aspect because a delict was also a sin. Thus the Church judged certain sins to be delicts and punished them in a particular way to

safeguard certain ecclesial values and to reform the offender.[57]

The break from the community due to sin did not mean that the sinner was no longer a member of the Church unless, of course, it was the sin of apostasy by which the sinner separated himself or herself from the community. Likewise, a delict did not mean that the delinquent was no longer a member of the Church. Even an excommunicated delinquent, deprived of all the helps of the Church, still remained a member. The notion of sin and delict ought to have been distinguished more clearly. Both sin and delict entailed a break in the offender's relationship with God and the community. But the difference between sin and delict was that Church attached penalties to certain sinful and criminal actions by law. Penal law did not distinguish clearly between the moral and juridical orders. Nevertheless, there was a need not to separate sin and delict unduly since the latter was a species of the former.[58]

2. The distinction between the moral and juridical orders

The moral order is broader than the juridical order. The juridical order needed to be inserted into the moral order to avoid juridical positivism, legalism and formalism.

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[57]DePaolis, 345-346.

[58]Ibid., 346-347.

This was particularly true for the Church where law ought not be viewed simply as an organizing principle but rather as an instrument of salvation with a distinctly theological dimension. Authentic church law ought to reflect its divine reality and respect personal relationships to God. Therefore law was necessarily inserted into the theological order.[59] But such an insertion posed questions about the distinction between the internal and external fora.

3. The distinction between the internal and external fora

Certain canonists said that the distinction between the moral and juridic orders implied a clear distinction between the internal and external fora. The juridic order was expressed through the external forum while the moral order was expressed through the internal forum. Since penal law pertained to the juridic order, it ought to be a public arena reality without juridic reference to the forum of conscience. As McManus noted:

> If the future of the canon law is to be clear and effective, the present hesitance of the [1917] *Code of Canon Law* to pronounce on matters of conscience or to enumerate sinful transgressions should become firm policy. The law should be explicitly intended as an external norm of conduct imposed when necessary for the Church society but without direct reference to obligation except in the juridic order.
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> To put it another way, sin or sinfulness cannot be used as a penalty and should not be used as a threat. The juridic sanctions or canonical penalties are something else again; this is not

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[59] Ibid., 347.

> the moment to consider their present usefulness or lack of usefulness. It is really improper, however, to employ the notion of sinful violation of conscience as a kind of sanction for ecclesiastical norms. The Code of the future, to the extent that codification is needed, should forestall all attempts to weaken the moral teaching of the Church by reducing it to an appeal for obedience to Church law simply because it is a law or because it is the lawmaker's will.[60]

a) The proper operation of the juridical order only in the external forum

Moreover, in order to avoid confusion between the juridical and moral orders, some authors wanted church law to be like civil law. They maintained that church law was established in a juridic context, providing for external discipline unless it concerned a question of conscience. Although the moral order ought to influence the legislator in establishing laws, nevertheless law was constituted in the juridical order. Clearly the juridical order had moral force since one was obliged in conscience to observe laws according to their gravity and to respect the common good. But the task of reflecting upon the moral principles affecting law pertained to moralists not legislators.[61]

Such a situation, therefore, required a clear distinction between the moral and juridical orders. Law's proper juridical context was external and public while the moral order looked to the order of conscience where the law could not penetrate. In the Church, the juridical order

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[60]McManus, 253-254.

[61]DePaolis, 348.

regulated relationships in the external forum while the moral order operated in the internal forum of conscience. Law was established in the external forum and envisioned that forum while the internal forum envisioned a person's relationship with God. Juridical formalities pertained exclusively to the external forum.[62]

If church law did refer to the internal forum, it meant either that the Church was reminding all the faithful that its laws obliged in conscience or that one was simply delegated to exercise some form of juridical power in the internal forum. However, the power which was exercised in the internal forum was really a species of the public power of the external forum. This anomalous situation ought to be eliminated so as to avoid as much as possible the confusion between the juridical forum and the forum of conscience, between the juridical order and the moral order.[63]

b) The sufficiency of the internal forum for moral obligation

Other authors also wanted to avoid confusion between the internal and external fora. Although they did not reduce the internal forum to the moral order or the external forum to the juridical order, they judged that the internal forum of conscience sufficed for moral obligation. Such obligations which derived precisely from the moral order did

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[62]Ibid., 348; Ciprotti, 98-99.

[63]DePaolis, 349.

not necessarily need another juridically imposed obligation in the internal forum. Since the law ought to determine interpersonal relationships within the context of the common good, juridical obligations in the internal forum ought to be suppressed. Moral obligations ought to be exclusively in the forum of conscience.[64] DePaolis here was following the argumentation of Huizing:

> The question is whether a secretly incurred penalty which adds obligations of positive law to the duties of conscience incurred *ipso facto* by violation of Church order, has still got any meaning today. The faithful, layman or priest, who is conscious of a grave offence, knows that he must confess this to the Church; that without conversion and readiness to confess he should not receive the sacraments; that, as the old saying goes, he is excommunicated before God, and that he has put himself outside the living community of the faithful in Christ. He knows that the Church judges the matter in this way and that he is subject to judgment. Why then burden his conscience by adding canonical sanctions? And why burden the confessors with having to absolve from disciplinary measures.[65]

c) The reduction of penal law to the private realm in the system of *latae sententiae* penalties

The confusion between the internal and external fora seemed to be greatest in the area of penal law, especially due to the system of *latae sententiae* penalties and, above all, those that punished occult delicts. Such punishment introduced an abstract and theoretical rather than practical

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[64]Ibid.

[65]Huizing, "Crime and Punishment," 123-124.

approach to delicts, which affected the understanding of the "external" violation of a law, absolution in the sacramental forum, and the obligation of observing the penalty in both fora.[66]

The system of *latae sententiae* penalties blurred the distinction between the internal and external fora, between the juridical and moral orders. Because such penalties were usually remitted in the internal sacramental forum, the Church's penal law was practically reduced to the forum of conscience. Clearly, penal law and the forum of conscience lacked a certain amount of harmony. Penal law in practice had been reduced almost exclusively to *latae sententiae* penalties. What was originally designed to be exceptional had become the rule. Penal law had *de facto* been reduced to the private realm. Such a system was no longer tolerable.[67]

There could be other ways of handling the occult delicts to which *latae sententiae* penalties were attached. For example, did *latae sententiae* excommunications for occult offenses such as absolution of an accomplice *in peccato turpi* or a direct violation of the seal of the confessional really repair the scandal and the ecclesial damage that had been done to the religious life of others?

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[66]Ibid., 350.

[67]Ibid.

Huizing maintained that certain priests could be designated to deal with those priests who broke the seal of the confessional. The faithful could be instructed in the limitations on a priest's ability to absolve an accomplice in sins against the sixth commandment.[68]

In brief, there was real confusion between the moral and juridical orders and the internal and external fora. For all practical purposes *latae sententiae* penalties had become the rule rather than the exception and their remission for all practical purposes had been reduced to the sacramental forum. For those reasons penal law had been reduced to the private realm, and such a state of affairs ought to be tolerated no longer.[69]

4. DePaolis' comments on the aforementioned lack of distinctions of fora

a) The place of *latae sententiae* penalties in the life of the Church.

DePaolis stated that greater light needed to be shed on the fifth objection to *latae sententiae* penalties. First, *latae sententiae* penalties were of great antiquity and have retained a certain usefulness in the life of the Church. Furthermore, did the aforementioned inconveniences and confusion derive from the institute itself or from current penal practice? DePaolis maintained that the distinction

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[68]DePaolis, 350; Huizing, 123-124; Adams, 119; Ramallo, 11-12.

[69]DePaolis, 350.

between the internal and external fora was not as clear as some authors indicated. It had to be demonstrated that the internal forum did not produce law or at least did not pertain to the juridical order.

The internal forum could be and frequently was a juridical forum since its exercise was regulated by juridical norms produced by a public power in the external forum and its norms were juridical norms with juridical as well as moral force. Moreover, church law envisioned not only its own social organization but also the effective directing of individual members along the way to eternal life. Therefore, the salvific nature of the Church required the internal forum to be characterized by certain juridic implications, e. g., in the relaxing of obligations, such as vows.

The fact that penalties bound the delinquent in both fora meant that canon 2232 was not simply a moral norm but a juridical one which bound the conscience of the faithful because of the positive will of the Church. Those who wanted the Church to retain *latae sententiae* penalties, at least for occult delicts, did so precisely because they were convinced that internal forum norms bound the conscience of the faithful in virtue of positive law.[70]

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[70]Ibid., 351-352; Antonius Rodriguez, "De foro interno iuxta canonistas posttridentinos," in *Acta Conventus Internationalis Canonistarum*, (Rome: Typis Polyglottis Vaticanis, 1968) 293: "Apud canonistas postridentinos luce meridiana apparent cum aspectus

b) Public order and common good

Second, further clarification was needed about the public order and the common good. Any canonist would affirm that penal law was established for public order and its end was the common good. Hence, some canonists argued that *latae sententiae* penalties for occult delicts could not be sustained because such penalties were more concerned with the individual than with the common good. Moreover, *latae sententiae* penalties could not be sustained even for public offenses because public authority must be involved in deciding whether an offense had been committed, a task which could not be left to the judgment of conscience.[71]

DePaolis made three animadversions regarding that argument. First, since *latae sententiae* penalties were established by public authority, there was a type of public intervention, minimal as it might be. A further intervention would be better but was this issue significant enough to suppress *latae sententiae* penalties? Second, a major objection to *latae sententiae* penalties concerned not the institute itself but rather the fact that most *latae sententiae* penalties were incurred for occult delicts. However, in the 1917 code a delict meant an external but not necessarily a publicly demonstrated violation.

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moralis fori interni tum eius indoles plene iuridica."

[71]DePaolis, 351-352; Adams, 118-119; Ramallo, 11-12.

Third, the notion of public order needed to be examined. Was such an idea merely transferred from civil society to the church community? Canonists did not seem to agree on this point. Some argued that occult delicts were private facts, for whose punishment the moral norms that bound all Christians sufficed.[72] Penal law should consider only public facts which could be proven. Such canonists seemed to view law as focusing on external factors and influenced by organizational concerns. They tended to liken canon law to civil law and wanted *latae sententiae* penalties suppressed. Other canonists, however, maintained that although penal law dealt with issues affecting the public order, the Church as a salvific and supernatural community could not ignore occult criminal offenses which were also relevant to that order. Such canonists viewed law as sacramental and hence were preoccupied that law not be separated from the mystery of the Church. Such canonists did not easily avoid the confusion between the moral and juridical orders and between the internal and external fora. They tended to consider penal law under its personal rather than communal aspect.[73]

F. Summary of objections to *latae sententiae* penalties

In sum, there were at least five objections to *latae*

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[72]Huizing, 124.

[73]DePaolis, 353-354.

sententiae penalties. First, *latae sententiae* penalties were not appropriate for punishing delinquents according to the different grades of responsibility for a delict. Second, it was difficult to determine the fact of one's incurring a *latae sententiae* penalty, its implications for the repentant offender and its effectiveness for the delinquent who did not care if such penalties had been incurred or not. Third, such penalties seemed to precipitate injustices. Fourth, such penalties were formalistic. Fifth, they blurred distinctions between sin and delict, between the moral and juridical orders, and between the internal and external fora. DePaolis made some animadversions on some of these objections and sought to clarify others. We turn now to arguments in favor of *latae sententiae* penalties.

III. Arguments in favor of *latae sententiae* penalties

There were at least four arguments in favor of *latae sententiae* penalties. First, such penalties highlighted the difference between civil and canon law and manifested, at least partially, that the Church is a supernatural reality. Second, *latae sententiae* penalties conformed to the spirit of Vatican II inasmuch as they presumably gave the faithful a share in the power of jurisdiction. Third, they were necessary to punish occult delicts which might otherwise go unpunished. Fourth, *latae sententiae* penalties were judged useful, just and necessary in punishing delicts and promoting justice within the Church.

A. First argument in favor of *latae sententiae* penalties: differences between civil and canon law

The first argument in favor of *latae sententiae* penalties was that they manifested the specific difference between canon and civil law. *Latae sententiae* penalties decisively emphasized the inner connection between law and morality and between the external and internal fora. Ecclesiastical law was an indispensable part of the ecclesial community of salvation, whose goals transcended the mere maintenance of the external order of society. *Latae sententiae* penalties reflected the uniqueness of the church's moral order in which every offense had certain moral consequences before God, even prescinding from the actions of church authority in dealing with such an offense. *Latae sententiae* penalties had indeed been abused in the past, had burdened the conscience of the faithful, and had frequently been remitted outside the external forum. These negative aspects needed to be eliminated; nevertheless, such penalties should be retained to safeguard the Church's proper nature and mission.[74]

1. A further consideration of the Church as a supernatural reality

First, the Church could not be reduced to a merely human society. It was a supernatural reality entailing a mystical union between God and the human race. That same

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[74]Ibid., 327, n. 12.

nature of the Church was reflected in church law. Law was not the whole reality of the Church but it touched that reality. Second, a delict wounded the community of saints and made it rather a community of sinners. Third, true discipline in the Church was neither restored nor vindicated without the conversion of the penitent. Fourth, *latae sententiae* penalties expressed well the intimate connection between the juridic and moral orders. Fifth, such penalties averted the danger of separating the internal and external fora, which would be seriously dangerous to the Church, since it could lead to legalism and formalism.[75]

2. Some difficulties with the first argument in favor of *latae sententiae* penalties

DePaolis judged that the aforementioned reasons for retaining *latae sententiae* penalties, however true, were not strictly *ad rem.* Those authors insisting that *latae sententiae* penalties were necessary to safeguard ecclesial values also agreed that there were problems with such penalties. For example, the great number of *latae sententiae* penalties burdened the conscience of the faithful. The internal forum remission of such penalties weakened and even obliterated their ecclesial dimension. As DePaolis pointed out, the weakened ecclesial dimension of penalties was not solely the result of *latae sententiae* penalties, but they were examples of some of the basic

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[75]Ibid, 358.

problems in penal law. Although there was a connection between the moral and juridical orders, between the internal and external fora, nevertheless the increased number of *latae sententiae* penalties pointed to an overemphasis on the personal, individual dimension of penal law. Although the penal law of the Church was not operative merely in the external forum and could not be separated from the internal forum, the moral order, or the Church's supernatural nature, it was questionable whether such arguments justified *latae sententiae* penalties. The fact of a connection between the juridical and moral orders did not mean they were identical. Likewise, although a delict presupposed a sin, it could not simply be identified with that sin. In brief, DePaolis maintained that the fact that *latae sententiae* penalties manifested the specific difference between canon and civil law might show their legitimacy and appropriateness but not their necessity.[76]

B. The second argument in favor of *latae sententiae* penalties: conformity to the spirit of Vatican II

The second argument in favor of *latae sententiae* penalties was that they conformed to the conciliar spirit since they called the faithful to a certain sense of responsibility. The faithful enjoyed a certain coercive power relative to *latae sententiae* penalties. For they judged if they had incurred them; and if the judgment were

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[76]Ibid., 358-360.

positive, they were bound to observe them in either the internal or external fora or both, depending on the public or occult nature of the delict.[77] However, for DePaolis there were other ways of exercising personal responsibility in the Church, and such an argument may have proven the appropriateness but not the necessity of *latae sententiae* penalties.

C. The third argument in favor of *latae sententiae* penalties: necessity of punishing occult delicts.

The third argument in favor of *latae sententiae* penalties was that they were necessary to punish certain occult delicts effectively.[78] Since such delicts seriously harmed the church community, *latae sententiae* penalties could not be consigned to oblivion. DePaolis considered this the most cogent argument in favor of *latae sententiae* penalties. However, he objected to certain points of its advocates. First an occult delict seemed to be a contradiction since a key feature of a delict was its public character. To maintain that occult delicts needed to be punished proved the confusion that existed between the notions of sin and delict, between the moral and juridical orders, between the internal and external fora, between the rupture with God through sin and the break with the Church

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[77]Ciprotti, 103-104; Adams, 122; DePaolis, 360.

[78]For some examples of this commonly held opinion among commentators of the 1917 Code, see Vermeersch, 3:239, Michiels 2:52-53, Regatillo 2:346.

through the delict. Such confusion derived from the *ius vigens*, for which penal law was a private matter pertaining practically only to the sphere of conscience.[79]

Furthermore, the various approaches to *latae sententiae* penalties reflected two different ways of understanding the nature of law in the Church. Some canonists insisted that occult offenses needed to be punished due to the peculiarities of canon law and the meaning of a delict in the Church. Other canonists insisted that the juridic reality of the Church was analogous to that of civil society. The former considered not only juridic facts but also sins. The latter admitted the reality of sin in the Church but affirmed that the law should be concerned simply with juridical facts relevant to the public order. DePaolis maintained that penal law in the Church, given its supernatural dimension, could not be reduced to public facts pertaining to the civil juridic order. For law envisioned the public good of the Church and was more than simply an instrument for maintaining the external discipline of the organization. Indeed, occult offenses harmed the nature of the Church and deformed the essential dignity of the Christian vocation. However, even if one grants this, did occult delicts justify *latae sententiae* penalties? If the moral law were sufficient to punish occult offenses, why

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[79]DePaolis, 360-361; Adams, 122-123.

intervene with a new positive, juridical imposition?[80]

D. The fourth argument in favor of *latae sententiae* penalties: a better way of justice.

The fourth argument in favor of *latae sententiae* penalties was that they provided a better way of administering justice within the Church. For such penalties punished all delinquents without distinction. Scheuermann maintained that *latae sententiae* penalties were useful, just and necessary to the life of the Church. In the immediate connection between guilt and punishment, the ecclesial punishment of delicts approached the divine method of punishment. One could argue that the aforementioned observation was relevant to *ferendae sententiae* penalties as well. Nevertheless, in no way could the punishment of delicts by such penalties be eliminated.[81]

1. *Latae sententiae* penalties: useful, just and necessary

Scheuermann also presented an objection to the aforementioned argument and rebutted it. The objection was that *latae sententiae* penalties precluded the shepherd's seeking the lost sheep and bringing them home either by love and kindness or by admonition and punishment. His rebuttal underscored the fact that such penalties served the interests of justice and were necessary. *Latae sententiae*

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[80]DePaolis, 361-362.

[81]Ibid., 329.

penalties were just because they applied to every criminal regardless of reputation. Such penalties not only served the end of penal law but spared judges and superiors the *odium* of imposing sanctions. Finally, such penalties were necessary lest penal authorities be overtaxed by the burden of dealing with numerous delicts. For example, could every single case of apostasy, bigamy, and the failure to rear children as Catholics be tried in an ecclesiastical forum? Clearly, some cases would be tried and others not, opening up the Church to criticism of acting unjustly.[82]

According to Scheuermann, the aforementioned argument fundamentally affirmed the legitimacy of *latae sententiae* penalties in the Church. Nevertheless, such penalties ought not primarily burden the conscience of the delinquent, which should be eased as soon as possible by the confessor. Penal law ought primarily to concern itself with the protection of public order and the safeguarding of ecclesial values. Finally, the infliction and remission of penalties had to be based on that public interest.[83]

2. Difficulties with *latae sententiae* penalties promoting justice

DePaolis questioned the persuasiveness of Scheuermann's argument that *latae sententiae* penalties promoted the administration of justice within the Church. For the former

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[82]Ibid., 329, n. 16.

[83]Ibid.

penalties were to be just, adequate, and effective, and hence the issue was: did *latae sententiae* penalties share such qualities? Were they an effective and appropriate means of administering justice in the Church? Moreover, most authors affirmed that *latae sententiae* penalties, especially excommunications, should be an exceptional means of punishing delicts. But if such penalties were considered just, beneficial and necessary in the administration of justice, it seemed a contradiction to say that they ought to be exceptional. Finally, if *latae sententiae* penalties were to be exceptional and utilized only for the most serious cases, then their necessity in serving justice in the Church ought to be justified in every case, and hence they should generally be eliminated.[84]

IV. Conclusions about objections to and arguments in favor of *latae sententiae* penalties

In his significant article, DePaolis collected, organized, and commented on the sparse and disparate sources pertaining to *latae sententiae* penalties. Likewise, Adams used many of the same sources in his work on such penalties. However, while the former argued that they should be eliminated from penal law, the latter argued that they be should retained even if in a reduced number. The following comments briefly summarize DePaolis' and Adams' views on *latae sententiae* penalties.

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[84]DePaolis, 363-364.

A. DePaolis' objections to *latae sententiae* penalties

DePaolis concluded his article by making some brief general observations about *latae sententiae* penalties. His specific remarks about them were based on the pre-schema work of the penal law *coetus* reported on in *Communicationes*.[85] The 1973 schema on penal law had not yet been published at the time his article appeared.

DePaolis observed that *latae sententiae* penalties had *de facto* become ineffective in the life of the Church. However, the question of eliminating or retaining them could not be answered *a priori*. In addition, the objections to *latae sententiae* penalties, however cogent, were important but not decisive since in order to reduce *latae sententiae* penalties some objections to them had to be posed. Likewise, the arguments in favor of *latae sententiae* penalties failed to consider the fact that such penalties in principal were exceptional. Moreover, these arguments needed to consider more carefully the necessity of *latae sententiae* penalties for administering justice in ecclesial life.[86] DePaolis proposed a possible solution to the question of the wisdom of retaining *latae sententiae* penalties. First such penalties were to be exceptional, especially excommunications, a point which canon 2241, §2 of

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[85] *Communicationes* 1 (1969) 85; 2 (1970) 99-107.

[86] DePaolis, 364-365.

the 1917 code made more or less explicit. Second, such penalties were excessive in the 1917 code, and all authors agreed that they needed to be reduced. Yet, he also proposed to investigate why *latae sententiae* penalties ought to be abolished altogether and to discover a more appropriate means of punishing the delicts to which they had been attached.[87]

DePaolis' point of departure for his investigation were the criteria established by the code commission. In principle, *latae sententiae* penalties were odious; and *ferendae sententiae* penalties were preferred. However, delicts that caused grave scandal or could not be effectively punished by *ferendae sententiae* penalties could be punished by *latae sententiae* penalties. At first glance, according to DePaolis, these two aspects of the *coetus* criteria might be confused as a disjunctive statement: if a most serious offense caused grave scandal, a *latae sententiae* penalty was warranted even if a *ferendae sententiae* penalty could efficaciously do so. [88]

However, DePaolis judged that the statement was not disjunctive and posed some questions about the aforementioned *coetus* criteria. He did not want to affirm or deny *a priori* the necessity of *latae sententiae* penalties,

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[87]Ibid., 365-366.

[88]Ibid., 366-367.

but he did want to investigate if they were necessary and effective in ecclesial life according to the commission's criteria. The 1917 code indicated that *ferendae sententiae* penalties were the rule and *latae sententiae* penalties were the exception. If *ferendae sententiae* penalties seemed sufficient to establish and maintain church discipline, then *latae sententiae* penalties were neither legitimate nor appropriate.[89]

DePaolis maintained that the necessity of *latae sententiae* penalties had to be proven not presupposed. The two *coetus* criteria, grave scandal and efficacious punishment, were not clear enough. According to him those criteria were not disjunctive. Rather, *latae sententiae* penalties were an appropriate means to sanction the most serious offense, especially if they could cause grave scandal and could not be effectively punished by *ferendae sententiae* penalties.[90]

However, such an interpretation of the criteria needed some more investigation. Undeniably *latae sententiae* penalties had been useful and effective in a Christian society which had a profoundly religious and ecclesial sense. Frequently, civil law merely reinforced the operative force of ecclesiastical penalties in such a

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[89]Ibid., 367.

[90]Ibid., 368.

society. However, such a society no longer existed; hence, *latae sententiae* penalties were no longer necessary, effective or useful for sanctioning occult delicts.[91]

As for public delicts, the seriousness of an offense or the scandal caused were not sufficient reasons for maintaining *latae sententiae* penalties. They were no longer an effective means of educating the faithful about ecclesial values or of deterring them from committing offenses. Moreover, the legitimacy and appropriateness of such penalties must be based on the law itself and its purpose.[92]

Furthermore, latae sententiae penalties were not appropriate for administering justice in the Church. If penal law were to be effectively restored within the Church, it could not happen "automatically" but rather required the personal intervention of competent authority. This would more likely cause the delinquent to face the consequences of an offense for him or her and for the Church. Such an intervention might not have been necessary in the past, but the situation has changed, and legitimate coercive power ought to be exercised in a personal way.

B. Adams' arguments in favor of *latae sententiae* penalties

Adams presented many of the same arguments regarding

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[91]Ibid., 369.

[92]Ibid., 369-370.

latae sententiae penalties as did DePaolis.[93] However, his personal conclusions were brief, less complicated and different than those of DePaolis. Adams argued that *latae sententiae* penalties ought to be retained. First, a basic rule of canonical reform was to maintain a just balance and continuity between tradition and progress. Without explanation, he asserted that the *coetus* reform of *latae sententiae* penalties recaptured their original pristine and uncomplicated form. Second, another study would be needed to answer those fundamental criticisms leveled at *latae sententiae* penalties. Such a study would need to consider "in depth the role of the Church's penal discipline, its relationship with civil models, the matter of the internal forum and its connections with the Church's external legal structures, and even the corresponding *munera* of moral theology and canon law."[94] Third, from their first appearance in church history, *latae sententiae* penalties have been a continuing part of the Church's penal system. Questions about such penalties seemed to spring from conceptual frameworks such as civil law which were foreign to the Church's nature and mission. Without further comment, Adams hoped his chronological study and juridical analysis of *latae sententiae* penalties would provide some insight

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[93]"Post-Conciliar Discussion Regarding the Automatic Penalty," in Adams, 116-128.

[94]Ibid., 132.

into the Church's lived experience pertaining to them.[95]

The opinions of various canonists on *latae sententiae* penalties in the 1917 code contributed to the over-all discussion of penal law reform. As we have seen, some canonists objected to such penalties while others favored them. But the responsibility for actually revising such penalties was the task of the *coetus* on penal law to which we now turn in section three.

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[95]For Adams' conclusions see ibid., 131-133.

Section Three

The Work of the *Coetus* on Revising Penal Law in the 1917 *Code of Canon Law*.

I. Introduction

A. A brief general chronology of the reform of penal law

As noted earlier, in January 1959, Pope John XXIII called for an ecumenical council and the reform of canon law.[96] By 1964, Pope Paul VI had designated the members of the *coetus* to reform penal law.[97] However, only a summary of their work was published in 1970.[98] In December 1973, the *coetus* had produced its first schema.[99] Animadversions on it from consultative bodies were due by the end of March, 1974. As noted earlier, the pace of events and the proposed

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[96]For chronologies of the code revision process and reports on the work of the individual *coetus* see Joseph Fox and Giorgio Corbellini, "Synthesis Generalis Laboris Pontificiae Commissionis CIC Recognoscendo," *Communicationes* 19 (1987) 262-308 esp. 296-299. The aforementioned synthesis was translated into English in Joseph Fox, "A General Synthesis of the Work of the Pontifical Commission for the Revision of the Code of Canon Law," *The Jurist* 48 (1988) 800-840, esp. 829-832.

[97]For a discussion of the members of the coetus for revising penal law, see Peters, 158, n. 31. For some works on the reform of penal law soon after the aforementioned announcement of John XXIII, see Ovid Cassola, "De iure poenali codicis canonico emedando," *Apollinaris* 32 (1959): 240-259; Rosalio Castillo Lara, "Algunas reflexiones sobre la futura reform del Libro V CIC," *Salesianum* 23 (1961) 317-339.

[98]*Communicationes* 2 (1970) 99-107.

[99]Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* [1973 schema] (Rome: Typis Polyglottis Vaticanis, 1973).

motu proprio Humanum consortium, which was to accompany the draft of penal law if it were to be promulgated as a separate text, left many canonists concerned whether a sufficient amount of reflection had been given to the whole process.[100] Reports on the revision of the 1973 schema appeared in 1976 and 1977.[101] Canons 1263-1351 of the 1980 schema contained the revised penal law.[102] Perhaps due to other pressing conciliar reforms, the reform of "penal law ha[d] not been one of the most hotly debated areas of contemporary reform."[103] In 1981 a report was published by the secretariat of the commission that synthesized the animadversions on the 1980 schema.[104] The report contained relatively minor proposed changes regarding *latae sententiae*

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[100]*Humanum consortium*, 1973 schema, 15: "Quamobrem, motu proprio et auctoritate Nostra Apostolica, eas, quae sequuntur, leges decernimus et statuimus, abrogatis cunctis canonibus libri quinti Codicis Iuris Canonici, ita ut fideliter serventur a die . . . donec novus Iuris Canonici promulgetur." Thomas Green, "The Future of Penal Law" *The Jurist* 35 (1975) 249.

[101]*Communicationes* 8 (1976) 166-183; 9 (1977) 147-174, 304-322.

[102]Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Schema Codicis Iuris Canonici iuxta animadversiones SRE Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecrate recognitum* [1980 schema], (Rome: Libreria Editrice Vaticana, 1980).

[103]Green, "Revisited," 135.

[104]Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis patribus commissionis ad novissimum schema codicis iuris canonici exhibitarum, cum responsionibus a secretaria et consultoribus datis* [1981 *Relatio*] (Rome: Typis Polyglottis Vaticanis, 1981).

penalties. By March 1982, the second integrated text of the code was presented to Pope John Paul II for promulgation.[105] After some refinements of minor consequence for *latae sententiae* penalties, the text was promulgated on January 25, 1983 and took effect on November 27, 1983.

B. Sources

The sparse official sources on the process of revising penal law make it difficult to evaluate that process. "The council itself offered few observations on the role of penalties in the life of the Church."[106] Post-conciliar penal developments dealt mostly with the abrogation of specific penalties such as that affecting Catholics contracting marriage before a non-Catholic minister and the index forbidding certain books.[107] In addition, there were no published reports of the work of the *coetus* from its inception in 1964 until 1970.[108] Not only are the sources

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[105]Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Codex Iuris Canonici schema novissimum iuxta placita patrum commissionis emendatum atque Summo Pontifici praesentatum* [1982 schema] (Rome: Typis Polyglottis Vaticanis, 1982).

[106]Peters, 163. For more discussion on the paucity of sources see ibid. illuminating the revision of penal law, nn. 46-48.

[107]James O'Connor, "Trends in Canon Law: the Question of Penalties," *Studia Canonica* 3 (1969) 226-229.

[108]Peters, 165, n. 51: "For practical purposes (not counting merely grammatical modifications) 26% of [current penal law reached its] final form by the time of the 1973 schema. An additional 71 canons [of books six and seven in the 1983 code](70%) reached their final form in the 1980 schema."

scarce, but they are relatively inaccessible, somewhat comparable to the canon law societies' reports on the 1973 schema.

C. Method.

The profile of *latae sententiae* penalties in the 1917 code provided in the conclusion of chapter one will form the basis of the following textual criticism of the 1973, 1980 and 1982 schemata developed during the revision process. Various questions were used in the aforementioned profile to focus our brief comments on the establishment, application and cessation of *latae sententiae* penalties. The same questions are generally used here to trace the textual development of the pertinent canons. After citing the canons of the 1917 code and the aforementioned schemata, the author will note comments from the various *coetus* reports and the relatively few comments on *latae sententiae* penalties published in the 1981 *Relatio*. Since the primary focus of this section is the work of the *coetus* revising penal law, the reports from the American, British and Canadian canon law societies will be noted as a supplemental criticisms of the *coetus*' work.[109] In addition, although

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[109]Thomas Green et al., "Report of the Special Committee of the Task Force of the Canon Law Society of America on the Proposed Schema *De Delictis et Poenis*," [CLSA Report] in *Proceedings of the Thirty-Sixth Annual Convention of the Canon Law Society of America (1974)*; Canon Law Society of Great Britain and Ireland, "Report on Schema Documenti quo Disciplina Sanctionum seu Poenarum in Ecclesia Latina denuo Ordinatur" [British-Irish Report],(unpublished report, February, 1974), photocopied; Canadian Canon Law Society, "Report

this section will indicate the pertinent canons of the 1983 code, the author will not comment formally on them until chapter three. However, before we turn to the relevant canons on *latae sententiae* penalties contained in the various revision process documents, it is important to recall some principles that guided the work of the penal law *coetus* before the publication of the 1973 schema.

II. The work of the penal law *coetus* before the 1973 schema

A. Applying the ten guiding principles to the reform of penal law

In April 1967 a central *coetus* of the code commission approved the text of ten principles for the revision of the code.[110] Johnson noted that "according to Florentius Romita, these principles were 'the fruit of study of and reflection on the Decrees of Vatican II, the general principles of law, the treasury of law and jurisprudence established in the Church,' all of which ripened under the influence of the spirit of canon law and the ecumenical solicitude, which moves the Church."[111] In addition,

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to the Canadian Catholic Conference on the proposed schema,'De delictis et poenis'" [Canadian Report], (unpublished report, February, 1974), photocopied. The author is grateful to Dr. Thomas Green for making these reports available to him.

[110]"Synodus Episcoporum," *Communicationes* 1 (1969) 55: "Haec 'Principia' a Coetu quodam centrali Consultorum attento studio subiecta sunt ac deinceps discussa et unanimi consensu approbata in Sessione diebus 3-8 aprilis 1967 celebrata."

[111]Johnson, 22. See ibid., n. 54.

"observations made by the Consultors [of the Pontifical Commission for the Revision of the Code of Canon Law] in accordance with the mind and direction of the cardinalatial members of the Commission and the Episcopal Conferences."[112] As noted earlier the ten principles were presented to and voted on during the 1967 synod of bishops. The penal law *coetus* reaffirmed principle nine regarding *latae sententiae* penalties and took into consideration the discussion on it at the 1967 synod.

> It is the mind [of the Commission] that penalties should generally be *ferendae sententiae* and should be imposed and remitted only in the external forum. As regards *latae sententiae* penalties, although not a few have proposed their abolition, it is the mind [of the Commission] that they be reduced to a few cases, indeed to a very few serious crimes.[113]

The commission underscored its clear preference for *ferendae sententiae* penalties inflicted either by judicial sentence or administrative decree. That preference implied a reference to principle three which stated that canon law ought to be influenced by the supernatural virtues of charity, temperance, humaneness and moderation.[114] The

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[112]Johnson 22, n. 55.

[113]"Principia quae Codicis Iuris Canonici recognitionem dirigant," *Communicationes*, 1 (1969) 85: "Mens est ut poenae generatim sint ferendae sententiae et in solo foro externo irrogentur et remittantur. Quod ad poenas latae sententiae attinet, etsi a non paucis earum abolitio proposita sit, mens est ut illae ad paucos omnino casus reducantur, imo ad paucissima eaque gravissima delicta." Translation: Adams, 123.

[114]*Communicationes* 1 (1969) 79.

personal intervention of the competent authority in imposing the sanction could do just that. The commission also reflected principle two that called for a clearer distinction between the internal and external fora.[115] Penalties were to be imposed and remitted in the external forum. Accordingly, *latae sententiae* penalties needed to undergo some changes which will be considered later. Although some had called for abolishing *latae sententiae* penalties altogether, the commission decided to retain them in principle, reducing them, however, to a very few grave crimes.

B. The reduction in the number of *latae sententiae* penalties

Ciprotti reported the changes in *latae sententiae* penalties during the initial stages of the drafting process.

> *Latae sententiae* penalties have been reduced to a very few instances, and care has been taken that, even in particular laws and precepts, they be used for only certain very serious offenses not punishable by *ferendae sententiae* penalties, or by reason of their greater scandal.[116]

The commission clearly preferred *ferendae sententiae* penalties, while setting certain parameters for the establishment of *latae sententiae* penalties without

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[115]Ibid.

[116]*Communicationes* 2 (1970) 102: "...poenae latae sententiae ad paucissimos casus reductae sunt et curatum est ut etiam in legibus particularibus et in praeceptis eae adhibeantur tantummodo 'in singularia quaedam delicta dolosa, quae vel graviori esse possint scandalo vel efficaciter puniri poenis ferendae sententiae non possint." Trans. Adams, 124.

explaining the criteria. Presumably *latae sententiae* penalties were pertinent if certain crimes could not be effectively punished by a *ferendae sententiae* penalty, or were the occasion of "greater scandal." Such criteria were used to reduce universal law *latae sententiae* penalties and establish particular law *latae sententiae* penalties and precepts.

> Moreover certain types of penalties were suppressed.
>
> > Not only to lessen the possibility of establishing *latae sententiae* penalties, but in order to avoid the confusion and difficulty connected with certain penalties - when they are enjoined *latae sententiae* - canon 35 proposes that only certain prohibitions among the expiatory penalties can in fact be enjoined *latae sententiae*.[117]

That provision of the proposed law solved some difficulties without specifying what difficulties were inherent in *latae sententiae* penalties, especially in the case of expiatory penalties.[118] The proposed draft would specifically establish which expiatory penalties could be incurred *latae sententiae*.

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[117]*Communicationes* 2 (1970) 105: "Praeterea, non solum ut minueretur possibilitas statuendi poenas latae sententiae, sed etiam ad confusiones ac difficultates vitandas quae ex nonnullis poenis, si forte latae sententiae sint, haberi possunt, can. 35, proponit ut tantummodo nonnullae prohibitiones possint, ex poenis expiatoris, esse latae sententiae." Trans. Adams, 125.

[118]*Praenotanda*, 1973 schema, 6: "Mox autem (can. 3, §1, 2°) nomen poenarum vindicativarum mutatum perspicitur in 'poenas expiatorias,' quae locutio ex Sancti Augustini *De civitate Dei* 21, 13 desumpta est."

C. Changes regarding those subject to *latae sententiae* penalties

The proposed draft also addressed those who were subject to penalties in general and *latae sententiae* penalties in particular. The proposed law would penalize only those who acted out of malice (*dolus*) unless the law or precept stated otherwise, a point which was contrary to canons 2199, 2203,§1 and 2229, §3, 2° in the 1917 code. Canon 2229, §3, 2° referred specifically to *latae sententiae* penalties from which one was not excused, diminished imputability notwithstanding, if the act were gravely culpable for reasons of intoxication, lack of due diligence, mental weakness or passion. Although the presumption of malice in canon 2220, §1 of the 1917 code was suppressed, the presumption of imputability was kept.[119]

D. Changes in observing *latae sententiae* penalties

Another major change concerned the obligation to observe penalties. The 1917 code provided for the

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[119]*Communicationes* 2 (1970) 103: "Quod attinet ad imputabilitatem, praecipua mutatio proponitur, statuendo puniri posse tantummodo qui dolo egerit, nisi lex vel praeceptum aliter caveat (can. 13 §2; contra CIC cann. 2199, 2203, §1, 2229, §3, 2°); cui principio, quod codices poenales civitatum iamdudum sequuntur, nonnullae aliae normae accommodari debuerunt.

Doli definitio, indirecte expressa (can, 13, §2), eadem est, quae in CIC can. 2200, §1. Verum omnino suppressa est distinctio illa verborum, quam innuit CIC can. 2229, §2, significans singularem doli figuram, quem dolum plenum vocant: neque tamen ex hoc timendum est ne severius fiat ius poenale canonicum, cum multo mitiores normae de imputabilitate et de circumstantiis et multo magis perspicuae proponantur.

Doli praesumptio (CIC can. 22, §1) suppressa est, servata tantum imputabilitatis presumptione."

extraordinary remission of *latae sententiae* penalties in the sacramental forum if the delinquent risked self-defamation and self-betrayal or if the penalty incurred prevented sacramental absolution. Thus, according to canon 2254, §1 of the 1917 code, a confessor could absolve from *latae sententiae* censures for occult delicts in urgent cases; and canon 2290, §1 of the same code suspended the obligation to observe *latae sententiae* vindictive penalties for occult delicts in urgent cases. However, the proposed law abolished this power of the confessor in order to keep penalties in the external forum and distinguish more clearly between the fora. Accordingly, a *latae sententiae* censure or vindictive penalty would not prevent a delinquent from receiving sacramental absolution; and the law itself would suspend the obligation of observing penalties in certain cases.

> When the obligation of observing a penalty is suspended in the draft, the matter is dealt with in a way different than canons 2232, 2254, 2290 of the *Codex*. Since now no censure hinders sacramental absolution, that case in which it might have been too hard for the penitent to remain in the state of grave sin has no longer been considered [by the draft]. Moreover, since the ordinary power of the confessor of absolving from censures or of suspending from the obligations of expiatory [vindicative] penalties has been abolished, it now stated that, even if a penalty be imposed or declared, the obligation of observing it is suspended by the very law itself in certain cases (which are clearly listed in canon 51), with the result that the delinquent himself sometimes may have to consult his own conscience in the matter of whether or not he is

excused from observing the penalty.[120]

Thus, a *latae sententiae* censure would not prevent the reception of sacramental absolution. Furthermore, the proposed draft abolished the need for the confessor to absolve from *latae sententiae* censures or to suspend *latae sententiae* vindictive penalties in urgent cases and provided for the possibility of not observing them in certain cases even if they were declared.

III. The *Praenotanda* of the 1973 schema and the proposed *motu proprio Humanum consortium*

Since the *Praenotanda* of the 1973 schema incorporated all of the aforementioned provisions regarding *latae sententiae* penalties, it would serve no purpose to reiterate them here.[121] The proposed *motu proprio, Humanum consortium*, addressed the relationship between charity and coercive power, pastoral gentleness in implementing penal law, the rationale for penal law in light of the Vatican II, and the need for conversion of life which precluded the need

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[120]*Communicationes* 2 (1970) 105: "Quando suspendatur obligatio servandae poenae, schema aliter moderatur quam CIC can. 2232, 2254, 2290. Cum enim iam nulla censura impediat sacramentalem confessionem, casus ille quo durum sit poenitenti in statu gravis peccati permanere considerandus amplius non fuit. Praeterea, cum quaelibet abolita sit ordinaria confessarii potestas sive absolvendi a censura sive suspendendi obligationem servendae poenae expiatoriae, statutum est ut, etiamsi poena si irrogata vel declarata, obligatio eam servandi suspendatur ipso iure in certis casibus (qui perspicue in can. 51 recensentur), quod efficit ut nonnumquam ipse delinquens pro sua conscientia sibi debeat quaerere utrum excusetur a poena servanda necne." Trans. Adams, 126.

[121]*Praenotanda*, the 1973 schema, 5-10,

for pastors to correct the faithful. Since authors such as Green, DePaolis, Provost and Chamberlain[122] have provided summaries of and useful commentaries on both of these documents, the author will highlight only the third section of the aforementioned *motu proprio*, which had implications for *latae sententiae* penalties.

The proposed *motu proprio* discussed some of the guiding principles of the draft and recapitulated some of the points made in the *Praenotanda*. While there could be different approaches to the same offense, universal law would be limited to the most serious breaches of church order which demanded uniform punishment throughout the Church. The recommendations of the 1967 synod were respected; and accordingly, penalties were reduced to a minimum and conflicts between the internal and external forum were minimized. Censures no longer precluded sacramental absolution or the anointing of the sick. Ordinaries would have broader faculties to remit *latae sententiae* and *ferendae sententiae* penalties except those reserved to the Holy See. As always, the hope was expressed that loving obedience to authority and harmonious collaboration among

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[122]Green, "Future," 212-275; Velasio De Paolis, "Animadversiones ad 'Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur,'" *Periodica* 63 (1974) 498-507; James Provost, "Revision of Book V of the Code of Canon Law," *Studia Canonica* 9 (1975) 135-152; Michael Chamberlain, "The Rationale for Ecclesiastical Penal Law," JCL Thesis, The Catholic University of America, 1982.

all the faithful would reduce the need to employ penal law at all.[123]

We now examine the textual development of the original 1973 penal law schema as well as the pertinent canons of the 1980 and 1982 schemata. We will consider the canons in terms of the establishment, application and remission of *latae sententiae* penalties.

IV. The establishment of *latae sententiae* penalties.

The following questions will focus our discussion on establishing *latae sententiae* penalties: what are they? who may establish them? who is subject to them?[124]

A. The definition of a *latae sententiae* penalty

1. General animadversions

The definition of a *latae sententiae* penalty has been simplified vis-à-vis the 1917 code. This was in accord with the *Praenotanda* that stated that such matters were best left to the doctors of law rather than to legislators.[125] The 1973 schema also used the terms "*irrogare*" to indicate

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[123]1973 schema, 13-15.

[124]The underlined passages in the text of the canons alert the reader to some of the more important modifications of the 1917 code which will be discussed in the commentary which follows each section of canons. Also, each group of related canons from the same code or schema is placed together in order to facilitate the pertinent discussion about them.

[125]*Praenotanda,* 1973 schema, 6: "...maxima habita est cura ut praetermitterentur definitiones aliaque, quae ad doctorum magis quam ad legislatoris pertinent officium, et ut verba et locutiones constanter uniformi adhiberentur significatione."

ferendae sententiae penalties and "*incurrere*" to indicate *latae sententiae* penalties.

Brief general animadversions by the consultative bodies on the 1973 schema as a whole were published by the *coetus* in 1975.[126] Brief general animadversions on individual canons in the 1973 schema were published in 1976.[127] A few words on the first set of animadversions seem warranted. In 1975 the penal law *coetus* reported that the number of *latae sententiae* penalties had been greatly reduced and were attached to those crimes causing more grave scandal and not able to be punished efficaciously by *ferendae sententiae* penalties. Some consultative bodies wanted *latae sententiae* penalties limited to the external forum only. Others judged that they were consonant with the spiritual end of the Church, which is the good of souls, and were necessary for punishing occult delicts.[128]

The 1976 report on comments on individual canons reiterated many of the aforementioned arguments. Some wanted to abolish *latae sententiae* penalties completely. Others argued that they should be kept because there was not a complete distinction between the internal and external forum. The consultors voted unanimously to retain *latae*

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[126] *Communicationes* 7 (1975) 93-97.

[127] *Communicationes* 8 (1976) 166-183.

[128] *Communicationes* 7 (1975) 96.

sententiae penalties while restricting them to only a few cases as the schema had done. They were not entirely suppressed because they were a unique means of safeguarding the spiritual good of persons and of punishing occult delicts.[129]

2. Animadversions on canon 5 of the 1973 schema and *coetus* response

> **Canon 2217 of the 1917 code** - §1. Poena dicitur:
> 1°. *Determinata*, si in ipsa lege vel praecepto taxative statuta sit; *indeterminata*, si prudenti arbitrio iudicis vel Superioris relicta sit sive praeceptivis sive facultativis verbis;
> 2°. *Latae sententiae*, si poena determinata ita sit addita legi vel praecepto ut incurratur ipso facto commissi delicti; *ferendae sententiae*, si a iudice vel Superiore infligi debeat;
> 3°. *A iure*, si poena determinata in ipsa lege statuatur, sive latae sententiae sit sive ferendae; *ab homine*, si feratur per modum praecepti peculiaris vel per sententiam iudicialem condemnatoriam, etsi in iure statuta; quare poena ferendae sententiae, legi addita, ante sententiam condemnatoriam est *a iure tantum*, postea *a iure* simul et *ab homine*, sed consideratur tanquam *ab homine*.
> §2. Poena intelligitur semper ferendae sententiae, nisi expresse dicatur eam esse *latae sententiae* vel *ipso facto* seu *ipso iure* contrahi, vel nisi alia similia adhibeantur.
>
> **Canon 5 of the 1973 schema**- Poena <u>per se</u> est ferendae sententiae, ita ut reum non teneat, nisi postquam irrogata sit; incurritur autem ipso facto commissi delicti, si in lege vel praecepto expresse dicatur esse latae sententiae.

Some animadversions of consultative bodies judged that canon 5 of the 1973 schema poorly reformulated canon 2217, §

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[129]*Communicationes* 8 (1976) 170-171.

2 of the 1917 code. The latter text simply stated that a penalty was to be understood as *ferendae sententiae* unless it was expressly stated that it was *latae sententiae*. In the former text the term "*poena per se*" was the subject of both verbs "*irrogata sit*" (*ferendae sententiae*) and "*incurritur*" (*latae sententiae*). As it stood, the canon did not make sense. The consultors admitted that the term "*per se*" needed to be changed to another word such as "ordinarily" (*ordinarie*) or "for the most part" (*plerumque*). After much discussion, the term "*plerumque*" replaced "*per se*."[130]

3. CLSA, Canadian and British-Irish Reports

The CLSA Report argued for the elimination of *latae sententiae* penalties for the following reasons. First, it would be extremely difficult to establish their appropriateness because such a penalty ought to be attached to a crime only if it was certainly necessary. Second, the observance of a *latae sententiae* penalty was a matter best left to an individual's conscience even in the external forum. Insisting on *ferendae sententiae* penalties could more suitably attain the purpose of the law. Third, *latae sententiae* penalties required the offender to be prosecutor, judge and defendant simultaneously, which offended more modern sensibilities vis-à-vis the demands of justice.

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[130]Ibid., 171.

Fourth, the most serious offenses warranted a personal judicial intervention by a competent authority. In short, "All judgment should be *ab homine*; only penalties declared after such a process should be admitted."[131]

The Canadian Report did not comment on *latae sententiae* penalties in general but did note specific changes in the *latae sententiae* censures mentioned in canon 68,§ 1 on clerics attempting marriage and in canon 71 on abortion of the 1973 schema. Moreover the report did call for some definitions of terms but did not specifically cite canon 5 of the 1973 schema.[132]

The British-Irish Report noted that definitions and explanatory canons had been reduced; for example, the schema did not define the term "*latae sententiae* penalties." Such an approach to definitions might have the advantage of streamlining the law; however, one disadvantage was that it equally demanded "a knowledge of earlier jurisprudence which can only be acquired by extensive study."[133] However, the British-Irish Report also noted that canon 5 was "a measure of success" since its provisions were rigorously applied and *latae sententiae* penalties had been reduced to nine.[134]

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[131]CLSA Report, 135.

[132]Canadian Report, 2.

[133]British-Irish Report, 3.

[134]Ibid, 5.

4. The 1980 and 1982 schemata and the 1983 code

> **Canon 1266 of the 1980 schema**- Poena plerumque est ferendae sententiae, ita ut reum non teneat, nisi postquam irrogata sit; est autem latae sententiae, ita ut incurratur ipso facto commissi delicti, si lex vel praeceptum id expresse statuat.
>
> **Canon 1314 of the 1982 schema and canon 1314 of the 1983 code** restated canon 1266 of the 1980 schema.

The aforementioned canons reflected the pre-1980 schema discussion of the penal law coetus.[135] Finally, the 1981 *Relatio* did not report any discussion on canon 1266.

B. Those who establish *latae sententiae* penalties

> **Canon 2220 of the 1917 code**- §1. Qui pollent potestate leges ferendi vel praecepta imponendi, possunt quoque legi vel praecepto poenas adnectere; qui iudiciali tantum, possunt solummodo poenas, legitime statutas, ad normam iuris applicare.
> §2. Vicarius Generalis sine mandato speciali non habet potestatem infligendi poenas.
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> **Canon 6 of the 1973 schema**- Qui legislativum [sic] habet potestatem, potest suis legibus quamlibet legem divinam, aut legem ecclesiasticam intra ambitum suae iurisdictionis vigentem congrua poena, vel ab ipso determinata vel prudenti iudicis arbitrio determinanda, munire; quod si quis legislativam potestatem de quibusdam tantum rebus habeat, de iis tantum potest poenalem legem ferre.

1. Animadversions on canon 6 of the 1973 schema and *coetus* response

What follows here are some general comments on legislative power which help to contextualize the subsequent discussion of *latae sententiae* penalties. Some

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[135]Green, "Revisited," 145-146.

animadversions of consultative bodies on canon 6 of the 1973 schema preferred that indeterminate penalties never be established. However, that suggestion was not acceptable. Nevertheless, the schema proposed that an indeterminate penalty could not be established by penal precept but only by law.[136]

Some consultors feared that there might be too great a diversity in penal law among dioceses of the same region and therefore proposed that only the episcopal conference could establish penal laws. However, the *relator* responded that such an approach would unduly constrict the power of bishops. Another consultor agreed with the *relator* and stated that episcopal conferences could attach penalties to their laws. However, the *coetus* included a norm urging bishops to enact uniform penal laws for their respective regions.[137]

A new paragraph was proposed: "Local ordinaries are to see to it that penal laws if they are enacted are uniform in the same city or region to the extent that this is possible."[138] The aforementioned paragraph was accepted and the phrase beginning "*quod si quis legislativam potestatem*"

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[136]*Communicationes* 8 (1976) 171.

[137]Ibid., 172.

[138]Ibid.: "Curent locorum Ordinarii ut quatenus fieri possit, in eadem civitate vel regione uniformes ferantur, si quae ferendae sint, poenales leges."

of canon 6 of the 1973 schema was suppressed. The newly proposed paragraph became canon 1268 of the 1980 schema.[139]

2. CLSA, Canadian and British-Irish Reports

The CLSA Report noted that the 1973 schema sought to accommodate penal law to Vatican II but that it also had a "tendency to view the determination of penalties and the place of authority figures as over and apart from the community."[140] Canons 6 through 9 needed to be rewritten so that the whole community could have a hand in shaping penal law. The CLSA report admitted that such a project might be difficult but argued that the efficacy of penal law depended on its "reflecting the expectations and standards of the whole community."[141]

The CLSA and Canadian reports also urged that episcopal conferences develop a regional policy for more serious crimes in order to preclude local arbitrariness.[142] However, the Canadian Report stated that subsidiarity "in the sense of leaving authority and its exercise to the lower echelons on the Church's hierarchy" was adequately reflected here.[143]

The British-Irish Report wanted an introductory canon

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[139]Green, "Revisited," 146-147.

[140]CLSA Report, 131.

[141]Ibid.

[142]Ibid., 133-134; Canadian Report, 1.

[143]Canadian Report, 1.

to mention among other things, "that the function of general law is to confine itself to a statement of general principles of the more serious crimes which are an offense to the Church *ubique terrarum*, thus leaving it to local legislators to deal with the problems which are specific to their own jurisdictions"[144]

3. The 1980 and 1982 schemata and the 1983 code

Canon 1267 of the 1980 schema- §1. Qui legislativam habet potestatem, potest etiam poenales leges ferre; potest autem suis legibus etiam legem divinam vel legem ecclesiasticam, a superiore potestate latam, congura poena munire, servatis suae competentiae limitibus ratione territorii vel personarum.

§2. Lex potest poenam ipsa determinare vel prudenti iudicis aestimationi determinandam relinquere.

§3. Lex particularis potest etiam poenis generali lege constitutis in aliquod delictum alias addere; id autem ne faciat, nisi ex gravissima necessitate. Quod si lex generalis indeterminatam vel facultativam poenam comminetur, lex particularis potest etiam in illius locum poenam determinatam vel obligatoriam.

Canon 1268 of the 1980 schema- Curent Episcopi diocesani ut, quatenus fieri possit, in eadem civitate vel regione uniformes ferantur, si quae ferendae sint, poenales leges.

Canon 1314 of the 1982 schema- [The wording of canon 1267, §1 and §2 of the 1980 schema was retained.] §3. Lex particularis potest etiam poenis universali lege constitutis in aliquod delictum alias addere; id autem ne faciat, nisi ex gravissima necessitate. Quod si lex universalis indeterminatam vel facultativam poenam comminetur, lex particularis potest etiam in illius locum poenam determinatam vel obligatoriam constituere.

Canon 1314 of the 1983 code retained the

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[144]British-Irish Report, 8.

wording of canon 1267, §1 and §2 of the 1980 schema and the wording of canon 1314, §3 of the 1982 schema.

Canon 1268 of the 1980 schema used the term "*Episcopi diocesani*" instead of the term "*locorum Ordinarii*" but no explanation of the change was given. Moreover, Green noted that "the *coetus* [was] well aware of the possible arbitrariness of local authorities and [was] sensitive to the need to moderate episcopal power. Hence an explicit provision encouraging penal law uniformity in the various ecclesiastical regions [was] included in norm 1268 of the *alter textus.*"[145] Canon 1268 of the 1980 schema was restated both in canon 1316 of the 1982 schema and canon 1316 of the 1983 code.[146] Finally the 1981 *Relatio* did not report any discussion on canons 1267 and 1268.

4. Establishing *latae sententiae* expiatory penalties

As noted earlier, the *coetus* drastically reduced the number of *latae sententiae* expiatory penalties. The textual changes from the 1917 code will be dealt with here in a summary fashion. Canons 2286-2305 of the 1917 code dealt with vindictive penalties. Those twenty canons were reduced to four canons, 21-24 in the 1973 schema. Of those four, canon 21, §2 dealt specifically with *latae sententiae* expiatory penalties:

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[145]Green, "Revisited," 146.

[146]Ibid.

> The only expiatory penalties which can be *latae sententiae* are those enumerated in §1, c [a prohibition against exercising those things mentioned under b [deprivation of power, office, function, right, privilege, faculty, favor, title, insignia, even merely honorary] or a prohibition against exercising them in a certain place or outside a certain place; which prohibitions are never under pain of nullity]."[147]

This canon was restated in canon 1287, §2 of the 1980 schema, canon 1336, §2 of the 1982 schema, and canon 1336, §2 of the 1983 code. The consultors' discussion of canon 21 did not pertain to *latae sententiae* penalties.[148] According to the *Relatio*, Cardinal Siri wanted the prohibitions of canon 1287, §1, 3° of the 1980 schema, which was also referred in §2 of the same, to be inflicted under pain of nullity so that they might be effective. The *relator* responded that if anyone desired or judged such nullity necessary, then canon 1287, §1, 2° of the 1980 schema which deprived one of power, office, function, etc., ought to be invoked. However, the sanction of nullity ought to be viewed from the viewpoint of the faithful not the minister; and thus one ought to proceed cautiously.[149]

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[147]*Communicationes* 9 (1977) 155: "Latae sententiae eae tantum poenae expiatoriae esse possunt, quae in §1, c, [prohibitio ea exercendi, quae sub b [privatio potestatis, offici, muneris, iuris, privilegii facultatis, gratiae, tituli, insignis etiam mere honorifici] recensentur, vel prohibitio ea in certo loco vel extra certum locum exercendi; quae prohibitiones numquam sunt sub nullitatis.] recensentur."

[148]Ibid., 156.

[149]*Relatio*, 296-297; Green, "Revisited," 157.

The CLSA report questioned the value of expiatory penalties, calling them "a negative value, psychologically unproductive and humanly undignified."[150] More than ever, the Church needed to be inclusive and reconciling, not punishing and avenging. The CLSA report dealt with expiatory penalties in general and the nature of punishment in the Church but did not specifically address *latae sententiae* expiatory penalties.[151] Neither the Canadian nor the British-Irish Reports considered that point.

5. Establishing *latae sententiae* suspensions

As regards the establishing of *latae sententiae* censures, the most notable change concerned *latae sententiae* suspensions. This issue will be dealt with here in a summary fashion. According to canon 2282 of the 1917 code, "a *latae sententiae* suspension, inflicted by common law, affected every office and benefice in whatever diocese they were held."[152] That provision was modified by canon 19, §2 of the 1973 schema, which more narrowly focused the scope of the suspension. "A law, but not a precept can establish a *latae sententiae* suspension without any further

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[150]CLSA Report, 132.

[151]Ibid., 132-133.

[152]*CIC* 17 c. 2282: "suspensio latae sententiae, iure communi irrogata, afficit omnia officia vel beneficia in quacunque dioecesi possideantur"

determination or limitation."[153] The text was restated in canon 1285, §2 of the 1980 schema, and in canon 1334, §2 of the 1982 schema and the 1983 code. The consultors did not make any animadversions on canon 19, §2 of the 1973 schema[154] nor did the *Relatio* report any comments on canon 1285, §2 of the 1980 schema. The CLSA, Canadian or British-Irish Reports did not comment on canon 19, §2 of the 1973 schema.

C. A caution regarding the establishing of *latae sententiae* penalties

Canon 2241, §2 of the 1917 code -Censurae, praesertim latae sententiae, maxime excommunicatio, ne infligantur, nisi sobrie et magna cum circumspectione.

Canon 8 of the 1973 schema-Latae sententiae poenas ne comminetur legislator, nisi forte in singularia quaedam delicta dolosa, quae vel graviori esse possint scandalo vel efficaciter puniri poenis ferendae sententiae non possint; censuras, praesertim excommunicationem, ne constituat, nisi maxima cum moderatione in sola delicta graviora vel in recidivos. Neque in delicta generali lege punita aliam poenam, nisi ex gravissima necessitate, constituat.

1. Animadversions on canon 8 of the 1973 schema and *coetus* response

Most of the discussion on canon 8 of the 1973 schema centered on its last sentence: "[The legislator] may not establish another penalty for delicts punished in the

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[153]1973 schema, c. 19, §2: "[l]ex, non autem praeceptum, potest latae sententiae suspensionem, nulla addita determinatione vel limitatione, constituere."

[154]*Communicationes* 9 (1977) 154.

general law unless for the most grave necessity."[155] There was a concern that particular law could establish another penalty for a delict already punished by general law. Some consultors responded that this was foreseen in the schema and was certainly foreseen in the 1917 code. A given universal law penalty might possibly not be enough to prevent or punish some crimes in some places. Other consultors judged that the canon restricted the episcopal penal power too much. But still other consultors judged that episcopal penal power should be moderated by general law.

Furthermore, some consultors said that the proposed faculty could allow bishops to establish censures under pain of reincidence even for less serious crimes. The other consultors agreed and the phrase "or for recidivists " (*vel in recidivos*) was expunged from the canon. In addition, other consultors judged that the canon ought to state that particular law could establish determinate and obligatory penalties for a delict where the general law had threatened indeterminate and facultative ones. The opinion on this proposed change was divided: some held that particular law could not establish such penalties; others held the contrary.[156]

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[155]1973 schema, c.8: "Neque in delicta generali lege punita aliam poenam, nisi ex gravissima necessitate, constituat."

[156]*Communicationes* 8 (1976) 173.

To reconcile the two opinions, the *relator* proposed to add a new paragraph to canon 6: "§3. Particular law can also add other penalties established in general law for some offense, but this is not to be done except for the most serious necessity. If the general law threatens a penalty which is indeterminate or facultative, however, particular law can establish in its place a determinate or obligatory penalty."[157] The formula was approved by all the consultors; and, consequently, the last phrase of canon 8 was dropped: "*neque in delicta generali lege punita aliam poenam, nisi ex gravissima necessitate, constituat.*" Finally, the consultors did not admit another animadversion according to which particular penal laws were to lapse after ten years unless the legislator promulgated them again.[158]

2. CLSA, Canadian and British-Irish Reports

The concerns of the CLSA Report about *latae sententiae* penalties in canon 8 of the 1973 code were largely addressed in canon 5 of the 1973 code as noted earlier. However, the CLSA Report also questioned the use of the word "scandal" in canon 8. Although the 1973 draft avoided definitions inappropriate to a legal text, some words, among them

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[157]1973 schema, c. 6, §3: "Lex particularis potest etiam poenis generali lege constitutis in aliquod delictum alias addere; id autem ne faciat, nisi ex gravissima necessitate. Quod si lex generalis indeterminatam vel facultativam poenam comminetur, lex particularis potest etiam in illius locum poenam determinatam vel obligatoriam constituere."

[158]Ibid., 173-174.

"scandal," ought to have been clarified. Thus, the CLSA Report posed the following questions: "Who is to determine the presence of scandal? Can someone be penalized merely because another is scandalized?"[159] The Canadian Report did not specifically address canon 8 of the 1973 schema, but the British-Irish Report noted it as "a measure of success" since it warned particular legislators to establish *latae sententiae* censures with the greatest moderation.[160]

That episcopal penal prerogatives be moderated by universal law was also considered in the CLSA Report in broad terms. That report raised some concerns about penal law in the context of the Church's mission and nature as communion. In particular, "the [1973] draft enforces the concept of the Church as primarily a society of governors and the governed, and it is [the] governed (laity, "lower clergy," and religious) who seem to be subject to penalties."[161] "Accordingly most of the committee questions the draft's tendency to view the determination of penalties and the place of authority figures as over and apart from the community. On the contrary Vatican II stresses authority figures as rooted within the community as

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[159]CLSA Report, 134.

[160]British-Irish Report, 5.

[161]CLSA Report, 131.

a service function."[162] The CLSA Report later urged the elimination of *latae sententiae* penalties in light of the conciliar stress on service-related authority.

> Another reason for eliminating *latae sententiae* penalties is the pastoral thrust of the draft. A truly service orientated exercise of authority precludes authority figures' remaining aloof from the real situation of the delinquent. If they are to engage in correction, persuasion and fraternal charity, they must be brought into direct contact with the concrete circumstances of every alleged breach of a law.[163]

3. The 1980 and 1982 schemata and the 1983 code

> **Canon 1270 of the 1980 schema**-Latae sententiae poenas ne comminetur legislator, nisi forte in singularia quaedam delicta dolosa, quae vel graviori esse possint scandalo vel efficaciter puniri poenis ferendae sententiae non possint; censuras autem, praesertim excommunicationem, ne constituat, nisi maxima cum moderatione in sola delicta graviora.
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> **Canon 1318 of the 1982 schema and canon 1318 of the 1983 code** retained the wording of canon 1270 of the 1980 schema.

Canon 1270 of the 1980 schema not only cautioned the legislator about establishing *latae sententiae* penalties but also protected the rights of recidivists by dropping the term "*in recidivos.*"[164] Finally the 1981 *Relatio* did not report any comments on canon 1270 of the 1980 schema.

D. Those subject to *latae sententiae* penalties

Canon 2226, §1 of the 1917 code indicated that those

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[162]Ibid.

[163]Ibid., 135.

[164]Green, "Revisited," 145.

subject to a law or precept are also normally subject to the penalties for their violation. However, canon 2227, §2 specified certain exemptions for cardinals (all penalties) and bishops (*latae sententiae* suspensions and interdicts) unless the law expressly provided otherwise. Neither canon appeared in the various drafts revising the 1917 code or in the 1983 code. However, canon 2230 of the 1917 code regarding the subjection to *latae sententiae* penalties of "*puberes*" and "*impuberes*" who were accomplices in a crime was revised even if it were not suppressed.

> **Canon 2230 of the 1917 code**-Impuberes a poenis latae sententiae, et potius punitionibus educativis, quam censuris aliisve poenis gravioribus vindicativis corrigantur; puberes vero qui eos ad legem violandam induxerint vel cum eis in delictum concurrerint ad normam can. 2209, §§ 1-3, ipsi quidem poenam lege statutam incurrunt.
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> **Canon 12, §3 of the 1973 schema**- Nulli autem poenali sanctioni est obnoxius, qui, cum legem vel preceptum violavit, duodevicesimum aetatis annum non expleverit, etiamsi rationis usum plenum habuerit et delictum dolo patraverit.
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> **Canon 15, §2 of the 1973 schema**- In poenam latae sententiae delicto adnexam incurrunt complices, qui in lege vel praecepto non nominantur, si sine eorum opera delictum patratum non esset, et poena sit talis naturae, ut ipsos afficere possit; secus poenis ferendae sententiae puniri possunt.

1. Animadversions on canons 12, §3 and 15, §2 of the 1973 schema and *coetus* response

The discussion on the relevance of age for incurring *latae sententiae* penalties and on accomplices in this connection has two aspects. One concerns those subject to

the legislator; the other concerns the factors a judge or superior must consider in declaring a *latae sententiae* penalty. The aforementioned concerns were discussed in the context of declaring a *latae sententiae* penalty. Specifically, one consultor wanted a canon on age as a factor excusing from penalties placed in the list of such excusing factors which had been prepared by the *coetus* but not included in the 1973 schema. Other consultors agreed but differed on the exact age. Some proposed sixteen years, yet one consultor wanted eighteen years as the age below which one could be excused from incurring a *latae sententiae* penalty.[165] Moreover, the consultors agreed that the moral imputability of those above the age of sixteen but below the age of eighteen was diminished.[166]

2. CLSA, Canadian and British-Irish Reports

The CLSA report specifically addressed canon 12, §3 of the 1973 schema:

> Shouldn't minority itself be a factor mitigating full capability? It would seem that this should be [a] separate canon since it is not merely a diminishing of imputability but an absolute norm exempting certain individuals from subjection to penal legislation.[167]

Neither the *coetus* report nor the reports of the canon

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[165] *Communicationes* 8 (1976) 178-179.

[166] Ibid., 179-180.

[167] CLSA Report, 136. The Canadian and British-Irish Reports did not comment on this issue.

law societies said anything about accomplices incurring *latae sententiae* penalties. Presumably, all concurred with the formulation of canon 15, §2 of the 1973 schema which concerned imposing a *ferendae sententiae* penalty on accomplices in a crime but not named in the law or precept to which a *latae sententiae* penalty had been attached.

3. The 1980 and 1982 schemata and the 1983 code

> **Canon 1274, 1° of the 1980 schema**- Nulli poena est obnoxius, qui, cum legem vel praeceptum violavit: 1° sextum decimum aetatis annum nondum explevit.
>
> **Canon 1275, §2 of the 1980 schema**- In circumstantiis, de quibus in §1 [1275, §1, 4°: a minore, qui aetatem sedecim annorum expleverit] reus poena latae sententiae non tenetur.
>
> **Canon 1280, §2 of the 1980 code**—the wording is the same as canon 15, §2 in the 1973 schema.
>
> Regarding age and incurring *latae sententiae* penalties, the wording of canons 1323, 1° and 1324, §3 of the **1982 schema** and of the same numbered canons in the **1983 code** remained the same. Regarding accomplices and incurring *latae sententiae* penalties, canon 1329, §2 in the **1982 schema** and canon 1329, §2 in the **1983 code** retained the wording of canon 15, §2 of the 1973 schema.

The aforementioned canons reflected the pre-1980 schema discussion on age and accomplices as regards *latae sententiae* penalties.[168]

V. The application of *latae sententiae* penalties.

The following questions will focus our discussion on applying *latae sententiae* penalties: what excused from them?

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[168]Green, "Revisited," 150.

what were the provisions for observing them? Who declared them and how was it done? Canon 2229 of the 1917 code addressed the various factors affecting moral imputability in the incurring of *latae sententiae* penalties. Although that canon was not included in the 1983 code, nonetheless the factors affecting moral imputability for the incurring of *latae sententiae* penalties were treated in the revision process. One of those factors, age, has already been discussed; other factors are discussed below.

A. Circumstances affecting the application of *latae sententiae* penalties.

Canon 2218, §1 of the 1917 code- In poenis decernendis servetur aequa proportio cum delicto, habita ratione imputabilitatis, scandali et damni; quare attendi debent non modo obiectum et gravitas legis, sed etiam aetas, scientia, institutio, sexus, conditio, status mentis delinquentis, dignitas personae quae delicto offenditur, aut quae delictum committit, finis intentus, locus et tempus quo delictum commissum est, num eum delicti poenituerit eiusdemque malos effectus evitare ipse studuerit, aliaque similia.

Canon 11 of the 1973 schema- Qui habitualiter rationis usu carent, etsi legem vel praeceptum violaverunt dum sani videbantur, delicti incapaces censentur.

Canon 12 of the 1973 schema-§1. Si qua adsit cirumstantia, quae delicti gravitatem deminuat, dummodo tamen gravis adhuc sit delicti imputabilitas, iudex poenam lege vel praecepto statutam temperare debet.

§2. Quod si delinquens vel usum rationis imperfectum tantum habuerit, vel delictum ex metu vel necessitate vel passionis aestu vel in ebrietate aliaque simili mentis perturbatione patraverit, iudex potest etiam a qualibet punitione irroganda abstinere, si censeat aliter posse melius consuli eius emendationi

§3. Nulli autem poenali sanctioni est

> obnoxius, qui, cum legem vel praeceptum violavit, duodevicesimum aetatis annum non expleverit, etiamsi rationis usum plenum habuerit et delictum dolo patraverit.

1. Animadversions on canons 11 and 12 of the 1973 schema and *coetus* response

Some animadversions of consultative bodies suggested a word change regarding canon 11 of the 1973 schema about those who habitually lack the use of reason. Since the verb "is judged" (*censentur*) used in canon 11 could be understood as the verb "is presumed" (*praesumuntur*) in canon 2201, §2 of the 1917 code, some proposed that either the verbs "are" (*sunt*) or "is held" (*habentur*) be substituted. Without explanation the consultors chose the verb "*habentur.*"[169]

Canon 12 of the 1973 schema on the factors affecting moral imputability generated significant discussion. Many animadversions from consultative bodies proposed that the circumstances excusing entirely from a penalty be clearly stated as well as those which would diminish penal responsibility. After some discussion the consultors agreed on the usefulness of listing excusing, diminishing, or aggravating circumstances. Without further clarification, another consultor wanted to insert a principle that would state something generally about excusing, diminishing or aggravating circumstances affecting *dolus* and *culpa*[170].

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[169] *Communicationes* 8 (1976) 177.

[170] Green, "Revisited," 150-151.

2. Animadversions on canon 1274 of the 1980 schema reported in the 1981 *Relatio*

Canon 1273 of the 1980 restated canon 11 of the 1973 schema.

Canon 1274 of the 1980 schema-Nulli poena est obnoxius, qui, cum legem vel praeceptum violavit:
1.° sextum decimum aetatis annum nondum explevit;
2.° sine sua culpa ignoravit se legem vel praeceptum violare; ignorantiae autem inadvertentia et error aequiparantur;
3.° egit ex vi physica vel ex casu fortuito, qui praevideri vel cui praeviso occurri non potuit;
4.° metu gravi, quamvis relative tantum, coactus legem vel praeceptum violavit, aut ex necessitate vel gravi incommodo, nisi tamen actus sit intrinsece malus aut vergat in animarum damnum;
5.° legitimae tutelae causa contra iniustum sui vel alterius aggressorem egit, debitum servans moderamen;
6.° rationis usu carebat, firmis praescriptis cann. 1275, §1, 2° et 1276;
7.° sine sua culpa putavit aliquam adesse ex circumstantiis, de quibus in 4° vel 5°.

a) Grave fear and *latae sententiae* penalties

The 1981 *Relatio* reports three animadversions on canon 1274 of the 1980 Schema. Cardinal Palazzini, commenting on canon 1274, 4° of the 1980 schema, judged that an act posited under grave fear should not be considered as a delict even if the act were intrinsically evil and verged on harm to souls. Rather, such an act lacked criminal intention. The *relator* rejected such an animadversion for it was contrary to canons 2205, §3 and 2229, §3, 3°of the 1917 code, which were substantially retained in the 1980 schema, and against the common canonical doctrine. The *relator* repeated the maxim that fear, even grave fear, in no

way coerced the will (*Coacta voluntas, est semper voluntas*).[171] Thus the competent authority who would declare a *latae sententiae* penalty would need to consider fear as it affected the will in committing a crime with such a penalty attached.

b) Age and *latae sententiae* penalties

Cardinal Freeman and Bishop O'Connell argued that the phrase "eighteen years of age" should replace the phrase "sixteen years of age" in canon 1274, 1° of the 1980 schema since according to canon 96, §1 of the 1980 schema, a person who had completed the eighteenth year of age was an adult but below this age a minor. A person in the Church ought not be subject to sanctions before acquiring the full exercise of rights. However, the *relator* stated that the canon would stand as it was. Those who were sixteen years of age should not be exempt from every penalty. A mitigation of imputability by reason of minor age was sufficiently provided for in canon 1275, §2.[172] Minor age excused one from *latae sententiae* penalties in canon 1275, §3.

c) Contempt of faith and of ecclesiastical authority

Cardinal Siri wanted to add to canon 1274, 4° of the 1980 schema the words "in contempt of faith or of

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[171] *Relatio*, 293.

[172] Ibid., 294.

ecclesiastical authority," which would be in keeping with church discipline.[173] However, the *relator* opposed such a change. He explained that acts which verge on the contempt of faith were already in some ways intrinsically evil; moreover, grave fear did not excuse from a penalty contemptuous of ecclesiastical authority. Hence such additional wording was unnecessary.[174]

3. The 1982 schema and the 1983 code

> **Canon 1322 of the 1982 schema** restated canon 11 of the 1973 schema.
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> **Canon 1323 of the 1982 schema** restated canon 1274 of the 1980 schema except for the following: 3.° egit ex vi physica vel ex casu fortuito, quem praevidere vel cui praeviso occurrere non potuit; 4.° metu gravi, quamvis relative tantum, coactus egit, aut ex necessitate...;
>
> **Canons 1322 and 1323 of the 1983 code** restated the same numbered canons of the 1982 schema.

The aforementioned norms were to "facilitate the work of the judges/administrators in coming to terms with [some of] the relevant variables in a given case and thereby making an appropriate judgment regarding imputability."[175]

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[173]*Relatio*, 294: "in contemptum fidei vel ecclesiasticae auctoritatis."

[174]*Relatio*, 294.

[175]Green, "Revisited," 151.

B. Ignorance and other factors affecting *latae sententiae* penalties

1. Animadversions on canon 10 of the 1973 code and *coetus* response

Canon 2229 of the 1917 code - §1. A nullius latae sententiae poenis ignorantia affectata sive legis sive solius poenae excusat, licet lex verba de quibus in §2 contineat.

§2. Si lex habeat verba: *praesumpserit, ausus fuerit, scienter, studiose, temerarie, consulto egerit* aliave similia quae plenam cognitionem ac deliberationem exigunt, quaelibet imputabilitatis imminutio sive ex parte intellectus sive ex parte voluntatis eximit a poenis latae sententiae.

§3. Si lex verba illa non habeat:
1.° Ignorantia legis aut etiam solius poenae, si fuerit crassa vel supina, a nulla poena latae sententiae eximit; si non fuerit crassa vel supina, excusat a medicinalibus, non autem a vindicativis latae sententiae poenis;
2.° Ebrietas, ommissio debitae diligentiae, mentis debilitas, impetus passionis, si, non obstante imputabilitatis deminutione, actio sit adhuc graviter culpabilis, a poenis latae sententiae non excusant;
3.° Metus gravis, si delictum vergat in contemptum fidei aut ecclesiasticae autoritatis vel in publicum animarum damnum, a poenis latae sententiae nullatenus eximit.

§4. Licet reus censuris latae sententiae ad normam §3, 1° non teneatur, id tamen non impedit quominus, si res ferat, congrua alia poena vel poenitentia affici queat.

Canon 10 of the 1973 schema- §1. Nemo punitur, nisi legis vel praecepti violatio, ab eo commissa, sit graviter imputabilis ex dolo vel ex culpa.

§2. Nisi lex vel praeceptum aliter caveat, sanctionibus poenalibus is tantum subiicitur, qui delictum dolo patravit, id est qui legem vel praeceptum violare deliberate voluit.

§3. Posita externa legis violatione imputabilitas praesumitur, nisi aliud appareat.

a) The effect of grave imputability on incurring *latae sententiae* penalties

As noted earlier, the *Praenotanda* of the 1973 schema

pointed out that canon 2229, §2 and §3, 2° of the 1917 code had been replaced by canon 10, §2.[176] The discussion of canon 10 by the *coetus* on penal law is difficult to follow here because the sources regarding the animadversions and responses to them are simply restated with little or no explanation. Some animadversions judged that the term "*graviter imputabilis*," in canon 10 of the 1973 schema ought to be rejected for at least two reasons. Some judged that it was enough that a violation was simply imputable. Second, they feared that violations of merely penal laws could not be punished especially since *dolus* or *culpa* was postulated. Still others proposed that the term "*moraliter imputabilis*" be inserted as it was used in canon 2195, §1 of the 1917 code. The *relator* responded that *grave* imputability was postulated in canon 2218, §2 of the 1917 code. However, moral imputability surely was supposed if either *dolus* or *culpa* were necessary for a sanctionable violation of the law.[177]

b) The exteriority necessary for a crime

Other animadversions pointed out that nothing was said about the *exteriority* of a violation. The consultors agreed that canon 10, §1 should state: "No one is punished unless

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[176] *Praenotanda*, 1973 schema, 7.

[177] *Communicationes* 8 (1976) 175.

there is an external violation of the law."[178] Moreover the *relator* stated that the question remained open regarding the definition of a crime in the schema, which would incorporate the notion of exteriority necessary for a crime.[179]

c) The need to define the term "*culpa*" in penal law

Many animadversions were made regarding the definition of *culpa*. One animadversion stated there was some confusion between the definitions of *dolus* and *culpa*. A gravely imputable violation could be deduced from the schema's use of the term "*culpa*." A consultor spoke of the usefulness of defining the penal meaning of *culpa* since it was neither clear nor complete in the 1917 code. He suggested, without explanation, that either the punishment of culpable delicts ought to be eliminated or "*culpa*" ought to be expunged from the general canons of the schema even if the concept of *culpa* itself were reserved implicitly.[180]

Further discussion was reported on the definition of *culpa*. One consultor wanted it defined as "the lack of due diligence" (*omissio debitae diligentiae*). Another consultor wanted a delict committed in circumstances of error to be

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[178]1973 schema, c. 10, §1:"Nemo punitur, nisi legis vel praecepti **externa** violatio etc."

[179]*Communicationes* 8 (1976) 175.

[180]Ibid.

qualified as culpable but not malicious. However, the *relator* noted, without explaining fully, that in the case of error the delinquent saw the end of the action and willed it; thus a delict committed in error could not be viewed merely as culpable but rather should be considered malicious. Yet another consultor argued for the need to define *culpa* because the law ought to make it clear to judges how someone could incur a penalty due to *culpa*.[181]

The relator wondered if the canon ought to refer to a malicious (*dolosum*) delict or to a culpable (*culposum*) delict if the alleged delinquent were in error or ignorant. Another consultor judged that defining *culpa* was necessary not so that one committing a culpable delict could be exempt from a penalty but so that a judge could determine which circumstances excused one from incurring a penalty. Yet another consultor said that only malicious delicts ought to be punished. Some other consultors wanted the schema to distinguish clearly between culpable delicts and malicious delicts. The *relator* proposed that a delict would be culpable but not malicious if due diligence were omitted, if someone erroneously thought that there were excusing circumstances and if someone were culpably ignorant that the law or precept was violated. Canon 10, §2 was reformulated as follows: "A person who has deliberately violated a law or

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[181]Ibid.

a precept is bound by the penalty stated in that law or that precept; unless a law or a precept provides otherwise, a person who has violated that law or that precept through a lack of necessary diligence is not punished."[182] Thus a *latae sententiae* penalty would not be incurred if the crime to which it was attached were committed though a lack of due diligence unless the law or precept stated otherwise.

2. CLSA, Canadian and British-Irish Reports on canon 10

The CLSA Report on the 1973 schema made at least two direct references to imputability. First, it called for a clarification of the term "*culpa*."[183] Second, it questioned the notion of imputability as expressed in canon 10, §3:

> A concern for the rights of individuals and the good of the community should direct our attention to another canon. Canon 10, §3 seemingly embodied a presumption of guilt even though this is surely not the draft's intention. Harmonious living within the Christian community presupposes that the presumption of innocence and concrete guarantees to protect the accused be given priority in the law. Ecclesiastical law should appear no less the guardian of freedom, justice and equity than civil law. Were there the slightest doubt that purity of intent is not a basic presumption in Church law, the faithful would be genuinely scandalized- and not only those

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[182]Ibid., 176; 1973 schema, c. 10, §2: "Poena lege vel praecepto statuta is tenetur, qui legem vel praeceptum deliberate violavit; qui vero egit ex omissione debitae diligentiae, non punitur, nisi lex vel praeceptum aliter caveat.

[183]CLSA Report, 134.

familiar with Anglo-Saxon legal traditions.[184] Without comment, the British-Irish Report cited canon 10, §1 of the 1973 schema as one instance of the schema's preference for abbreviated definitions.[185] However, the Canadian report noted a contradiction between paragraphs §1 and §2 of canon 10 of the 1973 schema, namely, between delicts committed maliciously or culpably (*ex dolo vel ex culpa*) in the former and maliciously (*ex dolo*) in the latter. If §1 read "*ex dolo seu ex culpa*" the contradiction would be overcome.[186]

3. The 1980 and 1982 schema and the 1983 code

> **Canon 1272 of the 1980 schema** -§1 and §3 restated the wording of canon 10, §1 and §3 of the 1973 schema.
> §2. Poena lege vel praecepto statuta is tenetur, qui legem vel praeceptum deliberate violavit; qui vero id egit ex omissione debitae diligentiae, non punitur, nisi lex vel praeceptum aliter caveat.
>
> **Canon 1321 of the 1982 schema and canon 1321 of the 1983 code** restated canon 1272 of the 1980 schema.

Green noted that "the *coetus* [had] not responded to the CLSA concern that the original norm 10, §3 be reformulated to express a basic presumption of innocence that should characterize the Christian community."[187]

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[184]Ibid, 133.

[185]British-Irish Report, 3.

[186]Canadian Report, 3.

[187]Green, "Revisited," 151.

4. Formulation of canons 1274-1276 of the 1980 schema

Canon 1275 of the 1980 schema-§1. Violationis auctor non eximitur a poena sed poena lege vel praecepto statuta temperari debet vel in eius locum poenitentia adhiberi, si delictum patratum sit:
1.° ab eo, qui rationis usum imperfectum tantum habuerit;
2.° ab eo, qui rationis usu carebat propter ebrietatem aliamve similem mentis perturbationem, quae culpabilis fuerit;
3.° ex gravi passionis aestu, qui non omnem tamen mentis deliberationem et voluntatis consensum praecesserit et impedierit, et dummodo tamen passio ipsa ne fuerit voluntarie excitata vel nutrita;
4.° a minore, qui aetatem sedecim annorum expleverit;
5.° ab eo, qui metu gravi, quamvis relative tantum, coactus est, aut ex necessitate vel gravi incommodo, si delictum sit intrinsece malum vel in animarum damnum vergat.
6.° ab eo, qui legitimae tutelae causa contra iniustum sui vel alterius aggressorem egit, nec tamen debitum servavit moderamen;
7.° adversus aliquem graviter et iniuste provocantem;
8.° ab eo, qui per errorem, ex sua tamen culpa, putavit aliquam adesse ex circumstantiis, de quibus in can. 1274, 4° vel 5°.
9.° ab eo, qui sine sua culpa ignoravit poenam legi vel praecepto esse adnexam;
10.° ab eo qui aliter sine plena imputabilitate, dummodo tamen haec adhuc gravis fuerit, egit.
§2. Idem potest iudex facere, si qua alia adsit circumstantia, quae delicti gravitatem deminuat.
§3. In circumstantiis, de quibus in §1, reus poena latae sententiae non tenetur.

Canon 1276 of the 1980 schema- Ignorantia crassa vel supina vel affectata numquam considerari potest in applicandis praescriptis cann. 1274 et 1275; item ebrietas aliaeve mentis perturbationes, si sint de industria ad delictum patrandum vel excusandum quaesitae, et passio, quae voluntarie excitata vel nutrita sit.

After the consultors reflected on the animadversions on

canon 12 of the 1973 schema, they engaged in a discussion which led ultimately to the formulation of canons 1274-1276 of the 1980 schema. These canons addressed factors which would excuse one from imputability, diminish it, or have no effect upon it. Aggravating circumstances will be considered later. Canon 1274 of the 1980 schema on factors excusing imputability was noted earlier. Canon 12 of the 1973 schema which addressed circumstances diminishing imputability was not as specific about such circumstances as were canons 2199-2209 of the 1917 code. However, a list of circumstances diminishing imputability comparable to the 1917 code was presented to the consultors for discussion during the revision of the 1973 schema.[188]

a) Circumstances diminishing imputability

The consultors agreed generally with the listing of circumstances diminishing imputability in what became canon 1275, §1 of the 1980 schema. What was to be added was a paragraph on *latae sententiae* penalties:

> An offender is not bound by a *latae sententiae* penalty if those circumstance which are enumerated in cann. x are present or if otherwise the imputability of the delinquent, although even grave, is diminished either on the part of the intellect or on the part of the will, except for the prescription of can. x concerning the mental conditions required for executing or excusing a

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[188]*Communicationes* 8 (1976) 178.

delict.[189]

The proposed paragraph was similar to canon 2229, §2 of the 1917 code; however the consultors agreed with the relator's proposal to drop the lengthy clause "*vel si aliter delinquentis imputabilitas . . .quaesitis.*" Such a clause, nevertheless, would be incorporated in canon 30, b of the 1973 schema which concerned judicial discretion in refraining from imposing a penalty or mitigating it if the delinquent repaired the scandal caused or had been sufficiently punished by the civil authorities.[190]

b) Circumstances not excusing from imputability

The circumstances of crass or supine ignorance that did not excuse from imputability also did not appear in the 1973 schema but were considered by the *coetus* in the following form as reported in *Communicationes*: "§1. One is excused from a penalty: 1° who was ignorant of the law or precept, unless the ignorance was affected or crass or supine; however inadvertence and error are equivalent to

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[189]Ibid., 179: "Reus poena latae sententiae non tenetur, si qua ex circumstantiis adsit, quae in cann. x recensentur, vel si aliter delinquentis imputabilitas, quamvis adhuc gravis, deminuta sit sive ex parte intellectus sive ex parte voluntatis, salvo praescripto can. x de perturbationibus ad delictum patrandum vel excusandum quaesitis."

[190]*Communicationes* 8 (1976) 180.

ignorance."[191] That wording corresponded to canon 2229, §1 of the 1917 code on the effect of affected ignorance on *latae sententiae* penalties and canon 2229, §3, 1° on the effect of crass or supine ignorance on such penalties.

c) canon 1276 of the 1980 schema in the 1981 *Relatio*

In the 1981 *Relatio*, Cardinal Palazzini stated that canon 1276 of the 1980 schema on crass or supine ignorance, drunkenness and other mental disturbances was incoherent. For, "mental disturbances" (*mentis perturbationes*) did not depend on the will of the subject but rather were "psychic anomalies" (*anomaliae psychicae*) which were never deliberately induced to commit a delict. The *relator* responded that the canon simply repeated canon 2201, §3 of the 1917 code and referred to those "mental disturbance" (e. g. from drugs) which could be induced deliberately to commit a crime more easily.[192]

5. The 1982 schema and the 1983 code

> **Canon 1324 of the 1982 schema** restated canon 1275 of the 1980 schema except for §1, 10° which read instead: "ab eo, qui egit sine plena imputabilitate, dummodo haec gravis permanserit." **Canon 1324 of the 1983 code** restated canon 1324 of the 1982 schema. **Canon 1325 of the 1982 schema and canon 1325 of the 1983 code** restated canon 1276 of the 1980 schema.

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[191]Ibid., 178.: "A poena eximitur: 1° qui legem vel praeceptum ignoravit, nisi ignoravit fuerit affectata vel crassa vel supina; ignorantiae autem inadvertentia et error aequiparantur."

[192]*Relatio*, 294.

As Green stated: "What is particularly noteworthy in contrast to the [1917] code [was] the effort to systematize the treatment of various grounds [affecting imputability] under some general rubrics."[193] In the 1980 schema those general rubrics were: excusing (c. 1274), diminishing (c. 1275), or aggravating (c. 1276) factors affecting imputability. The aforementioned general rubrics were retained in the 1982 schema and 1983 code.

C. Observing *latae sententiae* penalties

> **Canon 2232 of the 1917 code** on the observance of a latae sententiae penalty- §1. Poena latae sententiae, sive medicinalis sive vindicativa, delinquentem, qui delicti sibi sit conscius, ipso facto in utroque foro tenet; ante sententiam tamen declaratoriam a poena observanda delinquens excusatur quoties eam servare sine infamia nequit, et in foro externo ab eo eiusdem poenae observantiam exigere nemo potest, nisi delictum sit notorium, firmo praescripto can. 2223, §4.
> §2. Sententia declaratoria poenam ad momentum commissi delicti retrotrahit.
>
> **Canon 35 of the 1973 schema**- Nisi aliud expresse caveatur, poena reum ubique tenet, etiam resoluto iure eius qui poenam constituit vel irrogavit.
>
> **Canon 36 of the 1973 schema**- §1 Obligatio servandae poenae suspenditur, quandiu reus in mortis periculo versatur.
> §2. Praeterea, quandiu reus poenam servare nequit sine periculo gravis scandali vel infamiae, obligatio ex toto vel ex parte suspenditur, nisi:
> a) vel poena sit notoria in loco in quo delinqens versatur;
> b) vel superior observantiam legitime urgeat;
> c) vel observantia necessaria sit ad scandalum vel damnum reparandum.
> §3. Superior potest poenae observantiam

[193]Green, "Revisited," 150.

urgere, si poena sit irrogata vel declarata; item potest urgere, si delictum, poena latae sententiae punitum, certum sit ex iudiciali delinquentis confessione vel sit notorium, et ipse poenae observantiam utilem exsistimet ad scandalum vel damnum reparandum.

1. Animadversions on canons 35 and 36 of the 1973 code and *coetus* response

a) Canons 35 and 36, §1

Canon 35 of the 1973 schema about observing a penalty in both fora was only slightly reformulated in light of the comments made during the consultative process.[194] However, there were many animadversions on canon 36 of the 1973 schema about suspending the observance of a penalty in danger of death. One proposal was that canon 36, §1 should add the clause "salvo can. 16, §1, c." Without further explanation the *coetus* viewed the suggestion as fitting since the active exercise of the power of jurisdiction, the subject of can. 16, §1, c, was not a necessary medium for a delinquent in danger of death. After some discussion, which was not reported, the formula was changed to what would be canon 1304 in the 1980 schema.[195]

b) Canon 36, §2 and §3

There were many animadversions on canon 36, §2 of the 1973 schema which enabled the delinquent to judge when the obligation of observing a penalty was binding. Some

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[194] *Communicationes* 9 (1977) 166.

[195] Ibid., 167.

consultors opposed the canon because it did not make a clear distinction between *ferendae sententiae* and *latae sententiae* penalties. It was fair to give the delinquent the faculty of excusing himself or herself from observing a *latae sententiae* penalty if there were a danger of grave scandal or infamy. However, this was unnecessary for a *ferendae sententiae* penalty since the superior who applied the penalty ought to consider the circumstances lest there be a danger of grave scandal or infamy. Therefore a consultor proposed that the suspension of the obligation of observing the penalty in canon 36, §2 be restricted to *latae sententiae* penalties only.[196]

The aforementioned opinion was favored by the other consultors, except for one. However, canon 36, §2 listed three exceptions to such a suspension of the obligation of observing a penalty. First, the consultors agreed that a *latae sententiae* penalty notorious in the place where the delinquent lived must be observed. Second, all the consultors agreed that permitting a superior to urge the observance of a *latae sententiae* penalty should be dropped since often the penalty was not "declared" and therefore the superior could presumably not legitimately urge its observance. Third, all the consultors agreed that the required observance of a *latae sententiae* penalty to repair

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[196]Ibid.

scandal or damage should be dropped since the penalty was not yet declared and hence the reason for repairing scandal was lacking. However, when the penalty was declared, then the obligation to observe it bound the delinquent. Canon 36, §3, on a superior urging the observance of a *latae sententiae* penalty was deleted for the same reasons given for dropping the prior provision on superiors. [197]

2. CLSA, Canadian and British-Irish Reports

The CLSA and Canadian Reports commented on canon 36, §3 of the 1973 schema dealing with superiors urging the observance of a *latae sententiae* penalty. The CLSA report asked the following questions "Who is the Superior referred to in this canon and elsewhere? Likewise the *iudex* (cf. 6; 12, §1, §2; 13; 28, §3; 32; 33): Is it necessarily the Ordinary or the Officialis or might it be someone else?"[198] Although canon 36, §3 was dropped, the questions posed by the CLSA and Canadian reports were relevant to the issue of those who applied the penalty as will be noted later.[199] The British-Irish Report commented favorably on canon 36 of the 1973 schema as "a measure of success," reflecting "a distinct sensitivity for the very real human situations in which a person is either in danger of death or in danger of

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[197]Ibid.

[198]CLSA Report, 137.

[199]Ibid.; Canadian Report, 3.

being defamed."[200]

3. Canon 1304 of the 1980 schema in the 1981 *Relatio*

Canon 1303 of the 1980 schema restated canon 35 of the 1973 schema.

Canon 1304 of the 1980 schema- §1. Si poena vetet recipere sacramenta vel sacramentalia, vetitum suspenditur, quandiu reus in mortis periculo versatur.
§2. Obligatio servandi poenam latae sententiae, quae neque declarata sit neque sit notoria in loco quo delinquens versatur, eatenus ex toto vel ex parte suspenditur, quatenus reus eam servare nequeat sine periculo gravis scandali vel infamiae.

In the 1981 *Relatio*, Cardinal Siri made an animadversion on canon 1304, §1 of the 1980 schema. In danger of death, absolution in the sacramental forum with the burden of recourse ought to be granted and not just the suspension of the *vetitum* lest the sacraments be received by those who were forbidden by penalty to do so. The *relator* responded that ample faculties for absolving in danger of death had been given in canon 929 of the 1980 schema. However, canon 1304 remained useful for that case in which absolution could not be obtained for whatever reason.[201]

4. The 1982 schema and the 1983 code

Canon 1351 of the 1982 schema and canon 1351 of the 1983 code retained the wording but rearranged the word order of canon 1303 of the 1980 schema. **Canon 1352 of the 1982 schema and canon 1352 of the 1983 code** restated canon 1304 of

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[200]British-Irish Report, 6.

[201]*Relatio*, 298.

the 1980 schema.

Green noted at least three reasons why the German canonists sharply criticized canon 36 of the 1973 schema from which canon 1304 of the 1980 schema was derived. First, it did not differentiate between censures and vindictive penalties. Second, it raised theological problems about the status of an excommunicated person absolved by a confessor in danger of death situation. Third, allowing a delinquent such latitude in judging that a penalty need not be observed in situations of scandal or infamy eviscerated the force of the law. Although canon 1304 of the 1980 schema and its restatement in the 1982 schema and 1983 code might "not entirely meet the German canonists objections, it represents a significant step in coping with the above-mentioned objections."[202]

D. Those who apply *latae sententiae* penalties

1. Animadversions on canon 27 of the 1973 schema and *coetus* response

Canon 2223, §4 of the 1917 code -Poenam latae sententiae declarare generatim committitur prudentiae Superioris; sed sive ad instantiam partis cuius interest, sive bono communi ita exigente, sententia declaratoria dari debet.

Canon 27 of the 1973 schema- Ordinarius poenas irrogandas vel declarandas tunc tantum curet, cum perspexerit neque fraterna correctione neque correptione neque aliis pastoralis sollicitudinis viis satis posse scandalum reparari, iustitiam restitui, reum emendari, idque praevideat poenis efficacius posse obtineri.

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[202]Green, "Revisited," 166.

Canon 27 of the 1973 schema was highly praised for reflecting the new spirit of penal law, especially since every avenue of reform was to be exhausted before a penalty was imposed. Yet, some criticized the canon since it seemed to treat the removal of scandal as a secondary end of a penalty. However, some consultors judged that punishment was not necessarily required to remove scandal but rather it was enough that the delinquent be reformed. In addition, some consultors wished to drop the last clause of the canon, "and [the ordinary] may foresee that a more efficacious penalty could obtain"[203] because the requirement of such foresight on the part of the superior could be a source of anxiety for him. The *relator* proposed that only the adverb "more efficacious" (*efficacius*) be dropped. However, the whole phrase was dropped by consent of the consultors. It was also not clear to some whether canon 27 referred to the faculty for inflicting and declaring penalties which was given only to ordinaries or to a judicial process for inflicting and declaring penalties which was to be followed. Since that process was also envisioned, the *coetus* reformulated the canon to include the phrase "administrative or judicial process" (*proceduram iudicialem vel administrativam*).[204]

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[203]*Communicationes* 9 (1977) 160: "idque praevideat poenis efficacius posse obtineri."

[204]*Communicationes* 9 (1977) 161.

2. CLSA, Canadian and British-Irish Reports

The CLSA report noted that canon 12 on the circumstances affecting moral imputability and canon 27 on an ordinary applying a sanction "should assert more clearly the ordinary's freedom to use his discretion and not impose a penalty. This seems in keeping with the pastoral purpose of the law."[205] The Canadian Report stated without explanation that canon 27 was a very positive text but not absolute.[206] The British-Irish Report noted canon 27 as a "measure of success" since an ordinary was to impose a penalty only as a last resort.

3. Applying penalties in circumstances aggravating imputability

> **Canon 1277 of the 1980 schema**- §1. Iudex gravius punire potest quam lex vel praeceptum statuit:
> 1.° eum, qui post condemnationem vel poenae declarationem ita adhuc deliquit, ut ex adiunctis prudenter eius pertinacia in mala voluntate conici possit;
> 2.° eum, qui in dignitate aliqua constitutus est, vel qui auctoritate vel officio abusus est ad delictum patrandum;
> §2. In casibus, de quibus in §1, si poena constituta sit latae sententiae, alia poena potest addi vel poenitentia.

a) The formulation of canon 1277 of the 1980 schema

Canon 1277 of the 1980 schema is placed here because it called for the judge to decide if there were aggravating circumstances which might demand a more severe punishment

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[205]CLSA Report, 134.

[206]Canadian Report, 3.

than that provided by law. In this proposed text, the consultors agreed with the first two conditions. One condition was that a judge could more severely punish a delinquent who remained pertinaciously ill-willed after a declaration of a *latae sententiae* penalty. The other condition under which a judge could punish more severely was one which involved either the dignity of the one offended or the abuse of authority or of office in perpetrating a crime. However, without explanation the consultors dropped the clause, "whoever perpetrates a crime against the person who is established in a dignity."[207]

b) Canon 1277 of the 1980 schema in the 1981 *Relatio*

The 1981 *Relatio* stated that Cardinal Siri without explanation wanted the clause "one who commits a crime against a person who is established in a dignity"[208] to be added to canon 1277, §1, 2° of the 1980 schema. The *relator* responded that given the equality of believers and the service dimension of Church authority, it was hardly necessary to establish the aforementioned clause as an aggravating circumstances.[209]

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[207]*Communicationes* 8 (1976) 181: "eum, qui delictum patravit in personam, quae in dignitate sit constituta."

[208]*Relatio*, 294: "eum, qui delictum patravit in personam quae in dignitate sit constituta."

[209]Ibid.

c) The 1982 schema and the 1983 code

Canon 1326 of the 1982 schema and canon 1326 of the 1983 code restated canon 1277 of the 1980 schema.

Canon 1326 of the 1982 schema and the 1983 code retained the significant reworking of canons 2201-2208 of the 1917 code on various factors aggravating moral imputability which had been proposed by the penal law *coetus*.

E. The judicial sentence or administrative decree

1. Animadversions on canon 28 of the 1973 schema and *coetus* response

Canon 2225 of the 1917 code- Si poena declaretur vel infligatur per sententiam iudicialem, serventur canonum praescripta circa sententiae iudicialis pronuntiationem; si vero poena latae vel ferendae sententiae inflicta sit ad modum praecepti particularis, scripto aut coram duobus testibus ordinarie declaretur vel irrogetur, indicatis poena causis, salvo praescripto can. 2193.

Canon 28 of the 1973 schema- §1. Quoties graves obstent causae ne iudicialis processus fiat, et probationes de delicto evidentes sint neque actio criminalis sit exstincta, poena irrogari vel declarari potest per decretum extra iudicium; paenitentiae autem et remedia poenalia applicari possunt per decretum in quolibet casu.

§2. Per decretum neque irrogari neque declarari possunt poenae perpetuae, neque poenae lege particulari vel praecepto constitutae, quas lex vel praeceptum vetet per decretum applicare.

§3. Quae in lege vel praecepto dicuntur de iudice, quod attinet ad poenam irrogandam vel declarandam in iudicio, applicanda sunt ad superiorem, qui per decretum extra iudicium poenam irroget vel declaret, nisi aliter constet neque agatur de praescriptis quae ad procedendi tantum rationem attinent.

Canon 28 of the 1973 schema on the judicial sentence or

administrative decree prompted the following animadversions. Some proposed that a penalty could never be imposed by administrative process; penalties must always be applied by judicial process. Although the consultors were concerned that penalties be applied justly, they nevertheless judged that the proposition was unrealistic and that a flexible and expeditious administrative process was necessary at times. Another redaction of the canon would clarify the legislator's preference for the judicial process. One consultor, however, wanted the judicial process and the administrative process to be equally available. However, this proposition was rejected and the canon remained unchanged.[210]

Among those who approved of the administrative process for applying penalties, some wanted to drop the clause "And there are evident proofs about the delict."[211] The new code should have norms for administrative procedure which would be equivalent to the norms on judicial procedure. One consultor proposed that the term "certain" (*certae*) replace "evident" (*evidentes*). Another consultor's proposal to drop the whole clause "*et probationes . . . exstincta*" was approved by all the consultors. The *coetus* also approved another inversion of word order: "*remedia poenalia autem et*

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[210]*Communicationes* 9 (1977) 161.

[211]Ibid, 162: "Et probationes de delicto evidentes sint."

paenitentiae applicari possunt etc"[212]

Canon 28, §2, seemed unclear because the antecedent of the relative pronoun "*quas*" seemed to refer to "perpetual penalties" (*poenae perpetuae*); but this did not seem to accord with the mind of the legislator. The *relator* proposed the following redaction: "§2. Perpetual penalties cannot be imposed or declared by a decree; neither can penalties be so applied when the law or the precept which established them forbids their application by a decree."[213] In addition, the *relator* explained that the term "*superior*" in canon 28, §3 referred to all who were competent to issue a penal decree (*omnes qui potestatem habent ferendi decreta poenalia*).[214]

2. CLSA, Canadian and British-Irish Reports

The CLSA report examined canon 28 of the 1973 schema at some length. Its comments are worth quoting in full:

> If the draft's objectives are to be fully realized, however, there should be a general due process statement at the very outset, e.g. No crime is to be punished or penalty inflicted without the accused being given all his rights under the law. Specifically in canon 28 who determines that the proofs of a crime are so self-evident as to merit punishment? Are the rights of the accused adequately protected? The one inflicting the punishment seems to be the one

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[212]*Communicationes* 9 (1977) 162.

[213]Ibid.: "Per decretum irrogari vel declarari non possunt poenae perpetuae; neque poenae quas lex vel praeceptum eas constituens vetet per decretum applicare."

[214]Ibid.

> judging the action. This is a constant problem throughout the Code and needs to be looked at carefully. Since most penalties today are imposed *extra judicium*, there should be explicit safeguards against abuse of office. For example, it should be stated that penalties are invalidly imposed if the process is not observed.[215]

The CLSA Report further reflected on judicial and administrative process. Given the backlog of marriage cases in a tribunal, would it be realistic to expect bishops to pursue the judicial process in applying penalties?[216] In addition, two legal cultures seemed operative in the 1973 schema. On the one hand, judicial intervention was preferred theoretically; on the other hand, administrative action prevailed in practice. Because of the confusion between these two legal cultures, it seemed a superior could initiate a judicial process and then substitute an administrative action. Clearly, "this is highly unsatisfactory from the viewpoint of due process and individual rights."[217] The Canadian Report did not specifically comment on canon 28 except to note that superiors could in general abuse the powers given them. The British-Irish Report did not directly refer to canon 28 but it did call for some kind of consultation before a superior

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[215]CLSA Report, 133.

[216]For the concerns of German canonists regarding the practical implementation of a judicial process in penal law see Green, "Revisited," 163, n. 43.

[217]CLSA Report, 134.

would proceed adminstratively.[218]

3. The 1980 and 1982 schemata and the 1983 code

> **Canon 1293 of the 1980 schema**- Ordinarius proceduram iudicialem vel administrativam ad poenas irrogandas vel declarandas tunc tantum promovendam curet, cum perspexerit neque fraterna correctione neque correptione neque aliis pastoralis sollicitudinis viis satis posse scandalum reparari, iustitiam, reum emendari.
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> **Canon 1341 of the 1982 schema and canon 1341 of the 1983 code** restated canon 1293 of the 1980 schema.
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> **Canon 1294 of the 1980 schema**- §1 Quoties iustae obstent causae ne iudicialis processus fiat, poena irrogari vel declarari potest per decretum extra iudicium; remedia poenalia autem et paenitentiae applicari possunt per decretum in quolibet casu.
> §2. Per decretum irrogari vel declarari non possunt poenae perpetuae; neque poenae quas lex vel praeceptum eas constituens vetet per decretum applicare.
> §3. Quae in lege vel praecepto dicuntur de iudice, quod attinet ad poenam irrogandam vel declarandam in iudicio, applicanda sunt ad superiorem, qui per decretum extra iudicium poenam irroget vel declaret, nisi aliter constet neque agatur de praescriptis quae ad procendi tantum rationem attinent.
>
> **Canon 1342 of the 1982 schema and canon 1342 of the 1983 code** restated 1294 of the 1980 schema.

The *coetus* did not address the new 1972 administrative procedure schema in great detail, but it did "restate its view that the preference for judicial processes [was] clear in the schema even though it explicitly highlighted the discretionary authority of the superior to choose which

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[218]Canadian Report, 4; British-Irish Report, 9.

process to follow."[219]

VI. The cessation of *latae sententiae* penalties.

The following questions will focus our discussion on the cessation of *latae sententiae* penalties: who could remit them? under what circumstances were they remitted? One might note that the *Praenotanda* of the 1973 schema indicated that the norms for remitting penalties had been greatly reduced. In particular, both canon 2254, §1 of the 1917 code on absolving *latae sententiae* censures and canon 2290, §1 on suspending the observance of *latae sententiae* vindictive penalties in urgent and occult cases had been abolished.[220] However, some canons on the exceptional remitting of penalties in the sacramental forum were admitted in the 1980 and 1982 schemata and ultimately in the 1983 code.

A. Those who can remit *latae sententiae* penalties

> **Canon 2237 of the 1917 code-** §1. In casibus publicis potest Ordinarius poenas latae sententiae iure communi statutas remittere, exceptis:
> 1.° Casibus ad forum contentiosum deductis;
> 2.° Censuris Sedi Apostolicae reservatis;
> 3.° Poenis inhabilitatis ad beneficia, officia, dignitates, munera in Ecclesia, vocem activam et passivam eorumve privationis, suspensionis perpetuae, infamiae iuris, privationis iuris patronatus et privilegii seu gratiae a Sede Apostolica concessae,

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[219]Green, "Revisited," 163. For further discussion on the 1972 administrative procedure schema, see Thomas Green, "The Revision of Canon Law: Theological Implications," *Theological Studies* 40 (1979) 605-606.

[220]*Praenotanda*, 9.

§2. In casibus vero occultis, firmo praescripto can. 2254 et 2290, potest Ordinarius poenas latae sententiae iure communi statutas per se vel alium remittere, exceptis censuris specialissimo vel speciali modo Sedi Apostolicae reservatis.

Canon 38 of the 1973 schema- §1. Praeter eos, qui in cann. 39-40 recensentur, omnes, qui a lege, quae poena munita est, dispensare possunt vel a praecepto poenam comminanti eximere, possunt etiam eam poenam remittere.
§2. Potest praeterea lex vel praeceptum, poenam constituens, aliis quoque potestatem facere remittendi.

Canon 39 of the 1973 schema- §2. Poenam latae sententiae lege constitutam potest Ordinarius remittere suis subditis et iis qui ipsius territorio versantur vel ibi deliquerint.

Canon 40 of the 1973 schema- §1. Poenam ferendae vel latae sententiae constitutam praecepto quod non sit ab Apostolica Sede latum, remittere possunt:
a) Ordinarius, qui iudicium ad poenam irrogandam promovit vel decreto eam per se vel per alium irrogavit;
b) Ordinarius loci, in quo delinquens versatur.
§2. Antequam remissio fiat, consulendus est, nisi propter extraordinarias circumstantias impossibile sit, praecepti auctor.

1. Animadversions on canons 38-40 of the 1973 code and *coetus* response

There were no animadversions on canon 38 of the 1973 schema concerning those who had the power to remit penalties.[221] Canon 39, §2 of the 1973 schema was concerned with remitting *latae sententiae* penalties established by law. Some animadversions on the latter text questioned the ordinary's competence to remit *latae*

[221] *Communicationes* 9 (1977) 168.

sententiae penalties established by law for those who actually lived (*"versatur"*) in his territory because of the contemporary mobility of people. The consultors admitted that the animadversion had some merit if the penalty were declared and especially if it were established by *particular* law. To resolve the difficulty, one consultor proposed that §2 be restricted to non-declared *latae sententiae* penalties. In addition, he proposed that since the remission of both *ferendae sententiae* penalties and *latae sententiae* penalties was equivalent in practice, that equivalency ought to appear in §1 of canon 39 of the 1973 schema.[222] The rest of the consultors agreed with his proposal and the redacted text became canon 1307 of the 1980 schema.[223] Canon 40 of the 1973 schema concerning the remission of *latae sententiae* penalties established by precept but not reserved to the Holy See was likewise emended and became canon 1308 of the 1980 schema.[224]

2. Canons 1306-1308 of the 1980 schema in the 1981 *Relatio*

Canon 1306, §1 and §2 of the 1980 schema

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[222]1973 schema, c. 39, §1: "Poenam ferendae sententiae lege constitutam remittere possunt:
a) Ordinarius, qui iudicium ad poenam irrogandam promovit vel decreto eam per se vel per alium irrogavit;
b) Ordinarius loci in quo delinquens versatur, consulto tamen, nisi propter extraordinarias circumstantias impossibile sit, Ordinario, de quo sub a.

[223]*Communicationes* 9 (1977) 169.

[224]Ibid., 170.

restated canon 38 of the 1973 schema.

> **Canon 1307 of the 1980 schema-** §1. Poenam lege constitutam si sit irrogata vel declarata remittere possunt:
> 1) Ordinarius, qui iudicium ad poenam irrogandam vel declarandam promovit vel decreto eam per se vel per alium irrogavit vel declaravit.
> 2) Ordinarius loci in quo delinquens versatur, consulto tamen, nisi propter extraordinarias circumstantias impossibile sit, Ordinario, de quo sub n. 1.
> §2 Poenam latae sententiae nondum declaratam lege constitutam potest Ordinarius remittere suis subditis et iis qui ipsius territorio versantur vel ibi delinquent, et etiam Episcopus titularis in actu tamen sacramentalis confessionis.
>
> **Canon 1308 of the 1980 schema-** §1. Poenam ferendae vel latae sententiae constitutam praecepto quod non sit ab Apostolica Sede, remittere possunt:
> 1) Ordinarius loci, in quo delinquens versatur;
> 2) si poena sit irrogata vel declarata etiam Ordinarius, qui iudicium ad poenam irrogandam vel declarandam promovit vel decreto eam per se vel per alium irrogavit vel declaravit.
> §2. Antequam remissio fiat, consulendus est, nisi propter extraordinarias circumstantias impossibile sit, praecepti auctor.

The 1981 *Relatio* reported that Bishop Stewart of Chun Cheon, South Korea was concerned about the wording of canon 1306 of the 1980 schema because it seemed to give the power to dispense even from divine law; and thus he proposed that the pertinent clause be changed to: "all who can dispense from penal law."[225] However, the *relator* pointed out the canon had not been rightly understood. The norm, derived from canon 2236 of the 1917 code, actually referred to those authorities listed in canons 1307-1308 of the 1980 schema.

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[225] Relatio, 299: "omnes qui lege poenali dispensare possunt."

Therefore what was proposed could not be admitted.

Cardinal Siri suggested that before a penalty was remitted the *approval* or permission of the Ordinary who inflicted or declared the penalty should be required in canon 1307 of the 1980 schema; it was not enough that he be advised ("*moneatur*"). The *relator* responded that such a norm would be too severe. It was judged sufficient that the aforementioned ordinary be consulted ("*consuletur*"), which is not the same as "*monere*" or "*avvertire.*" [226] Presumably, this discussion focused on the distinction between notifying or consulting an authority figure, and receiving his approval for a course of action. An ordinary other than the penalizing ordinary could remit a penalty. Yet, the former ordinary needed to notify and consult the latter about such a remission but did not need his approval to do so. The *Relatio* did not report on canon 1308 of the 1980 schema. Furthermore, the CLSA, Canadian and British-Irish reports did not specifically comment on the aforementioned canons on remitting *latae sententiae* penalties in the 1973 schema.

3. The 1982 schema and the 1983 code

Canon 1354 of the 1982 schema and canon 1354 of the 1983 code restated canon 38 of the 1973 schema.

Canon 1355 of the 1982 schema- §1. Poenam lege constitutam si sit irrogata vel declarata remittere possunt, dummodo non sit Apostolicae Sedi reservata:

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[226] Ibid.

1.° Ordinarius, qui iudicium ad poenam irrogandam vel declarandam promovit vel decreto eam per se vel per alium irrogavit vel declaravit
2.° Ordinarius loci in quo delinquens versatur, consulto tamen, nisi propter extraordinarias circumstantias impossibile sit, Ordinario, de quo sub n. 1.

§2 Poenam latae sententiae nondum declaratam lege constitutam, si Sedis Apostolicae non sit reservata, potest Ordinarius remittere suis subditis et iis qui ipsius territorio versantur vel ibi delinquerint, et etiam Episcopus titularis in actu tamen sacramentalis confessionis.

Canon 1355 of the 1983 code retained the wording of canon 1355 of the 1982 schema except that "*Episcopus titularis*" in the latter was changed to "*quilibet Episcopus*" in the former.

Canon 1356 of the 1982 schema and canon 1356 of the 1983 code restated canon 1308 of the 1980 schema.

The aforementioned canons of the 1982 schema and the 1983 code reflected the various discussions on the intervention of appropriate ecclesial authorities in remitting *latae sententiae* penalties.

B. Reservation of *latae sententiae* penalties

1. Canon 41 of the 1973 schema

Canon 2245, §4 of the 1917 code- Censura latae sententiae non est reservata, nisi in lege vel praecepto id expresse dicatur; et in dubio sive iuris sive facti reservatio non urget.

Canon 41 of the 1973 schema- Potest Apostolica Sedes poenae remissionem sibi vel alii reservare; reservatio autem stricte est interpretanda.

The consultors agreed with a proposal that canon 41 of the 1973 schema on the reservations of penalties should be coordinated with canons 39 and 40 on who could remit penalties established by law or by precept respectively, and

that the norm of canon 41 be altered in the new text as follows without further explanation: "*Potest tamen Apostolica Sedes.*" [227]

2. The 1980 and 1982 schemata, the 1983 code

> **Canon 1306, §3 of the 1980 schema**- Potest tamen Apostolica Sedes poenae remissionem sibi vel aliis reservare, reservatio autem stricte est interpretanda.
>
> **Canon 1354, §3 of the 1982 schema**- Si Apostolica Sedes poenae remissionem sibi vel aliis reservaverit, reservatio stricte est interpretanda.
>
> **Canon 1354, §3 of the 1983 code** restated canon 1354, §3 of the 1980 schema.

According to the 1981 *Relatio* Cardinal Bafile pointed out that canon 1306, §3 of the 1980 schema made it seem that the Holy See needed a particular faculty to reserve penalties. His suggestion was accepted and the text redacted accordingly and became canon 1354, §3 of the 1982 schema.[228] The CLSA and Canadian Reports did not comment on this matter; however, the British-Irish Report noted that "the concept of reserved penalties, with all its intricacies and complications, has for the most part been abandoned."[229]

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[227] *Communicationes* 9 (1977) 170.

[228] *Relatio*, 299.

[229] British-Irish Report, 3.

C. The remission of penalties by the confessor

1. The 1973 schema

Canon 2254, §1 of the 1917 code-In casibus urgentioribus, si nempe censurae latae sententiae exterius servari nequeant sine periculo gravis scandali vel infamiae, aut si durum sit poenitenti in statu gravis peccati permanere per tempus necessarium ut Superior competens provideat, tunc quilibet confessarius in foro sacramentali ab eisdem, quoquo modo reservatis, absolvere potest, iniuncto onere recurrendi, sub poena reincidentiae, intra mensem saltem per epistolam et per confessarium, si id fieri possit sine gravi incommodo, reticito nomine, ad S. Poenitentiariam vel ad Episcopum aliumve Superiorem praeditum facultate et standi eius mandatis.

Canon 2290, §1 of the 1917 code- In casibus occultis urgentioribus, si ex observatione poenae vindicativae latae sententiae, reus seipsum proderet cum infamia et scandalo, quilibet confessarius potest in foro sacramentali obligationem servandae poenae suspendere, iniuncto onere recurrendi saltem intra mensem per epistolam et per confessarium, si id fieri possit sine gravi incommodo, reticito nomine, ad S. Poenitentiariam vel ad Episcopum facultate praeditum et standi eius mandatis.

The aforementioned canons were not restated in the **1973 schema**.

2. Animadversions of the May, 1977 *Plenarium*

Canon 1309 of the 1980 schema resulted from the decision of the May, 1977 *Plenarium* to restate as an effect of excommunication a prohibition forbidding the reception of all the sacraments.[230] Canon 16, §1, b of the 1973 schema

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[230]*Communicationes* 9 (1970) 80: "Utrum retinenda sit notio excommunicatio in schemate proposita, quatenus excipit paenitentiam et unctionem infirmorum a generali prohibitione, ipsi excommunicationi propria, recipiendi sacramenta (cf. can. 16, §1, schematis)." For the result of the voting on this question see, Ibid., 213. There were 26 negative and 3 affirmative votes with one

would have allowed an excommunicated person to receive penance and the anointing of the sick. The British-Irish report had specifically noted that canon as "a measure of success" because "even in the case of the most severe penalty of Excommunication, the offender [was] not excluded from the Sacraments of Penance and Anointing of the Sick."[231] However, the criticism of that canon by German canonists prompted the *Plenarium's* decision. Green's summary of the situation is worth quoting in full.

> [The German canonists] apparently felt that the [1973] schema's view of excommunication failed to take cognizance of the ecclesiological interrelationship between excommunication and penance, that the schema contradicted the conciliar teaching that absolution from one's sins reconciled one with the Church and finally that the schema violated the principles for revision by sharpening the distinction between external and internal forum.[232]
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> [T]he *coetus* [had] to consider whether to re-introduce the [c]ode's provisions for confessors' absolving those subjects of penalties who find it hard to be deprived of the grace of the sacraments prior to being absolved in the external forum. The *coetus* agreed in principle to articulate such a norm but disagreed on the scope of the confessor's absolving power. The relator wished simply to summarize the conditions of the present law [c. 2254 of the 1917 code]. However, another consultor felt that this could not be done in light of the directive principles for the revision of the [c]ode and the strong external forum thrust of the schema. In other words he wished to restrict the confessor's absolving power as much

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abstention.

[231]British-Irish Report, 5.

[232]Green, "Revisited," 156.

as possible and to confine it to a relatively circumscribed arena. Most members of the *coetus* agreed with the latter position and limited the absolving power of the confessor to non-declared *latae sententiae* excommunications or interdicts.[233]

3. Canon 1309 of the 1980 schema in the 1981 *Relatio*

Canon 1309 of the 1980 schema- §1. Firmis praescriptis cann. 428 et 929, censuram latae sententiae excommunicationis vel interdicti, non declaratam neque Sedi Apostolicam reservatam, confessarius remittere potest in foro interno sacramentali, si paenitenti durum sit in statu gravis peccati permanere per tempus necessarium ut superior competens provideat.

§2. In remissione concedenda confessarius paenitenti onus iniungat recurrendi intra mensem sub poena reincidentiae ad superiorem competentem vel ad sacerdotem facultate praeditum, et standi huius mandantis; interim imponat congruam paenitentiam et, quatenus urgeat, scandali et damni reparationem. Recursus autem fieri potest etiam per confessarium, sine nominis mentione.

The result of the *coetus* deliberation was canon 1309 of the 1980 schema. The 1981 *Relatio* reported that Cardinal Carter judged that the faculty attributed to confessors in canon 1309 of the 1980 schema did not include the reason for the necessary distinction of the fora. However, the Secretariat stated that the canon was absolutely necessary since it was called for by the 1977 Plenarium. If excommunication prohibited the reception of penance, absolution in urgent cases could not be denied even if there were a certain blurring of the distinction between the two fora. The Secretariat repeated the maxim: *Salus animarum*

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[233]Ibid., 170.

suprema lex. In addition, it noted that such options for absolution were restricted to *latae sententiae* penalties not declared and not reserved to the Holy See. The Secretariat also noted that canon 1309 of the 1980 schema contained a third paragraph because of an animadversion on canon 1304 of the 1980 schema concerning the remission of a penalty in danger of death. The new paragraph read: "§3. After they have recovered, those absolved in accord with the norm of can. 929 from an inflicted or declared censure or one reserved to the Holy See are bound by the same obligation of recourse."[234]

4. The 1982 schema and the 1983 code

> **Canon 1357 of the 1982 schema** restated canon 1309, §1 and §2 of the 1980 schema and added §3: Eodem onere recurrendi tenentur, postquam convaluerint, qui ad normam can. 976 absoluti sunt a censura irrogata vel declarata vel Sedi Apostolicae reservata.
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> **Canon 1357 of the 1983 code** restated canon 1309, §1 and §2 of the 1980 code and modified canon 1357, §3 of the 1982 schema: Eodem onere recurrendi tenentur, postquam convaluerint, ii quibus ad normam ca. 976 remissa est censura irrogata vel declarata vel Sedi Apostolicae reservata.

Canon 1357 of the 1982 schema and the 1983 code like canon 1309 of the 1980 schema "provide[d] for involvement of the confessor in situations where an undeclared *latae sententiae* penalty [could be] observed only with

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[234] *Relatio*, 299-300: "Eodem onere recurrendi tenentur, postquam convaluerint, qui ad normam can. 929 absoluti sunt a censura irrogata vel declarata vel Sedi Apostolica reservata."

difficulty."[235] However, canon 1357, §3 of the 1982 schema imposed a burden of recourse in case of recovery by one for whom certain censures had been remitted in danger of death in accord with canon 976. Finally, canon 1357, §3 of the 1983 code reflected a more consistent use of terminology by replacing the word "absolved" which was usually used in reference to the forgiveness of sins with the word "remitted" which was usually used in reference to penalties.

D. The risk of infamy

The risk of infamy of fact or grave scandal in observing a penalty were reasons in urgent cases for absolving occult *latae sententiae* censures in canon 2254, §1 of the 1917 code and for suspending the observance of *latae sententiae* vindictive penalties in occult cases in canon 2290, §1. Although the 1973 schema did not restate those canons, it did provide for the danger of infamy of fact or grave scandal in remitting penalties.[236]

> **Canon 45, §3 of the 1973 schema** -Caveatur ne reus ullam ex remissionis petitione aut ex ipsa remissione infamiam patiatur, nisi quatenus id necessarium sit ad scandalum vel damnum reparandum.

1. Animadversions on canon 45, §3 of the 1973 schema and *coetus* response

Some animadversions on canon 45, §3 of the 1973 schema concerning a delinquent's risk of infamy in the remission of

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[235]Green, "Revisited," 169.

[236]*Praenotanda*, 1973 schema, 9.

a penalty suggested dropping the clause "unless and to the extent that it is necessary to repair scandal or damage"[237] since it seemed to contradict §1 of that canon: "Remission can be granted even to those absent or under condition."[238] Moreover, one consultor questioned the redaction of §3 even if it were doubtful that publicizing the remission of a penalty to avoid scandal would be really necessary. Therefore the *relator* proposed a new formula which was approved by the consultors and became canon 1313, §3 of the 1980 schema. Ordinarily a petition for remission or the remission itself was not made public. However, they could be made public if it would be advantageous to protect the reputation of the delinquent or necessary to repair scandal.

2. CLSA, Canadian and British-Irish Reports

The CLSA Report cited canon 45, §3 of the 1973 schema as an instance in which the term "scandal" *(scandalum)* needed to be defined.[239] The Canadian Report did not comment on that canon, however the British-Irish Report did so extensively. The report referred to a basic principle enunciated in the *Praenotanda* that penal law be limited to

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[237]1973 schema, c. 45, §3: "nisi quatenus id necessarium sit ad scandalum vel damnum reparandum."

[238]1973 schema, c. 45, §1: "Remissio dari potest etiam absenti vel sub conditione"

[239]CLSA Report, 134.

the external form.[240] First it judged that the principle itself should be stated in the law. Second, canon 45, §3 apparently compromised the position taken in the *Praenotanda*. Since the confessor's role in absolving from or suspending the observance of *latae sententiae* penalties had been dropped, the obtaining of their remission in the schema involved some form of self-manifestation in the external forum. As the report noted, "[a]part from the case where the crime itself is notorious (which will clearly be the exceptional situation), the question at once arises: how can the offender obtain remission of such a penalty *in foro externo* without suffering *infamia*?"[241] To obtain the remission through the confessor seemed to violate the principle of separating the two fora. Although canon 36, §2 of the 1973 schema provided for suspending the observance of a *latae sententiae* penalty if it would risk self-defamation or cause grave scandal, the report noted that a truly contrite offender had the right to the remission of censures in the external forum according to canon 42, §1 of that schema. As evidence of the crucial and practical problem that canon 45, §3 of the 1973 schema presented, the report noted the *latae sententiae* penalty attached to abortion. For the aforementioned reasons, the British-Irish report

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[240]*Praenotanda*, 1973 schema, 5: "Itaque totum ius poenale ad externum tantum forum limitatum est,..."

[241]British-Irish Report, 6.

strongly recommended that abortion be punished with a *ferendae sententiae* penalty. But more generally, the report argued that "[a]t the very least the problem should always be carefully borne in mind before [a *latae sententiae*] penalty is attached to a crime."[242]

3. The 1980 and 1982 schemata and the 1983 code

> **Canon 1313, §3 of the 1980 schema**- Caveatur ne remissionis petitio vel ipsa remissio divulgetur, nisi quatenus id vel utile sit ad rei famam tuendam vel necessarium ad scandalum reparandam.
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> **Canon 1361, §3 of the 1982 code and canon 1361 of the 1983 code** restated the 1980 schema.

The 1980 and 1982 schemata and the 1983 code reflected the concern for a delinquent's right to a good reputation in cases of remission of a penalty.

Conclusion

In conclusion, the author offers some reflections on selected aspects of the revision of the 1917 code. His reflections on section one regarding the 1967 synod discussion of *latae sententiae* penalties are brief because the episcopal comments themselves were terse and often offered little or no explanations of the bishops' concerns. His reflections on section two regarding the discussion of canonists regarding *latae sententiae* penalties do not evaluate each argument presented but rather focus briefly on the positions of DePaolis and Adams. Finally, his

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[242]Ibid., 6-7.

reflections on section three appraise selected aspects of the work of the *coetus* on penal law and some comments made by consultative bodies and canon law societies.

I. Reflections on selected aspects of *latae sententiae* penalties discussed during the 1967 synod of bishops

Due to time constraints, the synodal fathers could not give much of a rationale for either retaining or eliminating *latae sententiae* penalties in the new code. However, generally, they judged that *latae sententiae* penalties had, in practice, lost much of their contemporary effectiveness in safeguarding ecclesial values, reforming an offender, restoring justice and repairing ecclesial damage. Hence, a theoretical rationale for retaining or eliminating such penalties would have to be sought in the opinions of various canonists, rather than in the comments of the bishops reflecting their pastoral experience.

II. Reflections on selected aspects of DePaolis' argument against and Adams' argument for *latae sententiae* penalties.

The author agrees with DePaolis' objections to *latae sententiae* penalties, which carefully weighed the evidence and argued persuasively for their elimination. All the reasons for retaining them could be answered by better reasons for eliminating them. In the author's opinion, DePaolis rightly averred that *ferendae sententiae* penalties could more justly safeguard ecclesial values such as justice itself and the importance of weighing the various pertinent

factors in an alleged offense. This was because the imposition of such penalties required the personal intervention of a competent authority.

By contrast, Adams judged that *latae sententiae* penalties should be retained for the sake of their historical continuity in the Church's legal life. After devoting much of his dissertation to tracing their historical development, Adams asked why the Church resorted to them. He conjectured that "a need arose for the safeguarding of a given value, the community responded spontaneously, unself-consciously in a way calculated to stem the abuse and the [*latae sententiae*] penalty was a reality."[243] Adams concedes that *latae sententiae* penalties have become "more complicated, difficult and illogical" down through the centuries.[244]

With the reform of the 1917 code, some canonists judged that *latae sententiae* penalties were ill-suited to contemporary ecclesial needs and should be abolished. However, Adams concluded that the code commission properly retained some *latae sententiae* penalties because "a basic rule of canonical reform [is to maintain] a balance between continuity with tradition and progress owing to the change

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[243]Adams, 130.

[244]Ibid.

of circumstances." [245] Undeniably such a balance is important to canonical reform; but, in the author's opinion, the circumstances have so changed that *latae sententiae* penalties have outlived their appropriateness as a canonical institute for at least three reasons.

First, Adams stated that *latae sententiae* penalties arose unself-consciously. But such an unself-conscious decision needs to be examined critically, and Adams conceded that the origins of *latae sententiae* penalties were uncertain and that they could be confused with the early Church's public penitential practices.[246] Second, Adams tends to confuse the ecclesial value itself with the manner of safeguarding it. In other words, it seems that an ecclesial value safeguarded by a *latae sententiae* penalty would presumably be of lesser value if it were safeguarded by a *ferendae sententiae* penalty. Clearly, a given ecclesial value rests on its intrinsic merits and not on the means used to safeguard it. Those offenses punished by *latae sententiae* penalties would not be any less serious *per se* than if they were punished by *ferendae sententiae* penalties. Third, how the Church safeguards a value is as important as the value itself. If contemporary circumstances were such that *latae sententiae* penalties were

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[245] Ibid., 131.

[246] Ibid., 20-26.

perceived as somewhat unjust in their modality, why retain them? In the author's opinion, not only the need to be just but also the need to appear to be just seem to tip the balance in favor of eliminating *latae sententiae* penalties.

III. Reflections on selected aspects of *latae sententiae* penalties in the work of the *coetus* on penal law and the comments made by consultative bodies and canon law societies during the revision process of the 1970s and 1980s.

A. Reflections on selected aspects of the exceptional character of *latae sententiae* penalties.

Both the 1917 code and 1973 schema recognized the exceptional character of *latae sententiae* penalties. In fact, their number was significantly reduced in the 1973 schema. Moreover, it would be interesting to know in more detail why the drafters of canon 5 of the 1973 schema stated that a penalty was "*per se*" *ferendae sententiae* vis-à-vis *latae sententiae* or why the adverb, "*plerumque*" was chosen over "*ordinarie.*" If a penalty were indeed "*per se*" *ferendae sententiae*, it would logically eliminate the need of *latae sententiae* penalties.

B. Reflections on selected aspects of canon 8 of the 1973 schema regarding the cautious establishment of *latae sententiae* penalties

Canon 8 seemed to underscore the exceptional nature of *latae sententiae* penalties. It stated that *latae sententiae* penalty could be attached only to most serious crimes which caused more grave scandal and could not be punished efficaciously by a *ferendae sententiae* penalty. However,

the very conditions articulated for their cautious establishment could also be arguments for their elimination. It is hard to imagine a very serious crime that could not be punished effectively by a *ferendae sententiae* penalty. Perhaps occult crimes needed to be punished by *latae sententiae* penalties, but one wonders how seriously such crimes damage the societal order of the Church, their sinfulness notwithstanding. Moreover, it is not entirely clear what grave scandal means or who determines it. Any crime that would cause grave scandal could presumably just as well be punished by a *ferendae sententiae* penalty.

Furthermore, canon 6 of the 1973 schema allowed a bishop to attach a particular *latae sententiae* penalty to a crime which had an universal indeterminate and facultative penalty for reasons of grave necessity. Although allowed to attach such a penalty, a bishop could perhaps more appropriately attach a determinate and preceptive *ferendae sententiae* penalty to such a crime. If a particular diocese needed more stringent penalties for certain crimes, perhaps a bishop might appropriately seek out the causes for those crimes and address the problem in a non-penal pastoral spirit. If that fails, he could sanction such crimes with particular law *ferendae sententiae* penalties without recourse to *latae sententiae* penalties. If a bishop is supposed to know the people entrusted to his care, he can hardly remain detached from the concrete pastoral situation

that may demand the exercise of fraternal or authoritative correction, spiritual-moral persuasion, pastoral charity, or as a last resort, ecclesiastical sanctions.

In short, the exceptional quality of *latae sententiae* penalties as well as the difficulty of determining "grave scandal" and what kind of crimes cannot be punished by *ferendae sententiae* penalties could be reasons to eliminate the former. Furthermore, the fact that bishops are warned to be cautious about establishing *latae sententiae* penalties in particular law could also be a reason for their elimination.

C. Reflections on selected aspects of canon 28 of the 1973 schema regarding the process of declaring *latae sententiae* penalties.

Although the 1917 code and the various schemata on revising it did not spell out the process for declaring a *latae sententiae* penalty, much of what was said about inflicting *ferendae sententiae* penalties would apply. Presumably, a judge or superior would have to make sure that a *latae sententiae* penalty was attached to a given violation of the law which was morally imputable to the delinquent. An objective fact-finding inquiry is necessary either to declare a *latae sententiae* penalty or to inflict a *ferendae sententiae* penalty. Such a fact-finding inquiry calls for some kind of personal judicial intervention by a competent authority detached from the conditions of the alleged offense. Ultimately a judgment to declare or not to declare

latae sententiae penalties is based upon the facts ascertained. In this context, there seems to be something inappropriate about making one who may have incurred a *latae sententiae* penalty simultaneously prosecutor, judge and defendant. If this is true, then perhaps *latae sententiae* penalties ought to be eliminated from penal law.

D. Reflections on selected aspects of the confessor's role in remitting *latae sententiae* penalties

Canon 1309 of the 1980 schema resulted from a decision of the 1977 *Plenarium* about canon 16 of the 1973 schema, which allowed an excommunicated person to receive the sacraments of anointing of the sick and penance. At the urging of some German canonists, the 1977 *Plenarium* voted to forbid such access to the sacraments. As a result, canon 1309 of the 1980 schema was formulated to provide for a confessor to absolve *latae sententiae* excommunications or interdicts in urgent cases.

The reasons given by the German canonists for reformulating canon 16, §1, b of the 1973 schema could presumably be reasons for eliminating *latae sententiae* penalties altogether. For example, those canonists claimed that permitting an excommunicated person to receive the sacraments of penance and anointing contradicted the conciliar teaching on the necessary connection between absolution of sins and ecclesial reconciliation. In the author's opinion, the connection between the absolution of

sins and ecclesial reconciliation can presumably be better served by *ferendae sententiae* penalties than by *latae sententiae* penalties.

Ferendae sententiae penalties would make the Church's ministry of reconciliation clearer because of the personal involvement of competent authority. A parallel can be drawn between the personal involvement of a competent authority in the sacrament of penance and the imposition of *ferendae sententiae* penalties. Certainly, God can forgive a repentant sinner outside of the sacrament of penance. However, the sacramental absolution of sins celebrated by a competent minister makes clear the forgiveness of those sins. In a similar way, the somewhat "automatic" quality of incurring *latae sententiae* penalties by definition precludes the personal intervention of church authority unless one refers to the authoritative declaration of the fact that they were so incurred. Furthermore, one incurring a *latae sententiae* penalty in an occult case may not be confronted with the offense's harm done to the ecclesial community. One could argue that a *ferendae sententiae* penalty, imposed by the personal intervention of a competent authority in the external forum, gives a firmer sense of the integrity of ecclesial reconciliation for both the offender and the community at large than a *latae sententiae* penalty.

Another area of concern regarding the role of the confessor in remitting *latae sententiae* penalties was

principle two of the revision process, which called for coordination between the internal and external fora so as to preclude any conflict between the two. The German canonists objected that canon 16, §1, b of the 1973 schema violated the aforementioned principle by sharpening the distinction between the external and internal fora. They maintained that allowing an excommunicated person to receive the sacraments of penance and the anointing of the sick failed to reflect the interrelationship between reconciliation with God and with the Church. Such a failure sharpened the distinction between the two fora for one could not remain reconciled to God by the sacraments in the internal forum and yet remain excommunicated from the Church in the external forum.

However, if a less sharp distinction between the two fora is desired, it could presumably be better served by *ferendae sententiae* penalties rather than by *latae sententiae* penalties. *Latae sententiae* penalties engender a certain amount of confusion regarding the fora. A *latae sententiae* penalty binds in both fora, and the delinquent is bound to observe it in both fora if it can be done so without the risk of scandal or infamy. Yet, certain legal effects of the penalty occur only when it has been declared in the external forum. Such a confusion was found in the 1973 schema.

For example, the 1973 schema envisioned many

circumstances excusing one from incurring a *latae sententiae* in both fora due to diminished imputability. Moreover, if aggravating circumstances in the external forum warranted it, a judge or superior could punish a crime to which a *latae sententiae* penalty had been attached by adding another penalty or penance. In addition a judge by law could declare or not declare the penalty. Such aforementioned provisions on not incurring *latae sententiae* penalties in both fora and not declaring them in the external forum if incurred seem to argue for their complete elimination since they confuse the fora and seem to be practically inoperative in the external forum. *Ferendae sententiae* penalties, on the other hand, eliminate such confusion between the fora because they are first imposed in the external forum and then bind in both fora.

The British-Irish Report also noted the confusion of fora affecting *latae sententiae* penalties. The report noted that the 1973 schema eliminated the role of the confessor in remitting *latae sententiae* penalties. As a result, the delinquent had to obtain remission in the external forum but in so doing seriously risked infamy. The report claimed that to seek remission through the confessor "could surely seem to violate the very principle of separating the two fora."[247]

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[247]British-Irish Report, 7.

> It is true that the [1973] schema does provide that the obligation of observing a penalty is suspended for as long as the offender cannot observe it without the danger of grave scandal or *infamia* (canon 36, §2; 45, §3). This provision - however compassionate though it is - is not an adequate solution, for it does not remove the penalty; it merely suspends its obligation; and a truly contrite offender has, canon 42, §1 says, a right to the remission of the penalty *in foro externo*.[248]

In particular, the report noted that the *latae sententiae* penalty attached to abortion demonstrated how crucial and practical an issue was a reconsideration of the coordination between the fora.

Furthermore, *latae sententiae* penalties bind in both fora, but one is not bound to observe them in the external forum if there is danger of infamy or scandal. One could ask how observing a *latae sententiae* penalty in the internal forum would practically speaking not cause scandal or risk self-betrayal in the external forum. The principle of observing penalties in both fora would probably be better respected if *latae sententiae* penalties were eliminated and only *ferendae sententiae* penalties were allowed. *Ferendae sententiae* penalties would make it clearer that some sins are also crimes and that some crimes so disturb the external, public ecclesial order that they must be addressed by the personal external forum intervention of competent church authority to reform the offender, restore justice and

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[248]Ibid.

repair scandal or ecclesial damage.

But since *latae sententiae* penalties were not eliminated from the 1973 schema, the *coetus* properly agreed with the strong external forum thrust of the proposed code and thereby restricted the confessor's absolving power to non-declared *latae sententiae* penalties. One criticism of canons 2254 and 2290 of the 1917 code was that for all practical purposes "urgent cases" had become the rule and most penalties were remitted by a confessor in the internal sacramental forum. The 1973 schema probably did not restate those canons to avoid the problems they posed in practice, to coordinate the internal and external fora better and to reduce the conflict between the two. This seems in keeping with principle two for the revision of the code. However subsequent schemata increased the role of the confessor in remitting penalties, presumably to cope with possible pastoral problems occasioned by the preeminently external forum emphasis in the remitting of penalties. Such an increased role of the confessor could presumably continue to blur the distinction between the fora and lead to conflict between them as well.

Undeniably *latae sententiae* penalties were significantly reduced in the proposed 1973, 1980, and 1982 schemata revising the 1917 code. Yet, it could be argued that the reasons given for reducing such penalties could also be reasons for eliminating them altogether. However,

the mind of the legislator regarding *latae sententiae* penalties was expressed in their being retained to some extent in the 1983 code. A detailed examination of such penalties in the 1983 code will be the subject of chapter three.

CHAPTER THREE

LATAE SENTENTIAE PENALTIES IN THE 1983 *CODE OF CANON LAW*

Preamble

Chapter three of this dissertation is divided into three sections. Section one is an overview of *latae sententiae* penalties in book six of the 1983 code. However, the arrangement of material in section one differs from the organization of book six. Moreover, the author will use the same organizational triad used in chapter one for the 1917 code, namely the establishment, application and remission of *latae sententiae* penalties. At least two commentators used the aforementioned organizational triad in their commentaries on the 1983 code.[1] Since the author is interested primarily in the general theory of *latae sententiae* penalties rather than in specific instances of such penalties, he deals solely with the canons in part one

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[1]Velasio DePaolis, *De Sanctionibus in Ecclesia: Annotationes in Codicem: Liber VI* [DePaolis, *De Sanctionibus*] (Rome: Editrice Pontificia Università Gregoriana, 1986) 20: "Ex istis iam apparet quomodo investiganda sit natura potestatis coactivae in Ecclesia, quaenam sint delicta et quaenam poenae, et quomodo hae statuantur, per diversos gressus: gressus *institutivus* poenarum, gressus *applicativus*, et tandem gressus *remissionis* poenarum. *Tres sunt ergo gressus semper* distinguendi [italics in original];" Alphonse Borras, *Les Sanctions dans l'Eglise: Commentaire des Canons 1311-1399* [Borras](Paris: Editions Tardy, 1990) 12: "Elle présupposera l'étude de la notion canonique de 'peine' ou de 'sanction *pénale*" dans sa triple phase de prévision (*phase constitutive*), d'application (*phase applicative*) et de cessation (*phase rémissive*)."

of book six on offenses and punishments in general [cc. 1311-1363]. Accordingly the canons in part two on penalties for particular offenses will not be examined; however, an appendix compares *latae sententiae* penalties in the 1983 and 1917 codes.

The sources for section one are primarily the commentaries on the 1983 code.[2] Such commentaries frequently indicate how a particular canon relates to the 1917 code and how it was redacted during the revision process. The advantage of such indications is that one gains an insight into the consensus of the authors about the evolution of a particular canon. Yet, the disadvantage is that the authors, generally speaking, offer only brief comments appraising *latae sententiae* penalties in the 1983 code.

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[2]For detailed and helpful studies on sanctions in book 6 of the 1983 code, see the aforementioned works of Borras and DePaolis. For the Spanish schools, see Juan Arias, "Book 6 - Sanctions in the Church," [Arias] in Ernesto Caparros, et al. eds., *Code of Canon Law Annotated*, Latin-English edition of the *Code of Canon Law* and English-language translation of the 5th Spanish-language edition of the commentary prepared under the responsibility of the Instituto Martìn de Azpilcueta (Montréal: Wilson & Lafleur Limitée, 1993) 817-867 and Federico Aznar, "Livre 6: Les Sanctions dans L'Eglise," [Aznar] in Lamberto de Echeverria et al., eds., *Code de Droit Canon Annoté*, traduction et adaptation français des commentaires de l'Université pontificale de Salamanque (Paris: Cerf; Bourges: Tardy, 1989) 713-761; for a French commentary, see Olivier Echappé, "Le Droit Pénal de L'Eglise," [Echappé] in Patrick Valdrini, ed., *Droit Canonique* (Paris: Dalloz, 1989) 450-478; for an Italian commentary see Francesco Nigro, "*Liber VI: De Sanctionibus in Ecclesia*," [Nigro] in Pio Pinto, ed., *Commento al Codice di Diritto Canonico* (Rome: Urbaniana University Press, 1985) 749-824; for an English commentary see, Thomas J. Green, "Book VI: Sanctions in the Church" [Green, "Sanctions"] in the CLSA Commentary, 891-941.

Section two briefly considers the role of *latae sententiae* penalties in the drafting of the Eastern code. As a matter of fact, *latae sententiae* penalties are absent from the Eastern code; but there is an advantage in examining certain key penal themes highlighted during that drafting process. Moreover, the differences between the Latin and Eastern codes regarding *latae sententiae* penalties will be noted.

Section three briefly examines critical appraisals of *latae sententiae* penalties in the commentaries consulted. Generally speaking, the authors note that such penalties are retained by the 1983 code but were reduced in number from the 1917 code during the revision process. During the revision process *latae sententiae* penalties were judged especially suitable for punishing certain occult delicts. However, most authors agree that *latae sententiae* penalties raised significant questions in the 1917 code and during the revision process. According to some authors, not all of these questions were answered satisfactorily.

Section One

An Overview of *Latae Sententiae* Penalties in the 1983 *Code of Canon Law.*

While section one presupposes the general notions of offense and penalty articulated in the 1917 code and examined in chapter one, it seems wise briefly to restate such notions. Likewise, this section of the dissertation

presupposes the earlier treatment of similarities and differences between *latae sententiae* and *ferendae sententiae* penalties. There are three related reasons for such presuppositions. First, the 1983 code, as a rule, does not include definitions. Second, it relies on those contained in the 1917 code and in the works of various canonists. Third, canon 6, §2 states that to the extent that the canons of the 1983 code reproduce the 1917 code, they are to be assessed in the light of the canonical tradition.[3]

Section one presupposes the Church's right to establish penalties. It then discusses those who can establish *latae sententiae* penalties, the legal cautions about establishing them, and certain specific restrictions regarding the establishing of *latae sententiae* expiatory penalties and suspensions. This section also discusses those who are subject to *latae sententiae* penalties.

The discussion on the applying of *latae sententiae* penalties begins by considering circumstances that exempt one from incurring them. Moreover, if there are mitigating circumstances, then *latae sententiae* penalties are not incurred. Possibly aggravating circumstances are considered in connection with the declaration of *latae sententiae* penalties since no *latae sententiae* penalty is automatically

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[3]*CIC* 83 c. 6, §2; "Canones huius Codicis, quatenus ius vetus referunt, aestimandi sunt ratione etiam canonicae traditionis habita."

increased unless a competent authority intervenes to declare it as such. Moreover, such penalties can be declared either by a judicial or administrative process. Finally, the suspension of the obligation to observe them due to grave scandal or the risk of self-betrayal is considered.

The discussion on the remitting of *latae sententiae* penalties begins with a consideration those who can remit them in the external forum. The internal forum remission of such penalties likewise warrants a certain amount of consideration. The reservation of such penalties and the risk of infamy in their remission are also explored.

I. Notions and distinctions of offense and penalty

A. The constitutive elements of an offense

Although section one presupposes the general notions of offense and penalty discussed earlier, they will be briefly examined here. The constitutive elements of a delict are objective, subjective and legal in character, which are evident in part from a consideration of canon 1321.[4] The objective element of a delict is its exteriority. A delict is an external violation of the law which may be either

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[4]*CIC* 83 c. 1321: "§1 Nemo punitur, nisi externa legis vel praecepti violatio, ab eo commissa, sit graviter imputabilis ex dolo vel ex culpa.

§2. Poena lege vel praecepto statuta is tenetur, qui legem vel praeceptum deliberate violavit; qui vero id egit ex ommissione debitae diligentiae, non punitur, nisi lex vel praeceptum aliter caveat.

§3. Posita externa violatione, imputabilitas praesumitur, nisi aliud appareat."

public or occult.[5] The subjective element of a delict involves canonical imputability. Canonical imputability presupposes serious moral imputability, and the legislator provides guidelines to aid competent authorities in weighing all the relevant factors.[6]

The legal element of a delict is the provision of a penal sanction by law or precept. A penalty is the deprivation of some good imposed by competent authority to correct the offender and punish the delict. Penalties can be further divided according to their mode of application. Thus, a *ferendae sententiae* penalty is inflicted by a judge or ordinary; while a *latae sententiae* penalty is incurred upon the commission of the offense.[7]

B. *Ferendae sententiae* and *latae sententiae* penalties

1. *Ferendae sententiae* penalties

Ferendae sententiae penalties clearly remain the preferred means of applying penalties in the 1983 code. Canon 1314, which notably simplifies canon 2217 of the 1917 code, prescribes that penalties are for the most part

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[5]Borras, 15; Arias, 824-825; Nigro, 758; DePaolis, *De Sanctionibus,* 40-41; Echappé, 457; Aznar, 721; Green, "Sanctions," 901.

[6]Borras, 18; Arias, 825; Nigro, 758-759; DePaolis, *De Sanctionibus,* 41-42; Echappé, 458-459; Aznar, 722; Green, "Sanctions," 901.

[7]Borras, 23; Arias, 819, 825; Nigro, 758; DePaolis, *De Sanctionibus,* 42-43; Echappé, 456; Aznar, 722-723; Green, "Sanctions," 901.

("*plerumque*") inflicted *ferendae sententiae*.[8] The former canon is in keeping with principle nine for the revision of the code.[9]

2. *Latae sententiae* penalties

Canon 1314 also states that the term "*latae sententiae*" must be expressly used in the law or precept which establishes such a penalty. Furthermore, as Green notes, "[a]pparently it was felt that without such *latae sententiae* penalties the public good of the Church would be jeopardized since certain occult or non-public offenses, such the absolution of an accomplice (canon 1378, §1) might otherwise not be penalized."[10]

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[8]*CIC* 83 c. 1314: "Poena plerumque est ferendae sententiae, ita ut rerum non teneat, nisi postquam irrogata sit; est autem latae sententiae, ita ut in eam incurratur ipso facto commissi delicti, si lex vel praeceptum id expresse statuat." Borras, 52; Arias, 821; Nigro, 753; DePaolis, *De Sanctionibus*, 50; Echappé, 462-463; Aznar, 716-717; Green, "Sanctions," 898.

[9]*Communicationes* 1 (1969) 85.

[10]Green, "Sanctions," 898; Nigro, 753: "Dal can. [1314] emerge la scelta fatta dal legislatore di volere fare ricorso ordinariamente alle pene f.s., ma anche emerge la volontà di conservare quelle l.s., nonostante l'aversione manifestata de alcuni canonisti, fino al punto da chiederne la pura e semplice abrogazione. È vero che le riserve che sono state avanzate contro tali pene, già si riscontravano nelle precedenti fonti canonistiche e si può ammettere che esse non tutelano sufficientemente i diritti soggettivi, però si giustificano per la particolare natura e le esigenze dell'ordinamento canonico, il quale, come sopra è stato detto, ha bisogno di interpellare ed affidarsi alla coscienza dei fedeli, sollecitandoli ad accettare questo genere di pene, attraverso le quali è solo possibile colpire alcuni comportamenti pregiudizievoli, sia per il bene spirituale dei singoli che della comunità ecclesiale." Borras, 52; Arias, 821; DePaolis, *De Sanctionibus*, 50; Echappé, 462-463; Aznar, 717.

II. The establishment of penalties

Penalties may be established by either law or precept but not by custom. Formally speaking, an offense constitutes an hypothesis to which a law or precept attaches a solution, namely a sanction with canonical effects. Nonetheless, a penal law or precept must be established in accordance with the same legal conditions as any other law or precept.

A. Those who can establish penalties

Canon 1315, §1 states that whoever has legislative power can likewise establish penal laws.[11] This includes the pope, the college of bishops, diocesan bishops within the limits of their territory, particular councils, episcopal conferences and major superiors of clerical religious institutes of pontifical right.[12] Neither vicars general nor judicial vicars may establish penal laws.

Moreover, a particular law may reinforce with a fitting

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[11]*CIC* 83 c. 1315: "§1. Qui legislativam habet potestatem, potest etiam poenales leges ferre; potest autem suis legibus etiam legem divinam vel legem ecclesiasticam, a superiore auctoritate latam, congrua poena munire, servatis suae competentiae limitibus ratione territorii vel personarum.

§2. Lex ipsa potest poenam determinare vel prudenti iudicis aestimatione determinandam relinquere;

§3. Lex particularis potest etiam poenis universali lege constitutis in aliquod delictum alias addere; id autem ne faciat, nisi ex gravissima necessitate. Quod si lex universalis indeterminatam vel facultativam poenam comminetur, lex particularis potest etiam in illius locum poenam determinatam vel obligatoriam constituere."

[12]See *CIC* 83 cc. 331, 336, 391, 445, 455, 596, 1320.

penalty a divine law or an ecclesiastical law of a higher authority. A particular legislator can establish particular penal law although the universal legislator may have judged it inopportune to penalize certain violations of the law. In other words, special circumstance may prompt the particular legislator to penalize more severely than universal law certain legal violations within his territory. In so doing, the particular legislator, notably the diocesan bishop, reflects his responsibility for the enforcement of the whole of ecclesiastical discipline. [13]

The current law emphasizes the legislative discretion of lower level legislators. For example, a diocesan bishop could foresee that certain cases of financial fraud or the deliberate practice of polygamy would require a penal sanction, even though the code provides for no such sanctions. The aforementioned offenses are considered not only morally evil acts which are gravely imputable, which is not primarily the focus of the legislator although it is presupposed, but also delicts with significantly negative ecclesial ramifications according to the sense of canon 1321.[14]

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[13]Borras, 56: "Ce faisant, le législateur particulier, entre autres et principalement l'évêque diocésain, manifeste dans son domaine qu'il n'est pas seulement responsable de ses propres lois, mais ausssi de la discipline ecclésiale dans ensemble." Arias, 821-822; Aznar, 717-718; Echappé, 456; DePaolis, *De Sanctionibus*, 47-48; Green, "Sanctions," 899; Nigro, 754.

[14]Borras, 56.

B. Conditions for the establishing of *latae sententiae* penalties

1. For certain malicious offenses

The code's preference for *ferendae sententiae* penalties is also evident in canon 1318, which prescribes that particular legislators are to establish *latae sententiae* penalties only under restrictive conditions comparable to universal law.[15] First of all such penalties are to be established for certain exceptionally malicious offenses. Such "malice" refers to the deliberate intent of the offender to violate the law.[16] *Latae sententiae* penalties are not meant to punish all particularly malicious delicts but only *certain* (*quaedam*) delicts, outstanding for their malice.[17]

2. Grave scandal and the possible ineffectiveness of a *ferendae sententiae* penalty

Secondly *latae sententiae* penalties are to be established for delicts which are particularly grave due to

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[15]*CIC* 83 c. 1318: "Latae sententiae poenas ne comminetur legislator, nisi forte in singularia quaedam delicta dolosa, quae vel graviori esse possint scandalo vel efficaciter puniri poenis ferendae sententiae non possint; censuras autem, praesertim excommunicationem, ne constituat, nisi maxima cum moderatione et in sola delicta graviora." Borras, 53; Arias, 882-883; Aznar, 719; Echappé, 463; DePaolis, *De Sanctionibus*, 50; Nigro, 756; Green, "Sanctions," 900.

[16]*CIC* 83 c. 1321, §2.

[17]Borras, 53: "Il ne s'agit donc pas de riposte de la sorte à *tous* les délits particulièrement malicieux, mais seulement à certains (*quaedam*);" Arias, 882-883; Aznar, 719; Echappé, 463; DePaolis, *De Sanctionibus*, 50; Nigro, 756; Green, "Sanctions," 900.

the scandal they cause or which cannot be effectively punished by *ferendae sententiae* penalties. This second condition establishes a double alternative criteria ("*vel . . . , vel*"): either there may be grave scandal eventually; or a *ferendae sententiae* penalty may be insufficient to sanction a certain delict effectively.[18]

Canon 1318 thereby remains consistent with the principles guiding the revision of the 1917 code, namely, that *latae sententiae* penalties be few in number and only for the most serious offenses.[19] As Green notes:

> While the 1917 Code explicitly called for moderation in the use of censures, especially excommunication (*CIC* 2241, §2), the explicit moderation in employing *latae sententiae* penalties is new. The restraint of the revised Code in determining *latae sententiae* penalties (seventeen in the present law) and such censures as excommunication (seven in the present law) should guide lower-level legislators.[20]

3. Caution as regards establishing *latae sententiae* penalties by law and precept.

a) By law

The 1983 code cautions the particular legislator about establishing particular penal law. Although a particular law can substitute a determined or obligatory penalty for one that is undetermined or discretionary in universal law, this ought to be done only for the gravest reasons and to

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[18]Borras, 53.

[19]Ibid., 53-54; *Communicationes* 1 (1969) 85; 8 (1976) 171.

[20]Green, "Sanctions," 900.

maintain ecclesiastical discipline.[21] Furthermore, canon 1318 also cautions that censures and especially excommunications are to be established only for more grave offenses and with the greatest moderation.[22]

b) By precept

Canon 1319 treats of penal precepts, which that they are administrative acts which require executive power.[23] The canon specifies certain conditions for issuing them. The matter must be extremely pressing for such acts must not be undertaken lightly. Moreover, *latae sententiae* penalties issued by precept are governed by the same conditions for those established by law. Namely, they envision exceptionally malicious offenses which may cause potentially grave scandal or could not be punished effectively by *ferendae sententiae* penalties. *Latae sententiae* censures established by precept also are to envision more grave offenses and are to be threatened only with the greatest

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[21] *CIC* 83 c. 1317: "Poenae eatenus constituantur, quatenus vere necessariae sint ad aptius providendum ecclesiasticae disciplinae. Dimissio autem e statu clericali lege particulari constitui nequit."

[22] Borras, 57.

[23] *CIC* 83 c. 1319, §1: "Quatenus quis potest vi potestatis regiminis in foro externo praecepta imponere, eatenus potest etiam poenas determinatas, exceptis expiatoriis perpetuis, per praeceptum comminari.

§2. Praeceptum poenale ne feratur, nisi re mature perpensa, et iis servatis, quae in cann. 1317 et 1318 de legibus particularibus statuuntur." Borras 60-61; Arias, 823-824; DePaolis, *De Sanctionibus*, 49; Aznar 720; Nigro 756-757; Green, "Sanctions," 900.

moderation.

C. Limitations on establishing *latae sententiae* expiatory penalties and *latae sententiae* suspensions

Canon 1336, § 2, limits the establishment of *latae sententiae* expiatory penalties to those enumerated in canon 1336, §1, 3°, namely, the deprivation of exercising a power, office, function, right, faculty, favor, title or insignia, even of a merely honorary nature.[24] Such a limitation reflects the general tendency to reduce *latae sententiae* penalties to a minimum. Furthermore, canon 1334, §2 notes that a law, but not a precept, can establish a *latae sententiae* suspension without an added determination or limitation; such a penalty has all the effects enumerated in canon 1333, §1. This prohibits all or some of the acts of the power of order, all or some of the acts of the power of governance, all or some of the acts of the rights or functions attached to an office.[25] Arias states without

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[24] *CIC* 83 c. 1336, §2: "Latae sententiae eae tantum poenae expiatoriae esse possunt, quae in §1, n. 3 [prohibitio ea exercendi, quae sub n. 2 [privatio potestatis, officii, muneris, iuris, privilegii, facultatis, gratiae, tituli, insignis, etiam mere honorifici] recensentur, vel prohibitio ea in certo loco vel extra certum locum exercendi; quae prohibitiones numquam sunt sub poena nullitatis] recensentur." Borras, 54; Arias, 836; Nigro, 780; DePaolis, *De Sanctionibus*, 80; Echappé, 463; Aznar, 744; Green, "Sanctions," 909.

[25] *CIC* 83 c. 1334, §2: "Lex, non autem praeceptum, potest latae sententiae suspensionem, nulla addita determinatione vel limitatione, constituere; eiusmodi autem poena omnes effectus habet, qui in canon 1333, §1 [Supensio, quae clericos tantum afficere potest, vetat: 1° vel omnes vel aliquos potestatis ordinis; 2° vel omnes vel aliquos actus potestatis regiminis; 3° exercitium vel omnium vel aliquorum iurium vel munerum officio

explanation that only a law can establish an unlimited *latae sententiae* suspension because it is a particularly grave penalty.[26]

D. Those subject to *latae sententiae* penalties

1. Age and *latae sententiae* penalties

According to canon 11 ecclesiastical penal law obliges only those baptized into the Catholic Church or received into it, who enjoy the use of reason and have completed their seventh year of age unless the law states otherwise.[27] However, canon 1323, 1° expressly provides that an offender who has not completed his or her sixteenth year of age is not subject to penal sanctions.[28]

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inhaerentium] recensentur." Borras, 87; Nigro, 776; Depaolis, *De Sanctionibus*, 77; Echappé, 466; Aznar, 742; Green, "Sanctions," 908.

[26]Arias, 835.

[27]*CIC* 83 c. 11: "Legibus mere ecclesiasticis tenetur baptizati in Ecclesia catholica vel in eandem recepti, quique sufficienti rationis usu gaudent et, nisi aliud iure expresse caveatur, septimum aetatis annum expleverunt."

[28]*CIC* 83 c. 1323: "Nulli poena est obnoxius qui, cum legem vel praeceptum violavit: 1.° sextum decimum aetatis annum nondum explevit." Borras, 55; Aznar, 725; Nigro, 761: "Minore età secondo la nuova disciplina cessa al compimento del 18° anno (Can. 97, §1); essa è stato sempre presa in considerazione come circostanza che più o meno influisce sulla imputabilità del delitto; però, dal *CIC* 17 dalla pubertà in poi era considerata, fino al compimento del 21° anno, come attenuante la imputabilità (can. 2204 *CIC* 17). La nuova norma è innovativa doppiamente: 1) in primo luogo, perchè dalle minore età fino al compimento del 16° anno ne ha fatto una circostanza esimente e non attenuante, come era nel *CIC* 17; si deve anzi ricordare che lo schema nel can. 12, §3 aveva fatto una scelta veramente sorprendente e soprattutto direi illogica, quando ipotizzava la non punibilità di chi non avesse compiuto 18° anno di età, nonostante avessa avuto il pieno uso della ragione ed avessa

2. Accomplices and *latae sententiae* penalties

Certain accomplices are subject to the same *latae sententiae* penalties as the principal offender.[29] Even if the accomplices are not named in the law or precept, nevertheless they incur such a penalty if the crime could not have been committed without their assistance and if the nature of such a penalty could affect them. In other words, "the accomplices are subject to the same or a lesser penalty than the author, according to their personal capacity and the nature of their cooperation."[30] Like canon 2209 of the 1917 code, the 1983 code retains *latae sententiae* penalties for necessary accomplices but drops such a punishment for accomplices with limited imputability, accomplices who, despite their office, neglected to prevent an offense, and accomplices after the fact.

III. The application of penalties

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commesso il delitto dolosamente. Davvero deve parlarsi di scelta sconcertante in aperto contrasto con tutti principi della imputabilità criminale e della prassi canonica e civile. Fortunamente il testo promolgato non contiene più la precisazione del pieno uso della ragione e del comportamento doloso dell'atto, ed ha abbassato, al 16° anno incompiuto, l'età, che libera dalla imputabilità penale. La scelta ancor più meravigliava, in quanto la maggiore età era stata fissata al 18° anno di età."

[29]*CIC* 83 c. 1329, §2: "In poenam latae sententiae delicto adnexam incurrunt complices, qui in lege vel praecepto non nominantur, si sine eorum opera delictum patratum non esset, et poena sit talis naturae, ut ipsos afficere possit; secus poenis ferendae sententiae puniri possunt." Borras, 93-40; DePaolis, *De Sanctionibus*, 65; Echappé, 461; Nigro, 769-770; Aznar, 734-735; Green, "Sanctions," 906.

[30]Arias, 831.

The 1983 code foresees circumstances which exclude, diminish or aggravate the imputability of a given offender. The different circumstances are contained in canons 1322-1327. Canon 1322 deals with those who are habitually lack the use of reason and hence are incapable of a delict. Canon 1323 exempts from a penalty certain persons who do not habitually lack the use of reason and hence are capable of a delict. Likewise, circumstances diminishing imputability in canon 1324 exclude the incurring of a *latae sententiae* penalty. Canon 1325 deals with factors not to be taken into account in assessing imputability; canon 1326 deals with aggravating circumstances. Finally, canon 1327 allows particular law to determine other excusing, diminishing, or aggravating circumstances.

A. Circumstances excusing from all imputability

1. The habitual lack of reason

Canon 1322 states that whoever habitually lacks the use of reason, despite appearing sane at the time of the violation of a law or a precept is considered incapable of committing an offense.[31] Canon 1322 includes two hypotheses envisioned by canon 2201, §§ 1-2 of the 1917 code. However, there is a substantial difference between the two codes because the 1983 code states that habitual insanity

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[31] *CIC* 83 c. 1322: "Qui habitualiter rationis usu carent, etsi legem vel praeceptum violaverint dum sani videbantur, delicti incapaces habentur." Arias, 825; Green, "Sanctions," 902; Nigro, 760; Echappé, 459; DePaolis, *De Sanctionibus*, 59; Aznar, 724.

constitutes an incapacity for a delict while this was stated as a presumption in canon 2201, §2 of the 1917 code. The habitual lack of the use of reason evidently excludes all imputability because the offense was not a human act. The 1983 code canonizes a widely held doctrinal consensus that, even in so-called lucid intervals, a person who lacks the habitual use of reason is actually incapable of committing a delict.[32]

2. Other factors excusing from all imputability

Canon 1323 considers other circumstances which excuse one from all delictual imputability.[33] Such circumstances include age, ignorance, inadvertence, error, physical force, grave or relative fear, necessity, grave inconvenience, self-defense, the actual lack of the use of reason, or the

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[32]Borras, 18; Arias, 825; Green, "Sanctions," 902; Nigro, 760; Echappé, 459; DePaolis, *De Sanctionibus*, 59; Aznar, 724..

[33]*CIC* 83 c. 1323: "Nulli poenae est obnoxius qui, cum legem vel praeceptum violavit:
1.° sextum decimum aetatis annum nondum explevit;
2.° sine culpa ignoravit se legem vel praeceptum violare; ignorantiae autem inadvertentia et error aequiparantur;
3.° egit ex vi physica vel ex casu fortuito, quem praevidere vel cui praeviso occurrere non potuit;
4.° metu gravi, quamvis relative tantum, coactus egit, aut ex necessitate vel gravi incommodo, nisi tamen actus sit intrinsece malus aut vergat in animarum damnum;
5.° legitimae tutelae causa contra iniustum sui vel alterius aggressorem egit, debitum servans moderamen;
6.° rationis usu carebat, firmis praescriptis cann. 1324, §1, n. 2 et 1325;
7.° sine culpa putavit aliquam adesse ex circumstantiis, de quibus in nn. 4 vel 5." Borras, 19-22; Arias, 826-827; Aznar, 724-725; DePaolis, *De Sanctionibus*, 59-60; Nigro, 760-763; Echappé, 459-460; Green, "Sanctions," 902-903.

mistaken yet inculpable judgment, that certain mitigating factors like force, fear or self-defense existed. The canon is not taxative because, as canon 1327 provides, a particular law or precept can determine other circumstances that excuse one from imputability.[34]

Most of the circumstances listed in canon 1323 exclude canonical imputability but not necessarily the moral imputability of the offender. For example, the factor of age has always influenced the canonical imputability of a delict. The lack of a certain age excuses from legal imputability but not necessarily from moral imputability. The morality of an act is linked to the violation of a given ecclesial value; but the legislator has determined that it cannot be canonically imputed to those under sixteen years of age. Nonetheless those who have completed their sixteenth year of age are subject to *latae sententiae* penalties unless the factors diminishing imputability in canon 1324 are present.[35]

B. Circumstances diminishing imputability and excusing from *latae sententiae* penalties

Canon 1324, §1 considers different circumstances that

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[34]*CIC* 83 c. 1327: "Lex particularis potest alias circumstantis eximentes, attenuantes vel aggravantes, praeter casus in cann. 1323-1326, statuere, sive generali norma, sive singulis delictis. Item in praecepto possunt circumstantiae statui, quae a poena praecepto constituta eximant, vel eam attenuent vel aggravent."

[35]Borras, 19, 55; see *CIC* 83 c. 97, §1.

diminish imputability.[36] Such circumstances include the imperfect use of reason, culpable intoxication, passion, age, grave or relative fear, necessity, grave inconvenience, self-defense, provocation, culpable error regarding the circumstances of fear, necessity, inconvenience or self-defense, ignorance of a penalty attached to a crime, and grave but not full imputability. Paragraph 3 of the same canon states that those circumstances exempt an offender from incurring a *latae sententiae* penalty. Such a provision is similar to canon 2218, §2 of the 1917 code which envisioned circumstances diminishing imputability and

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[36] *CIC* 83 c. 1324: "§1. Violationis auctor non eximitur a poena, sed poena lege vel praecepto statua temperari debet vel in eius locum paenitentia adhiberi, si delictum patratum sit:
1.° ab eo, qui rationis usum imperfectum tantum habuerit;
2.° ab eo qui rationis usu carebat propter ebrietatem aliamve similem mentis perturbationem, quae culpabilis fuerit;
3.° ex gravi passionis aestu, qui non omnem tamen mentis deliberationem et voluntatis consensum praecesserit et impedierit, et dummodo passio ipsa ne fuerit voluntarie excitata vel nutrita;
4.° a minore, qui aetatem sedecim annorum explevit;
5.° ab eo, qui metu gravi, quamvis relative tantum, coactus est, aut ex necessitate vel gravi incommodo, si delictum sit intrinsece malum vel in animarum damnum vergat;
6.° ab eo, qui legitimae tutelae causa contra iniustum sui vel alterius aggressorem egit, nec tamen debitum servavit moderamen;
7.° adversus aliquem graviter et iniuste provocantem;
8.° ab eo, qui per errorem, ex sua tamen culpa, putavit aliquam adese ex circumstantiis, de quibus in can. 1323, nn. vel 5;
9.° ab eo, qui sine culpa ignoravit poenam legi vel praecepto esse adnexam;
10.° ab eo, qui egit sine plena imputabilitate, dummodo haec gravis permanserit.
§2. Idem potest iudex facere, si qua alia adsit circumstantia, quae delicti gravitatem deminuat.
§3. In circumstantiis, de quibus in §1, reus poena latae sententiae non tenetur." Borras, 29-32; Arias, 827; DePaolis, *De Sanctionibus*, 60-61; Aznar, 728-730; Echappé, 460; Nigro, 763-766; Green, "Sanctions," 903-904.

thereby excusing from both *ferendae sententiae* and *latae sententiae* penalties.[37] Since a *latae sententiae* penalty is incurred upon the very commission of the offense, an offender would need to know those factors which diminish imputability to determine if the penalty had been incurred or not. If an offender could not incur a *latae sententiae* penalty due to such circumstances, then neither a judge nor a superior could declare it as so incurred.

C. Circumstances not excusing from *latae sententiae* penalties

Canon 1325[38] deals with crass, supine or affected ignorance which cannot be taken into account when applying the provisions of canons 1323 and 1324 on excusing or diminishing circumstances, respectively, to any penalty including *latae sententiae* penalties. Moreover, canons 1323 and 1324 do not envision deliberate intoxication or deliberately excited or nourished passion, sought to commit or excuse an offense.

D. Circumstances aggravating imputability and the declaration of *latae sententiae* penalties

Since only a competent authority who can declare a

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[37]Nigro, 765.

[38]*CIC* 83 c. 1325: "Ignorantia crassa vel supina vel affectata numquam considerari potest in applicandis praescriptis potest cann. 1323 et 1324; item ebrietas aliaeve mentis perturbationes, si sint de industria ad delictum patrandum vel excusandum quaesitae, et passio, quae voluntarie excitata vel nutrita sit." Borras, 19, 22; Arias, 828; Aznar, 730-731; DePaolis, *De Sanctionibus*, 62; Nigro, 766; Green, "Sanctions," 904.

latae sententiae penalty can increase it by another penalty or penance due to aggravating circumstance, such factors mentioned in canon 1326 will be treated with those who can declare such penalties.

1. Differences between declared and non-declared *latae sententiae* penalties

The ordinary may initiate a judicial process or an administrative procedure only when he perceives that neither by fraternal correction or reproof, nor by any other methods of pastoral care, can scandal be sufficiently repaired, justice restored and the offender reformed.[39] Canon 1341 states that penalties are a last resort measure and are to be used only after other pastoral means have failed to achieve the triple aforementioned finality of the penal system.

However, canon 1341 seems to present some challenges to the declaration of *latae sententiae* penalties. For example, they are incurred "automatically" and therefore are "self-applying." Accordingly, how can an ordinary intervene pastorally to achieve the aforementioned finalities before a *latae sententiae* penalty is applied? Borras answers that canon 1341 is concerned only with declaring *latae sententiae*

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[39] *CIC* 83 c. 1341: "Ordinarius proceduram iudicialem vel administrativam ad poenas irrogandas vel declarandas tunc tantum promovendam curet, cum perspexerit neque fraterna correctione neque correptione neque aliis pastoralis sollicitudinis viis satis posse scandalum reparari, iustitiam restitui, reum emendari." Borras, 104-107; Arias, 838-839; Green, "Sanctions," 911; Aznar, 747-748; Nigro, 784-785; DePaolis, *De Sanctionibus*, 83-85.

penalties and not all *latae sententiae* penalties in general. Furthermore, canon 1318 supports the triple aim of penalties articulated in canon 1341. Canon 1318 states that *latae sententiae* penalties are foreseen in cases of grave scandal or when certain delicts cannot be punished effectively by *ferendae sententiae* penalties. Thus, he maintains that the legislator makes it clear that declaring a *latae sententiae* penalty has the same triple finality as inflicting a *ferendae sententiae* penalty, but with a more pronounced accent on repairing scandal.[40]

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[40]Borras, 107: "A s'en à la littéralité du canon 1341, le principe fondamental qu'il contient ne concerne que les déclarations de peines *latae sententiae* ou les impositions de peines *ferendae sententiae*, et non les peines *latae sententiae* tout court. Il ne faudrait cependant pas conclure hâtivement que les peines *latae sententiae* ne poursuivent pas les finalités énoncées au canon 1341. La teneur du canon 1318 nous convainc du contraire. Ce canon affirme explicitement que la peine *latae sententiae* est prévue dans les cas de grave scandale ou lorsque certains délits ne peuvent être punis plus efficacement par une peine *ferendae sententiae*. En clair, cela signifie que, dans le chef du législateur, l'application d'une peine *latae sententiae* poursuit les mêmes finalités particulières que l'application *ferendae sententiae*, avec néanmoins un accent manifestement mis sur la réparation du scandale."

2. Aggravating circumstances and declaring *latae sententiae* penalties.

Canon 1341 states that penalties are a means of last resort of reforming the offender and repairing the scandal arising from the offense. However, as canon 1326, §2 indicates, sometimes aggravating circumstances may cause a judge or superior to increase the punishment of a crime in a *latae sententiae* context.[41] A judge or superior may add another penalty or penance to a *latae sententiae* penalty due to recidivism, the dignity of the offender, the abuse of authority or office, or culpable negligence comparable to malice.

Canon 1326, §1, 1° no longer distinguishes between general and specific recidivism as did canon 2208 of the 1917 code. In the 1917 code, a general recidivist was one who committed other delicts after a sentence had been either inflicted or declared. By contrast, a specific recidivist was one who committed the same crime under similar

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[41] *CIC* 83 c. 1326: "§1. Iudex gravis punire potest quam lex vel praeceptum statuit:
1.° eum, qui post condemnationem vel poena declarationem ita deliquere pergit, ut ex adiunctis prudenter eius pertinacia in mala voluntate conici possit;
2.° eum, qui in dignitate aliqua constitutus est, vel qui auctoritate aut officio abusus est ad delictum patrandum;
3.° reum, qui, cum poena in delictum culposum constituta sit, eventum praevidit et nihilominus cautiones ad eum vitandum omisit, quas diligens quilibet adhibuisset.
§2. In casibus, de quibus in §1, si poena constituta sit latae sententiae, alia poena addi potest vel paenitentia. Borras 32-34; Arias 828-829; Echappé, 460; Aznar, 731-732; DePaolis *De Sanctionibus*, 62-63; Nigro 766-768; Green, "Sanctions," 904-903.

conditions soon after the condemnatory or declaratory sentence. Yet, canon 1326, §1, 1° of the 1983 code does refer to a recidivist as someone who, after a *latae sententiae* penalty has been declared, continues so to offend that obstinate ill-will may be prudently concluded from the circumstances. Canon 1326, §1, 2° concerns the constituted dignity of the offender and the abuse of authority. Such circumstances may aggravate imputability due to the greater scandal caused in a given place and the violation of the conciliar call to exercise authority in a spirit of service.[42] Canon 1326, §1, 3° concerns the offender who, after a penalty for a culpable offense was constituted, foresaw the event but nevertheless failed to take the precautions necessary to avoid it which any reasonable person would have taken. In such cases, a judge may add another penalty or penance to a *latae sententiae* penalty. Finally canon 1326, §2 states that such aggravating circumstances allow a judge or superior, with certain limitations, to add another penalty or penance to a *latae sententiae* penalty already incurred.[43]

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[42]Borras, 33: "Quant à l'abus de l'autorité ou de la charge que l'on détient, il est particulièrement grave, parce qu'il va véritablement à l'encontre de ce pourquoi on a reçu l'autorité ou une charge dans la société ou dans l'Eglise, à savoir service du bien commun ou celui de la communion ecclésiale."

[43]Ibid., 33-34.

3. The judicial sentence or administrative decree and declaring *latae sententiae* penalties

As noted earlier, canon 1341 indicates that an ordinary may determine that a judicial or an administrative procedure may be undertaken as a last resort measure to deal with a problematic situation. According to canon 1342,[44] whenever there is a just cause not to use a judicial procedure, a penalty may be inflicted or declared by an extra-judicial decree. However, penal remedies and penances can be applied by such a decree in any case whatever given their less serious character than penalties in the proper sense. The judicial trial is the ordinary means of imposing a penalty. Yet, a judicial process must be used when perpetual penalties like dismissal from the clerical state are to be imposed; in fact a law or precept can forbid the application of a penalty by administrative decree. The law also recognizes an equivalency between a judge and a superior in applying penalties unless the contrary is evident or unless

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[44] *CIC* 83 c. 1342: " §1. Quoties iustae obstent causae ne iudicialis processus fiat, poena irrogari vel declarari potest per decretum extra iudicium; remedia poenalia autem et paenitentiae applicari possunt per decretum in quolibet casu.

§2. Per decretum irrogari vel declarari non possunt poenae perpetuae, neque poenae quas lex vel praeceptum eas constituens vetet per decretum applicare.

§3. Quae in lege vel praecepto dicuntur de iudice, quod attinet ad poenam irrogandam vel declarandam in iudicio, applicanda sunt ad Superiorem, qui per decretum extra iudicium poenam irroget vel declaret, nisi aliter constet neque agatur de praescriptis quae ad procedendi tantum rationem attineant." Borras, 108-109; Arias 839; Echappé, 467-468; Aznar, 748-749; Nigro, 785-786; DePaolis, *De Sanctionibus*, 85-87; Green. "Sanctions," 911-912.

there is question of specifically procedural provisions such as those features proper to a given process, for example, the joinder of issues (*contestatio litis*). Green notes that there is a proportion between the seriousness of the penalty and the procedure to inflict or declare it.[45] Presumably, graver reasons are needed to declare a *latae sententiae* penalty administratively since such penalties are to be established with the greatest moderation and only for more serious offenses.

E. Observing *latae sententiae* penalties

1. Differences in observing declared and non-declared *latae sententiae* penalties

According to canon 1351, the effects of a penalty bind an offender everywhere.[46] However, there are some differences between observing a declared and non-declared *latae sententiae* penalty. By definition a *latae sententiae* penalty is incurred by the very commission of the offense. Unlike a *ferendae sententiae* penalty, a *latae sententiae* penalty requires neither a judicial sentence nor an administrative decree to be operative, and it must be observed in the external and internal forum. However, the declaring of a *latae sententiae* penalty requires such a

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[45]Green, "Sanctions," 912.

[46]*CIC* 83 c. 1351: "Poena reum ubique tenet, etiam resoluto iure eius qui poenam constituit vel irrogavit, nisi aliud expresse caveatur." Borras, 103; Arias, 842; Nigro, 790; Aznar, 735; DePaolis, *De Sanctionibus*, 92; Green, "Sanctions," 914.

judicial or administrative intervention.

According to Borras, there are essentially four consequences of a declared *latae sententiae* penalty.[47] First, such a declaration attaches a public character to the offense. Second, a declaration makes it legally notorious. Third, a declaration obliges the offender to observe all of its effects in the external forum. The fourth consequence is the aggravation of its penal effects. For example, according to canon 1331, §2, among the effects of a declared *latae sententiae* excommunication is the fact that an offender is to be removed from worship. Such a one invalidly exercises the power of governance and is forbidden to benefit from privileges already granted.[48]

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[47]Borras, 62, n. 26; Ibid., 102: "Quant à la déclaration d'une peine *latae sententiae* déjà encourue, elle implique également la médiation du juge ou du supérieur et le moyen d'une sentence ou d'un décret de telle sorte que le coupable n'est tenu aux effets de la déclaration qu'après celle-ci. La déclaration d'une peine *latae sententiae* est donc seconde et successive: elle est un ajout, comme un '*supplementum poenae*.' Elle a essentiellement quatre conséquences. Tout d'abord, elle attache à la sanction pénale un caractère de publicité et, par le fait même de la sentence ou du décret déclaratoire, elle attribue à la piene une notoriété de droit (au sens du c. 2197, 2° du Code de 1917). La troisième conséquence de la déclaration est l'obligation qu'elle entraine pour l'auteur du délit d'observer au for externe les effets de la peine (cf. c. 1352, §2). La dernière conséquence est l'aggavation des effets de la peine (cf. c. 1331, §2 etc.; c. 1332, etc; c. 1333, §2, etc.)."

[48]*CIC* 83 c. 1331: "§1. Excommunicatus vetatur:
1.° ullam habere participationem ministerialem in celebrandis Eucharistiae Sacrificio vel quibuslibet aliis cultus caerimoniis;
2.° sacramenta vel sacramentalia celebrare et sacramenta recipere;
3.° ecclesiasticis officiis vel ministeriis vel muneribus quibuslibet fungi vel actus regiminis ponere.

Canon 1351 also adds that a penalty continues to bind everywhere even when the one who established or inflicted it has ceased from office, unless it is expressly provided otherwise. Such contrary dispositions could be provided in the law or precept that establishes a *latae sententiae* penalty or in the judicial sentence or administrative decree that declares it. For example, canon 1352 provides expressly for the total or partial suspension of the obligation to observe *latae sententiae* penalties in particular circumstances.[49]

2. The suspension of the obligation of observing *latae sententiae* penalties

Canon 1352, §1 states that one circumstance for suspending the obligation to observe a *latae sententiae* penalty is danger of death wherein the prohibition to

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§2. Quod si excommunicatio irrogata vel declarata sit, reus:
1.° si agere velit contra praescriptum §1, n. 1, est arcendus aut a liturgica actione est cessandum, nisi gravis obstet causa;
2.° invalide ponit actus regiminis, qui ad normam §1, n. 3, sunt illiciti;
3.° vetatur frui privilegiis antea concessis;
4.° nequit valide consequi dignitatem, officium aliudve munus in Ecclesia;
5.° fructus dignitatis, offici, muneris cuiuslibet, pensionis, quam quidem habeat in Ecclesia, non facit suos.

[49]*CIC* 83 c. 1352: "§1. Si poena vetet recipere sacramenta vel sacramentalia, vetitum suspenditur, quamdiu reus in mortis periculo versatur.
§2. Obligatio servandi poenam latae sententiae, quae neque declarata sit neque sit notoria in loco ubi delinquens versatur, eatenus ex toto vel ex parte suspenditur, quatenus reus eam servare nequeat sine periculo gravis scandali vel infamiae." Arias, 843; Borras, 123-124; DePaolis, *De Sanctionibus*, 92-92; Aznar, 753-754; Nigro, 790; Green, "Sanctions," 914-915.

receive the sacraments or sacramentals due to a penalty, (e. g., excommunication) is lifted. This canon derives in part from canons 2254 and 2290 of the 1917 code, which dealt with the absolution of a censure in the internal forum in urgent cases and the power of a confessor to suspend vindictive penalties for occult cases, respectively.

Canon 1352, §2 states the other circumstance warranting suspension of the obligation of observing a *latae sententiae* penalty. If a *latae sententiae* penalty has not been declared, and is not notorious in the place where the offender actually is, its observance is suspended either wholly or partly if the offender cannot observe it without the danger of grave scandal or the loss of a good reputation.[50] Moreover, according to canon 1352, §2, the total or partial suspension is only for non-declared *latae sententiae* penalties which are not notorious in the place where the offender resides. Although such notoriety is not defined, presumably it refers to a factual and not a legal situation. The 1917 code distinguished between infamy of law and infamy of fact. "Infamy of law is that which is declared in the cases fixed by law. Infamy of fact is contracted when, through commission of an offense or bad conduct, one has lost good repute with righteous and serious Catholics; the judgement as to whether infamy of fact exists

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[50]Borras, 123; For a discussion of canons 2254 and 2290 of the 1917 code see chapter one, 70-74.

in a given case is vested with the Ordinary."[51] If in this case notoriety would refer to law, then the terms "not declared" and "not notorious" would be tautological. Thus the legislator apparently used the term "not notorious" in its non-technical sense as "not known." The basis for suspending totally or partially the obligation to observe a *latae sententiae* penalty is grave scandal within the community or the offender's risk of self-betrayal. But once a *latae sententiae* penalty is known or if it has been declared, its observance cannot be suspended totally or partially because the reason for the suspension no longer exists.[52] In short, canon 1352, §2 seeks to protect the offender from the risk of self-betrayal and the community from grave scandal while harmonizing the requirements of justice and the exigencies of charity.

The legislator's concern for harmonizing the requirements of justice and the exigencies of charity can

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[51]Woywod, 457.

[52]Ibid., 124. Green, "Sanctions," 915: "Although the original formulation of this canon was fairly broad in the kinds of penalties it envisioned, criticism from various sources led to a reworking of the text, which limits such non-observance of penalties by offenders to non declared *latae sententiae* penalties. Presumably in the case of both declared *latae sententiae* and *ferendae sententiae* penalties, the appropriate penal authority would have taken cognizance of the offender's existential situation so that recourse to this extraordinary measure of non-observance would be unnecessary."

also be seen in canon 1335.[53] If a *latae sententiae* censure has not been declared, the prohibition to celebrate the sacraments or sacramentals or to exercise the power of governance is also suspended if for any just reason, one of the faithful requests a sacrament or sacramental or an act of the power of governance.

IV. The cessation of penalties

The remitting of penalties derives from the executive power of governance and generally pertains to the external forum, yet it also has implications for the internal forum. In effect the remission dissolves the normative relationship established between the delict and the penal sanction. Consequently, the delinquent is released from his or her penal obligations which were binding in conscience before God and the Church (*coram Deo et in facie Ecclesiae*).[54]

Principle nine for the revision of the 1917 code underscored the external forum character of penal law. Consequently, the 1983 code resolutely, but not absolutely,

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[53]*CIC* 83 c. 1335: "Si censura vetet celebrare sacramenta vel sacramentalia vel ponere actum regiminis, vetitum suspenditur, quoties id necessarium sit ad consulendum fidelibus in mortis periculo constitutis; quod si censura latae sententiae non sit declarata, vetitum praeterea suspenditur, quoties fidelis petit sacramentum vel sacramentale vel actum regiminis; id autem petere ex qualibet iusta causa licet." Arias, 835; Borras, 123; DePaolis, *De Sanctionibus*, 92; Aznar, 743; Nigro, 776-777; Green, "Sanctions," 908-909.

[54]Borras, 131: "Le rémission, en effet, dissout la relation normative établie entre le délit et la sanction pénale et, par conséquent, libère l'intéressé de son obligation pénale à laquelle il était tenu en conscience, '*coram Deo et in facie Ecclesiae.*'"

limits penal law to the external forum. For the law foresees exceptional situations in which penalties can be remitted in the internal forum.[55] Hence we first consider those who can remit penalties in the external forum in canons 1354-1356. Subsequently, we will treat those who, by way of exception, can remit penalties in the internal forum.

A. Those who can remit *latae sententiae* penalties in the external forum

1. Those who have ordinary power

Canon 1354, §1 states that besides those who are listed in canon 1355 and 1356, all who can dispense from a law which is fortified by a penalty can also remit the penalty itself.[56] The universal legislator and particular legislators can remit the penalties they respectively establish as well as those who can dispense from such laws. However, although the universal legislator can dispense from particular penal law, particular legislators cannot dispense from universal penal law. Furthermore, the competent remitting authorities include those who have

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[55]Ibid., 131.

[56]*CIC* 83 c. 1354: "§1. Praeter eos, qui in cann. 1355-1356 recensentur, omnes, qui a lege, quae poena munita est, dispensare possunt vel a praecepto poenam comminanti eximere, possunt etiam eam poenam remittere.
§2. Potest praeterea lex vel praeceptum, poenam constituens, aliis quoque potestatem facere remittendi.
§3. Si Apostolica Sedes poena remissionem sibi vel aliis reservaverit, reservatio stricte est interpretanda." Arias, 844; Green, "Sanctions," 915-916; Nigro, 791-792; Aznar, 755-756; DePaolis, *De Sanctionibus*, 96-98; Echappé, 468-469.

executive power in the external forum to threaten determinate penalties through a precept, ordinaries who have the power to execute a sentence or decree, and superiors who impose a penalty on a subject. Finally, all those who succeed to the aforementioned offices also have the power to remit penalties.[57]

2. Those who have delegated power

All of the aforementioned persons have the *ordinary* power to remit penalties since it is attached to their office by the law itself. But since remitting penalties is an act of executive power, it can be delegated in light of the general rules on delegating executive power. Furthermore, canon 1354, §2 states that a law or a precept establishing a penalty can allow others to remit the same. The ordinaries referred to in canons 1355 and 1356 enjoy ordinary executive power and therefore can delegate it to another.[58]

3. The distinction between reserved and non-reserved *latae sententiae* penalties

Canons 1355 and 1356 make more precise which kind of penalties the competent authority can remit. Before we discuss them, however, some distinctions are warranted. The remission of a *latae sententiae* penalty depends on its establishment either by law or by precept. Moreover,

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[57]Borras, 131.

[58]Borras, 131-132.

penalties may be declared or non-declared, reserved or non-reserved. If the Holy See has reserved the remission of such penalties to itself or to others, then the reservation is to be interpreted strictly. In fact only five *latae sententiae* penalties are reserved to the Holy See: the violation of sacred species (c. 1367); a physical attack on the pope (c. 1370, §1); the absolution of an accomplice (c. 1378, §1); unauthorized episcopal consecration (c. 1382); and the direct violation of the confessional seal by a confessor (c. 1388, §1). The distinction between censures and expiatory penalties does not make a difference as regards their remission in the external forum. However, canon 1357 distinguishes their remission in the internal forum, a point which will be discussed later. In brief, the 1983 code treats uniformly the external forum remission of censures and expiatory penalties, which is the normal forum for remitting penalties. Such remission options are divided into three categories: those who can remit declared but non-reserved *latae sententiae* penalties; those who can remit non-declared and non-reserved *latae sententiae* penalties; and those who can remit *latae sententiae* precepts [59]

4. Those who can remit declared but non-reserved *latae sententiae* penalties

First of all, canon 1355, §1 provides for remitting *ferendae sententiae* penalties and declared *latae sententiae*

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[59]Ibid., 132.

penalties established by law but not reserved to the Holy See.[60] Such penalties may be remitted by the ordinary who initiated the judicial proceedings to impose or declare them, or who by a decree, either personally or through another, imposed or declared them. Furthermore, such penalties may be remitted by the ordinary of the place where the offender actually is, after consulting the ordinary who initiated the judicial or administrative proceedings, unless some extraordinary circumstances make such consultation impossible.

Canon 1355, §1, 1° like canon 2245, §2 of the 1917 code indicates that the penalizing authority (e. g., the one who declared a *latae sententiae* penalty), remits it himself or through another. The prior canon refers specifically to the term "ordinary." Yet, canon 1355, §1, 2° specifies that a local ordinary who is not the penalizing authority can remit a penalty of an offender actually living within his jurisdiction. Such a local ordinary is to consult the penalizing ordinary before remitting the declared non-reserved *latae sententiae* penalty. However, such

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[60]CIC 83 c. 1355, §1: "Poenam lege constitutam, si sit irrogata vel declarata, remittere possunt, dummodo non sit Apostolicae Sedi reservata:
1.° Ordinarius, qui iudicium ad poenam irrogandam vel declarandam promovit vel decreto eam per se vel per alium irrogavit vel declaravit;
2.° Ordinarius loci in quo delinquens versatur, consulto tamen, nisi propter extraordinarias circumstantias impossibile sit, Ordinario, de quo sub n. 1." Borras, 132-133.

consultation is serious but not required for validity because of the exceptive clause.[61] Nonetheless, before remitting such a penalty, the offender's ordinary of residence ought to consult the penalizing ordinary about the reasons for imposing or declaring it in the first place.

5. Those who can remit non-declared and non-reserved *latae sententiae* penalties

The second category of those who can remit penalties in the external forum are those who can remit *latae sententiae* penalties established by law which are neither declared nor reserved to the Holy See. According to canon 1355, §2, a non-reserved *latae sententiae* penalty established by law but not yet declared can be remitted by the ordinary for his subjects, those actually present in his territory or those who committed the offense in his territory.[62]

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[61]Aznar and Borras adopt different positions on the significance of the exceptive clause regarding the consultation of the non-penalizing ordinary. See Aznar, 757: "Le paragraphe 2, de même que le canon précédent, mentionne la condition unique pour procéder validement, à savoir, consulter l'auteur du précepte lorsque cela est possible." But Borras rightly points out that this is not the sense of the canon because it is not expressly stated and because of the exceptive clause. See Borras, 135: "Contrairement à ce qu'écrit F. Aznar, cette consultation n'est pas "*ad validitatem*" pour les raisons données plus haut dans notre commentaire du canon 1355, §1, 2.°"

[62]*CIC* 83 c. 1355, §2: " Poenam latae sententiae nondum declaratam lege constitutam, si Sedi Apostolicae non sit reservata, potest Ordinarius remittere suis subditis et iis qui in ipsius territori versantur vel ibi deliquerint, et etiam quilibet Episcopus in actu tamen sacramentalis confessionis." Borras, 133-134.

6. Those who can remit *latae sententiae* penal precepts

The third category of those who can remit penalties in the external forum is envisioned by canon 1356, §1.[63] A *ferendae sententiae* penalty or *latae sententiae* penalty established by a precept but not issued by the Holy See can be remitted by the ordinary of the place where the offender actually is or, if the penalty has been imposed or declared, by the ordinary who initiated the judicial proceedings to impose or declare the penalty, or who by decree, either personally or through another, imposed or declared it.

Canon 1356, §1 covers remitting penalties foreseen by particular precepts in a fashion similar to canon 1355 on remitting penalties established by law. According to canon 1354, §1 the author of a precept establishing a penalty can remit the same. Moreover those who can dispense from a law or precept that threatens a penalty, can remit the penalty. If a penalty were established by a precept but is neither declared nor inflicted, the ordinary of the place where the offender actually is can remit the penalty (canon 1356, §1, 1°). If the penalty were declared or inflicted, it may be

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[63] *CIC* 83 c. 1356, §1: " Poenam ferendae vel latae sententiae constitutam praecepto quod non sit ab Apostolica Sede latum, remittere possunt:
1.° Ordinarius loci, in quo delinquens versatur;
2.° si poena irrogata vel declarata, etiam Ordinarius qui iudicium ad poenam irrogandam vel declarandam promovit vel decreto eam per se vel per alium irrogavit vel declaravit." Borras, 134-135.

remitted by the ordinary who began the judicial or administrative proceedings (c. 1356, §1, 2°).

To proceed licitly, the ordinary designated in canon 1356, §1 ought to consult the author of the precept not only out of respect but also to clarify the reasons for it and to ascertain the appropriateness of remitting the penalty. Such consultation is needed for liceity but not for validity since extraordinary circumstances may make it impossible (c. 1356, §2).[64]

7. A summary of those who can remit *latae sententiae* penalties in the external forum

In summary there are three categories of penalties according to the persons who may remit them in the external forum. First, if the Holy See has reserved some penalty to itself or to others, this must be expressed in the law or precept; and such a reservation is to be interpreted strictly. Second, the local ordinary, within the limits of his territory, can remit all penalties established either by law or by precept. Outside of his own territory, he can remit the penalties only of his own subjects. To remit a penalty established by law for those who are not his subjects but actually present in his territory, an ordinary must consult the ordinary who began the judicial or administrative proceedings unless it is impossible.

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[64] *CIC* 83 c. 1356, §2: "Antequam remissio fiat, consulendus est, nisi propter extraordinarias circumstantias impossibile sit, praecepti auctor."

Likewise, there ought to be such consultation with the author of a penal precept before another ordinary can remit it. Moreover, an ordinary can remit the penalty of an offender who is not his subject but committed the offense in his territory. Third, an ordinary can remit penalties established by law or precept if he began the judicial or administrative proceedings to inflict or declare such penalties. In addition, an ordinary can remit non-declared *latae sententiae* penalties for his subjects, those actually living within his territory or those who committed delicts there.[65] We turn now to the remission of penalties in the internal forum.

B. Those who can remit *latae sententiae* penalties in the internal forum

As a rule, penalties are established and remitted in the external forum. However, for the good of souls, there are certain cases in which penalties may be remitted in the internal forum, an institution which is proper to the Church and has been operative for centuries.[66] There are pastoral reasons for not applying rigidly the principle of remission of penalties in the external forum. For example, the legislator considered those who were under censure of

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[65]Borras, 135-136; DePaolis, *De Sanctionibus*, 99-100.

[66]"Preface to the Latin Edition," *Code of Canon Law*, CLSA Latin-English Edition, 20: "[principle two of the revision process] There is to be a coordination between the external and internal forum, which is proper to the Church and has been operative for centuries, so as to preclude any conflict between the two."

excommunication or interdict. Such censures prohibit receiving the sacraments. Yet, there can be urgent cases wherein the excommunicated or interdicted person who truly repents does not want to delay the moment of sacramental reconciliation with the Church. In such a situation, recourse to the competent authority to obtain the remission of the censure may risk a considerable delay of sacramental absolution. Foreseeing this situation and not wanting to burden unduly the repentant offender, the legislator permits the remission of such a censure in the internal forum under certain circumstances (cc. 1355, §2, 508, 976, 566, §2, and 1357).[67] The discussion of the aforementioned canons, begins with those who have less restricted power to remit penalties in the internal forum and continues with those whose remitting power is more restricted.

1. All bishops in the act of sacramental confession

All bishops can remit penalties, but only in the act of sacramental confession (c. 1355, §2).[68] Such a power includes both *latae sententiae* expiatory penalties and censures established by law but neither declared nor reserved to the Holy See. However, other internal forum

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[67]Borras, 136.

[68]*CIC* 83 c. 1355, §2: "Poenam latae sententiae nondum declaratam lege constitutam, si Sedi Apostolicae non sit reservata, potest Ordinarius remittere suis subditis et iis qui in ipsius territorio versantur vel ibi deliquerint, et etiam quilibet Episcopus in actu tamen sacramentalis confessionis." Borras, 137.

authorities can remit only censures and not expiatory penalties. This contrast highlights the broader power of bishops by comparison with those faculties granted canons penitentiary (c. 508, §1), certain chaplains (c. 566) or confessors (cc. 976 and 1357). Furthermore, canon 1355, §2 is an innovation. That any ordinary can remit non-declared, non-reserved *latae sententiae* penalties for his subjects, those actually present in his territory or those who committed the offense in his territory is not new (c. 2237, §1 of the 1917 code). What is new is that any bishop, diocesan or titular, can remit such penalties in confession, an innovation introduced after the 1980 Schema for reasons not entirely clear.[69] Such power granted to a titular bishop by canon 1355, §2 cannot be delegated since it is a privilege enjoyed in virtue of the dignity of the episcopal office.[70]

Moreover, the phrase, "in the act of sacramental confession," is new in the matter of remitting penalties and appears only one other time in the code. Canon 1079, §3 uses it regarding the dispensing of marriage impediments in danger of death cases.[71] Such a remission within the act

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[69]Green, "Sanctions," 916.

[70]Arias, 846.

[71]*CIC* 83 c. 1079, §3: "In periculo mortis confessarius gaudet potestate dispensandi ab impedimentis occultis pro foro interno sive intra sive extra actum sacramentalis confessionis."

of sacramental confession is operative within the internal forum.[72]

2. The canon penitentiary

In virtue of his office, the canon penitentiary both of the cathedral church and of a collegiate church has non-delegable ordinary faculties to absolve in the sacramental forum from non-declared, non-reserved *latae sententiae*

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[72]Borras, 133-134. There is a difference of opinion between Borras and Arias about the format of remission in such cases. Arias maintains that "it is lawful -this does not violate the obligation of the seal of confession- when, at the request of the interested party, the remission is given in writing by means of a certificate from the bishop who remitted it, in order that it might take effect in the external forum. This is deduced from c. 2251 of the *CIC*/17 and from the commentaries of most authors. [Arias does not cite them.] All this leads us to affirm, within the strictest logic, that the remission to which we refer is a public juridical act carried out within the sacramental framework, but in the external forum -proper to law- though with an occult character. This affirmation would clarify, as far as possible, the confusion between the internal and the external forum to which this and other similar cases give rise." Arias, 845.

But Borras maintains that Arias misread canon 2251 of the 1917 code, which does not support his claim that an interested party can request a written certificate of remission, which might be effective in the external forum, from a bishop who remitted *latae sententiae* penalties in confession. "*Salvo meliori iudicio*, ce canon [2251] ne dit pas que, dans certaines circonstances, l'absolution *vaut* au for externe mais que l'absolution au for interne peut être prouvée au for externe. D'ailleurs il dit que l'absous au for interne peut, en écartant le scandale, se comporter *comme* absous même dans les actes du for externe: autrement dit, il n'est pas absous au for externe mais il se comporte 'comme si,' du moins dans les 'actes au for externe.'" Borras, 134, n. 28.

Both positions need further clarification. For example, Borras rightly points out that Arias' misreads canon 2251 of the 1917 code. However, Borras does not sufficiently address the issue that Arias presents. Namely, in certain cases a penitent has a right to a written remission in the external forum of non-declared, non-reserved *latae sententiae* penalties (canon 1361, §2). In short, the format of remission in such cases needs further study.

censures (c. 508, §1).[73] Within the diocese he can absolve not only diocesans but also outsiders; outside of the diocese, he can absolve only his own diocesans. Furthermore, the canon penitentiary may exercise his faculty "even for those who are not experiencing special hardship for remaining in grave sin until a competent authority can absolve him from the censure in the external forum; nor is it necessary for the penitent to have recourse to the competent superior in the external forum within one month."[74] Unlike a diocesan bishop who can delegate his power to remit penalties, a canon penitentiary cannot do so.

3. Any priest in danger of death cases

Canon 976 envisions broad options for remitting censures in danger of death. Any priest, even though he lacks the faculty to hear confessions, can validly and licitly absolve any penitents who are in danger of death, from any censures and sins, even if an approved priest is present.[75] The term, "any priest" includes all priests and

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[73]*CIC* 83 c. 508, §1: "Paenitentiarius canonicus tum ecclesiae cathedralis tum ecclesiae collegialis vi offici habet facultatem ordinariam, quam tamen aliis delegare non potest, absolvendi in foro sacramentali a censuris latae sententiae non declaratis, Apostolicae Sedi non reservatis, in dioecesi extraneos quoque, dioecesanos autem etiam extra territorium dioecesis." Borras, 137; DePaolis, *De Sanctionibus*, 100; Echappé, 469.

[74]John A. Alesandro, "The Internal Ordering of Particular Churches," in CLSA Commentary, 409.

[75]*CIC* 83 c. 976: "Quilibet sacerdos, licet ad confessiones excipiendas facultate careat, quoslibet paenitentes in periculo mortis versantes valide et licite absolvit a quibusvis cesuris et

bishops, validly ordained, those who lack the faculty to hear confessions or are deprived of its exercise due to a suspension or excommunication, apostates, heretics or schismatics, even in cases when an approved priest is present. The term "any censure" refers to all censures, no matter how they are applied or reserved. However, the penitent who recovers is sometimes obliged to seek recourse from the competent authority for the remission of the censure in the external forum (c. 1357, §3).[76] Such recourse is necessary for censures already inflicted, declared, or reserved to the Holy See, however, not for non-declared *latae sententiae* censures.

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peccatis, etiamsi praesens sit sacerdos approbatus." Borras, 137-138; DePaolis, *De Sanctionibus*, 100; Echappé, 469.

[76] *CIC* 83 1357, §3: "Eodem onere recurrendi tenentur, postquam convaluerint, ii quibus ad normam can. 976 remissa est censura irrogata vel declarata vel Sedi Apostolicae reservata."

Rincón and McManus have differing views on the obligation of recourse after recovery in danger of death cases. See Tomás Rincón Pérez, "The Sacrament of Penance," in Caparros et al., eds., *Code of Canon Law Annotated*, 620: "according to canon 1357, §3 those who have been absolved, when in danger of death, from an imposed or declared censure or one reserved to the Holy See, are under the obligation to have recourse to the competent authority." See Frederick R. McManus, "The Sacrament of Penance," in CLSA Commentary, 688: "the revised canon has suppressed the norm . . . that the penitent upon recovery would in certain circumstances be obliged to have further recourse." It is not clear why McManus did not refer to canon 1357, §3 in his commentary on canon 976. Nonetheless canon 1357, §3 states that upon recovery, those absolved in accord with canon 976 from an imposed or declared censure or one reserved to the Holy See are bound to the obligation of recourse.

4. Chaplains in hospitals, prisons and on sea voyages

Canon 566, §2, a new canon, grants chaplains of hospitals or prisons or those on sea voyages, a further faculty to be exercised only in those places, to absolve from non-declared, non-reserved *latae sententiae* censures without prejudice to canon 976.[77] Like the canon penitentiary, a hospital, prison, or sea-voyage chaplain may absolve from non-declared, non-reserved *latae sententiae* censures but only in those places, while the faculty for any priest to absolve in danger of death remains. The prior canon was established not only to promote the good of offenders in the aforementioned circumstances but also to enhance the ecclesial role of chaplains by granting them a faculty that is not even accorded parochial vicars or deans. Unlike canon 1357, §3 as regards canon 976, canon 566, §2 does not impose the obligation of recourse to the competent authority in the external forum after the internal forum remission of non-declared, non-reserved *latae sententiae* censures.[78]

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[77]*CIC* 83 c. 566, §2: "In valetudinariis, carceribus et itineribus maritimis, cappellanus praeterea facultatem habet, his tantum in locis exercendam, a censuris latae sententiae non reservatis neque declaratis absolvendi, firmo tamen praescripto can. 976."

[78]Borras, 138; DePaolis, *De Sanctionibus*, 109; Echappé, 469; Joseph A. Janicki, "Rectors of churches and Chaplains," in CLSA Commentary, 445-446.

5. Confessors

a) The remission of non-declared *latae sententiae* excommunications and interdicts

Canon 1357, §1 states that without prejudice to the provisions of canons 508 and 976, a confessor in the sacramental forum can remit a non-declared *latae sententiae* excommunication or interdict, if it is difficult for the penitent to remain in a grave state of sin for the time necessary for the competent superior to provide.[79] This canon derives in part from canon 2254 of the 1917 code. Whereas that canon envisioned the absolution of all *latae sententiae* censures, canon 1357, §1 more logically excludes suspensions since a suspension does not prohibit receiving the sacraments, in particular the sacrament of penance. Furthermore, the 1983 code considers only non-declared excommunications and interdicts whereas the 1917 code covered all declared censures. By excluding declared *latae sententiae* excommunications and interdicts, canon 1357, §1 remains in harmony with the external forum emphasis in the revision of penal law.[80]

Interestingly enough canon 1357 was absent from the

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[79]*CIC* 83 c. 1357, §1: "Firmis praescriptis cann. 508 et 976, censuram latae sententiae excommunicationis vel interdicti non declaratam confessarius remittere potest in foro interno sacramentali, si paenitenti durum sit in statu gravis peccati permanere per tempus necessarium ut Superior competens provideat."

[80]Borras, 139; Arias, 846-847; Echappé, 469; DePaolis, *De Sanctionibus*, 100-101; Green, "Sanctions," 917-918; Aznar, 758; Nigro, 794-795.

1973 schema, which considerably modified the concepts of excommunication and interdict. Traditionally, such censures prohibited the reception of all the sacraments. But the 1973 schema permitted an excommunicated or interdicted person to receive penance and anointing; it was no longer necessary to provide for urgent cases as did canon 2254 of the 1917 code. This newer approach was due to the desire to minimize conflicts between the internal and external fora and provide for the well-being of the offender. However, this approach was later rejected; hence it became necessary to formulate a canon to remit censures in urgent cases.[81]

Somewhat surprisingly, canon 1357, §1 fails to mention canon 566, §2 granting certain chaplains the faculty to remit non-declared and non-reserved *latae sententiae* censures, a provision which had been introduced at the October 1981 Plenarium. This failure probably resulted from inadvertence or forgetfulness during the final stages of revising the 1917 code.[82]

b) Confessors' qualifications to remit penalties

Canon 1357, §1 grants the faculty to remit non-declared excommunications and interdicts to confessors, that is, all priests or bishops, approved to hear confessions. In

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[81]Borras, 139. For a discussion of canon 1357 during the revision process, see chapter two, 230-234.

[82]Ibid., 139-140.

principle, if a penitent is bound by one of the aforementioned censures yet approaches a confessor, the latter can grant sacramental absolution and remit the aforementioned penalties although normally a penalty ought to be remitted in the external forum before one receives sacramental absolution.

c) Conditions for remitting certain censures

The faculty of remitting non-declared, non-reserved excommunications and interdicts in the internal sacramental forum is to be exercised under the conditions determined by canon 1357, §1. "An urgent case" occurs if it is hard for a penitent to remain in a state of grave sin until the competent superior can remit the non-declared *latae sententiae* excommunication or interdict. In such a situation then the confessor may exercise such a faculty. Thus, the 1983 code retains only one of the three situations envisioned by canon 2254 of the 1917 code, namely, the difficulty of the penitent's remaining in a state of grave sin while the competent authority was contacted, which usually referred to fifteen days but could be reduced to one.[83] However, outside danger of death cases, the code provides for the danger of scandal and infamy in canon 1352, §2 by suspending partially or totally the obligation to observe certain *latae sententiae* penalties.

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[83]Ibid.

d) The implications of the obligation of recourse to competent authorities in the external forum

Canon 1357, §2 imposes on the confessor at least four obligations regarding the penitent whose *latae sententiae* excommunication or interdict is absolved.[84] In granting the remission, the confessor is to impose upon the penitent, under pain of reincidence of the penalty, the obligation to have recourse within one month to the competent superior or a priest with the required faculty, and to abide by his instructions.[85] In the meantime, the confessor is to impose an appropriate penance and to require appropriate reparation of scandal and damage. The recourse, however, may be made even through the confessor without mentioning the penitent's name.

(1) Obligation of recourse within one month from the remission

Comparable to canon 2254, §1 of the 1917 code, the first obligation of the confessor is to impose on the penitent the obligation of recourse, within one month to the competent superior or to a priest who may remit the censure

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[84]In this connection Borras cites DePaolis, "Comparatio c. 1357 CIC 1983 cum c. 2254 CIC 1917," in *De Sanctionibus*, 101-107. See Borras, 141-144.

[85]CIC 83 c. 1357, §2: "In remissione concedenda confessarius paenitenti onus iniungat recurrendi intra mensem sub poena reincidentiae ad Superiorem competentem vel ad sacerdotem facultate praeditum, et standi huius mandatis; interim imponat congruam paenitentiam et, quatenus urgeat, scandali et damni reparationem; recursus autem fieri potest etiam per confessarium, sine nominis mentione." Arias, 847; Nigro, 794-795; Aznar, 758; Echappé, 469-470; DePaolis, *De Sanctionibus*, 100-101.

in the external forum (cc. 1354-1356). However, the 1983 code no longer envisions the situation of morally impossible recourse as did canon 2254, §3 where, in an exceptional case, the confessor could absolve from a censure without imposing such an obligation. Furthermore, the confessor was to enjoin on the penitent an appropriate penance, for example, restitution, or what a competent authority would do normally. In the 1983 code, the imposition of a penance for the remission of the censure is normally foreseen.[86]

According to DePaolis, the issue of morally impossible recourse is not envisioned in the 1983 code presumably for two reasons. First of all, by allowing remission in an urgent case but by disallowing the option of morally impossible recourse, the legislator wanted to underscore the normally external forum characteristic of penalties in accord with the revision principles. Secondly the obligation of recourse is of ecclesiastical law, and hence does not oblige in case of grave inconvenience. Thus, if recourse is gravely inconvenient for one month, then the law does not oblige.[87]

(2) Penitent's obligation to obey external forum directives

Like canon 2254, §1 of the 1917 code, the second

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[86]Borras, 141.

[87]DePaolis, "Il libro VI: le sanzioni nella Chiesa," *La Scuola Cattolica* 112 (1984) 371-372; Borras, 144-145

obligation of the confessor is to impose on the penitent the obligation to obey the directives of those who would grant the absolution in the external forum.[88] However, Green notes that the obligation to obey such directives was a point disputed by authors after the 1917 code was promulgated which still seems unresolved by the *ius vigens*.

> What if the penitent makes recourse to the competent superior within a month yet does not observe the superior's mandates? Is the censure incurred again? The phrase "under pain of reincidence" qualifies "having recourse" directly and not "obeying mandates." The position affirming the reincidence of the censure seems more likely; yet the view denying such reincidence seems probable also because of the structure of the canon. Furthermore, in light of the necessarily strict interpretation of penal law, the reincidence of the censure must be proven conclusively.[89]

(3) Confessor's obligation to impose penance

The third obligation of the confessor is to impose on the penitent an appropriate penance such as a work of religion, piety or charity.[90] This obligation is new. According to canon 2254, §3 of the 1917 code, in cases where recourse was morally impossible, the penance was to be appropriate (*"congrua"*); but none of the authors could agree

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[88]Borras, 141-142.

[89]Green, "Sanctions," 918.

[90]*CIC* 83 c. 1340: "§1. Paenitentia, quae imponi potest in foro externo, est aliquod religionis vel pietatis vel caritatis opus peragendum.
§2. Ob trangressionem occultam numquam publica imponatur paenitentia."

on what such a term meant. The 1983 code does not prescribe penances the same way. Remitting censures in the internal forum depends on the disposition of the penitent; and the penance substitutes for but does not increase the censure. Consequently, the penance ought to be light since a non-declared *latae sententiae* censure frequently involves an occult matter; and an overly burdensome penance could make it public.[91]

(4) Penitent's obligation to repair scandal and damage

The fourth obligation of the confessor is relative to the urgency of the circumstances and consists in ensuring the repairing of scandal and any damages caused. Canon 2254, §3 of the 1917 code referred to the satisfaction of a censure, which was imposed only if recourse to the competent authority were morally impossible. However, in the 1983 code the promise to repair any damage and scandal is required at the moment of remitting a censure in the internal forum and precedes seeking recourse from the competent authority in the external forum. Such a provision is congruent with the reform of the offender (canon 1358) and with the specific aim of the censure, which envisions the voluntary reparation of the offense (canon 1347, §1).[92]

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[91]Borras, 142.

[92]*CIC* 83 c. 1358 §1: "Remissio censurae dari non potest nisi delinquenti qui a contumacia, ad normam can. 1347, §2, recesserit; recedenti autem denegari nequit."

Both the reform of the offender and the repairing of any damage and scandal need to be verified. If reparation had not been made at the time of remitting the censure, the confessor must induce the penitent at least to promise seriously to do so.[93]

(5) Correlative obligations of confessor and penitent

The obligations imposed by the confessor are correlative to the obligations of the penitent. First of all, receiving the remission of a censure in the internal sacramental forum binds the penitent to make recourse to a competent authority either by himself or herself or through the confessor. Borras judges that failure to seek the appropriate recourse within a month, imposed under pain of reincidence, means the kind and number of censures return in all their vigor.[94] Evidently, this requirement reflects the general rule that penalties ought to be remitted in the external forum. The other obligations imposed on the penitent are obeying such directives in the external forum, completing the penance imposed by the confessor, and repairing damage and scandal as required, all of which do

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CIC 83 c. 1347, §1: "Censura irrogari valide nequit, nisi antea reus semel saltem monitus sit ut a contumacia recedat, dato congruo ad resipiscentiam tempore." The law or precept itself to which *latae sententiae* penalties are attached is considered to be the canonical warning.

[93]Borras, 142.

[94]Ibid., 143, n. 40.

not oblige under pain of reincindence.[95]

(6) The obligation of recourse upon recovery in danger of death cases

According to canon 1357, §3, the same duty of recourse, after recovery, binds those who have had remitted an imposed or declared censure or one reserved to the Holy See (c. 976).[96] Canon 1357, §3 like canon 2252 of the 1917 code has the same aim as canon 1357, §§1-2, namely, to involve an external forum authority figure. For persons who escape the danger of death, however it arises, the obligation of recourse to a competent authority flows from the general principle that penalties ought to be remitted in the external forum.[97]

Borras agrees with Nigro that reincidence of the penalty is attached to the non-fulfillment of such an obligation even though canon 1357, §3 does not expressly state it as such. They argue that since canon 1357, §1 on remitting non-declared *latae sententiae* excommunications or interdicts is a less serious situation than canon 976 on remissions in danger of death cases, the phrase "under pain of reincidence" is operative *a fortiori* in danger of death cases. Furthermore, canon 2252 of the 1917 code also

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[95]Ibid., 143-144.

[96]*CIC* c. 1357, §3: "Eodem onere recurrendi tenetur, postquam convaluerint, ii quibus ad normam 976 remissa est censura irrogata vel declarata vel Sedi Apostolicae reservata."

[97]Borras, 144.

contained such a phrase. Borras concurs with Nigro that such an interpretation is justified by canon 6, §2 regarding the relationship between the 1917 and 1983 codes.[98]

However, canon 1357, §3 does not apply to non-declared *latae sententiae* censures remitted in danger of death cases. In such cases, the censure is often occult or not public as is the offense itself, in all probability. According to Borras, the legislator did not foresee recourse for such cases because there is no reason for remitting them in the external forum.[99]

6. A summary of those who can remit penalties in the internal forum

In sum, there are five possibilities for remitting penalties in the internal forum. First, except for danger of death cases, declared *latae sententiae* penalties and *ferendae sententiae* penalties cannot be remitted in the internal forum. Second, only a bishop can remit expiatory penalties in the internal sacramental forum. Third, censures reserved to the Holy See can be remitted by any priest in danger of death cases and by any confessor in an urgent case, according to the conditions of canons 976 and 1357, §1, respectively. Fourth, non-declared *latae*

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[98]Nigro, 795; Borras, 144. However, as Borras notes: "On pourrait cependant objecter le canon 19 du Code qui interdit l'analogie en matière pénale." Ibid., n.42.

[99]Borras, 144: "Cela explique que le législateur ne prévoit pas le recours, car il n'y a pas de raison dans ces cas d'urger le principe du for externe."

sententiae censures can be remitted by the canon penitentiary, certain chaplains, a confessor, or by any priest in danger of death cases. Fifth, the obligation of recourse is imposed for urgent cases and danger of death cases. For the former, the obligation always obliges the penitent. For the latter, it obliges only for inflicted or declared censures reserved to the Holy See.[100]

The different ways of remitting certain censures in the internal forum according to canons 508, §1, 566, §2, and 976 still allow broad enough possibilities for particular pastoral circumstances as did canon 2254 of the 1917 code. DePaolis observes that the limitations placed on such remitting options in the 1983 code conform to the principles guiding the revision of the 1917 code, namely, that penalties be established and remitted in the external forum.[101]

C. The format of remission and the risk of infamy

The format of the remission needs to take cognizance of an offender's right to a good reputation.[102] Someone who

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[100]Borras, 145.

[101]Ibid., 140-141; DePaolis, *De Sanctionibus*, 102; See idem "Totum ius poenale ad externum tantum forum limitatum est," *Periodica* 65 (1976) 297-315.

[102]*CIC* 83 c. 1361: "§1. Remissio dari potest etiam absenti vel sub condicione.
§2. Remissio in foro externo detur scripto, nisi gravis causa aliud suadet.
§3. Caveatur ne remissionis petitio vel ipsa remissio divulgetur, nisi quatenus id vel utile sit ad rei famam tuendam vel

has incurred a non-declared, non-notorious *latae sententiae* penalty is not obliged to observe the penalty if there is danger of scandal or infamy in so doing. Yet, at the same time, the offender has a right to its remission in the external forum, which depends on the type of penalty and the disposition of the guilty party. The code cautions, especially in such a case, that care should be taken that a petition for remission or the remission itself not be divulged, unless it would be advantageous to protect the reputation of the guilty party or necessary to repair scandal.[103] "This would seem especially true if the offender occupied a position of trust in the community, e.g., diocesan official, pastor, director of religious education, etc."[104]

In conclusion to section one, we have seen how *latae sententiae* penalties are established, applied, and remitted in the 1983 code. Clearly, the 1983 code in contrast to the 1917 code simplifies their application and remission. However, as noted earlier, during the code revision process some called for abolishing them altogether. Interestingly enough, such penalties are absent from the Eastern code. We now turn to the drafting of that code and examine some

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necessarium ad scandalum reparandum."

[103]Borras, 146-147; Arias, 848-849; Nigro, 797; DePaolis, *De Sanctionibus*, 108; Aznar, 760.

[104]Green, "Sanctions," 919.

possible reasons for their absence as an example of the diversity of our canonical traditions in the Church.

Section Two

An Overview of *Latae Sententiae* Penalties in the Drafting of the *Code of Canons of the Eastern Churches*

The Second Vatican Council insisted that the history, traditions and many ecclesiastical institutions of the Eastern Churches belonged to the heritage of the whole Church of Christ.[105] Yet, the council also declared that the Eastern Churches like those of the West have the right and duty to govern themselves according to their own special disciplines.[106] Such special discipline can be seen in the 18 October 1990 promulgation of *Code of Canons of the Eastern Churches*.[107] Its promulgation along with the Latin code "clearly show[s] the observance of that which results in the Church by God's Providence - that the Church itself, gathered in the one Spirit breathes as though with two lungs - of the East and West."[108]

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[105]Decree on Eastern Catholic Churches, *Orientalium Ecclesiarum* 5, November 21, 1964 [*OE*]: *AAS* 57 (1965) 78; for an English translation of the council document see Walter Abbott, ed., *The Documents of the Second Vatican Council* (New York: The America Press, 1966) 376.

[106]Ibid.

[107]*Codex Canonum Ecclesiarum Orientalium* [*CCEO*] *Ioannis Pauli II Pontificis Maximi auctoritate promulgatus*. For the original Latin text of the apostolic constitution, a preface to the Eastern code, the original text of the canons and a corresponding index see *AAS*, 82 (1990) 1033-1363. For an English translation, see *Code of Canons of the Eastern Churches*, [Eastern code] Latin-English ed., (Washington, D.C: Canon Law Society of America, 1992).

[108] John Paul II, apostolic constitution *Sacri Canones*,18 October 1990, *AAS* 82 (1990) 1037: "admodum manifesto ostendit velle eosdem servare id quod in Ecclesia, Deo providente, evenit,

"The complex of penal canons in the Eastern code represents a canonical innovation in the Eastern Churches"[109] because it was the first time the twenty-one *sui iuris* Churches had a common penal law on which to base particular legislation. In the 1930's and 1940's various titles were drafted for a proposed Eastern code, but only selected parts were promulgated by Pius XII. Penal law was not one of them. In the 1970's the work on the Eastern code was resumed. However, after some discussion on penal law and "in light of Eastern canonical traditions *latae sententiae* penalties were viewed as inappropriate."[110] Nonetheless, it might be advantageous for a critical appraisal of Latin *latae sententiae* penalties to explore briefly the references to them in the history of the Eastern code drafting process and to note the differences between the two codes.[111]

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ut ipsa unico Spiritu congregata quasi duobus pulmonibus Orientis et Occidentis respiret." For the English translation, see Eastern code, 14.

[109]Thomas J. Green, "Penal Law in the *Code of Canon Law* and in the *Code of Canons of the Eastern Churches*: Some Comparative Reflections," [Green, Eastern code] *Studia Canonica* 28 (1994) 411.

[110]Idem, "Reflections on the Eastern Code Revision Process," [Green, Eastern Revision] *The Jurist* 51 (1991) 25.

[111]Green, Eastern Code, 409; For a detailed consideration of the Eastern Code drafting process see John Faris, *The Eastern Catholic Churches: Constitution and Governance*, (Brooklyn NY: St. Maron Publications, 1992) 67-109. For a shorter overview with a selected bibliography see Green, Eastern Revision and Frederick McManus, "The Code of Canons of the Eastern Catholic Churches," *The Jurist* 53 (1993) 22-61. For bibliographical references on the drafting of the Eastern Code see Warren Soule, *Eastern Canon Law Bibliography*, Maronite Rite Series: Liturgy, Theology,

I. A brief overview of the chronology of the drafting of the Eastern code

A. Chronology

The promulgation of the Eastern code culminated a long drafting process begun after the promulgation of the 1917 Latin code. Various titles were drafted for the proposed Eastern code during the 1930's and 1940's, but only selected parts were promulgated by four motu proprios of Pius XII.[112] After a period of relatively little activity during the 1960's, Paul VI revived the process by establishing the Eastern Code Commission on 10 June 1972. Yet it was not until the initial March 1974 plenary session that the work of codification became intense. That session established guidelines for the drafting process similar to those

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Spirituality, Music, Culture and History (Brooklyn, NY: St. Maron Publications, 1993). Besides Green, Eastern Code, another detailed study of comparing the Eastern and Latin codes is Giuseppe DiMattia, "La normativa di diritto penale nel *Codex iuris canonici* e nel *Codex canonum Ecclesiarum orientalium*" [DiMattia] *Apollinaris* 65 (1992) 149-172. For briefer references to Eastern penal law see Victor J. Pospishil, *Eastern Catholic Church Law according to the Code of Canons of the Eastern Churches* (Brooklyn, NY: St. Maron Publications, 1993) 634-643; John Faris, "The Codification and Revision of Eastern Canon Law," *Studia canonica* 17 (1983) 482-483; René Metz, "Le nouveau Code de droit canonique des Eglises orientales," *Revue de droit canonique*, 42 (1992) 116; McManus, "The Code of Canons of the Eastern Catholic Churches, 55-56; Francis Morrisey, "The Spirit of the New Eastern Code of Canons," *Logos* 34 (1993) 213-214.

[112]For the selected parts of Eastern law promulgated by the four motu proprios of Pius XII see *Crebrae Allatae*, *AAS* 41 (1949) 89-119 (131 canons on marriage); *Solicitudinem Nostram*, *AAS* 42 (1950) 5-20 (576 canons on procedure); *Postquam Apostolicis*, *AAS* 44 (1952) 65-152 (325 canons on religious, temporal goods and definition of terms); and *Clero Sanctitati*, *AAS* 49 (1957) 433-603 (588 canons on rites and persons).

established for the Latin code by the 1967 synod of bishops. Broad consultation on and evaluation of the original drafts took place between 1980 and 1984. By October 1986, the proposed code was submitted to the Code Commission. After the November 1988 plenary session, an approved text was submitted to John Paul II in January 1989 who reviewed the proposed Eastern code with some advisors. The Eastern code was promulgated in October 1990 and was to take effect in October, 1991.[113] What follows is a brief history of the drafting of Eastern penal law with particular reference to *latae sententiae* penalties.

B. The significance of the 1948 schema on penal law

A committee of the Commission for the Redaction of the Eastern Code, established in 1935, prepared a draft of penal law. The Commission's twenty-second plenary session approved the committee's draft of 241 canons on penal law on 15 March 1946. Certain modifications were approved on 21 January 1948. However, for reasons that are still unclear, the completed and approved draft was never promulgated by Pius XII. The 1948 draft on Eastern penal law largely corresponded to book five of the 1917 code. The prior text remained in the Commission archives until the post-conciliar Eastern penal law *coetus* began meeting in 1974. The text is "absolutely indispensable for a proper understanding of the

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[113]Green, Eastern Code, 408.

contemporary evolution of the Eastern penal discipline."[114]

II. Initial stages of the post-conciliar drafting process, 1974-1976

A. The March 1974 plenary session of the Eastern Code Commission

1. Approval of principles for drafting the code

The first plenary session of the Eastern Code Commission, 18-23 March 1974 approved a collection of principles for drafting the code. The guidelines on penalties touched on three issues, namely, *latae sententiae* penalties, the canonical warning, and the imposition of a positive act as a penalty.[115]

2. Discussion of the principle regarding *latae sententiae* penalties

During the first session, the vice-president of the Eastern Code Commission asked the pro-secretary to explain in detail the guideline concerning *latae sententiae* penalties. Besides the pro-secretary's explanation there were certain animadversions of member C of the commission on the same topic. Their remarks on the proposed *latae sententiae* guideline for the revision of Eastern penal law warrant some attention because of their influence on subsequent discussion. Their comments reported in *Nuntia* are somewhat more detailed than comparable reports in *Communicationes*. Unfortunately their remarks are not as

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[114]Ibid., 412.

[115]Ibid., 413.

orderly as a written report probably would be. What follows are the animadversions of the pro-secretary and member C on the following text from the guidelines for the revision of the Eastern code:

> It is well known that the Pontifical Commission for the Latin Code had already operated a reduction of the penalties "*latae sententiae*" in the draft of canons
> In the Oriental Code all the "*poenae latae sententiae*" should be abolished, because they do not correspond to the genuine Oriental traditions, are unknown to Orthodox Churches, and do not seem necessary for the purposes of the adaptation of the Oriental Code to the present-day requirements of the discipline of the Oriental Catholic Churches.[116]

a. The animadversions of the pro-secretary

The pro-secretary responded that the aforementioned text had been discussed by the central *coetus* and the Faculty of Eastern Canon Law. Its members made a few objections but the pro-secretary did not mention what they were. Abolishing *latae sententiae* penalties was the most important question to be decided. All but two of the members of the central *coetus* favored abolishing such penalties since they did not exist in the East.[117]

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[116]*Nuntia* 3 (1976) 24; Ibid. 18: "The following 'Guidelines for the Revision of the Code of Oriental Law,' which were approved at the First Plenary Assembly of the Commission of the [sic] March 18-23 1974, are published under the sole responsibility of the Commission itself with the precise intention of offering them thereby to the critical evaluation of competent bodies."

[117]*Nuntia* 30 (1990) 68:"Pro-Segretario: 'Quest sezione è stata discussa bene, penso nel 'Coetus centralis' e anche nella Facultà di Diritto Canonico Orientale. Si sono fatte poche obiezioni da parte dei Membri. La questione più importante da

(1) Some historical notes on *latae sententiae* penalties in Eastern penal traditions

The pro-secretary's remarks on the history of *latae sententiae* penalties in Eastern penal traditions raised many issues, which require a more detailed analysis than is possible in the context of this dissertation. In brief, he especially noted the scholarly historical studies of Seriski[118] and Herman[119]. Seriski maintained that *latae*

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decidersi sarebbe l'abolizione delle 'poena latae sententiae.' Nel 'Coetus centralis' tutti, ad eccezione di due che si sono astenuti, erano favorevoli alla loro abolizione perché queste punizioni non sono mai esistite in Oriente."

The pro-secretary did not precisely identify the Faculty of Eastern Canon law to which he referred, although he may be referring to the Pontifical Oriental Institute, Rome.

[118] Peter Seriski, *Poena In Iure Byzantino Ecclesiastico Ab Initiis Ad Saeculum XI (1054)* (Rome: Officium Libri Catholici, 1941) 17, n. 10: "a) C. 1 Antiochenus: 'si qui autem episcopus, presbyter vel diaconus post hanc definitionem tentaverit ad subversionem populorum...et cum Iudaeis celebrare pascha sancta Synodus *hunc alienum iam nunc -enteuthen- ab Ecclesia iudicavit...*' (italics in original)

b) c. 13 Antiochenus:'episcopus ordinationes faciens in aliena diocesi pro incomposito muto suo et irrationabili audacia subeat ultionem ex hoc iam -enteuthen- depositus sancto concilio' Poena hic infligenda -dicit Van Espen- videtur esse ipsa depositio, quam in antecessum contra violatores huius decreti pronuntiat synodus; ex hoc iam damnatus a synodo, vel exinde depositus, propter huiusmodi praesumptionem, iam praedamnatus."

Ibid., n. 11: "C. 1 Ephesus: 'Contra suae regionis episcopos nihil poterit praevalere, omni ecclesiastica communione a praesenti iam synodo factus extorris atque privatus effectu.' Quae verba clarius intelliguntur si cum illis conferantur quibus patres Ephesini excommunicarunt et suspenderunt Iohannem Antiochenum: 'omni ecclesiatica communione alienos effecit et cuncta sacerdotii operatione privavit per quam possent vel nocere vel iuvare.'"

[119] *Nuntia* 30 (1990) 68 n. 1: "Quanto alle Chiese bizantine, cfr. E. Herman, 'Hat die byzantinische Kirche von selbst eintretende Strafen (poenas latae sententiae) gekannt?'

sententiae penalties existed in the East as far back as the council of Antioch (341). On the contrary, Herman maintained that they did not exist at all in Eastern penal traditions; this latter view clearly prevailed during the *coetus* discussions.

(2) The significance of the principles for revising *latae sententiae* penalties in the Latin code for the drafting of the Eastern code

The pro-secretary also compared and contrasted *latae sententiae* penalties in the two codes. Such penalties in the 1917 Latin code were inflicted for the gravest delicts; however, such penalties have no correspondence with the Eastern tradition. Furthermore he cited *Communicationes*, which reported that such penalties are now significantly reduced but still are retained for more serious offenses, especially for those that are occult. However, a *ferendae sententiae* penalty is always possible for punishing more serious offenses. But occult delicts presented a problem because they were usually remitted in the internal forum; yet, *Communicationes* reported that all penal law is limited to the external forum. Finally, the pro-secretary stated that he did not know how to punish truly occult delicts and

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Byzantinische Zeitschrift 44 (1951) 258-264; cfr. pure I. Zuzek, *Kormcaja Knigna*, p. 220, n. 6. Quanto ad alcune Chiese non-bizantino, se esistesse qualche dubbio, bisognerebbe scioglierlo alla luce della prassi de facto seguita: una qualche prassi della applicazione di *poenae latae sententiae* è sconosciuta all'intero Oriente."

The pro-secretary's study was not clearly identified.

claimed such was the crux of the problem.[120]

b) The animadversions of member C

Member C of the commission spoke next and questioned the pro-secretary's approach since all he looked at were penal sanctions in the Latin Church as reported in *Communicationes*. Yet, further objections to such penalties ought to be made and considered according to Eastern penal discipline. For example, minor excommunications were ancient but they were operative only in the external forum. Member C also maintained that there was a danger of merely repeating the penal canons of the 1917 code, which were nearly inapplicable, either because of the ignorance of the offenders or that of the confessors who needed a knowledge of them as great as jurists like Suarez. Furthermore, references to the Latin code weakened the Eastern character of the draft. Member C judged that some delicts punished by

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[120]*Nuntia* 30 (19900 69: "E vero che alcune 'poena latae sententiae' nel Codice latino sono inflitte per gravissimi delitti, si deve però dire, che esse di per sé, non corrispondono alle tradizioni orientali. Quinidi se si decide di recepirle nel Codice orientale, ciò si faccia con piena consapevolezza che esse di per sé non appartengono alle tradizioni orientali. In *Communicationes*, si dice che queste punizioni sono ridotte a poche. *Communicationes* danno due ragioni di ciò: 1) alcuni delitti sono gravissimi; 2) essi spesso sono occulti. Ma si può pensare che anche nei riguardi di delitti gravissimi sia possibile sempre una gravissima pena 'ferendae sententiae.' Se poi si tratta di delitti occulti, trovo delle difficoltà con l'altro principio, pure espresso in *Communicationes*, che dice, 'totum ius poenale ad forum externum reductum est.' Come si fa alloa a punire delict vere occulta, non saprei dirlo. Quindi questo è il punto nodale testo proposto."

For the pro-secretary's references to the revision of the Latin code, see *Communicationes* 1 (1969) 84-85, 90-91, 96-97 and the *Praenotanda*, 1973 schema, 5-6.

latae sententiae penalties in the Latin Church (e. g. those that threatened church unity) could be dealt with by other appropriate and salutary penalties in the Eastern Churches.[121]

B. The first session of the penal *law coetus*, 18-23 November 1974

The first session of the penal law *coetus* on 18-23 November 1974 clarified the thrust of its work. Such clarifications underscored the influence of the Vatican II, the need to impose canonical penalties at times, and the relationship of the *coetus* to the Latin code revision process, especially principle 9 dealing with penal issues. Furthermore, the lengthy discussion of *latae sententiae* penalties at the March 1974 plenary session significantly shaped the original 1981 penal law schema, which forcefully

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[121]*Nuntia* 30 (1990) 69: "Cum petierit Pro-Secretarius aliquid, nihil est explicandum, nam omne quod spectat sanctiones poenales Ecclesiae latinae est in *Communicationes*. Sunt iam aliquae obiectiones factae. Una ex iis est illa quam nunc fecit Pro-Secretarius. Sed sunt modi diversi videndi. Antiquitus erant excommunicationes minores, verbi gratia, quae habebant vim tantummodo in foro externo. Quomodo hoc componi possit? Multi studiosi censent hoc fieri posse, alli contra non. Expectantur animadversiones Episcoporum praesertim circa haec puncta. Ex alia parte 'Principia' Episcoporum hoc perspexerunt, ne repeteremus quod iam erat in vetere Codice in libro V de Delictis et poenis, qui fere erat inapplicabilis, sive ob ignorantiam eorum qui crimina commiserunt, sive etiam ob ignorantiam confessariorum qui debebant in re intellectum grandem, ut iurista, tamquam Suaresius, et hoc non eveniebat. Quapropter videbunt Episcopi quid dicendum sit. Coetus studiorum Commissionis poterit etiam videre quid admittendum sit, attenta indole orientali, illius partis Codicis latini. Sed etiam, quoad poenas latae sententiae, poterunt alias vias ingredi. Attamen ego censerem quoad delicta, quae minantur unitatem Ecclesiae, oportet ut aliqua poena salutaris statuatur; secus separationes fiunt et postquam factae sunt vix pristinum restituantur."

articulated the distinctiveness of the Eastern code.[122]

III. Consultation on the 1981 schema

A. The *praenotanda* of the 1981 schema on abolishing *latae sententiae* penalties

The subsequent revisions of the original Eastern penal law schema between 1977 and 1980 treated *latae sententiae* penalties to a limited extent.[123] The *praenotanda* of the schema forwarded for evaluation to the eparchs and others on 30 September 1981 explained why such was the case.[124] Among the seven general points in the schema's *praenotanda* which Green mentioned as especially noteworthy were the fact that *latae sententiae* penalties were not to be introduced to the Eastern code, the fact that penalties had a medicinal character and the fact that a prior canonical warning and a prior process were needed before a penalty was imposed.[125]

While recognizing principle 9 that guided the revision of the 1917 code regarding *latae sententiae*

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[122]Green, Eastern Code, 413.

[123]For the text of the provisional schema see *Nuntia* 4 (1977) 76-79. For a brief introduction to the revision of the schema in 1977 see S. Mudryj, "La nuova revisione dei canoni riguardanti le sanzioni penali nelle Chiese orientali cattoliche," ibid., 12 (1981) 37-38. For a report on the review of penalties by a special committee of the Eastern Code Commission, 20 November 1980 - 6 December 1980 see I. Zuzek, "Nota sull'operato del coetus specialis di Novembre-Dicembre riguardante lo Schema de sanctionibus poenalibus in Ecclesia," ibid. 12 (1981) 78-84.

[124]For the text of the *praenotanda* and the canons of the original schema see ibid. 13 (1981) 59-80.

[125]Ibid., 414-418.

penalties, the Eastern code maintained the position articulated during the March 1974 plenary session. Therefore, *latae sententiae* penalties were to be abolished in the Eastern code because they were not consonant with Eastern canonical traditions, unknown to the Orthodox and unnecessary for adapting Eastern penal discipline to contemporary circumstances.[126] "Accordingly, canon eight[127] of the schema affirm[ed] the fundamentally *ferendae sententiae* orientation of penalties with due regard for the possible establishment of a *latae sententiae* penalty by the pope or an ecumenical council."[128]

B. Observations on the *praenotanda* of the 1981 schema

1. Characteristics of the observations

Observations on the original penal law schema sent out to various consultative organs on 30 September 1981 were to be submitted to the Commission by 30 March 1982. About one third of the consultative organs replied. About two thirds of the replies agreed that *latae sententiae* penalties should be dropped from the code. According to Green the other third was somewhat difficult to characterize. For example, some consultative organs wanted to retain such penalties as a matter of principle; others wanted to retain them for

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[126]*Nuntia* 13 (1981) 62.

[127]ibid., 69: "Poena reum non tenet nisi postquam irrogata est, salvo iure Romani Pontificis vel Concilii Ecumenici poenas latae sententiae in Ecclesias Orientales introducendi."

[128]Green, Eastern Code, 417; DiMattia, 158-159.

certain offenses; still others wanted them as an option for particular law and some desired them for the sake of uniformity with the Latin code. Those who wanted to retain *latae sententiae* penalties in the Eastern code stated that such offenses as the violation of the confessional seal or a physical attack on the pope were so serious that they warranted uniform punishment throughout the Church. Moreover, such penalties provided for the reform of the offender and safeguarded important ecclesial values.[129]

2. Argument for uniformity between the codes

The argument for a uniform approach to *latae sententiae* penalties in the Eastern and Latin codes was discussed on 2 December 1982 by a special nine member *coetus* designated to review the replies on the penal law schema.[130] Without further explanation, the *coetus* listed eight offenses punished by *latae sententiae* penalties in Eastern law while Latin law punished sixteen offenses by such penalties.[131] To

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[129]Green, Eastern Code, 419-420; DiMattia, 159, n.22.

[130] For general comments regarding the schema, see *Nuntia* 20 (1985) 3-11; for specific canons, see ibid., 12-58.

[131]For the *latae sententiae* penalties in the Eastern and Latin codes listed by the special nine member coetus on penal law, see ibid. 9, n. [no note number is given]:[for the Eastern Code] "In forza del decreto S. Uffizio del 21 luglio 1934, valgono i canoni 2320, 2343, 2367, e 269 [sic; c. 2369] del CIC del 1917; in forza del Decreto del S. Ufficio del 9 aprile 1951, valgono le scomuniche 'latae sententiae' comminate per i delitti relativi alla consacrazione dei vescovi senza il mandato pontificio; in forza della Cost. 'Apostolicae Sedi' del 1885, varrebbero ancora i cann 2314, 2332 e 2335 del CIC del 1917 (tutto però, a nostro avviso, come nei relativi canoni del nuovo CIC)

make the Eastern code conform to the Latin code would mean doubling the number of *latae sententiae* penalties in the former. But this was contrary both to the principle of reducing *latae sententiae* penalties in the Latin code and to the value of safeguarding Eastern penal traditions. In short, the uniformity argument lacked persuasiveness.[132]

3. Argument for the reservation of sin

Although the decision of the March 1974 plenary session made it clear that *latae sententiae* penalties ought to be abolished in the Eastern code, the special *coetus* agreed to review the matter. Whatever was the conclusion of the penal law *coetus,* the code commission as a whole would have to approve it. One of the objectives of the review was to determine if threatening *latae sententiae* penalties achieved the purposes of ecclesiastical authority, such as the reform of the offender, the repair of damages, and the restoration of justice. However, such a review of the differing perspectives of various consultative organs revealed that *latae sententiae* penalties were not the only real deterrent to specific offenses.[133] For example, the relative ease with which an offender could obtain an internal forum absolution

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"[The Latin code added the following to the aforementioned canons; the numbers refer to the 1983 code] canoni 1364 (3 casi) 1367, 1370 §1, 1370 §2, 1378 §2, 1°, 1378 §2, 2° (due casi), 1382 (due casi) 1388, 1394 §1, 1394 §2, 1938 [sic; c. 1398]."

[132]*Nuntia* 20 (1985), 8-9; Green, Eastern Code, 421.

[133]*Nuntia* 20 (1985) 9-10; Green, Eastern Code, 422.

for a non-declared, non-reserved *latae sententiae* excommunication rarely contributed to his or her reform.[134]

A better solution seemed to be defer absolution of the sin until such time as the eparch judged an offender reformed and the damage repaired. Such a solution was in keeping with genuine Eastern penitential discipline and somewhat comparable to the reservation of sins dropped by the Latin code. Deferring absolution for some time and insisting on a lengthy penance made more sense to Easterners than *latae sententiae* penalties. The special *coetus* agreed with the decision of the March 1974 plenary session to abolish *latae sententiae* penalties and would not raise the question again with the commission members. However, the *coetus* would provide in the canons on penance for possibly reserving absolution from certain frequent or serious sins like abortion to the eparch comparable to the Latin code's reservation of the remission of certain penalties to the Holy See.[135]

4. Argument for *sui iuris* Churches establishing *latae sententiae* penalties

Since it was not easy for some Easterners to return to their ancestral traditions, the *relator* of the special penal law *coetus* proposed that canon 8 of the schema be modified to allow bishops to establish *latae sententiae* penalties for

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[134]DiMattia, 159.

[135]*Nuntia* 20 (1985) 10; Green, Eastern Code, 422.

their *sui iuris* churches, a proposal which would not need the approval of the Eastern Code Commission. However, the *relator*'s proposal was rejected by the special penal law *coetus* because it was contrary to genuine Eastern traditions. Accordingly, only the supreme legislator can establish *latae sententiae* penalties for *sui iuris* churches.[136]

IV. The promulgation of the Eastern code

The last stages of the process of drafting the Eastern code have little bearing on *latae sententiae* penalties. "On 17 October 1986 the *Schema Codicis iuris canonici orientalis* was forwarded to the members of the Eastern Code Commission." [137] Title 27 of the schema dealt with penal sanctions.[138] Subsequently, a further modified schema was presented to the 18-23 November 1988 plenary session which in turn, after some modifications, was submitted for papal approval on 20 January 1989. The Eastern code was promulgated by John Paul II on 17 October 1990 and took effect 1 October 1991. We now examine some differences between the Eastern and Latin codes regarding *latae*

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[136]*Nuntia* 20 (1985) 10-11.

[137]Green, Eastern Code, 423.

[138]For the 1986 schema on penal law, titles 27 and 28 see *Nuntia* 24-25 (1987) 245-258. For the reference to *latae sententiae* penalties dropped from canon 8 of the 1981 schema see ibid., 246: "Poena reum non tenet, nisi post quam sententiae vel decreto irrogata est, salvo iure Romani Pontificis vel Concilii Oecumenici aliter statuendi."

sententiae penalties.[139]

V. The differences between the Eastern and Latin codes regarding *latae sententiae* penalties

The Eastern code does not explicitly mention *ferendae sententiae* penalties, yet the reality is that any penalty must be imposed by sentence or decree inasmuch as *latae sententiae* penalties are absent from it.[140] Hence, the Eastern code lacks the following Latin code provisions. There is no need to caution legislators about establishing *latae sententiae* penalties.[141] There is no need to articulate circumstances excusing from incurring them; moreover, aggravating circumstances heightening imputability are judged in light of common practice and canonical doctrine.[142] There is no need to make separate provisions for collaborators in a delict punished by a *latae sententiae* penalty.[143] There is no need to suspend certain *latae*

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[139]Green, Eastern Code, 427.

[140]*CCEO* c. 1408: "Poena reum non tenet, nisi postquam sententiae vel decreto irrogata est, salvo iure Romani Pontificis vel Concilii Oecumenici aliter statuendi."

[141]*CIC* 83 c. 1318

[142]*CIC* 83 c. 1324, 1326; *CCEO* c. 1416: "Si delictum a recidivo commissum est vel alia adest secundum communem praxim et doctrinam canonicam circumstantia aggravans, iudex potest reum gravius punire, quam lex vel praeceptum statuit, non exclusis poenis in can. 1402, §2 recensitis;" Green, Eastern Code, 432.

[143]*CIC* 83 c. 1329; *CCEO* c. 1417: "Qui communi delinquendi consilio in delictum concurrunt neque in lege vel praecepto expresse nominantur, eisdem poenis ac auctor principalis puniri possunt vel ad prudentiam iudicis aliis poenis eiusdem vel minoris gravitatis;" Green, Eastern Code, 432.

sententiae censures which forbid the celebration of the sacraments or sacramentals or positing acts of governance.[144] There is no need to suspend the obligation to observe *latae sententiae* penalties.[145]

There is no need to restrict remitting certain such penalties to an ordinary in the external forum, to bishops in the internal forum or to confessors.[146] "Since the Eastern code does not authorize confessors to remit penalties, there is no need to make a special reference to the external forum when speaking of the format of such a remission. The contemporary tendency towards a strictly external focus of penal discipline is most evident in the Eastern code here."[147]

The Second Vatican Council insisted that the history, traditions and many ecclesiastical institutions of the Eastern Churches belonged to the heritage of the whole Church of Christ. Yet, the council also declared that the Eastern Churches like those of the West have the right and duty to govern themselves according to their own special disciplines. Accordingly, "in light of Eastern canonical traditions *latae sententiae* penalties were viewed as

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[144]*CIC* 83 c. 1335.

[145]*CIC* 83 c. 1352, §2.

[146]*CIC* 83 c. 1355, §2.

[147]Green, Eastern Code, 433; *CIC* 83 c. 1357; *CCEO* c. 1422, §2: "Remissio poenae dari debet scripto, nisi gravis causa aliud suadet."

inappropriate."[148] Nonetheless, briefly exploring the discussion of *latae sententiae* penalties during the Eastern code drafting process and noting the differences between the two codes help to highlight certain key points regarding such penalties. We now examine the work of some commentators on the 1983 code who critically appraise *latae sententiae* penalties.

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[148]Green, Eastern Revision, 25.

Section Three

The Legitimacy and Appropriateness of *Latae Sententiae* Penalties in the 1983 *Code of Canon Law*

I. The general response of the authors to *latae sententiae* penalties in the 1983 code

Generally speaking, the commentators on the 1983 code consulted by the author make three points about *latae sententiae penalties*. First, they generally cite principle nine which guided the reform of such penalties.[149] "As an external visible society, the Church cannot renounce penal law. However, penalties are generally to be *ferendae sententiae* and are to be inflicted and remitted only in the external forum. *Latae sententiae* penalties are to be reduced to a few cases and are to be inflicted only for the most serious offenses."[150] Second, the authors give a reason for retaining *latae sententiae* penalties. Green sums up the common opinion: "Apparently it was felt that without such *latae sententiae* penalties the public good of the Church would be jeopardized since certain occult or non-public offenses, such as the absolution of an accomplice

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[149]DePaolis, *De Sanctionibus*, 49-50; Aznar, 717; Arias, 822-823; Echappé, 463; Borras, 53; Green, "Sanctions," 895; Nigro, 754.

[150]Annotated 1983 code, 25-26: "9°) Circa ius coactivum, cui Ecclesia tamquam societas externa, visibilis et independens renuntiare nequit, poena sint generatim ferendae sententiae, et in solo foro externo irrogentur et remittantur. Poenae latae sententiae ad paucos casus reducantur, tantum contra gravissima delicta irrogandae." trans. "Preface to the Latin Edition," *Code of Canon Law*, Latin-English Edition, (Washington, DC: Canon Law Society of America, 1983) 22.

1378, §1), might otherwise not be penalized."[151] Third, the authors acknowledge that there was some debate about *latae sententiae* penalties during the revision process and that some questions still remain but they usually do not elaborate further.[152] We consider Borras' defense of *latae sententiae* penalties in general, which is one of the few more extensive treatments of the issue.

II. The implementation of principle 9 guiding the revision process

Borras generally made the aforementioned points that other commentators did. *Ferendae sententiae* penalties clearly remain the preferred means of applying penalties in the 1983 code. Canon 1314 prescribes that penalties are for

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[151]Green, "Sanctions," 898; Borras, 52; DePaolis, *De Sanctionibus*, 39; Echappé, 463; Arias, 823; Aznar, 719; Nigro, 753.

[152]Aznar, 719: "Le Code actuel, malgré un courant important d'opinion dans l'Eglise, qui demandait leur supression pour diverses raisons, a conservé le principe que ce type ne pouvait être supprimé, car c'est souvent le seul moyen dont dispose l'Eglise pour protéger le bien des âmes;" Echappé, 463: "Cette institution, souvent critiqueé, a été maintenue dans le Code de 1983;" ibid., n. 2: "Elle était défendue, déjà, par Pie VI, dans sa constitution Auctorem fidei;" DePaolis, *De Sanctionibus*, 49: "Plures sunt motae difficultates contra institutum poenarum latae sententiae sive antiquis temporibus sive occasione recognitionis Codicis. Allatae sunt rationes pro et contra;" Green, "Sanctions," 898: "A significant post-conciliar discussion has concerned the continuing viability of *latae sententiae*, or automatic, penalties;" ibid., n. 10: "Green, 'Future of Penal Law [in the Church,' The *Jurist* 35 (1975)] 224-228; V. de Paolis, 'De legitimitate et opportunitate poenarum latae sententiae in iure poenali canonico,' *P[eriodica]* 6[2] (197[3]) [319-373];" Nigro, "Dal can. emerge la scelta fatta dal legislatore di volere fare ricorso ordinariamente alle pene f.s. ma anche emerge la volontà di conservare quelle l.s., nonostante l'avversione manifestata da alcuni canonisti, fino al punto da chiederne la pure e semplice abrogazione."

the most part ("*plerumque*") inflicted *ferendae sententiae*. Therefore the law is in accord with the principles guiding the revision of the 1917 code.[153] A *ferendae sententiae* penalty does not bind the delinquent unless it has been inflicted by a judge or superior by means of a judicial sentence or administrative decree respectively.[154] It is in accord with contemporary legal culture that penalties are usually inflicted *ferendae sententiae*. However, what remains difficult to understand within that culture is that the legislator also provides for *latae sententiae* penalties which are incurred by the very commission of the delict. Nevertheless, *latae sententiae* penalties are proper to canon law. Historically, they appeared gradually at least from the fourth century. Bishops used them more frequently in the eleventh and twelfth centuries and excessively, even abusively, in the thirteenth century according to the reprimands of Innocent IV at the Council of Lyon (1245).[155]

III. The need to punish certain occult offenses with *latae sententiae* penalties

Latae sententiae penalties derive from early church

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[153]*Communicationes* 1 (1969) 85.

[154]*CIC* 83 c. 1314; *CIC* 17 c. 2217, §1, 2°.

[155]Borras, 52; ibid., n. 8: "Cf. R. Castillo-Lara, 'Algunas reflexiones sobre la futura reforma del Libro V CIC,' *Salesianum* 23 (1961) 324-329 où l'on trouve une petite synthèse historique sur le sujet. En relation avec l'excommunication, on lira l'article de P. Huizing, 'The earliest development of excommunication *latae sententiae* by Gratian and the earliest decretists,' *Studia Gratiana* 3 (1955) 277-320."

penitential discipline and reflect a concern to sanction occult delicts which would not be known to the community. Incurred "automatically," the penalty usually remained occult because a fair number of its effects, for example, the prohibition of the reception of sacraments or acts of governance, were suspended in the external forum and hence the Christian community would remain unaware of them. Those who incurred *latae sententiae* penalties in the internal forum would frequently remain unknown to the competent authority. According to Borras, *latae sententiae* penalties were situated at the border between penitential discipline and penal intervention, revealing the link between penance and penalty. Such a distinction was elaborated during the course of the Middle Ages, where the provision of *latae sententiae* penalties seemed to be an effective means of punishing occult delicts.[156] The one committing an occult offense to which a *latae sententiae* penalty had been attached could not escape punishment because its execution obliged in conscience in the internal forum, even if some of its effects were suspended in the external forum in certain circumstances.[157]

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[156]Borras, 52: "Se situant sur la ligne de frontière entre la discipline pénitentielle et l'intervention pénale, révélatrice des liens entre la pénitence et la peine, -distinction élaborée au fil du Moyen Age-, la prévision d'une peine *latae sententiae* semblait etre, dans ce monde de la chrétienté médiévale, un moyen efficace pour sanctionner des délits occultes."

[157]Ibid.

Ferendae sententiae penalties, however, are completely different. If the judge or superior were unaware of the offense, it could not be sanctioned by the penalty in question; hence the offender would escape punishment.[158]

IV. Some remaining questions

Most authors acknowledge that there was some debate about *latae sententiae* penalties during the revision process and that some questions still remain but they usually do not elaborate on them. However, Borras and Arias still maintain somewhat contrasting opinions about such penalties. Borras affirms the current system because the Church has a right to establish *latae sententiae* penalties and has done so in the past. To support his argument he cites Castillo-Lara and states that *latae sententiae* penalties are a particularity of canon law "because only the Church can permit itself the luxury of obliging consciences juridically beyond the limits of what is externally verifiable."[159] Borras maintains that *latae sententiae* penalties are an historically verifiable fact and are still contained in the 1983 code. Yet, he acknowledges that maintaining them had been a controversial issue throughout the reform of the 1917 code.[160]

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[158]Ibid., 52-53.

[159]Ibid., 53, n. 9; R. Castillo-Lara, 'Algunas reflexiones,' 324.

[160]Borras., 53: "La prévision d'application latae sententiae est une particularité de la législation canonique 'parce que l'Eglise peut, pour ainsi dire, se permettre le luxe d'obliger

By contrast, Arias states the following:

> [t]he *latae sententiae* penalty is a hybrid procedure -juridical and moral- that creates confusion and conflict between the external and internal forum. Consequently, it is impossible to apply *Guiding Principles [sic] 9* to its full extent, inasmuch as it refers to the external forum as the one proper to penal law. This explains why the *latae sententiae* penalty is regarded as a very special exception.[161]

Arias does not elaborate further on the aforementioned statement. Presumably, the exceptionality of *latae sententiae* penalties refers both to the law's preference for *ferendae sententiae* penalties (c. 1314) and the external forum focus as the one proper to penal law in such areas as the remission of penalties, e. g., canons 1355 and 1356.

Conclusion

Chapter three dealt with the 1983 code, the Eastern code and selected commentators on the 1983 code. Section one considered the establishment, application and remission, of *latae sententiae* penalties in the 1983 code. Legislators are warned to establish such penalties for only the most serious offenses. The canons on circumstances affecting imputability aid both the offender and the competent authority in deciding if a *latae sententiae* penalty is

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juridiquement les consciences au-delà des limites de ce qui est extérieurement vérifiable.' C'est un fait historiquement constatable. C'est encore ce que contient la législation du Code. Portant le maintien des peines latae sententiae avait été une question controversée lors de réforme du Code de 1917."

[161]Arias, 823.

incurred. Furthermore, the most notable difference between the 1917 and 1983 codes is the manner of remitting such penalties. Although such penalties are usually remitted in the external forum, the law grants certain competent authorities the power to remit certain non-declared, non-reserved *latae sententiae* penalties in the internal forum.

In section two, the discussion on the absence of *latae sententiae* penalties in the Eastern code demonstrated that there is another way to deal with particularly serious breaches of church order and to safeguard ecclesial values. Moreover, at least one concern of the Eastern penal law *coetus* was to remain faithful to Eastern penal discipline. *Latae sententiae* penalties were considered foreign to such a discipline and were ommitted during the drafting process. Nonetheless, it is instructive for Latin canonists to examine the reasons for the absence of such penalties in the Eastern code.

However, few Latin canonists commented on *latae sententiae* penalties, other than the fact that the 1983 code implemented principle 9 of the revision process and that they were needed to punish certain occult offenses. Section three treated such brief comments as well as some remaining issues, which were raised during the revision process but not always satisfactorily resolved. We now offer some general conclusions on *latae sententiae* penalties in the 1917 code, the revision process and the 1983 code.

CHAPTER FOUR

A CRITICAL APPRAISAL OF *LATAE SENTENTIAE* PENALTIES IN THE 1983 *CODE OF CANON LAW*

Preamble

The conclusion of this dissertation assesses the historical, practical and theoretical value of *latae sententiae* penalties in the 1983 *Code of Canon Law*. Throughout the dissertation the author has tried to give some indication of the scholarly discussion of their legitimacy and appropriateness in the 1917 code, the process leading to its revision, and the process of drafting of the Eastern code. The author relies on such previous observations in his critical appraisal of *latae sententiae* penalties in the 1983 code and will refer to such observations only briefly here. This dissertation did not concern itself with an analysis of the history and origins of *latae sententiae* penalties. However, further study is needed since one reason given for the absence of such penalties in the Eastern code is that they are unknown to the Orthodox, who draw from the same early penal law sources as do Latin and Eastern Catholics. Such penalties also need to be assessed practically since one of the purposes of the penal law is the better maintenance of ecclesiastical

discipline. Finally, the major thrust of this dissertation has been to assess the general theory behind *latae sententiae* penalties, which also needs to be evaluated. What follows is a critical appraisal of *latae sententiae* penalties in the 1983 code in terms of their history, practice and theory.

I. A critical appraisal of the historical value of *latae sententiae* penalties

This dissertation did not include original historical research on the origins of *latae sententiae* penalties but was dependent on selected excerpts from the works of others. Subsequently, an area for further study for a critical appraisal of *latae sententiae* penalties in the 1983 code is an historical-critical examination of their origins, which "ha[ve] been the subject of much scholarly discussion for centuries."[1] Furthermore, such scholarly discussion has taken on some ecumenical urgency since the promulgation of the Eastern code.[2]

As noted earlier, *latae sententiae* penalties "do not correspond to the genuine Oriental traditions [and] are

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[1]Adams, 17.

[2]Pontificium Consilium ad Christianorum Unitatem Fovendam, *Directory for the Application of Principles and Norms on Ecumenism*, [Directory on Ecumenism] (Washington DC: United States Catholic Conference, 1993) 11: "The promulgation of the new *Code of Canon Law* for the Latin Church (1983) and of the *Code of Canons of the Eastern Churches* (1990) has created in ecumenical matters a disciplinary situation for the faithful of the Catholic Church which is partly new."

unknown to the Orthodox."[3] Yet, Latin and Eastern Catholics as well as other Eastern Christians share many of the same early penal law sources. Such sources could be the subject of a comparative study such as the *Directory for the Application of Principles and Norms On Ecumenism* envisions. The *Directory* states that such study is important for canon law "which must distinguish clearly between divine law and those ecclesiastical laws which can change with time, culture or local tradition."[4] In the author's opinion, *latae sententiae* penalties would benefit from an ecumenically critical appraisal of their origins and history.

II. A critical appraisal of the practical value of *latae sententiae* penalties

During the revision process, one of the chief reasons given for retaining *latae sententiae* penalties in the Latin code was that they were a practical and necessary means to punish certain occult delicts. For example, during the 1967 synod of bishops, Bishop Taguchi of Japan judged *latae sententiae* penalties practical lest bishops be overburdened by the task of deciding penal cases.[5] Moreover, in the same synod, Cardinal Ferretto, the Apostolic Penitentiary, stated without explanation that such penalties were

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[3]*Nuntia* 3 (1976) 24.

[4]*Directory for Ecumenism*, 48.

[5]Caprile, 104.

necessary for exceptional and determined cases and that the law needed a provision for their remission in the internal forum.[6] However, the synodal consensus was that such penalties should be abolished or at least reduced to a minimum, for the most serious offenses and for the good of souls.[7] The synodal consensus was reflected in the decision of the code commission to retain some *latae sententiae* penalties due to the seriousness of certain offenses, the possible ineffectiveness of *ferendae sententiae* penalties in dealing with them, and the grave scandal which might be caused.[8]

The reasons given by the code commission for retaining *latae sententiae* penalties, especially for occult delicts, were similar to those given by Augustine in his commentary on the 1917 code. Without such penalties "the most sacred offices might be neglected or abused because of a lack of witnesses and plaintiffs."[9] He also maintained that "to protect ecclesiastical discipline more efficaciously, this quasi self-executory remedy was found most efficient and secure."[10]

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[6]Ibid., 117.

[7]Ibid., 129-130.

[8]*Communicationes* 2 (1970) 102.

[9]Augustine, 74-75.

[10]Ibid.

However, *latae sententiae* penalties in the 1917 code became practically inoperable. This was due to several factors. For example, the purpose of canon 2229 of the 1917 code was to assist the alleged offender in deciding whether or not a *latae sententiae* penalty had been incurred. However, Swoboda concluded that Catholics rarely knew penal law and that pastors rarely instructed them on these matters.[11] If such was the case, one could ask if such penalties really did protect ecclesiastical discipline more efficaciously than *ferendae sententiae* penalties. Furthermore, practically speaking, most *latae sententiae* penalties were remitted by a confessor in the internal sacramental forum, making them a "cross for confessors"[12] because of the complex rules governing their remission. If such were the case, one could ask if *latae sententiae* penalties really did check malice, or the abuse of certain ecclesial values more effectively than *ferendae sententiae* penalties.

In the absence of "a penal law reporter comparable to the valuable tribunal reporters in marriage nullity jurisprudence,"[13] it is difficult to determine the practical consequences of *latae sententiae* penalties in the current

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[11]Swoboda, 239.

[12]For Bishop Ligondé's comment on this issue, see Caprile 103.

[13]Green, "Penal Law: A Review of Selected Themes," *The Jurist* 50 (1990) 236, n. 44.

life of the Church. For example, an objective fact-finding inquiry is as necessary to declare a *latae sententiae* penalty as it is to inflict a *ferendae sententiae* penalty since one must determine whether an external violation of the law is morally imputable to an alleged offender. Without studying a sampling of judicial sentences or administrative decrees declaring *latae sententiae* penalties, it is difficult to tell if such penalties in the *ius vigens* are any more successful in punishing more serious offenses than was true under the 1917 code. Furthermore, it is difficult to tell in practice whether *latae sententiae* penalties have effectively punished certain occult offenses, which was a chief reason for retaining such penalties in the 1983 code.

There are other practical concerns as well. For example, the law considers the offender sufficiently warned if a *latae sententiae* penalty is attached to an offense.[14] But the law also states that time must be allowed for an offender to withdraw from contumacy and to repent. How can such happen, practically speaking, when a *latae sententiae* penalty is incurred upon the commission of the offense? Similarly, the competent authority is urged to correct or rebuke an offender before declaring a *latae sententiae*

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[14]See *CIC* 83 c. 1347, requiring a prior warning before the imposition of a *latae sententiae* penalty.

penalty.[15] Yet, at the same time, an offender is obliged to observe a non-declared penalty in both fora.[16] But, such an obligation is totally or partially suspended if the offender risks self-betrayal or grave scandal.[17] It is the responsibility of the competent authority to use every pastoral means possible to repair scandal, restore justice and reform the offender before declaring a *latae sententiae* penalty. However, how can the competent authority do so, since he cannot oblige the offender to reveal himself or herself in occult cases? In short, *latae sententiae* penalties today continue to raise some of the same practical difficulties as they did in the 1917 code, especially in occult cases.

III. A critical appraisal of the theoretical value of *latae sententiae* penalties

A major thrust of this dissertation has been to examine the general theory behind *latae sententiae* penalties. During the revision process, DePaolis summarized the arguments for and objections to such penalties. Both those who favored them and those who objected to them referred specifically to the issue of their justness as did some commentaries on both codes.

As regards *latae sententiae* penalties in the 1917 code,

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[15]See *CIC* 83 c. 1341.

[16]*CIC* 83 c. 1351.

[17]*CIC* 83 c. 1352, §2.

Augustine stated that it "appears unjust and unworthy of a perfect society to condemn one before one is heard."[18] As regards the 1983 code, Borras echoes a similar theme when he states that *latae sententiae* penalties "remain difficult to understand within the contemporary legal culture."[19] Yet, Borras justifies them by quoting Castillo-Lara: "only the Church can permit itself the luxury of obliging consciences juridically beyond the limits of what is externally verifiable."[20] Similar language was used by Augustine to justify them in the 1917 code: "[b]ut we must not forget that the Church is a peculiar society, with a religious character that does not remain on the surface, but penetrates and encompasses the whole man. She reaches into the court of conscience."[21]

However, during the revision process, McManus, among others,[22] challenged such a justification for *latae sententiae* penalties, maintaining that by establishing such penalties, ecclesiastical authority was taking advantage of its position in a way that hardly conformed to the conciliar-inspired image of servant authority. He

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[18]Augustine, 74.

[19]Borras, 52.

[20]Ibid., 53, n. 9.

[21]Augustine, 74-75.

[22]For other similar opinions see the CLSA Report, 130-132 and the British-Irish Report, 4-5.

distinguished between the penal rights of Church authority, which seem to be more of a concern for such authors as Borras and Augustine, and *latae sententiae* penalties *per se*. McManus stated that such penalties, as "the use of threat or entrapment," could be renounced without harming the penal rights of the Church.[23]

The issue, then, is not the Church's right to impose penalties, but the justice of *latae sententiae* penalties *per se*. At least for DePaolis, if *ferendae sententiae* penalties were deemed sufficient to maintain church discipline, which is the purpose of penal law, then *latae sententiae* penalties were neither legitimate nor appropriate.[24] Furthermore, the lack of personal intervention of competent authority as regards the "automatic" application of *latae sententiae* penalties was a serious deficiency in the institute, which could preclude the offender from coming to terms with the harm done to the community, especially in occult cases.[25]

But in the author's opinion, Roberti's five elements of a just penalty provided the most serious challenge to the

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[23]Frederick McManus, "The Internal Forum," in *Actus Conventus Internationalis Canonistarum* (Rome:Typis Polyglottis Vaticanis, 1970) 259-260.

[24]DePaolis, 367.

[25]Ibid., 369-370.

justice of *latae sententiae* penalties *per se*.[26] Although he did not state it categorically, from all the evidence his five elements were constitutive of a just penalty. Roberti noted that *latae sententiae* penalties in the 1917 code were fraught with difficulties, especially for occult cases. One of those difficulties was that such penalties seemed to be missing one of the elements of a just penalty, namely, divisibility. This referred to the adapting of the penalty to fit the crime; but this could not happen in the case of *latae sententiae* penalties since they were automatically incurred upon the commission of the offense. As a result, an offender was "automatically" penalized by a fair number of deprivations and ran the risk of infamy in occult cases. Without the constitutive element of divisibility, *latae sententiae* penalties at least appear unjust even if they are not indeed unjust, especially in occult cases. In short it

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[26]Roberti, 252, n. 225: "Ut poena sit iusta debet esse: 1) *legalis* seu a lege statuta, ita ut non possit a iudicibus pro lubitu determinari; 2) *personalis*, ita ut delinquentem tantum teneat, nec innocentes, e.g. filios afficiat; 3) *proportionata* delicto, et, quantum fieri potest, eidem contraria; 4) *divisibilis* ut possit delicto accom[m]odari; 5) *reparabilis*, ut corrigi possint errores qui in administratione iustitiae humanae facile occurrunt."

Roberti applied his definition of a just penalty to *latae sententiae* penalties: "Poenae latae sententiae frequentius quoque dubium relinquunt suam irrogationem ac difficile dividuntur (cfr. n. 225)," ibid., 279. He also noted that they were fraught with difficulties, especially in occult cases: "Poenae latae sententiae quae suas procul dubio habent utilitates, praesertim ob immediatam et infallibilem applicationem (cfr. n. 225), nonnullis quoque scatent difficultatibus, quia in casibus occultis exhibent *periculum infamiae* et generatim redolent specialem *rigorem*, cum reus tenetur easdem in se ipsum urgere," ibid. [italics original].

is difficult to maintain that they are more effective than *ferendae sententiae* penalties or as effective as they are in safeguarding certain ecclesial values, even in occult cases.

Conclusion

In sum, the author is indebted to all of the canonical scholarship that enabled him to appraise *latae sententiae* penalties critically in terms of their historical, practical and theoretical value. In so doing, he tried to keep before his eyes the good of souls, which is the supreme law of the Church.

APPENDICES

Although the author does not deal with specific *latae sententiae* penalties *ex professo*, the purpose of the appendix is to illustrate principle 9 of the revision process, which called for a reduction in the number of such penalties. Table one of the appendix compares *latae sententiae* penalties in the 1983 code with the 1917 code.[1] There are 17 *latae sententiae* penalties in the 1983 code: 7 excommunications (5 reserved to the Holy See), 4 interdicts and 6 suspensions.

Table two of the appendix compares *latae sententiae* penalties in the 1917 code with the 1983 code.[2] Table two is subdivided into excommunications, suspensions and interdicts because of the number of *latae sententiae* penalties in the 1917 code. Moreover, the abbreviation "FSP" designate those penalties that become preceptive *ferendae sententiae* in the 1983 code.

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[1]For the source of table one of the appendix, see Green, "Sanctions," 937.

[2]For the source of table two of the appendix, see Bouscaren-Ellis, 948-952. The author added the comparison with the 1983 code.

Table 1
Latae sententiae penalties in the 1983 code compared to the 1917 code

1983 code canon	Brief Description of Offense	Nature of Penalty	1917 code canon
1. 1364, §1	Apostasy, heresy or schism	Excommunication	1. 2314, §1, 1°-2°
2. 1367	Violation of sacred species	Excommunication (reserved to the Holy See)	2. 2320
3. 1370, §1	Physical attack on pope	Excommunication (reserved to the Holy See)	3. 2343, §1, 1°,3°
4. 1370, §2	Physical attack on bishop	Interdict	4. 2343, §3
5. 1378, §1	Absolution of an accomplice	Excommunication (reserved to the Holy See)	5. 2367, §1
6. 1378, §2	Pretended celebration of Eucharist or conferral of sacramental absolution by one not a priest	Interdict Suspension (cleric)	6. 2322
7. 1382	Unauthorized episcopal consecration	Excommunication (reserved to the Holy See)	7. 2370
8. 1383	Bishop ordaining without proper dimissorials	Suspension from conferring order for a year	8. 2373, 1°
9. 1383	One ordained without proper dimissorials	Suspension from exercise of order	9. 2374
10. 1388, §1	Direct violation of confessional seal by confessor	Excommunication (reserved to the Holy See)	10. 2367, §1
11. 1390, §1	False accusation of a confessor	Interdict Suspension (cleric)	11. 2363
12. 1394, §1	Attempted marriage of a cleric	Suspension	12. 2388
13. 1394, §2	Religious (non-cleric) in perpetual vows attempting civil marriage	Interdict	13. 2388
14. 1398	Procuring an abortion	Excommunication	14. 2350, §1

Table 2
Latae sententiae penalties in the 1917 code compared to the 1983 code

Excommunications

1917 code canon	Brief Description of Offense	How reserved	1983 code canon
1. 2314, §1	Apostasy, heresy, schism	a) In the forum of conscience, specially to the Holy See b) In the external forum, to the Ordinary	1. 1364, §1
2. 2318, §1	Special books	Specially to the Holy See	2. X
3. 2318, §2	Scripture printed without permission	To no one	3. X
4. 2319, §1, 1°-4°	Marriage before minister; non-Catholic education or baptism	To the Ordinary	4. X
5. 2320	Profanation of sacred species	Most specially to the Holy See	5. 1367
6. 2322, 1°	Mass or confession without priestly orders	Specially to the Holy See	6. 1378, §2
7. 2326	Relics (eg., falsification)	To the Ordinary	7. X
8. 2327	Traffic in Indulgences	Simply to the Holy See	8. X
9. 2330	Crimes in papal elections	Most specially to the Holy See	9. X
10. 2332	Appeals from Pope to council	Specially to the Holy See	10. X
11. 2333	Recourse to lay authority to impede papal documents	Specially to the Holy See	11. X
12. 2334, 1°	Laws contrary to liberty or rights of Church	Specially to the Holy See	12. X
13. 2334, 2°	Recourse to lay authority to impede ecclesiastical jurisdiction	Specially to the Holy See	13. X
14. 2335	Masonic rites	Simply to the Holy See	14. X
15. 2338, §1	Presuming to absolve from *latae sententiae* excommunications specially or most specially reserved	Simply to the Holy See	15. X
16. 2338, §2	Communication with *vitandus*	Simply to the Holy See	16. X
17. 2339	Ordering or compelling ecclesiastical burial of excommunicated or interdicted person	To no one	17. X

Table 2 continued
Latae sententiae penalties in the 1917 code compared to the 1983 code

Excommunications

1917 code canon	Brief Description of Offense	How reserved	1983 code canon
18. 2341	Summoning higher prelate before lay tribunal	Specially to the Holy See	18. X
19. 2341	Summoning prelate lower than own bishop before lay tribunal	Simply to the Holy See	19. X
20. 2342	Various violations of papal cloister	Simply to the Holy See	20. X
21. 2343,§1	Laying hands on the Roman Pontiff	Most specially to the Holy See	21. 1370, §1
22. 2343, §1-2	Laying violent hands on Cardinal *et al.* down to titular bishop	Specially to the Holy See	22. 1370, §2
23. 2343, §4	Laying violent hands on cleric or religious	To offender's own Ordinary	23. X
24. 2345	Usurping property or rights of Roman Church	Specially to the Holy See	24. X
25. 2346	Confiscation of church property	Simply to the Holy See	25. X
26. 2347	Alienation without *beneplacitum*	To no one	26. X
27. 2350	Abortion	To the Ordinary	27. 2350, §1
28. 2351, §1	Dueling	Simply to the Holy See	28. X
29. 2352	Compulsion to clerical or religious state	To no one	29. X
30. 2360, §1	Forgery of papal documents	Specially to the Holy See	30. X
31. 2363	False accusation of solicitation	Specially to the Holy See	31. 1390, §1
32. 2367, §1-2	Absolving accomplice	Most specially to the Holy See	32. 1378, §1
33. 2368. §2	Failure to denounce solicitation	To no one	33. X
34. 2369, §1	Direct violation of seal	Most specially to the Holy See	34. 1388, §1
35. 2385	Apostasy from religion	a) clerical exempt, to his own major superior b) lay or nonexempt, to ordinary of place	35. X

Table 2 continued
Latae sententiae penalties in the 1917 code compared to the 1983 code

Excommunications

1917 code canon	Brief Description of Offense	How reserved	1983 code canon
36. 2388, §1	Marriage with sacred orders or solemn vows (accomplices also)	Simply to the Holy See	36. 1394, §1
37. 2388, §1	Same in case of priest who cannot separate	Most specially to the Holy See	37. 1394, §1
38. 2388, §2	Marriage with simple perpetual vows	To Ordinary	38. 1394, §2
39. 2392	Simony in office, benefice, etc.	Simply to the Holy See	39. X
40. 2405	Tampering with episcopal documents	Simply to the Holy See	40. X

Table 2 continued
Latae sententiae penalties in the 1917 code compared to the 1983 code

Suspensions

1917 code canon	Brief Description of Offense	Nature and Reservation	1983 code canon
1. 671, 1°	Religious of perpetual vows dismissed for minor crimes	General, reserved to the Holy See	1. X
2. 2341	Summoning cleric or religious before lay tribunal	From office, reserved to Ordinary	2. X
3. 2366	Presuming to hear confessions without jurisdiction	*A divinis*, not reserved	3. 1378, §2, 2°
4. 2366	Presuming to absolve from reserved sins	From hearing confessions, not reserved	4. X
5. 2370	Consecrating a bishop without a mandate	General, reserved to the Holy See	5. 1382
6. 2371	Simony in receiving or administrating sacraments	General, reserved to the Holy See	6. 1380 (FSP)
7. 2372	Receiving orders from one under censure	*A divinis* reserved to the Holy See	7. X
8. 2373	Various illegal ordinations	From conferring orders (vindictive, 1 yr.), reserved to the Holy See	8. 1383
9. 2374	Illegal reception of orders	From order so received, not reserved	9. 1383
10. 2386	Religious fugitive in sacred orders	General, reserved to own major superior	10. X
11. 2387	Religious in sacred orders, fraudulent profession	General (vindictive), reserved to the Holy See	11. X
12. 2394, 3°	Chapter admitting official unlawfully in possession	From right to elect, etc. (vindictive) reserved to the Holy See	12. 1381, §1 (FSP)
13. 2400	Resigning office to lay person	*A divinis*, not reserved	13. X
14. 2402	Abbot or Prelate nullius failing to receive blessing	From jurisdiction, not reserved	14. X
15. 2409	Vicar capitular illegally granting dimissorial letters	*A divinis*, not reserved	15. X 16. X
16. 2410	Violating right of Ordinary in ordination of religious	From celebration of Mass (vindictive, 1 month), not reserved	

Table 2 continued
Latae sententiae penalties in the 1917 code compared to the 1983 code

Interdicts

1917 code canon	Brief Description of Offense	Nature and reservation	1983 code canon
1. 2332	College appealing from Pope to Council	Specially to the Holy See	1. 1372 (FSP)
2. 2338, §3	Permitting divine services in interdicted place	From entry into church, not reserved	2. X
3. 2338, §4	Giving cause for local or collective interdict	Personal, not reserved	3. X
4. 2339	Giving ecclesiastical burial to excommunicated person	From entry into church, reserved to Ordinary	4. X

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