(par contre, je le répète, l'association civile diocésaine ayant un objet civil exclusivement limité à l'entretien du culte ne peut accueillir ni l'activité de ces œuvres sanitaires sociales, ni leurs biens).

Dans les cas où le caractère propre confessionnel catholique était jusqu'alors assumé par la supérieure majeure de l'institut religieux, il s'agit d'étudier et de réaliser le transfert de cet exercice d'autorité à une personne physique apte à exercer l'autorité canonique de tutelle catholique. C'est un aspect à étudier davantage.

Avenir (canonique et civil) des *biens ecclésiastiques* : Et en cas de maintien de la contribution de ce support immobilier d'Église et d'origine congréganiste, une association de droit canonique public (et de régime civil associatif) reçoit ces biens avec comme objet civil exclusif l'assistance d'intérêt général.[12]

[12] Frederico AZNAR GIL, *La administracion de los bienes temporales de la Iglésia*, secunda edición, Salamanca, Biblioteca Salmanticensis, 1993; Velasio DE PAOLIS, *De bonis temporalibus. Adnotationes in Codicem Liber V*, Rome, Pontificia Universitas Gregoriana, Facultas Iuris Canonici, 1986; Jean-Claude PERISSET, *Les biens temporels de l'Église. Commentaires des canons 1254-1310*, collection Le nouveau droit ecclésial, Paris, Tardy, 1996; Jean-Pierre SCHOUPPE, *Elementi di diritto patrimoniale canonico*, coll. Trattati di diritto 4, Milano, A. Giuffrè, 1997; Collectif, « Les biens ecclésiastiques (canons 1254-1310) en droit canonique et en droit français », dans *AC*, 47 (2005), pp. 7-85; Henri GLEIZES, « L'exercice de la charité et le droit. L'exemple de deux institutions confessionnelles », dans *AC*, 47 (2001), pp. 139-172; Philippe GREINER, « Les biens des paroisses et le diocèse », dans *Documents épiscopat*, 14 (2005); Silvia RECCHI, « Gestion des biens et bien commun », dans *AC*, 46 (2004), pp. 449-460; Patrick VALDRINI, « À propos du statut juridique et canonique du Secours catholique », dans *AC*, 41 (1999), pp. 279-284, et IDEM, « La gestion des biens dans les diocèses français », dans *Documents épiscopat*, 16 (1997).

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THE 1962 INSTRUCTION *Crimen sollicitationis*: CAUGHT RED-HANDED OR HANDED A RED HERRING?

John P. Beal*

RÉSUMÉ — La lettre apostolique de Jean-Paul II *Sacramentorum sanctitatis tutela*, publiée en 2001, révélait pour la première fois l'existence d'un document disciplinaire secret de la Sacrée Congrégation du Saint-Office remontant à 1962, soit l'Instruction *Crimen sollicitationis*. Étant donné le contexte, soit la crise résultant d'accusations d'abus sexuel lancées contre des prêtres et les accusations de complicité qui n'ont pas manqué de fuser dans les médias après la divulgation de ces normes de 1962, il semble qu'elles méritent de faire l'objet d'un examen plus attentif. L'A. commence par rendre compte de la nature et de la portée de l'Instruction, décrivant le crime de sollicitation et le distinguant de ce qu'il est convenu d'appeler le *crimen pessimum*. Puis il décrit très en détail les procédures requises par les normes lorsqu'il s'agit de juger de causes pénales impliquant de tels crimes. Enfin, il procède à une évaluation des normes elles-mêmes et, à la lumière de modifications des procédures qui ont résulté de la lettre apostolique de 2001, il formule certaines critiques de la notion actuelle de secret pontifical.

Introduction

On April 30, 2001, Pope John Paul II issued the apostolic letter *Sacramentorum sanctitatis tutela*, by which he promulgated norms governing the prosecution of certain more serious delicts reserved to the competence of the Congregation for the Doctrine of the Faith.[1] The apostolic letter and its accompanying norms attracted widespread attention because of their inclusion

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[1] JOHN PAUL II, Apostolic Letter *Sacramentorum sanctitatis tutela*, April 30, 2001, in *AAS*, 93 (2001), pp. 737-739 (= JOHN PAUL II, *SST*), and CONGREGATION FOR THE DOCTRINE OF THE FAITH, Letter *Ad exsequendam ecclesiasticam legem*, May 18, 2001, in *AAS*, 93 (2001), pp. 785-788 (= CDF, *Ad exsequendam*). Although the substantive and procedural *Norms* which the apostolic letter promulgates were not published in the *AAS*, these norms in both Latin and English can be found along with the apostolic letter itself in William WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2nd rev. and updated ed., Ottawa, Faculty of Canon Law, Saint Paul University, 2003, pp. 300-309 (= WOESTMAN, *Ecclesiastical Sanctions*).

among the reserved delicts offenses "against the sixth commandment of the Decalogue committed by a cleric with a minor below the age of eighteen,"[2] and because of the letter's mention of "the Instruction *Crimen sollicitationis* addressed to all Patriarchs, Archbishops, Bishops, and other local ordinaries even of an Oriental Rite, on March 16, 1962" by the Sacred Congregation of the Holy Office, an instruction which also had touched on the delict of sexual abuse of minors by clergy.[3] Interest in this 1962 instruction was heightened when it became known that it was a "secret" document, that is, that its recipients had been instructed that it was "to be diligently preserved in the secret archive of the curia for internal use, not to be published, and not to be elaborated on by any commentary,"[4] and that participants in processes pursuant to its norms were bound by "the secret of the Holy Office."[5]

The shroud of secrecy that had surrounded the 1962 instruction for nearly forty years prompted suspicion that Church authorities at the highest levels had long been complicit in "covering up" the sexual abuse of minors by priests. On CNN, Anderson Cooper asked breathlessly, "What do you make of this

[2] CDF, *Ad exsequendam*, p. 787, and *Normæ Substantiales*, art. 4, §1, in WOESTMAN, *Ecclesiastical Sanctions*, pp. 304-305.

[3] JOHN PAUL II, *SST*, pp. 737-738. The document referred to is SUPREME SACRED CONGREGATION OF THE HOLY OFFICE, Instruction on the Manner of Proceeding in Causes of Solicitation *Crimen sollicitationis*, March 16, 1962, Vatican City, Typis polyglottis Vaticanis, 1962 (= 1962 Instruction). Although an "instruction" was normally an administrative document that facilitated the implementation of the law but did not add to or derogate from it, this instruction did constitute new law. As John Paul II, p. 738, explained: "It is to be kept in mind that an instruction of this kind had the force of law since the Supreme Pontiff, according to the norm of can. 247, §1 of the *Codex Iuris Canonici* promulgated in 1917, presided over the Congregation of the Holy Office, and the instruction proceeded from his own authority, with the Cardinal at the time only performing the function of Secretary" (JOHN PAUL II, *SST*, p. 738).

[4] 1962 Instruction, p. 5: "servanda diligenter in archivo secreto curiæ pro norma interna non publicanda nec ullis comentariis augenda." As the Congregation for the Doctrine of the Faith has made clear, the new substantial and procedural norms promulgated by John Paul II in 2001 replace the 1962 Instruction as the operative law of the Church. CDF, *Ad exsequendam*, May 18, 2001, p. 786. Since the 1962 instruction is no longer the law, its strictures against publication and commentary no longer bind. In any case, since the 1962 Instruction is being cited and commented on in the civil courts of the United States on an almost daily basis, continuation of its prohibition of commentaries seems pointless. The document has become publicly available, albeit in an unauthorized form. It has been posted at http://www.bishop-accountability.org/resources/resource-files/churchdocs/CrimenLatin/pdf. A slavishly literal and not always accurate English translation is also posted at http://www.bishop-accountability.org/resources/resource-files/churchdocs/CrimenEnglish/pdf.

[5] 1962 Instruction, §70, p. 22.

document? Some say it's a smoking gun. Do you think that's true?"[6] More ominously, plaintiff attorneys have charged into court brandishing copies of the instruction and claiming that it proves that the diocesan bishop knew or should have known of the propensities toward sexual abuse of minors of the priests who abused their clients and that abusive priests' dioceses should be held liable for millions of dollars in damages for their negligence. Bishops and other representatives of the Church have responded that portraying the 1962 Instruction as proof "that there was a ground plan for covering up the crime of sexual abuse of minors by clerics...[is] taking the document entirely out of context, therefore distorting it completely."[7] However, many have found such responses less than convincing because of the lack of a larger context within which to situate the 1962 Instruction.

Throughout his long and distinguished careers as a canonist, Monsignor Roch Pagé has excelled in clarifying the meaning and significance of often obscure canonical texts by interpreting them "in their text and context" (c. 17) for scholars and lay people alike. In his careful attention to context, he has served as a model and mentor for us who have come after him. In his honor, this article attempts to provide that needed context for understanding the controversial and much controverted 1962 Instruction of the then Holy Office.

1 — *Nature and Scope of the 1962 Instruction*

The 1962 Instruction *Crimen sollicitationis* was no great innovation in canon law. With a few minor additions, it essentially repeated a previous instruction issued by the Holy Office on the same subject in 1922.[8] From its establishment

[6] CNN.com, Transcripts, "Vatican Secret Document Revealed," aired August 7, 2003; available from http://transcripts.cnn.com/TRANSCRIPTS/se.02.html; accessed March 8, 2007.

[7] UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, Office of Media Relations, "United States Conference of Bishops Responds to Reports About 1962 Vatican Document," August 7, 2003; available at http://www.usccb.org/comm/archives/2003/03-165.shtml; accessed June 22, 2007.

[8] SACRED CONGREGATION OF THE HOLY OFFICE, Instruction *Pagella*, June 8-9, 1922. The 1962 Instruction is identical to this earlier instruction except for three minor additions, all of which deal with situations where the accused confessor is a member of a religious institute. This 1922 instruction was designed to harmonize the existing practice of the Holy Office with the norms of the recently promulgated 1917 Code. Although the 1922 instruction was secret and has never been published, previous versions of this instruction were promulgated as public documents. See SACRED CONGREGATION OF THE HOLY OFFICE, Instruction *Quæ supremus*

by Pope Paul III in 1542, the Sacred Congregation of the Holy Office of the Universal Inquisition (the previous formal name for the present Congregation for the Doctrine of the Faith) has had responsibility for oversight of both faith and morals in the whole Catholic Church, a responsibility that has entailed its particular competence over certain especially serious delicts, particularly those committed in the celebration of the sacraments.[9] The offenses which are the object of the Congregation's special concern are often said to be "reserved" to it.[10]

In the context of penal law, the reservation of delicts to the Congregation has two meanings. On the one hand, what is reserved is the investigation and prosecution of certain delicts, most recently those referred to in *Sacramentorum sanctitatis tutela* and specified in the complementary norms subsequently issued by the Congregation for the Doctrine of the Faith, but previously those stipulated in the 1962 Instruction *Crimen sollicitationis* and elsewhere in the law. This reservation does not preclude lower level authorities such as diocesan bishops from investigating and prosecuting these "reserved" offenses, but, when they do so, they act not in their own names but by special delegation from and according to special norms issued by the Congregation.[11] The reservation of these delicts to the Congregation also entails: 1) the right of the Congregation to receive complaints arising from these delicts directly and to prosecute them itself; 2) the obligation of local authorities to inform the Congregation of their receipt of a denunciation for one of these reserved delicts and to keep it apprised of the development of the case until its conclusion; 3) the exclusive competence of the Congregation to hear appeals and recourses against decisions of the lower tribunals in these cases; and 4) all

Pontifex, February 20, 1866, in *ASS*, 3 (1867), pp. 499-501, and in *Codex iuris canonici fontes*, Petrus GASPARRI (ed.), vol. 4, no. 990, Rome, Typis polyglottis Vaticanis, 1926, pp. 267-272 (= *CIC Fontes*); ID., Instruction *Non raro*, July 20, 1890, in *ASS*, 25 (1892-1893), pp. 451-454, and in *CIC Fontes*, no. 1123, pp. 450-452; ID., Instruction *Instructionis*, August 6, 1897, in *ASS*, 30 (1897-1898), pp. 249-251, and in *CIC Fontes*, no. 1190, pp. 495-496.

[9] For the history of the Congregation and the reservation of delicts to it, see Urbano NAVARRETE, "Commentarium in documentum *Integræ servandæ*," in *Per*, 55 (1966), pp. 614-652 (= NAVARRETE, "Commentarium").

[10] Thus, *Sacramentorum sanctitatis tutela* was issued under the heading "litteræ apostolicæ motu proprio data quibus Normæ de *gravioribus delictis Congregationi pro Doctrina Fidei reservatis* promulgantur" (JOHN PAUL II, *SST*, p. 738, emphasis added).

[11] 1962 Instruction, §2, p. 5. The same principle is asserted a bit more obliquely in CDF, *Normae*, art. 13, in WOESTMAN, *Ecclesiastical Sanctions*, p. 306: "[O]nce the preliminary investigation has been completed, [the local Ordinary] is to communicate the matter to the Congregation for the Doctrine of the Faith which, unless it calls the case to itself because of particular circumstances, will direct the Ordinary or Hierarch [how] to proceed further."

officials involved in investigating and prosecuting these delicts are bound by the "pontifical secret."

On the other hand, what is also reserved to the Congregation is the authority to remit the penalties imposed or incurred as a result of the commission of one of these reserved delicts. For example, according to both the 1917 and 1983 Codes, confessors who directly violate the sacramental seal incur *latæ sententiæ* the censure of excommunication, whose remission is "reserved to the Apostolic See," that is, to the Congregation for the Doctrine of the Faith,[12] and, even if they are imposed by authorities below the level of the Holy See, *ferendæ sententiæ* penalties for reserved delicts can be remitted only by the Congregation.[13]

In his 1588 Apostolic Constitution *Immensa æterni Dei*, Sixtus V charged the Holy Office with the special responsibility of "investigating, citing, proceeding, sentencing and defining in all cases, concerning both manifest heresy and schism, apostasy from the faith, magic, sorcery, divination, abuses of the sacraments, and whatever others which even seem to smack of presumed heresy."[14] This broad charge has been given greater specification over the years in the internal norms and practice of the Congregation and occasionally in public documents. Nevertheless, even as sympathetic a commentator as Navarrete could complain, "What concretely the delicts of this kind may be is not easy to determine."[15] Thus, the enumeration of the delicts reserved to the

[12] 1983/*CIC*, c. 1388, §1; 1917/*CIC*, c. 2369, §1 where the remission of the penalty is reserved to the Holy Office "specialissimo modo."

[13] See 1962 Instruction, §65, p. 21.

[14] SIXTUS V, Apostolic Constitution *Immensa aeterni Dei*, January 22, 1588, in *Magnum Bullarium Romanum*, Luxemburg, Andrae Chevalier, 1727, vol. 2, p. 667. This broad competence has been reiterated again and again. See, most recently, PIUS X, Apostolic Constitution *Sapienti consilio*, June 29, 1908, I, 1°, §2, in *ASS*, 41 (1908), p. 427: "Eidem proinde soli manet iudicium de haeresi aliisque criminibus, quae suspicionem haeresis inducunt"; 1917/*CIC*, c. 247, §2: "Iudicat de iis delictis quae sibimet secundum propriam eius dem legem reservantur"; PAUL VI, Apostolic Letter *Integræ servandæ*, December 7, 1965, §8, in *AAS*, 57 (1965), p. 954: "It is watchful to maintain the dignity of the sacrament of penance, following its own irreproachable and proven procedure"; PAUL VI, Apostolic Constitution *Regimini Ecclesiæ universæ*, August 15, 1967, §36, in *AAS*, 59 (1967), p. 898: "It acts to guard the dignity of the sacrament of penance, proceeding according to its own revised and approved norms"; JOHN PAUL II, Apostolic Constitution *Pastor bonus*, June 28, 1988, art. 52, in *AAS*, 80 (1988), p. 874: "Delicta contra fidem necnon graviora delicta tum contra mores tum in sacramentorum celebratione commissa."

[15] NAVARRETE, "Commentarium," p. 647. See also Brian E. FERME, "Graviora delicta: The Apostolic Letter M.P. *Sacramentorum sanctitatis tutela*," in *Il Processo penale canonico*, Zbigniew SUCHECKI (ed.), Rome, Lateran University Press, 2003, pp. 368-369 (= FERME, "Graviora delicta").

Congregation in *Sacramentorum sanctitatis tutela* and its accompanying norms may be the clearest and most complete account of these reserved delicts in the long history of the Congregation.

The Holy Office's 1962 Instruction *Crimen sollicitationis* dealt with only two of these reserved delicts: the delict committed by a confessor who solicited a penitent for a sexual sin and the delict referred to somewhat euphemistically as "the worst crime" (*crimen pessimum*).

1. The crime of solicitation, which is the principal focus of both the 1962 Instruction and its predecessors, consists in a priest's enticing or prompting a penitent, female or male, to a sexual sin

> either by words or by signs, or by gestures or by touch, or by writing intended to be read either then or later, or through illicit and indecent words or discussion, either in the act of sacramental confession, or before or immediately after confession, or on the occasion or pretext of confession, or even outside the occasion of confession but in a confessional or in some other place designated or chosen for hearing confessions with the pretense of hearing a confession there.[16]

The crime consists in the solicitation itself, whether the untoward advances are submitted to or resisted by the penitent. Any actual sexual sin resulting from the solicitation is a distinct offense. Although there are scattered references to the crime of solicitation in earlier particular legislation, solicitation in the confessional context did not become a subject of universal legislation until the post-Tridentine era with Gregory XV's 1622 Constitution *Universi Dominici gregis*,[17] which also gave special but not exclusive responsibility for the prosecution of this delict to the Congregation of the Inquisition.[18] This constitution was reiterated and expanded by Benedict XIV's 1741 Constitution *Sacramentum pœntitentiæ*, which reserved the investigation and prosecution of the delict of solicitation to the Holy Office. This constitution was incorporated by reference in canon 904 of the 1917 Code and included as an appendix of that code and so remained the universal law governing this delict until 1983.

[16] John Ortega Uhink, *De Delicto Sollicitationis: Evolutio Historica, Documenta, Commentarius*, Canon Law Studies 289, Washington, DC, The Catholic University Press, 1954, p. 141 (= Uhink, *De Delicto Sollicitationis*). See the almost identical description in 1962 Instruction, §1, p. 5.

[17] Gregory XV, Constitution *Universi Dominici gregis*, August 30, 1622, in *CIC Fontes*, no. 201, vol. 1, p. 42.

[18] For a summary of the emergence of the crime of solicitation in the history of canon law, see Uhink, *De Delicto Sollicitationis*, pp. 3-84.

This penal legislation not only provided serious penalties for the priest solicitor but also imposed a legal obligation on the victim to denounce the offense to competent authority within thirty days of being solicited. Penitents who failed to make this required denunciation incurred *latæ sententiæ* the penalty of excommunication which could not be remitted until the denunciation had been made, and confessors to whom the penitent later recounted this crime were bound to warn penitents of this obligation.[19]

The very nature of the act of soliciting a person to commit a sexual sin in the context of sacramental confession marks it as an extremely grave violation of trust and a horrible abuse in the celebration of the sacrament. It is therefore not surprising that canon law has long accorded particular responsibility for this delict to the Congregation of the Holy Office, whose competence has included not only protection of faith and morals but also prosecution of abuses in the celebration of the sacraments. However, there was another connection between the delict of solicitation and the competence of the Holy Office. Since at least Paul IV's 1561 letter *Cum sicut nuper*, priests guilty of the crime of solicitation have been considered heretics or at least suspect of heresy.[20] Although the suspicion of heresy with which those guilty of solicitation were tainted has not always been explicitly stated, the 1962 Instruction stipulated:

> On defendants who have been convicted and have confessed, there is to be imposed as well the abjuration, according to diverse cases, from light or vehement suspicion of heresy which soliciting priests incur because of the very nature of the crime, or even from formal heresy if perchance the crime of solicitation has been linked with false doctrine.[21]

For this purpose, the instruction provides in an appendix a formula for the abjuration of heresy by the convicted confessor.[22]

[19] 1917/*CIC*, cc. 904 and 2368. It is clear from the context and from the standard commentaries that the confessor who was obligated in conscience to warn a penitent of the obligation to report the offense and of the penalty he or she would incur for failing to do so was not the confessor who solicited the penitent but the one who became aware of the offense in the context of the penitent's subsequent confession. Although the 1983 Code has abrogated the positive law obligation of penitents to report solicitation and the penalty for failure to do so, the *moral* obligation of the solicited penitent to report the offense and of subsequent confessors to urge such reporting remains.

[20] Paul IV, Letter *Cum sicut nuper*, April 16, 1561, in *CIC Fontes*, vol. 1, no. 102, p. 181.

[21] 1962 Instruction, §64b, p. 21.

[22] Ibid., Formula B, p. 28.

2. The other reserved delict mentioned explicitly in the 1962 Instruction is the so-called "worst crime" (*crimen pessimum*),[23] i.e., "whatever obscene external, gravely sinful deed committed in whatever way or attempted by a cleric with a person of his own sex."[24] For penal purposes, the instruction equated this *crimen pessimum* with grave, external sexual sins committed or attempted with pre-pubescent children (*impuberibus*) of either sex and with brute animals (*bestialitas*).[25] While the seriousness of such offenses, especially when committed by clerics, cannot be gainsaid, it is not immediately clear why they came to be reserved to the Holy Office, as they have been at least since the 1922 Holy Office instruction which was the predecessor of the 1962 Instruction.[26]

Of course, offenses gathered under the title *crimen pessimum* might have been incidentally connected with another delict reserved to the Holy Office, such as solicitation in a confessional context or attempted absolution of one's accomplice in a sexual sin or even the violation of the sacramental seal. In these cases, the inclusion of the *crimen pessimum* among the reserved delicts offered the advantage of procedural economy by allowing the Congregation to prosecute both delicts in the same penal process. However, this advantage seems an insufficient reason for the Holy Office to reserve the *crimen pessimum* to itself.

Scholars have suggested that the reservation of this delict to the Holy Office stems from the fact that the offenses encompassed by the phrase *crimen pessimum* are so inherently vile, especially when committed by one bound to perfect and perpetual continence, that they disqualified the cleric from serving as a confessor or as a minister of the other sacraments. In other words, the reservation of these offenses was simply a specification of the Holy Office's more general responsibility for the protection of the integrity of the sacraments by insuring the worthiness of their ministers. These same commentators also pointed out that the offenses to which the phrase *crimen pessimum* refers are

[23] The term *crimen pessimum* has traditionally been derived from Genesis 37:2 where, according to the Vulgate, the sixteen year old Joseph "fratres suos apud patrem *crimine pessimo* accusasse." Although this "worst crime" is not further identified in the Bible, Christian commentators, including Thomas Aquinas, have not hesitated to identify it with bestiality or sodomy and this is the sense the expression has acquired in the canonical tradition. See Aurelius YANGUAS, "De crimine pessimo et de competentia S. Officii relate ad illud," in *REDC*, 1 (1946), pp. 427-428, no. 4 (= YANGUAS, "De crimine pessimo").

[24] 1962 Instruction, §71, p. 23. The 1917/*CIC*, c. 88, §2 continued the long tradition of both Roman and canon law by setting the age of legal puberty at fourteen for males and twelve for females.

[25] 1962 Instruction, §73, p. 23.

[26] UHINK, *De Delicto Sollicitationis*, p. 198.

(or at least were) mixed crimes, that is, crimes subject to the jurisdiction both of the Church and of the State and that it would be a source of scandal if a perpetrator were hauled before a secular court for such a scandalous offense while still a cleric. Thus, the reservation of these offenses to the Holy Office was meant to protect the reputation of the Church and avoid scandal by allowing ecclesiastical authorities to be "proactive," that is, to prosecute these offenses before they reached the attention of secular authorities or at least to show that the Church was as severe in punishing these offenses as secular authorities.[27]

Lurking in the background of the reservation of the *crimen pessimum* to the Holy Office, however, was the longstanding conviction mentioned above that those who engaged in deviant sexual behavior were heretics or at least suspect of heresy.

> Numerous heretics of the twelfth and thirteenth centuries and some whole movements, like the Albigensians, were accused of practicing "sodomy," often (though not always) in the specific sense of homosexual intercourse. Civil and ecclesiastical records of trials dealing with heresy mention "sodomy" and crimes "against nature" with some regularity. It became a commonplace of official terminology to mention "traitors, heretics, and sodomites" as if they constituted a single association of some sort. "Bougre," a common French word for heretics, even came to refer to a person who practiced "sodomy" or, more particularly, "a homosexual male."[28]

It was from this French word that the term "buggery" entered English as a vulgar slang synonym for sodomy. In 1179, the Third Lateran Council called for clerics guilty of "that incontinence which is against nature, on account of which the wrath of God came upon the sons of perdition and consumed five cities with fire" to be deposed and consigned to a monastery to do penance and for laymen to be excommunicated.[29] By the thirteenth century, sodomy, whether by a cleric or a lay person, had become, at least in some places, a sin whose absolution was reserved to the pope or a bishop delegated by him.[30] By

[27] YANGUAS, "De crimine pessimo," pp. 433-437.

[28] John BOSWELL, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*, Chicago, IL, University of Chicago Press, 1981, pp. 283-284 (= BOSWELL, *Christianity, Social Tolerance, and Homosexuality*). See also James A. BRUNDAGE, *Law, Sex, and Christian Society in Medieval Europe*, Chicago, IL, University of Chicago Press, 1987, p. 473 (= BRUNDAGE, *Law, Sex, and Christian Society*).

[29] X 5.31.4.

[30] BOSWELL, *Christianity, Social Tolerance, and Homosexuality*, p. 293; BRUNDAGE, *Law, Sex, and Christian Society*, pp. 472-473. See especially the letter of Honorius III to the Bishop of Lund in 1227 in English translation in BOSWELL, *Christianity, Social Tolerance, and Homosexuality*, p. 380.

the post-Tridentine era, secular authorities had assumed the responsibility for enforcing public morality, including sexual morality, which had once been the exclusive province of ecclesiastical courts, but "cognizance of the most heinous and scandalous types of sexual misbehavior," especially by the clergy, devolved to the Inquisition which was institutionalized in the Holy Office.[31] Thus, it is ultimately the link, once in the popular imagination but still in canonical tradition, between sexual deviance and heterodoxy that accounts for the continued reservation of the *crimen pessimum* to the Congregation.

2 — *The Procedural Norms of the Instruction*

Although it is not clear why the Holy Office saw fit to issue a revised instruction on the crime of solicitation in 1962, it is clear that this instruction, like its predecessors, was intended to assist local ordinaries who were confronted with complaints against priests for solicitation in the confessional context or for the sorts of sexual misconduct encompassed by the phrase *crimen pessimum*. Despite the secrecy in which the document itself and processes conducted pursuant to it were cloaked, it is clear that the instruction was not intended to "cover up" sexual misconduct by clerics but to insure that their offenses were prosecuted to the fullest extent of the Church's law.

Both the crime of solicitation and the *crimen pessimum* presented Church authorities with vexing investigative problems. Because of the very nature of these offenses, there were usually few if any witnesses to their commission. Moreover, in cases where solicitation was alleged, the accused confessor was bound by the sacramental seal and thus handicapped in his efforts to defend himself against the accusation. As a result, diocesan bishops could easily be faced with a situation where an accusation of misconduct was lodged against a priest by a solitary individual but the priest vehemently denied the allegation. Since the general rule governing evidence in canonical processes was that the testimony of one witness could not provide full proof in a canonical process,[32] the bishop would have had no choice but to drop charges against an accused priest for lack of sufficient evidence, even though he might have harbored

[31] BRUNDAGE, *Law, Sex, and Christian Society*, p. 574.

[32] Canon 1791, §1 of the 1917 Code clearly articulated the longstanding evidentiary rule that "the deposition of one witness does not provide full proof, unless it is a qualified witness who deposes concerning things done *ex officio*."

strong suspicions that the accusation was not without foundation.[33] The 1962 Instruction, like its predecessors, sought to provide procedural guidance to local bishops so that such evidentiary obstacles would not necessarily thwart effective prosecution of these crimes. In particular, the instruction adapted procedural law for these types of cases by softening the general rule that one witness could not provide full proof and suggesting strategies for bolstering the probative force of the testimony of solitary accusers. These modifications of and elaborations on the more general canonical norms for penal procedure, if carefully followed, would have made successful prosecution of these cases much more likely.

The body of the 1962 Instruction consisted of some preliminary considerations (*Præliminaria*) and five titles or sections dealing respectively with the denunciation of the soliciting confessor (*De prima criminis notitia*), the penal processes itself (*De processu*), penalties for offenses (*De pœnis*), official communications (*De communicationibus officialibus*), and the *crimen pessimum*. Joined to the text of the instruction itself are twenty appendices which provide formularies for use at various stages of the investigation and prosecution of the offenses.

2.1 — Preliminary Considerations (§§1-13)

After repeating the definition of the crime of solicitation found in Benedict XIV's Constitution *Sacramentum pœnitentiæ*, the instruction assigned primary responsibility for the prosecution of complaints of this "unspeakable crime" in first instance to the local ordinaries[34] of the places of residence of

[33] This evidentiary obstacle was not, of course, unique to the Catholic Church. The prosecution of sexual abuse of minors by secular courts was often stymied by lack of witnesses and other corroborating evidence and a tendency to doubt the credibility of accusers, especially when they were still minors. See Lucy S. MCGOUGH, *Child Witnesses: Fragile Voices in the American Legal System*, New Haven, CT, Yale University Press, 1994, pp. 8-22 and Seth L. GOLDSTEIN, *The Sexual Exploitation of Children: A Practical Guide to Assessment, Investigation, and Intervention*, Boca Raton, FL, CRC Press, 1999, pp. 8-9, 207-216.

[34] 1962 Instruction, §3, p. 6. The instruction explicitly excludes vicars general from its enumeration of local ordinaries.

the accused priests.[35] The local ordinary, who acted not in virtue of his own office but in virtue of special delegation granted in advance by the Holy See, was "*gravely bound in conscience to take care that in the future cases of this kind were introduced, examined, and concluded in his own tribunal as soon as possible.*"[36] This competence of local ordinaries, however, did not preclude their referring cases to the Holy Office, victims making their denunciations directly to the Holy Office, or even the Holy Office's calling cases to itself. Moreover, once the penal process was underway, the defendant was free to request that the Holy Office take the case to itself, but, except in cases of appeal, the jurisdiction of the local ordinary remained intact until he was notified that the Holy Office had accepted the defendant's request.[37]

Canon 501, §2 of the 1917 Code prohibited religious ordinaries from meddling in penal cases reserved to the Holy Office, but the instruction authorized these ordinaries to discipline members of their institutes who were found to be delinquent as confessors by monitoring them, imposing penances on them, admonishing and correcting them, and even removing them from ministry. Although the 1922 instruction had also mentioned the possibility of transferring a delinquent religious as one of the disciplinary options available to his religious ordinary, one of the 1962 Instruction's few modifications of its predecessors was to bar religious ordinaries from transferring a member if a local ordinary, who had already accepted a complaint and begun to investigate it but had not yet formally initiated the penal process with a citation, prohibited such a transfer.[38] This modification of the earlier instruction clearly evidenced a desire on the part of the Holy Office that prosecution of religious for solicitation not be thwarted by their transfer outside the jurisdiction of the local ordinary who had already received a criminal complaint.

Although the 1917 Code prescribed that penal cases involving the possible imposition of the penalty of dismissal from the clerical state were to be heard

[35] Ibid., §2, p. 5. This first instance competence of the local ordinary of the "residence" of the accused confessor derogated from the 1917 Code's general norms for competence in penal cases where the tribunal of the "domicile or quasi-domicile" of the defendant or the place where the delict was committed were usually competent. See 1917/*CIC*, cc. 1561 and 1566. The 1962 Instruction's derogation allowed the local ordinary to prosecute complaints against religious confessors who lived in his diocese but whose canonical domicile was elsewhere.

[36] Ibid., §2, p. 5. Emphasis in the original.

[37] Ibid., §2, pp. 5-6. This provision of the instruction was simply a practical application of the general norm of 1917/*CIC*, c. 1569.

[38] 1962 Instruction, §4, p. 6.

by a college of at least three judges,[39] the 1962 Instruction made an exception to this requirement and called for a single judge, the local ordinary himself or a mature priest delegated by him, as the norm for solicitation cases.[40] Despite the instruction's preference for involving as few court officials as possible in the prosecution of solicitation cases, it reluctantly authorized the local ordinary or his delegate to use the assistance of one or more assessors in his weighing of the case or even to delegate a college of three judges to decide the case.[41] Also necessary for the penal process outlined in the instruction were a promoter of justice, distinct from the promoter stably appointed for the diocesan curia, a notary, and a defender or advocate for the defendant. All three of these functions were to be fulfilled by mature priests specifically appointed for the case by or, in the case of an advocate proposed by the defendant, approved by the local ordinary.[42] The local ordinary or judge was authorized, however, to dispense with the use of a notary when receiving denunciations and examining witnesses.[43]

To insure the confidentiality of prosecutions of the crime of solicitation, the instruction bound the local ordinary himself, the promoter of justice, the notary, and any other tribunal officials who might become involved in these cases to secrecy – not only while the case was pending, but even after it was decided – under the so called "secret of the Holy Office."[44] Violators of the "secret of the Holy Office" incurred *latæ sententiæ* the penalty of excommunication whose remission was reserved to the Roman Pontiff personally, except in situations of danger of death. The local ordinary was bound to this "secret" in virtue of his office; other participants in the process were so bound either in virtue of the oath provided in Formula A, which they were to take prior to assuming their function, or in virtue of a precept attached to their commission in the cases of those who were drawn into the process for individual procedural acts.[45]

[39] 1917/*CIC*, c. 1576, §1, 2°.

[40] 1962 Instruction, §5, p. 6.

[41] Ibid., §6, p. 6.

[42] Ibid., §7, pp. 6-7.

[43] Ibid., §9, p. 7.

[44] Ibid., §11, pp. 7-8. From 1962 until 1974, the "secret of the Holy Office" was governed by two papal decrees, one by Clement XI from December 1, 1709, and the other from Clement XIII from February 1, 1759. These two decrees were reproduced in Latin with a commentary by Casimiro Gennari, in *Le Canoniste contemporain*, 21 (1898), pp. 433-453. These decrees were also reproduced with the same commentary in Italian under the headings "Consultazioni," in *ME*, 11 (1897), pp. 174-185.

[45] 1962 Instruction, Formula A, p. 25.

The instruction directed that accusers and witnesses should also be bound by oath to maintain secrecy about their testimony, but it specifically noted that "none of these are to be subjected to censures" for failure to maintain secrecy, unless such penalties were explicitly threatened at the time they actually offered their testimony.[46] It should be noted that the oath of secrecy to which accusers and witnesses were to be bound was not the one that binds to the "secret of the Holy Office" but the more generic oath foreseen by canon 1769 of the 1917 Code: "Witnesses can even be put under an oath to observe secrecy about the question proposed and the responses given to the interrogations until the acts and the things alleged have been published." This temporary obligation of secrecy could be extended in perpetuity if, in the discretion of the judge, the protection of good reputation or the avoidance of scandal so required.[47] Unlike tribunal officials who were bound to maintain confidentiality about everything they learned as part of the penal process and who knew nothing about the case except what they learned during their official participation in the process, accusers and witnesses were bound to confidentiality only about the fact that they had been interrogated, the questions asked them, and their own responses during the process itself. This obligation did not bar them from speaking about what they know independently of the canonical process. In particular, it did not prohibit victims from bringing their accusations to secular authorities. Nor did the instruction bind the accused confessor to the "pontifical secret." The instruction did, however, direct the local ordinary to warn the defendant not to discuss the case with anyone except his advocate and to threaten the penalty of suspension for non-compliance with this warning.[48]

2.2 — The Denunciation (§§15-28)

Since the crime of solicitation was usually committed in circumstances where there are few if any witnesses, it could rarely be successfully prosecuted without a denunciation of the soliciting confessor by his victim. Consequently, the instruction recalls the moral and legal obligations incumbent on victims of solicitation to make denunciations to competent authority. Although the moral obligation to report solicitation bound anyone who became aware of the offense, this moral obligation of the victim of solicitation was bolstered by

[46] Ibid., §13, p. 8.

[47] 1917/*CIC*, c. 1623, §3.

[48] 1962 Instruction, §13, p. 8.

an obligation of positive law to report the offense to the local ordinary within one month of its commission under pain of a *latæ sententiæ* excommunication, which could be remitted only after the victim had made the required denunciation or at least seriously promised to do so.[49] The victim's obligation to report the offense was personal and ceased only with the death of the offender, but it could be fulfilled in a variety of ways: by appearing in person before the local ordinary or his delegate, by letter, or by communicating with the local ordinary through a trusted third party.[50]

Since complaints of solicitation from lay people would usually come to the attention of the local ordinary in a rather informal way, it was important that he translate these informal complaints into formal judicial denunciations. The usual procedure for receiving a formal denunciation was for the victim to appear before the local ordinary or his delegate, who would administer to her an oath to tell the truth, interrogate her pursuant to the questionnaire contained in Formula E of the instruction, reduce the deposition to writing and read it back to the deponent so that she could make any necessary corrections or additions, ask the accuser to sign the emended denunciation, co-sign it along with the notary, and dismiss her after administering an oath to maintain confidentiality about the questioning for the duration of the process or, if deemed necessary, perpetually.[51] Although the one receiving the denunciation could dispense with some of the legal formalities for taking the deposition of a victim, including the use of a notary, he was required to take down an accurate and complete account of the victim's statement so that it could serve as a basis for further investigation and, ultimately, prosecution of the offense.[52]

Once the denunciation was received, the local ordinary was "*bound under a grave obligation* to communicate it as soon as possible to the promoter of justice who had to declare in writing whether or not" it raised a plausible

[49] This obligation and the related penalty go back to Benedict XIV's 1741 Apostolic Constitution *Sacramentum pœnitentiæ* and even earlier, but they were restated in cc. 904 and 2368, §2 of the 1917 Code as well as in the 1922 and 1962 Instructions of the Holy Office.

[50] 1962 Instruction, §19, p. 9. Despite the variety of forms in which a denunciation could legitimately be made, it was important that it identify the one making the complaint. In §20, the instruction repeats the injunction of c. 1942, §2 of the 1917 Code that anonymous denunciations were generally to be ignored, while it recognized that such denunciations might serve as admincular or circumstantial evidence or as the impetus for a more thorough investigation if the circumstances warranted.

[51] 1962 Instruction, §23, p. 10.

[52] Ibid., §§24-26, pp. 10-11, and Formula E, pp. 33-35.

claim that the crime of solicitation had been committed.[53] If the local ordinary disagreed with the promoter of justice's assessment of the case, he was to defer the matter within ten days to the Holy Office.[54] However, if he agreed with the promoter's assessment or if the promoter himself had not already made recourse to the Holy Office against the ordinary's inaction, the local ordinary was either to initiate the canonical preliminary investigation of the delict or to take whatever disciplinary action seemed warranted by the circumstances, and then file the denunciation in the secret archives of the curia for future reference.[55]

2.3 — The Process (§§29-60)

The instruction's treatment of the penal process itself is divided into four sections: the preliminary investigation; the canonical ordering of the process and the admonition of the delinquent; the arraignments of defendants; and the discussion of the case, the definitive sentence and the appeal. In each of these sections, the instruction attempted to adapt the penal procedure of the 1917 Code to make it serviceable for the peculiar circumstances of solicitation cases.

2.3.1 — *The Investigation (§§29-41)*

When the local ordinary received a denunciation that at least seemed to involve the crime of solicitation, he was to initiate a further investigation to attempt to bolster the denunciation with supporting evidence. Once this investigation was opened, the local ordinary could prohibit a religious priest from being transferred by his superior until the process had run its course.[56] The instruction frankly acknowledged the evidentiary problems raised by cases of this kind, but it prescribed a three-pronged investigatory strategy for overcoming these problems.

First, the local ordinary was to scour his own secret archives for records of previous accusations or complaints against the accused and to request the

53 Ibid., §27, p. 11. Emphasis in the original.

54 Ibid.

55 Ibid., §28, p. 11.

56 Ibid, §29, p. 12: "*Aperta inquisitione, si sacerdos denunciatus sit religious, poterit Ordinarius impedire ne alio transferatur ante processus conclusionem.*" Emphasis in the original. This provision of the 1962 Instruction was one of its three modifications to its 1922 predecessor.

local ordinaries where the accused had previously resided and, in the case of a religious priest, his major superior to do the same. Any documentary evidence of previous misconduct could be used as admincular proof of the new accusation or as evidence of recidivism. If this archival search unearthed previous accusations that had not yet been prosecuted, the local ordinary was competent by reason of the connection of cases to prosecute these offenses as part of his prosecution of the current accusation, even if the previous offenses occurred outside his territory.[57] If the accused priest no longer resided in the territory of the local ordinary conducting the investigation, the acts were to be transmitted to his current local ordinary or, if that ordinary was not known, to the Holy Office.[58]

Second, the local ordinary was to try to buttress the credibility of the accuser by questioning two witnesses from the local area who knew both the accuser and the accused confessor well. This effort to bolster the denunciation by circumstantial and admincular proofs was called "making diligent inquiry" (*diligentias peragere*) in the technical language of the Holy Office.[59] Although these witnesses could not be expected to know anything about the specifics of the denunciation, they could shed light on the respective reputations of the two principles in the case. Thus, these witnesses were to be questioned pursuant to Form G about "the life, morals and public reputation of both the accuser and the accused: whether they consider the accuser credible; or, on the contrary, capable of lying, calumny, perjury; and whether they know of any reason for hatred, feuding or enmity between the accuser and the accused."[60] If two witnesses who knew both principles in the case were not available, other witnesses who knew one or the other of the principles could be questioned, even extrajudicially if necessary.[61]

Third, if the accuser mentioned other people who may have been solicited by the same confessor or who had knowledge of the solicitation, even from hearsay, these people should also be called as witnesses.[62] However, care was

57 Ibid., §30, pp. 12-13. See 1917/*CIC*, c. 1567 and commentaries thereon concerning tribunal competence in virtue of the "connection of cases."

58 1962 Instruction, §31, p. 13.

59 Ibid., §32, p. 13. See *Black's Law Dictionary,* Saint Paul, MN, West Publishers, 1990, s.v. "diligent inquiry:" "Such inquiry as a diligent man, intent on ascertaining a fact, would ordinarily make, and it is an inquiry made with diligence and good faith to ascertain the truth, and must be an inquiry as full as the circumstances of the situation will permit."

60 1962 Instruction, §33, p. 13, and Formula G, pp. 38-39.

61 Ibid., §§35-36, pp. 13-14, and Formula H, pp. 40-41.

62 Ibid., §37, p. 14, and Formula I, pp. 42-45.

to be taken in questioning these witnesses lest their own reputation be called into question and undue publicity be given to the inquisition.[63] Throughout its treatment of the interrogation of the accuser and witnesses, the instruction was insistent that every precaution be taken by the local ordinary to protect the confidentiality of the investigation. While this emphasis on secrecy can seem rather exaggerated to the contemporary reader, it was prompted by concern for the reputations both of the accused and of the victim and for the integrity of the investigative process.[64] In the secular world, the same concerns shield from public scrutiny ongoing investigations of criminal cases as well as the deliberations of grand juries. When the investigation was completed, the local ordinary was to communicate the *acta* to the promoter of justice and, if the promoter was satisfied with the conduct of this investigation, it was to be closed.[65]

2.3.2 — *Canonical Ordering and Admonition of the Delinquent (§§42-46)*

Once the preliminary investigation was concluded, the local ordinary, after hearing the promoter of justice, had to decide how to proceed with the case. The instruction presented him with four options:

1) If it was clear that the denunciation was altogether without merit (*prorsus fundamento destitui*) this judgment was to be so declared in the acts of the case and the documentation of the accusation destroyed.[66]

2) If the denunciation seemed to have some basis at least but was still too vague or uncertain to allow for successful prosecution, the local ordinary was to order the file to be deposited in the archives while leaving open the possibility of resuming the case should new information become available in the future.[67]

3) If the evidence supporting the accusation was serious but still insufficient to support a prosecution of the offense, the local ordinary was to issue a canonical warning to the accused, place him under vigilance, and even threaten to initiate a penal process should new accusations be forthcoming.[68] This warning could be made orally by the local ordinary himself or by a delegate or in a letter, but, in either case, a copy of the warning was to be preserved in the case file in the secret archives of the curia.[69] If additional accusations of offenses allegedly committed prior to the warning subsequently surfaced, the local ordinary had to decide whether the first warning was sufficient, whether a new warning should be issued, or whether a penal process should be initiated.[70]

4) If the investigation turned up certain or at least probable evidence of the accused's guilt, the local ordinary was to order that the canonical penal process be begun with the citation and the arraignment of the defendant.[71]

To check any tendency on the part of the local ordinary to excessive lenience, the instruction allowed the promoter of justice to appeal against the decision of the local ordinary not to pursue the case through a penal trial or to impose only a warning on the accused; to temper any tendency to undue rigor, it allowed the accused to make recourse against the penances or penal remedies imposed on him to the Holy Office.[72] However, decisions by the local ordinary to terminate the investigation of a complaint short of a trial, did not extinguish the penal action for the offense. The matter could always be resumed at a later date if new evidence or new accusations were brought forward.[73]

2.3.3 — *The Arraignment of the Defendant (§§47-54)*

If, after hearing the promoter of justice, the local ordinary determined that a penal process was warranted, he was to cite the respondent to appear before himself or the judge delegated by him to answer to the charges. This process of citing the accused to appear before a judge and respond to the charges against him was termed, in the technical language of the Holy Office, "*reum constitutis subiicere.*"[74] It corresponds to what is called in secular criminal procedure the "arraignment."

When the accused appeared in response to the citation, the judge was to confront him with the accusations against him and try paternally and

63 Ibid., §37, p. 14.
64 Ibid., §38, p. 14.
65 Ibid., §41, p. 15, and Formula L, p. 46.
66 Ibid., §42a, p. 15.
67 Ibid., §42b, p. 15.
68 Ibid., §42c, p. 15, and Formula M, p. 47.
69 Ibid., §43, p. 16.
70 Ibid., §44, p. 16.
71 Ibid., §42d, p. 16.
72 Ibid., §45, p. 16.
73 Ibid., §46, p. 16.
74 Ibid., §47, p. 16.

gently to persuade him to confess to the offense.[75] If the accused did confess, his confession was to be taken down accurately and completely in writing. After the accused had confessed, the judge could, after receiving the written animadversions of the promoter of justice, proceed to issue a definitive sentence in the case.[76] The defendant had the option of accepting this sentence along with the penalties it imposed or requesting that the ordinary penal process move forward.[77] Even though he had confessed to the offense with which he was charged, a defendant might request the full penal process so that he would have a fuller opportunity to present evidence that would mitigate his imputability for the delict and lead to a more lenient penalty.

If the defendant denied the accusation or offered a less than complete confession or even confessed but sought the full penal process, the judge was to issue a decree formally charging him with the offenses.[78] At this point, the judge could impose on the defendant all the restrictions usually summarized today under the phrase "administrative leave," a prohibition on the exercise of priestly ministry or at least on the use of the faculty to hear confessions for the duration of the process and even a precept to live in a particular place under vigilance.[79] Following the indictment, the judge was to interrogate the defendant pursuant to the format prescribed in Formula P. This interrogation was to be conducted cautiously so that the judge not reveal the identity of the accusers or even the exact details of the offense with which the defendant was charged. The defendant was never to be induced or allowed to violate the sacramental seal, and the defendant could never be interrogated under oath lest he be forced to incriminate himself.[80] Only after he had responded in general and in particular to all the charges lodged against him and after he was badgered to confess to them was the defendant to be asked "*whether he was able to bring forth anything in his own defense*" and given an opportunity to be assisted by an advocate, either one provided by the curia or one he named himself.[81] If the defendant asked that new questions be posed to the accusers or that additional witnesses be heard, his own interrogation was to be suspended until this new testimony had been gathered.[82] Before the interrogation of the defendant was concluded, a transcript of his testimony was to be given to the

75 Ibid., §48, pp. 16-17.
76 Ibid., §49, p. 17.
77 Ibid.
78 Ibid., §50, p. 17.
79 Ibid., §51, p. 17. 1917/*CIC*, cc. 1956-1957. See John P. BEAL, "Administrative Leave: Canon 1722 Revisited," in *StC*, 27 (1993), pp. 297-320.
80 1962 Instruction, §52, p. 17.
81 Ibid., Formula P, p. 53.
82 Ibid.

promoter of justice who could propose further questions to be asked to the defendant or suggest supplementary evidence that should be gathered.[83]

After completing the interrogation of the defendant and of any witnesses he might have proposed, and securing the consent of the promoter of justice, the judge was to decree the conclusion of the probatory phase of the case.[84] If the defendant was contumacious or if it was impossible to move ahead to try the case in the diocesan tribunal, the local ordinary was to defer the case to the Holy Office.[85]

2.3.4 — *The Discussion of the Case, the Definitive Sentence and the Appeal (§§55-60)*

Once the conclusion of the case had been decreed, the local ordinary or the judge delegated by him was to give the defendant a reasonable period of time within which to submit written arguments in his own defense. Two copies of these arguments were to be submitted, one for the judge and one for the promoter of justice.[86] After the promoter of justice had been given an appropriate period of time within which to submit his response to the defense brief and to recommend an appropriate decision in the case (his *requisitoria*),[87] the judge weighed the evidence[88] and issued a definitive sentence. Unlike secular criminal trials where the defendant is found either "guilty" or "not guilty," a canonical judge had three options. His decision could be "condemnatory, if he was certain of the commission of the crime; or absolutory, if he was certain of [the defendant's] innocence; or dimissory, if from a defect in the evidence he was invincibly doubtful."[89] An absolutory

83 Ibid., §52, p. 17.
84 Ibid., §53, pp. 17-18.
85 Ibid., §54, p. 18.
86 Ibid., §55, p. 18.
87 Ibid., and Formula Q.
88 Oddly, the instruction does not at this point either cite or refer to Benedict XIV's 1741 Constitution *Sacramentum pœnitentiæ*, §1, which, "lest a delict so enormous and injurious to the Church of God remain unpunished because of a lack of proofs, granted [judges in solicitation cases] the faculty of proceeding with solitary witnesses, provided that presumptions, indications and other admincula concurred." 1917/*CIC*, Appendix III.
89 1962 Instruction, §56, p. 18. See Michele LEGA and Vittorio BARTOCETTI, *Commentarius in iudicia ecclesiastica iuxta Codicem iuris canonici*, Rome, Libreria Cattolica Italiana, 1941, vol. 3, pp. 338-342 (= LEGA-BARTOCETTI, *Commentarius*). It is perhaps noteworthy that, although the instruction foresees three possible outcomes of the penal trial, it provides models for definitive sentences only in cases where the sentences was condemnatory. See Formulae R and S.

sentence became *res iudicata* and therefore beyond further legal challenge if it was not appealed within the peremptory period of ten days from the publication of the sentence or if it was confirmed on appeal; however, neither a condemnatory sentence nor a dismissory sentence became *res iudicata* even after a second conformed decision. A condemnatory sentence could be given the favor of a new hearing if the defendant could identify new and substantial evidence that would probably lead to a reversal of the decision; a dimissory sentence left the matter open so that the defendant could be tried again for the same offense if new evidence later became available.[90]

After notifying the promoter of justice of his decision, the judge was to summon the defendant and solemnly read the sentence to him. If the defendant refused or was unable to answer this summons, the sentence was to be sent to him by registered mail.[91] Both the defendant and the promoter of justice retained the right to appeal a sentence within ten days of its communication to them, if one of them believed either that the case was wrongly decided or that the penalties imposed were inappropriate to the circumstances.[92]

All appeals were to be forwarded to the Holy Office, which was exclusively competent as the appellate tribunal in these cases.[93] Although any appeal suspended the execution of the sentence, the sentence could be executed immediately if there was no appeal within the peremptory period of ten days from the communication of the sentence.[94]

2.4 — Penalties (§§61-65)

The instruction reiterated the prescription of canon 2368, §1 of the 1917 Code on the penalties that can be imposed on those found guilty of the crime of solicitation, and it suggested criteria for the appropriate choice of penalties in concrete cases: the number of persons solicited, their age and condition, the form the solicitation assumed, its connection to false doctrine or other delicts, the length of the obscene conversation, and recidivism.[95] Resort to

[90] LEGA-BARTOCETTI, *Commentarius*, vol. 3, pp. 363-368.

[91] 1962 Instruction, §57, p. 18.

[92] Ibid., §58, pp. 18-19.

[93] Ibid., §59., p. 19.

[94] Ibid., §58, pp. 18-19.

[95] Ibid., §62, p. 20. These penalties included suspension from celebrating Mass and from hearing confessions or even being declared disqualified from the same, deprivation of all benefices and dignities, of active and passive voice, and being declared disqualified from acquiring them, and in more grave cases degradation.

the most serious penalty of "degradation" or dismissal from the clerical state was warranted only when "it evidently appears that the defendant sunk in the depth of evil and in the abuse of the sacred ministry, with grave scandal to the faithful and danger to souls, has reached such a degree of boldness and habit that, humanly speaking, there appears no hope, or almost no hope, any longer of his betterment."[96] Despite the instruction's reluctance to sanction the imposition of the penalty of dismissal from the clerical state for confessors found guilty of solicitation, it did recommend a number of additional penalties and penances that could be imposed on offenders according to the gravity of their offenses.[97] Although these penalties and penances could be imposed by the local ordinary or his delegate, their remission was always reserved to the Holy Office.[98]

2.5 — Official Communications (§§66-70)

The 1962 Instruction allowed local ordinaries considerable freedom to pursue complaints of solicitation at the local level, but it was insistent that local authorities keep the Holy Office and others informed of complaints they received and trials they initiated and concluded pursuant to these procedural norms. Thus, the local ordinary was to inform the Holy Office as soon as he received a denunciation of solicitation, and if the priest did not reside in his territory, he was also to inform the local ordinary of his place of residence.[99] When a local ordinary initiated a process against a priest accused of solicitation, he was to inform the Holy Office and, if the defendant was a religious, his superior general of the outcome of the process.[100] If a priest who was condemned or admonished because of complaints of solicitation

[96] Ibid., §63, p. 20. Although the 1983/*CIC* retains only the expiatory penalty of dismissal from the clerical state for the most serious offenses by clerics, the 1917/*CIC* foresaw the progressive disciplining of recalcitrant clerics and provided three distinct but related penalties to achieve this end: "deposition," deprivation of the right of wearing ecclesiastical garb (popularly referred to as "defrocking"), and "degradation." See 1917/*CIC*, cc. 2303-2305. A "deposed" cleric retained the rights and privileges of the clerical state, but he was suspended or deprived of his office and rendered unqualified to receive any office, dignity, benefice, pension or function in the Church. A "defrocked" cleric was deprived both of the right to wear ecclesiastical garb and also of the privileges of clerics, including the right to decent support. A "degraded" cleric was "reduced to the lay state."

[97] 1962 Instruction, §64, pp. 20-21.

[98] Ibid., §65, p. 21.

[99] Ibid., §66, p. 22.

[100] Ibid., §67, p. 22.

transferred his residence, the local ordinary who had penalized or warned him was to inform the priest's new local ordinary of his past offenses and his current juridic status.[101] When a priest who was suspended from hearing confessions because of solicitation but not prohibited from preaching went to another territory to preach, the priest's own local ordinary was to inform the ordinary *ad quem* that the priest was not to be given the faculty to hear confessions.[102] All of these communications were to be made under the secret of the Holy Office.[103]

2.6 — The *Crimen pessimum* (§§71-74)

For the 1962 Instruction, the principle meaning of the phrase *crimen pessimum* is "any obscene, gravely sinful external act in any way committed or attempted by a cleric with a person of his own sex,"[104] that is, an actual or attempted homosexual act. Only secondarily and for penal purposes did the instruction extend the meaning of the phrase to include sexual sins committed or attempted with prepubescent youths of either sex and with animals.[105] The purpose of the inclusion of the *crimen pessimum* so understood in the instruction was to bring the investigation and prosecution of these delicts under the same procedural norms as the crime of solicitation, except that victims of the *crimen pessimum* were not bound by positive ecclesiastical law to denounce the priest within thirty days or incur *latæ sententiæ* the penalty of excommunication.[106] However, victims and others with knowledge of such offenses remained bound by the moral obligation to report them to competent authority.[107]

The instruction states simply that "what has been laid down above concerning the crime of solicitation is also valid, with due consideration only for things which must be changed by the nature of the matter, for the *crimen pessimum*."[108] Thus, when they received denunciations, investigated complaints, arraigned defendants, tried cases, and imposed penalties in cases

[101] Ibid., §68, p. 22.
[102] Ibid., §69, p. 22.
[103] Ibid., §70, p. 22.
[104] Ibid., §71, p. 23.
[105] Ibid., §73, p. 23. The 1917/*CIC*, c. 88, §2 established the ages of legal puberty as fourteen for young men and twelve for young women.
[106] 1962 Instruction, §72, p. 23.
[107] See 1917/*CIC*, c. 1935.
[108] 1962 Instruction, §72, p. 23.

involving this type of offense, local ordinaries were bound to observe the procedural norms prescribed in the instruction. The phrase *mutatis tantum pro rei natura necessario mutandis* obviously authorized the local ordinary to adapt the language of the several formularies provided in the instruction to the context of the investigation and prosecution of cases involving the *crimen pessimum*, and to make other more or less superficial modifications to the procedure.

However, the phrase also touched on a more fundamental difference between the two crimes dealt with in the instruction. The delict of solicitation was a merely ecclesiastical crime, that is, one that directly and principally injured the Church and its members, while the various offenses summarized by the phrase *crimen pessimum* were *per se* mixed crimes, that is, those which violated the laws of both civil and ecclesiastical societies and which the could be prosecuted in the courts of both.[109] Thus, "the nature of the matter" required local ordinaries who were investigating or prosecuting these delicts to make allowances and adaptations to the procedural norms of the instruction to avoid conflicts with the secular laws of their territories.

A feature of the 1962 Instruction that had not appeared in its 1922 predecessor was its provision for religious superiors to proceed against

[109] 1917/*CIC*, c. 2198. See Francis Xavier WERNZ and Peter VIDAL, *Ius Canonicum*, Rome, Gregorian University Press, 1951, vol. 7, p. 50 and 541 (= WERNZ and VIDAL, *Ius Canonicum*). The crime of sexual abuse of minors was such a mixed offense. Although it was incorporated into the criminal codes of most nations, it was also an ecclesiastical crime. The 1917 Code provided the possibility of canonical penalties for perpetrators who were lay (c. 2357, §1), clerics in minor orders (c. 2358), and clerics in major orders (c. 2359, §1). The Church claimed exclusive jurisdiction over this offense and the other species of the *crimen pessimum* when the perpetrator was a cleric in virtue of the privilege of the forum (1917/*CIC*, c. 120, §1). However, since this traditional privilege was not recognized in the laws of most nations, the Church allowed clerics to be tried in secular courts lest the insistence on the privilege by the Church be seen as resulting in "the faithful being impeded from effectively pursuing their rights or the crimes of clerics going unpunished." WERNZ and VIDAL, *Ius Canonicum*, vol. 2, p. 107. Thus, c. 120, §2 of the 1917 Code permitted clerics to stand trial in a secular court with the permission of the local ordinary of the place where the trial was taking place, a permission that "was not to be denied without just and grave cause, especially when the petitioner was a lay person." Indeed, one leading commentator cites the fact that "civil judges in almost all nations, either because in some the privilege of the forum has been abrogated by concordat or custom, or because in others it is not recognized" prosecute clerics accused of the *crimen pessimum* as the rationale for reserving this delict to the Holy Office. YANGUAS, "De crimine pessimo," pp. 436. Yanguas' argument seems to be that it was only by taking swift, decisive and secret action to discipline offending clerics before their crimes reached the attention of the civil courts that the Church could be spared the humiliation of having priests in the public dock as sex offenders. See ibid., pp. 433-437.

members accused of the *crimen pessimum*. Although religious superiors were barred from prosecuting complaints of the crime of solicitation and other delicts reserved to the Holy Office as penal cases, the 1962 Instruction authorized them to proceed judicially or administratively, depending on the nature of the institute and its constitutions, to discipline and even dismiss members accused of the *crimen pessimum*.[110] These superiors were to report the results of these proceedings to the Holy Office, and their decision to dismiss a member for this offense did not take effect until it was approved by the same Holy Office.[111]

3 — *An Assessment of* Crimen sollicitationis

3.1 — The 1962 Instruction: A Harbinger of the Sexual Abuse Crisis?

Contemporary commentators have been riveted on the 1962 Instruction's inclusion of a brief section on the *crimen pessimum* and especially its mention of sexual offenses with pre-pubescent children of either sex. As a result, many have seen in this inclusion a recognition by the Holy See of how widespread the problem of sexual abuse of minors by priests had become even in 1962 (or, more accurately, in 1922, since this final title was already appended to the version of the instruction disseminated in that year). However, it is almost impossible to read the instruction and not reach the conclusion that its treatment of the *crimen pessimum* was a distinct afterthought for its drafters and that the instruction would have been complete even without this brief concluding title. Moreover, nowhere in the instruction's twenty appendices was there as much as a mention of the *crimen pessimum*; the exclusive focus of these appendices was the crime of solicitation and, as the priority they give to feminine pronouns indicated, their presumption was that the victim

[110] Although the 1983/*CIC*, cc. 695, §1 and 746 explicitly mention the sexual abuse of minors as a ground for mandatory dismissal from a religious institute and a society of apostolic life, respectively, the 1917/*CIC* was a bit more vague about the grounds for mandatory dismissal. For example, 1917/*CIC*, c. 656, 1° authorized dismissal of religious under perpetual solemn or simple vows in clerical exempt institutes for "grave external delicts either against the common law or against the special law of the religious." Thus, the instruction specifies the *crimen pessimum* as one of these grave violations of the common law warranting dismissal.

[111] 1962 Instruction, §74, p. 23. There is some question as to how widely the 1962 Instruction was actually circulated. The widespread ignorance of the existence of the instruction until recently even among bishops and canonists suggests that the distribution system for the instruction was flawed.

of these unwanted advances would usually be a woman. It seems clear that the *crimen pessimum* was mentioned in the instruction not because it was thought to be especially prevalent at the time of the drafting, but because it also was an offense which fell under the special scrutiny of the Holy Office and which presented the same sort of evidentiary problems to investigators and prosecutors as solicitation.

Although the 1962 Instruction included the sexual abuse of minors by clerics among the species of the *crimen pessimum*, the sexual abuse of minors was not its primary meaning. The primary meaning of the term *crimen pessimum* in the 1962 Instruction and its principal focus was homosexual sodomy. To the extent that the drafters of the 1962 Instruction (as well as its 1922 predecessor) might have been prompted to append a section on the *crimen pessimum* by concern about contemporary problems of which the Holy Office had become aware, the tenor of the document suggests that these problems would have been priests engaged in homosexual activities with other adults. The sexual abuse of minors was mentioned in the same paragraph with, and given no more emphasis than, the sin of bestiality. There is no reason to think that bestiality was a particularly pressing concern either in 1962 or in 1922. In short, the 1962 Instruction was not "about" the sexual abuse of minors, even though it touched on this issue in a rather peripheral way.

3.2 — The Adequacy of the 1962 Instruction as a Manual for Prosecutors

Like its 1922 predecessor, the 1962 Instruction provided local ordinaries with useful guidance and practical strategies for investigating and prosecuting the crime of solicitation and the various species of the *crimen pessimum*. Its provisions for the use of testimonial witnesses and for the collection of circumstantial evidence to assist in the assessment of the credibility of both the accuser and the accused in these cases were quite creative and, somewhat ironically, placed the Church well in advance of secular authorities of the day in the sophistication of its protocols for investigating sex crimes.

There were two notable omissions from the instruction, however. First, although the instruction refers to Benedict XIV's 1741 Constitution *Sacramentum pœnitentæ* several times, it does not explicitly cite his authorization for tribunals to proceed to conviction in solicitation cases "even with solitary witnesses, provided that presumptions, indications and other admincula concur."[112]

[112] Benedict XIV, Constitution *Sacramentum pœnitentiæ*, June 1, 1741, §1, in 1917/*CIC*, Appendix III.

Perhaps the fact that the constitution as a whole had been incorporated as Appendix III in all editions of the 1917 Code made an explicit mention of this lower evidentiary standard in solicitation cases seem unnecessary. However, since the instruction extended this standard of proof to cases involving the *crimen pessimum* as well, an explicit mention of this issue in the instruction would have been helpful. Second, it is a bit odd that the instruction nowhere mentions that those who filed false denunciations of a confessor for solicitation incurred *latæ sententiæ* the penalty of excommunication reserved in a special way to the Holy See, which could not be remitted until the person had formally retracted the accusation.[113] Since the instruction is elsewhere concerned about the damage to a confessor's reputation that would arise from a false accusation, it is surprising that the threat of the penalty for a false denunciation was not included in the interrogation of the accuser as an additional way of testing her or his veracity and of deterring malicious accusations.

Since copies of the 1962 Instruction have become available, sympathizers with the victims of clergy sexual misconduct have complained about the lack of pastoral sensitivity in the formulary for receiving denunciations from victims. It is true that the questions posed to the accuser betray a considerable skepticism about the truth of her or his complaint and can even at times be characterized as harsh. On the other hand, the instruction's formulary for receiving denunciation of solicitation eschewed the sort of delving into the sexual histories of accusers that was once commonplace during investigations and prosecutions of rape and other sexual offenses by secular authorities. Local ordinaries were admonished by the instruction scrupulously to avoid asking accusers whether they acceded to a confessor's libidinous advances and to stop accusers from volunteering such information. The instruction was also insistent that the names of accusers not be divulged, even to the accused priest. Nor did the instruction require or even allow a face-to-face confrontation of the accuser and the accused. Thus, the canonical process was much more concerned to protect the privacy and anonymity of accusers than were the secular criminal justice systems of the time. Nevertheless, the primary responsibility of the one charged with questioning the accuser was not to offer pastoral comfort and solicitude, but to secure a deposition that could reliably serve as a basis for the prosecution of a delict. As a result, a certain amount of skepticism was warranted by the circumstances of the interrogation.

[113] 1917/*CIC*, c. 2363. See Herbert LINENBERGER, *The False Denunciation of an Innocent Confessor: A Commentary with Historical Notes on the Manner of Making Judicial Denunciations*, Canon Law Studies 236, Washington, DC, Catholic University Press, 1949.

While not beyond criticism, the formulary for questioning the accuser was a model of gentleness by comparison with the formulary for arraigning the defendant. The latter called upon the inquisitor to badger the defendant, perhaps over a period of several days, until he confessed to the crime of which he was accused. During at least the initial phases of this interrogation, the defendant was not permitted the assistance of an advocate. Nor was he to be informed of the identity of his accuser or even of the exact nature of the offense with which he was accused.[114] From the defendant's perspective, the process prescribed in the 1962 Instruction had all the hallmarks of a star chamber proceeding and was hardly a model of due process.

3.3 — The Problem of Secrecy

3.3.1 — *The Secrecy of the Instruction Itself*

The 1962 Instruction, like its 1922 predecessor, was not published in the *Acta Apostolicæ Sedis* or in any other publicly accessible source, but distributed to diocesan bishops with the instruction that it was to be "diligently preserved in the secret archive of the curia for internal use, was not to be published, and was not to be elaborated on by any commentary."[115] Since the existence of the 1962 Instruction came to public attention in 2001, the secrecy in which this instruction itself and proceedings pursuant to it were enshrouded has prompted frequent and vociferous criticism. The secrecy has provided fodder for critics of the Church's handling of complaints of sexual abuse of minors by priests in general and has even prompted charges that the instruction's insistence on secrecy represents an attempt by the Church authorities to "cover up" the problem.

In defense of the Holy Office's practice, it can be argued that its insistence on maintaining the secrecy of the 1962 Instruction and particularly of its

[114] 1962 Instruction, §52 and Formula P. This prohibition on revealing to the defendant the name of his accuser was somewhat mitigated by the 1974 norms revising the rules on the "secret of the Holy Office." SECRETARIAT OF STATE, Instruction *Secreta continere*, February 4, 1974, art. I, 4, in *AAS*, 66 (1974), pp. 89-92, at p. 90, English translation in *CLD*, vol. 8, pp. 207-208 (= SECRETARIAT OF STATE, *Secreta continere*), recognizes "the right of him who has been reported to authorities to know of the denunciation, if such knowledge is necessary for his own defense. However, it will be permissible to make known the name of the denouncer only when the authorities think it opportune that the denounced and the denouncer come face to face."

[115] Ibid., p. 5.

formularies for questioning accusers, witnesses, and defendants was not at all sinister but simply the adoption of what was and is the standard practice by law enforcement agencies generally to protect the confidentiality not only of their sources and ongoing investigations but also of their investigative manuals and protocols. After all, the CIA and the FBI have protocols for investigating "moles" and terrorism suspects, which are not publicly available.[116] When viewed in the light of the practice of most law enforcement agencies, the reservation of the 1962 Instruction in the secret archives of the diocesan curia until it was needed to deal with an actual complaint made a considerable amount of sense. The instruction was a very detailed and technical procedural manual for the use of local ordinaries and those who assisted them in investigating and prosecuting cases of solicitation and the *peccatum pessimum*. It could be argued that these officials were the only ones who had a genuine "need to know" about this procedure and that dissemination of the documents outside this closed circle might compromise investigations by alerting suspects to the questions that would be posed to them.

The lack of publicity attendant to the 1962 Instruction may not have been an insuperable obstacle to its effectiveness as a tool for enforcing ecclesiastical discipline in the years after it was first issued in 1922 and even in the years immediately following its re-issuance in slightly amplified form in 1962. Since everything outsiders needed to know about the seriousness of the offenses dealt with in the instruction and the obligation of reporting them was available in public sources, it could be argued that no harm was done by maintaining the secrecy of the document itself. On the one hand, it is hard to imagine that any Catholic was not aware that the various sins against the sixth commandment of the Decalogue gathered under the rubric of the *crimen pessimum* and the abuse of the office of confessor to solicit a penitent for sex were grave violations of the moral law and were particularly reprehensible when committed by clerics. On the other hand, the fact that

[116] Exempt from disclosure under the Freedom of Information Act are "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, and, in the case of a record compiled by a criminal law enforcement agency in the course of a criminal investigation, or by an agency conducting a lawful national security investigation, confidential information furnished only by a confidential source, (E) disclose investigative techniques and procedures." The Freedom of Information Act, codified at *U. S. Code* 5 [2000], §502, (b) (7).

solicitation and the *crimen pessimum* were also canonical delicts punishable by severe sanctions and that victims of these offenses had an obligation to report them to ecclesiastical authorities was a matter of public record in the *Code of Canon Law* itself. Although lay people, who were the most likely victims of these crimes, might not be aware of the details of canon law, confessors, who were supposed to be aware of these matters, were to alert them to the gravity of these matters and of their obligation to report these offenses, and, if need be, to threaten canonical sanctions and refusal of absolution if they failed to do so. In addition, the seriousness of these offenses, their reservation to the Holy Office, and, at least in general, the procedure to follow when confronted with them were topics dealt with in the manuals of moral theology[117] and canon law[118] used in seminary formation and were broached at study days and other opportunities for continuing formation after ordination.[119] Thus, Yanguas could say with confidence in 1947, "*knowledge of the* crimen pessimum *and of the shape of the process for [dealing with] it* is considered to be divulged universally among clerics today."[120]

One can be skeptical of Yanguas' claim about how widespread knowledge of these matters actually was even among the clergy in his day, but he was correct that the information most people, both clergy and lay, needed to know should a complaint of solicitation or one of the permutations of the *crimen pessimum* arise was at least accessible. Not long after the 1962 Instruction was disseminated, however, the Church underwent profound upheavals in the way in which the clergy were formed. The traditional manuals of moral theology were jettisoned; the study of canon law was relegated to a minor place in the seminary curriculum, and canon law itself was not widely viewed as an appropriate instrument for enforcing ecclesiastical discipline; as the study of Latin became at best marginal to priestly formation, fewer priests were able to read official documents in that language; junior clergy examinations which had pressured the newly ordained to remain abreast of developments in Church teaching and practice vanished;[121] and the focus on ongoing clergy formation shifted from *casus conscientiae* in confessional practice to more "pastoral"

[117] See, for example, Thomas Iorio, *Theologia moralis*, Naples, M. D'Auria Editori, 1954, vol. 2, pp. 158-159.

[118] See, for example, Wernz and Vidal, *Ius Canonicum*, vol. 7, p. 584; Eduardo Regatillo, *Institutiones iuris canonici*, Santander, Sal Terræ, 1951, vol. 2, pp. 571-572.

[119] See, for example, Ulpianus Lopez, "Casus Conscientiæ – I," in *Per*, 27 (1938), pp. 32-35. Yanguas, "De crimine pessimo," p. 438.

[120] Yanguas, "De crimine pessimo," p. 438. Emphasis in the original.

[121] See 1917/*CIC*, c. 130, §1.

and "relevant" subjects. As a result, the traditional channels by which the clergy (and, through them, the laity) were kept abreast of their responsibility when they became aware of the offenses treated in the instruction quickly eroded. Meanwhile, the 1962 Instruction gathered dust in the secret archives of diocesan curias until a reference to its existence in the Holy Father's 2001 apostolic letter took most people, including most bishops, by surprise. What is truly surprising is that there is no evidence that the Holy See reminded bishops of the existence of this document and of their obligation to follow it as the clergy sexual abuse crisis began to unfold in the United States and elsewhere during the 1980s and after.

Defenses of the policy of maintaining the confidentiality of the 1962 Instruction are not without merit, but they overlook the most serious harm that resulted, albeit inadvertently, from this secrecy. This secrecy was so strictly observed that those for whom the instruction was intended were, for the most part, unaware not only of the procedure set forth in the document but even of its existence. As a result of this ignorance, local ordinaries and those who assisted them could not and did not use the procedure prescribed in the instruction when they were confronted with accusations of misconduct. The Congregation for the Doctrine of the Faith seems to have seen the wisdom of these criticisms of the secrecy in which previous instructions were shrouded. It has made its 2001 substantive and procedural norms for cases involving reserved delicts (but not formularies and detailed norms for specific cases) more accessible than were those of the 1962 Instruction.[122] Although these norms were not published in the *Acta Apostolicæ Sedis*, the Congregation has permitted their publication elsewhere both in Latin and in vernacular languages as well as scholarly commentaries on them.

3.3.2 — *The Secrecy of Processes Pursuant to the Instruction*

As was explained earlier, any actual investigations and prosecutions of complaints of solicitation and the *crimen pessimum* fell not only under the general requirement of secrecy that was attached to the 1962 Instruction itself, but also under the more exacting requirements of the "secret of the Holy

[122] CDF, *Ad exsequendam*, in WOESTMAN, *Ecclesiastical Sanctions*, p. 313 stipulates that, in addition to the norms of the Code for penal processes, tribunals are to observe "the special norms which are transmitted by the Congregation for the Doctrine of the Faith for an individual case and which are to be executed entirely."

Office"[123] (which, since 1974, has been known as "the pontifical secret").[124] Originally, this secret bound the members and staff of the Holy Office itself, but its reach was gradually extended to outsiders who in any way became involved in business proper to the Congregation.[125] Since the crimes of solicitation and the *crimen pessimum* were reserved to the Holy Office, those who became involved in their investigation and prosecution at the local level were by that fact bound by the "secret of the Holy Office." Although accusers and witnesses were not bound by the "secret of the Holy Office," at the completion of their testimony, they could be required to take an oath of secrecy about the questions asked them, the responses they gave, and even about the fact that they had been interrogated. It did not, however, prohibit accusers and witnesses from speaking to others, with due regard for the right to a good reputation, about what they knew independently of this process. One can doubt, however, that the average lay person would make such fine casuistic distinctions about what was and what was not covered by the oath of secrecy. Thus, the imposition of such an oath may well have deterred some victims from reporting crimes to secular authorities

Although the revisions of the law governing this "secret of the Holy Office" by authority of Paul VI abrogated the *latæ sententiæ* excommunication incurred by violation of this secret, it retained the obligation of what was now called the "pontifical secret" for all who in their official capacity became aware of "extrajudicial denunciations received regarding delicts against the faith and against morals, and regarding delicts perpetrated against the sacrament of penance. Likewise, the process and decision which pertain to these denunciations."[126] The more recent substantive and procedural norms

[123] Although attention has been focused on the "pontifical secret" as it applies to prosecutions of reserved delicts, it has also applied to such matters as information relating to diplomatic correspondence, the nomination of bishops and cardinals, doctrinal examinations, and the preparation of papal documents.

[124] The matter of the "secret of the Holy Office" was wholly revised and renamed the "pontifical secret" by Pope Paul VI in 1974. See SECRETARIAT OF STATE, *Secreta continere* (see note 115). Particularly worthy of note is the fact that this revision abrogated the *latæ sententiæ* penalties of excommunication reserved to the Roman Pontiff personally that the previous law had threatened for violations of the "secret of the Holy Office."

[125] Pius X extended this secret to include the members, consultors and employees of the Consistorial Congregation (the present Congregation for Bishops). See PIUS X, *Ordo servandus, normæ peculiares*, in *ASS*, 41 (1908), pp. 712-713. It was extended again in 1925 to include the Congregation of Extraordinary Ecclesiastical Affairs, the dicastery responsible for the Holy See's relations with secular governments and the papal diplomatic corps. See PIUS XI, Notificatio, July 25, 1925, §4, in *AAS*, 18 (1926), p. 89.

[126] SECRETARIAT OF STATE, *Secreta continere*, art. I, 4, in *CLD*, vol. 8, pp. 207-208.

of the Congregation for the Doctrine of the Faith still stipulate: "Cases of this kind are subject to the pontifical secret."[127]

The preamble of the norms revising the "secret of the Holy Office" defended this secrecy on the ground that these matters "if revealed, or if revealed at the wrong time and in the wrong way, are prejudicial to the building up of the Church, or destroy the public good, or, finally, offend the inviolable rights of individuals and communities."[128] It has been argued that the continued protection of denunciations and processes to investigate and prosecute delicts reserved to the Congregation for the Doctrine of the Faith even in the most recent norms is justified on the ground that such secrecy was

> necessary not to encourage undue or morbid interest in this delicate and particularly serious material. This approach is not based on a simplistic idea of keeping the question secret but rather is aimed at safeguarding the interests and reputation both of the accused and the victims. Given the nature of the *graviora delicta* victims also have a right to confidentiality if they choose to exercise it. This naturally also applies to the accused. As far as reasonably possible we should avoid the possibility that certain individuals might take particular delight in using the norms to make unjust and unfounded accusation. The nature of the *graviora delicta* suggest[s] that it needs to be treated with great care and sensitivity in order to avoid any potential disrespectful exaggeration or abuse in the public forum.[129]

In fact, if victims of solicitation or the *crimen pessimum* were aware of the extent to which Church authorities were bound to maintain confidentiality about their complaints and even their identities, they might have been more inclined to come forward with denunciations.

Concern for the reputations of victims and defendants and for the integrity of the penal process are certainly legitimate reasons for maintaining an appropriate degree of confidentiality about denunciations and about investigations and prosecutions that are still in progress. However, insisting on

[127] *Normæ*, art. 25, §§1-2, in WOESTMAN, *Ecclesiastical Sanctions*, p. 308. It seems that the current CDF norms are less comprehensive in what they bring under the scope of the "pontifical secret." Woestman notes: "It seems that the *graviora delicta* are included under pontifical secrecy or confidentiality and the norms of *Secreta continere* only once the matter is brought to the Congregation for the Doctrine of the Faith [and, therefore, only after the reception of a denunciation and the completion of the preliminary investigation]. Prior to that the matter is often confidential by its nature either as a natural, committed, or professional secret" (WOESTMAN, *Ecclesiastical Sanctions*, p. 309).

[128] SECRETARIAT OF STATE, *Secreta continere*, p. 89, *CLD*, vol. 8, p. 206. The footnote to *Normae*, art. 25, §1, in WOESTMAN, p. 309, makes clear that the norms of *Secreta continere* remain the *ius vigens*; it cites the 1999 *Regolamento generale della Curia Romana*, art. 36, §2, in *A.A.S.* 91 (1999), p. 646.

[129] FERME, "Graviora Delicta," p. 273.

secrecy even long after the process has reached its conclusion is more difficult to justify. Blanketing everything connected with denunciations and the penal process under the "pontifical secret" in perpetuity seems inimical to other ecclesial values and, quite frankly, counterproductive.

It is particularly difficult to understand how withholding the name of the accuser from the accused (and even the denunciation itself) once the process is underway can be reconciled with the defendant's "right of defense," which the Magisterium has elsewhere claimed is guaranteed by the natural law itself. Nor is it clear that enjoining perpetual silence under the pontifical secret was or is a particularly effective way to safeguard the reputation either of the accuser or of the accused. When word of a complaint leaked out, as it inevitably would and does in an open society, even after the case has been concluded, the diocesan bishop was and is barred by the pontifical secret from stating publicly that the ecclesiastical process had established either that the accuser's complaint was founded or that the accused was found not guilty of the offense. This officially imposed silence could result in damage to the reputations of both: to the reputations of accusers since the absence of official confirmation of the truth of their claims taints them in the public mind as malicious gossips or even liars, and to the reputations of falsely accused priests since the absence of official vindication leaves them under the cloud of suspicion.

Like all members of the Christian faithful, the clergy enjoy and should enjoy the right to a good reputation.[130] However, when a person's conduct belies the reputation he enjoys in the community, he no longer deserves the good reputation he enjoys, and it is not illegitimate, for proportionate reasons, to make known the discrepancy between the person's actual conduct and his reputation, even though such a revelation is inevitably injurious to the latter. Restoring justice after it has been breached by criminal actions and preventing future injustices are critical functions of penal law, which can provide the proportionate reasons for revealing information about the outcome of penal processes, even though these revelations are damaging to reputations. When the Christian community or a portion of it is already aware that a priest has been accused of serious misconduct, restoring justice requires that those responsible for the care of the community provide that community with sufficient information either to rehabilitate the priest's damaged reputation or to assure the community that appropriate remedial action has been taken. Protecting reputations is an important value, but not one that trumps all others. Finding the appropriate balance between the full

[130] 1983/*CIC*, c. 220.

disclosure characteristic of tabloid journalism and the blanket confidentiality required by the "pontifical secret" is a challenge, but it is a challenge that Church authorities cannot shirk in the present climate.

Even if the community was not previously aware of complaints of wrongdoing by a priest, preventing future injustices entails providing sufficient information to allow members of the community to protect themselves and their loved ones against new infractions. In recent years, the most vehement criticism of the Church's handling of complaints of the sexual abuse of minors by priests has been leveled at the practice of reassigning priests guilty of misconduct to ministry with no notice or warning to the faithful they were to serve or even to the other ministers with whom they served about restrictions imposed on their ministries or the need to be vigilant about their dangerous propensities. The secrecy imposed by the 1962 Instruction and even the more recent 2001 norms about denunciations, processes, and decisions in these cases can easily be seen – and has been seen by many – as an official sanction for such irresponsible behavior by Church authorities. When a priest was reassigned to ministry after a process resulted in a conclusion that was neither his full vindication nor his dismissal from the clerical state, the silence imposed by the "pontifical secret" could set the stage for recidivism with disastrous consequences both for victims and for the Church.

To the extent that it contributed to an inadequate restoration of justice when it had been breached and a prevention of injustice when it was threatened, the silence imposed by the pontifical secret has often had the deleterious consequence foreseen by the Holy See itself: "When ecclesiastical authorities are unwilling to give information or are unable to do so, then rumor is unloosed, and rumor is not a bearer of the truth but carries dangerous half-truths."[131] In recent years, the swirl of rumors unloosed by the absence of timely and truthful information from Church officials about denunciations and the results of investigations and disciplinary proceedings has given rise to an atmosphere of cynicism and mistrust. Although the 1962 Instruction and the subsequent legislation justified their invocation of the "pontifical secret" by an appeal to concern for the reputations of both accusers and the accused, it is hard to avoid the conclusion that the overriding motivation was to protect

[131] PONTIFICAL COUNCIL FOR SOCIAL COMMUNICATION, Instruction *Communio et progressio*, January 29, 1971, §121, in *AAS*, 63 (1971), p. 636, English translation in Austin FLANNERY (ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents*, Northport, NY, Costello, 1975, p. 332. Although this paragraph of the instruction is cited in the preamble to the revision of the law governing the pontifical secret, the section cited above is omitted.

the reputation and public image of the Church itself. It is ironic, therefore, that concerted efforts of ecclesiastical authorities to keep the Church's public image unsullied by maintaining secrecy about its "dirty laundry" has tarred the Church's reputation more badly than timely revelations of clergy misconduct ever could have. After all that has come to light in recent years, restoring justice and restoring trust will require a much greater transparency in Church official's dealings with clergy misconduct than the "pontifical secret" allows.

Conclusion

While it is not hard to be critical of the attempt of the 1962 Instruction, and particularly of its efforts to cloak investigations and prosecutions of complaints of the crime of solicitation and the *crimen pessimum* in secrecy, it would be a mistake to lay the blame for the debacle that has been unfolding over the past decade or more on the 1962 Instruction itself. This instruction was clearly aimed at insuring that these offenses were vigorously prosecuted and that offenders were severely punished and, if the circumstances warranted, dismissed from the clerical state. The instruction was willing to soften traditional rules of evidence and abridge due process to achieve that end. The principal problem was not the secrecy that the instruction enjoined, but the fact that the instruction was rarely (if ever) used, and barely (if at all) known.

There is precious little evidence that, when diocesan bishops received complaints of solicitation or, more frequently it appears, the *crimen pessimum*, they were aware that the instruction was available in their secret archives as a resource or that they would have been inclined to use it if they were aware of its existence.[132] Canon lawyers who advised and assisted diocesan bishops also seem to have been largely unaware of this instruction or at least of its applicability to cases involving the sexual abuse of minors. Even Thomas Doyle, who was an official at the Apostolic Nunciature in Washington when the news of sexual abuse cases in Lafayette, Louisiana, began to break in the 1980s and distributed to bishops a canonical handbook for dealing with abuse cases, seems to have been unaware of the 1962 Instruction until John Paul II's 2001 *motu proprio* alerted him to its existence.[133] The explanation for the

[132] John J. COUGHLIN, "The Clergy Sexual Abuse Crisis and the Spirit of Canon Law," in *Boston College Law Review*, 44 (2003), pp. 977-997, esp. pp. 986-992.

[133] Thomas P. DOYLE, A. Richard SIPE, and Patrick J. WALL, *Sex, Priests, and Secret Codes: The Catholic Church's 2000 Year Paper Trail of Sexual Abuse*, Los Angeles, Volt Press, 2006, pp. 47-50.

silence that enshrouded complaints of sexual abuse of minors by priests until recently has to be sought not in canon law but in organizational psychology and an institutional culture that valued secrecy even without the explicit threat of penal sanctions. However, in the context of maintaining ecclesial order and discipline, this institutional penchant for secrecy was compounded by a tendency to see canon law as part of the problem rather than as part of the solution. As Roch Pagé has been reminding us for years, ignorance of and disdain for canon law inevitably exacts a price. In recent years, we have learned that that price can be steep indeed.

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L'INTERROGATION DES PARTIES ET DES TÉMOINS DANS LA CAUSE EN NULLITÉ DE MARIAGE SELON LA FORMULATION DU DOUTE

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SUMMARY — Rare is it that a judge in a marriage tribunal has not, at times, in the search for truth and moral certitude concerning the validity or invalidity of a marriage bond, deplored the sparsity of proofs, more so when the cause cannot infrequently be traced back to poor auditions of parties and witnesses. This article looks at the role of the auditor, the proofs required when judging different grounds for nullity, and offers suggestions for the interrogation of deponents in relation to defects of psychological nature, of intelligence, and of will.

Introduction

Il n'est pas que peu frustrant pour un juge, qui n'est pas sans percevoir qu'un mariage lui semble présenter toutes les apparences de nullité, de réaliser que les actes de la cause n'arrivent tout simplement pas à lui fournir ce dont il ou elle a besoin pour en arriver à une décision qui soit juste et équitable, fondée en droit et en faits.

De nos jours, les tribunaux ont le plus souvent recours à des auditeurs pour entendre les dépositions des parties et des témoins. Sans leur précieux service, il serait fort difficile de mener à terme et dans un délai convenable les nombreuses causes soumises à un examen judiciaire. Or, n'avons-nous pas entendu à maintes reprises que l'auditeur « doit être les oreilles et les yeux du juge »? Pour être en soi un prolongement du juge, il arrive que certains auditeurs aient reçu la formation nécessaire pour mener une enquête judiciaire qui soit logique et complète, qu'ils soient capables de rechercher les preuves dont le juge aura besoin pour en arriver à une décision selon la formulation du doute quant à la nullité du mariage. Mais il arrive trop souvent, hélas, que d'autres auditeurs, bien que consciencieux et désireux de remplir soigneusement leur

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