

THE CATHOLIC UNIVERSITY OF AMERICA

Penalties as a Service to the Church's Mission:
A Comparison of the *Codex Iuris Canonici* and *Codex Canonum Ecclesiarum Orientalium* to
Develop Principles for a Proposed Revision

A THESIS

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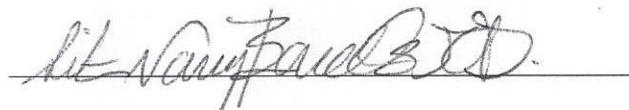
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ABBREVIATIONS

AAS	<i>Acta Apostolicae Sedis</i>
CCC	<i>Catechism of the Catholic Church</i>
CCEO	<i>Codex Canonum Ecclesiarum Orientalium</i>
CIC	<i>Codex Iuris Canonici</i>
CLSA	Canon Law Society of America
D	<i>Digest</i>
EV	<i>Enchiridion Vaticanum</i>
LG	<i>Lumen Gentium</i> , dogmatic constitution on the Church from the Second Vatican Council
PL	<i>Patrologia Latina</i> , J. P. Migne
S.Th.	<i>Summa Theologicae</i> of Thomas Aquinas

Introduction

Since the promulgation of the *Codex Iuris Canonici* some thirty-six years ago by Pope St. John Paul II, the Catholic Church has become acutely aware of the necessity and usefulness of penal law as a service to its mission. The eminent canonist, Msgr. Thomas J. Green states: “While the Church is a graced community empowered by the Spirit, its members are sinners reflecting the limitations of the human condition. . . . Hence there needs to be a framework to restore ecclesial peace and order and reintegrate the offending party within the community.”¹ The Catholic Church is a communion of Churches, *sui iuris*² and particular,³ and “of faith, sacraments, and ecclesiastical governance”⁴ and this communion is preserved, in part, by penal law which serves to restore justice, repair scandal, maintain order, provide for the safety of the Christian faithful, and reintegrate those who have injured this complex communion. “Penal law is necessary in light of the Church’s societal character; yet it is unique and differs from civil penal law in light of the Church’s salvific character.”⁵ Canon 1752 of the Latin code states that the “salvation of souls” is the supreme law of the Church⁶—the mission of the Church—and thus creates the background for ecclesiastical penal law.

¹Thomas Green, “Sanctions in the Church,” in *New Commentary on the Code of Canon Law*, ed. John P. Beal et al. (New York/Mahwah, NJ: Paulist Press, 2000) [hereafter *New Commentary*] 1529.

²See *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (Vatican City: Libreria Editrice Vaticana, 1990) cc. 27-28 and *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (Vatican City: Libreria Editrice Vaticana, 1983) c. 1.

³See *CIC*, c. 368.

⁴*CIC*, c. 205: “. . . fidei, . . . sacramentorum et . . . ecclesiastici regiminis.”

⁵Thomas Green, “The Revision of Canon Law: Theological Implications,” *Theological Studies* 40/4 (Dec. 1, 1979) 607.

⁶See *CIC*, c. 1752: “et prae oculis habita salute animarum, quae in Ecclesia suprema semper lex esse debet.”

By exploring canons 1311 in the 1983 *Codex Iuris Canonici* and 1401 in the *Codex Canonum Ecclesiarum Orientalium*, the foundational norms for the penal law in each code, the purpose of penalties as a service to the mission of the Church will provide a foundation for the development of principles for proposed developments. Neither canon 1311 nor 1401 provide a purpose for penal law, yet canon 1341 of the Latin code gives three reasons for penalties: restore justice, repair scandal and reform the offender.⁷ Canon 1311 expresses the fundamental right to coerce with penalties grounded in an ecclesiology that expresses the incarnation of the mystical body of Christ in the world⁸ which can be parsed into a multipurpose aim for the preservation of *communio*, the reform of the offender, restoration of justice and peace, the healing of injury and scandal, and the deterrent of future offenders. On the other hand, canon 1401 in the Eastern code contains an implicit expression of the fundamental right to coerce with penalties and an explicit pastoral exhortation to bishops to preserve *communio* through preventative measures and apply penalties as a last resort for a singular purpose: the benefit (reform) of the offender. From an exploration of the *fontes* of the current *ius vigens* and applying a binomial fidelity to these canons' interpretation, we will show that the fundamental right to coerce with penalties is affirmed in both codes currently in use and develop our argument toward the purpose of penal law in the Churches, Eastern and Latin.

The development toward an expression of a purpose for penal law in chapter 1, will lead us to explore in chapter 2 the need for penal law in order to preserve the complex reality of *communio* in a mixed society. Chapter 3 will apply the inter-codal purpose of preserving communion and the principles of penalties as a last resort and the

⁷See *CIC*, c. 1341.

⁸See Vatican II, dogmatic constitution *Lumen gentium*, November 21, 1964: *AAS* 57 (1965) 11.

Church as Teacher and Shepherd and propose a new delict concerning sex trafficking as an expression of the Church's power to coerce through penalties to reform offenders and be a leaven to society.

The ecclesiology of the Second Vatican Council embraces both the perfect society and the *communio* ecclesiology of the Mystical Body of Christ. The Church is an organized society in the world in need of order which is preserved, in part, by penalties to maintain *communio* with the Church which is necessary for salvation. This role of penalties as a service to the mission of the Church—*salus animarum*—will become clear to us by connecting the role of penalties to the reality of the Church as the universal sacrament of salvation. Thus, the need for penalties, in both codes, to preserve *communio* will show that there is an inter-codal purpose to penalties: the preservation of *communio* with the Church, the universal sacrament of salvation.

This will lead us to explore the notion of justice as it applies to penalties, in general and in particular. We will need to look at the *ius objectivum* for a general notion of justice applied to penalties, but then also the particular types of penalties, specifically censures and expiatory penalties, and lastly the reality of justice as it concerns how penalties are incurred, that is *latae* or *ferendae sententiae*. For instance, ought someone incur a penalty without a judicial or administrative process? What about the right to defense and protection of one's reputation, especially when such effect the status of persons? Can one be, in essence, their own judge and judge themselves as guilty of incurring a penalty, such as is the case when incurring a penalty *latae sententiae*?

The fundamental, innate, and proper right of the Church to coerce the faithful with penalties for the inter-codal purpose of preserving *communio* leads us to extract two principles: that penalties are a last resort and the Church as Shepherd and Teacher. These two principles bespeak an emphasis on the preventative. Drawing from the Church's right to coerce with

penalties to preserve *communio* and the two abovementioned principles, we will then illustrate how the Church could benefit from a new delict concerning sex trafficking to provide for the preservation of *communio*, to deter such behavior in the Church, and for the Church as Shepherd and Teacher to restore justice, repair scandal and reform the offender with penalties when needed.

Chapter I: The *Ius Vigens* of Penalties in the Church

This chapter will explore the *ius vigens* of canons 1311 of the *Codex Iuris Canonici* and 1401 of the *Codex Canonum Ecclesiarum Orientalium* as they are the foundational canons to the book or title on sanctions in each code. By analyzing the history, ecclesiology, and canonical concepts present in the *fontes* the purpose for penal law in the Church will be expressed. This will begin with the Council of Trent's thirteenth session and progress through the First Vatican Council and its ecclesiological emphasis on the perfect society which culminates in the Pio-Benedictine Code of 1917. We will then look at the Second Vatican Council, especially the dogmatic constitution on the Church *Lumen gentium*, which re-emphasizes the Church as a complex reality of both a perfect society and the Mystical Body of Christ. This will then be applied to the interpretation of the two current canons—1311 in the Latin code and 1401 in the unified Eastern code—and express the purpose of penal law in accord with a hermeneutic of binomial fidelity to the canonical tradition and the newness of the current codes. For the sake of clarity, the following table is provided to see, side-by-side, the pertinent canons: canon 2214 of the Pio-Benedictine Code, which provides the foundation, and the two canons of the codes currently in usage which draw from the prior.

<u>Canon 2214 of the 1917 <i>Codex Iuris Canonici</i></u> §1. Nativum et proprium Ecclesiae ius est, independens a qualibet humana auctoritate, coercendi delinquentes sibi subditos poenis tum spiritualibus tum etiam temporalibus. §2. Prae oculis autem habeatur monitum Conc. Trid., sess. XIII, de ref., cap. 1: “Meminerint Episcopi aliique Ordinarii se pastores non percussores esse, atque ita praeesse sibi subditis oportere, ut non in eis dominantur, sed illos tanquam filios et fratres diligant elaborentque ut hortando et monendo ab illicitis deterreant, ne, ubi deliquerint, debitum eos poenis coercere cogantur; quos tamen si quid per humanam fragilitatem peccare contigerit, illa Apostoli est ab eis servanda praeceptio ut illos arguant, obsecrent, increpent in omni bonitate et patientia, cum saepe plus erga corrigendos agat benevolentia quam austeritas, plus exhortatio quam comminatio, plus caritas quam potestas; sin autem ob delicti gravitatem virga opus erit, tunc cum mansuetudine rigor, cum misericordia iudicium, cum lenitate severitas adhibenda est, ut sine asperitate disciplina, populis salutaris ac necessaria, conservetur et qui correcti fuerint, emendentur aut, si resipiscere noluerint, ceteri, salubri in eos animadversionis exemplo, a vitiis deterreantur.”	<u>Canon 1311 of the 1983 <i>Codex Iuris Canonici</i></u> Nativum et proprium Ecclesiae ius est christifideles delinquentes poenalibus sanctionibus coercere.	<u>Canon 1401 of the <i>Codex Canonum Ecclesiarum Orientalium</i></u> Cum omnem rationem init Deus, ut errantem ovem reducat, illi, qui ab Eo solvendi et ligandi potestatem acceperunt, morbo eorum, qui deliquerunt, convenientem medicinam afferant, eos arguant, obsecrent, increpent in omni patientia et doctrina, immo poenas imponant, ut vulneribus a delicto illatis medeatur ita, ut neque delinquentes ad desperationis praecipitia impellantur neque frena ad vitae dissolutionem et legis contemptum relaxentur.
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1917 Code of Canon Law, and the Period after 1917

To understand the source of the second paragraph of canon 2214 of the Pio-Benedictine Code—and therefore the font for canon 1401 of the *Codex Canonum Ecclesiarum Orientalium*—, which was the thirteenth session of the Council of Trent, we must first understand the context in which that session of the council occurred. The thirteenth session of the Council of Trent occurred on 11 October 1551, immediately after the twelfth session, which was supposed to have been held on 1 September 1551, but had to be postponed forty days due to notably poor attendance, specifically from Germany.¹ The western Church was contending with schisms and heretical teachings proffered by Martin Luther and other Protestant reformers at this time.² The thirteenth session was convoked with the specific role of addressing a correct teaching concerning the Eucharist as opposed to the teachings of the reformers,³ in particular, the teaching on transubstantiation and its subsequent logical consequences, such as the worship, reverence, and reservation of the Eucharist. In the context of providing a clear and orthodox teaching concerning the Eucharist, the “*Decretum super reformatione*” provided the bishops an admonition concerning the pastoral method of returning those who had gone astray—specifically due to false teachings about the Eucharist—to communion with the Church and its orthodox faith. Clearly, this implied the aim of the thirteenth session to maintain the *communio fidei, sacramentorum et ecclesiastici regimini*. The desire to restore this threefold *communio* is given

¹Council of Trent, Session XII, September 1, 1551, *Decretum prorogationis sessionis*: Norman P. Tanner, ed., *Decrees of the Ecumenical Councils*, Vol. Two *Trent to Vatican II* (London and Washington, D.C.: Sheed & Ward Limited and Georgetown University Press, 1990)[hereafter *Tanner*] 2: 692-693.

²Norman P. Tanner, *The Councils of the Church: A Short History* (New York: The Crossroads Publishing Company, 2001) [hereafter *Tanner, Councils*] 77-78. Other Protestant reformers include Huldrych Zwingli and John Calvin in Switzerland, John Knox and Thomas Cramner in Scotland and England respectively, and Jan Hus in Germany and Czech Republic.

³Council of Trent, Session XIII, October 11, 1551, *Decretum de sanctissimo eucharistiae sacramento*: Tanner, 2: 693. See also: Tanner, *Councils*, 82.

further clear expression in the three separate invitations given to Protestant reformers to attend the Council of Trent.⁴

Firstly, the Council of Trent began its exhortation to bishops and other ordinaries in “*Decretum super reformatione*” by stating that “they are shepherds not oppressors.”⁵ As shepherds they are to “love them [the offenders] as children and brothers”⁶ and through counsel and exhortation prevent the need for penalties. Secondly, toward those who “through human frailty have chanced fallen into sin,”⁷ the shepherd should “reprove, beseech and rebuke them in all goodness and patience”⁸ which expresses the wisdom of Proverbs 19 that sweetness and goodness attracts better than severity.⁹ Thirdly, when the medicine of a penalty was to be applied it was to be done with restraint and mercy and with the view toward reforming the offender and acting as a deterrent for others.¹⁰ Lastly, harsher penalties could be applied only if earlier measures failed to reform the offender and, again, to further prevent others from erring.¹¹ It is in fidelity to these original purposes for penalties expressed in “*Decretum super Reformatione*” of the thirteenth session of the Council of Trent that the Eastern Churches express in canon 1401 of the *Codex Canonum Ecclesiarum Orientalium* a pastoral exhortation to bishops to preserve

⁴Tanner, *Councils*, 82.

⁵Council of Trent, Session 13, October 11, 1551, *Decretum super Reformatione*, cap. 1-8: Tanner, 2: 698: “ut se pastores, non percussores”

⁶Ibid.: “sed illos tanquam filios et fratres diligant”

⁷Ibid.: “si quid per humanam fragilitatem peccare contigerit”

⁸Ibid., 699: “arguant, obsecrent, increpent in omni bonitate et patientia”. See also *CIC*, c. 1341.

⁹See Proverbs 19: 11: “עָבַר עַל-פֶּשַׁע ; וְתַפְאֶרְתּוֹ, אֶפְסֹ; שְׂקָל אָדָם, הָאֲרִיזָה אָפוֹ – It is the discretion of a man to be slow to anger; and it is to his glory to pass-over a transgression.”

¹⁰Council of Trent, Session 13, October 11, 1551, *Decretum super Reformatione*, cap. 1-8: Tanner, 2: 699.

¹¹Ibid.: “post, ubi morbi gravitas ita postulet, ad acriora et graviora remedia descendere; sin autem ne ea quidem proficiant, illis submovendis caeteras saltem oves a contagionis periculo liberare.” This is a foundation for the aggravating circumstance in *CIC*, c. 1326 §1, 1°.

communio through preventative measures and apply penalties as a last resort for a singular purpose: the benefit (reform) of the offender.¹²

The mention of the use of penalties at the Council of Trent¹³ to coerce the faithful back to orthodoxy and orthopraxy did not make a clear distinction between “sin” or “vice” and a canonical “crime” or “delict.” While the purpose of the Church’s law is the salvation of souls, penal law is not intended to police morals. Msgr. Thomas Green states: “The Church’s penal order does not refer primarily to the individual’s relationship with the Lord in conscience. This is largely inaccessible to church authority and hence beyond its competence. Rather, what is principally envisioned is a public act or omission adversely affecting the community.”¹⁴ Thus we can state that while every delict is a sin, not every sin is a delict subject to penalties in the penal law of the Church.¹⁵ *Nulla crimen sine culpa – There is no crime without malicious intent.*¹⁶ Where a delict, not just a false judgment, is truly present, there must be prior legislation with a penalty attached (the juridic element); there must be an *actus reus* (the objective element); and malicious intent (the subjective element).¹⁷ This means that one knowingly and deliberately intends to commit a grave offense, and actually commits the offense.¹⁸ Yet, to sin is not necessarily to be guilty of a delict. The Church’s penal law does not exist to punish sin, but to punish delicts. “Even if laws and morality coincide in a specific matter, the jurist is not a

¹²It should be noted that the Latin code likewise exhorts bishops to preventative measures and non-penal resolutions before resorting to a penal process and the declaration of penalties. See *CIC*, cc. 1341, 1347 §1, 1718 §1, 2° and §4.

¹³See Council of Trent, Session 13, October 11, 1551, *Decretum super Reformatione*, cap. 1-8; Tanner, 2: 698-699.

¹⁴Thomas Green, “Sanctions,” in *New Commentary*, 1529.

¹⁵See *CCC* 1463.

¹⁶cf. Anacletus Reiffenstuel, “Caput II - Regula XXIII,” in *Ius Canonium Universum: Tractatus de Regulis Iuris*, Tomus Sextus, (Romæ: Apud Dominicum Ercole, 1834) 45-46.

¹⁷See *CIC*, c. 1321.

¹⁸cf. *CCC* 1857.

moralist, because the *juridical aspect* and the *moral aspect* of an action are distinct . . . Law is directed to making a person a good citizen: the interior realm of the heart pertains to the person and to God.”¹⁹ Thus, in the perfect society that is the Mystical Body of Christ in the world, it will become incumbent upon canonists to systematize penal law and distinguish between the role of the Sacrament of Penance and the penal law of the Church.

Between the time of Trent (1545-1563) and the Pio-Benedictine Code (1917), the *Corpus Iuris Canonici* saw the inclusion of many new papal decrees concerning penalties and but these did not provide a systematization of the Church’s penal law. Rather, it was the commentaries such as that of Anacletus Reiffenstuel (1642-1703) in his *Ius Canonicum Universum*, which systematically treated canon law by following the ordering of the Decretals of Gregory IX while including the Council of Trent and other subsequent papal decrees. Yet, the reliance of the Church upon commentators, such as Reiffenstuel and Giovanni Devoti, led to the law itself being neglected by the time of the First Vatican Council. The dawn of the French Revolution (1789), which violently seized control of the Church in France, and the later loss of the Papal States (1870) contributed to the Church at the First Vatican Council (1869-1870) reaffirming itself as a perfect society.

In this climate the distinction was made between *ius publicum*, relating to the constitution of the Church, *societas perfecta*, and *ius privatum*, concerning the rights and duties of the individual faithful. The canonical penal sector was obviously reintroduced into “public law” and was used by the category called *ius publicum ecclesiasticum*. This instrument was developed to vindicate the power of the Church internally, and her rights in

¹⁹Javier Hervada, *What is Law? The Modern Response of Juridical Realism: An Introduction to Law*, trans. William L. Daniel (Montreal: Wilson and Lafleur Ltée, 2007) 94.

²⁰See Pope Urban VIII’s bull *In Coena Domini*, Gregory XV’s constitution *Universi dominici gregis*, Pope Benedict XIV’s bulls *Ad Militantis* and *Sacramentum Poenitentiae*, and Bl. Pope Pius IX’s apostolic constitution *Apostolicae Sedis*.

relationship with States and her prerogatives confronting the advance of the accentuated agnostic liberalism and anticlericalism.²¹

Yet, it will not be until the codification of canon law in the Pio-Benedictine Code (1917) that there will appear a full systematization of the Church's penal law.

Amidst this climate, the Pio-Benedictine Code states in canon 2214 §1 an “innate and proper . . . right . . . to coerce . . . by both spiritual and temporal penalties,”²² which reflects an ecclesiology of the Church as a perfect society. The view of the Church as a perfect society indicates that the Church has all the institutional means to attain its purpose—the salvation of souls. Does this mean that penal law ought to concern itself with all sins and not just delicts? For, if the salvation of man is the end of penal law, then ought not all sins be its preoccupation?

Commenting on the 1917 *Codex Iuris Canonici*, the twentieth century canonist, Father John M. Costello, addresses the conflict that will arise between a clear distinction between the internal and external *fora* and the application of penalties. There is a twofold sphere with which the Church as a perfect society must concern itself—the external and public spiritual good of the whole society of the Church and the individual sanctification of each individual member.²³ Costello makes the distinction amidst this singular end for the activity of the Church, the salvation of souls, and the twofold sphere in which that end operates. “When this power of ruling or of jurisdiction is ordained *directly* for the *internal spiritual good* of the individual faithful, it is

²¹Bruno Fabio Pighin, *Diritto Penale Canonico* (Venezia: Marcianum Press s.r.l., 2008) 36-37: “In questo clima si operò la distinzione tra *ius publicum*, relativo alla costituzione della Chiesa, *societas perfecta*, e *ius privatum*, relativo ai diritti e doveri dei singoli fedeli. Il settore penale canonico venne fatto reentrare ovviamente nel ‘diritto pubblico’ e fu utilizzato dalla categoria detta *ius publicum ecclesiasticum*. Questo strumento fu elaborato per rivendicare il potere della Chiesa al suo interno, i suoi diritti nelle relazioni con gli Stati e le sue prerogative di fronte all’avanzata del liberalismo accentuatamente agnostico e anticlericale.”

²²1917 *CIC*, c. 2214: “Nativum et proprium . . . ius est . . . coercendi . . . poenis tum spiritualibus tum etiam temporalibus.”

²³John M. Costello, “Penal Legislation in the Code of Canon Law,” *The Jurist* 4 (1944) 574.

called jurisdiction of the internal forum. . . . When this power of ruling or of jurisdiction is ordained *directly* for the *public good* of external society it is called jurisdiction of the external forum and also *proper* jurisdiction inasmuch as it is exercised by the Church in the *external forum* and *in its own name*.”²⁴ This raises two important questions: 1) What is the role of the Church’s penal law in the internal forum (arena of the conscience) vs. the external forum (arena of the public order)?; and 2) What is meant by native/innate and proper?

The emphasis on a perfect society ecclesiology led to the need for the code revision process after Vatican II to address the desire for a clear distinction between the internal and external *fora* concerning penal law, such that one may have had their sins forgiven—a matter of the internal forum—, while remaining subject to an ecclesiastical penalty.²⁵ The jurist, Richard Cunningham, expresses this need for clarity between the two *fora* during the revision process,

Since church law is involved not only with external and social matters, the Code should deal also with matters of conscience. The commission states that the juridical nature of the Code must be confirmed in both the external and internal forums. In a new Code the norms which refer to the external forum should be retained. The best possible coordination between the two forums is to be sought in order to avoid altogether, or at least to reduce to a minimum, any conflict. Special care is to be taken, the commission believes, in the areas of sacramental and penal law.²⁶

Cunningham expresses the need for this careful coordination between *fora*, but does not explain how to achieve this end. We can see this praxis expressed in the actions of the Apostolic

²⁴John M. Costello, “Penal Legislation in the Code of Canon Law,” 574-575.

²⁵Thomas J. Green, “Introduction - Noteworthy Changes from 1917 Code,” in *The Code of Canon Law: A Text and Commentary*, ed. James A. Coriden, et al. (New York/Mahwah: Paulist Press, 1985) 896.

²⁶Richard Cunningham, “The Principles Guiding the Revision of the Code of Canon Law,” *The Jurist* 30 (1970) 448.

Penitentiary which, while being a tribunal, acts in the internal forum concerning dispensations which, were the irregularity, impediment or crime to be public, would otherwise involve jurisdiction of a congregation or tribunal in the external forum.²⁷

Concerning the Church's claim of a native right to coerce by penalties, Francisco Wernz, a late nineteenth and early twentieth century canonist, wrote that "the divine positive right concerning penal law is certainly found in the inspired books of the New Testament and in divine tradition."²⁸ The Church's claim to a "proper right" to impose penalties is given further expression in canon 2214 of the Pio-Benedictine Code when it states that the Church coerces "independent from any human authority."²⁹ Both of these concepts—native and proper—bespeak the perfect society ecclesiology that the Church is uniquely and autonomously capable of attaining its purpose and that it is a right based on the nature of the Church herself and not derivative of any other power, such as the State. While both of these concepts—native and proper—will remain in the 1983 *Codex Iuris Canonici*, they do not appear in the *Codex Canonum Ecclesiarum Orientalium*, except implicitly, and they will be contextualized within a fuller ecclesiology of the Church as the incarnation of the Word of God in the world.

²⁷See John Paul II, apostolic constitution *Pastor Bonus*, June 28, 1988: *AAS* 80 (1988) 890.

²⁸Francisco Xavier Wernz and Petrus Vidal, *Ius Canonicum: Codicis Normam Exactum: Tomus VIII – Ius Poenale Ecclesiasticum* (Romae: Apud Aedades Universitatis Gregorianae, 1951) 3-4: "Praeterea ius divinum positum de iure poenali certe reperitur in libris inspiratis novi testamenti atque in traditione divina." In particular Matthew 18: 14-18; I Cor. 5: 1-6, 10-15; II Cor. 2: 6-12, 5: 1-6; and II Thess. 3: 14 are given as New Testament scriptural sources for the penal law of the Church. Yet, these are not systematic treatments of penal law. Rather, they inform the development of penal law as they provide a moral basis and they bespeak the end of penal law, the salvation of souls.

²⁹1917 *CIC*, c. 2214 §1: "independens a qualibet humana auctoritate".

Canonical developments from Vatican II to the *Codex Iuris Canonici* of 1983

At the heart of the Second Vatican Ecumenical Council (1962-1965) is its development of an ecclesiology of communion—*communio*—in the dogmatic constitution on the Church *Lumen gentium*. The theologian, Gérard Gustaaf Philips, states: “This [*Lumen gentium*] is rather the vitally important center to which the other decrees [of the Second Vatican Council] must be referred, and they must all be read in the light of the mystery of the Church.”³⁰ Seeing the Church as a *communio* of the mystical body was always a part of the Church’s but became a greater emphasis before the Second Vatican Council, especially in the biblical and liturgical movements and in the ecclesiological magisterium of Venerable Pope Pius XII. “It is a relatively new element of doctrine, but one in which a number of recent religious trends have crystallized, such as the renewed interest in the Bible and the liturgical movement, both directly concerned with the fellowship of the Church, which was displayed in a new light in the encyclical *Mystici Corporis*. The idea of *communio* gained ground everywhere, after a long period of individualism.”³²

At the council, many of the Fathers emphasized this view of the Church as a *communio*. “As regards the content [of *Lumen Gentium*], many Fathers stressed the need of new perspectives, without abandoning the most ancient and original ones. The nature of the Church as a community rather than a society [perfect society ecclesiology] should be stressed, though there was no need to separate the two aspects, since both were

³⁰Gérard Philips, “History of the Constitution,” in *Commentary on the Documents of Vatican II*, five vols., ed. Herbert Vorgrimler (New York: Herder and Herder, 1967) [hereafter Vorgrimler, *Commentary*] I: 105.

³¹For a more in-depth analysis of the roots of *communio* ecclesiology, see Dennis M. Doyle, “Journet, Congar, and the Roots of Communion Ecclesiology,” *Theological Studies* 58 (1997) 461-479. Furthermore, Joseph Ratzinger grounds his *communio* ecclesiology in St. Augustine and Augustine’s theory of the Holy Spirit as the bond of love that yields communion. See Joseph Ratzinger, “The Holy Spirit as Communio: Concerning the Relationship of Pneumatology and Spirituality in Augustine,” *Communio* 25 (Summer 1998) 324-337.

³²Gerard Philips, “History of the Constitution,” in Vorgrimler, *Commentary*, I: 105.

animated and therefore united by love (Cardinal Lefebvre).”³³ However, the concern arose that the notion of communion, both sacramental and spiritual (mystical), still needed further “juridical determination”³⁴ without which unity would become overly spiritual and flaccid, a “vague disposition.”³⁵ This led to the clarification in the *Nota explicativa praevia* to the dogmatic Constitution on the Church *Lumen gentium*.³⁶ Commenting on the *Nota*, then-Father Joseph Ratzinger states that “*communio* means the sacramental constitution of the ancient Church and indicates the original source and context of law in Catholic conception.”³⁷ Thus *communio*, as recognized by the Second Vatican Council, is threefold: of faith, of sacraments, and of ecclesiastical governance and in need of a juridic determination. *Communio* is not meant to be expressed merely sacramentally, that is, spiritually and mystically, but also juridically.³⁸ “On the juridical level, the maintenance of fellowship coincides with recognition of the government, which means fellowship with the whole community, since the fellowship of the whole Church is manifested in the *communio* of the bishops under the Pope.”³⁹ Here, we see *communio* not only expressed as a threefold *communio* of faith, sacraments and ecclesiastical governance, but the further parsing of the communion of ecclesiastical governance as a

³³Gerard Philips, “History of the Constitution,” in Vorgrimler, *Commentary*, I: 108.

³⁴Joseph Ratzinger, “Announcements and Prefatory Notes of Explanation,” in Vorgrimler, *Commentary*, I: 301.

³⁵Vatican Council II, *Nota explicativa praevia*, November 16, 1965: *AAS* 57 (1965) 73: English translation in Tanner, *Decrees*, 2: 899.

³⁶The *Nota explicativa praevia* preceded the promulgation of the dogmatic constitution *Lumen gentium* by five days and was issued by Pope Paul VI so as to ease tensions that the mention of a “college of bishops” would create a return to the fifteenth century issue of conciliarism. The *Nota explicativa praevia* reconciled this issue with its teaching that the “college of bishops” exercises its authority only in communion with its head, the pope, and thus papal primacy is maintained within the college.

³⁷Joseph Ratzinger, “Announcements and Prefatory Notes of Explanation,” in Vorgrimler, *Commentary*, 301-302.

³⁸See Aloys Grillmeier, “Dogmatic Constitution on the Church – Chapter II,” in Vorgrimler, *Commentary*, 176-177. This threefold communion receives legal expression in canon 205 of the 1983 *Codex Iuris Canonici*.

³⁹Aloys Grillmeier, “Dogmatic Constitution,” in Vorgrimler, *Commentary*, 177.

*communio ecclesiarum et episcoporum*⁴⁰ which was central to the discussion of the text of *Lumen gentium* and the clarification that includes a juridic expression.⁴¹

This ecclesiology which embraces both a perfect society and a complex *communio*, effects significant theological-canonical development leading to the revision of the *Codex Iuris Canonici*. In a *communio* ecclesiology, what is just serves the preservation and development of communion because the *salus animarum* is offered by Christ to the community of the faithful. In a perfect society ecclesiology, justice serves the right of the society to maintain its essential values and identity. The balancing of these two ecclesiological nuances, which may be a mere distinction of emphasis, will become the task of the revision process for the new codes. Yet, the code is meant to express the nature of the Church as taught by the Second Vatican Council—thus a *communio* ecclesiology and perfect society.⁴²

Pope St. John XXIII called for the Second Vatican Council on January 25, 1959. He did so with the precise intentions of promoting Christian unity, updating the Code of Canon Law, and he also envisioned the forthcoming promulgation of an Eastern Code of Canon Law, at that time, which would provide a foretaste for revisions to come.⁴³ The

⁴⁰See Eugenio Corecco, “Universal Church – Particular Church,” in *Canon Law and Communio: Writings on the Constitutional Law of the Church*, ed. Graziano Borgonovo and Arturo Cattaneo (Citta Del Vaticano: Libreria Editrice Vaticana, 1999) 389.

⁴¹The organic communion of the churches is concretized by the unity of faith, the sacraments, and in the governance, shepherding, when expressed by a juridic and sacramental unity with the visible sign of unity for the whole Church which is the Petrine Office. Thus, this communion of churches and bishops is not some vague, ambiguous or amorphous sentiment, abstraction or mere concept, but it is a sacramental, that is, an ontological, and juridic reality.

⁴²See Vatican II, dogmatic constitution *Lumen gentium* 8, November 21, 1964: *AAS* 57 (1965) 11: “Societas autem organis hierarchicis instructa et mysticum Christi Corpus, coetus adspectabilis et communitas spiritualis, Ecclesia terrestris et Ecclesia coelestibus bonis ditata, non ut duae res considerandae sunt, sed unam realitatem complexam efformant, quae humano et divino coalescit elemento.”

⁴³John XXIII, “Solemn Allocution at St. Paul’s Outside the Walls,” January 25, 1959: in *AAS* 51 (1959) 68-69.

revised Latin Code desired by John XXIII was to reflect the Council's teachings; thus the work of revision had to wait until the conclusion of the ecumenical council.

The 1967 Synod of Bishops proposed ten principles for the revision of the code of canon law.⁴⁴ Principles 1, 2, 5, 6 and 9 were of particular importance to the revision of the penal law as they deal with: the juridic character of the code, the position of the internal and external fora in the code, the principle of subsidiarity, protection of the rights of persons,⁴⁵ and the revision of penal law, which cannot be renounced by the Church.⁴⁶

The first principle of maintaining the juridic character of the code is due to the reality that the Church is a society in the world and similar to any society it needs to maintain order and express the rights and obligations of those in this society to attain its purpose, the salvation of souls. Thus, laws are needed to order the conduct of this society.

The committee tasked with addressing the reform of the penal law of the Church for the Canon Law Society of America stated: "The Church has the responsibility to be and remain the sign of God's Kingdom and the embodiment of Christ's saving presence . . . Hence occasionally though regrettable some speak or act contrary to the faith they profess and the way of life to which they are committed. In such circumstances the values of corporate integrity and individual welfare

⁴⁴Synod of Bishops, "Principia quae Codicis Iuris Canonici recognitionem dirigant," April 3-8, 1967, in *Communicationes* 1, (June 1969) 55.

⁴⁵This principle of reform concerning the protection of rights of persons is based on the development in the understanding of human dignity. See Vatican II, declaration *Dignitatis humanae* 4 and 9-11, December 7, 1965: in *AAS* 58 (1966) 932-933 and 935-938.

⁴⁶Similar to the principles of reform for the Latin code, the Eastern code embraced these same principles stated above and also applied the guidelines of "authentic Eastern traditions" and "ecumenism" to its revision of an Eastern code. See Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, "Principi direttivi per la revisione del Codice di Diritto Canonico Orientale," in *Nuntia* 3 (1976) 3-10. The guideline of ecumenism is particularly significant because, in an ecclesiology of *communio*, the ecumenical initiative comes into play as regards the content of faith (heresy), the sacraments (*communicatio in sacris*), as well as the importance of the role of unity in governance structures (*communio episcoporum* - schism), and communion of Churches (*communio ecclesiarum*). These concepts in the context of *communio* will be further explored in the first part of the second chapter.

presuppose the community's being able to reaffirm its identity and reestablish unity, peace and order."⁴⁷

The principle of legality states "*Nullum crimen et nulla poena sine lege praevia*," thus without a prior law to which a penalty is attached, a truly juridic character of the code, there would be no just way for the Church to reaffirm its identity and reestablish order. Principle 9, by upholding the importance of penal law in the Church, provides for the laws given in the code with which a penalty is attached to be enforced and hence to provide for the maintaining of the just order of the society and *communio* of faith, sacraments and ecclesiastical governance in the Church.

The revision process also included discussions on the issue of the conflict of *fora*: internal and external. The hope was for greater clarity and disambiguation. Writing in 1979, Msgr. Thomas Green states: "A major development is the restriction of penal discipline to the external forum to minimize possible conflicts of fora. Accordingly, henceforth no penalty would bar one from receiving the sacraments of penance and anointing of the sick."⁴⁸

This was further expressed by the preference that penalties generally be *ferendae sententiae* rather than *latae sententiae* and, therefore, imposed in the external forum by a judicial or administrative process for the protection of the rights of persons. Nonetheless, *latae sententiae* penalties were upheld in the Latin Church, but not included in the Eastern Code because they do not correspond with authentic Eastern traditions.⁴⁹ Despite

⁴⁷Thomas J. Green, et al., "Report of the Special Committee of the Task Force of the Canon Law Society of America on the Proposed Schema De Delictis et Poenis," *CLSA Proceedings* (Oct. 7-11, 1974) 131.

⁴⁸Thomas J. Green, "The Revision of Canon Law: Theological Implications," *Theological Studies* 40/4 (Dec. 1, 1979) 607.

⁴⁹See Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, "Principi direttivi per la revisione del Codice di Diritto Canonico Orientale," in *Nuntia* 3 (1976) 3-10. See also Victor J. Pospishil, "Penal Law of the Church," in *Eastern Catholic Church Law: Second Revised and Augmented Edition* (Staten Island, New York: Saint Maron Publications, 1996) [hereafter *Eastern Catholic Church Law*] 747. It should also be stated that in the

their preservation in the Latin Church, they were to be greatly reduced and only inflicted for the most serious offenses where an occult crime would fail to be punished otherwise.⁵⁰

The principle of subsidiarity is also an important principle of reform applied to the penal law of the Church. Msgr. Thomas Green writes: “A noteworthy development in contemporary penal law are broader options for particular law initiatives, especially given the reduction of the universal law corpus.”⁵¹ This principle also contributed to the reduction in the number of sanctionable offenses in the universal law leaving only those offenses so disruptive to *communio* and the societal order of the Church as to require uniform punishment throughout the Church.⁵²

The revision process sought to reduce greatly the number of sanctionable offenses, to emphasize penalties as a last resort, to emphasize a judicial instead of administrative process for the infliction of a penalty with a view to better protect the rights of persons, and to bring greater clarity between the two *fora*. Furthermore, there was discussion amongst some canonists that called for a clear expression of the purpose or rationale for penal law.⁵³ Developing an authentic expression of the purpose of penal law will be key to seeing penal law as a service to the mission of the Church.

principles of reform for the Eastern Code the guideline of “ecumenism” with the Orthodox Churches was to be respected. Thus, since the Orthodox Churches did not have the concept of a *latae sententiae* penalty, the ecumenical principle also applied to its not being adopted in the Eastern Code.

⁵⁰Thomas J. Green, “Sanctions,” in *New Commentary*, 1531.

⁵¹Thomas J. Green, “Penal Law: A Review of Selected Themes,” *The Jurist* 50 (1990) 226.

⁵²Thomas J. Green, “The Revision of Canon Law: Theological Implications,” 607.

⁵³Thomas J. Green, “Penal Law: Review,” 226-228.

Canon 1311 of the 1983 *Codex Iuris Canonici* and Canon 1401 of the *Codex Canonum Ecclesiarum Orientalium*

In his discourse to the Pontifical Commission for the Revision of the Code of Canon Law, Pope St. Paul VI addressed the *novus habitus mentis* to which the Church's law must be adapted in light of the Second Vatican Council.⁵⁴ The *novus habitus mentis* was to adopt the *communio* ecclesiology of the council, the doctrine of the Church as the People of God, the threefold *munera* of Christ as the expression of how the people of God participate in the Church, authority as service, the rights and obligations of the Christian faithful, and a commitment to ecumenism.⁵⁵ Pope St. John Paul II states: "If, therefore, the Second Vatican Council has drawn both new and old from the treasury of tradition, and the new consists precisely in the elements which I have enumerated, then it is clear that the Code should also reflect the same note of fidelity in newness and of newness in fidelity."⁵⁶ This might be described, by analogy, as a canonical "Janus"—looking at the canonical doctrine of the past and simultaneously looking forward to the new mind of the canonical science.

Sister Elizabeth McDonough, O.P. highlights the thoughts of Cardinal Rosalio Castillo Lara, the theologian Michael Place and the canonist Ladislav Orsy in regards to how the *novus habitus mentis* is to be applied to the penal law of the Church.⁵⁷ "Penal law should be viewed with binomial fidelity and newness as part of a transitional stage of

⁵⁴Paul VI, *discorso di Paolo VI alla Pontificia Commissione per la Revisione del Codice di Diritto Canonico*, November 20, 1965: *AAS* 57 (1965) 988: "Nunc admodum mutatis rerum condicionibus - cursus enim vitae celerius ferri videtur - ius canonicum, prudentia adhibita est recognoscendum: scilicet accommodari debet novo mentis habitui, Concilii Oecumenici Vaticani Secundi proprio, ex quo curae pastoralis plurimum tribuitur, et novis necessitatibus populi Dei."

⁵⁵See John Paul II, apostolic constitution *Sacrae disciplinae leges*, January 25, 1983: *AAS* 75/2 (1983) xii.

⁵⁶See Ibid. English translation in *Code of Canon Law, Latin-English Edition: New English Translation* (Washington, DC: Canon Law Society of America, 2001) xxxi.

⁵⁷Elizabeth McDonough, "A *Novus Habitus Mentis* for Sanctions in the Church," *The Jurist* 48 (1988) 727-728.

change that from a new vantage point engenders new questions and new answers.”⁵⁸ This binomial fidelity spoken of by McDonough, having originated in the thought of Cardinal Castillo Lara, means that “one can neither read new canons of the revised code as if they had no reference to canonical tradition, nor read canons taken verbatim from the former code as if they were still in their previous context.”⁵⁹ Thus, although canon 1311 of the *Codex Iuris Canonici* is derived from canon 2214 §1 of the Pio-Benedictine Code and canon 1401 of the *Codex Canonum Ecclesiarum Orientalium* is derived from paragraph two of the same canon, as well as from the “*Decretum super reformatione*” of the thirteenth session of the Council of Trent, we must apply this *novus habitus mentis* to how we interpret these canons in their respective codes that are in force today.

Even amidst the *novus habitus mentis*, Pope St. Paul VI, in a discourse to the Roman Rota, addressed the sensibility of some who think that the Church should not coerce with punishments, that such belonged to a former age as a remnant of a Church which had absolute power—a perfect society ecclesiology; according to Paul VI, they are mistaken even amidst the spirit of *ressourcement*.

But yet one need not forget that the coercive power is also founded in the experience of the primitive Church, and already St. Paul makes use of it in the christian community of Corinth (I Cor. 5): suffice it to say that the perspective of this citation, for an understanding of the pastoral significance of such a severe procedure, be taken uniquely in view of the spiritual and moral integrity of the entire Church, and for the good of the same offender: “that his spirit may be saved on the day of the Lord.”⁶⁰

⁵⁸Elizabeth McDonough, “A *Novus Habitus Mentis* for Sanctions in the Church,” 728.

⁵⁹Ibid., 727-728. See also Rosalio Castillo Lara, “Some Reflections on the Proper Way to Approach the Code of Canon Law,” *CLSA Proceedings* 46 (1984) 32-33.

⁶⁰Paul VI, *discorso al Tribunale della Sacra Rota Romana*, January 29, 1970: in *AAS* 62 (1970) 117: “Eppure non bisogna dimenticare che la potestà coercitiva è anch’essa fondata nell’esperienza della Chiesa primitiva, e già San Paolo ne fece uso nella comunità cristiana di Corinto (I Cor. 5): basta la prospettiva di questa citazione, per far comprendere il significato pastorale di un provvedimento tanto severo, preso unicamente in vista della integrità spirituale e morale dell’intera Chiesa, e per il bene dello stesso colpevole: ‘*ut spiritus salvus sit in die Domini nostri Iesu Christi*’ (Ibid. 5, 5).”

The retention of the coercive power affirmed in canon 1311 of the Latin code as a “native” and “proper” right is seen as an expression of the “binomial fidelity” spoken of by Cardinal Castillo Lara. We no longer interpret these terms “*nativum*” and “*proprium*” merely from the perspective of a perfect society ecclesiology, even if these terms were rooted in that system. Rather, simultaneously embracing the *communio* ecclesiology of Vatican II, we see that this canon speaks to the singular yet complex reality of the Church as comprising both a human and divine element, a society and the Mystical Body of Christ.⁶¹ Pope St. John Paul II, when addressing the Roman Rota, also expressed that the coercive power of the Church by penalties, even the threatening of a penalty, is to be viewed as an instrument of communion.⁶² The penalty or threat thereof is an instrument of *communio* when seen “as a means of recouperating that which is deficient concerning the individual good and the common good which are revealed in the anti-ecclesial conduct, criminal and scandalous, of the members of the people of God.”⁶³ The coercive power to penalize the Christian faithful is an act of the hierarchical Church that serves the *communio fidei*, *sacramentorum et ecclesiastici regimini* and is thus a part of the nature of the Church—an innate and proper right—to enforce the laws that provide order, preserve the safety of the Christian faithful and protect the common good of the complex reality of the Church as society and the Mystical Body of Christ.

⁶¹*LG* 8: *AAS* 57 (1965) 11: “Societas autem organis hierarchicis instructa et mysticum Christi Corpus, coetus adspectabilis et communitas spiritualis, Ecclesia terrestris et Ecclesia coelestibus bonis ditata, non ut duae res considerans unam realitatem complexam efformant, quae humano et divino coalescit elemento.”

⁶²John Paul II, *Address to the Roman Rota*, February 17, 1979: *AAS* 71 (1979) 425.

⁶³*Ibid.*: “cioè come mezzo di recupero di quelle carenze di bene individuale e di bene comune che si sono rivelate nel comportamento antiecclesiale, delittuoso e scandaloso, dei membri del popolo di Dio.”

Canon 1401 of the *Codex Canonum Ecclesiarum Orientalium* does not have any explicit language retaining a perfect society ecclesiology. It does express the complex reality of the Church, a mixed society—“holy and at the same time always purifying”⁶⁴—therefore, in need of applying “appropriate medicine.”⁶⁵ Furthermore, the explicit mention “of loosing and binding,”⁶⁶ of “arguing convincingly, imploring and scolding,”⁶⁷ and “to impose penalties”⁶⁸ suggest that implicit in this canon is the Church’s fundamental or innate right to coerce the Christian faithful for the sake of the reform the offender.⁶⁹ Pope St. Paul VI exhorted the Tenth International Congress on Penal Law in 1969 stating: “More modest indeed, your role is none the less indispensable. It is a matter for human justice to prevent evil, to protect society against all attacks on the common good, and also to redress the culpable, as far as possible. This power of coercion itself, exercised against a brother in the name of the community, like the legislative power that corresponds to it, expresses in effect the demands of a fundamental right.”⁷⁰ Yet, the coercion by punishment prescribed in the Eastern code is either a privation of some good or the imposition of

⁶⁴*LG* 8: *AAS* 57 (1965) 12: “. . . sancta simul et semper purificanda. . .”

⁶⁵*CCEO*, c. 1401: “convenientem medicinam.”

⁶⁶*Ibid.*: “solvendi et ligandi.” See also Matthew 16: 19.

⁶⁷*Ibid.*: “arguant, obsecrent, increpent.”

⁶⁸*Ibid.* “poenas imponent.”

⁶⁹It should be noted that this is the unique aim of penalties in the Eastern code, that is, that they are medicinal, for the benefit of the reform of the offender. See Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, “Lo schema dei canoni riguardanti le sanzioni penali nelle Chiese Orientali Cattoliche,” *Nuntia* 4 (1977) 73-74. Whereas the Latin code envisions the purpose of penalties also to re-establish justice, remedy scandal, and deter other would-be offenders.

⁷⁰Paul VI, *discourse to the Organizers of the Tenth International Congress Concerning Penal Law*, October 4, 1969: “Plus modeste certes, votre rôle n’en est pas moins indispensable. Il s’agit, pour la justice humaine, de prévenir le mal, de protéger la société contre toutes les atteintes au bien commun, et de redresser aussi le coupable, pour autant que faire se peut. Ce pouvoir de coercion lui-même, exercé à l’encontre d’un frère au nom de la communauté, comme le pouvoir législatif qui lui correspond, expriment en effet les exigences d’un droit fondamental.” Accessed at http://w2.vatican.va/content/paul-vi/fr/speeches/1969/october/documents/hf_p-vi_spe_19691004_diritto-penale.html (accessed February 3, 2019). The preceding is not published in the *AAS*.

a positive act.⁷¹ Thus, how the East uses its coercive power to punish is always for the benefit of the offender.

The coercive power of the Church is a fundamental right of the Church present in both codes, even though only implicit in the Eastern code. In light of both codes, it is seen as a power exercised for the purpose of the common good and the good of the individual offender—*salus animarum*—so as to preserve and restore the *communio fidei, sacramentorum et ecclesiastici regimini* where injury has been caused by a delict.

While the preservation of the fundamental right to coerce with penalties has been clearly expressed in this first chapter, the purpose of penalties is not identical in the Eastern and Latin Churches. By exploring the need for penalties to preserve *communio* in a mixed society we will show how an inter-unitary purpose arises for the Latin and Eastern Churches Furthermore, we will then be able to analyze critically the reality of justice as it applies to penalties in general and specifically as to how they are incurred.

⁷¹See Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, “Principi direttivi per la revisione del Codice di Diritto Canonico Orientale,” *Nuntia* 3 (1976) 9-10.

Chapter II: Select Issues in the *Codex Iuris Canonici* and *Codex Canonum Ecclesiarum Orientalium* as they Pertain to the Purpose of Penalties in the Church

The *Ius Objectivum* of penal law is: where there is a delict committed, justice must be restored, scandal and injury healed, the common good and safety of the Christian faithful preserved, and the delinquent reformed and reconciled.¹ In the background of this *ius* is the *salus animarum* because penal law is in service to the mission of the Church.² The multi-purposes expressed in this definition of the *ius objectivum* of penal law coincides with the Latin code, whereas the sole purpose of penal law in the Eastern code is medicinal. Yet, if we look at the necessity of penalties to preserve the complex reality of *communio* in the mixed society of the Church, we will discover that this purpose provides an inter-codal purpose for penalties. This exploration will achieve this inter-codal purpose by connecting penalties to the preservation of *communio* with the Church which is necessary for salvation. It will then become incumbent upon us, having established this inter-codal purpose for penalties—the preservation of *communio*—to explore the reality of the application of justice as it applies to penalties in general and specifically as to how they are incurred, *latae* or *ferendae sententiae*.

The Spanish canonist, Javier Hervada, defines laws in this way: “laws are rules of the conduct of citizens and of the organisation of society, whose purpose is the common good.”³ The common good of the Christian faithful is their salvation and penal law provides for the preservation of the Church’s effectiveness in mediating Christ’s salvation to the faithful as a

¹Anacletus Reiffenstuel, *Ius Canonicum Universum: Quinque Librorum Decretalium: Tomus III* (Romae: Apud Dominicum Ercole, 1833) Lib. III, Tit. 49.22. The formulation of the *ius objectivum* of penal law is derived from the purpose of penal law as expressed in chapter one and an analysis of natural and Roman law formulations. See also, Reiffenstuel, “Caput II – Regulae IV, V, XXIII, LXXVI,” in *Ius Canonicum Universum*, 22-24, 45-46 and 120.

²Velasio DePaolis, “Aspectu Theologici et Iuridici in Systemate Poenali Canonico,” *Periodica* 75 (1986) 221-254. See also Thomas J. Green, “Penal Law: A Review of Selected Themes,” *The Jurist* 50 (1990) 225-230.

³Javier Hervada, *What is Law?: The Modern Response of Juridical Realism*, trans. by William L. Daniel (Montreal: Wilson & Lafleur Ltée, 2007) 120.

society, a united body, because it enforces laws which are necessary for the just ordering of that society.⁴ Hervada makes clear the necessity of law against the contemporary spirit of anti-juridicism in the Church when he states that, “The law makes good citizens according to justice *by regulating their social external conduct*.”⁵ Each of the Christian faithful is a citizen of the perfect society and mystical body of Christ that is the Church. In order to preserve this unity—*communio*—we need laws.⁶

The ancient Romans distinguished three types of law: *lex perfecta*, *lex minus quam perfecta*, *et lex imperfecta*.⁷ *Lex perfecta* contained an invalidating clause, thus the failure to fulfill a law would totally invalidate the act.⁸ A *lex minus quam perfecta* is a law that includes the punishment of one who violates that law.⁹ Lastly, *lex imperfecta* was considered imperfect because it neither invalidated nor punished failure to fulfill the law or the violation thereof.

The enforcement of laws by attaching the possibility of a punishment and the subsequent execution of the punishment of offenders serves to reform the offender,

⁴Javier Hervada, *What is Law?*, 107-109.

⁵*Ibid.*, 102.

⁶See Carlos Jose Errazuriz, *Justice in the Church A Fundamental Theory of Canon Law*, trans. by Jean Gray in collaboration with Michael Dunnigan (Montreal: Wilson & Lafleur, Ltée, 2009) 132-140. Errazuriz states that *communio* is the heart of the Church’s self-understanding and this *communio* requires laws to provide for justice amidst the complex relationships within the Church. The relationships of persons within the Church are not individualistic, rather they are in relationship to the Church as a whole, all the other Christian faithful and the salvific mission of the Church and are thus subject to juridical expression to provide for a just society. See also Paul VI, discourse at the Pontifical Gregorian University, *Cursui renovationis canonicae pro iudicibus aliisque tribunalium administris*, 14 December 1973: *AAS* 66 (1974) 10-12.

⁷See Frederick James Tomkins, *The Institutes of the Roman Law, Part I* (Edinburgh & Dublin: Clark, Bell & Bradfute, Hodges, Smith & Co., 1867) 30-31.

⁸See *CIC*, c. 10; *CCEO*, c. 1495.

⁹In Canon law there is also the *lex plus quam perfecta* which both punishes the doer of the act and invalidates the act. For instance, the attempted ordination of a woman to the priesthood is both invalid and punished.

restore justice amidst the common good of the society, and deters future offenders. Thus, the obligation of the Christian faithful to maintain *communio*,¹⁰ and to be obedient to the declared teachings of their sacred pastors¹¹ are not mere suggestions for the sake of social harmony, but are obligations in the law whose violation are meant to be punished by penalties as expressed in their corresponding delicts. To destroy *communio* with the Church is a delict against the unity of the Church,¹² or to deny obstinately some truth which is proposed as divinely revealed—*de fide catholica et universa*—by the magisterium, that is, the sacred pastors,¹³ are delicts. It is also worth noting that canon 1389 §2 in the Latin code provides for a just penalty to be incurred upon one who is culpably negligent and omits an act of ecclesiastical power, for instance, failure to enforce the law with the effect being the harm of another. Canon 1389 §2 should be read with canon 392 in the Latin code which exhorts bishops to urge their subjects to observe all ecclesiastical laws and disciplines. The bishop, here, could be subject to a just penalty for his failure to urge the observance of the law if it brings about the injury of another. On the other hand, those who are disobedient to the bishop's urgings to observe the law can be punished. Even if a law does not have its own penalty attached to it, the disobedience of a singular precept, which especially urges the observance of law,¹⁴ when legitimately issued by competent authority, such as by the bishop, and after a warning, is a delict punishable by a just penalty.¹⁵ Hence, all of canon law is enforceable.

¹⁰See *CIC*, c. 209 §1.

¹¹See *CIC*, c. 212 §1; *CCEO*, c. 402.

¹²See *CIC*, cc. 1364-1366, 1376; *CCEO*, cc. 1436-1437.

¹³See *CIC*, cc. 1364, 1372; *CCEO*, cc. 1436 §2.

¹⁴See *CIC*, c. 49; *CCEO*, c. 1510 §2, 2°.

¹⁵See *CIC*, c. 1371, 2°; *CCEO*, c. 1446.

This second chapter will explore the need for the Church to provide order and unity within a mixed society.¹⁶ This will show how the Church, the incarnation of the Mystical Body of Christ in the world,¹⁷ and the universal Sacrament of Salvation¹⁸ is in need of laws, specifically penal law, to fulfill its mission, *salus animarum*. We will then turn our attention to the value and effectiveness of *latae sententiae* and *ferendae sententiae* penalties.

It is important to look at these two ways of incurring a penalty—*latae* and *ferendae sententiae*—because in the Eastern Churches *sui iuris* and the Latin Church there is a difference in understanding and canonical praxis. In the Eastern Churches there are only *ferendae sententiae* penalties because of the value placed on a just process to establish the *mens rea* or *dolus/culpa* as well as the right to defense, to vindicate one's rights and to a just judgment by a proper judge,¹⁹ since one cannot judge themselves in a criminal matter as is the case in a penalty incurred *latae sententiae*. Whereas, in the Latin Church, the value of protecting the sacred—even in occult circumstances, that is, when and where the criminal act is not yet publicly knowable—is protected by the automatic imposition of penalties.

¹⁶See CCC 827. By “mixed society” it is understood that the Church is, at once, holy and yet always reforming. The Church embraces sinners and thus in order for the Church to maintain its sanctifying ministry and salvific mission it uses penalties to reform the faithful and maintain order and unity.

¹⁷See LG 8: AAS 57 (1965) 11.

¹⁸LG 1: AAS 57 (1965) 5: “Cum autem Ecclesia sit in Christo veluti sacramentum seu signum et instrumentum intimae cum Deo unionis totiusque generis humani unitatis.” See also CCC 774-776.

¹⁹See CCEO, c. 24. See also CIC, c. 221. The right to be judged according to the prescripts of law applied with equity as is stated in CCEO, c. 24 §2 and CIC, c. 221 §2 is later expressed in that a canonical penalty must be imposed by a judicial process and where an administrative process is allowed it cannot impose expiatory penalties. See CCEO, c. 1402 §§1-2. In the Latin Church, the right to be judged in accord with the precepts of law in CIC, c. 221 §2 is viewed as protected by either a judicial or administrative process. See CIC, cc. 1341-1342.

Need for the Church to Provide Order in its *Communio*, a Mixed Society

Mercy cannot become permission for or permissive of acts contrary to the *communio fidei, sacramentorum et ecclesiastici regimini* in the Church.²⁰ Monsignor John Renken states: “Penal law is an occasion for justice in the Church – a justice that leads to a conversion of heart which draws one to eternal communion with God . . . Those who do wrong must pay the price.”²¹ Msgr. Renken further explains, in the context of Pope Francis’s bull *Misericordiae vultus* decreeing a “Jubilee Year of Mercy,” that penal law is an instrument of grace that ought to serve the conversion of the offender and is thus placed in a context of mercy.²² This helps us understand how penalties are a service to the mission of the Church, the *salus animarum*. Yet, mercy and justice meet²³ in the penal law of the Church because penal law provides for the preservation of order and unity in the *communio* of a mixed society.

The Church is the *Mystical Body of Christ* and a perfect society that exists in the world and is, at the same time, indefectibly holy and a community of sinners.²⁴ The Church is also the

²⁰See CCC 2526 and 2091-2092. Mercy and forgiveness are granted to the penitent who converts from the ways of sin. See also the concept of *rīb*, “lawsuit,” in Micah 6: 1-2, where the Lord is both the judge and the accuser of the “people,” but so as to bring about the conversion of the malefactors. See further commentary in *The New Jerome Biblical Commentary*, 16: 27-30. See also Anacletus Reiffenstuel, “Caput II – Regula IV,” in *Ius Canonikum Universum*, 22-23.

²¹John A. Renken, *The Penal Law of the Roman Catholic Church: Commentary on Canons 1311-1399 and 1717-1731 and Other Sources of Penal Law* (Ottawa: Saint Paul University, 2015) 15.

²²*Ibid.*, 13-17.

²³Mercy does play a role in the justice system of penal law in the Church as justice is balanced by mercy through deference, abstention and suspension of a preceptive penalty in *CIC*, c. 1344; in certain circumstances a judge can abstain from declaring a penalty if reform can be achieved by other means in *CIC*, c. 1345; one can be exempted from a penalty in *CIC* c. 1323; or imputability can be mitigated in *CIC* c. 1324. Thus, the application of penalties, that is, justice for one’s offense(s), is not without mercy. Furthermore, *Regula Iuris* XLIX states, “In poenis benignior est interpretatio facienda,” thus this Rule of Law establishes mercy as it calls for the more benign interpretation to be applied concerning penalties. This *Regula Iuris* is explicitly stated in the *CCEO*, c. 1404 §1.

²⁴Paul VI, *motu proprio Solemni Hac Liturgia*, June 30, 1968: *AAS* 60 (1968) 440. See also, CCC, 827.

universal sacrament of salvation,²⁵ and it is necessary for salvation.²⁶ Thus, the Church has the responsibility of preserving the *communio fidei, sacramentorum et ecclesiastici regimini* to remain an effective instrument of salvation. “The Church’s first purpose is to be the sacrament of the *inner union of men with God*. Because men’s communion with one another is rooted in the union with God, the Church is also the sacrament of the *unity of the human race*.”²⁷ The Church achieves this unity of man with God and between mankind through unity of faith, sacraments and shepherding—*ut unum sint* (Jn. 17: 21). This unity of mankind with God and with one another can also be seen through the operation of the threefold *munera*: to teach, to govern and to sanctify, which, in effect, is a leitmotif throughout the current *Corpus Iuris Canonici*.

To unite all humanity in faith requires that the Gospel be proclaimed and preached, an evangelization activity that is intimately tied to the nature and mission of the Church, the prophetic *munus*.²⁸ It is for this reason that canon 747 §1 of the Latin Code states that it is, again, a “proper” and “innate” right to preach the Gospel to all peoples.²⁹ The *communio fidei* is shared by the whole Church, uniting all of its members in word, profession, and in action—lived faith—as one body and in the one Spirit of God.³⁰ It is for this reason that those who adhere to heretical teachings which are adverse to the teachings of the Church

²⁵LG 1: AAS 57 (1965) 5. See also CCC 774-776 and Pope St. John Paul II, encyclical *Redemptoris missio*, December 7, 1990: AAS 83 (1991) 257-258.

²⁶CCC 816. See also Vatican II, decree *Unitatis redintegratio* 3, November 21, 1964: AAS 57 (1965) 94: “Per solam enim catholicam Christi Ecclesiam, quae generale auxilium salutis est, omnis salutarium mediorum plenitudo attingi potest./For only through Christ’s Catholic Church, which is the general help to salvation, can everyone attain the fullness of the means of salvation.”

²⁷CCC 775.

²⁸Paul VI, apostolic exhortation *Evangelii nuntiandi*, December 8, 1975: AAS 68 (1976) 13-15.

²⁹CIC, c. 747; CCEO, c. 595.

³⁰Pope Francis, encyclical *Lumen fidei* 46-49, June 29, 2013: AAS 105/7 (2013) 586-589.

which are to be held *fide divina et catholica*³¹ as well as those which are proposed definitively by the magisterium³² are punished with a penalty.³³

The Church unites humanity to God and to one another through the sacraments, the sanctifying ministry of the Church, most especially through baptism and the Eucharist.³⁴ “As actions of Christ and the Church, they are signs and means by which the faith is expressed and strengthened, the worship of God is rendered and the sanctification of mankind is effected and thus, in the greatest way, they contribute to establish, strengthen and manifest ecclesiastical communion.”³⁵ Likewise, the sacraments, which effect ecclesiastical unity, also need to be protected from violations by penalties.³⁶

The ministry of governance concretely unites the People of God. The reality of *communio* in the Church is complex. As a *communio ecclesiarum*,³⁷ it is tripartate: the universal Church, Churches *sui iuris*, and particular churches. *Communio* is also hierarchical, that is, a horizontal *communio episcoporum*—the college of bishops—and the vertical *communio fidelium* with their

³¹See *CIC*, c. 750 §1; *CCEO*, c. 598 §1.

³²See *CIC*, c. 750 §2; *CCEO*, c. 598 §2.

³³*CIC*, c. 1364; *CCEO*, c. 1436 §1. The penalty for heresy, that is, as expressed in canon 750 §1/598 §1 is a *latae sententiae* excommunication in the Latin Church *sui iuris* and a major excommunication in the Eastern Churches *sui iuris*, whereas, the penalty for the violation of a teaching definitively proposed in canon 750 §2 /598 §2 is a just or appropriate penalty; see *CIC*, cc. 1369 and 1371, 1°; *CCEO*, cc.1436 §2 and 1448 §1.

³⁴Commissione Teologica Internazionale, documento *La Speranza della Salvezza per i Bambini che Muoiono Senza Battesimo*, January 19, 2007: *EV* 24 (2007) 447.

³⁵*CIC*, c. 840.

³⁶Congregation for the Doctrine of the Faith, rescriptum ex audientia *Normae de gravioribus delictis*, May 21, 2010: *AAS* 102/7 (2010) 421-424.

³⁷The *communio ecclesiarum* refers to both the communion of the twenty-four Churches *sui iuris*—twenty-three Eastern and the Latin Church *sui iuris*—as well as to the communion of particular churches with the universal Church. Concerning the Latin Church, it is unique in that it is both a Church *sui iuris* and *sui generis*. The relationship of Churches *sui iuris* is relative to the supreme authority of the Church. The relationship of particular Churches to the universal Church is not analogous to a federation of particular churches which yields the universal Church. Rather, the universal Church ontologically and temporally precedes the particular churches and gives birth to them. For a further explanation see CDF, *Communio notio*, May 28, 1992: *AAS* 85 (1993) 843-844.

sacred pastors. And, fundamentally, there is the horizontal *communio* of all the Christian faithful by virtue of our common baptism.³⁸ The maintaining of this complex reality of *communio* in the Church requires juridical expression.

The Petrine ministry, by bestowing the juridic power to exercise the episcopal office within a Church *sui iuris* or particular church “strengthens” by affirming the expression of one’s ontic capacity and “protects” the faithful by guaranteeing, through juridic empowerment, that bishops exercise their episcopal office in *communio fidei et sacramentorum*, that is, in communion with the whole Church. Specifically, a bishop exercises his office in communion with the Petrine Office and the rest of the college of bishops, thus effecting the *communio ecclesiarum et episcoporum*.³⁹ The *communio fidelium* finds its positive expression in the Latin code in canon 209: “The Christian faithful are bound by the obligation, also by one’s own way of acting, to always preserve/maintain communion with the Church.”⁴⁰ The reality of communion expressed in canon 209 is with both the universal Church—that is, the Pope and the college of bishops—and with the particular church, that is, one’s diocesan bishop who is to protect unity with the universal Church in the particular church entrusted to him.⁴¹ Yet, by “Church” we do not merely suggest that communion is meant to be maintained with ecclesiastical authorities: the pope and bishops. The Church is all the Christian faithful and thus we are called to maintain

³⁸The fundamental *communio* of all the Christian faithful, grounded in baptism, expresses an obligation to maintain communion with one’s brothers and sisters in Christ. This is found in the Latin Code in canons 205, which identifies what it means to be in full communion of the Catholic Church, and canon 209 §1 which obligates the Christian faithful to maintain communion.

³⁹See *CIC*, cc. 204 §2, 333 §§1-2; *CCEO*, cc. 7, 45.

⁴⁰*CIC*, c. 209 §1: “Christifideles obligatione adstringuntur, sua quoque ipsorum agendi ratione, ad communionem semper servandam cum Ecclesia.” For the Eastern code’s parallel canon, see *CCEO*, c. 12. Canon 209 of the *CIC* finds further complement in c. 212 §1, which expresses the requirement of the Christian faithful to be obedient, not only to the teachings of the sacred pastors, but to that which is established by the sacred pastors as rulers of the Church. The parallel canon to 212 in the *CCEO* is canon 15.

⁴¹See *CIC*, c. 392; *CCEO*, c. 201.

communion with all of our brothers and sisters in Christ. The Church punishes the delict of schism which violates the *communio ecclesiarum, episcoporum et fidelium*—vertically, with one’s bishop.⁴²

In order to maintain the complex reality of *communio* and the effective threefold *munera* of teaching, governing, and sanctifying in the Church, penalties, employed as a last resort, are used to preserve unity and order. Penalties serve to maintain corporate identity, protect the flock and deter would-be offenders.⁴³ The need for the Church to provide for order and unity in its *communio* is directly connected to the Church’s nature as the instrument and universal sacrament of salvation.

As sacrament, the Church is Christ's instrument. “She is taken up by him also as the instrument for the salvation of all,” “the universal sacrament of salvation,” by which Christ is “at once manifesting and actualizing the mystery of God's love for men.” The Church “is the visible plan of God's love for humanity,” because God desires “that the whole human race may become one People of God, form one Body of Christ, and be built up into one temple of the Holy Spirit.”⁴⁴

The Church, in her essence, mirrors the incarnation of the Eternal Word.⁴⁵ She is both visible and spiritual, a hierarchical society and the Mystical Body of Christ.⁴⁶ Her humanity, which needs laws to provide the skeletal structure and just ordering of relationships between her members is, at the same time, hypostatically united to the divine life of grace. Therefore, it is the sacrament of salvation for all those who are in communion with God and one another.

⁴²*CIC*, c. 1364; *CCEO*, c. 1436 §1. See also CDF, rescriptum ex audientia *Normae de gravioribus delictis*, May 21, 2010: *AAS* 102/7 (2010) 420.

⁴³Thomas J. Green, et al., “Report of the Special Committee of the Task Force of the Canon Law Society of America on the Proposed Schema De Delictis et Poenis,” *CLSA Proceedings* (Oct. 7-11, 1974) 131.

⁴⁴*CCC* 776.

⁴⁵*LG* 8: *AAS* 57 (1965) 11.

⁴⁶Paul VI, discourse at the Pontifical Gregorian University *Cursui renovationis canonicae pro iudicibus aliisque tribunalium administris*, December 14, 1973: *AAS* 66 (1974) 10-12.

The Church's mission is the salvation of souls. The Church is the universal sacrament of salvation and necessary for salvation. The *communio fidei, sacramentorum et ecclesiastici regimini* is what visibly manifests the baptized person's union with the Church.⁴⁷ Penalties are needed to preserve *communio* in the reality of a mixed society. Thus, penalties are a service to the mission of the Church—*salus animarum*. This purpose is clearly shown to be an inter-codal reality—a unitary purpose present in both the Eastern and Latin codes—and thus we can state that for the whole Church the purpose of penalties is the preservation of *communio* with the Church, the universal sacrament of salvation, for the salvation of souls.

The Value of *Latae Sententiae* and *Ferendae Sententiae* Penalties

Understanding that penalties are a service to the mission of the Church and are needed for the preservation of *communio* in a mixed society, requires us to analyze now the two ways of incurring a penalty: *latae sententiae* and *ferendae sententiae*. The analysis of these two ways of incurring a penalty does not merely serve to highlight the different canonical systems between the unified Eastern code and the Latin code but will look at the value of each way of incurring penalties in light of the general purpose of penalties being a service to preserve *communio* to affect the mission of the Church. Yet, this will first require us to examine the two systems of penalties as their primary function in the penal system of the Church is different.

⁴⁷See *CIC*, c. 205; *CCEO*, c. 8.

In the current two codes there are two forms of penalties: 1) censures,⁴⁸ which are excommunication,⁴⁹ suspension, interdict⁵⁰ and, in the Eastern code, demotion;⁵¹ 2) expiatory;⁵² and two means of dissuading one from a delict or reforming them after having committed a delict: 1) penal remedies; and 2) penances. For the sake of exploring the value of *latae* and *ferendae sententiae* penalties we will only concern ourselves with censures and expiatory penalties because penal remedies and penances cannot be imposed for an occult offense and therefore do not help our understanding of the value of these two forms of incurring a penalty. Penal remedies and penances serve to warn, rebuke or impose a work of charity, religion or piety to reform the offender and can be used to substitute or increase a censure or expiatory penalty.⁵³

⁴⁸The Eastern Churches only have censures.

⁴⁹In the East there are two types of excommunication: major and minor, whereas in the Latin code there is merely excommunication without such a distinction as minor and major. A minor excommunication in the East is a prohibition of the following: invalidity of being admitted to the novitiate, see *CCEO*, cc. 450, 2° and 517 §1; invalidity of being admitted to a society of common life in the manner of religious, see *CCEO*, c. 559 §1; or secular institute, see *CCEO*, c. 568; prohibition to function as a sponsor in baptism, see *CCEO* c. 685 §1, 6°; and the prohibition to function as an arbitrator in a compromise, see *CCEO* c. 1172, 2°. Whereas, a major excommunication is a prohibition against the reception of all the other sacraments; a prohibition to participate in the Divine Liturgy and any other public worship; a prohibition to administer sacraments and sacramentals; a prohibition to exercise any office, ministry, functions or place acts of governance under pain of their validity; a prohibition against the use of privileges previously granted; a prohibition from obtaining dignities, offices, ministries, functions or a pension in the Church as well as obtain revenue attached to any of these ministries, functions or pensions, see *CCEO* c. 1434 §§1-3. The Latin code's censure of excommunication means that one is prohibited from any ministerial participation in celebrating the Eucharist or any other ceremony of worship; prohibited from celebrating or receiving the sacraments; prohibited from exercising any ecclesiastical office, ministry, functions or to place acts of governance; and, if the excommunication is declared or imposed, one incurs the further penalties that one who attempts to place any of the above mentioned acts must be stopped; that any acts of governance are invalid and not merely illicit as they are for one who is excommunicated without it being imposed or declared; one is prohibited from benefitting from privileges previously granted; they cannot validly acquire a dignity, office or other function; and they do not appropriate the benefits of a dignity, office, function or pension which they have in the Church, see *CIC* c.1331.

⁵⁰Interdict only exists in the Latin code.

⁵¹Demotion only exists in the Eastern code.

⁵²Deposition, deprivation, penal transfer, and injunction are expiatory penalties in the Latin code, yet since the East doesn't have expiatory penalties, deposition, deprivation, penal transfer and injunction would also be enumerated among censures.

⁵³ *CIC*, c. 1312 §3. Penal remedies and penances do not exist in the Eastern code, yet penances are part of the medicinal reality of the Eastern system of penal law and can be used in place of other penalties, such as an

Censures or medicinal penalties “are those which have as their purpose the change of heart of the offender, his repentance, and his readiness to give satisfaction for the disturbance of the social order caused by his/her offense.”⁵⁴ Expiatory penalties,⁵⁵ formerly called “vindictive penalties,” have the purpose of remedying disturbances of the social order, healing scandal, and deterring other would-be offenders, whether or not the offender is reformed.⁵⁶ Yet, the usage of the term “expiatory” instead of “vindictive” in the 1983 *Codex Iuris Canonici* does denote a significant change in notion. The notion that expiatory penalties ignore the salvation of souls is not an accurate interpretation, as the reform of the offender, while not the primary function of expiatory penalties, is connoted in the word “expiatory” itself since expiation means “atonement” or “the making of amends for a wrong.” The connotation of *in vindictam rei* in Roman law merely signified “revenge” for a wrong.⁵⁷

The over-arching purpose of penalties common to both codes is to preserve *communio* with the Church, the universal sacrament of salvation. “Despite the different orientations of these two types of penalties, the Church’s redeeming, healing character means that the primary focus of any penal activity must be to affirm ecclesial unity through faith and charity rather than to

excommunication, or can be incurred with such penalties. This is because all penalties are penances in the Eastern code since they all have the purpose of the benefit (reform) of the offender. See *CCEO*, c. 1426.

⁵⁴Victor J. Pospishil, “Penal Law,” in *Eastern Catholic Church Law: Second Revised and Augmented Edition* (Staten Island, New York: Saint Maron Publications, 1996) 747. See also Thomas J. Green, “Penal Law: Review,” in *The Jurist* 50 (1990) 228. It should be noted that all penalties in the Eastern code are solely understood to be medicinal.

⁵⁵Expiatory penalties only exist in the Latin code.

⁵⁶See *op cit*. See also *CIC*, cc. 1312 and 1336.

⁵⁷Giuseppe Di Mattia, “De poenis expiatoriis,” in *Code of Canon Law Annotated*, ed. Ernest Caparros et al. (Montreal: Wilson & Lafleur, 1993) [hereafter *Code Annotated*] 342.

condemn an individual engaging in anti-ecclesial conduct, however reprehensible.”⁵⁸ Viewing the purpose of a penalty from the perspective of preserving or as a therapy to restore an offender to *communio* means that the penalty does not undermine the person’s dignity as a member of the Christian faithful. After all, excommunication or dismissal from the clerical state—to use an example of a censure and an expiatory penalty—do not remove one from being a member of the Christian faithful since neither can erase the effect of baptism.⁵⁹ Rather, a penalty affects one’s status, condition, and ability to function within the community of the faithful, the Church.⁶⁰

It will serve our purpose well to look first at the dismissal or deposition from the clerical state and excommunication—examples of an expiatory penalty⁶¹ and a censure—to better understand these two types of penalties in general. The dismissal from the clerical state,⁶² an expiatory penalty in the Latin code,⁶³ expresses the Church’s right and duty to provide suitable ministers for the Christian faithful⁶⁴ and to protect the Christian faithful from those who

⁵⁸Thomas J. Green, “Penal Law: Review,” *The Jurist* 50 (1990) 228.

⁵⁹See CCC 1463. See also CCC 1262-1274.

⁶⁰Since penal causes affect the status, condition, and ability to function of persons, one must consider *CIC*, cc. 1400 §1, 2°, 1401, 2° and 1731; *CCEO*, cc. 1055 and 1485 concerning penal trials as a penal trial can become *res iudicata* – cf. *CIC*, c. 1643; *CCEO*, c. 1324. See also CCC 1463.

⁶¹Dismissal from the clerical state is an expiatory penalty in the Latin code, but there are no expiatory penalties in the Eastern code. Thus, this example which helps us distinguish between expiatory penalties and censures is solely apt to the mentality of the Latin code.

⁶²Irregularities *ex delicto* also protect the common good of the Christian faithful by rendering a cleric irregular for ministry due to a crime, such as incurred for heresy, schism or apostasy in *CIC*, cc. 1041, 2° and 1364.

⁶³There are no expiatory penalties in the Eastern Code; See Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, “Lo schema dei canoni riguardanti le sanzioni penali nelle Chiese Orientali Cattoliche,” *Nuntia* 4 (1977) 74. Rather, in the East, this is a censure since the deposition from the clerical state is a penance for the reform of the offending cleric. Furthermore, *CCEO*, c. 1433 speaks first of the demotion of a cleric to a lower grade and only in the worst cases the deposition, that is removal, from the clerical state.

⁶⁴*CIC*, cc. 1025 and 1029; *CCEO*, cc. 758 §1, 2° and §2.

would cause them injury, especially concerning the faith and morals,⁶⁵ sacraments, and unity with the authentic shepherds of the Church. This follows from the more general purpose given expiatory penalties in the 1917 Pio-Benedictine Code, that they look directly to the expiation of the delict and the cessation of the contumacy of the offender.⁶⁶ Unlike censures which must be remitted upon the cessation of contumacy,⁶⁷ an expiatory penalty can be perpetual. Thus, even if a person repents, an expiatory penalty can remain.

A perpetual penalty, such as the loss of the clerical state, which is only incurred for the gravest offenses, has the purpose in the Latin code: to repair scandal or restore justice. The sole aim of penalties in the East is medicinal, yet the notion of the expiation of scandal and healing of not only the offender but those offended is not lost in the East. The eastern canonist, Chorbishop John Faris states: “Despite the fact that all penalties are essentially *expiatory* to repair the harm done to the community (a requirement essential for the sake of justice), the Eastern Code construes the purpose of penal law as *medicinal*, to heal both the perpetrator and wounds resulting from the criminal act.”⁶⁸ The loss of the clerical state should serve as such a severe punishment that the offender must confront the grievous “error of his ways” and repent.

The *ius obiectivum* of excommunication is the reform of the offender with a medicinal punishment. One who has committed a delict has the right to the pastoral care of the Church and thus to be punished—coerced—by the Church with the medicinal

⁶⁵CDF, *Normae de gravioribus delictis*, May 21, 2010: AAS 102/7 (2010) 424. See also *CIC*, cc. 1390-1398; here the concept of *mores* (morals) is broad as it applies to violations of the Decalogue and of specific obligations tied to one’s state in life. The Eastern code expresses these delicts in *CCEO*, cc. 1450-1455 and 1466-1467.

⁶⁶1917 *CIC*, c. 2286.

⁶⁷*CIC*, c. 1358 §1.

⁶⁸John Faris, “Penal Law in the Catholic Churches: A Comparative Overview,” *Folia Canonica* 2 (1999) 58.

censure of excommunication for the sake of their reform. Through the institute of excommunication, the Church expresses its right as priest, prophet, and shepherd and the offender their right to be sanctified, taught, and shepherded.⁶⁹ “For those whom the Lord loves, he punishes; he himself scourges every son he receives.”⁷⁰

The society of the Church offers justice by punishing those who offend ecclesial values and injure the *communio fidei, sacramentorum et ecclesiastici regimini*. Yet, this justice administered by the Church to offending parties, when concerning an excommunication, seeks the reform of the offender.⁷¹ It is then the duty of legal justice on the part of the offender to reform so as to re-establish communion with the Church. And, in order to provide for commutative justice, those in society owe each other fraternal correction and assistance in reforming.⁷²

The mere punishment for justice’s sake—giving one their due⁷³—and not also seeking their reform, as is the purpose of excommunication, would be insufficient. Charity seeks to restore communion with the offender and mercy seeks to temper the punishment so that it

⁶⁹*CIC*, cc. 209-210, 212-213 and 217; *CCEO*, cc. 12-13, 15-16, 20.

⁷⁰Hebrews 12: 6. “ὃν γὰρ ἀγαπᾷ κύριος παιδεύει, μαστιγοῖ δὲ πάντα υἱὸν ὃν παραδέχεται.” Adversity is seen as discipline or punishment from a loving God. Hence, the adversity that may come with living the faith, sacramental discipline, and obedience to ecclesiastical governance, and the subsequent disciplining of one who offends these constitutive elements of *communio* is the act of the loving God. See *New Jerome Biblical Commentary*, 60:67 and 28:23.

⁷¹See *CIC*, 209 §1; *CCEO*, c. 12.

⁷²The fundamental right based on the constitution of the Church and granted to the Christian faithful is the right to *educatio*, that is Christian formation. In the circumstance of a delictual behavior being punished with an excommunication, which seeks the reform of the offender, this is a last resort form of Christian formation since it seeks to re-form the offender. This is likewise its formative value, that the declaration or imposition of the medicinal penalty of excommunication brings about the reform not only of the offender but, by witness and in second instance, not just a deterrent, but a reform to the community *for the common good*. Thus, all the Christian faithful have the right and obligation to assist one another in their Christian formation. See *CIC*, cc. 217, 759 and 793-795; *CCEO*, cc. 20, 618-619 and 627-629.

⁷³See *S. Th.*, II-II, q. 58, a. 1.

accomplishes its end without any further coercive infliction after that end is attained.⁷⁴ Mercy likewise expresses equity by exempting or mitigating imputability based on the offender's circumstances.⁷⁵ Furthermore, in the application of penalties there is discretion given to the judge to apply equity and mercy, even to the point of setting aside the imposition of the penalty in favor of a more appropriate action.⁷⁶ And, in danger of death, any prohibition from reception of the sacraments or the administration of the sacraments by an otherwise prohibited cleric is suspended.⁷⁷ Equity is expressed through mercy which outweighs a strict view of law enforcement for the sake of the salvation of souls and the pastoral care of the Christian faithful which, if denied or set aside in favor of the enforcement of the penalty, would be a greater injustice and cause further injury to the faithful and the good of souls. In the sophistication of ecclesiastical penal law there is a beauty to how we punish an offender, because it is not merely the punishment of an offense, but it is for the sake of the salvation of souls.⁷⁸ Our canonical systems of law, which ought to be exemplary in justice, ought to be a leaven for all other legal systems.

Having explored the notion of justice as it applies to penalties in general and in specific to censures and expiatory penalties, it is now incumbent upon us to explore the value of incurring penalties either *latae* or *ferendae sententiae*. As was stated earlier, only the Latin Church *sui iuris* has retained *latae sententiae* penalties, though greatly reducing the number of them in the law, whereas the Eastern Churches only have *ferendae*

⁷⁴See *CIC*, c. 1358 §1; *CCEO*, c. 1424.

⁷⁵*CIC*, cc. 1322-1324; *CCEO*, cc. 1413 and 1415.

⁷⁶*CIC*, cc. 1343-1344; *CCEO*, c. 1409 §1, 1°, 2°, and 4°.

⁷⁷*CIC*, c. 1352; *CCEO*, c. 1435.

⁷⁸In the Eastern code there is also the possibility of demotion or reduction to a lower grade of the clerical state; see *CCEO*, c. 1433 §1.

sententiae penalties even those *latae sententiae* penalties promulgated in the *Normae de gravioribus delictis* where there was not a previously established Eastern penalty coinciding with the delict established are still imposed.⁷⁹

In the Eastern code all penalties are censures, that is medicinal. While certain penalties may be privations⁸⁰ or the deposing of a cleric from the clerical state,⁸¹ these are not called expiatory.⁸² Rather, they are still conceived as medicinal, in that they aim primarily at reforming the offender.⁸³ Furthermore, there are no penal remedies or penances in the Eastern code.⁸⁴ These were not received in the Eastern code for the following three reasons: the dichotomy between penalties and penances that is present in the Latin Code is not idoneus with the Eastern tradition, the medicinal character of all canonical penalties, and that penalties result precisely in a positive act which the penalty imposes.⁸⁵

⁷⁹See George Nedungatt, "Penal Sanctions in the Church – The Aim of Punishment," in *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, ed. George Nedungatt, et al. (Rome: Pontificio Istituto Orientale, 2002) [hereafter *A Guide to the Eastern Code*] 792. This could also occur in any other case in which the supreme authority of the Church might find it necessary to establish a new delict with a *latae sententiae* penalty. cf. Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, "Lo schema dei canonici riguardanti le sanzioni penali nelle Chiese Orientali Cattoliche," *Nuntia* 4 (1977) 80.

⁸⁰*CCEO*, c. 1430.

⁸¹*CCEO*, c. 1433 §2.

⁸²See Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, "Lo schema dei canonici riguardanti le sanzioni penali nelle Chiese Orientali Cattoliche," *Nuntia* 4 (1977) 73-74.

⁸³See George Nedungatt, "Penal Sanctions in the Church – The Aim of Punishment," in *A Guide to the Eastern Code*, 792.

⁸⁴*Ibid.*

⁸⁵Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, "Lo schema dei canonici riguardanti le sanzioni penali nelle Chiese Orientali Cattoliche," *Nuntia* 4 (1976) 74. The Latin code distinguishes between penalties and penances. This distinction is foreign to Eastern traditions. In the Pio-Benedictine Code, canon 2215 stated that a penalty was a deprivation of a good whereas a penance was the imposition of a positive act: work of charity, piety or religion. The absence of this distinction in the Eastern code is why there is not the presence of penal remedies and penances as distinct penalties. *CCEO*, c. 1426 expresses the Eastern tradition that all penalties seek the reform of the offender. See also John Faris, "Penal Law in the Catholic Churches: A Comparative Overview," *Folia Canonica* 2 (1999) 58-59.

The solely medicinal character of penalties in the Eastern code means that penalties in the East are not primarily meant to repair scandal, re-establish justice, or compensate a person injured by another's delictual behavior.⁸⁶ The reality of scandal and harm are to be considered in the imposition of the medicinal penalty and its subsequent remission, but it is not the primary aim of penalties in the East.⁸⁷ Furthermore, the sole mode of incurring a penalty in the East is *ferendae sententiae*.

The First Plenary Assembly of the Commission for the Revision of Code of Canon Law of the East, on March 18-23, 1974, stated in regards to Eastern penal law, "In the Oriental Code all the 'poenae latae sententiae' should be abolished, because they do not correspond to the genuine Oriental traditions, are unknown to Orthodox Churches, and do not seem necessary for the purposes of the adaption of the Oriental Code to the present-day requirements of the discipline of the Oriental Catholic Churches."⁸⁸ The commission furthermore sought to make a clear distinction between *fora* and thus penalties are imposed and remitted only in the external forum. The sole mode of incurring a penalty in the East emphasizes the canonical Lastly, the incurrence of a penalty only *ferendae sententiae* signifies that only a competent judge

⁸⁶George Nedungatt, "Penal Sanctions in the Church – The Aim of Punishment," in *A Guide to the Eastern Code*, 793.

⁸⁷Ibid. See also *CCEO*, cc. 1403 §1, 1409 §1, 2° and 4°, 1415, 1418 §§2 and 3, 1422 §3 and 1424.

⁸⁸Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, "Principi direttivi per la revisione del Codice di Diritto Canonico Orientale," *Nuntia* 3 (1974) 9-10. Further reading directs us to "The Rudder" or "Pedalion" of the sacred canons of the Orthodox Church to see what the authentic penal laws are of the Orthodox. See D. Cummings, *The Rudder (Pedalion)* (Chicago: The Orthodox Christian Educational Society, 1957) 7-27, 31-32, 35-50, 52-55, 60-61, and 63-81.

⁸⁹Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, "Principi direttivi per la revisione del Codice di Diritto Canonico Orientale," *Nuntia* 3 (1974) 9-10. See also *CCEO*, c. 1407 §§1-2. There must be at least one warning and a suitable amount of time for one to cease the delictual behavior, or at least seriously promise to do so, and repent.

can impose a penalty and that the accused (*reus*) have an opportunity to defend themselves.

Both the Latin and the Eastern codes posit the right of all the Christian faithful to vindicate and defend their rights before the competent ecclesiastical forum according to the norm of law, to be judged according to the prescripts of the law applied with equity, and not to be punished with canonical penalties except in accord with the norms of law.⁹⁰ Furthermore, the judicial process is preferred as the means of imposing penalties in regards to the process for the declaration of penalties.⁹¹ A judicial or an administrative penal process both provide for the protection and opportunity for the vindication of the rights of the offender. In either process there is the right to an advocate/procurator,⁹² the right to be heard in the proceedings and to be informed concerning the proceedings,⁹³ a right to justice applied with equity,⁹⁴ and a right to appeal.⁹⁵

The lack of a canonical warning, to be judged by a competent authority, for justice to be applied with equity, and for there to be a process in order to incur a penalty are issues concerning *latae sententiae* penalties. Chorbishop John Faris states,

The institution of *latae sententiae* penalties in the Latin Code creates some interesting anomalies. For example, the Latin Code requires *for validity* that a censure cannot be imposed without at least one prior warning. However, if a person commits apostasy, schism, or heresy, he automatically incurs the penalty of excommunication (*CIC* c. 1364

⁹⁰See *CIC*, c. 221; *CCEO*, c. 24.

⁹¹See *CIC*, c. 1342 §§1 and 3; *CCEO*, c. 1402 §2. It should be stated that the Latin code prohibits the application of a perpetual penalty outside a judicial process; see *CIC*, c. 1342 §2. Yet, a perpetual penalty can be imposed through an administrative process for grave delicts reserved to the Congregation for the Doctrine of the Faith. See CDF, *Normae de gravioribus delictis*, May 21, 2010: *AAS* 102/7 (2010) 428.

⁹²*CIC*, c. 1723 §§1-2 and 1738; *CCEO*, cc. 1474 and 1003.

⁹³*CIC*, c. 1720, 1°; *CCEO*, c. 1486 §1, 1°.

⁹⁴*CIC*, c. 221 §2; *CCEO*, c. 24 §2.

⁹⁵*CIC*, cc. 1353, 1727 §1, and 1734 §§1-2; *CCEO*, cc. 1481 §1 and 1487.

§1). The Eastern Code, takes perhaps a more realistic approach that a warning is to be given to the offender with an opportunity to recant (*CCEO* cc. 1436-1438).⁹⁶

Yet, is not the fact that a delict is in the law with a *latae sententiae* penalty already sufficient warning? After all, ignorance of the law, including penal law, is not presumed.⁹⁷

Lastly, there remains the matter of justice that concerns incurring a penalty *latae sententiae* and one's procedural rights enumerated above. Is it just to incur a penalty without a process? Are these rights inviolable and absolute? And, are they being violated by the institute of *latae sententiae* penalties?

The rights of an individual or even of a group of people who constitute an association are not absolute. Rather, they are tempered by the common good of the Church.⁹⁸ Yet, one's procedural rights are grounded in the natural law. An undeclared *latae sententiae* penalty is enforced by the persons themselves, bound in conscience; thus, it can be said that there is no violation of their rights. When *latae sententiae* penalties are declared, offenders would have all of their procedural rights available to them. Thus, whether or not this is an injustice depends upon whether one places greater value on an individual or the sacred nature of the Church, her faith and morals, her sacraments, and her ministry of shepherding the faithful unto communion with one another, the Church and God. The *latae sententiae* incurring of a penalty serves to protect the sanctity of what could be violated in the occult and expresses a clear warning to all the Christian faithful that these particular violations are especially egregious.

We see that the coercive power of the Church to penalize comes from *ius objectivum* and is therefore a true act of justice, mercy, and charity that provides a leaven for other legal systems

⁹⁶John Faris, "Penal Law in the Catholic Churches: A Comparative Overview," *Folia Canonica* 2 (1999) 61.

⁹⁷*CIC*, c. 15 §2; *CCEO*, c. 1497 §2.

⁹⁸*CIC*, c. 223 §§1-2; *CCEO*, c. 26 §§1-2.

in the development of their own penal laws. Furthermore, we have shown how the inter-codal purpose of the preservation of *communio* balances the aim of reform of the offender and truth and justice in regards relationships in the Church. It will now be incumbent upon us in the next chapter to apply this purpose to the current penal issues that face the Church.

Chapter III: Principles for a Revision

In light of the overarching inter-codal purpose of the preservation of *communio* with the Church we see that penalties are necessary, a service to the mission of the Church, and are just when applied for this purpose. As has been the purpose of this thesis, we will now propose a revision of current penal law which draws from the objective and fundamental right of the Church to coerce the Christian faithful and the inter-codal purpose expounded in the first two chapters. Two principles will be explored: penalties as a last resort and the Church as Shepherd and Teacher. The Church has the responsibility, in accord with justice, to provide pastoral care. The Church's pastoral care, especially as a teacher and shepherd, should emphasize preventing the need for the imposition of penalties. Yet, the pastoral care of the Church, at times, has the responsibility to act to protect the Christian faithful and preserve the complex reality of *communio* in the Church that it may nourish the faithfuls' salvific relationship with God.¹ This will find us proposing a new delict concerning sex trafficking, a crime against human dignity, which disrupts a person's communion with the God who created us in His image and likeness and undermines the reverence proper to each human person in the *communio fidelium* and in the whole of human civilization to which the Church is called to be a leaven.²

Principles Drawn from the First Two Chapters

In the spirit of the medieval brocardica from the School of Bologna, we can extract from the law two principles: penalties as a last resort and the Church as Teacher and Shepherd. In both codes in force, specifically canons 1341 in the Latin and 1401 in the Eastern, the legislator

¹CCC 775; *CIC*, c. 1752.

²See I Cor. 5: 8; Matt. 13:33; Luke 13: 20-21. See also Vatican II, dogmatic constitution on the Church *Lumen gentium* 36, November 21, 1964: *AAS* 57 (1965) 41-42; and Francis, motu proprio *Vos estis lux mundi*, May 7, 2019. Pope Francis's motu proprio is not yet published in the *Acta*. Accessed at https://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html, (accessed May 25, 2019).

directs the bishop to prevent the need for penalties. Furthermore, concerning procedural law, both codes require the bishop and all the Christian faithful to avoid formal litigation and to seek peaceful resolution of conflicts.³ From these canons we can posit the principle that penal procedures and penalties are a last resort activity in the life of the Church to preserve *communio*, restore justice, repair scandal, and reform the offender. Both codes call for the bishop or ordinary to first employ the following:

- A. Fraternal Correction: to correct someone's behavior in a manner seeking their reform to prevent sinful and/or criminal activity.
- B. Teaching, Imploring, Rebuking: patiently teaching and begging an errant person to reform, after which a strong reprimand and warning may still be needed if teaching and imploring go unheeded.
- C. Pastoral Care of Specialized Treatment: this could include outpatient or residential psychological/psychiatric care, directed spiritual retreats, or other appropriate professional treatment.

When these methods fail to result in the reform of the offender, repair of scandal and restoration of justice, then the declaring or imposing of penalties becomes necessary.

The second, and related principle, extracted from the overarching threefold *munera* of the Church which exists as a *leitmotif* throughout the Latin code is "The Church as Shepherd and Teacher." While seeking the reform of an offender is certainly a sanctifying activity of the Church, the imposition or declaration of penalties is an act of the Church as Shepherd and its preventative activity arises from the Church as Teacher.

Pope Gregory IX's *Regula Iuris* 10 states: "The pastor is not excused for ignoring the sins of his flock and the ravages that the wolf causes."⁴ Thus, the bishop or hierarch/ordinary has

³ *CIC*, c. 1446; *CCEO*, c. 1103.

a responsibility concerning justice to provide pastoral care to his clergy⁵ and to the lay faithful.⁶ When penalties are not employed and one is allowed to continue to wander astray without correction, rebuke, pastoral care and ultimately punishment, the Church fails in its role as shepherd and teacher. The Second Vatican Council exhorts bishops, “The bishops govern the churches entrusted to them as vicars and legates of Christ, by counsel, persuasion, and example and indeed also by authority and sacred power which they make use of only to build up their flock in truth and holiness.”⁷ To this Pope Francis adds, “That which more closely regards the successors of the Apostles, concerns all those who, in various ways, assume ministries in the Church, profess the evangelical counsels, or are called to serve the Christian people. Therefore, it is good that there are adopted procedures at the universal level to prevent and counteract these crimes that betray the trust of the faithful.”⁸ Thus, clergy, those in consecrated life, and all laity in roles of service in the Church have a duty to prevent, to the best of their ability, and bishops and hierarchs/ordinaries to punish, when all prior pastoral methods fail, those who harm truth, justice, and *communio*.

Drawing from these two principles. penalties are a last resort and the Church as Teacher and Shepherd, the clear emphasis should be on the prevention of delicts. It is in this regard that

⁴X 5.41.10: “Non enim potest esse pastoris excusatio, si lupus oves comedit, et pastor nescit.” English Translation from Albert Gauthier, *Roman Law and Its Contribution to the Development of Canon Law* (Ottawa: Saint Paul University, 1996) 120.

⁵*CIC*, c. 384; *CCEO*, c. 192 §4

⁶*CIC*, cc. 383 and 386; *CCEO*, cc. 192 §1 and 196 §§1-2.

⁷*LG 27*: English Translation in *Decrees of the Ecumenical Councils*, ed. Norman P. Tanner, 2 vols. (London and Washington: Sheed & Ward and Georgetown University Press, 1990) [hereafter Tanner] 2: 871.

⁸Pope Francis, apostolic letter given motu proprio *Vos estis lux mundi* 1, May 7, 2019. Original Italian text: “Quanto in maniera piu stringente riguarda i successori degli Apostoli, concerne tutti coloro che in diversi modi assumono ministeri nella Chiesa, professano i consigli evangelici o sono chiamati a servire il Popolo cristiano. Pertanto, e bene che siano adottato a livello universale procedure volte a prevenire e contrastare questi crimini che tradiscono la fiducia dei fedeli.”

Christian formation, including education, catechesis, and evangelization play a tantamount role in prevention. Christian formation seeks the cultivation of faith, right worship in spirit and truth, conformity of one's life with justice and truth, the development of a mature Christian witness, and that one is therefore capable of contributing to the building-up of the Church.⁹ Furthermore, for those who are called to serve the Church in an official capacity, whether lay, in consecrated life, and/or the clerical state, there is an even greater need for Christian formation. And, in light of the current sex abuse scandal, a stronger emphasis during formation should be placed on the role of canon law and psycho-sexual development and integration. Addressing this issue at the Vatican's *Incontro* in February of 2019, Archbishop Scicluna stated:

Certainly, among the contributing factors we can include: inadequate procedures for determining the suitability of candidates for priesthood and the religious life; insufficient human, moral, intellectual and spiritual formation in seminaries and novitiates. . . . Another aspect of the stewardship of prevention is the selection and presentation of candidates for the mission of Bishop. Many demand that the process be more open to the input of lay people in the community.¹⁰

After all, it is not merely clerics who have brought this scandal upon us and all the Christian faithful share in the work of prevention, especially those in ministry and offices within the Church.

Effective Usage of Penalties to Address Current Issues

The scandal of sexual abuse of minors and violations of celibacy with adults has caused wounds to *communio*, especially among the lay faithful. Penalties need to be more effectively applied to restore justice and preserve *communio*. Pope Boniface VIII, in his *Regula Iuris* 76

⁹See Vatican II, declaration *Gravissimum educationis* 2, October 28, 1965: *AAS* 58 (1966) 730-731.

¹⁰Charles J. Scicluna, "Address to the *Incontro*: Taking Responsibility for Processing Cases of Sexual Abuse Crisis and For Prevention of Abuse" (February 21, 2019) (Vatican City State, Holy See Press Office, 2019) 1-2 and 9.

teaches: “The delict of an individual should not cause a detriment to the Church.”¹¹ Yet, the delictual behaviors of clerics, those in consecrated life, and lay persons working for the Church in diverse ministries and offices who have abused minors¹² and vulnerable adults¹³ have caused a detriment to the Church.

The Church’s recent legislative steps to curb sex abuse have focused on minors and vulnerable adults and only punishes clerics and those in consecrated life.¹⁴ Yet, there are other forms of abuse of a person’s dignity that are affecting the Church and both clergy and lay persons are among the offenders. The issue of sex trafficking comes to mind. In 2000, the United Nations in the Palermo Protocol defined trafficking as:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁵

¹¹VI *De Regulis Iuris* 76: “Delictum personae non debet in detrimentum ecclesiae redundare.” English Translation from Gauthier, *Roman Law*, 115.

¹²The term “minor” for the purpose of delicts *contra sextum* is any person under 18 years of age or who is considered by law the equivalent of a minor. This definition is given in Pope Francis, motu proprio *Vos estis lux mundi* 1§2a, May 7, 2019.

¹³A vulnerable adult is “any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want or otherwise resist the offense.” This definition is given in Pope Francis, motu proprio *Vos estis lux mundi* 1§2b, May 7, 2019.

¹⁴See Pope Francis, motu proprio *Vos estis lux mundi* 1§1, May 7, 2019.

¹⁵United Nations General Assembly, “Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,” Resolution 55/25, November 15, 2000, Art. 3 (a), United Nations, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx> (accessed May 18, 2019).

Sex trafficking, specifically, is defined by the United States as “the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”¹⁶

According to a September 2017 report, “Global Estimates of Modern Slavery: Forced Labor and Forced Marriage,” by the International Labor Organization of the United Nations, an estimated 4,816,000 people were being sex trafficked.¹⁷ The National Human Trafficking Hotline, operated by Polaris, between 2007 and 2017, received 34,700 reports of sex trafficking inside the United States of America.¹⁸

The issue of sex trafficking has been a moral and legal issue in the Church and in civil society,¹⁹ to which the Church is meant to be a leaven and witness to justice, truth, and charity. There is a need for further legislative development concerning sexual and human dignity issues that cause scandal to the detriment of the whole Church. These behaviors harm the society and *communio* of the Church, are an offense to justice in the Church, and undermine the mission of the Church, the *salus animarum*, that is, to foster communion between God and man. Hence, issues concerning human dignity should be criminal—established in the law of the Church as delicts.

The Pio-Benedictine Code, in canons 2353-2354, established penalties for the sale of humans into servitude or other evil ends, as well as for carrying off an unwilling woman by force

¹⁶U.S. Code Title 22 Foreign Relations and Intercourse, Chapter 78 Trafficking Victims Protection, §7102 (12).

¹⁷International Labor Organization and Walk Free Foundation, “Global Estimates of Modern Slavery: Forced Labor and Forced Marriage,” (Geneva, 2017), accessed at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf (accessed May 18, 2019).

¹⁸Polaris, “Sex Trafficking,” accessed at <https://polarisproject.org/human-trafficking/sex-trafficking>.

¹⁹James A. Brundage, “Prostitution in Medieval Canon Law,” *Signs* 1/4 (Summer, 1976) 825-845; Ion Cristinel Rujan, “Reflections on Prostitution and Pimping,” *Annals Constantin Brancusi U. Targu Jiu* 1 (2014) 7-20; Donna Hughes, “Combating Sex Trafficking: A History,” *Fair Observer* (October 6, 2013), accessed at https://www.fairobserver.com/region/north_america/combating-sex-trafficking-history/.

or fraud for the sake of lust, in essence, sex trafficking, as an attack against human dignity and a deprivation of liberty. During the code revision process, Pope John Paul II, referring to these canons in the Pio-Benedictine Code, in an allocution to the participants of the Fourth International Convention on Canon Law of Fribourg in Switzerland, emphasized the role of the Church and public authorities in promoting these human rights.²⁰ Public authorities clearly have the resources and ability to actively prosecute such crimes in the secular sphere in ways the Church does not. Yet, the Church does have the ability to coerce her faithful who participate in such criminal activity, seeking their reform, repairing scandal, and standing for justice and human dignity by making clear witness that the denigration of human dignity is unacceptable.²¹ These two canons were consolidated into canon 1397 in the Latin code, which establishes homicide, kidnapping, detaining, mutilating or gravely wounding a person by force or fraud as a delict, and canons 1450 §1 and 1451 in the Eastern code, which establish the same abovementioned delicts and adds bodily or mental torture.²² In the Latin code, canon 1397 appears in Title VI of Book VI dealing with human life and freedom, that is, human dignity, rather than under Title V concerning special obligations, such as clerical celibacy. Lastly, canon 2354 §§1-2 of the Pio-Benedictine and both codes in force apply delicts against human life and freedom to laypersons and clerics.

²⁰John Paul II, allocution *Ad participes IV Conventus Internationalis de Iure Canonico Friburgi in Helvetia celebrati*, October 13, 1980, in *Communicationes* 12/2 (1980) 205-206.

²¹Similarly, the Church does not, in most countries, prosecute the delict of murder until after the secular public authorities have first had their process. Yet, the Church does still reserve the right to promote justice by the punishing of those persons who have committed the delict of murder.

²²The *CCEO* in canon 1500 requires strict interpretation for laws which establish a penalty. Thus, while one could most certainly consider a victim of sex trafficking as one who underwent physical and mental torture, there is no clear interpretation as to the application of this canon and whether or not it would apply to sex trafficking.

The Object and the Subject of the Delict

The first issue in proposing a delict on sex trafficking is distinguishing the object of the delict. Is the object of this proposed delict illicit sexual activity, a delict *contra sextum*, or is it a delict against human dignity? This will directly affect whether the subject of this proposed delict is the trafficked sex worker, the so-called “John,” that is, the patron or solicitor, the pimp/trafficker, or some combination of all three.

The classical Roman law formulation focused on the subject of the prostitute and the object of prostitution which involved “the offering of the body for sexual intercourse in return for money or other remuneration, at least so long as the woman made herself available to more than one or two lovers.”²³ Here, we see the emphasis of the law concerning the criminal object being the commerce in a sexual act.

The medieval canonists distinguished between the moral act and the legality of prostitution. Firstly, prostitution and concubinage were mutually exclusive, concubinage currently being a delict for a cleric.²⁴ In the medieval period, concubinage was conceived differently from prostitution, because concubinage was fornication in a pseudo-marital relationship. “Yet although the canonists clearly thought concubinage undesirable, it was less undesirable than prostitution, and they felt it necessary to draw a sharp distinction between prostitution and concubinage.”²⁵ Sadly, even though prostitution was deemed more undesirable than concubinage, and was morally condemned, there were some, notably St. Augustine, who taught that prostitution should be tolerated because he thought that the removal of a harlot from

²³James A. Brundage, “Prostitution,” 828. See also Ulpian in D 23.2.43; Modestinus in D 23.2.24; and Marcellinus in D 23.2.42.

²⁴See *CIC*, c. 1395 §1; *CCEO*, c. 1453 §1.

²⁵Brundage, “Prostitution,” 829.

society would cause greater social instability.²⁶ Despite the attitude of toleration of prostitution, the canonists did give the subject canonical attention and the object was the “element of promiscuity, not on the element of gain in the relationship.”²⁷ The main subjects of the crime were the patron and the pimp, whereas prostitutes were not severely punished except by their loss of any respectable social status and possible prohibitions in marriage.²⁸ Being a vulnerable person, for example, due to economic necessity, did not mitigate culpability of entering a life of prostitution, but force and violence did mitigate the culpability of the prostitute.²⁹ Those who were sold into or involuntarily forced into prostitution, that is, sex trafficked, “could petition the local bishop or other authority to liberate them from their carnal bondage.”³⁰ In fact, a religious order, the Order of the Penitents of St. Mary Magdalen, was founded for reformed prostitutes who sought reform and holiness of life after prostitution.

By analyzing the medieval canonical practice concerning prostitution, we see that the object of the delict was illicit sexual activity *contra sextum*. The subjects were, therefore, the prostitute, the patron and the pimp. It wasn’t until the nineteenth century that the name “sex trafficking” developed with the dawn of abolition movements, especially in England, working to end “white slavery” which was championed by many of the same abolitionist movements that sought to end African slavery. This brought with it a shift in emphasis from the prostitute and the sin *contra sextum* to the “enslaver” and the denigration of human dignity for profit.

²⁶Augustine of Hippo, *De ordine* 2.4, in *PL* 32 (Paris: Garnier, 1844-1846) 1000: “Aufer meretrices de rebus humanis, turbaveris omnia libidinibus: constitue matronarum loco, labe ac dedecore dehonestaveris.” See also St. Thomas Aquinas, *S. Th.* II-II, q. 10 a. 11 where St. Thomas teaches that prostitution may be a necessary evil whose elimination would cause greater social disorder.

²⁷Brundage, “Prostitution,” 829.

²⁸*Ibid.*, 835, 837, 842, and 844.

²⁹*Ibid.*, 835-836.

³⁰*Ibid.*, 842.

On December 2, 1949, the newly established United Nations approved the “Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others” with the purpose of punishing the trafficker, not the prostitute.³¹ At the Second Vatican Council, in the constitution on the Church in the Modern World *Gaudium et spes*, under the title of “Concerning the Reverence for the Human Person,” the council condemned “whatever offends human dignity” and explicitly names “prostitution, trafficking of women and children.”³² The United States and the European Union have also legislated against sex trafficking, explicitly naming it a criminal offense.³³ The law of the European Union explicitly addresses this violation as an offense against human dignity³⁴ and both of the aforementioned secular legislatures punish the procurers, exploiters, recruiters, harborers, transporters, providers, obtainers, patronizers and solicitors.³⁵

The object of a proposed delict on sex trafficking would focus on the activity of the trafficker and the patron or solicitor who offends human dignity by profiting from a commercial sex act or offers or pays for a commercial sex act. The emphasis being that the mere profiting from, soliciting or patronizing a commercial sex act denigrates the human dignity of the person sold, solicited or patronized in a commercial sex act. While the object of the activity of

³¹United Nations, “Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,” 264th Plenary Meeting, Resolution 317 (IV) (Dec. 2, 1949) 33-35.

³²Vatican II, constitution *Gaudium et spes* 27, December 7, 1965: *AAS* 58 (1966) 1047: “quaecumque humanam dignitatem offendum. . .prostitutio, mercatus mulierum et iuvenum.”

³³U.S. Code Title 18 Crimes and Criminal Procedure, Part I Crimes, Chapter 77 Peonage, Slavery and Trafficking in Persons, §1591 and U.S. Code Title 22 Foreign Relations and Intercourse, Chapter 78 Trafficking Victims Protection, §7102 (12); see also The European Parliament and the Council of the European Union, “Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework,” (April 5, 2011) (Strasbourg: Official Journal of the European Union, 2011)[hereafter “Directive 2011/36/EU”].

³⁴The European Parliament and the Council of the European Union, “Directive 2011/36/EU,” 33.

³⁵*Ibid.*, Arts. 2-4; see also U.S. Code Title 18 Crimes and Criminal Procedure, Part I Crimes, Chapter 77 Peonage, Slavery and Trafficking in Persons, §1591.

prostitution is clearly sexual, the object of sex trafficking is financial gain through the deprivation of another human person's dignity. Thus, sex trafficking is distinguishable from a delict *contra sextum* which has as its object the illicit sex act or the gratification therefrom. The subject of the proposed delict of sex trafficking would, in general, be any member of the Christian faithful, clergy, or laity, who patronizes or solicits or who recruits, harbors, transports, provides or obtains, that is, aids and/or supports the activities of sex trafficking.

The object and subjects for a proposed delict of sex trafficking would differ from article 1 of the apostolic letter given *motu proprio* by Pope Francis, *Vos estis lux mundi*, because it would apply to both clergy and laity. Article 1.a.i. of *Vos estis*, which addresses “forcing someone, by violence or threat or through abuse of authority to perform or submit to sexual acts,”³⁶ would apply to: a trafficker, directly, and indirectly to a patron or solicitor, only if they are a cleric or in consecrated life. Further, the object would remain a delict *contra sextum* which would require a sexual act. Whereas, the proposed delict would apply to any person who is a trafficker, and to any person who is a patron or solicitor, and would not require a sex act; rather, the mere denigration of one's human dignity by engaging in the trafficking of a person for financial gain would be the object of the delict. Furthermore, since Pope Francis wasn't addressing the issue of sex trafficking in *Vos estis lux mundi*, but the issue of sexual abuse of minors and vulnerable adults by clerics and those in consecrated life, the recruitment, harboring, transporting, provision, and obtaining of persons in sex trafficking are not currently objects of a delict. These proposed objects are integral to any proposed delict concerning sex trafficking, because they distinguish the delict from an illicit sexual act and focus on the specific acts of trafficking that offend human dignity.

³⁶Pope Francis, *motu proprio Vos estis lux mundi* 1.a.i: “nel costringere qualcuno, con violenza o minaccia o mediante abuso di autorità, a compiere o subire atti sessuali.”

Recruitment, *supplementum*, signifies the act of luring, persuading or enticing any person, especially a vulnerable person, into a life of for-profit sex acts. This includes publishing advertisements for sex workers on any form of media. This object is distinct from kidnapping, *rapit*, in canon 1397 of the Latin code and 1451 of the Eastern code, though indeed the delict of kidnapping may also apply in a particular case involving sex trafficking. Harboring, *excipio*, means to run, own, or manage a brothel for the sake of financial profit by commercial sex acts. Again, harboring is distinct from detaining, *detinet*, which could apply to situations of sex trafficking in which a temporary place is provided for the holding of a trafficked person during the process of transporting because in this situation the freedom of the detained person is violated. Transporting, *vectura*, is the act of moving a trafficked person from one place to another for the purpose of making financial gain by a commercial sex act. Provision, *praebenda*, is the offering of aid or assistance, whether financial, personal or professional, to facilitate the activity of commercial sex. Obtain, *acquire*, means to acquire someone by purchasing them from a trafficker. Patronizing, *patrocinor*, means to have paid for a commercial sex act. Soliciting, *sollicitatio*, is the act of requesting a commercial sex act. Lastly, a commercial sex act is any act that involves a financial transaction or exchange of things of value for the reception of a sex act.

The Penalty to be Established for the Proposed Delict of Sex Trafficking

The determination of the type of penalty to be established for the proposed delict of sex trafficking will look to the current penalties established for a delict against human life and freedom under Book VI, Title VI in the Latin code and in canons 1450 and 1451 in the Eastern code. This will also take into consideration the purposes for the Church's penal activity and the fact that this delict would also be the subject of the criminal justice activity of the civil authorities.

Since the inter-codal purpose of penal law is the preservation of *communio* and since civil authorities would already have punished the offender in a manner far more severe,³⁷ the censure of excommunication is most appropriate because the Church's primary end in punishing offenders of this delict is to reform them for the sake of their salvation. However, the Latin code, when addressing kidnapping, detaining and wounding by force or fear, which are objects that may also be present in sex trafficking but are distinct delicts against human freedom, imposes the expiatory penalties of privation and prohibition.³⁸ The Eastern code, for the same delicts, imposes a just penalty including a major excommunication.³⁹ The Latin code's explicit mention of privations and prohibitions mentioned in canon 1336 for the delicts mentioned in canon 1397 excludes penal transfer and dismissal from the clerical state. Thus, the penalties incurred for the delicts in canon 1397 includes loss of any office(s), rights, functions, privileges, faculties, favors, titles or insignia as well as the prohibition of the aforementioned, and restrictive residence. Yet, even if the offender who was punished by a censure of excommunication for sex trafficking has had this penalty remitted, a penal precept could still be applied. Removal from the office of pastor could still occur in accord with the process for the removal of a pastor in canons 1740 and 1741, 1° and 3°; those who hold other ecclesiastical offices, whether clergy, those in consecrated life, or laity, can be removed by a decree issued by competent authority for a grave cause⁴⁰ if the office is conferred for an indefinite period of time or definite period of time but before it elapses,

³⁷Msgr. Thomas Green argues that punishment of the delicts in canon 1397 should apply canon 1344, 2° since civil authorities will have also punished the crime. See Thomas Green, "Delicts Against Human Life and Freedom," in *New Commentary*, 602. This should also be applied to a delict concerning sex trafficking.

³⁸*CIC*, c. 1397.

³⁹*CCEO*, c. 1451.

⁴⁰*CIC*, cc. 192 and 193 §§1-2. Paragraph 1 refers to those with an office conferred for an indefinite period of time and paragraph 2 to those with an office conferred for a definite period of time.

or a just cause when the office is conferred by prudent discretion.⁴¹ The offense of sex trafficking would meet the measure of a just or grave cause for removal. Thus, there is no reason in the Latin code for this proposed delict to incur an expiatory penalty in accord with canon 1397; however, the purposes of reform of the offender, repair of scandal, restoration of justice, and restoring communion between the offender and the Church for the sake of their salvation would make the censure of excommunication the most appropriate penalty. Lastly, considering the fact that much of the activity of sex trafficking occurs in the occult, similar to abortion,⁴² it is appropriate that this egregious offense against human dignity be punished automatically, that is, incurred *latae sententiae* in the Latin Church.

Keeping with the authentic Eastern tradition of only *ferendae sententiae* incurrence of a penalty, the major excommunication, which imposes the same penalties as a *latae sententiae* excommunication in the Latin Church, applies the appropriate penalties to seek the reform of the offender in the Eastern Churches in accord with the aforementioned reasons.

Language of the Proposed Delict on Sex Trafficking

Delictus libidinis commercium quod est: suppleendum, excipiendum, vecturandum, praebendum, acquirendum, patrocinandum, vel sollicitandum personae physicae pro acta commercii libidinis, excommunicationem latae sententiae (excommunicationis majoris) incurrit -
The delict of sex trafficking which is: recruiting, harboring, transporting, providing, obtaining, patronizing or soliciting of a physical person for a commercial sex act incurs a *latae sententiae* excommunication (major excommunication).

The usage of “*vel*” signifies that a person could offend against a singular object of this delict, for example, recruitment, or multiple, for example recruitment and transporting, or all. It

⁴¹CIC, c. 193 §3.

⁴²CIC, c. 1398; CCEO, c. 1450 §2.

also applies to one who has offended as a pimp, e.g., recruitment, but also acted as a “John,” i.e. patronized, and thus has been an offender on both ends of sex trafficking.

The language of this delict is clear, concise, and focused on identifying the trafficker, patron and/or solicitor as the subject of this proposed delict and not the trafficked person.

Likewise, the objective elements of the delict are distinct from current delicts in both codes and focus on the specific acts connected to trafficking and the commercial sex act which denigrates the human dignity of the trafficked person. The distinct criminal acts that this proposed delict addresses will assist the Church in reforming offending members of the Christian faithful, thus restoring *communio*, repair scandal where members of the Christian faithful have been known to engage in these behaviors, restore justice to those offended and give to society a witness to justice by the Church.

Conclusion

Having shown that the universal Church has the fundamental and objective right to coerce the Christian faithful with penalties for delicts, we established an inter-codal purpose for penal law: the preservation of *communio*. We then examined this inter-codal purpose of the preservation of *communio* for how it applies to the delicts in both codes in force and the grave delicts in *Normae de gravioribus delictis*. Having established this inter-codal purpose, we then looked at the concept of justice as it applies to penalties in general and specifically as to how penalties are incurred within the two systems of law, the Latin and the Eastern. We then drew from the *ius commune poenalis* to extract two principles: penalties as a last resort and the Church as Shepherd and Teacher, by which a proposed revision of the current law could be made in light of the Church's right to coerce for the purpose of preserving *communio* and in accord with the just application and incurrence of penalties. This led us to explore the possibility of a new delict concerning sex trafficking.

The proposal of a new delict on sex trafficking further develops penalties as a service to the Church's mission because the establishing of this delict would act as a deterrent, that is, to help prevent a conscientious member of the Christian faithful from incurring this penalty, give broad witness to how the Church's law is a model of justice for the world, urge the reform of the offenders that they might return to full communion with the Church for the sake of their salvation and restore justice in the Church which was wounded by this offense against human dignity. Penalties should be a last resort to preserve *communio*, a purpose which justly balances the reform of the offender with truth and justice concerning relationships in the Church, and a delict on sex trafficking would certainly advance the truth of our human dignity, justice for its violation, and reform of the offender with the end being the restoration of communion.

Appendix: Principles of Penal Law

1. **The Principle of the *salus animarum*.** The reform of the offender is a primary concern. Even the purposes of restoration of justice and preservation of *communio* for the sake of the common good of all the Christian faithful touch upon the mission of the Church—*salus animarum*.

2. **The Principle of Legality-*Nullum crimen et nulla poena sine lege praevia*.** Thus, without a prior law with a penalty or penal precept, one cannot be punished.

3. **The Principle of Imputability.** There must be simultaneously a juridic element, that is, a law with a penalty establishing a delict; a subjective element, that is, malicious intent; and an objective element, that is, an *actus reus*, for imputability. Furthermore, while all delicts are sins, not all sins are delicts. In light of *Vos estis lux mundi*, during the investigation of a bishop by the metropolitan or senior suffragan, if it is the metropolitan who is being investigated, the person under investigation enjoys the presumption of innocence.¹

4. **The Principle of Penalties as a Last Resort.** In both codes in force, canons 1341 in the Latin and 1401 in the Eastern, direct the bishop to prevent the need for penalties. Both codes call for the bishop or ordinary to employ first:

A. Fraternal Correction: to correct someone's behavior in a manner seeking their reform or to prevent sinful and/or criminal activity.

B. Teaching, Imploring, Rebuking: patiently teaching and begging an errant person to reform, after which a strong reprimand and warning may still be needed if teaching and imploring go unheeded.

C. Pastoral Care or Specialized Treatment: this could include outpatient or residential psychological/psychiatric care, directed spiritual retreats, or other appropriate professional treatment.

5. **The Principle that the Church acts as Shepherd and Teacher through her Coercive Power to Punish.** Pope Gregory IX's *Regula Iuris* 10 states: The pastor is not excused for

¹Pope Francis, *Vos estis lux mundi* 12 §7.

ignoring the sins of his flock and the ravages that the wolf causes—*Non enim potest esse pastoris excusatio, si lupus oves comedit, et pastor nescit.*”² Thus, the bishop or hierarch/ordinary has a responsibility concerning justice to provide pastoral care to his clergy and to the lay faithful.

Hence, clergy, those in consecrated life, and all laity in roles of service in the Church have a duty to prevent, to the best of their ability, and bishops and hierarchs/ordinaries to punish, when all prior pastoral methods fail, those who harm truth, justice and *communio*.

6. The Principle of Proportionality in Penalties. The punishment administered needs to be appropriately tailored, according to justice and mercy expressed through equity. Thus, a penalty may be diminished due to mitigating circumstances or augmented by aggravating circumstances so as to achieve the purpose of penalties: the preservation of *communio* with the Church, which is necessary for salvation, and the restoration of justice for the sake of the common good of all the Christian faithful.

7. Principle of Restoration of the Offender. Upon the cessation of contumacy, the censure must be remitted. Though a perpetual expiatory penalty may be incurred, this merely affects one's status, condition or ability to function, not their being a part of the People of God with whom they may restore full communion through grace and the sacraments.

8. The Principle of a Just Process to Incur a Penalty. One has a right to a process (judicial or administrative), to be heard and informed, to counsel, to be judged by a competent authority, to be judged with equity, and to appeal. Further, a person has a right to *restitutio in integrum*.

²X 5.41.10. English Translation from Gauthier, *Roman Law*, 120.

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