

**PROTECTING THE RIGHT TO PRIVACY
WHEN EXAMINING ISSUES AFFECTING
THE LIFE AND MINISTRY OF CLERICS AND RELIGIOUS
CONFERENCE OF THE CANADIAN CANON LAW SOCIETY***

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Introduction

In providing advocacy, the most difficult cases by far involve those in which priests or religious have in fact, been responsible for the misconduct or abuse with which they have been accused and whose actions have victimized and injured individuals and been a source of upset and scandal to the community at large. If ever you have doubted that advocacy is a ministry in the Church, all you need do is take on a couple of guilty parties as clients; and you quickly learn how profound and complex a ministry it really is.

In dealing with cases of this nature, I have always found support and comfort in the eighth chapter of the Gospel of St. John in which the evangelist narrates the incident of the woman caught in adultery.¹ For me, Jesus exemplifies the advocate *par excellence* representing a woman who is clearly guilty of the crime with which she has been charged. The Lord does not judge the woman or condemn her for her actions; he simply represents her before the group of scribes and pharisees who are prepared to put her to death for her crime in accord with the law of Moses. Considering how everything finally turned out, no one can deny that the Lord's advocacy for this woman was eminently successful. She was not subjected to the rigors of the law, but she was clearly challenged to examine her way of life and the implications of her sinfulness.

When I began considering the topic which I have been invited by the Society to address this morning, I found myself again drawn to this incident in St. John's Gospel — actually to the most pivotal moment in the narrative, the Lord's statement to the crowd, "Let the one among you who is without sin be the first to throw a stone at her."²

Scripture is not my field, but I have long been fascinated by the dramatic effect which this statement of the Lord had on the crowd. From what I have come to understand, the statement is not a part of the Mosaic law: the law itself clearly did provide that this woman should be put to death — although a strict application of the law suggests that it would have been more appropriate to strangle her to death than to stone her. But apparently there is nothing in the Mosaic law suggesting that only a sinless person could carry out the execution of a guilty party when called for by the law. Hence, from the point of view of the law alone, it would appear that this woman should have been put to death for her adulterous conduct.

Of course, the principal point of this passage in John's Gospel is that there was something much more important at work here than simply observing the procedures of the Mosaic law. Jesus himself placed the entire event into a larger context than simply carrying out the law. Everything that the Lord embodies — his mercy, his forgiveness, his challenge to repentance, his willingness even to accord a sinner a measure of dignity — touched the lives of the scribes, the pharisees and certainly the woman herself.

Instruction of the Secretariat of State, August 6, 1976

In August of 1976, the Papal Secretary of State at that time, Cardinal Villot, issued an Instruction to the Pontifical Representatives throughout the world which has re-surfaced in the past few months most notably in a recent decision of the Congregation for the Clergy. This Instruction may well prove to have as surprising and perhaps disturbing an effect today as the Lord's intervention on behalf of the woman caught in adultery did to the scribes and pharisees. It certainly will force all of us to consider anew the way we deal with sensitive issues involving individual priests and religious.

As a preface to sharing the actual case with you, I would first like to present some background information on this Instruction. It appears to have had its origins through actions taken by the United Nations Economic and Social Council in the late 1960s and into the 1970s. At the time, this body was addressing questionable psychological methodologies and related treatments which were being used in certain nations, in the words of the Instruction itself, "to violate the privacy of the human person, without the free and informed consent of the interested party and without respect for the obligatory and rigorous secrecy which their use entails."³

The specific concerns raised by the United Nations were expressed in a 1968 document in French entitled "Respect of the private life of individuals and of the sovereignty of Nations."⁴ In addressing the right to privacy in the face of medical and psychological testing and other methodologies being imposed on persons against their will, this documents states,

In the measure in which these various aspects embody a threat to the privacy of the individual, they risk violating many other rights which respect for privacy protects, among them notably, freedom of thought, of conscience, of religion and of opinion....When a "personality" test or "lie detector" test is presented as a necessary pre-condition or even is simply "recommended" or said to be "desirable" for recruitment or for maintaining a position or getting a promotion, there is evident doubt whether the person who undergoes such tests does so voluntarily.⁵

Exploring the implications of such abusive actions for the Church, the *Nota Indicativa* which accompanied the Instruction of the Secretariat of State indicated that "the most grave abuses, frequently hidden, can be perpetrated at all levels — social, business, educational, racial, political, military and, it is necessary to say it, even if

with distress, religious.”⁶ And the *Nota* did not hesitate to cite specific examples of this type of abuse within the Church.

Canon 530 of the [1917] Code of Canon Law is concerned with a question connected with the manifestation of conscience, in the sense of a defense of privacy for the subjects of Religious Superiors. In fact, there are many abuses, above all in novitiates and seminaries, in order to obtain a manifestation of conscience with projective psychological methods or by other means.

It is well known, in fact, that not only have many parties attempted to disregard already existing norms, but since this norm is limited indicating a law for the subjects of Religious Superiors, there are attempts to subject persons to projective psychological and other types of tests and to related therapies in the stage preceding entry into religion, that is to say, in the stage of admission to the religious life; curiously, some [candidates] arrive and are made to agree to signed declarations which permit, even after their admission, the use of knowledge of the privacy of the person known earlier.

Similarly, in many Seminaries and in the stage of admission to them, the same abuses manifest themselves, however more openly, there not being an express canon which prohibits this; some Dioceses are found even to impose such exams and therapies on all of the diocesan priests, with psychological forms, pressure, the leakage of records and whatever else one can imagine.⁷

In order to address this issue within the Church, the Cardinal Secretary of State, after consulting with experts from Universities in Europe and in America, commissioned the preparation of an article for publication in *La Civiltà Cattolica*, by the Reverend Vittorio Marcozzi, S.J., a professor of anthropological psychology and of scientific anthropology at the Pontifical Gregorian University in Rome. In fact, Father Marcozzi has written two articles on the subject, the first commissioned by the Secretary of State in 1976 entitled “Psychological Testing and the Rights of the Person,”⁸ and the second in December of 1983 following the promulgation of the current Code of Canon Law entitled “The Right to Privacy in the New Code of Canon Law.”⁹

When this Instruction was issued in August of 1976, the Pontifical Representatives were directed to share Father Marcozzi’s earlier article with the episcopal conferences of the countries and nations to which they were assigned and to emphasize three specific criteria of respect for the human person expressed in that article, namely,

- 1) It is not licit for anyone, either a religious or diocesan superior, to enter into the psychological or moral privacy of a person without having received from that person a prior, explicit, informed and absolutely free consent; in this sense, therefore, of considering illicit all projective psychological or other practices, which are in fact used during admission or continuation in Seminaries or Novitiates, if the prior and

free consent of the interested party is lacking, which cannot be extorted in any manner.

2) Moreover, without the free consent of the interested party, a psychologist must not manifest to a third person, whatever the authority may be with which the person is invested, whether religious or political, knowledge which he may have arrived at concerning the interested party's private life, both psychological and moral.

3) An analyst is obligated, in turn, to respect the known principles of morality concerning secrets to which one is held (the natural secret, the professional secret and the committed secret).¹⁰

Decision of the Congregation for the Clergy, October 8, 1998

With this background in place, I would now like to share with you the case which I referred to earlier resulting in a decision rendered just last October by the Congregation for the Clergy in which this 1976 Instruction has been invoked. The case involved a pastor in the United States whose ministry had become "detrimental" to borrow a term from canon 1740. Without going into specific detail, I can simply say that this priest was laboring under some very significant problems of a personal nature. His bishop, obviously, was very concerned and very much wanted to help him; but the priest himself was fighting the bishop at every turn.

Eventually, the bishop issued an ultimatum and ordered the pastor under obedience to submit to a psychological assessment at a well known facility which the bishop specifically named. The pastor considered this directive an undue intrusion on his right to privacy as expressed in canon 220, and so he initiated the process for recourse by asking that the bishop reconsider his decision. When the bishop refused and again directed the pastor to undergo the psychological assessment, the pastor then placed a petition for hierarchic recourse before the Congregation for the Clergy.

The response issued by the Congregation for the Clergy on October 8, 1998, sustained the recourse placed by the Pastor. In part, the decision stated,

It is the consistent teaching of the Magisterium that investigation of the intimate psychological and moral status of the interior life of any member of the Christian faithful can not be carried on except with the consent of the one to undergo such evaluation, as is clearly written about in the instruction of the Secretariat of State in their August 6, 1976 letter to Pontifical Representatives.

Therefore this Congregation concludes that Your Excellency can not, in this case, under pain of obedience, oblige your priest...to undergo psychological evaluation.¹¹

Needless to say, this decision was somewhat unexpected by the parties in this case. Every procedure had been properly followed by the bishop, and he was convinced that his actions relative to the pastor were in accord with the principles and procedures of canon law, especially those associated with the diocesan bishop's responsibility to care for his priests and protect the common good of the faithful. The Congregation's decision, however, certainly suggested otherwise and, by implication, clearly calls for a re-examination of the approach and procedures that we follow in cases of this nature.

I would suggest, also, that there is much more at work in this decision than simply the immediate issue being addressed by the Congregation in its response. By citing the principles expressed in the Instruction of the Secretariat of State, there is a clear implication that it is going to be necessary for us to look anew at the approaches to the many problems of clergy and religious misconduct which we have been addressing over the past years. In particular, will we have to re-examine the specialized procedures and protocols which almost all dioceses and religious communities have established in dealing with cases of this nature. Many of these policies require priests or religious accused of sexual misconduct or other questionable behaviors to undergo a psychological assessment as part of the investigative process with the implied or explicit threat or condition that they will not be allowed to return to ministry until and unless they comply.

It would appear that procedures of this nature — even if established as particular law for a diocese or placed in the rule of a religious institute or society — could well be in conflict with the basic right to privacy enunciated by canon 220.

The Use of Psychological Testing in the Church

As we consider this issue, it is important to emphasize that the Church has traditionally not been opposed in principle to the use of psychology and psychiatry in dealing with serious problems involving clergy and religious. Any overriding concerns have always been in the area of providing for the free and informed consent of the party undergoing such testing or treatment, and a secondary issue has addressed the nature of the testing or treatment which one undergoes.

In a 1958 address to the thirteenth Congress of the International Association of Applied Psychology, for example, Pope Pius XII stated, "the goals of psychology, namely, the scientific study of the human psyche and the cure of mental illnesses, deserve nothing but praise; but the means used sometimes give rise to justifiable reservations."¹² Focussing on this issue more directly with regard to priests and religious, the Holy Office, as it was then called, issued a *monitum* in 1961 which stated in part that

The opinion of those who assert that prior psychological instruction is altogether necessary for those receiving Sacred Orders must be rejected, or that candidates for the priesthood and religious profession must be subjected to psychoanalytic examinations or investigations properly so-called. Yet it is still of value if it is done to

explore the requisite aptitude for the priesthood or the religious life. Similarly, priests and religious of either sex are not to undergo psychoanalysis unless the Ordinary himself permits it for a grave reason.¹³

Examining this question specifically in the area of priestly formation, the Sacred Congregation for Catholic Education in 1970 acknowledged that

...the physical and psychological [*psychica*] state of health of [candidates for orders] must generally be examined by medical experts and others who are experienced in the psychological sciences, with due consideration also of conditions passed on by the family by reason of heredity.¹⁴

While it seems clear that there is an expectation that candidates to the priesthood and religious life should freely consent to such necessary examinations, the issue of privacy and freedom does remain at the forefront once one has made religious profession as is clear from a 1969 Instruction of the Congregation for Religious which specifically provided that if a Superior “in certain more difficult cases...determines that a psychiatrist [*medicum psychologum*]...should be consulted,” this could be done only “after having obtained the consent of the interested party.”¹⁵ And, as the recent case decided by the Congregation for the Clergy demonstrates, this same principle applies for priests following their ordination.

The second issue which must be considered is the type of testing which an individual can be expected to undergo when he or she does consent to a psychological evaluation or assessment. This topic was addressed in Father Marcozzi’s 1976 article in *La Civiltà Cattolica*.

Drawing on principles expressed in the 1958 address of Pope Pius XII to the Congress of the International Association of Applied Psychology, Marcozzi distinguished between two types of tests, (1) those which he refers to as “measuring or exploring the attitudes and the capacities which the individual manifests spontaneously,”¹⁶ and (2) those which “reveal the privacy [*intimità*] or inner life of the person.”¹⁷

In this first category, Marcozzi considers both structured, or *objective* tests such as the Minnesota Multiphasic Personality Inventory (MMPI) which provides a choice of responses to specific questions and unstructured, or *projective* tests such as the Rorschach Test, the Thematic Apperception Test (TAT) and similar tests of this nature which present the individual with a specific scenario and invite the person being tested to describe or respond to the image or scene which he or she has been shown.

In the second category of tests, Marcozzi includes techniques which provide responses to questions and stimuli; however, the one being tested has little or no control over the responses which are given. Such *invasive* tests include the use of the polygraph or lie detector and the use of substances which produce a semi-conscious

state similar to hypnosis reducing the inhibitions of the one being tested. The use of techniques of this nature generally elicits responses to questions which an individual would not normally reveal except in the most intimate or private of circumstances.

Another testing device not specifically mentioned by Marcozzi but one which certainly must be included in this category is the penile plethysmograph. This device records sexual response to various visual or auditory stimuli presented to the person who is undergoing the procedure. As in the case of the polygraph, the individual being tested has little or no control over the responses which are registered by the plethysmograph.

For Pope Pius XII, the use of the first category of tests, that is the *objective* and *projective* testing was completely acceptable with the free and informed consent of the one being tested. However, the use of the second category of testing constituted an illicit and immoral invasion of what he referred to as the “private psyche” of the person, that is, that “portion of [one’s] inner world which [a] person discloses to a few confidential friends and shields against the intrusion of others.”¹⁸ The Pope also included in this “private psyche” certain personal matters which an individual keeps secret at any price from everyone, and those matters or issues which the person himself or herself is unable to face or deal with.

Pius also addressed the consent of the individual who is the subject of an evaluation or assessment. He clearly stressed the right to privacy in stating that

If...consent is unjustly extorted, any action of the psychologist will be illicit; if the consent is vitiated by a lack of freedom (due to ignorance, error, or deceit), every attempt to penetrate into the depths of the [individual’s] soul will be immoral.¹⁹

If, on the other hand, the consent of an individual is freely given, Pius insisted that “the psychologist can in the majority of cases, but not always, act according to the principles of his science without contravening moral norms.”²⁰

However, when it came to the second category of *invasive* testing in which the person will unknowingly and perhaps unwillingly reveal information which touches on the most intimate and personal level of his or her “private psyche,” the Pope concludes that even if the individual consents to such testing, “although he violates no right, the psychologist is not acting morally”²¹ when he elicits information from an individual utilizing invasive techniques of this nature. By extension, any Ordinary or Superior making use of information obtained by such immoral means would be cooperating in such actions.

Providing for the Right of Privacy

Clearly, there are times when Ordinaries and Religious Superiors must give serious consideration to the possibility of having a priest or religious undergo a psychological evaluation or enter therapy. This is especially true in cases in which the behavior or actions of a particular priest or religious are jeopardizing the proper

exercise of the individual's ministry or mission, threatening the common good or placing at risk the rights and safety of members of the Christian faithful.

Even in the presence of these overriding and serious concerns, there remains a clear obligation on the part of the Ordinary or Religious Superior to protect the rights of the individual priest or religious. To provide for these rights in the practical order, I would like to propose three working principles that can be of assistance when confronting an individual priest or religious in circumstances which suggest the need for a psychological assessment or ongoing care.

- (1) When circumstances suggest the need for a priest or religious to undergo a psychological evaluation or when an assessment recommends ongoing therapy, the individual should be invited to take part in the evaluation or therapy.
- (2) A priest or religious who freely consents to an evaluation or ongoing therapy should be invited to release the results of the evaluation or the therapy to his or her Superior or Ordinary. He or she cannot be compelled to release such results following the assessment or to sign a release prior to an assessment agreeing to the later release of the results.
- (3) Under no circumstances can a priest or religious be required to undergo *invasive* testing which elicits information over which the individual has no freedom or personal control, for example, through testing or procedures which involve the use of a polygraph, the penile plethysmograph, drug induced responses, or other techniques of this nature. Due to the questionable morality associated with the use of these techniques, even if an individual should freely submit to such testing, any information gathered from such procedures cannot be used in the external forum.

The first two working principles approach the matter of testing or therapy from the position of an "invitation" to the individual and are direct responses to the concerns which have been raised in the Instruction of the Secretariat of State. This approach provides for the individual priest's or religious' right to privacy, and acknowledges that it would be completely improper to compel or coerce a person to undertake an assessment or enter into therapy. However, it is also important to recognize — and to communicate to the individual priest or religious — that there are very real consequences if a party elects to invoke the right to privacy as a means of avoiding an evaluation or ongoing therapy. Hence, the individual should be clearly apprised of the concerns which have motivated the Ordinary's or Superior's request; and, as we will see in a few minutes when considering two specific scenarios, there are actions which can be taken when an individual rejects the invitation to be evaluated or to enter therapy.

The third principle is closely related to the issues of privacy and coercion and reflects the concerns raised by Pope Pius XII in his 1958 address to the thirteenth

Congress of the International Association of Applied Psychology concerning *invasive* testing which is also addressed in the Marcozzi article commissioned by the Secretary of State. I believe that this third working principle is also well-grounded in an application of the right to privacy in canon 220, especially in the context of canon 630, §5, which forbids superiors from “induc[ing] their subjects in any way whatever to make a manifestation of conscience ” and canon 1728, §2, which prohibits compelling an individual accused of a crime from testifying against himself or herself in a penal action.

Given the tenor of the Instruction of the Secretariat of State and the application of this Instruction by the Congregation for the Clergy, it would seem misguided to attempt to limit an application of these two norms of law only to the single circumstances of the relationship of individual members to their Superior on the one hand or the instruction of a penal process on the other. Rather, there appears a clear expectation that the principles expressed in canons which provide for the rights of individuals should be given a broad interpretation and extended to all situations or circumstances which touch on the right to privacy which the individual members of the Christian faithful enjoy.

Let us now apply these working principles to two specific canonical procedures. The first addresses an issue affecting only clerics, specifically, the administrative investigation of a priest’s incapacity on the basis of canon 1044, §2, 2°; the second addresses the role of psychological assessments within the context of a penal process.

Investigation of the Incapacity to Exercise of Ministry

When a priest’s behavior becomes so disordered that his very ability to exercise the priestly ministry is called into question, the operative norm of law addressing such circumstances is found in canon 1044, §2, 2°, which states that a cleric

...who is afflicted with insanity or some other psychic infirmity [*aliave infirmitate psychica*] mentioned in can. 1041, n. 1, [is impeded from the exercise of orders] until the time when the ordinary, after consultation with an expert, permits him the exercise of that order.

In ascertaining whether a priest is, in fact, laboring under an impediment of this nature, the Ordinary must also be guided by canon 1041, 1°, which provides that in making his determination, the consultation of an expert must be sought. Should the ordinary fail to seek this consultation, canon 127, §2, 2°, clearly indicates that any decision he might render would be invalid.

From our work in marriage cases when dealing with the question of “psychic incapacities,” we all understand that the use of the term “psychic infirmity” in the Code of Canon Law is not limited to a defined mental disorder but is intended to include any behaviors of a psychological, emotional or even social nature which would serve to disrupt seriously a priest’s ability to exercise his ministry. When such conditions arise, there is a clear obligation on the part of the Ordinary to investigate the allegations and make a determination whether or not this priest is capable of

rightly exercising his priestly ministry and, when appropriate, to provide him with the means of dealing with his problems.

Since the law does not provide a specific process addressing this issue, the general norms for an individual administrative act found in canons 48 through 58 provide the steps that are followed in undertaking such an investigation. The only special procedural step unique to an examination of this nature is that noted a moment ago in canon 1041, 1°, which requires that the Ordinary seek the consultation of an expert. In providing for this requirement, canon 50 would urge the Ordinary to explain to the priest the nature of the concerns which he has relative to his ministry and to invite him to undergo an assessment and even to recommend a specific institution where this examination might take place. If the priest accedes to this invitation and later freely releases the results, the Ordinary can use this information in arriving at his determination whether or not the declaration of an impediment is warranted.

For the sake of this example, however, let us assume that the priest refuses the invitation to undergo an assessment; or he does complete the testing and then refuses to provide his Ordinary with the final report from the testing.

In this case, the Ordinary is certainly free to seek the consultation of an expert of his own choosing and direct that an assessment be prepared based solely on the reports of the priest's behavior which the Ordinary has gathered. In undertaking his investigation of this matter, the Ordinary should seek detailed statements from those associated with the priest's ministry or offended by his behavior for the purpose of obtaining as much clarity as possible regarding the actions of the priest which have first given rise to the Ordinary's concerns.

While it is certainly preferable for the expert to have direct contact with the priest who is the subject of the Ordinary's concern, if this is not possible due to the priest's exercise of his right of privacy, an evaluation based solely on the information contained in the acts of the investigation will usually be sufficient for an expert to provide an initial estimate of whether the priest appears to be laboring under a disorder or problem of some nature.

In suggesting this approach, it is important to recognize that the requirement of canon 1041, 1°, does not specifically require that the expert being consulted conduct actual testing on the priest in question or render a formal evaluation or diagnosis of the priest's psychological or mental well-being. Hence, if the priest has exercised his right to privacy and chosen not to participate in an evaluation, a report based on the observed behavior of the priest would certainly suffice in these circumstances to fulfill the requirement of this canon for a consultation.

In situations in which a priest has elected not to undertake an evaluation and the Ordinary has sought a report from an expert based on the observations and testimony of others, any information which is gathered — or at least a summary — should be made available to the priest in order to comply with the requirement of canon 50. It then will fall to the priest himself to determine whether or not to

undertake an assessment in the interests of his own defense. Should the priest then decide to be tested by a private expert whose conclusions are at variance with those of the expert the Ordinary has used, the Ordinary may want to seek further consultation from his own expert. If so, he can then make use of the principles found in canons 1574 through 1581 in weighing the acceptability and probative force of the various reports.

Once he has provided the priest with an appropriate opportunity to respond to the information which has been gathered and he has completed his own examination of the information available to him, the Ordinary should then be in a position to make a determination whether or not the declaration of an impediment is warranted. In the decree in which he renders his decision, he should indicate that the priest has chosen to invoke his right to privacy and has not undergone a formal assessment and that the determination that an impediment is present has been made on the basis of an expert assessment of the priest's behavior as reported in the proofs which have been gathered.

Of course, the priest in question certainly has the right to challenge the decision made by the Ordinary and even to take recourse to the Congregation for the Clergy. However, if the Ordinary has conducted his investigation carefully and sought an expert assessment of the acts, the burden of proof will then fall to the priest to demonstrate that an incorrect determination has been made.

The Role of Psychological Assessments Within the Context of a Penal Process.

As a final consideration, let us now examine the use of psychological assessments within the context of a penal process. Even in a penal trial, the question of the right to privacy which a member of the Christian faithful enjoys must be addressed, even when an individual has been accused of serious wrongdoing. The issue of privacy takes on a special significance in two areas: (1) when considering factual information concerning incidents of misconduct which come to the attention of the Ordinary as a result of psychological testing, and (2) when considering issues surrounding the accused's imputability.

For example, when investigating allegations of criminal misconduct involving a priest accused of sexually abusing children, the Ordinary or delegate conducting the investigation may become aware of information about the accused's background and activities as a result of interviews with the accused conducted in the process of preparing a psychological report. This same report may also raise questions concerning the grave imputability of the accused, especially if he has been diagnosed with the mental disorder of pedophilia.

When making the decision whether or not to initiate a penal process against an individual, an Ordinary must make a clear determination at the very outset concerning the direction and purpose of the investigation that is going to be undertaken: is the purpose or intention of this investigation to help an individual who is sick, or is the purpose and intention to punish a person who has committed a crime? This is often not an easy question to answer; and it is going to depend on a

number of factors such as the cooperation of the accused party, the needs of the victim and family who have been injured by the accused's actions, and the questions of notoriety and publicity which often accompany this type of misconduct and the scandal that may result. Often it will be a lack of cooperation of the accused which will tip the scales in favor of pursuing a penal process.

When making this determination and actually beginning the process, great care must be taken not to create confusion by falling into the trap of initiating a procedure which attempts to be a combination of a penal process and one which prohibits the exercise of ministry for psychological reasons.

An interesting case study prepared by the Congregation for the Clergy addresses this very point. The case involved a priest who had been defrauding members of the faithful and, basically, extorting large amounts of money from them. At the bishop's request, this priest did submit — albeit reluctantly — to a psychological assessment. However, due to the priest's irascible nature, he became extremely uncooperative. In addition, the anger of the victims who were threatening legal action, the publicity which was starting to develop, and the fear that scandal might ensue prompted the bishop to pursue the matter as a penal action. My involvement in the case resulted from my *ex officio* appointment as the accused's advocate in the action when the priest himself failed to name an advocate.

When I argued against the imposition of any penalty on the basis of the psychological report that the priest's actions suggested the presence of a disorder of sufficient severity to call into question his grave imputability, the bishop changed the process in midstream and decided to declare the priest impeded from the exercise of ministry rather than imposing the censure of suspension. He made this decision on the basis of advice which he was given which had argued that the declaration of an impediment would have the same effect as a suspension and would have the added benefit of being perpetual in nature. By taking such an action, so the argument stated, the bishop would not have to address the issue of imputability or any question concerning the infliction of a perpetual penalty by administrative decree.

At this point, the priest himself contacted the Congregation for the Clergy seeking their intervention. He wanted nothing to do with me as his *ex officio* advocate, and he did not follow proper procedure or file a true petition for hierarchic recourse. Hence, the Congregation did not actually render any decision in the matter or even address the issue as a recourse; however, it did issue a case study which was illuminative in a number of areas.

In addressing the question of the bishop's decision to declare an impediment in the midst of what was ostensibly a penal process, the Congregation noted

[O]ne could hold that it is contradictory, illogical and unjust to consider the same situation contemporaneously as one involving both a true illness and a serious crime; for if we were truly dealing with a serious, perpetual condition or psychic cause which so interfered with the subject's freedom and responsibility that he would be incapable of

exercising the priesthood, then his exterior criminal action would not be morally imputable to him.²²

But what is much more to the point for our considerations is the comment that follows:

Furthermore, the medical expert's reports which are obtained with the cooperation of the person being investigated for the purpose of evaluating his psychic condition so that he might obtain care if needed, should not be admitted as evidence in a penal case. These are confidential medical records which are meant to be used for the good of the patient; other use of them violates the principle of confidentiality and of the doctor-patient privilege. What is provided in an extra-legal forum for the benefit of a patient, cannot be used in a legal forum against that patient's interests and rights (even if, under compulsion, he should have consented to such use...)²³

Although the Congregation did express concern about the questionable nature of declaring an impediment in the venue of an administrative penal process, of much greater moment is the fact that they state very emphatically that information of any nature arising from psychological testing conducted outside of the context of the penal forum cannot be admitted as a proof in the process.

The study itself did not cite applicable canons; but it is quite obvious that the Congregation was taking cognizance of canon 1548, §2, 1°, which exempts witnesses from answering on the basis of the professional secrecy arising from the patient-doctor privilege, and canon 1728, §2, which protects the accused from self-incrimination.

While this study addressed the inclusion in the acts of a penal procedure factual information arising from an assessment or evaluation, I would suggest that the same principle would apply regarding the diagnostic conclusions of such reports which would have relevance when examining the issue of the accused's imputability. The use of any such material without the consent of the accused would constitute a violation of the principles of privacy and protection against self-incrimination.

When considering the question of imputability in the context of a penal process, an important starting point must be the presumption of law found in Book VI of the Code in canon 1321, §3, which states, "whenever an external violation of the law has occurred, imputability is presumed, unless it is otherwise evident."²⁴

This presumption of law places the entire issue of diminished imputability directly in the hands of the defense. It is not necessary nor is it appropriate for the Ordinary or the Promoter of Justice to seek a psychological assessment as a means of demonstrating that the accused acted with grave imputability: the presumption of law absolves the Ordinary or the Promoter of Justice from the burden of proof regarding this question.²⁵ If the accused intends to argue that he or she was lacking grave imputability due to the presence of a mental disorder or other difficulty, the

burden of proof falls to the defense.²⁶ Moreover, even if the accused were to have freely submitted to a psychological assessment *apart from the penal process* and released the report to his Ordinary, on the basis of the Congregation's comments, it appears that no information from this assessment could be used by the Ordinary or Promoter of Justice in a penal process, a conclusion which appears to be consistent with the protection afforded an accused against self-incrimination in canon 1728, §2.

A very obvious working principle arises from the study of the Congregation for the Clergy: only the accused himself or herself should request that the results of psychological testing be placed in the acts of a penal process in providing for the right of defense.

With regard to the example which I have used of the penal process gone awry, it would have been better had the bishop not initiated a penal process in the first place in view of the information he already had concerning the psychological state of the priest in question. However, once the penal process had been initiated, it should have been brought to conclusion and a new and separate process begun examining the question of whether this priest was impeded from the exercise of his ministry.

Conclusion

In the brief time that we have had this morning, it has not been possible to consider every possible issue or convolution that arises in situations in which the mental or emotional well-being of a cleric or member of a religious institute or society of apostolic life is called into question. I remain convinced that the Church has afforded us the procedural means of examining issues of this nature in a spirit of justice and compassion which provide not only for those who might be victimized by individual clerics or religious, but also for the person himself or herself who may well be laboring under difficulties of a psychological or emotional nature.

In our rush to utilize these procedures, however, we must not lose sight of the larger principles of law and morality which are basic to all that we do. Among these is the dignity of the person and the right to privacy and freedom from coercion which arise from this dignity. Just as the Lord reminded the scribes and pharisees of this in dealing with the woman caught in adultery, we cannot ignore the reminders which the Church is providing us in the various instructions, decisions and studies which have addressed the questions we have considered today.

APPENDIX

**I. DECISION OF THE CONGREGATION
FOR THE CLERGY**

CONGREGATION FOR THE CLERGY

Vatican City, 8 October 1998

N. 9800XXXX

Most Reverend Diocesan Bishop
Bishop of Diocese
Address
City, State ZIP
U.S.A.

Your Excellency,

In reference to the recourse against two of Your Excellency's decrees of the Reverend Priest, a priest of your Diocese, written on the 30th of June and received here at this Congregation on the 8th day of July, 1998, this Congregation has found and decided upon the following.

Your Excellency issued to Reverend Priest a decree on April 28, 1998 sending him for psychological evaluation to the [Professional Facility] in [Location]. The Reverend Priest did not assent to psychological evaluation which he regarded as an "undue intrusion on the canonical right to privacy" (cf. c 220) and he therefore asked you for a revocation of the said decree.

You declined the request for revocation on 29 May, 1998, and once again directed the priest to undergo psychological evaluation at the [Professional Facility] in [Location]. Father Priest once again refused the assignment on the 5 of June, 1998 and once again asked Your Excellency to revoke both the decree of April 28 and of May 29, 1998.

It is the consistent teaching of the Magisterium that investigation of the intimate psychological and moral status of the interior life of any member of the Christian faithful can not be carried on except with the consent of the one to undergo such evaluation, as is clearly written about in the instruction of the Secretariat of State in their August 6, 1976 letter to Pontifical Representatives.

Therefore this Congregation concludes that Your Excellency can not, in this case, under pain of obedience, oblige your priest, the Reverend Priest, to undergo psychological evaluation.

The Congregation hastens to add that this decision in no way touches upon or enters into the merit of the canonical process of removal of a pastor which Your Excellency has already begun.

I take this opportunity to renew my sentiments of esteem and with every best wish I remain,

Sincerely yours in Christ,

s/ Darío Cardinal Castrillón
Prefect

s/ ...
Secretary

**II. STUDY PREPARED BY THE CONGREGATION
FOR THE CLERGY**

CONGREGATION FOR THE CLERGY

Vatican City, 9 June 1998

Prot. N. 98000XXXX

Most Reverend Diocesan Bishop
Bishop of Diocese
Address
City, State ZIP

Your Excellency:

This Congregation has received the additional materials you kindly sent on the matter of the Reverend Priest of your diocese.

We have thoroughly studied the extensive information and feel that Your Excellency had to deal with a very difficult situation and did so in an appropriate fashion.

We are enclosing, for Your Excellency's perusal, a copy of the study conducted by this Congregation of the process followed in this matter. You may find it helpful for any such future situations. We all know that these processes can be fraught with many pitfalls, from the canonical perspective. We offer this information to you only in an attempt to be helpful to you and your canonical advisors.

I take this opportunity to renew my sentiments of esteem and with every best wish, I remain,

Sincerely yours in Christ,

s/ Darío Cardinal Castrillón

I. Summary of the Facts:

1. On October 7, 1997 the Congregation of the Clergy received a letter from Reverend Priest, a priest ordained for your Diocese, complaining of actions taken against him by the Diocese, actions that led to his status as “an abandoned cleric under the Code of Canon Law.” He complains of being summarily released from his assignment on September 21, 1996 and of not having the opportunity to defend himself. He speaks of being in “a year of what can only be called Hell”; “I have been abandoned as a cleric and left in this misery for a one year period (p. 3)”; he further complains that he has no means of sustenance. He says he has not heard from the Diocese since March 21, 1997, when his superiors seemed favorable to his request for a transfer to another Diocese.

The general tone of his letter, however, is not to present a recourse against the administrative acts of his Ordinary, but simply to get the Congregation to intervene so that he might be released from the authority of the Ordinary of the Diocese and be able to practice ministry somewhere else.

2. In response to a request for information, the Diocese has presented a full dossier on the case and has presented the facts in a quite different light.

Although we do not have full and precise details as to the date and actual origin of the difficulties with Father Priest (e. g., no explanation is given for the Diocese’s letter of March 21, 1997, which gives a favorable reply to his request to seek another benevolent Bishop), the Bishop informs us that he began a canonical investigation into allegations against Father Priest on 11 April 1997, in accord with c. 1717. Thus there is a discrepancy between what the recurrent alleges about the date of his removal from his assignment and the date of the beginning of the investigation as claimed by the Diocese. Was the recurrent still exercising his ministry in the parish at the time of the “formal canonical investigation,” or had he already been effectively removed?

At any rate, it seems that the Diocese had received information that Father Priest was using his position as a priest to unduly influence the faithful, particularly the Victim to donate money to him so that he could continue his higher studies. Furthermore, he fabricated false documents and passed himself off as a civil lawyer; then he drew up a will for the Victim, making himself the executor and also a beneficiary of the will. He also, publicly, in the parish bulletin, made false statements about his activities as a Reserve Air force (sic) Chaplain and with regard to help given to Cuban and Bosnian refugees.

3. The Bishop assures us that during that investigation, Father Priest was kept informed of his rights and that he had the help of a canonical advocate, even though he did not actually participate in the proceedings except by undergoing a

psychological evaluation. Thus “On the basis of the investigation, consultations with assessors, and a formal hearing, I issued a decree dated 22 September 1997. In that decree, among other determinations, I declared that Father Priest was irregular for the exercise of orders.”

Since the issuance of the decree the recurrent has attempted to avoid being served a copy of it and has also violated a precept given to him to keep the Bishop informed of his address.

In his decree, the Bishop also determined “that the monthly payment which the Diocese has been providing for Father Priest be directed into a fund to make restitution to the victim.”

II. Evaluation of the Procedure:

4. In general, and at first glance, one would have to say that the procedure followed by the Ordinary in this case seems to be in accord with the provisions of the Code, providing of course that the recurrent did have effective access to his canonical attorney so that his right of defense could have been exercised before practical steps and definite actions were taken against him. (For example, why is it that the recurrent visited the diocesan appointed psychologist on February 21, 1997, if the preliminary investigation was initiated only on April 11, 1997?).

The preliminary investigation in accord with c. 1717 was begun on April 11, 1997 and evidence was collected, including testimony from Father Witness, pastor, and workers in the rectory of Saint Parish, and also from the daughter and son-in-law of the victim, as well as various priests.

A lawyer was appointed for Father Priest on June 11, 1997, that is, before the completion of the preliminary investigation. However, c. 1720, n. 1 and c. 1723 #1 seem to suggest that the lawyer be appointed only after the decree mentioned in c. 1718 #1 has been issued, that is, when the actual decision to proceed to a penal action has been made.

At any rate, on August 5, 1997 the Bishop issued the decree called for in c.1718 stating that he would follow the administrative rather than judicial process. One must note however, that the Bishop does not indicate the “just causes which preclude a judicial process” (cf. c. 1342, #1) and which incline him instead to pursue the administrative process.

A hearing was held on September 9, 1997 at which the recurrent, despite two citations, did not present himself. His Advocate was available by phone and had presented the recurrent’s position in a brief.

5. I use the phrase above, “at first glance,” because questions could be raised as to the suitability and liceity of using one and the same process (c. 1720, “per decretum extra iudicium”) to determine the existence of and punish true crimes and delicts and

also to determine the existence of an irregularity or impediment to Orders in accord with cc. 1044, #1,1 and 1044 #2,2.

C. 1342 #2 clearly tells us: “Per decretum irrogari vel declarari non possunt poenae perpetuae ...”

Yet the practical result of a finding of the presence of an irregularity is the priest's permanent exclusion from the practice of the ministry. One of the assessors in the case is quite aware of this since he advises: “I see an advantage in a declaration of the existence of an irregularity ... a declaration of the existence of an irregularity, if such can be established, would have the same effect as a permanent suspension from the exercise of orders...”

De facto, the Bishop, in the case in question, finds a determination of unfitness according to c. 1044 to be “another and more fitting remedy ... which should be employed in the place of the imposition of an expiatory penalty (Decree, p. 4)”.

6. A further problem from the combining of both processes arises, in my opinion, from the difficulty of isolating the two contrasting perspectives upon which each separate judgment is to be made.

From the point of view of ecclesiastical penal law, the investigator and the Ordinary are trying to determine crime and punishment, delict and penalty, imputability and extenuating circumstances. Yet, in the exact same process and at the same time, the Ordinary, with impartial serenity of mind and with the principal purpose of providing for a seriously ill brother priest, is supposed to use the exact same information as evidence, no longer as of sin or crime, but now as of an incapacitating medical and psychological condition.

Thus one could hold that it is contradictory, illogical and unjust to consider the same situation contemporaneously as one involving both a true illness and a serious crime; for if we were truly dealing with a serious, perpetual condition or psychic cause which so interfered with the subject's freedom and responsibility that he would be incapable of exercising the priesthood, then his exterior criminal action would not be morally imputable to him.

Furthermore, the medical expert's reports which are obtained with the cooperation of the person being investigated for the purpose of evaluating his psychic condition so that he might obtain care if needed, should not be admitted as evidence in a penal case. These are confidential medical records which are meant to be used for the good of the patient; other use of them violates the principle of confidentiality and of the doctor-patient privilege. What is provided in an extra-legal forum for the benefit of a patient, cannot be used in a legal forum against that patient's interests and rights (even if, under compulsion, he should have consented to such use [cf. psychological report, p.1]).

7. The Ordinary himself seems to have been aware of the above possible objection since he does try to address in the decree this question of the relation between

psychic defect and true imputability. Father Advocate, the lawyer for the recurrent, had argued that the crimes could not be considered imputable to Father Priest because of his psychological impairment. But, the Bishop replies that Father Priest “appears to have at least some use of reason and seems to be able to understand the nature of his actions.” He continues: “The presence of a pathology and the reality of culpability are not mutually exclusive. Father Priest is an intelligent man. His very efforts to cover up and create plausible excuses for his manipulative behavior reveal that he did have a basic understanding that his actions were seriously wrong.”

If this is true, does it not then seem very difficult to sustain that there is also present such a serious psychic irregularity which would have made Father Priest incapable of ministry? If he had knowledge, freedom and culpability, how is it that his actions are also judged at the same time to be not under his control, that he is not *dominus sui*?

Our Holy Father in his talk to the Rota on February 8, 1987 has warned us to evaluate carefully the underlying anthropology of the experts consulted: “l’aiuto di esperti non dispensa il giudice ecclesiastico, nell’uso delle perizie, dal dovere di non lasciarsi suggestionare da concetti antropologici inaccettabili, finendo per essere coinvolto in fra intendimenti circa la verità dei fatti e dei significati (AAS, 79 [1987], p. 1454)”²⁷ and “Quindi anche i risultati peritali, influenzati dalle suddette visioni, costituiscono una reale occasione di inganno per il giudice che non intravedda l’equivoco antropologico iniziale (ibid., p. 1457).”²⁸

8. As an argument to sustain both the presence of full imputability and a truly incapacitating psychic defect in the recurrent, the Bishop makes use of the reasoning presented by one of the assessors: “... a severe personality disorder is sufficient to render him incapable (There is a parallel in c. 1095 on incapacity for marital consent).”

The parallel with matrimonial consent used by in his explanation of the influence of personality disorders is only an analogy and not a strict comparison. Marriage comes about by a contractual consent between two parties, and the contract is seen to be null and void if one of the parties is judged not able to consent or to deliver the object of his consent. The Sacrament of Orders, however, is not exactly similar.

Holy Orders is the result of a divine call, a vocation, and is a permanent gift of God, which impresses a character on the soul of the individual and gives him sacred powers including that of confecting the Eucharist. The Catechism of the Catholic Church teaches us that the Sacrament of Holy Orders: “conferisce un dono dello Spirito Santo che permette di esercitare una potestà sacra, la quale non può venire che da Cristo stesso, mediante la sua Chiesa (n. 1537)” e “Come ogni grazia, questo sacramento non può essere ricevuto che come un dono immeritato (n. 1578).”²⁹ Since it is a gift conferred through the hands of another minister, reception of orders, per se, does not require the actual use of reason. It follows then that the incapacity to fulfill the obligations of Ordination, since it does not make up part of a consensual contract, in contrast to the case in Matrimony, does not of itself nullify or void the Sacrament.

Accordingly, the widespread use of the procedures and the line of reasoning used in this case could lead to a factual situation which, in practice, would be equivalent to the nullification of Holy Orders and the imposition of a perpetual penalty by means of a decree.

8 (sic). One further caution could be raised about the procedure used in this case. C. 1350 provides that: "In poenis clerico irrogandis semper cavendum est, ne iis quae ad honestam sustentationem sunt necessaria ipse careat, nisi agatur de dimissione e statu clericali."

Apparently then, the Ordinary, even though he has declared the recurrent psychologically incapable of exercising ministry, seems to consider him as dismissed from the clerical state since Father Priest is not actually receiving support and sustenance. The money which would have been provided to him has been put in a fund to make restitution to the victim. This is a noble and charitable provision, and is in fact an obligation of justice on the part of Father Priest. But the direct payment by the Diocese of this money to the victim has the double disadvantage of 1) leaving Father Priest, someone judged as psychically incapable of exercising ministry, without any sustenance whatsoever, and 2) also of creating the precedent (perhaps also under civil law) that the Diocese itself will in the future be responsible for making up for all the debts and injustices of all its priests and clerics.

III. Conclusion:

9. While in the particular case I do not see, apart from the problem of the actual date of the original disciplinary actions against the recurrent and the initiation of the canonical process, serious violations of procedural law, I would suggest that the Congregation encourage that this model of combining both processes not be widely used in the future because of the reasons illustrated above. A difficult decision concerning a cleric's incapacity to rightly exercise ministry according to c.1044 #2, 2, should be taken in the context of charitable assistance to a sick brother, not in the context of penal law and punishment.

Endnotes

* This talk was later published in *Studia Canonica*: “Protecting the Right to Privacy when Examining Issues Affecting the Life and Ministry of Clerics and Religious,” in *Studia Canonica*, 34 (2000), pp. 439-459.

1. John 7, 53 — 8, 11.

2. John 8, 7.

3. Instruction of the Secretariat of State, August 6, 1976, Prot. N. 311157 (unofficial translation of the original Italian). It should be noted that the actual document issued by the Secretariat of State does not identify itself as an Instruction in the formal sense; rather, it has the appearance of a circular letter. Since the Congregation for the Clergy has referred to this letter as an “instruction” in its October 8, 1998, decision which is discussed at a later point, this terminology has been adopted in the present article. For a discussion of the legislative impact of instructions and circular letters, see Francis G. Morrissey, O.M.I., *The Canonical Significance of Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law*, Faculty of Canon Law, Saint Paul University, Ottawa, 1992.

4. The title in French is “Respect de la vie privée des individus et de l’intégrité et de la souveraineté des Nations.”

5. *Ibid.* The original French text cited in the Instruction reads, “dans la mesure où ces façons d’agir portent atteinte à la vie privée d’un individu elles risquent de violer plusieurs autres droits que le respect de la vie privée tend à protéger. Il s’agit notamment de la liberté de pensée, de conscience, de religion et d’opinion....Lorsqu’un test de ‘personnalité’ ou de ‘détection de mensonge’ est présenté comme une condition préalable obligatoire, ou même simplement ‘recommandée’ ou ‘souhaitable’ de recrutement, de maintien de poste ou de promotion, on peut douter que la personne qui s’y soumet agisse en fait volontairement.”

6. *Ibid.*

7. *Ibid.* The parallel canon in the 1983 Code of Canon Law is canon 630, §5, “Members are to approach superiors with trust, to whom they can express their minds freely and willingly. However, superiors are forbidden to induce their subjects in any way whatever to make a manifestation of conscience to them.

8. Vittorio Marcozzi, S.J., “Indagini Psicologiche e Diritti della Persona,” in *La Civiltà Cattolica*, 1976, Anno 127, Volume Secondo, pp. 541-551.

9. Vittorio Marcozzi, S.J., “Il Diritto alla Propria Intimità nel Nuovo Codice di Diritto Canonico,” in *La Civiltà Cattolica*, December 17, 1983, Anno 134, pp. 573-580.

10. Instruction of the Secretariat of State, *op. cit.*

11. Decision of the Congregation for the Clergy, October 8, 1998. The full text of this letter is found in the Appendix. In order to protect the privacy of all parties associated with the cases presented in the course of this address, actual names and protocol numbers have been removed.

12. Pope Pius XII, to the Participants at the XIII Congress of the International Association of Applied Psychology, April 10, 1958, AAS 50 [1958] 276, cited in English in *The Pope Speaks*, Vol. 5, No. 1, page 13.
13. SC. S. Officii, Monitum, *Cum Compertum*, July 2, 1961, AAS 53 [1961] 571 (unofficial translation).
14. SC. pro Institutione Catholica, *Ratio fundamentalis insitutionis sacerdotalis*, in AAS 62 [1970] 349 (unofficial translation).
15. SC. Religiosorum, Instructio, *Renovationis causam*, January 6, 1969, AAS 61 [1969] 103-120, §10, III (unofficial translation).
16. Vittorio Marcozzi, S.J., "Indagini Psicologiche e Diritti della Persona," p. 545.
17. *Ibid.*
18. Pope Pius XII, *op. cit.*, p. 15.
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*, p. 16.
22. Study of the Congregation for the Clergy, June 9, 1998 [English original]. The full text of this study is found in the Appendix. In order to protect the privacy of all the parties, actual names and protocol numbers have been removed.
23. *Ibid.*
24. This translation of the canon varies from the CLSA edition in that it placed the phrases in the same order as the Latin text.
25. See canon 1526, §2, 1°.
26. For a more developed presentation of this rationale, see Gregory Ingels, "Dismissal from the Clerical State: An Examination of the Penal Process," in *Studia Canonica*, Vol. 33/1, 1999, pp. 185-188.
27. [Unofficial translation]: "The help of experts...does not dispense the ecclesiastical judge, in the use of experts, from the obligation of not permitting them to hypothesize from unacceptable anthropological concepts concluding by being involved in misunderstandings concerning the truth of the facts and what is signified."
28. [Unofficial translation]: "Therefore, even the expert's results, influenced by the above-mentioned perspectives, constitute a real occasion of deception by the judge who has not glimpsed the initial anthropological misunderstanding."
29. [Unofficial translation]: "confers a gift of the Holy Spirit which permits the exercise of a sacred power, which cannot come but from Christ himself by means of His Church....As each grace, this sacrament cannot be received but as an unmerited gift."

