

BISHOPS' NORMS: COMMENTARY AND EVALUATION

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Abstract: In November 2002, the U.S. Conference of Catholic Bishops approved the *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priest or Deacons* ("Norms") in response to allegations of sexual abuse of minors by Roman Catholic Church ("Church") officials. This Article examines the *Norms* on the basis of canonical traditions and the concepts, propositions, and positions contained within them. It strives to find the meaning of the individual norms within the broader context of the life and beliefs of the Church and its need to have structures that prevent corruption and promote healthy growth. The author argues that the *Norms* are not enough to bring local churches back to good health. Genuine healing can only come from the internal resources of the Church's body through a renewed vision of the Church as a community endowed with gifts which are authenticated and coordinated by the Church hierarchy.

INTRODUCTION

The U.S. Conference of Catholic Bishops ("USCCB" or "Conference"), in November 2002, approved the *Charter for the Protection of Children and Young People Revised Edition* ("Charter") and the *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* ("Norms").¹ The two documents

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In this Commentary, the original text of the *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* ("Norms") is reproduced in boldface type in its entirety; the footnotes that belong to the *Norms* are reproduced partially—if they warrant comments in this context. The locations of such footnotes are marked with asterisks within the text of the *Norms* and they are printed in smaller bold type immediately after the text of the Norm to which they belong. All numbered footnotes within the individual norms are not part of the *Norms* themselves but have been added to provide further information.

¹ U.S. CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE REVISED EDITION, available at <http://www.usccb.org/bishops/>

form a unity but differ in nature. The *Charter* contains an extensive declaration of intent about future policies; the *Norms* are legislation establishing legal rights and duties. As canon law requires,² the bishops submitted the *Norms* to the Holy See who reviewed them on December 12, 2002. The *Norms* are now valid law, *ius vigens*, for the dioceses and eparchies of the United States. This Article concerns the *Norms* only. Part I of this Article offers a critical commentary of the *Norms*, not in the sense of idle criticism, but in the sense of a close examination, on the basis of canonical traditions, of the concepts, propositions, and positions contained in them. In Part II, I wish to find the meaning of the individual norms within the broader context of the life and beliefs of the Roman Catholic Church (the "Church") and its need to have good structures that prevent corruption and promote healthy growth.³

I. COMMENTARY

Before commenting on the *Norms*, some preliminary clarifications are in order.

First, the review and approval by the Holy See does not raise the *Norms* to the level of pontifical law; the legislator remains the USCCB. Should the bishops wish to change the *Norms*, they would have to follow the original procedure and submit the intended changes to the Holy See for review.

Second, the *Norms* ought to be interpreted according to the traditional rules of interpretation valid throughout the field of canon law.

charter.htm (2002) [hereinafter CHARTER]; U.S. CONFERENCE OF CATHOLIC BISHOPS, ESSENTIAL NORMS FOR DIOCESAN/EPARCHIAL POLICIES DEALING WITH ALLEGATIONS OF SEXUAL ABUSE OF MINORS BY PRIESTS OR DEACONS, available at <http://www.usccb.org/bishops/norms.htm> (2002) [hereinafter NORMS].

² See 1983 CODE c.455. The original and official Latin text of the Code of the Western Church is found in CODEX IURIS CANONICI (Libreria Editrice Vaticana 1989) ("CIC"); in this Article's quotations the English translation found in CODE OF CANON LAW (Canon Law Soc'y of Am. trans., 1999) is used. The *Norms* also regularly refer to CODEX CANONUM ECCLESIAE ORIENTALIS (Typis Polyglottis Vaticanis 1990) ("CCEO") for which an English translation can be found in CODE OF THE CANONS OF THE EASTERN CHURCHES (Canon Law Soc'y of Am. trans., 2001). Because I found no significant difference between the two codes for the material I quote, in this article I refer to the code for the Western Church only.

³ For a detailed canonical analysis of the *Norms* see CANON LAW SOC'Y OF AM., GUIDE TO THE IMPLEMENTATION OF THE U.S. BISHOPS' ESSENTIAL NORMS FOR DIOCESAN/EPARCHIAL POLICIES DEALING WITH ALLEGATIONS OF SEXUAL ABUSE OF MINORS BY PRIESTS OR DEACONS (2003) [hereinafter GUIDE]. This Article should be read as complementary to the *Guide*.

Such rules are essentially—but not comprehensively—articulated in the *Code of Canon Law* ("Code") under the title "Ecclesiastical Laws."⁴ Some of them are particularly relevant for this Article, such as:

- laws are not retroactive, unless an exception is expressly stated;⁵
- if there is reasonable doubt about the meaning of a text (a "doubt of law"), the ordinance has no binding force;⁶
- laws that establish a penalty, restrict the free exercise of a right, or constitute an exception to general provisions are subject to strict construction; that is, they must be interpreted minimally within the ordinary meaning of the words.⁷

The reader should be aware that these canonical directives for interpretation are different from those used by courts in the United States. Following the practice of the federal or state courts—good as they may be—would lead to incorrect conclusions in canon law.⁸

The title of the legislative document adopted by the bishops reveals its complex character:

**Essential Norms for Diocesan/Eparchial Policies
Dealing with Allegations of Sexual Abuse of Minors
by Priests or Deacons⁹**

*Approved by the Congregation for Bishops, December 8, 2002*¹⁰

As stated above, the legislator is the USCCB; the Conference drafted and promulgated the *Norms*. This is legally correct, but the statement hides an undesirable situation: the Conference nominally is in charge, but the Holy See effectively holds the power. There is a latent danger in such a system as the Conference may easily lose its le-

⁴ See 1983 CODE cc.7–22.

⁵ *Id.* c.9

⁶ See *id.* c.14.

⁷ See *id.* c.18.

⁸ See Ladislav Orsy, S.J., *Canons and Commentary*, in THE CODE OF CANON LAW: A TEXT AND COMMENTARY 25–45 (James A. Coriden et al. eds., 1985); see also John M. Huels, O.S.M., *Canons and Commentary*, in NEW COMMENTARY ON THE CODE OF CANON LAW 47–96 (John P. Beal et al. eds., 1998).

⁹ NORMS, *supra* note 1 (title).

¹⁰ Canon 455, section 2 states that decrees issued by the conference of bishops "do not obtain binding force unless they have been legitimately promulgated after having been reviewed [(*recognita*)] by the Apostolic See." 1983 CODE c.455, § 2. "Approved" is used to render the Latin *recognitum*. *Recognitio* is a relatively new concept in the canonical tradition; in theory the term means less than "approval" but more than "taking notice of"; yet, in the present practice of the Holy See it amounts to approval. Note, however, that if the legislator had intended "approval," he could have used the perfectly fitting Latin word *approbatio*. He did not. *Id.*

gitimate autonomy and, for all practical purposes, become an agency of the Holy See. Thus, caution for the future is necessary. For the present, however, one must admit that the current practice has the advantage that it ensures harmony between the universal law of the Church and particular legislations on regional levels.¹¹

Preamble:

On June 14, 2002, the United States Conference of Catholic Bishops approved a *Charter for the Protection of Children and Young People*. The charter addresses the Church's commitment to deal appropriately and effectively with cases of sexual abuse of minors by priests, deacons, and other church personnel (i.e., employees and volunteers). The bishops of the United States have promised to reach out to those who have been sexually abused as minors by anyone serving the Church in ministry, employment, or a volunteer position, whether the sexual abuse was recent or occurred many years ago. They stated that they would be as open as possible with the people in parishes and communities about instances of sexual abuse of minors, with respect always for the privacy and the reputation of the individuals involved. They have committed themselves to the pastoral and spiritual care and emotional well-being of those who have been sexually abused and of their families.

In addition, the bishops will work with parents, civil authorities, educators, and various organizations in the community to make and maintain the safest environment for minors. In the same way, the bishops have pledged to evaluate the background of seminary applicants as well as all church personnel who have responsibility for the care and supervision of children and young people.¹²

¹¹ A question that may be raised is who is entitled to interpret the *Norms*: the Conference who makes them or the Holy See who reviews them? Canon 16, section 1 states, "The legislator authentically interprets laws . . ." 1983 CODE c.16, § 1. By this principle, the Conference is competent. *See id.*

¹² NORMS, *supra* note 1, paras. 1-2. The *Guide* states correctly, "[t]he *Norms* are not retroactive," and then continues incorrectly, "This means that the determination that for the good of the Church 'any priest in the United States . . . shall not continue in the active ministry' (*Norm* 9), cannot be applied to offenses that were committed before the *Norms* take effect. Any offense committed before the *Norms* take effect is subject to the applicable laws at the time, not to the new norms . . ." *See GUIDE, supra* note 3, at 2. There is nothing in canonical tradition to forbid the legislator from introducing a disqualification for a

The preamble of the *Norms* refers to the *Charter* that "addresses the Church's commitment" to deal with cases of abuse and was intended to bring remedy to a corruption that closely or remotely affects the whole community.¹³ In interpreting the *Norms*, however, the *Charter* must be used with restraint. This is because the principal aim of the *Charter* is to make clear to the public the bishops' determination to remedy the wrongs perpetrated and to prevent them from happening again and, thus, it has a broad scope stated in sweeping terms. The *Norms*, however, contain legislation establishing penalties, restriction of rights, and exceptions from universal laws; hence they have a narrow scope and are subject to strict interpretation. Although the *Charter* is a good source for learning about the "intent" of the bishops, who wanted to reach out as broadly as is feasible in order to protect children, the *Norms* in their punitive, restrictive, and exceptional nature must be applied narrowly.¹⁴

The *Norms* focus on allegations of abuse by priests and deacons only because the USCCB has no judicial authority over bishops and cardinals, who are directly subject to the Holy See or to the pope himself. Providing a remedy for lack of episcopal supervision or for structural deficiencies in the common law of the Church is beyond the competence of a conference of bishops.

Preamble (continued):

Therefore, to ensure that each diocese/eparchy in the United States of America will have procedures in place to respond promptly to all allegations of sexual abuse of minors, the United States Conference of Catholic Bishops decrees these norms for diocesan/eparchial policies dealing with allegations of sexual abuse of minors by diocesan and religious priests or deacons.* These norms are complementary to

present office as from now, *ex nunc*, as the consequence of a crime committed in the past, *tunc*. Such disqualification is not a retroactive law establishing a crime or a penalty; it is a disciplinary provision for the future, *leges respiciunt futura*. See 1983 CODE c.9. It follows that the provision of Norm 8 disqualifying a person found guilty of the crime of sexual abuse perpetrated before the promulgation of the *Norms* from exercising ecclesiastical ministry in the future is valid. See NORMS, *supra* note 1, Norm 8.

¹³ See NORMS, *supra* note 1, para. 1.

¹⁴ See 1983 CODE c.18. One must recall the old canonical adage: "the reason for the law is not the law," *ratio legis non est lex*. A broad intent to catch criminals is not, and cannot be, a reason to apply punitive laws broadly. U.S. courts—rightly—will speak of the "intent of the Congress" even in deciding criminal cases. In canon law, however, the "intent" of the legislator cannot be invoked if it is counter to a minimal interpretation of the ordinary meaning of the terms. See *id.*

the universal law of the Church, which has traditionally considered the sexual abuse of minors a grave delict and punishes the offender with penalties, not excluding dismissal from the clerical state if the case so warrants.

* In applying these Norms to religious priests and deacons, the term "religious ordinary" shall be substituted for the term "bishop/eparch" *mutatis mutandis*.¹⁵

The Norms are particular law; they are additional law to the universal law of the Church for the territory of the USCCB. As such, they represent a step towards resolving the crisis and preventing new ones, even if they cannot be a comprehensive response. If, however, the causes of the ill are not adequately covered by the Norms, the inquiry must move beyond the priests and deacons for a full and correct diagnosis—which the observations and reflections of this Article intend to do. For the moment, it should be enough to say that the Norms are dealing with some, but not all, the causes of the crisis.

The lack of legal precision in the first footnote in the preamble concerning religious priests and deacons brings up the issue of the applicability of the Norms to priests and deacons who are members of an institute of consecrated life or of a society of apostolic life.¹⁶ The footnote does not say who is applying the Norms to "religious priests and deacons," who is substituting "religious ordinary" for "bishop/eparch," or whether the term "religious" includes secular institutes and societies of apostolic life. The issue may be addressed by answering a simple question: Does the legislative power of the Conference extend to institutes of consecrated life, and if so, how far?

Initially, it should be noted that the Roman *recognitio* adds nothing to the power (*potestas regiminis* in this case) of the Conference, nor is there evidence of any delegation by the Holy See. Consequently, the question must be answered by recalling the extent of the ordinary power of the Conference.

A conference can exercise legislative power by issuing general decrees setting rules for the operations of the dioceses in the territory.¹⁷ It follows, therefore, that whenever a member of a pontifical institute of consecrated life or of a society of apostolic life enters into the service of a diocese (normally through a contract), he must accept to be bound by the same rules as the diocesan ministers; this would be the case of "religious" clergy serving in parishes. Further,

¹⁵ NORMS, *supra* note 1, para. 3.

¹⁶ See *id.* para. 3 n.1.

¹⁷ See 1983 CODE c.455.

the bishop may condition the granting of the "faculties" for apostolic work in the diocese on the acceptance of the diocesan norms.

Beyond that, the *Norms* are not binding on members of the institutes and societies of pontifical right. Should anyone claim otherwise on the basis of a doubt on this point, the question must not be resolved by invoking "the mind of the legislator" (that is of the USCCB), or the "intent" of the Holy See (we are not dealing with pontifical legislation), but by applying canons 14 and 18: "Laws . . . do not oblige when there is a doubt about the law,"¹⁸ and "Laws which establish a penalty, restrict the free exercise of rights, or contain exception from the law are subject to strict interpretation."¹⁹ These provisions confirm the negative response.

It is soundly arguable, though, that institutes of diocesan right are subject to the *Norms*.

Preamble (continued):

Sexual abuse of a minor includes sexual molestation or sexual exploitation of a minor and other behavior by which an adult uses a minor as an object of sexual gratification. Sexual abuse has been defined by different civil authorities in various ways, and these norms do not adopt any particular definition provided in civil law. Rather, the transgressions in question relate to obligations arising from divine commands regarding human sexual interaction as conveyed to us by the sixth commandment of the Decalogue. Thus, the norm to be considered in assessing an allegation of sexual abuse of a minor is whether conduct or interaction with a minor qualifies as an external, objectively grave violation of the sixth commandment (USCCB, *Canonical Delicts Involving Sexual Misconduct and Dismissal from the Clerical State*, 1995, p. 6). A canonical offence against the sixth commandment of the Decalogue (CIC, c. 1395 § 2;²⁰ CCEO, c. 1453 § 1) need

¹⁸ *Id.* c.14.

¹⁹ *Id.* c.18.

²⁰ Canon 1395, section 2 provides:

A cleric who in another way has committed an offense against the sixth commandment of the Decalogue, if the delict was committed by force or threats or publicly or with a minor below the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.

Id. c.1395, § 2.

not be a complete act of intercourse. Nor, to be objectively grave, does an act need to involve force, physical contact, or a discernible harmful outcome. Moreover, "imputability [moral responsibility] for a canonical offense is presumed upon external violation . . . unless it is otherwise apparent" (CIC, c. 1321 § 3;²¹ CCEO, c. 1414 § 2). Cf. CIC, canons 1322-27, and CCEO, canons 1413, 1415, and 1416.*

* If there is any doubt whether a specific act qualifies as an external, objectively grave violation, the writings of recognized moral theologians should be consulted, and the opinions of recognized experts should be appropriately obtained. . . . Ultimately, it is the responsibility of the diocesan bishop/eparch, with the advice of a qualified review board, to determine the gravity of the alleged act.²²

The preamble concludes without a precise legal definition of the criminal act of abuse; it refers, instead, to a generally accepted understanding in moral theology. A lawyer handling criminal cases, whether as prosecutor, attorney for the defense, or judge may find such an approach insufficient and confusing in a trial. The lack of exactness may have been due to the external circumstances of the drafting of the *Norms*, circumstances that compelled the bishops to act under pressure and with unusual haste—hardly a favorable environment for the exercise of prudence.²³ Admittedly, to find a clear and accurate definition of child sexual abuse cannot be easy, yet the general terms borrowed from moral theology may leave too much room for ambiguities. To assign the ultimate responsibility for the definition of the crime to the diocesan bishop/eparch may result in definitions diverging from place to place and from case to case; not a sound practice in criminal law.²⁴

²¹ Canon 1321, section 3 provides, "When an external violation has occurred, imputability is presumed unless it is otherwise apparent." *Id.* c.1321 § 3.

²² *NORMS*, *supra* note 1, paras. 4-5.

²³ In the history of canon law, it would be difficult to find a precedent for the Dallas event where the bishops legislated under immense pressure from the media without assuring themselves a reasonable opportunity for quiet reflection and deliberation. Such an unusual manner of proceeding has left its mark on their document; no wonder the Holy See was the first to ask for significant modifications.

²⁴ An additional problem is that in our days, moral theology is undergoing a serious updating, *aggiornamento*, and consensus is not easily found among the specialists. As it is, a combination of Christian prudence and ordinary common sense may be as good a guide as any manual. For further discussion of this issue, see generally the judicious observations in James H. Provost, *Offenses Against the Sixth Commandment: Toward a Canonical Analysis of Canon 1395*, 55 *JURIST* 632, 632-63 (1995).

Norm 1:

1. Having received the *recognitio* of the Apostolic See on December 8, 2002, and having been legitimately promulgated in accordance with the practice of this Episcopal Conference on December 12, 2002, these Norms constitute particular law for all the dioceses/eparchies of the United States of America.²⁵

The *Norms* are not pontifical law; they cannot modify or annul any legislation enacted by the Holy See.

Norm 1 (continued):

Two years after *recognitio* has been received, these norms will be evaluated by the plenary assembly of the United States Conference of Catholic Bishops.²⁶

After two years, the USCCB must evaluate the *Norms*. The process of evaluation, however, does not affect the continuing validity of the *Norms*.

Norm 2:

2. Each diocese/eparchy will have a written policy on the sexual abuse of minors by priests and deacons, as well as by other church personnel. This policy is to comply fully with, and is to specify in more detail, the steps to be taken in implementing the requirements of canon law, particularly CIC, canons 1717–1719,²⁷ and CCEO, canons 1468–1470. A copy

²⁵ NORMS, *supra* note 1, norm 1.

²⁶ *Id.*

²⁷ Canon 1717 provides:

§ 1. Whenever an ordinary has knowledge, which at least seems true, of a delict, he is carefully to inquire personally or through another suitable person about the facts, circumstances, and imputability, unless such an inquiry seems entirely superfluous.

§ 2. Care must be taken so that the good name of anyone is not endangered from this investigation.

§ 3. The person who conducts the investigation has the same powers and obligations as an auditor in the process; the same person cannot act as a judge in the matter if a judicial process is initiated later.

1983 CODE c. 1717.

Canon 1718 provides:

§ 1. When it seems that sufficient evidence has been collected, the ordinary is to decide:

- 1° whether a process to inflict or declare a penalty can be initiated;
- 2° whether, attentive to can. 1341, this is expedient;

of this policy will be filed with the United States Conference of Catholic Bishops within three months of the effective date of these norms. Copies of any eventual revisions of the written diocesan/eparchial policy are also to be filed with the United States Conference of Catholic Bishops within three months of such modifications.²⁸

Each diocese/eparchy must have a policy of dealing with the sexual abuse of minors by priests, deacons, and other personnel. This policy ought to be based on, and spell out in greater detail, the universal legislation found in canons 1717-1719.²⁹

The *Norms* do not direct the bishops to create one common policy for all the dioceses/eparchies of the Conference, or common policies for culturally unified regions, even though sound reasoning, not to mention common sense, would demand it.³⁰ Instead, each diocese is instructed to create and to file its own policy. Producing a well-balanced policy is not an easy accomplishment, and smaller dioceses may not have the resources to do it. Moreover, it is hardly expedient to follow different policies in a region with closely clustered dioceses, for example, in the states of California, New England, or New York.

Such an obviously deficient approach can be explained only by the extreme concern of the Conference not to trespass on the jurisdiction of the individual bishops. A concern for unity is, however, expressed, in Articles 8 and 9 of the *Charter* where the bishops call for

3° whether a judicial process must be used or, unless the law forbids it, whether the matter must proceed by way of extra judicial decree.

§ 2. The ordinary is to revoke or change the decree mentioned in § 1 whenever new evidence indicates to him that another decision is necessary.

§ 3. In issuing the decrees mentioned in §§ 1 and 2, the ordinary is to hear two judges or other experts of the law if he considers it prudent.

§ 4. Before he makes a decision according to the norm of § 1 and in order to avoid useless trials, the ordinary is to examine carefully whether it is expedient for him or the investigator, with the consent of the parties, to resolve equitably the question of damages.

Id. c.1718

Canon 1719 provides, "The acts of the investigation, the decrees of the ordinary which initiated and concluded the investigation, and everything which preceded the investigation are to be kept in the secret archive of the curia if they are not necessary for the penal process." *Id.* c.1719.

²⁸ *NORMS*, *supra* note 1, norm 2.

²⁹ Canon law, in its overall approach to criminal cases, is radically different from American law. See 1983 CODE cc. 1717-1731.

³⁰ The Code itself recommends it. *Id.* c. 1316. ("Insofar as possible, diocesan bishops are to take care that if penal laws must be issued, they are uniform in the same city or region.").

the establishment of a national "Office for Child and Youth Protection."³¹ That office is already in existence and operating as part of the staff of the USCCB.

Norm 3:

3. Each diocese/eparchy will designate a competent person to coordinate assistance for the immediate pastoral care of persons who claim to have been sexually abused when they were minors by priests or deacons.³²

The bishop has the power to designate the "competent person." To function effectively, he or she will need also the confidence of the priests, the diocesan personnel, and the people at large.

Norm 4:

4. To assist diocesan/eparchial bishops, each diocese/eparchy will also have a review board which will function as a confidential consultative body to the bishop/eparch in discharging his responsibilities. The functions of this board may include

A. advising the diocesan bishop/eparch in his assessment of allegations of sexual abuse of minors and in his determination of suitability for ministry;

B. reviewing diocesan/eparchial policies for dealing with sexual abuse of minors; and

C. offering advice on all aspects of these cases, whether retrospectively or prospectively.³³

The review board has a purely consultative task; in the selection of its members and in its operation, it depends entirely on the discretion of the bishop. This may well lead to serious breakdowns in the process: the board on its own initiative has no right of access to the bishop, the bishop has no duty to inform anyone of the board's counsel, and the bishop is not obligated to respond to the board or to enter into a dialogue with its members.

Norm 5:

5. The review board, established by the diocesan/eparchial bishop, will be composed of at least five persons of outstanding integrity and good judgment in full communion

³¹ CHARTER, *supra* note 1, arts. 7–8.

³² NORMS, *supra* note 1, norm 3.

³³ *Id.* norm 4.

with the Church. The majority of the review board members will be lay persons who are not in the employ of the diocese/eparchy; but at least one member should be a priest who is an experienced and respected pastor of the diocese/eparchy in question, and at least one member should have particular expertise in the treatment of the sexual abuse of minors. The members will be appointed for a term of five years, which can be renewed. It is desirable that the Promoter of Justice participate in the meetings of the review board.³⁴

The *Norms* determine the composition of the review board; the bishop appoints its members. He must call on persons in full communion with the Church, i.e., all on the board must be Roman Catholics—whether they number five or more. The majority of its members must come from the laity, a local pastor should be elected to represent the clergy, and one of them should be an expert. If the Promoter of Justice is not a member, he must be invited to the meetings.

The members' term of office is five years, which can be indefinitely renewed. It could be argued that on general principles, the bishop has the power to remove any of them before the term expires because the appointment does not create a "vested right." If so, the board suffers from a lack of independence that can seriously affect its work: the bishop can easily and legally render the board ineffective. Considering how many bishops in the past failed to respond vigorously even to repeated complaints, a stronger body with better-defined rights and duties should have been created. Had the priests and the people of the diocese been given an opportunity to have a voice in the selection of the candidates for the board, the chance to provide wise advice to the bishops would have been greater. This is a glaring failure in using the God-given wisdom and energy of our Christian people. The danger that some bishops may appoint persons who will "never cause any problems" is obvious.

Norm 6:

6. When an allegation of sexual abuse of a minor by a priest or deacon is received, a preliminary investigation in harmony with canon law will be initiated and conducted promptly and objectively (CIC, c. 1717;³⁵ CCEO, c. 1468). All appropriate

³⁴ *Id.* norm 5.

³⁵ 1983 CODE c.1717 (quoted in full *supra* note 27).

steps shall be taken to protect the reputation of the accused during the investigation. The accused will be encouraged to retain the assistance of civil and canonical counsel and will be promptly notified of the results of the investigation. When there is sufficient evidence that sexual abuse of a minor has occurred, the Congregation for the Doctrine of the Faith shall be notified. The bishop/eparch shall then apply the precautionary measures mentioned in CIC, canon 1722,³⁶ or CCEO, canon 1473—i.e., remove the accused from the sacred ministry or from any ecclesiastical office or function, impose or prohibit residence in a given place or territory, and prohibit public participation in the Most Holy Eucharist pending the outcome of the process.³⁷

Although Norm 6 says that the canonical investigation must be conducted objectively, the Code does not give well-structured rules concerning the investigations that may lead to a criminal charge. Although the accused is encouraged to retain counsel, neither the accused nor his counsel has any right to be informed about the investigation's progress or be heard during the investigation. Tragic situations may consequently arise: a priest can be deprived of his ministry while kept in ignorance and "under a cloud" for an indeterminate time while the investigation goes on in secrecy.³⁸

Once the investigation is completed, the accused must promptly be notified of the results. But that is not the end because this merely is an investigation *preliminary* to a criminal charge.

The investigator has the authority to determine whether the evidence is sufficient to warrant a formal process, either judicial or administrative. In canon law, the degree of "sufficient" evidence means "reasonable probability"—not unlike the standard required for indictment in American law. Once such probability is ascertained, the Congregation for the Doctrine of the Faith ("CDF" or "Congregation") must be notified.

³⁶ *Infra* text accompanying note 40.

³⁷ NORMS, *supra* note 1, norm 6.

³⁸ This canonical investigation is not equivalent to a "police investigation" in secrecy on suspicion. In canon law the person investigated must be notified and often is publicly marked as heavily suspected (for instance, by removal from office); his situation is close to that of a person "indicted" in secular law.

The Apostolic letter *motu proprio* ("by the pope's own initiative"), *Sacramentorum sanctitatis tutela* of April 30, 2001,³⁹ reserved jurisdiction to the CDF over the "delict" of sexual interaction by a cleric with minors under the age of eighteen. The purpose of the notification prescribed by Norm 6 is to make the Congregation aware of the grounds of the accusation. Needless to say, the physical distance, the inevitable delays in communication, and the difficulties in giving a hearing to both sides and examining witnesses are significant impediments to a fair trial, and make a speedy one virtually impossible.

Perhaps for these reasons, the *Norms* indicate that the Congregation, after taking cognizance of the case, may authorize the local Ordinary to handle it. While the Ordinary is awaiting the response of the CDF, he must take precautionary administrative measures according to canon 1722. Since it is the primary canon for administrative procedure, canon 1722 ought to be quoted in full:

To prevent scandals, to protect the freedom of witnesses, and to guard the course of justice, the ordinary, after having heard the promoter of justice and cited the accused, at any stage of the process can exclude the accused from the sacred ministry or from some office and ecclesiastical function, can impose or forbid residence in some place or territory, or even can prohibit public participation in the Most Holy Eucharist. Once the cause ceases, all these measures must be revoked; they also end by the law itself when the penal process ceases.⁴⁰

Before the Ordinary imposes any precautionary measure, he must hear the Promoter of Justice, but is not bound to follow his opinion; he must cite the accused, but he is not bound by any strict evidentiary rule.

These precautionary measures can intrude on the basic human rights of the accused; they appear, therefore, punitive in nature, but, strictly as a matter of law, they are not. Nonetheless, the accused may be excluded from any ministry, office, or function, he may be exiled from the territory of the diocese or any part of it, and may be prohibited from participating in the Eucharist—which comes close to an effective excommunication. Although, in theory, a right to appeal

³⁹ *Sacramentorum sanctitatis tutela* [The Safeguarding of the Sanctity of the Sacraments], 93 ACTA APOSTOLICAE SEDIS 737, 737-39 (2001).

⁴⁰ 1983 CODE c.1722.

against such precautionary measures may exist, in practice, it is unlikely to produce any relief.

Norm 7:

7. The alleged offender may be requested to seek, and may be urged voluntarily to comply with, an appropriate medical and psychological evaluation at a facility mutually acceptable to the diocese/eparchy and to the accused.⁴¹

The expression "may be requested" is not clear. Grammatically it could mean that the bishop has the authority to *compel* the alleged offender to seek treatment, or that the bishop can *advise* him to do so. Legally, however, the rule is certainly restrictive of personal freedom; hence it must be interpreted strictly, meaning no more than "the offender may be strongly advised." The treatment itself must be at a place that is mutually acceptable to the diocese/eparchy and the accused.

Norm 8:

8. When even a single act of sexual abuse by a priest or deacon is admitted or is established after an appropriate process in accord with canon law, the offending priest or deacon will be removed permanently from ecclesiastical ministry, not excluding dismissal from the clerical state, if the case so warrants (CIC, c. 1395 § 2;⁴² CCEO, c. 1453 § 1).⁴³

Norm 8 establishes the so-called "zero tolerance" policy, an expression much used in the media but unknown in canonical tradition. Its special meaning is not immediately clear. No sound legal system will have anything but "zero tolerance" toward serious crimes; that is what it means to live "under the rule of law." Convicting a person is another matter. The evidence of crime, the existence of a *corpus delicti*, is not enough; there must be a criminal intent, *mens rea*. In other words, the law should have "zero tolerance" toward any crime by proscribing it, but the judge and jury should weigh and ponder the personal responsibility and culpability of the accused (which can exist on different degrees) and come to a decision accordingly. This distinction is foundational for any civilized legal system and is also a matter of natural justice. Yet, the *Norms* ignore it, a grave omission.

⁴¹ NORMS, *supra* note 1, norm 7.

⁴² 1983 CODE c.1395, § 2 (quoted *supra* note 20).

⁴³ NORMS, *supra* note 1, norm 8.

Once the culpability of the accused, or in canonical language, the "imputability" of the crime, is established, there are consequences. One of them is that the presence of the guilty person cannot be tolerated among ecclesiastical ministers.

Barring a person from ministry on the basis of a crime committed has a long history in canon law.⁴⁴ Norm 8 does no more than establish—all but in name—an "irregularity" on the ground of a crime, *ex delicto*, for the exercise of ministry. Canon law can do this, and can do this for the future—even in the case of a crime committed in the past; there is no problem with retroactivity.

All irregularities can be dispensed with either by the Holy See or by the bishop for adequate reason. Should, however, an "authentic interpretation" reject the analogy of the "zero tolerance" rule with the traditional irregularity, the diocesan bishop could still dispense with the prohibition because it is a disciplinary norm.

Norm 8.A:

8.A. In every case involving canonical penalties, the processes provided for in canon law must be observed, and the various provisions of canon law must be considered (cf. *Canonical Delicts Involving Sexual Misconduct and Dismissal from the Clerical State*, 1995; Letter from the Congregation for the Doctrine of the Faith, May 18, 2001).⁴⁵

The relevant judicial processes are found in Book Seven of the Code.⁴⁶ In the practical order, however, the issue is not merely to have courts and rules, but also to do justice with efficiency and speed. As it is, the diocesan courts in the United States (and elsewhere) are limited in their ability to handle criminal cases. The judges and the officers of the courts were trained primarily for the adjudication of doubts about the validity of marriages (annulments). They received little special preparation for dealing with criminal issues; few of them, if any, would have any experience in such matters. Moreover, even in matrimonial cases, far too many complaints are heard about unreasonable delays. Admittedly the problems do not always originate within the tribunals; smaller dioceses may not have the human resources and the financial means to install and run a well-organized

⁴⁴ See *id.* cc.1040–1052.

⁴⁵ NORMS, *supra* note 1, norm 8.A.

⁴⁶ See 1983 CODE cc.1400–1752.

and efficient judiciary. Experience will tell how the diocesan courts will be able to administer criminal justice.⁴⁷

Norm 8.A (continued):

Unless the Congregation for the Doctrine of the Faith, having been notified, calls the case to itself because of special circumstances, it will direct the diocesan bishop/eparch how to proceed (Article 13, "Procedural Norms" for *Motu proprio Sacramentorum sanctitatis tutela*, AAS, 93, 2001, p. 787).⁴⁸

The CDF has exclusive jurisdiction in all cases; hence the bishops can proceed only if jurisdiction is delegated to him. It is reasonable to expect that in most cases the CDF will grant such delegation because a trial in Rome is bound to encounter extreme difficulties that can interfere with fair and just procedures. The information about the procedure that the Congregation will follow when it decides to handle a case is limited.

Norm 8.A (continued):

If the case would otherwise be barred by prescription, because sexual abuse of a minor is a grave offense, the bishop/eparch shall apply to the Congregation for the Doctrine of the Faith for a dispensation from the prescription, while indicating appropriate pastoral reasons.⁴⁹

The meaning of Norm 8.A is clear: the CDF may set aside the effect of prescription. Such a power is novel: to dispense from, or to "annul," a prescription is an unheard of act in Roman law tradition, where the roots of canon law are. It seems that the drafters of this Norm confused the nature and effect of the canonical "prescription" with that of the Anglo-American "statute of limitations." The two have a common effect: both erect a bar to a legal action (estoppel) after a certain time period elapses, but they are radically different in nature. Statutes of limitations merely bar actions; prescriptions create or extinguish the rights and obligations themselves. Hence, dispensation from a statute of limitations is conceivable;⁵⁰ dispensation from the

⁴⁷ The author of this Article has not heard of one single criminal case handled by a diocesan court in the United States in recent memory—some forty years.

⁴⁸ NORMS, *supra* note 1, norm 8.A.

⁴⁹ *Id.*

⁵⁰ California has recently removed the statute of limitations for certain claims of child sexual abuse for one year. See CAL. CIV. PROC. CODE § 340.1 (West Supp. 2003). In canon law, however, even if the Anglo-American idea of "limitation of actions" were introduced,

rights and duties created by prescription does not make sense. Apart from undermining genuine "vested rights" in all circumstances, in criminal law it would be equivalent to retroactive legislation: it would recreate an extinguished crime and destroy an acquired innocence.⁵¹

Norm 8.A (continued):

For the sake of due process, the accused is to be encouraged to retain the assistance of civil and canonical counsel. When necessary, the diocese/eparchy will supply canonical counsel to a priest. The provisions of CIC, canon 1722,⁵² or CCEO, canon 1473, shall be implemented during the pendency of the penal process.⁵³

"Due process" is not a standard term with a recognized content in canon law. Canonists tend to interpret it as "a process according to our procedural law"—no more. Lawyers in the English common law tradition go further and insist on some substantive elements that the process must include in order to be fair and due, such as the right to the presumption of innocence, to confront witnesses, to trial by an independent court, and so forth. Not all such "rights" are protected by the canonical procedures.

Norm 8.B:

If the penalty of dismissal from the clerical state has not been applied (e.g., for reasons of advanced age or infirmity), the offender ought to lead a life of prayer and penance. He will not be permitted to celebrate Mass publicly or to administer the sacraments. He is to be instructed not to wear clerical garb, or to present himself publicly as a priest.⁵⁴

If the person is incardinated into a diocese, much more is needed to determine his exact status in law. Does he have a right to useful employment? Is he permitted to accept a "quasi-office" in the Catholic Church? To lead a "life of prayer and penance"—salutary as

dispensation would not be automatically available to local Ordinaries: they are not entitled to dispense from procedural law. See 1983 CODE c.87.

⁵¹ By way of an example, in the Roman law tradition in matters of property, prescription may create ownership. Whoever heard of a dispensation from, or the annulment of, a legitimately acquired and fully vested ownership?

⁵² 1983 CODE c.1722 (quoted *supra* text accompanying note 40).

⁵³ NORMS, *supra* note 1, norm 8.A.

⁵⁴ *Id.* norm 8.B.; see 1983 CODE c.1722.

it may be—is not a legally identifiable state of life; all Christians are called to do it.

This provision needs further clarification in the case of a person who is able to lead a productive life. It seems that if he is not dismissed from ministry, and remains a member of the clergy, he must not be condemned to perpetual idleness (hardly a process of rehabilitation!) but ought to be given an occupation in the Church that excludes contact with minors.

Norm 9:

9. At all times, the diocesan bishop/eparch has the executive power of governance, through an administrative act, to remove an offending cleric from office, to remove or restrict his faculties, and to limit his exercise of priestly ministry.⁵⁵

Immense prudence is needed in the application of this Norm and of the canons to which it refers. It recalls the bishop's broad discretionary authority rooted in his executive power, but this authority is not unrestricted nor can it be exercised without following prescribed procedures. The Code regulates it under the headings "Singular Administrative Acts"⁵⁶ and "Singular Decrees and Precepts."⁵⁷

In a footnote,⁵⁸ the Norm refers to canons governing the qualifications required for an ecclesiastical office,⁵⁹ to the right and duty of the diocesan bishop to fill offices in his diocese,⁶⁰ the right of an officeholder to resignation,⁶¹ and the procedure the bishop must follow to remove a person from an office.⁶²

⁵⁵ NORMS, *supra* note 1, norm 9.

⁵⁶ 1983 CODE cc.35–47.

⁵⁷ *Id.* cc.48–58.

⁵⁸ NORMS, *supra* note 1, norm 9 n.5.

⁵⁹ 1983 CODE c.149.

⁶⁰ *Id.* c.157.

⁶¹ *Id.* cc.187–189.

⁶² *Id.* cc.192–195. This norm refers also to other canons less immediately relevant. *See id.* c.277, § 3 (the power of the diocesan bishop to issue specific laws concerning the prudent observance of celibacy); *id.* c.381, § 1 (the extent and limits of the ordinary power of the diocesan bishop; the bishop's duty to act in a pastoral spirit); *id.* c.391 (recognizes the division of the bishops' power into legislative, executive, and judicial, but although acknowledging the value of some division, it affirms that all powers are ultimately united in the bishop); *id.* c.438 (a determination of the standing of the tribunals of second instance); *id.* cc.1742–1747 (the manner of proceeding in the removal of pastors).

Norm 9 (continued):

Because sexual abuse of a minor by a cleric is a crime in the universal law of the Church (CIC, c. 1395 § 2;⁶³ CCEO, c. 1453 § 1) and is a crime in all jurisdictions in the United States, for the sake of the common good and observing the provisions of canon law, the diocesan bishop/eparch shall exercise this power of governance to ensure that any priest who has committed even one act of sexual abuse of a minor as described above shall not continue in active ministry.⁶⁴

This part of the Norm repeats the disqualification from public ministry of any cleric who has committed even one act of sexual abuse of a minor. The comments made above concerning Norm 8 and the creation of a "quasi irregularity" apply here as well.

The question may arise whether conviction by a secular court should be enough to permanently bar a cleric from the ministry, or if it is necessary to conduct a separate canonical process. To safeguard the autonomy of the Church, a canonical process, administrative or judicial, is indispensable.

Norm 10:

10. The priest or deacon may at any time request a dispensation from the obligations of the clerical state. In exceptional cases, the bishop/eparch may request of the Holy Father the dismissal of the priest or deacon from the clerical state *ex officio*, even without the consent of the priest or deacon.⁶⁵

To request a dispensation is within the rights of the priest or deacon. To initiate a petition to the pope is within the rights of the bishop/eparch. The pope himself has discretionary power to impose the dismissal. Yet, in the interest of all parties, even in such an extreme procedure, elements of substantive "due process" should be followed. As it is now, the process of obtaining a dispensation is slow, cumbersome, and often unpredictable. A forced dismissal can be speedy, but surely, the accused should have his day in court. The cases are handled by the Congregation for Divine Worship and the Discipline of the Sacraments.

⁶³ *Id.* c.1395 (quoted *supra* note 20).

⁶⁴ NORMS, *supra* note 1, norm 9.

⁶⁵ *Id.* norm 10.

Norm 11:

11. The diocese/eparchy will comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and will cooperate in their investigation. In every instance, the diocese/eparchy will advise and support a person's right to make a report to public authorities.⁶⁶

The Church regards communication under the seal of the sacrament of penance as absolutely privileged and will resist any attempt from a secular jurisdiction to impose a breach of such communication.

There is no uniform legislation among the states regarding the confidentiality of communications made outside of the seal of confession between the bishop and his priests. The laws of individual states must be consulted.

Norm 12:

12. No priest or deacon who has committed an act of sexual abuse of a minor may be transferred for ministerial assignment to another diocese/eparchy or religious province. Before a priest or deacon can be transferred for residence to another diocese/eparchy or religious province, his bishop/eparch or religious ordinary shall forward, in a confidential manner, to the local bishop/eparch and religious ordinary (if applicable) of the proposed place of residence any and all information concerning any act of sexual abuse of a minor and any other information indicating that he has been or may be a danger to children or young people. This shall apply even if the priest or deacon will reside in the local community of an institute of consecrated life or society of apostolic life (or, in the Eastern Churches, as a monk or other religious, in a society of common life according to the manner of religious, in a secular institute, or in another form of consecrated life or society of apostolic life). Every bishop/eparch or religious ordinary who receives a priest or deacon from outside his jurisdiction will obtain the necessary information regarding any past act of sexual abuse of a minor by the priest or deacon in question.⁶⁷

⁶⁶ *Id.* norm 11.

⁶⁷ *Id.* norm 12.

For the most part, the Norm is self-explanatory: it imposes a legal duty on the bishop/eparch. The ruling that concerns religious priests and deacons is applicable whenever they wish to do pastoral work in the diocese.

Norm 13:

13. Care will always be taken to protect the rights of all parties involved, particularly those of the person claiming to have been sexually abused and of the person against whom the charge has been made. When an accusation has proved to be unfounded, every step possible will be taken to restore the good name of the person falsely accused.⁶⁸

The bishop has a duty to protect children whenever there is a risk; he has also a duty to protect his priests from false accusations. No universally valid principle can be given as to how to balance these two duties—both are absolutely binding.

II. EVALUATIONS AND REFLECTIONS

A. *Positive Achievements in the Norms*

The *Norms* contain a few new provisions and provide some remedies. They are valid for the territory of the USCCB; they are more than diocesan rules but their implementation is left to the diocesan bishop. They exist in addition to the common law of the Church, *prater legem*; they must be interpreted in harmony with existing universal legislation.

The *Norms* limit the immunity acquired by "prescription" in the case of child sexual abuse: the required "useful time" starts when the victim turns eighteen years of age and it runs for ten years. A significant difficulty is that the *Norms* substitute the American concept of "statute of limitations" of action for the classical Roman devise of prescription.⁶⁹

⁶⁸ *Id.* norm 13.

⁶⁹ In early Roman law, prescription was used as a procedural norm barring action; later however, it developed into an institution creating and extinguishing substantive rights; for example, in matters of property it became a way of "acquisition" that could be asserted by *vindicatio*—an action grounded in ownership. See ADOLF BERGER, *ENCYCLOPEDIA OF ROMAN LAW* 645-46 (1953) (entries on the various forms of "praescriptio").

In canon law "prescription" is defined in canon 197: "prescription is a means of acquiring or losing a subjective right as well as of freeing oneself from obligations." 1983

The "review boards" assisting the bishop in handling child sexual abuse cases are likewise a creation of the *Norms*; they are appointed by the bishops and their role is advisory at the discretion of the bishop. Neither the clergy of the dioceses nor the laity have any role in the selection or in the operation of the board.

The duty of the diocese to articulate a "policy statement" and file it with the USCCB is also a new provision. The *Norms*, however, do not provide a legal mechanism for the enforcement of the policy.

The "zero tolerance" rule is a disciplinary law and—in all but name—the creation of a new "irregularity." On the basis of general principles, the local bishop should have the power to dispense from it, unless such power has been reserved to the Holy See—which is not the case. Obviously, such dispensation should never be granted if there is a risk of a repeated criminal action.

Overall, the *Norms* add little to the common law of the Church. They have their merits but they offer remedy only for the most proximate cause of the abuses by removing and punishing the individual wrongdoer. To deal with more remote causes was not within the authority of the Conference.⁷⁰

CODE c.197. This definition goes well beyond a procedural device, it speaks of substantive subjective rights. The use of the term "acquisition" is technical and precise: it refers mainly to property. Similarly, "obligation" refers to a legal bond, *vinculum iuris*, which has its origin either in a contract or in a "delict."

Canon 197 determines that "[t]he church receives prescription as it is in the civil legislation of the nation in question . . ." *Id.* "To receive" in this context means to make civil law part of canon law. But, of course, the Church can receive only what is there; in American law (maybe from Louisiana) there is no prescription that is "a means of acquiring or losing subjective rights as well as of freeing oneself from obligations"; there is only an "estoppel" barring an action. It follows that the Church should follow the American procedural norms (that far the American law can be "received"), but in matters of acquisitions and obligations, canon law stands unaffected. Ecclesiastical courts and administrators should respect vested rights "acquired" by canonical prescription, and they should not try to revive obligations extinguished by canonical prescription.

If the above exegesis is correct, a "dispensation" that would revive an extinguished obligation—as the *Norms* require—does not make good sense in canon law. An extinguished obligation cannot be revived by a court order or by an administrative decree. *See supra* notes 50–51 and accompanying text.

⁷⁰ There is so little by way of new legislation in the *Norms* that the question could be raised if the *Norms* are anything more than a "general executory decree . . . which more precisely determine the methods to be observed in applying the law," in this case applying the law promulgated by the Apostolic letter *Sacramentorum sanctitatis tutela* of April 30, 2001. *See* 1983 CODE c.31; *Sacramentorum sanctitatis tutela* [*The Safeguarding of the Sanctity of the Sacraments*], *supra* note 39, at 737–39. The answer is that although the *Norms* do not contain much new legislation, there are enough new rules in them to classify them as "particular law." One must admit though that there are ambiguities and complexities in the

B. Omissions in the Norms

The *Norms* offer no legal safeguards to prevent the repetition of misguided actions by bishops. Several bishops have admitted their own lack of vigilance and they apologized for it. Independently from their confessions, overwhelming evidence exists in the public domain to the same effect. They failed in their supervisory duties by not investigating suspicious circumstances, by covering up crimes, by "buying silence," by transferring offending priests from parish to parish, and by untruthful letters of recommendation.⁷¹ In fairness, however, it must be said that the USCCB issued a "Statement of Episcopal Commitment" as a step towards the implementation of the *Charter* and they promised to help each other to do so.⁷² Honorable as this commitment is, it is not binding legally, in contrast to the legally enforceable measures imposed on priests and deacons.

The *Norms* assign no role to the priests, or to the "college of presbyters" in resolving the crisis and preventing similar ones in the future. Further, in the practical order, the *Norms* offer weak protection to innocent priests and deacons who are easy targets of groundless accusations.

The *Norms* do not assign any significant role to the ecclesial community in the healing process. This is a lack of recognition of the theological reality that a diocese is a "church," an *ecclesia*, a gathering of God's people endowed with varied gifts. The new institution of the review boards is the maximum participation allowed to the faithful; the boards however are created by, and function at the good pleasure of, the bishops.

C. Issues Beyond the Norms

Looking beyond the *Norms* is justified by the simple principle that when an organism suffers a breakdown in one part, the whole of it must be examined for possible causes. The process of healing a human body offers a proper analogy. Whenever it displays the symptoms of a disease, the alert physician will push the inquiry beyond the immediate symptoms and scrutinize the whole body to see if all of its vital forces are operating in good order.

Norms that fall short of the classical clarity and simplicity that Cardinal Pietro Gasparri, one of the chief architects of the 1917 Code, has imprinted on the canons of the same code.

⁷¹ See *CHARTER*, *supra* note 1, para. 1.

⁷² See U.S. Council of Catholic Bishops, *A Statement of Episcopal Commitment*, 32 *ORIGINS* 408, 408 (2002).

The Church, too, depends on the balanced operations of its vital forces. They well up from two sources, one is the "earthly reality" of the community, the other is its "heavenly riches"; "they form one complex reality comprising a human and a divine element."⁷³ For this "complex reality" to function well, each element must play its role fully for a common purpose—each according to its own nature and in harmony with the other. If one unduly prevails over the other, an imbalance is introduced and the whole body suffers.

The lack of good order at the depth, however, may not be immediately obvious. As partial breakdowns are noticed, the temptation is to stay with partial remedies.

The *Norms* certainly provide some remedies for directly visible breakdowns. But the abuses went on for too long, and they spread too far to be just temporary and local problems; common sense tells us that there must be a deeper malaise in the social body of the Church. Its "immune system" was not working well for an extended time and in many places. An inquiry beyond the obvious is in order.

This inquiry, of course, must concern the earthly realities or the human element in Church, which are not only changeable but—according to Vatican Council II—in perpetual need of reform. The Council could not have been more outspoken: "The church, however, clasping sinners to its bosom, at once holy and in need of purification, follows constantly the path of penance and renewal."⁷⁴

Further, and more explicitly:

Christ summons the church, as she goes her pilgrim way, to that continual reformation of which she always has need, insofar as she is a human institution here on earth. Consequently, if, in various times and circumstances, there have been deficiencies in moral conduct or in church discipline, or even in the way that church teaching has been formulated—to be carefully distinguished from the deposit of faith itself—these should be set right at the opportune moment and in the proper way.⁷⁵

⁷³ See VATICAN COUNCIL II, *Lumen gentium: Dogmatic Constitution on the Church*, in VATICAN COUNCIL II: THE BASIC SIXTEEN DOCUMENTS CONSTITUTIONS DECREES DECLARATIONS, No. 8, at 1, 9 (Austin Flannery, O.P. ed., 1996).

⁷⁴ *Id.* at 10.

⁷⁵ VATICAN COUNCIL II, *Unitatis redintegratio: Decree on Ecumenism*, in VATICAN COUNCIL II: THE BASIC SIXTEEN DOCUMENTS CONSTITUTIONS DECREES DECLARATIONS, *supra* note 73, No. 6, at 499, 507–08.

The present moment is certainly opportune, but one must search for the proper way. This leads to three questions:

(1) *Was the constitutional—structural and organizational—environment, within the human component of the Church, sufficiently protective? Has it allowed the infection in the social body to develop, spread, and thrive unchecked?*

(2) *Have the Norms created a new environment that is protective enough? If the answer is negative—even partially—a new question arises.*

(3) *What better structures and procedures could the Church create, within its human element, to provide better ways and means to prevent serious damage?*

I intend to answer these questions one by one. But before I do, I need to recall three doctrinal principles belonging to the Catholic tradition as guiding—and binding—rules.

Principle 1: The Church is essentially a human community with all the native weaknesses of a human community.

This community has been lifted up into God's grace-filled Kingdom, justified but not fully sanctified; it is still on its way to full redemption. As long as this full redemption is not accomplished, Christian people are subject to, and marked by, the fragility of our race that not even the sacrament of baptism washes away. The community is called to practice divine virtues—and it is prone to fall into human vices. It follows that this community needs protective structures and procedures against corruption. In this, it is not different from any other human community.

Principle 2: In practical matters the Church has no divine assistance to help it operate on the highest level of prudence.

(Should anyone doubt, let him or her read Church history and ponder many practical decisions by popes, bishops, even ecumenical councils!) It follows that the Church needs all the help that it can gather to bring good order and protective provisions into its own community life. The human laws of the Church, organizational structures, disciplinary canons, ordinances, and precepts should be subject to steady scrutiny and evaluated for their prudence—or lack of it. There is an obvious application of the old principle newly voiced by Vatican Council II: *ecclesia semper reformanda*, the Church is always in need of reform.⁷⁶

⁷⁶ See *supra* notes 74–75 and accompanying text.

Principle 3: Episcopal ordination confers sacred power but it gives no human learning or prudence.

I am echoing the "Common Doctor," Thomas of Aquinas, in the thirteenth century.⁷⁷ Yes, the sacrament of orders gives power to shepherd the people of God, but it works no miracles on a human level; the learning of the newly ordained is not increased, his capacity for prudential judgment is not supplemented by divine inspiration. Precisely because the divine mandate imposes an immense responsibility on the bishop, he is in an immense need of help to act prudently. Such help can come only through well-conceived constitutional structures and operational laws that provide and sustain opportunities for the faithful to give advice and support to the bishop.

Let us return to the questions:

Question 1: Was the constitutional—structural and organizational—environment sufficiently protective?

Clearly not, because it has allowed the infection in the social body to develop, spread, even thrive. Where was the deficiency? In each diocese, the bishop enjoyed virtually unlimited discretionary power without serious checks and balances. The life and employment of every priest depended on him, every complaint converged on him, and all decisions originated from him. He was immune from any control from within his jurisdiction; no outside person or agency (apart from the pope or a Vatican office) could ever enter into a diocese, assess its administration, and provide help if needed.

In the diocese, the divine power of the bishop has been exaggerated to the point that protection from human frailties has been omitted or neglected. The ecclesiastical laws (human as they are) exalted the divine gift given to the bishop through his sacramental ordination to the point that the human element could play only a diminished role. Yet, the bishop had to take on many human tasks for which ordination did not qualify him: the practical management of a complex organism that demands a good deal of ordinary prudence and—in our age—technical knowledge. Since the bishop represented Christ in

⁷⁷ "[H]e who receives an episcopal cathedra, receives an eminence of power, which he did not have before"; further, "the eminence of power is attributed to a person only in relation to others." See THOMAS AQUINAS, *QUAESTIONES QUODLIBETALES* quodl. 3, quaest. 4, art. 1 (author's translation). In the context it is clear that in the opinion of Aquinas the sacrament of orders give no increase in human learning, skills, or virtues. For a similar handling of the same issue see also THOMAS AQUINAS, *SUMMA THEOLOGIAE* 2-2, q.185, a.1. A century earlier, the initiator of "critical exegesis" in canon law, Gratian, articulated the same doctrine. See D.20 c.1 (d.a.).

the community, the words and action of his humanity became virtually exempt from all control and supervision: the idea of the divine intruded into the human. Logically, there could not be any accountability toward the priests and the faithful at large; they had no "right" to know. Then, to avoid criticism, much of the operations were shrouded in mystery. In classical theological language, a practice of monophy-site inspiration (the exaltation of the divine at the expense of the human) crept into the administration of the dioceses.

The immense gifts and energies of the laity were not used. For the universal Church the *Annuario Pontificio* (the "Catholic Directory" of the universal Church) for the year of 2003 gives the number of dioceses and similar units as over 2700.⁷⁸ They all report to the Holy See—only. No matter what the administrative apparatus of the Holy See is—and it is relatively small—it cannot provide preventive control. By way of comparison, imagine a worldwide corporation with 2700 local branches and with no intermediate controlling stations between them and the center, which has a relatively small staff. If something does not make good sense in a well-administered human community, it is not likely to be suitable for the fledgling Kingdom of God that is the Church.

The universal Church has outgrown its structural and organizational framework created in different times and finds itself now with a dangerous vacuum in supervision. This situation is somewhat a novelty within the Church's two thousand years' history. Until the beginning of the modern age, the Church operated with strong intermediary authorities between the individual dioceses and the Roman center, if for no other reason than that the lack of easy communication demanded it. This is how the system of metropolitans and patriarchs developed together with the various types of episcopal synods. In the West, however, at the time of the Reformation, the restoration of unity became the prime necessity; it eliminated the (not imaginary) danger of fragmentation. This unity eventually led to an excessive centralization.

Question 2: Is the environment that the Norms are creating protective enough?

The bishops sensed the problem: a controlling force was needed; hence they created the review boards on a national and diocesan level. The boards' power, however, is circumscribed (it is merely advi-

⁷⁸ CITTÀ DEL VATICANO, *ANNUARIO PONTIFICIO* 1063 (2003).

sory), and they depend entirely on the bishops for the appointment of members and for their operations. Surely, more is needed.

Question 3: What better structures and procedures could the Church create?

To help the diocese, the bishops could create a system of friendly visitation; it would be a practical expression of their task of caring for other churches—a task stressed by Vatican Council II.⁷⁹ A remote model could be the practice of accreditation visits among universities: friendly, non juridical, and immensely useful. In a diocese, the faithful at large, the clergy, and the institutions all could bring their concerns to the visiting “team,” who then could issue a report on the state of the diocese. In the apostolic times, Paul visited the various churches—although not their own bishop—and left behind good reports on the state of the community. There is transparency and there is accountability: if the bishops wanted to introduce such a “fraternal service,” there is nothing in canon law to stop them, and much in Church traditions to encourage them. Vatican Council II reminded the bishops repeatedly of their responsibility for the wellbeing of the universal Church and of other local churches: “United in one college or body for the instruction and pastoral government of the universal Church, the bishops, in shared solicitude for all the churches, exercise their episcopal function, which was given them at their episcopal consecration in communion with the supreme pontiff and subject to his authority.”⁸⁰

Again, the Council speaks of the “participation of all the bishops in hierarchical communion in the care of the universal church.”⁸¹ A system of mutual “visitation,” however, to work consistently should be institutionalized. It would not be difficult to design its structures and procedures: a few competent persons could do it in a short time.

Within the universal Church, there is the need to move away from an extreme centralization, which has reached a peak probably never before realized in history. The more it is stressed, the more the social body is stretched and the vital forces break down in the distant members. The present doctrine that insists on “direct interfacing” between the Holy See and the individual dioceses cannot hold. Either an immense bureaucratic apparatus will have to be created in Rome,

⁷⁹ See VATICAN COUNCIL II, *Christus Dominus: Decree on the Pastoral Office of Bishops in the Church*, in VATICAN COUNCIL II: THE BASIC SIXTEEN DOCUMENTS CONSTITUTIONS DECREES DECLARATIONS, *supra* note 73, No. 3, at 283–84; *id.* No. 6, at 286.

⁸⁰ *Id.* No. 3, at 284 (internal footnote omitted).

⁸¹ *Id.* No. 6, at 286.

or even the pretense of serious supervision (and help) must be abandoned.

CONCLUSION

As has happened so many times in history, the difficulties the Church is experiencing in the practical order have their origin in doctrinal positions. The *Norms* were not born from an ecclesiology inspired by the theology of communion; they are modeled on the procedures of a secular state. The bishops did not turn to the sacramentally grounded college of presbyters and deacons calling for their cooperation, nor did they turn to the rest of the faithful asking for their help; thus they have bypassed vital sources of energy in the Church. The bishops are trying to pursue healing mostly through tight controls and strict disciplinary norms, with the help of committees they themselves appointed. All that may lead to some improvement but it is not enough to bring the local churches back to good health. There is the need for more than vigilance and "absence of crime"; what is needed is a Church that is able to manifest the power of the Spirit—collectively and individually—in the ordained and not ordained persons. It is well known that the bishops' approach brought about widespread resentment among the clergy—not to mention a great deal of alienation from the "institutional" Church among the laity. This is not to reject legal measures but to stress that, ultimately, genuine healing can come only from the internal resources of the body: its energies must be liberated and given as much scope as possible.

In our times two contrasting visions of the Church ("ecclesiologies") are current. One has its remote origins in the Gregorian reform at the end of the eleventh century and its reinforcement in the Counter Reformation; it conceives of the Church as a community that receives all good things through the mediation of the pope and consigns all others (bishops included) to obedience. Another vision was common in the early Church (strongly present in the letters of Paul); it sees the Church as a community endowed with gifts and the task of the hierarchy as the authentication and the coordination of the gifts; in no way does it take away an iota of the God-given power that the bishops inherited from the apostles.

The issue is not who has the power to govern and who is the ultimate judge in matter of doctrine: it is the episcopal college under the presidency of the pope. The issue is who are the recipients of

God's gifts: it is not the hierarchy alone but each and all of the people of God.

Vatican Council II endorsed the latter view and made an effort to reestablish it. It was a Council that reached back to the Church's earliest beliefs and practices—some of them forgotten. For this lack of memory, many think falsely that it was an unduly innovative council.

What are the prospects? Are such structural changes—needed for a healthy and protective environment—likely to be introduced either in the administration of the dioceses or in their interaction with the Holy See? The sobering answer is that they are not likely to be adopted in the foreseeable future; legal rules that have crystallized over the second millennium have a great deal of built-in resistance to change. Are then our reflections idle and fruitless? Not at all; remedial propositions are needed because without good ideas there will be no change—ever. A small seed, seemingly lifeless, may contain much energy; when it is sown and strikes roots, it may split—unexpectedly—even a piece of granite.