

## BENEDICT XVI'S REMISSION OF THE LEFEBVRITE EXCOMMUNICATIONS: AN ANALYSIS AND ALTERNATIVE EXPLANATION

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**RÉSUMÉ** – En janvier 2009, une crise médiatique a secoué l'Église lorsque le Pape Benoît XVI a soudainement levé les excommunications placées en 1988 contre les quatre évêques schismatiques qui avaient reçu la consécration épiscopale illicite faite par Mgr Marcel Lefebvre. Alors que cette première tempête de controverses au sujet des rémissions s'était calmé au cours des mois qui ont suivi, les dernières explications du pape (données au cours d'une longue entrevue accordée au journaliste Peter Seewald), concernant les actes qu'il a posé, ont réouvert certaines questions au sujet de plusieurs aspects canoniques de cette décision du pape. Se basant particulièrement sur les commentaires pio-bénédictions et ceux de l'époque de Jean-Paul II sur le droit canonique pénal, cet article examine les explications du pape sur sa décision de lever les excommunications lefebvristes (et la remise en question de sa décision de remettre les censures contre Mgr Richard Williamson) et examine attentivement plusieurs objections à ces explications. Il propose ensuite une explication alternative des actions pontificales dans cette affaire.

### *Introduction*

Twice in the book-length interview he granted to journalist Peter Seewald,<sup>1</sup> Pope Benedict XVI discussed his decision to lift the excommunications declared in 1988 against four priests who had received illicit episcopal consecration from Abp. Marcel Lefebvre.<sup>2</sup> The pope acknowledged that his remission of

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1 See *Light of the World: the Pope, the Church, and the signs of the times. Pope Benedict XVI: A Conversation with Peter Seewald*, M. MILLER & A. WALKER, (trans.), San Francisco, Ignatius Press, 2010, pp. 21-23, 120-123 [= *Light*].

2 Documentation on the events leading up to Lefebvrite excommunications is scattered throughout several resources. A collection of Latin, French, and Italian original documents is available in Onorato BUCCI, "Lo scisma de Lefebvre," in *Apollinaris*, 61 (1988), pp. 529-555 [=

these censures provoked a public relations crisis for the Church, particularly in regard to Catholic-Jewish affairs,<sup>3</sup> but he repeatedly defended his actions as being, not simply permitted under canon law, but as actually *required* by the law.<sup>4</sup> The pope added, however, that had he known about Lefebvrite Bp. Richard Williamson's views on the Holocaust he would not have lifted his excommunication. I believe that both of these assertions—namely, that remission of the Lefebvrite excommunications was required as a matter of canon law, and that Williamson's views of the Holocaust would have justified withholding remission of his censure—raise canonical questions. Addressing these questions, however, is not simply a matter of taking Benedict's specific comments on the Lefebvrite case and testing them in light of the relevant canons and major commentaries thereon,<sup>5</sup> for two reasons.

BUCCI, "Scisma"]. Most of this documentation is also available in English in *CLD*, vol. 8, pp. 793-809, and much of it, along with some useful earlier material, is available in French in *Documentation Catholique* [= *DC*], 85 (1988), pp. 733-740 and *DC*, 85 (1988), pp. 788-789. Benedict did not discuss, nor will I, the canonical situation of Lefebvre himself or his co-consecrator, Bp. Antonio Castro Mayer. Both prelates died unreconciled long before Benedict's actions were taken in 2009 in regard to the four priests who had received episcopal orders from Lefebvre (i.e., Fellay, de Mallerais, Williamson, and de Galarreta). Neither were addressed by the pope, nor are by me, the canonical situation of the various groups, formal or informal, related to the Lefebvrite bishops.

3 See *Light*, p. 121. See also BENEDICT XVI, letter, "A word of clarification for peace within the Church," 10 March 2009, in *L'Osservatore Romano*, Eng. ed., n. 42/11, 18 March 2009, pp. 3-4.

4 The pope's reiterations of this canonical claim are quoted in full below at fn. 57. The canon law under which the Lefebvrite bishops were originally excommunicated and their censures later remitted is found in: *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, in *AAS*, 75/2 (1983), pp. 1-320, English translation *Code of Canon Law, Latin-English Edition, New English Translation*, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, Canon Law Society of America, 1999. At several points in this study we will need to draw on insights developed under the Pio-Benedictine Code, that is, *Codex Iuris Canonici, Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, in *AAS*, 9/2 (1917), pp. 3-521, English translation Edward N. PETERS (ed.), *The 1917 or Pio-Benedictine Code of Canon Law in English Translation with Extensive Scholarly Apparatus*, San Francisco, Ignatius Press, 2001. The actual remissions were effected through the Congregation for Bishops operating with a faculty expressly granted to it by Benedict XVI. See CONGREGATION FOR BISHOPS, "Decretum remissionis poenae excommunicationis latae sententiae Episcopis Fraternitatis Sacerdotalis Sancti Pii X irrogatae," 21 January 2009, in *Communicationes*, 41 (2009), pp. 94-95 [= Decretum].

5 In addition to works used just once and cited as needed in the course of this article, I will draw on several major canonical commentaries in the course of this article. Among Johanno-Pauline commentaries, see: J. CORIDEN, T.J. GREEN, and D.E. HEINTSCHEL (eds.), *The Code of Canon Law: A Text and Commentary*, New York/Mahwah, N.J., Paulist Press, 1985 [= *CLSA Comm.*]; Alphonse BORRAS, *L'excommunication dans le nouveau Code de droit canonique*, Paris, Desclée, 1990 [= BORRAS, *L'excommunication*]; G. SHEEHY et al. (eds.), *Canon Law: Letter and Spirit, A Practical Guide to the Code of Canon Law*, prepared by the CLSGBI in association with the CCLS, Collegeville, MN, The Liturgical Press, 1995 [= *CLSGBI Comm.*]; J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, commissioned by the CLSA, New York/Mahwah, NJ, Paulist Press, 2000 [= *CLSA Comm2*]; A. MARZOA, J. MIRAS, R. RODRÍGUEZ-OCAÑA (eds.) and E. CAPARROS (gen. ed. of English translation), *Exegetical Commentary on the Code of Canon Law*, Montréal, Wilson & Lafleur, 2004 [= *Exegetical Comm.*];

First, as we shall see, in narrating his decision to remit the excommunications of the four surviving Lefebvrite bishops, Benedict accepted part of the published canonical chronology of this case (that the Lefebvrite bishops had been excommunicated for violating canon 1382),<sup>6</sup> but apparently neglected another part (that the Lefebvrite bishops had been excommunicated for violating canon 1364 § 1),<sup>7</sup> and introduced still a third (that the Lefebvrite bishops had been excommunicated for "violating papal primacy," for which act no penal canon exists). Much of this study must therefore be devoted to tracing out these three aspects of the Lefebvrite matter.

Second, even before attempting that canonical analysis, I believe that responsible critiques of major papal governance decisions should be set within a proper context. This one arises thus.

Among canonists, the pope is referred to, with a genuine professional affection as "the Legislator."<sup>8</sup> But, being a legislator does not mean that one is a lawyer. One's authority to establish and enforce law does not mean that one's comments on specific areas or applications of law will necessarily be persuasive. Fortunately, though, the pope's own words confirm his openness to having his personal views critiqued,<sup>9</sup> and his comments to a journalist about legal disciplinary questions can hardly be regarded as expressing anything more than his personal opinions about how canon law operates. But, precisely

and A. PERLASCA et al. (eds.), *Codice di Diritto Canonico Commentato* [2001], 3<sup>rd</sup> ed., Milan, Ancora, 2009 [= *Codice Comm.*]. Among Pio-Benedictine commentaries, see: DOM AUGUSTINE (Charles BACHOFEN), *A Commentary on the New Code of Canon Law*, in 8 vols., Saint Louis, MO, Herder, 1918-1922 [= DOM AUGUSTINE, *Commentary*]; Ioannes CHELODI, *Ius Canonium de Delictis et Poenis et de Iudiciis Criminalibus* [1920], 5<sup>th</sup> ed., rev. by P. CIPROTTI, Vincenza, Societa Anonima Tipografica, 1943 [= CHELODI, *De Delictis*]; Henry AYRINHAC, *Penal Legislation in the New Code of Canon Law* [1920], rev. by P. LYDON, New York, Benziger, 1936 [= AYRINHAC, *Penal Legis.*]; Franciscus WERNZ and Petrus VIDAL, *Ius Canonium ad Codicis Normam Exactum*, in 7 vols., variously bound, in up to three editions, later editions edited by P. AGUIRRE and F. CAPPELLO, Rome, Gregorianum, 1924-1949 [= WERNZ-VIDAL, *Ius Canonium*]; Felix CAPPELLO, *Tractatus Canonico-Moralis de Censuris iuxta Codicem Iuris Canonici*, 4<sup>th</sup> ed., Rome, Marietti, 1950 [= CAPPELLO, *De Censuris*].

6 *CIC* canon 1382. A bishop who consecrates someone a bishop without a pontifical mandate and the person who receives the consecration from him incur a latae sententiae excommunication reserved to the Apostolic See.

7 *CIC* canon 1364 § 1. Without prejudice to the prescript of can. 194, § 1, n. 2, an apostate from the faith, a heretic, or a schismatic incurs a latae sententiae excommunication; in addition, a cleric can be punished with the penalties mentioned in can. 1336, § 1, nn. 1, 2, and 3.

8 For evidence that the affection which canon lawyers have for Benedict XVI is reciprocated by His Holiness, one need look no further than the pope's "Letter to Seminarians," 18 October 2010, wherein he urged future priests to "learn to understand and—dare I say it—love canon law, appreciating how necessary it is and valuing its practical applications: a society without law would be a society without rights. Law is the condition of love." See *L'Osservatore Romano*, English edition, n. 2166, 20 October 2010, pp. 1, 24 (esp. p. 24).

9 "It goes without saying that the pope can have private opinions that are wrong." *Light*, p. 8.

because pontifical comments on canon law, given their provenance, are likely to be accepted by many at face value — encouraging, if those comments prove imprecise, a similarly imprecise application of the law in other cases — those qualified to express alternate opinions should do so in service to clarifying the operation of canon law in the Church.<sup>10</sup>

Finally, and notwithstanding my concerns about the *explanation* of his actions that Benedict offered in this case, I believe that his action in regard to the Lefebvrite excommunications can be squared with sound canon law, albeit not in the way that he proposed to Seewald. Indeed, I think that what the pope did in regard to the Lefebvrite excommunications, as opposed to how he *explained* what he did, is important for penal canonistics, but the significance of the pope's action will be missed if the current, arguably improper, accounting of his decision is left unexamined. I offer, then, the following canonical analysis of the pope's action in regard to the Lefebvrite bishops not only to dissuade others from presenting legally tremulous *apologiae* of this important papal action, but to facilitate the recognition of what was, I think, another demonstration — in what seems to be an emerging line of such demonstrations — of an important papal prerogative in regard to penal canon law.

## 1 — Preliminary Points of Penal Canon Law

We may begin by recalling three important aspects of penal canon law with special relevance to our inquiry, namely, (1) the principle of legality, (2) certain considerations regarding the declaration of automatic censures, and (3) the conditions generally necessary for the remission of censures. After that, we will present the pope's comments regarding his remission of the Lefebvrite excommunications, and begin our specific analysis thereof.

### 1.1 — The Principle of Legality

Canon 221 § 3, commonly regarded by canonical commentators as expressing a fundamental ecclesiastical value,<sup>11</sup> declares the right of the Christian faithful “not to be punished with canonical penalties except according to the norm of law.” The possibility of canonical penalties being inflicted without the competent ecclesiastical authority having to follow the prescriptions of substantive and procedural penal canon law, simply because ecclesiastical

<sup>10</sup> An admonition by Benedict to ecclesiastical leadership figures seems relevant for canonists as well: “I think that courage is one of the chief qualities that a bishop and a Curia head have to have nowadays. One aspect of this courage is the refusal to bow to the dictate of opinions but, rather, to act on the basis of what one inwardly knows is right, even when it causes annoyance.” *Light*, p. 85.

<sup>11</sup> See, e.g., PROVOST, in *CLSA Comm.*, pp. 155-156; CENALMOR, in *Exegetical Comm.*, II/1, p. 139; VANZETTO, in *Codice Comm.*, p. 238.

authority believes, albeit sincerely, that a given individual's actions deserved punishment, has basically disappeared from canon law.<sup>12</sup> More specifically, canon 1321 § 1, a key norm by which the principle *Nulla poena sine lege* is codified,<sup>13</sup> specifies that canonical sanctions may be inflicted only upon the achievement of moral certainty (c. 1608 § 1) that a member of the Christian faithful has culpably committed an “external violation of a law or precept” (emphasis added). Two elements are necessary, therefore, before any canonical sanctions may be inflicted on an otherwise culpable individual,<sup>14</sup> namely, the presence of a law or precept susceptible to being violated,<sup>15</sup> and an external act by which the violation of that law or precept occurs. As Marzoa puts it, “[e]

<sup>12</sup> Pio-Benedictine legislation had countenanced practically such a possibility in *CIC/17* canons 2186-2194, the so-called *suspensio ex informata conscientia*, but that institute has disappeared from modern canon law. I would note, however, that, as the very title of that former penal institute implied, only the penalty of *suspension* — and not interdict, let alone excommunication — could have been applied thereunder. Moreover, the notoriousness of the Lefebvrite bishops' offense would have precluded *suspensio ex informata conscientia* from being invoked against them. See *CIC/17* canon 2191 § 2.

<sup>13</sup> See, e.g., MARTIN, in *CLSGBI Comm.*, p. 754, and MOSCONI, in *Codice Comm.*, pp. 1053-1054. There seems to be some debate about whether the “principle of legality” (also expressed as *Nullum crimen nulla poena sine praevia lege poenali*) applies in canon law, or at least, as to whether it applies in penal canon law. See MARZOA, in *Exegetical Comm.*, IV/1, pp. 268-269. Without attempting to arbitrate that debate, I will simply remark that, in my view, the two schools of thought are closer than they realize: both, I suggest, admit the principle of legality in canon law, including penal canon law, and thereby situate canon law among all modern legal systems in terms of an important question of justice. See generally WERNZ-VIDAL, *Ius Canonikum* VII, n. 29, p. 36, and CENALMOR, in *Exegetical Comm.*, II/1, p. 139. The schools differ only, I suggest, as to whether divine and natural law are sufficiently known so as to provide a sufficient legal basis for canonical punishment and, in particular, whether canon 1399 offers an adequate positive foundation for penal sanctions in the event of such violations. Personally, I believe that, properly understood and applied, canon 1399 does provide an adequate legal basis for canonical punishment, but the question is not germane to our study for the reasons set forth below, esp. at fn. 33.

<sup>14</sup> In Robert Bolt's famous play *A Man for All Seasons* (1960), Sir Thomas More and his family debate the arrest of an admittedly nefarious Richard Rich, and illustrate thereby the “principle of legality”, thus (my emphasis):

Lady Alice: “Arrest him!”  
 Sir Thomas: “For what?”  
 Lady Alice: “He's dangerous.”  
 Margaret: “Father, that man is bad!”  
 Sir Thomas: “There's no law against that!”  
 Son Roper: “But there is, God's law!”  
 Sir Thomas: “Then God can arrest him.”  
 Lady Alice: “While you talk he's gone!”  
 Sir Thomas: “And go he should, if he were the Devil himself, until he broke the law!”

<sup>15</sup> A variety of “literary forms” are found among the canons of the Johanno-Pauline Code. See ÖRSY, in *CLSA Comm.*, pp. 41-42. Many of these forms, however, (for example, definitions, exhortations, and teaching provisions) are not susceptible to being “violated.” I suggest that, as a general rule, only canons that express commands or prohibitions, can be “violated” in such a way as to give rise to possible canonical sanctions.

cept for canon 1399, which doubtless introduces a discretionary principle, no behavior that has not been *expressly* designated as an offense in a penal norm can be punished in the Church.<sup>16</sup>

### 1.2 — The Declaration of Automatic Censures

Under the Johanno-Pauline Code only seven canons authorize an automatic excommunication,<sup>17</sup> which censure could later be formally “declared” (with additional consequences in the community per canon 1331 § 2). Among the very few crimes still punished by automatic excommunication are two with relevance for our question, namely the (conferral and/or) reception of episcopal orders without pontifical mandate (c. 1382) and the commission of heresy or schism (c. 1364 § 1). Now, for the valid declaration of a censure incurred automatically, no independent warning is required, nor, for the valid imposition of a censure threatened under penal precept, is an independent warning required.<sup>18</sup> But, any penalty that is not threatened *latae sententiae* can only be threatened *ferendae sententiae* (see *CIC* c. 1314),<sup>19</sup> and therefore *ferendae sententiae* censures (not threatened by precept) must, for validity, be preceded by an independent warning in virtue of canon 1347 § 1.

### 1.3 — The Remission of Censures

Given their “medicinal” nature, that is, their fundamental orientation to the reform of the individual (c. 1312 § 1, 1<sup>o</sup>), censures such as excommunication are to remain in place until they achieve their intended purpose of reform.<sup>20</sup> When,

16 MARZOA, in *Exegetical Comm*, IV/1, p. 269, my emphasis. See also CAPPELLO, *De Censuris*, n. 24, p. 25, wherein: “Quae verba significant, requiri et sufficere illud determinatum delictum, quod legislator censura notavit” (original emphasis, and commenting on *CIC/17* c. 2228).

17 Namely, canon 1364 § 1 (apostasy, heresy schism); canon 1367 (violation of Sacred Species); canon 1370 § 1 (physical attack on the pope); canon 1378 § 1 (absolution of an accomplice); canon 1382 (illicit episcopal ordinations); canon 1388 § 1 (violation of the seal); and canon 1398 (abortion). GREEN, in *CLSA Comm.*, p. 932.

18 See DE PAOLIS, in *Exegetical Comm*, IV/1, p. 383, noting that a proposed requirement for an independent warning of the possibility that an automatic censure was going to be declared formally was dropped during the revision of penal canon law. See also Edward PETERS, *Incrementa in Progressu 1983 Codicis Iuris Canonici*, Montréal, Wilson & Lafleur, 2005, p. 1168. De Paolis misspeaks slightly when he says that the requirement of prior express warning disappeared in the final version of the law; it actually disappeared in the second (of ultimately four) versions of canon 1347 § 1.

19 *CIC* canon 1314. Generally, a penalty is *ferendae sententiae*, so that it does not bind the guilty party until after it has been imposed; if the law or precept expressly establishes it, however, a penalty is *latae sententiae*, so that it is incurred *ipso facto* when the delict is committed.

20 This observation, uncontested among canonists, is deducible from the terms of canon 1358 § 1 (“Remission of a censure cannot be granted unless the offender has withdrawn from contumacy according to the norm of can. 1347, §2”), which, like *CIC/17* canon 2241 § 1 (“A censure is a penalty by which a baptized person delinquent and contumacious, is deprived of a spiritual

however, but only when, a censure achieves its goal of bringing about personal reform, does an offender have a claim *in justice* for the prompt remission of the censure under canon 1358 § 1.<sup>21</sup>

The condition warranting (indeed, requiring) remission of a censure, is known as the “withdrawal from contumacy”, and is set out in canon 1347 § 2, wherein two specific criteria for determining an offender’s “withdrawal from contumacy” are stated, namely, a manifestation of true repentance for the specific criminal action(s) in question, and suitable reparation for damage or scandal caused by the delict (or at least the making of a serious promise to perform such measures). *Both* conditions are elements of “withdrawal from contumacy.”<sup>22</sup> But here two points, easy to overlook perhaps because they are so obvious, bear immediate underscoring.

First, an offender’s “withdrawal from contumacy” must be oriented to the offense for which the offender was censured.<sup>23</sup> This requirement is based on the juridic significance of what, in Pio-Benedictine legislation at least, was known as the “quality” of a delict (*CIC/17* c. 2196).<sup>24</sup> We shall return to the matter of the *qualitas delicti* in more detail later, but suffice as an example of it for now, that, to obtain remission of his or her censure, one excommunicated for having physically attacked the Roman Pontiff (c. 1370 § 1) must, among things, express sorrow *for having physically attacked the pope*, and would have no justice claim for remission of an excommunication under canon 1370 § 1 upon, say simply acknowledging, however sincerely, the governing authority of the Roman Pontiff (c. 331). This point will be important when we consider whether the gestures that the Lefebvrite bishops reportedly offered responded, in fact, to the specific crimes for which they were censured.

Second, where an offender labors under multiple censures, he or she must generally express regret and make reparation for *each* offense in order to be freed of the censures.<sup>25</sup> For example, if one is excommunicated for having

good [or] something connected with the spiritual, until, receding from contumacy, he is absolved.”), ties the remission of a censure to an offender’s “withdrawal from contumacy”. See MARTIN, in *CLSGBI Comm*, p. 782; GREEN, in *CLSA Comm.*, p. 918; CHELODI, *De Delictis*, n. 31, p. 38; and CAPPELLO, *De Censuris*, n. 1, p. 1, and n. 90, p. 80.

21 See BORRAS, in *Exegetical Comm*, IV/1, p. 417; MARTIN, in *CLSGBI Comm*, p. 782; CAPPELLO, *De Censuris*, n. 89, p. 78.

22 CAPPELLO, *De Censuris*, n. 89, pp. 78-79; DE PAOLIS, in *Exegetical Comm*, IV/1, p. 384.

23 MOSCONI, in *Codice Comm.*, p. 1076.

24 Relatively few commentators makes this point explicitly because it is, I suggest, so obvious. But see, e.g., AYRINHAC, *Penal Legis.*, nn. 4-5, p. 3, and WERNZ-VIDAL, *Ius Canonicum VII*, n. 51, pp. 68-69.

25 AYRINHAC, *Penal Legis.*, n. 43, p. 36; CAPPELLO, *De Censuris*, n. 84, p. 76, and n. 92, p. 81; and CHELODI, *De Delictis*, n. 32, pp. 40-41. Only where an accumulation of offenses makes impractical the visitation of a long string of punishments on an offender might, in accord with sound

absolved an accomplice (c. 1378 § 1) and for having violated the seal of confession (c. 1388 § 1), one's remorse at having violated the seal, while welcome and effective toward securing remission of the excommunication levied under canon 1388, does not result in remission of the censure for having absolved an accomplice per canon 1378 § 1. That separate offense must be addressed separately. This point will bear recalling because the Lefebvrite bishops were, as we are about to see, expressly excommunicated for *two* qualitatively distinct offenses.

With these elements of penal canon law in mind, we may now turn to an examination of the pope's description of the Lefebvrite bishops' canonical situation.

## 2 — *The Pope's Presentation of the Lefebvrite Matter*

The pope's discussion of the Lefebvrite case begins thus: "It is not true that those four bishops were excommunicated because of their negative attitude toward Vatican II, as was often supposed. In reality they were excommunicated because they had received episcopal ordination without a papal mandate."<sup>26</sup> This framing of the Lefebvrite case is accurate as far as it goes, but it is also incomplete. The Lefebvrite bishops were expressly excommunicated on *two* grounds, namely, violation of canon 1382 (illicit episcopal ordinations) and violation of canon 1364 § 1 (schism).<sup>27</sup>

Having asserted, in any event, that the Lefebvrite sanctions only came in response to their illicit ordinations, the pope's next remark, too, rings oddly when he says that the 1988 excommunications had been "handled according

penal law, a judge or superior reduce the number of punishments visited upon an offender and consequently reduce the expressions of regret and acts of reparation required for their remission. See *CIC* c. 1346.

<sup>26</sup> *Light*, p. 21. With, I think, some show of irritation, the pope offers this background information in refutation of what he called "an incredible amount of nonsense ... circulated, even by trained theologians" about the Lefebvrite case. The pope is, of course, correct that the Lefebvrite offenders were not excommunicated for having "rejected Vatican II," but I think some patience can be extended to observers who might have concluded otherwise. In the protocol of 5 May 1988 to which Lefebvre had promised adherence, two of its five points expressly required him to respect the teachings of Vatican II. In his final brief and defiant letter 2 June 1988 to Pope John Paul II, Lefebvre directly attacked Vatican II no fewer than three times. See BUCCI, "Scisma," pp. 534, 536-537, and *CLD*, vol. 8, pp. 796, 802. Such an esteemed observer as papal biographer George Weigel leaves little doubt but that most of Lefebvre's ire was, and was known at the time to be, directed at Vatican II (George WEIGEL, *Witness to Hope: the Biography of Pope John Paul II*, New York, Cliff Street Books, 1999, pp. 562-564).

<sup>27</sup> CONGREGATION OF BISHOPS, *Decretum [excommunicationis]*, 1 July 1988, in BUCCI, "Scisma," pp. 550-551, and *CLD*, vol. 8, pp. 804-805.

to the applicable canon of the old canon law then in force."<sup>28</sup> I do not know what the phrase "the old canon law then in force" might mean here. Canon 1382 (on illicit ordinations) had been in force since 1983 and has undergone no textual changes since then. Similarly, canon 1364 § 1 (on schism), had been in force since 1983 and has not been revised. Although the pope's phrasing here suggests that he is making a significant qualification about the canon law in question, I do not know what that qualification might be.

Finally, in the wake of these two anomalous comments, the pope initially summarized canon 1382 accurately when he said "According to that canon, those who consecrate others as bishops without a papal mandate and also those who are thus consecrated are to be excommunicated," but then he immediately, and with major implications for our discussion, offered a third canonically questionable comment by rephrasing the operation of canon 1382 as follows: "They were excommunicated, therefore, because they violated papal primacy."<sup>29</sup> Now, because this reformulation of what appears to be canon 1382 (but, curiously, apparently not of canon 1364 on schism, whose terms would seem much more relevant to questions of papal primacy) is going to be invoked, repeatedly,<sup>30</sup> by the pope toward justification of his controversial decision to remit the Lefebvrite censures, we will need to consider the implications of this rephrasing very carefully. Before proceeding to an analysis of the notion of "violating papal primacy" (which discussion I fear will be lengthy), we may summarize thus: the pope has correctly underscored the illicit episcopal ordinations contrary to canon 1382 as one basis for the Lefebvrite excommunications, he has omitted to point out that the Lefebvrite bishops were also excommunicated for schism under canon 1364 § 1, and he has apparently recast canon 1382 (on illicit episcopal ordinations) as if that act were equivalent to "violating papal primacy" for which action a sanction is owed.

## 3 — *Violating Papal Primacy*

Three basic questions present themselves here: (1) Is "violating papal primacy" a crime under canon law? (2) If it is a crime, were the Lefebvrite bishops excommunicated for committing that crime? And (3) if they were excommunicated for "violating papal primacy" would their "accepting papal

<sup>28</sup> *Light*, pp. 21-22.

<sup>29</sup> *Light*, p. 22.

<sup>30</sup> These multiple papal recitations are gathered and presented below in fn. 57. I do not think there is any doubt that the pope meant his words to be taken at face value. We have from him not an off-hand comment or two, but up to a half dozen reassertions of the same point, namely, that, in the face of their excommunications for (allegedly) "violating papal primacy" and in light of their later "acceptance of papal primacy", canon law itself *required*, and this, as if quite routinely, the prompt remission of the Lefebvrite excommunications.

primacy” result in a right to remission of their censures under canon 1358 § 1? Though distinct, we may yet profitably discuss these three questions together.

### 3.1 — Preliminary Aspects of the Violation of “Papal Primacy”

To begin with, it is patent that no canon makes it a crime “to violate papal primacy,”<sup>31</sup> and no penal precept against “violating papal primacy” was ever issued to the Lefebvrite bishops.<sup>32</sup> In light of the fundamental principle of legality as outlined above, whereby no member of the faithful may be punished unless he or she is proven to have violated “a law or a precept”, these considerations, even standing alone, weigh heavily against finding that the Lefebvrite bishops were *ever* excommunicated for having “violating papal primacy.”<sup>33</sup>

But perhaps the pope was simply using the phrase “violating papal primacy” as a shorthand way of saying that “ordaining bishops without a pontifical mandate *is* a violation of papal primacy.” If so, would *that* understanding of illicit episcopal ordinations vindicate the pope’s assertion that, according to canon law, the Lefebvrite bishops were excommunicated for having “violated papal primacy” and, more importantly, support his claim that their later “acceptance of papal primacy” had won them the *right* to reconciliation? I think not.

31 The term “primacy” (*primatus*) in regard to the pope makes only three appearances in the Johanno-Pauline Code, none of which is penal in nature, specifically, canon 591 (allowing the Roman Pontiff to exempt institutes of consecrated life from the authority of local ordinaries), canon 1273 (establishing the Roman Pontiff as supreme administrator and steward of ecclesiastical goods), and canon 1417 (declaring the right of the faithful to place cases before the Holy See at any point in the proceedings).

32 See CONGREGATION FOR BISHOPS, *Monitum*, 17 June 1988, in BUCCI, “Scisma,” pp. 544-545 (which threatened penalties only in terms of canon 1382), and the post-ordination “Comunicato”, in BUCCI, “Scisma,” pp. 545-555 (which recited canons 1382 and 751 — but, curiously, not canon 1364 — as the basis for the Lefebvrite sanctions). Recall, too, that no prior warning about incurring a censure based on “violation of papal primacy” was issued to the Lefebvrite bishops, raising questions about the validity of any censures purportedly inflicted in response to such an offense that is (supposedly) threatened either in law or by precept.

33 A plausible argument could have been made that “violating papal primacy” (however that act might eventually be defined) was, as a violation of divine or canonical laws, sufficient basis for a “just penalty” in virtue of canon 1399. Such an argument, to be sure, would have faced various objections, including explaining what ecclesial values canon 1399 protected in this case that were not already protected by canon 1382 (and, I would have made plain, by canon 1364), and how, despite canon 1349, one could immediately invoke the Church’s highest sanction, excommunication, when canon 1399 speaks only in terms of “a just penalty.” But such a discussion, as I say, would have been tenable. Because, however, canon 1399 was not invoked against the Lefebvrite bishops upon their excommunications, nor was it referenced by the pope at the time of his remissions, an appeal to it at this late point would be suspect.

First, the pope’s marked rephrasing of canon 1382, can itself only be: (1) gratuitous; (2) an attempt by him to clarify an ambiguity in the law; or (3) deliberately made in pursuit of some goal. I take for granted that the pope’s rephrasing of the canon was not merely gratuitous.<sup>34</sup> I think, however, that we can also eliminate the possibility that the pope was attempting to clarify some ambiguity in the canon.

The key terms of canon 1382, such as “bishop,” “consecration,” and “pontifical mandate,” and so on, are not “doubtful and obscure” in themselves.<sup>35</sup> Even if, notwithstanding that “the proper meaning of the words considered in their text and context” is, I think, sufficiently clear, some doubt or obscurity regarding the operation of canon 1382 remained, one is directed by canon 17 to look “to parallel places, if there are such, to the purpose and circumstances of the law, and to the mind of the legislator”, for guidance, none of which prescribed techniques of canonical interpretation the pope seems to have considered or followed.<sup>36</sup> In short, canonists do not find the terms of canon 1382 ambiguous, nor does it seem that the pope found it so.

We are, then, apparently left with but one explanation for such a significant rephrasing by the pope of canon 1382 on illicit episcopal ordination as if it penalized “violating papal primacy,” namely, that he deliberately rephrased the norm in pursuit of some other purpose (probably, I think, to prepare for his later assertion that remission of the Lefebvrite excommunications would be required under some facts that the pope considered relevant).<sup>37</sup> But, if this were his goal, there are at least three substantive objections to be raised against rephrasing canon 1382 as if it were concerned chiefly with “papal primacy.”

34 Not only are papal remarks to a journalist insufficient in themselves to amount to a binding explanation of the law, but *gratuitous* remarks to a journalist could be wholly ignored. If, *per ridiculum*, the pope’s comments about the operation of canon law in excommunication cases were simply casual chatter, one could disregard every conclusion asserted in their wake.

35 *CIC* canon 17. Ecclesiastical laws must be understood in accord with the proper meaning of the words considered in their text and context. *If the meaning remains doubtful and obscure*, recourse must be made to parallel places, if there are such, to the purpose and circumstances of the law, and to the mind of the legislator (emphasis added).

36 There is no dearth of interpretative materials available by which the import of an allegedly unclear canon in this matter can be illuminated. Canon 1382 of the Johanno-Pauline Code has a clear Pio-Benedictine predecessor norm, namely *CIC/17* canon 2370, which in turn traces its roots back at least as far the *Liber Sextus* of Boniface VIII (1298). These norms have been amply discussed by canonists over the centuries and I detect no significant debate as to the basic meaning of the terms. Finally, to construe the pope’s remarks to Seewald as having exposed “the mind of the Legislator” would simply be to regard papal comments on canon law to journalists as bootstrapping themselves into authentic interpretations of law.

37 In the midst of questioning whether the pope *ought* to have rephrased canon 1382 as he did, I pause to remind readers that, in my opinion, a solid canonical rationale for the pope’s remission action exists (albeit outside the boundaries of penal canon law) and will be set out below. In other words, I pause to suggest that the various difficulties occasioned by the pope’s rephrasing canon 1382 need not have been raised at all.

### 3.2 — The “Quality” of a Delict

As suggested above, penal canons are distinguished by, among other things, their “quality” or “object,” that is, by what specific ecclesial value they are designed to protect.<sup>38</sup> Wernz-Vidal illustrate the notion of *qualitas* well: “One criminal act might be placed against the property of another and is called *theft*; another against his life would be called *homicide*; and another against his honor or reputation is termed *injury*.”<sup>39</sup> No one would doubt but that all three crimes are offenses against “human dignity” (or for that matter, against “justice”, or “divine sovereignty”, and so on), but that all three laws are simply and solely variations on the theme of, say, upholding “human dignity”, or that they should be punished by the same sanctions and be remitted upon the same grounds (say, upon proclaiming one’s “respect for human dignity”), is to blur their respective *qualitates* and therefore would be very much debatable, as follows.

It is, first, bad legal science to substitute for the specific object of a penal law what might (or might not) be its genus, here, to assert that the illicit conferral of episcopal orders amounts to a “violation of papal primacy.” As Dom Augustine notes, because “every law has in view special acts, it is evident that crimes differ specifically according to their formal objects. Thus crimes against faith and unity of the Church differ from those against religion, even though faith belongs to religion, [and] sins against property and life differ from one another, although all are directed at the virtue of justice, because they are morally specified by the formal objects.”<sup>40</sup> Second, such confusion of conceptual categories weakens the methodological similarities that, without exaggeration of course, should be maintained between the closely related disciplines of moral theology and penal canon law.<sup>41</sup> Third, homogenizing penal canons according to one level or

38 This juridic point was explicitly made in *CIC/17* canon 2196, which stated that “The quality of a delict is determined by the object of the law....” The elimination of this provision from the Johanno-Pauline Code implies no doubt about its soundness, but rather was, I think, simply another example of the revised Code’s regrettable distaste for definitions and its avoidance of treatment, however basic, of juridic scientific matters.

39 “Aliud factum criminis positum est contra bona fortunae alterius et vocatur *furtum*; aliud contra vitam et vocatur *homicidium*; aliud contra honorem vel famam et vocatur *iniuria*.” WERNZ-VIDAL, *Ius Canonikum* VII, n. 51, p. 68.

40 DOM AUGUSTINE, *Commentary* VIII, p. 14.

41 DOM AUGUSTINE, *Commentary* VIII, pp. 14-15. Something of the overlap between the internal forum of conscience and the external forum of justice can be glimpsed in the language of canon 978 § 1, which states: “In hearing confessions the priest is to remember that he is equally a judge and a physician and has been established by God as a minister of divine justice and mercy, so that he has regard for the divine honor and the salvation of souls.” While no one should want to see the application of moral theology in sacramental reconciliation reduced to an exercise akin to conducting a “miniature penal trial,” nor should want to see the objective application of penal justice cut off from considerations of personal responsibility, the very “coordination” of the internal and external fora called for by the Synod of Bishops in 1967 (see PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, “Principia quae Codicis iuris canonici recognitionem dirigant,” in *Communicationes*, 1 [1969], pp. 77-85, esp. Principle No. 2) demonstrates that many ecclesial

another of their ascending categories makes it difficult to assess the gravity of *individual* offenses committed against *specific* ecclesial values and consequently makes it difficult to assess the penalties that should be inflicted in response to concrete offenses and, eventually, even to determine the kind of remorse that could lead to their remission. This last consideration, in particular, leads to a second major objection to a rephrasing of canon 1382 as if it were concerned chiefly with “papal primacy.”

### 3.3 — “Papal Primacy” as a Doctrinal Datum

“Papal primacy” is essentially a fact, specifically, a doctrinal datum to be believed with divine and Catholic faith (*Catechism of the Catholic Church*, n. 882 and c. 750 § 1). Now, granted, from the fact of “papal primacy” flow many important norms for ecclesiastical behavior. For example, given the fact of “papal primacy,” one can see why a pope’s resignation need not be accepted by anyone (c. 332 § 2); why diocesan bishops must make quinquennial reports to the pope (c. 399 § 1); why individual religious are bound to obey the pope as their highest superior (c. 590 § 2); why the pope has “supreme authority” over ecclesiastical goods (c. 1256); why physical force used against the pope’s person is an excommunicable offense (c. 1370 § 1); why recourse against pontifical acts to an ecumenical council is subject to censure (c. 1372); why the faithful have the right to bring their cases before the Holy See at any time (c. 1417 § 1); and so on. But are these norms for behavior, and many others like them, simply occasions to reassert the fact of “papal primacy”? Or are there other, more accurate, descriptions of the ecclesial values upheld by such canons and, therefore, of the animus with which such canons might be violated in specific cases? I think that there are other ecclesial values reflected by these canons, and that it is important for ecclesiological and juridic reasons to avoid “reductionist thinking” that tends to view the violation of any canon related to papal authority (which is a very long list of canons!) as if such violations were necessarily attacks on “papal primacy.”

For example, is a bishop who fails to make a timely quinquennial report contrary to canon 399 necessarily challenging *papal primacy*? Perhaps he is, of course; perhaps he says “I refuse to make a quinquennial report because I do not believe that the pope enjoys primacy in the Church such that I have to follow his rules about making reports.” But such a stance is hardly plausible. A much more likely explanation for a bishop’s failure to make his quinquennial report (assuming it was not accidental, of course) is that the bishop was being negligent in performing the duties of his office, contrary to canon 1389. Depending on the circumstances, the competent ecclesiastical authority might decide to punish

values are shared between the internal and external fora, and that the analytical techniques of one (such as distinguishing carefully between genus and species of offenses) might at times shed light on the concrete questions faced by the other.

such negligence, but — and here is the important point — in order to punish episcopal negligence in office, the competent ecclesiastical authority should *not* have to prove that the bishop was acting (or failing to act) out of contempt for “papal primacy”; it should need only to prove that the bishop was acting negligently in regard to his office.

These examples could easily be multiplied. For example, is a tribunal official who improperly discourages a member of the faithful from submitting a marriage case to the Holy See necessarily challenging *papal primacy* thereby, or is he or she simply trying to avoid the administrative inconvenience of hierarchic review? Is a woman who attempts to receive Holy Orders, contrary to canon 1378 § 2, n. 1 and the general decree of the Congregation for the Doctrine of the Faith (2008),<sup>42</sup> challenging *papal primacy*, or is she challenging the Church’s divine custodianship of the sacraments (*Catechism of the Catholic Church*, n. 1117)? Or, for that matter, if one will forgive an extreme example, might not a miscreant who lays violent hands on the pope contrary to canon 1370 § 1 be attacking him, not to deny papal primacy, but precisely *because* he enjoys primacy in the Church? And if even canon 1370 § 1 — a norm unquestionably central to the protection of papal primacy — can be violated by one who does not in the slightest dispute papal primacy, how does one determine that the violation of other canons less closely linked to papal primacy must have been violated out of contempt for papal primacy?

Once one begins viewing the violation of canons in service to papal authority as if such violations were aimed at “papal primacy” itself, it becomes very difficult not to view *every* violation of the canon law promulgated by the pope — or at least, every violation of some canon delineating an aspect of papal authority — as if it were an act of ecclesiastical sedition. As we all know, however, people frequently violate important laws, in the Church and in the State, without necessarily disputing the authority of the respective Legislators to have enacted such laws.<sup>43</sup> Thus, any re-characterization of canon 1382 as if it really punished the “violation of papal primacy” is methodologically questionable in light of canon 17, juridically questionable in light of the principle of legality and the importance of delineating the *qualitas* of a delict in order to apply penal law correctly, and ecclesiologically questionable in its tendency to reduce dozens of canons related to papal authority into mere expressions of “papal primacy.”

42 See CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Decretum Generale [de delicto attentatae sacrae ordinationis mulieris]*, effective 29 May 2008, in *AAS*, 100 (2008), p. 403.

43 I know of no protestations by the Lefebvrite bishops that John Paul II did not have the authority to promulgate canon 1364 and/or canon 1382. Indeed, they alleged (gravely flawed) arguments claiming that the otherwise certainly binding force of these canons—promulgated, as it happened, in virtue of papal primacy!—simply did not apply to them under the circumstances. See, e.g., BUCCI, “Scisma,” p. 546.

### 3.4 — Utilization of More Pertinent Norms

Finally, invoking canon 1382 as essentially a defense of “papal primacy,” suggests an under-appreciation of the ability of other, more pertinent, norms to protect this important ecclesial value, specifically, canons on heresy and schism.

#### 3.4.1 — Heresy (cc. 751 and 1364)

Among the many canons that might be said to operate in service to papal authority, some operate more directly in service to “papal primacy” than others. One example would be canons 751 and 1364 § 1 which together punish, among other things, heresy. Now, recalling that “papal primacy” is an article of faith, if one were, by a perceptible utterance (c. 1330),<sup>44</sup> to *deny* “papal primacy,” one would have placed a component act of the delict of heresy, which deed (upon the satisfaction of the other elements of the crime, of course) would render one liable to sanction in accord with law. But notice, canons 751 and 1364 § 1 are not provisions oriented toward upholding “papal primacy” per se, but rather, are norms oriented to checking heresy within the Church, which heresies might or might not offend the doctrine of papal primacy. An accusation of heresy was not levied at the Lefebvrite bishops as a basis for their excommunication, so the matter need not detain us further, except to note again that penal canons, even when they operate in service to “papal primacy,” are to be assessed according to their own terms and not as mere variations on the theme of “papal primacy.”

#### 3.4.2 — Illicit Episcopal Consecrations (c. 1382)

All of which brings us to canon 1382 which was invoked against the Lefebvrite bishops as a basis for their excommunication and which Pope Benedict acknowledged the Lefebvrites had violated (although, as we have seen, he re-characterized the canon) when explaining to Seewald his decision to remit the Lefebvrite censures. Although few canonical commentators seem to read canon 1382 primarily in the light of “papal primacy,”<sup>45</sup> it is not difficult

44 Canon 1330, states “A delict which consists in a *declaration* or in another manifestation of will, doctrine, or knowledge, must not be considered completed if no one perceives the declaration or manifestation.” (emphasis added). In other words, canon law does not punish thoughts or attitudes, even if such thoughts or attitudes are sinful; it punishes only certain external utterances and/or deeds. As Thomas Green notes in *CLSA Comm2*, p. 1548, “Whatever may be one’s moral culpability, it is not a delict technically to simply hold heretical views. Someone must perceive the expression of such views if it is to be penally imputable.” Green’s good point implies a related one: canon law does not punish harboring contra-ecclesial attitudes, but neither does it reward expressing pro-ecclesial attitudes.

45 Not even John Paul II’s apostolic letter *motu proprio Ecclesia Dei*, 2 July 1988, seems to equate illicit episcopal ordinations *per se* with a “violation of papal primacy.” Instead, John Paul II says, and says obliquely at that, about the Lefebvrite ordinations, that their “disobedience — which



to see how the norm operates in service to “papal primacy.” Nevertheless, the canon still needs to be assessed, as I have shown above, in light of its own *qualitas*. Doing so immediately facilitates recognition of the fact that “papal primacy” is not the only ecclesial value being defended by this canon, and thus it is not the only *bonum Ecclesiae* that can be violated by offenders against canon 1382.

Canonical commentators on canon 1382 point, for example, to the importance of the norm in protecting hierarchical communion not simply between the illicitly ordained bishops and the Roman Pontiff, but between them and the College of Bishops.<sup>46</sup> Indeed some, like Borrás, observe that canon 1382 operates largely in service to “the social order of the Church” and that remission of penalties under it is reserved to the pope in his role as protector of the unity of the Church spoken of in *Lumen gentium* 23(a).<sup>47</sup> The more that one appreciates that canon 1382 operates not simply in service to “papal primacy,” but also in service to the integrity of the College of Bishops and the wider social order of the Church, the more one appreciates, I think, that *schism*, despite its not being mentioned by Benedict in the course of remitting the Lefebvrite sanctions, was a very important way in which to measure the crimes committed by the Lefebvrite bishops.

### 3.4.3 — Schism (c. 1364)

Canon 751 defines schism as “the refusal of submission to the Supreme Pontiff or of communion with the members of the Church subject to him.” Schism is punished under canon 1364 § 1 by automatic excommunication and, like other automatic excommunications, the effects of the censure can be broadened in the community by formal declaration of the sanction (see c. 1331 § 2). As was true for canon 1382 — and even though canonical commentators seem not to view canon 1364 against schism as primarily a norm oriented toward upholding “papal primacy” — it would not be startling to claim that “papal primacy” is *one* of the more important values protected under canon 1364 § 1.<sup>48</sup> Recitations of the dangers of schism were clear, especially in the final

*implies* in practice the rejection of the Roman primacy — constitute[d] a *schismatic* act.” *Ecclesia Dei*, n. 3 (my emphasis), for which specific *schismatic* act (and for the illicit ordinations themselves) the Lefebvrite offenders were justly punished. We will examine the issue of schism more carefully shortly.

46 See, e.g., CALABRESE, in *Exegetical Comm*, IV/1, p. 511; GREEN, in *CLSA Comm2*, p. 1588; BORRAS, *L'excommunication*, pp. 62-63; MOSCONI, in *Codice Comm.*, p. 1098. It is interesting to note that, in addition to Roman dicastery officials, the presidents of the Swiss, German, and French episcopal conferences were involved in the attempts to dissuade Lefebvre from his schismatic acts. See BUCCI, “Scisma,” p. 544, and *DC*, 85 (1988), p. 739.

47 BORRAS, *L'excommunication*, p. 63.

48 This remains true even though one could, strictly speaking, refuse communion with certain members of Churches subject to the Supreme Pontiff, and thereby commit schism, without even

weeks leading up the Lefebvrite consecrations.<sup>49</sup> Notwithstanding that several commentators are careful to distinguish between “schism” properly so-called and “disobedience” (even to the Roman Pontiff, which should probably be treated under, say, canon 1373),<sup>50</sup> that the Lefebvrite bishops went into schism seems objectively undeniable.<sup>51</sup> What is perplexing, then, is why the pope did not acknowledge the schism basis for their censure and instead, as we have seen, points only to canon 1382 as the basis for their excommunication, which canon he rephrased as punishing “violations of papal primacy.”

## 4 — The Lefebvrite Situation Under Standard Penal Canon Law

At this point, we may begin to turn our attention back to how, in accord with the accepted principles of penal canon law, one might have expected the Lefebvrite excommunications to have been addressed. The first thing to note in this regard is that Benedict could have moved much more forcefully *against* the Lefebvrite bishops had he chosen to do so.

### 4.1 — The Option to Augment Sanctions Was Present

The four Lefebvrite bishops were expressly excommunicated for schism and had remained in that state for over twenty years. Now, canon 1364 § 2 states that “If contumacy [in regard to schism is] of long duration or the gravity of scandal demands it, other penalties can be added, including dismissal from the clerical state.” Now, what was, until quite recently, an unimaginable possibility — namely, dismissing a bishop from the clerical state — was, upon closer inspection, a canonical option always open to Benedict. Two very recent cases demonstrate this point conclusively.

First, in July 2008, Fernando Lugo Méndez, the bishop of the diocese of San Pedro (Paraguay), petitioned for and received a rescript of return to the lay state.<sup>52</sup> Now, even though canon 290 does not envision the possibility of

mentioning papal primacy, let alone “violating” it. See MARZOA, in *Exegetical Comm*, IV/1, p. 446.

49 See “Letter of Holy Father to Abp. Lefebvre,” 9 June 1988, in *CLD*, vol. 8, pp. 803-804, and “Comunicato dei Presidenti delle Conferenze Episcopali” (undated), in BUCCI, “Scisma,” p. 544.

50 See, e.g., MARZOA, in *Exegetical Comm*, IV/1, p. 445.

51 I am aware of the arguments raised by some Lefebvrites that theirs was not, strictly speaking, a “schismatic” act, but, given the repeated and express warnings from the Holy See that the Lefebvrites were risking schism (see, e.g., BUCCI, “Scisma,” pp. 544, 545, 546, and *DC*, 85 (1988), p. 740, and CORIDEN, in *CLSA Comm2*, p. 916, fn. 7), and given the express declaration by the Congregation of Bishops of their having incurred excommunication for having committed schism (at the same time as their taking episcopal orders illicitly), I see no basis upon which to question but that the Lefebvrite bishops incurred excommunication for schism.

52 See *Origins*, 38 (2008), p. 180. See also SCHNEIDER, in *CLSA Comm2*, p. 386.

a bishops being “laicized”,<sup>53</sup> the Lugo case demonstrates that the departure of a bishop from the ranks of the clergy is canonically possible. But the case of the notorious Abp. Emmanuel Milingo makes it indisputable that a bishop can be *expelled* from the clerical state for delictual conduct.

In December 2009, Milingo, suspended since 2001 for attempting marriage, and excommunicated since 24 September 2006 for violation of canon 1382, was dismissed from the clerical state for his “persistent contumacy.”<sup>54</sup> Thus, whether criminous bishops can be expelled from the clerical state is no longer merely an academic question, it is now a practical question of penal canon law, to be determined by the Roman Pontiff in accord with the relevant canons and the facts of each case (c. 1405 § 1, 3<sup>o</sup>).<sup>55</sup> Had the pope chosen to, then, I think that he could have viewed the more than twenty years of “insordescence” by the Lefebvrite bishops (on two counts each, at that) as grounds to dismiss them from the clerical state for “contumacy of long duration” under canon 1364 § 1.<sup>56</sup>

Returning, in any case, to our question as to how one might have expected the Lefebvrite censures to have been handled under penal canon law, we begin by recalling that medicinal penalties such as excommunication are not to be

53 *CIC* canon 290. Once validly received, sacred ordination never becomes invalid. A cleric, nevertheless, loses the clerical state: 1<sup>o</sup> by a judicial sentence or administrative decree, which declares the invalidity of sacred ordination; 2<sup>o</sup> by a penalty of dismissal legitimately imposed; 3<sup>o</sup> by rescript of the Apostolic See *which grants it to deacons only for grave causes and to presbyters only for most grave causes* (emphasis added).

54 See generally “Holy See Press Communiqué,” in *L’Osservatore Romano*, English edition, n. 2125, 23-30 December 2009, p. 2 [= Milingo Communiqué]; also available in *Newsletter of the Canon Law Society of Great Britain & Ireland*, n. 162 (June 2010), pp. 27-28, with commentary by Gordon Read.

55 Naturally, questions of removing delinquent bishops from office would usually be faced before considering a bishop’s removal from the clerical state, but even these preliminary considerations, it seems, must overcome various inertial obstacles. See George WEIGEL, *The Courage to be Catholic: Crisis, Reform, and the Future of the Church*, New York, Basic Books, 2002, esp. pp. 216-218, and *idem*, *God’s Choice: Pope Benedict XVI and the Future of the Catholic Church*, New York, Harper Collins, 2005, esp. pp. 254-255.

56 Under Pio-Benedictine law, “insordescence” was the willful remaining under an excommunication for more than one year, and was grounds to suspect a delinquent of heresy. See *CIC/17* canon 2340 § 1 and Marius PISTOCCHI, *Lexicon Juridico-Canonicum*, Torino, Berruti, 1934, s.v. “Insordescencia,” p. 83. Although the term “insordescence” does not appear in the Johanno-Pauline Code, the concept seems to have survived in canon 1326 § 1, 1<sup>o</sup> under which norm a “judge can punish the following more gravely than the law or precept has established: a person who after a condemnation or after the declaration of a penalty continues so to offend that from the circumstances the obstinate ill will of the person can prudently be inferred...” Recall that when Milingo was finally dismissed from the clerical state, his “persistent contumacy” (as evidenced by repeated violations of canon 1382) was cited as a motivating factor (Milingo Communiqué, p. 2). Moreover, canon 1326 is cited by Read as a modern expression of (what amounted to insordescence, or) contumacy lasting more than one year, under the Pio-Benedictine Code. See READ, fn. 54, above.

remitted except upon an offender’s withdrawal from contumacy (cc. 1347 § 1 and 1358 § 2) but that, upon a withdrawal from contumacy, an offender has a right in justice to the remission of the censure. Because the pope asserted repeatedly that the remission of the Lefebvrite censures was *required* by canon law,<sup>57</sup> I think it is clear that he saw *what he regarded as* a canonically sufficient “withdrawal from contumacy” by the Lefebvrite bishops for both of their crimes, namely, the illicit reception of episcopal orders and schism. But I ask, would a canonist, with access to the publicly-disclosed information available about this case, have seen that “withdrawal from contumacy”?

#### 4.2 — Canon 1382

Regarding the Lefebvrites’ censure for their illicit reception of episcopal orders, there should be little dispute as to what would show their “withdrawal from contumacy.” A public statement of regret for having taken episcopal orders illicitly, and a promise not to participate in such a rite in the future, would certainly qualify. As for the second criterion for withdrawing from contumacy, namely, making “suitable reparation” for the harms caused to the faith community, admittedly, this criterion is somewhat harder to measure, but it is possible that, at least to some degree, the same statement of remorse suggested above would be of value. I am aware, however, of no evidence whatsoever that the Lefebvrite bishops have ever expressed sorrow for having illicitly taken episcopal orders, nor to my knowledge have they offered public assurance they would never confer illicit orders to others in the future.<sup>58</sup> I am

57 Benedict makes, I suggest, some half-dozen assertions that the remission of the Lefebvrite censures was *required* as a matter of canon law, as follows: “[W]hen a bishop [who was consecrated without papal mandate] professes his acknowledgment both of the primacy in general and also that of the currently reigning Pope in particular, his excommunication is revoked, because there is no more reason for it. ... [F]or the sole reason [sic] that they had been consecrated without a papal mandate they were excommunicated; and for the sole reason that they now pronounced an acknowledgment of the Pope — albeit not yet following him on all points — their excommunication was revoked. That is per se quite a normal canonical procedure. ... [F]or purely canonical reasons, [they] had to be absolved from the excommunication. ... In this case we were simply dealing with a clear, canonical situation. With their acknowledgment of the primacy of the Pope, these bishops, canonically speaking, had to be freed from the excommunication. ... But now they had written a letter declaring their Yes to the primacy, and the next step was therefore quite clear from a canonical point of view.” *Light*, pp. 22-23, 121.

58 There seemed to be no evidence, before 2009 or after, that the Lefebvrite bishops *were* sorry for having taken episcopal orders illicitly and/or that they were resolved not to participate in such illicit rites in the future, nor, I note, does the pope claim that such intimations of regret had been made to him. See *Decretum*, p. 94, featuring an excerpt from a letter dated 15 December 2008 from Fellay asking for remission of the excommunication, but expressing no sorrow for any past actions. Indeed, continuing uncertainty about the attitudes of the Lefebvrite bishops (who, according to Benedict himself, do not yet follow the pope “on all points”) probably explains their current anomalous canonical situation, inaccurately described by Seewald as “suspended.” Sorting out problems arising from imprecise use of the term “suspension” is a common task for canon lawyers, and admittedly, some of the problems here arise from inartful drafting within the

likewise unaware of any gesture by the Lefebvrite bishops to make suitable reparation for the scandal and other damages they caused within the Church by their actions. In my opinion, therefore, the remission of the Lefebvrites' excommunications for having violated canon 1382 is not justified under the accepted principles of penal canon law, and it is certainly not *required* under such norms.

#### 4.3 — Canon 1364

Regarding the Lefebvrites' censure for their act of schism, it is more difficult to determine, because of the amorphous nature of the crime, what precisely would qualify as a withdrawal from contumacy for it, but something oriented to expressing regret for the specific act that occasioned the delict of schism (namely, the illegal reception of episcopal orders) would seem in order, along with an assurance not to repeat such conduct in the future. Alternatively, some acknowledgement by the Lefebvrite bishops that a state of schism, brought about by them, existed and that they regretted such a state and were determined not to commit such acts in the future, would also have been desirable. As noted above, however, such expressions of regret seem not to have been offered, nor do there seem to have been any promises from them not to engage in such conduct in the future, nor are any public acts of reparation for scandal or damages caused by public schism discernible. Based, then, on what is publicly known at this point, in my opinion, the remission of the Lefebvrites' excommunications for having violated canon 1364 § 1 is probably not justified under the accepted principles of penal canon law, and it is certainly not *required* under such norms.

#### 4.4 — "Violation of Papal Primacy"

The "violation of papal primacy" is not a crime under canon law, nor has any persuasive rationale by which it could be construed as a delict under canon law been offered, nor has any justification for excommunication in the face of "violation of papal primacy" been proposed. Moreover, short of construing a long list of canonical offenses as essentially "violations of papal primacy," those aspects of the Lefebvrite bishops' malefactions that, in some sense, seemed to offend against "papal primacy," were already adequately sanctioned by specific penal canons (two of which were invoked against the Lefebvrite bishops), and no justification for deviating from the application of such canons has been offered. In short, in my opinion, the Lefebvrite bishops were not excommunicated for having "violated papal primacy" and therefore no action of remorse in regard

1983 Code itself. Moreover, regarding irregular *bishops* there seems to be very little jurisprudence available to guide Roman officials in sorting out their status. See, e.g. *CLD*, vol. 8, pp. 1216-1217 and *AAS*, 75 (1983), pp. 393-393. Suffice it to say, though, that the Lefebvrite bishops are probably not "suspended" but are instead "irregular for the exercise of orders" illicitly received (c. 1044 § 1, nn. 2, 3).

to "papal primacy" needs to be offered by them. On the other hand, no action on their part in regard to "papal primacy," even an endorsement of "papal primacy," would seem to remove their specific contumacy for schism, and even less would it address their specific contumacy for having illicitly taken episcopal orders.

In sum, based on what is publicly known about the Lefebvrite matter, if penal canon law had been applied to the Lefebvrite bishops, I believe that they would still be excommunicated for having violated canon 1382 prohibiting the illicit reception of episcopal orders, that they would probably still be excommunicated for having fomented schism, but that they would not be excommunicated for having "violated papal primacy."

### 5 — *The Williamson Case*

Before presenting what I think *is* a compelling canonical rationale for the pope's decision to remit the Lefebvrite excommunications, we need to address briefly the special case of Lefebvrite bishop Williamson, about which the pope expressed second thoughts tantamount to regretting his decision to remit Williamson's censure. According to the pope, he would not have lifted Williamson's excommunication if he had known that Williamson denied the existence of the Nazi gas chambers. I do not see, however, given the normal principles of penal canon law, how a refusal of the remission of a censure would have been justified on these facts.

An offender who "withdraws from contumacy" has, as we have seen, a right *in justice* to the remission of a censure under which he or she labors.<sup>59</sup> Indeed, withholding of the remission of a censure from one who has withdrawn from contumacy is a violation of canons 1358 § 1 and 221 § 3.<sup>60</sup> Now, if the "acceptance of papal primacy" were, as the pope concluded, sufficient to signal one's withdrawal from contumacy for having taken illicit episcopal orders, caused a schism, and "violated papal primacy," and if Williamson sufficiently expressed his acceptance of that article of the Faith (and we have no evidence that Williamson did not), then one must wonder how Williamson's positions on the historicity of the Holocaust, or on any other historical point, could be of any canonical relevance in determining his *ecclesiastical* status.

Holocaust denial is generally the act of an ignoramus or a lunatic, I grant, and it is often closely related to the sin of anti-Semitism; it is, moreover, a civil crime in certain countries scarred by their particular proximity to the Shoah. But

59 BORRAS, in *Exegetical Comm*, IV/1, p. 417; CAPPELLO, *De Censuris*, n. 89, p. 78.

60 MARTIN, in *CLSGBI Comm*, p. 782; CAPPELLO, *De Censuris*, n. 89, p. 79.

it is not a *crime* under canon law.<sup>61</sup> Nor can Holocaust denial be parlayed into a canonical crime under, say, canons 1369<sup>62</sup> or 1399,<sup>63</sup> not, at least, if the canonical principles against the concoction of crimes from loosely related canons are to be accorded their traditional interpretations.<sup>64</sup> Even more perplexing, though, is how Williamson's refusal to acknowledge certain historical truths about the Holocaust could justify withholding the remission of a censure levied for his *ecclesiastical* crimes when even his continual refusal to follow the pope "on all points"<sup>65</sup> (presumably, points of *ecclesiastical* doctrine and discipline!) was no bar to his canonical reconciliation. In short, I suggest that, even though nothing in penal canon law *required* the remission of the Lefebvrite excommunications, if remissions *were* granted to the other offenders, nothing in penal canon law would have supported withholding one from Williamson.

## 6 — *Alternative Theory Supporting the Pope's Actions*

The onus of this article has been to demonstrate that the explanation which the pope offered to the journalist Seewald concerning the operation of penal canon law in the Lefebvrite matter was insufficient to support the pope's repeated claim that penal canon law, not simply permitted, but *required* him to remit the Lefebvrite excommunications, and that therefore such a remission should have been seen by others as being canonically uncontroversial. I believe that I have demonstrated those explanations are unpersuasive.<sup>66</sup> But that does

61 Many terrible things are not crimes under canon law, either because they are treated as matters of moral theology (say, adultery or race-baiting) and/or because they are adequately treated by secular criminal law (say, drug trafficking or arson). The failure of canon law to criminalize this or that offensive behavior cannot be taken as approval, let alone toleration, of such behaviors. See MARZOA, in *Exegetical Comm*, IV/1, p. 268.

62 *CIC* canon 1369. A person who in a public show or speech, in published writing, or in other uses of the instruments of social communication utters blasphemy, gravely injures good morals, expresses insults, or excites hatred or contempt against religion or the Church is to be punished with a just penalty.

63 *CIC* canon 1399. In addition to the cases established here or in other laws, the external violation of a divine or canonical law can be punished by a just penalty only when the special gravity of the violation demands punishment and there is an urgent need to prevent or repair scandals.

64 See, e.g., *CIC* canons 6 § 1, 3°, 18, and 19, and AYRINHAC, *Penal Legis*, n. 37, p. 30. The pope could, if he wanted to, establish new laws against Holocaust denial for Catholics (or maybe, just for Catholic bishops) or, less clumsily, he could issue a penal precept to an individually obnoxious bishop not to deny the true scope of the Holocaust (per cc. 49, 331, 1319 § 1, and 1321), but there is no indication that any of these options were ever considered in the Williamson case.

65 *Light*, p. 22.

66 This is perhaps a good place to comment, too, on the pope's twice-proposed (*Light*, pp. 22, 120) parallel between the situation of the Lefebvrite bishops and the situation of Chinese bishops consecrated without papal mandate. Just as several Chinese bishops have recently experienced

not mean that the pope had no canonically cogent explanation of his remission of the Lefebvrite excommunications. To the contrary, I hold that the pope could have remitted all of the Lefebvrite excommunications (that of Fellay, de Mallerai, Williamson, and de Galarreta) if he had chosen to, and that he could have even withheld remission of Williamson's censure if he wished (again quite in accord with canon law), if, instead of the explanation he gave to Seewald, the interpretation of his action that I am about to suggest had been proposed in this case. No confusion as to the normal operation of penal canon law would have been occasioned thereby, and an important manifestation of papal prerogatives, even in penal matters, would have been afforded.

### 6.1 — *Remission of a Censure Consequent to a Change in Law*

Notwithstanding that censures generally should not be remitted unless and until they achieve their goal of bringing about personal reform, canon law does know of mechanisms by which censures may be remitted regardless of an offender's degree of personal reform. The most common instance of this is where the law underlying an excommunication is changed (c. 1313).<sup>67</sup> This last occurred in the United States in 1977 when Pope Paul VI abrogated the automatic excommunication against Catholics divorced and remarried outside the Church that had been established by the Third Plenary Council of Baltimore in 1884.<sup>68</sup> With no showing of remorse or repentance on their part, all Catholics then excommunicated for having violated Baltimorean law on divorce and remarriage were automatically reconciled with the Church.<sup>69</sup>

reconciliation, so the pope comments, should the Lefebvrites. The analogy seems unpersuasive. First, we probably do not know all of the information available to the pope in regard to the Lefebvrite situation, but we surely do not know all of the information about the Chinese bishops' situation. It does not avail, however, to assert as a parallel case what outside observers cannot verify as in fact parallel. Second, what we do know about the plight of the Chinese bishops suggests that their situation is quite different from the Lefebvrite's. See, e.g., Geoffrey KING, "The Catholic Church in China: A Canonical Evaluation," in *The Jurist*, 49 (1989), pp. 69-94. In particular, the pressures brought to bear on Chinese bishops, both consecrators and consecrated, to act as they did does not seem similar at all to the situation under which the Lefebvrite bishops acted. It should surprise no one, then, if it were easier to reconcile men who were coerced into certain actions by Communist governments, than it would be to reconcile men who acted with ample liberty in free states.

67 See *CIC* canon 1313 § 1, but see CAPPELLO, *De Censuris*, n. 87, p. 78, who, with *CIC/17* canon 2226 § 3 before him, noted that contracted censures were *not* remitted upon the abrogation of the relevant penal law. The debate was mooted with the advent of the Johanno-Pauline Code and canon 1313 § 2 thereof. The mutual remission of excommunications exchanged between Paul VI and Athenagoras I in 1965, might be cited as another example of censures being vacated without their goals having been achieved. See PAUL VI, apostolic letter *motu proprio Caritatis officia erga Ecclesiam Constantinopolitanam*, 7 December 1965, in *AAS*, 58 (1966), pp. 40-41. The *sui generis* character of Catholic-Orthodox relations, however, makes very difficult one's attempting to draw from this incident any lessons for penal law.

68 See *CLD*, vol. 8, pp. 1213-1214.

69 This remission of these censures impacted only the *juridic* status of American Catholics who were divorced and remarried outside the Church and, even at that, it impacted only their status

## 6.2 — Remission of a Censure Based on Clemency for a Specific Individual

Moreover, in individual cases, and again without a recitation of remorse or repentance, it seems that individual letters of remission of censures have been granted to some persons *con atto di peculiare clemenza* for reasons of, say, the poor health of the offender.<sup>70</sup> Again, none of the Lefebvrite bishops was reconciled on grounds of poor health, but such letters of remission demonstrate that, in individual cases at least, censures can be lifted without having achieved their purpose.<sup>71</sup>

## 6.3 — Remission of a Censure Based on Canon 331

But the primary — and as far as I can tell, the only certain — justification for the pope's lifting of the Lefebvrite excommunications, is this: a pope has, in virtue of canon 331,<sup>72</sup> the power to lift sanctions against offenders if, in his considered judgment, it is a pastorally appropriate thing to do.<sup>73</sup> Lifting a censure without a demonstration of an offender's withdrawal from contumacy

in regard to penal law. It did not regularize their marriages nor address their moral situations.

<sup>70</sup> From a personal letter known to me, issued by the Congregation for the Doctrine of the Faith in 2008.

<sup>71</sup> There are, I suspect, too few such letters to allow one to claim that they represent a new trend in penal canonistics, but I would urge caution in issuing any such individual reprieves. Alphonse Borras, makes a good point when he warns against remitting censures as if by way of dispensation: “[S]i la rémission de la censure s’opérait par dispense, c’est-à-dire par cet acte gracieux, qui dans un cas particulier relâche la loi purement ecclésiastique (cf. c. 85), cela signifierait qu’elle dépend d’abord de la volonté de l’autorité compétente et non pas essentiellement de l’amendement du coupable conjointement à la réparation des dommages et du scandale. Ce serait oublier ou négliger la contumace formelle ou virtuelle qui a accompagné la malice propre au délit et qui a donné lieu à la censure.” (Alphonse BORRAS, *Les sanctions dans l’Église*, Paris, Tardy, 1990, p. 126, original emphasis.)

As an aside, it may be remarked that the censure remission process, alleging on slight evidence the reform of the individual, should not be used as a back-door method to correct what to later eyes might seem to have been an improper application of penalties in the first place. If the original process used to impose or declare sanctions was wanting, that defect should be addressed forthrightly, and not achieved by a fiction that the (improperly) punished individuals had since reformed. Benedict alleges no such faults with the 1988 declaration of Lefebvrite excommunications, and indeed none exists, I think, but I mention the possibility for completeness.

<sup>72</sup> *CIC* canon 331. The bishop of the Roman Church, in whom continues the office given by the Lord uniquely to Peter, the first of the Apostles, and to be transmitted to his successors, is the head of the college of bishops, the Vicar of Christ, and the pastor of the universal Church on earth. By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely.

<sup>73</sup> A pope could, but would have no need to in virtue of canon 331, perhaps point to some of the same values that animate canon 1341 and observe that, just as penalties are imposed only as a last resort (and even then, always in accord with the requirements of law), so their remission may be sought as a first resort, albeit again, *in accord with the requirements of law*.

might be a questionable pastoral initiative,<sup>74</sup> and, drawing only on penal canon law and the information publicly available, a remission seems unsupported in a case such as this one, but, if a remission were performed by the Roman Pontiff in virtue of canon 331, it would be of unquestionable legality.<sup>75</sup> Moreover, precisely the same pontifical power would have allowed Benedict to retain Williamson's censure, because the remission of censures in virtue of canon 331 sounds as a favor, not as an act of justice, and as a favor it would be owed to no one.

This is not the place, of course, for a treatise on the papal powers expressed in canon 331, but this much I may suggest: positive law cannot anticipate every eventuality of human conduct with which ecclesiastical authority might someday be faced. Moreover, in pastoral life, the extraordinary is common and consequently, the factors that might move the Successor of Peter to respond one way in this situation, and another way in that, cannot always be known in advance. Without denigrating the great importance of canon law in the life of the Church (indeed, most of this article is premised upon the importance of the correct application of canon law in the Church), the Body of Christ must also, at some level, be able to react to unforeseen eventualities without, on the one hand, conveying the impression of caprice nor, on the other, limiting its responses to the patterns plainly predicted within the law. Canon 331 is an important expression of that radical freedom, and Benedict XVI's action in remitting the excommunications of the Lefebvrite bishops (regardless of how one might feel about the prudence of that decision) was, I suggest, an important demonstration of that freedom.

<sup>74</sup> Pope Benedict XVI certainly recognizes the pastoral appropriateness of penalties in the Church. Commenting on the failure of many bishops to levy sanctions on clergy involved in the sexual abuse of children, the pope remarked: “After the mid-sixties, however, [punishment] was simply not applied any more. The prevailing mentality was that the Church must not be a Church of laws but, rather, a Church of love; she must not punish. Thus the awareness that punishment can be an act of love ceased to exist. This led to an odd darkening of the mind, even in very good people. Today we have to learn all over again that love for the sinner and love for the person who has been harmed are correctly balanced if I punish the sinner in the form that is possible and appropriate. In this respect there was in the past a change of mentality, in which the law and the need for punishment were obscured. Ultimately this also narrowed the concept of love, which in fact is not just being nice or courteous, but is found in the truth. And another component of truth is that I must punish the one who has sinned against real love.” *Light*, pp. 25-26.

<sup>75</sup> Normally, sorting out different levels of hierarchic authority in regard to the remission of censures requires careful attention (see, e.g. CAPPELLO, *De Censuris*, nn. 90-91, pp. 80-81) but these questions are mooted if the remission takes place in virtue of the *papal* authority outlined in canon 331.