

**THE PRESUMPTION OF IMPUTABILITY AND THE PRESUMPTION OF
INNOCENCE:
TWO PRESUMPTIONS IN CONFLICT?**

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ABSTRACT

In *CIC/83*, c. 1321, §1 states the principle often referred to as the presumption of innocence, yet §4 of the same canon states that, once an external violation of a penal law or penal precept has been proven, imputability is presumed. Though the presumption of imputability is less rigorous than the presumption of *dolus* in *CIC/17*, c. 2200, §2, some authors consider the presumption of imputability to be incompatible with the presumption of innocence.

By thoroughly examining the history of presumptions, the concept of the imputability of delicts, and the historical development and content of the presumption of innocence, the Author clarifies the nature of these presumptions and how they function in penal processes. Further insights and clarifications are achieved by analyzing and responding to objections to the presumption of imputability made by J. Provost, T. Green, L. Eusebi, N. Bartone, and P. Skonieczny.

This analysis leads the Author to various conclusions concerning the nature of the presumptions of innocence and imputability and how they are compatible. It is demonstrated that the presumption of innocence is not a true presumption, in the sense of a probable conjecture about an uncertain matter (see c. 1584). Rather, it is a favour of law and/or what E. Labandeira describes as a regulatory precept. It stands above the shifting burden of proof in a penal process. The Author also argues that this favour of law is not contradicted by the presumption of imputability, or even by the earlier presumption of *dolus*, which is still included in *CCEO*, c. 1414, §3. The Author further argues that the presumption of *dolus* in fact remains implicitly in the *CIC/83*.

RÉSUMÉ

Dans le *CIC/83*, c. 1321, §1 énonce le principe souvent appelé la présomption d'innocence, mais le §4 du même canon stipule que, une fois qu'une violation externe d'une loi pénale ou d'un précepte pénal a été prouvée, l'imputabilité est présumée. Bien que la présomption d'imputabilité soit moins rigoureuse que la présomption de dol dans le *CIC/17*, c. 2200, §2, certains auteurs considèrent que la présomption d'imputabilité est incompatible avec la présomption d'innocence.

En examinant en profondeur l'histoire des présomptions, le concept d'imputabilité des délits et le développement historique et le contenu de la présomption d'innocence, l'auteur clarifie la nature de ces présomptions et la manière dont elles fonctionnent dans les procédures pénales. Des éclaircissements supplémentaires sont obtenus en analysant et en répondant aux objections à la présomption d'imputabilité formulées par J. Provost, T. Green, L. Eusebi, N. Bartone et P. Skonieczny.

Cette analyse conduit l'auteur à diverses conclusions concernant la nature des présomptions d'innocence et d'imputabilité et leur compatibilité. Il est démontré que la présomption d'innocence n'est pas une véritable présomption, au sens d'une conjecture probable sur une question incertaine (voir c. 1584). Il s'agit plutôt d'une faveur de la loi et/ou de ce que E. Labandeira décrit comme un précepte réglementaire. Elle se situe au-dessus du renversement de la charge de la preuve dans un processus pénal. L'auteur soutient également que cette faveur de la loi n'est pas contredite par la présomption d'imputabilité, ni même par la présomption antérieure de dolus, qui est toujours incluse dans le *CCEO*, c. 1414, §3. L'auteur soutient en outre que la présomption de dol demeure en fait implicite dans la *CIC/83*.

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ABBREVIATIONS

<i>AAS</i>	<i>Acta Apostolicæ Sedis, Commentarium officiale</i>
<i>C.</i>	<i>Causa</i>
<i>c.</i>	canon
<i>cap.</i>	<i>capitulum</i>
<i>cc.</i>	canons
<i>CCEO</i>	<i>Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus</i>
<i>CIC/17</i>	<i>Codex iuris canonici, Pii X Pontificis Maximi iussu digestus</i>
<i>CIC/83</i>	<i>Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus</i>
<i>CLSA</i>	Canon Law Society of America
<i>CLSA Comm2</i>	J.P. BEAL, J. A. CORIDEN, and T.J. GREEN (eds.), <i>New Commentary on the Code of Canon Law</i>
<i>CLSGBI Comm</i>	G. SHEEHY et al. (eds.), <i>The Canon Law: Letter & Spirit</i>
<i>Comm</i>	PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO), <i>Communicationes</i> , 1969-1983, vols. 1-15
<i>D.</i>	JUSTINIAN, <i>Digesta in Corpus iuris civilis</i>
<i>D.</i>	<i>Distinctio</i>
<i>Exegetical Comm</i>	A. MARZOA, J. MIRAS, R. RODRÍGUEZ-OCAÑA (eds.) and E. CAPARROS (gen. ed. of English translation), <i>Exegetical Commentary on the Code of Canon Law</i>
<i>Extrav. J. XXII</i>	JOHN XXII, <i>Extravagantes</i> , in <i>Corpus iuris canonici</i>
<i>lib.</i>	<i>liber</i>
<i>PCCICOR</i>	PONTIFICIA COMMISSIO CODICI IURIS CANONICI ORIENTALIS RECOGNOSCENDO
<i>PGD</i>	FRANCIS, Apostolic Constitution <i>Pascite gregem Dei</i>

<i>praesumpt.</i>	<i>praesumptio</i>
<i>quaest.</i>	<i>quaestio</i>
<i>Relatio</i>	PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, <i>Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus commissionis ad novissimum Schema Codicis iuris canonici exhibitarum, cum responsibus a secretaria et consultoribus datis</i>
<i>RJ in VI°</i>	GREGORY IX, <i>Regulae iuris</i> , in <i>Liber sextus</i>
X	GREGORY IX, <i>Decretales</i> , in <i>Corpus iuris canonici</i>

GENERAL INTRODUCTION

In the recently revised Book VI of the 1983 *Codex iuris canonici*,¹ an explicit statement of the presumption of innocence is included in c. 1321, §1: “Any person is considered innocent until the contrary is proven.”² Though this principle is known to canonical doctrine and has been implicit in canonical legislation, the explicit statement of it in recent universal law³ has brought a renewed interest in the presumption of innocence and how it is observed in canon law.

Since the presumption of innocence is considered a fundamental right of the accused and a critical institute of penal law, some would argue that there can be no presumption in penal processes that would contradict the presumption of innocence. For this reason, some jurists had previously criticized the presumption of *dolus* that was found in c. 2200, §2 of the *CIC/17*. This presumption directed that, when the objective element of a delict had been proven, *dolus*, which is the deliberate intent to violate the law, was to be presumed until proven otherwise. Since some jurists saw in this a possible violation of the presumption of innocence, the legislator sought to mitigate the presumption in the *CIC/83*. Thus, the current legislation states in c. 1321, §4: “Where there has been an external violation, imputability is presumed, unless it appears otherwise.” This change from the presumption of *dolus* to a presumption of imputability was considered to be a

¹ See FRANCIS, Apostolic Constitution Reforming Book VI of the Code of Canon Law *Pascite gregem Dei*, 23 May 2021, in *AAS*, 113 (2021), 534-537.

² All translations are the author’s unless otherwise indicated.

³ See CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Lettera circolare per aiutare le Conferenze episcopali nel preparare linee guida per il trattamento dei casi di abuso sessuale nei confronti di minori da parte di chierici*, 3 May 2011, I, d, 3, in *AAS*, 103 (2011), 408, English translation in *Origins*, 41 (2011), 42; see FRANCIS, Apostolic Letter Motu Proprio *Vos estis lux mundi*, 7 May 2019, art. 12, §7, in *AAS*, 111 (2019), 830.

significant mitigation of the presumption, yet some canonists have continued to criticize it as still conflicting with the presumption of innocence.

In light of such criticisms, this thesis seeks to answer the question of whether there is in fact a conflict between the presumption of imputability and the presumption of innocence. If there is a conflict, where exactly is the conflict to be found? Since the legislator has chosen to juxtapose these two presumptions in the same canon, how can they be reconciled?

The answer to these questions begins with an examination of the history and use of presumptions in law. The first chapter begins with an overview of the use of presumptions and their meaning in European legal history, beginning with the origins of presumptions in Roman law and proceeding to identify their use and conceptual development through various stages of canonical history. The chapter concludes with an analysis of various types of presumptions.

The second chapter turns to the topic of delicts and their imputability. It contains an explanation of the nature of delicts; their objective, subjective, and juridic elements; and the meaning of imputability and its sources, viz., *dolus* and *culpa*. This provides the necessary foundation for understanding the concept of imputability and the history of the change from a presumption of *dolus* in the *CIC/17* to a presumption of imputability in the *CIC/83*. At this point, it will also be noted that the presumption of *dolus* remains in ecclesiastical legislation by the inclusion of a presumption of deliberateness in *CCEO*, c. 1414, §3.

The third chapter analyzes the history and meaning of the presumption of innocence. An analysis of scholarship on the topic shows that this concept, which is rooted

in natural law, gradually developed throughout European legal history until the legal maxim that one is presumed innocent until proven guilty was first articulated by a medieval canonist, Johannes Monachus. The subsequent history of the presumption of innocence is presented, including the significant emphasis placed on the presumption in modern times. The description of its historical development is followed by an analysis of what is meant by the presumption of innocence in canon law and the various rights and values that it is intended to protect.

Once the history and meaning of these two presumptions has been presented and analyzed in the first three chapters, the fourth and final chapter clarifies the nature of the two presumptions of imputability and innocence and then considers and responds to objections to the presumption of imputability offered by several legal scholars. Having analyzed the arguments of these scholars and responded to their objections, the chapter concludes with a defence of the presumption of *dolus* as expressed in the *CCEO* and argues that the presumption of *dolus* still remains in the *CIC/83*.

CHAPTER 1: PRESUMPTIONS

Introduction

A “presumption” is defined in *CIC/83*, c. 1584 as a “probable conjecture about an uncertain matter.” The definition is so succinct that it would seem to be a relatively simple legal institute to understand and explain; however, much ink has been spilled trying to explain the nature and origin of presumptions in law.¹

In the introduction of Eduardo Labandeira’s book on presumptions in canon law, he provides a definition of presumptions that more fully elaborates its logical function: “The presumption is a logical reasoning in which, starting from one or more previously known facts, one comes to know another fact which till then was doubtful.”² This is in accord with the principle in the *Regulae iuris*: “In uncertain matters we look for that which has the appearance of truth or which is usually likely to occur.”³ The formulation of presumptions is a logical function to which people often turn to make up for deficiencies and limitations in their knowledge. Thus, it is not surprising that presumptions are used in every legal system.⁴

¹ Andreas Alciatus, who wrote one of the early treatises on the subject of presumptions, described the law on the subject to be “*confusa et inextricabilis*.” Subsequent authors in every time have also expressed frustration with the topic. See R. HELMHOLZ and D. SELLAR, “Presumptions in Comparative Legal History,” in ID. (eds.), *The Law of Presumptions: Essays in Comparative Legal History*, Comparative Studies in Continental and Anglo-American Legal History, no. 7, Berlin, Duncker & Humblot, 2009, 9-10; A. SÁNCHEZ-GIL, *La presunzione di validità dell’atto giuridico nel diritto canonico*, Monografie Giuridiche, no. 30, Rome, Giuffrè Editore, 2006, 7-8.

“Presumptions have also been described in a modern textbook on evidence as ‘the slipperiest member of the family of legal terms, except its first cousin, burden of proof’” (C. MCCORMICK, *McCormick on Evidence*, K. Broun et al. [eds.], 7th ed., St. Paul, MN, Thomson Reuters/West, 2013, §342; quoted in R. GAMA, “The Nature and the Place of Presumptions in Law and Legal Argumentation,” in *Argumentation*, 31 [2017], 562).

² E. LABANDEIRA, *Las presunciones en derecho canónico*, Pamplona, Universidad de Navarra, S.A., 1967, 16. See ID., “Las máximas de experiencia en los procesos canónicos,” in *Ius canonicum*, 29 (1989), 261.

³ “Inspicimus in obscuris quod est verisimilius, vel quod plerumque fieri consuevit” (*RJ 45 in VI*^o). Also PAULUS: “In obscuris inspicere solere, quod verisimilius est aut quod plerumque fieri solet” (*D. 50. 17.114*).

⁴ See LABANDEIRA, *Las presunciones en derecho canónico*, 16.

In canon law, presumptions are usually divided between legal presumptions (*praesumptiones iuris*) and human presumptions (*praesumptiones hominis*). Human presumptions are formulated by the judge, whereas legal presumptions are stated in the law. Legal presumptions were traditionally divided into rebuttable legal presumptions (*praesumptiones iuris tantum*) and irrebuttable presumptions (*praesumptiones iuris et de iure*). These concepts and their terminology, however, were developed over a long period of time with much variation and many discrepancies between various authors, both civil and canonical.

This chapter begins with an overview of the history of presumptions in law from their roots in ancient rhetoric to their use and development throughout the history of law on the Continent to the crystallization of the canonical concept in the Codes of Canon Law. The following history does not attempt to be exhaustive since the detail of the vicissitudes of the development of presumptions would require a study of its own. Rather, the focus is on important developments noted by scholars that can provide some idea of the difficulty of understanding and categorizing presumptions in law. This history is followed by a more systematic explanation of the nature and classification of presumptions as it is commonly elaborated in contemporary canonical doctrine.

1.1—Historical Origins of Presumptions in Law

The following account of the historical origins of presumptions begins with a brief examination of the roots of presumptions in Aristotelian and Stoic rhetoric. Then an overview of the development of presumptions from Roman law and into the *ius commune* of Europe is provided.

1.1.1—Presumptions in Ancient Rhetoric and Roman Law

The use of presumptions likely entered Roman law first as a rhetorical device used by advocates in arguing their cases before judges. In the Greek and Roman tradition, proofs were considered to be part of rhetoric.⁵ Aristotle's *Rhetoric*, had a great influence on Quintilian and on the Stoics,⁶ but, as will be seen later, his writing on rhetoric became even more influential on the legal authors who began to write treatises on presumptions in the sixteenth century.⁷

In Aristotle's *Rhetoric*, an important and enduring distinction is made between two different types of proof (πίστεις)—ἔντεχνοι and ἄτεχνοι, which came to be translated as artificial and inartificial proofs, based on the Latin translation of Quintilian.⁸ Inartificial proofs are those which are not produced by dialectical expertise.⁹ Such proofs would include documents, oaths, witnesses, etc.¹⁰ Artificial proofs are arguments that draw conclusions from signs and probabilities.¹¹

The various types of inartificial proofs, which Cicero summarized under the heading of *testimonia*, are passively received by the listener as pieces of evidence, but

⁵ See P. BONNET, "L'argomentazione presuntiva e il suo valore probatorio," in *Presunzioni e matrimonio*, Studi giuridici, no. 98, Vatican City, Libreria editrice Vaticana, 2012, 13-14; A. GIULIANI, "Civilian Treatises on Presumptions, 1580-1620," in R. HELMHOLZ and D. SELLAR (eds.), *The Law of Presumptions* 37-51; P. HUBERT, *De praesumptionibus iurisprudentialibus: Zur Entwicklung ständiger richterlicher Vermutungen in der neueren Rota-Rechtsprechung und deren Anwendung an untergeordneten Gerichten*, Rome, Editrice Pontificia Università Gregoriana, 2009, 14.

⁶ See BONNET, "L'argomentazione presuntiva," 14.

⁷ See GIULIANI, "Civilian Treatises on Presumptions," 38-39. See section 1.1.4.3.

⁸ See *ibid.*; BONNET, "L'argomentazione presuntiva," 14; HUBERT, *De praesumptionibus iurisprudentialibus*, 15, 24.

⁹ See GIULIANI, "Civilian Treatises on Presumptions," 39.

¹⁰ See *ibid.*, 39-40; BONNET, "L'argomentazione presuntiva," 14.

¹¹ See GIULIANI, "Civilian Treatises on Presumptions," 40; BONNET, "L'argomentazione presuntiva," 14; J. MANNING, *Presumptions of Law in Marriage Cases*, Washington, DC, The Catholic University of America, 1935, 10.

Aristotle "divides means of persuasion or proof into the artistic, or that furnished by the speaker, and the nonartistic, or that furnished by external evidence" (J. MURPHY, *A History of the Rhetorical Theory from Saint Augustine to the Renaissance*, Tempe, AZ, Arizona Center for Medieval and Renaissance Studies, 2001, 4).

artificial proofs persuade by a course of reasoning based on an ascertained fact. This is an important distinction because inartificial proofs are passively received, while artificial proofs require an intermediate course of reasoning to arrive at the intended conclusion. The two kinds of proof are thus distinguished based on the mental operation performed by the listener.¹²

Whereas Aristotle was philosophical in his approach to the problem of communication—emphasizing the connection between rhetoric and logic, more interested in the principles of rhetoric rather than its technique—Cicero tends to follow the approach of Aristotle’s contemporary, Isocrates, who saw rhetoric as a branch of politics. Thus, with Cicero and Quintilian, efficiency, or procuring results, is the main criterion of good speech.¹³

The procedural and technical legal meaning of the word procedure was developed by the Stoics: “As evidence was the area of expertise of orators, it is generally accepted that the Stoics transposed the meaning of the corresponding Greek term *πρόληψις* from their theory of evidence onto *praesumptio*.”¹⁴ The use of *praesumptio* as a translation for *πρόληψις* can be found in a letter of Seneca.¹⁵ The Stoics took Aristotle’s category of artificial proofs, designated by the Latin term *argumentationes*, and further divided them into *probabiles* and *necessariae*. The *praesumptiones* were equivalent to the

¹² See GIULIANI, “Civilian Treatises on Presumptions,” 40.

¹³ See MURPHY, *A History of the Rhetorical Theory*, 7-8.

¹⁴ T. KARLOVIĆ, “Propter celeritatem dirimendarum litium—Presumptions and Stipulatio in Roman Law,” in C. VAN RHEE and A. UZELAC, (eds.), *Truth and Efficiency in Civil Litigation: Fundamental Aspects of Fact-finding and Evidence-taking in a Comparative Context*, Cambridge, Intersentia, 2012, 376. See O. GRADENWITZ, “Interpolationen in den Pandekten,” in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 7 (1886), 70; see also G. DONATUTI, “Le ‘praesumptiones iuris’ come mezzi di svolgimento del diritto sostanziale romano,” in *Rivista di diritto privato*, 3 (1933), 165-166.

¹⁵ See SENECA, *Epistolae*, 117, 6; English translation in SENECA, *Epistles: 93-124*, R. GUMMERE (trans.), Loeb Classical Library, no. 77, Cambridge, MA, Harvard University Press, 1925, 340. See also HUBERT, *De praesumptionibus iurisprudentiae*, 23.

argumentationes probabiles.¹⁶ Tomislav Karlović sees in this development the origin of what came to be called the human presumption: “This form of argumentation based on the *communis opinio* with regard to the probability of the existence of one uncertain fact assumed from the fact that is certain was called, in postclassical terminology, *praesumptio facti* or *praesumptio hominis*, because it was founded solely on probability or on the persuasiveness of the facts.”¹⁷

Labandeira considers it safe to conclude that there are no true legal presumptions during the classical period.¹⁸ The arguments based on “common opinion” indicate that the opinions of jurists of the classical period were recognized as having some normative value. In most cases, these are not examples of reasoning from a known fact to an unknown fact but rather rules for interpreting people’s will or thoughts.¹⁹

1.1.1.1—The Classical Period of Roman Law

Throughout the greater part of Roman legal history, from the Twelve Tables until the third century A.D., civil procedure was divided into two main parts: “the first part (*in iure*) took place before the *praetor*, who decided on the admissibility of a case, i.e. whether the alleged conduct constituted a violation of a legally recognised right; the second part (*apud iudicem*) took place before a judge, whose primary role was to rule on the matter of

¹⁶ See CICERO, *De inventione*, I, 44, English translation CICERO, *De inventione*, H. HUBBELL (trans.), Cambridge, MA, Harvard University Press, 1949, 82; SÁNCHEZ-GIL, *La presunzione di validità*, 17; KARLOVIĆ, “Propter celeritatem dirimendarum litium,” 376.

¹⁷ KARLOVIĆ, “Propter celeritatem dirimendarum litium,” 376.

¹⁸ See LABANDEIRA, *Las presunciones en derecho canónico*, 26. See also A. D’ORS, *Derecho privado romano*, 10th ed., Pamplona, Ediciones Universidad de Navarra, S.A., 2004, 163.

¹⁹ “[V]ale la pena sottolineare ai nostri fini che si tratta nella maggior parte dei casi di regole d’interpretazione della volontà o del pensiero delle persone, seppure non mancano deduzioni di fatti a partire da altri fatti” (SÁNCHEZ-GIL, *La presunzione di validità*, 18). See R. MOTZENBÄCKER, *Die Rechtsvermutung im kanonischen Recht*, Munich, Kommissionsverlag Karl Zink, 1958, 31-32.

facts.”²⁰ Oftentimes, this judge, known as a *iudex privatus*, was not trained in law and was not bound by any codified procedure or rules of evidence. He had great freedom in assessing evidence in a case. He only evaluated the evidence according to his own good judgment.²¹ It is reasonable to assume that the *iudex privatus* would make use of human presumptions in evaluating evidence.²²

There is great difficulty in ascertaining the specific origins of the presumption of law in Roman law because, during the classical period of Roman law, there were no laws governing the process before the *iudex privatus*. In Labandeira’s study of presumptions in the classical period, he notes that the use of the word “*praesumere*” is used only as an equivalent to “*credere*,” “*opinare*,” as a mere expression of opinion, not as a technical term denoting a presumption stated in the law.²³

There are in the classical period certain norms that favour a particular solution. Labandeira gives the example in testamentary law where, if there is any doubt about whether a testator intended to grant freedom to his slave, the law inclines toward freedom having been granted. In this situation, however, there is not a true presumption that the testator intended to emancipate. Rather, the law is inclined to a particular outcome that is considered more beneficial to society and more equitable. Labandeira writes: “Therefore, the act of will is not presumed, but the law establishes an exhaustive norm.”²⁴

²⁰ KARLOVIĆ, “Propter celeritatem dirimendarum litium,” 375.

²¹ See LABANDEIRA, *Las presunciones en derecho canónico*, 23-24; KARLOVIĆ, “Propter celeritatem dirimendarum litium,” 375-376; SÁNCHEZ-GIL, *La presunzione di validità*, 14-15. See also R. DECOTTIGNIES, *Les présomptions en droit privé*, Paris, Librairie générale de droit et de jurisprudence, 1950, 29; P. BONFANTE, *Istituzioni di diritto romano*, 10th ed., Turin, Giappichelli, 1946, 131-132; HUBERT, *De praesumptionibus iurisprudentiae*, 28.

²² See LABANDEIRA, *Las presunciones en derecho canónico*, 23.

²³ See *ibid.*, 25; KARLOVIĆ, “Propter celeritatem dirimendarum litium,” 376; A. BUSSO, “Algunas consideraciones acerca de las presunciones jurídicas: Aportes de la filosofía del derecho canónico,” in *Anuario Argentino de derecho canónico*, 14 (2007), 74; SÁNCHEZ-GIL, *La presunzione di validità*, 12.

²⁴ LABANDEIRA, *Las presunciones en derecho canónico*, 25.

There can also be found examples of rules of interpretation that would appear to be early examples of presumptions of law. Labandeira gives an example of a principle articulated by Ulpianus that, when the quantity of a debt is doubted, “we always follow the lesser amount in uncertain cases”²⁵ unless the plaintiff can prove that the amount of the debt was higher. Labandeira notes, however, that this and other such rules of interpretation are not examples of true legal presumptions because they do not allude to a presumed will. Rather they contain a legal norm that, as is seen in the stated example, one is bound by the words one uses and must comply with what is expressed in them.²⁶

Some scholars assert that there was one presumption in classical times that would eventually come to constitute a legal presumption, though it does not use the term *praesumptio*.²⁷ Hanns Hohmann, in an article that discusses the origin of presumptions writes of a Roman jurist around the turn of the second to the first century B.C., Quintus Mucius Scaevola, who argued with regard to widows that “when it is not clear where the property has come from, it is more correct and decent to hold that she got it from her husband or someone in his power.”²⁸ A later jurist of the second century A.D., Pomponius, who makes mention of this contribution, added the comment that “Quintus Mucius appears to have taken this view in order to avoid any disgraceful inquiry involving a wife.”²⁹

²⁵ “Semper in obscuris quod minimum est sequimur” (*D.* 50.17.9, quoted in *ibid.*, 25).

²⁶ See LABANDEIRA, *Las presunciones en derecho canónico*, 25-26.

²⁷ See HUBERT, *De praesumptionibus iurisprudentiae*, 31-34.

²⁸ Quoted in H. HOHMANN, “Presumptions in Legal Argumentation: From Antiquity to the Middle Ages,” in H. HANSEN, et al. (eds.), *Presumptions and Burdens of Proof: An Anthology of Argumentation and the Law*, Tuscaloosa, AL, The University of Alabama Press, 2019, 24-25.

²⁹ *D.* 24.1.51, quoted in *ibid.*, 25.

“Pomponius’ explanation makes it clear that moral propriety (or at least its appearance), rather than factual accuracy, is the ultimate concern here: an inquiry might unearth further information, but it is to be replaced by a presumption in favor of the wife, in order to spare her from embarrassment. A proper Roman matron does not accept gifts from strangers, and therefore the Roman jurists are prepared to assume without further investigation that unexplained property comes from the husband” (H. HOHMANN, “Presumptions in Roman Legal Argumentation,” in *Ontario Society for the Study of Argumentation Conference Archive*, 61,

Hohmann notes that this example attributed to Quintus Mucius Scaevola is a model for presumptions: “Legal presumptions take as their starting point an established fact (in the example: a married woman holds property of uncertain origin) and then draw from this a conclusion about an uncertain matter (here: the origin of the property, which is presumed to have come from the husband).”³⁰ Karlović also mentions this as the sole example of a true presumption: “The only undisputed exception represents the *praesumptio Muciana* as a legal presumption, while the other cases of alleged presumptions were convincingly refuted as rules of interpretation. The problem is that in the classical Roman sources *it is sometimes very difficult to draw the line between rules of interpretation and presumptions* since there was no systematic division of substantive and procedural law in this area.”³¹

1.1.1.2—The Imperial Period of Roman Law

From the first century A.D., significant innovations took place in Roman procedural law with the appearance of the third system of procedure in Roman law, the *cognitio extraordinaria*.³² With this procedure, one can see that the administration of justice became a state function. Private judges were no longer entrusted with deciding litigation. They were replaced by magistrates who were public officials that direct the judicial process.³³

http://scholar.uwindsor.ca/ossaarchive/OSSA4/papersandcommentaries/61?utm_source=scholar.uwindsor.ca%2Fossaarchive%2FOSSA4%2Fpapersandcommentaries%2F61&utm_medium=PDF&utm_campaign=PDFCoverPage, 7 [16 May 2025]).

³⁰ HOHMANN, “Presumptions in Legal Argumentation,” 25.

³¹ KARLOVIĆ, “Propter celeritatem dirimendarum litium,” 376, n. 8 [emphasis added].

³² See *ibid.*, 377.

³³ See LABANDEIRA, *Las presunciones en derecho canónico*, 26; KARLOVIĆ, “Propter celeritatem dirimendarum litium,” 377; M. KASER, *Das römische Zivilprozessrecht*, Munich, C.H. Beck’sche Verlagsbuchhandlung, 1966, 339-518; HUBERT, *De praesumptionibus iurisprudentiae*, 28-29.

The magistrate's authority was seen to be derived from the emperor, who in this period assumed legislative and jurisdictional powers.³⁴ The judge was obliged to adopt the solution indicated by the emperor, which he usually based on the doctrine of deceased jurists. Labandeira speculates that it could be that legal presumptions find their origin where what in classical times was an authoritative opinion now had the force of law since it was supported by the authority of the emperor, but likely only a solution with legal force for a specific case without any relation to procedure.³⁵ Antonio Sánchez-Gil noted that it was only at this point when the private judges were replaced by trained magistrates that legal presumptions were even possible: "The existence of legal presumptions is only possible in a system in which the judge has the duty to give his opinion, the trial is regulated by law and there are normative rules on evidence. And this only occurred in the post-classical period."³⁶

Sánchez-Gil also noted that, during this period, certain "imposed suppositions" can be found in Roman law. Some of these presumptive suppositions became legal presumptions in the post-classical period, but some of the other suppositions of this period were what would come to be known as legal fictions.³⁷

³⁴ See SÁNCHEZ-GIL, *La presunzione di validità*, 20; LABANDEIRA, *Las presunciones en derecho canónico*, 27.

³⁵ "Pero lo más probable es que se trata solo de una solución con fuerza legal, para un caso determinado, sin relación alguna con la prueba procesal" (LABANDEIRA, *Las presunciones en derecho canónico*, 27).

³⁶ "In realtà, com'è stato detto, l'esistenza di presunzioni legali è possibile unicamente in un sistema in cui il giudice ha il dovere di pronunciarsi, il processo è regolato dalla legge e ci sono regole normative sulla prova. E ciò si ebbe soltanto in epoca post-classica" (SÁNCHEZ-GIL, *La presunzione di validità*, 15).

³⁷ A frequently noted legal fiction was that a prisoner of war who died before returning home was legally considered to have died before capture. This is because a prisoner of war lost his legal rights, which would result in the nullification of his will. The legal fiction avoided injustice to the prisoner's heirs by declaring the fiction that he had died before capture. See SÁNCHEZ-GIL, *La presunzione di validità*, 20-21; D. 49.15.18.

During this period, legal presumptions can be recognized in Roman law sources by the use of the phrase *nisi speciliater adprobetur*. Karlović noted: “The difference between evidence (*probatio*) and presumptions, more exactly *praesumptiones iuris*, are the only truly legally relevant presumptions.”³⁸ Since the term “*praesumptio*” is often associated with the terms “*probatio*” and “*approbatio*” in the *Corpus iuris civilis*, Guido Donatuti drew the conclusion that a legal presumption could be characterized as a juridic norm that orders a fact whose existence is doubtful to be admitted in the trial as proven until there is proof to the contrary.³⁹ Legal scholars in the 19th century, however, have determined that “this connection is not found in classical texts, but was the work of Byzantine compilers.”⁴⁰ It is only at the time of Justinian that the presumption would be clearly recognized as an element of procedure.⁴¹

1.1.1.3—Justinianic Law

True legal presumptions begin to appear in Roman law with the publication of Justinian’s *Digest* and *Code*,⁴² though one does not find “a consecutive or coherent treatment of procedural law” in either the *Code* or the *Digest*.⁴³ There is in the *Code* a

³⁸ KARLOVIĆ, “Propter celeritatem dirimendarum litium,” 377.

³⁹ See G. DONATUTI, “Le ‘praesumptiones iuris’ in diritto romano,” in *Annali della Facoltà di Giurisprudenza di Perugia*, 43 (1931), 6; A. SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” in *Ius ecclesiae*, 24 (2013), 13, n. 10.

⁴⁰ SÁNCHEZ-GIL, *La presunzione di validità*, 13. See also C. FERRINI, *Le presunzioni in diritto romano*, Rome, Ermanno Loescher & C., 1898, 34-36.

⁴¹ SÁNCHEZ-GIL, *La presunzione di validità*, 13.

⁴² See LABANDEIRA, *Las presunciones en derecho canónico*, 27; BUSSO, “Algunas consideraciones,” 74; HUBERT, *De praesumptionibus iurisprudentialibus*, 33-34.

⁴³ K. NÖRR, “On the Early History of *prima facie* Evidence in German Law,” in R. HELMHOLZ and D. SELLAR (eds.), *The Law of Presumptions: Essays in Comparative Legal History*, Comparative Studies in Continental and Anglo-American Legal History, no. 7, Berlin, Duncker & Humblot, 2009, 78. See B. SHAPIRO, “Presumptions in the Anglo-American Legal Tradition 1500-1900,” in R. HELMHOLZ and D. SELLAR, (eds.), *The Law of Presumptions*, 155; H. HOHMANN, “The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation,” in *American Journal of Jurisprudence*, 34 (1989), 171-197.

section entitled *De probationibus* and, in the subsequent *Digest*, Book 22, Title 3, the expanded title *De probationibus et praesumptionibus*. Because of this placement, throughout the development of the *ius commune*, presumptions have continued to be treated in connection with the law of proof.⁴⁴ Karlović wrote: “Although there are only three presumptions in this title, this is understandable as the title in itself represented an innovation and the other presumptions, concerning the problems of *commorientes*, paternity, inheritance, etc., were left in the appropriate titles where their *sedes materiae* was situated.”⁴⁵ Though there was no comprehensive law governing proofs at this time and no definition of presumptions, there was the emergence of clear legal provision for presumptions that prevailed until the contrary evidence was provided.⁴⁶

There are several uses of the terms *praesumere* and *praesumptio* in the *Corpus iuris civilis* that refer to popular opinion or the subjective thinking of individuals. These judgments are based on the common person’s experiences and make inferences based on the known circumstances. Based on a certain external fact, inferences are made based on probability, in light of experience. Yet they have a provisional nature since they are based on conjecture rather than knowledge.⁴⁷ These would seem to be the forerunners of human presumptions.

⁴⁴ See K. NÖRR, “On the Early History of *prima facie* Evidence in German Law,” 79; KARLOVIĆ, “Propter celeritatem dirimendarum litium,” 377; H. BURCKHARD, *Die civilistischen Präsumtionen*, Weimar, Landes-Industrie-Comptoir, 1866, 67-74; BUSSO, “Algunas consideraciones,” 74.

⁴⁵ KARLOVIĆ, “Propter celeritatem dirimendarum litium,” 377. Karlović locates the three presumptions at *D.* 22.3.9; *D.* 22.3.24; *D.* 22.3.25pr. See also GRADENWITZ, “Interpolationen in den Pandekten,” 73, 73; DONATUTI, “Le ‘praesumptiones iuris’ in diritto romano,” 45-46, 49, 90.

⁴⁶ See LABANDEIRA, *Las presunciones en derecho canónico*, 29, citing J. HEDEMANN, *Las presunciones en el derecho*, M. SANCHO SERAL (trans.), Madrid, Revista de Derecho Privado, 1931, 18. See also D’ORS, *Derecho privado romano*, 185; MOTZENBÄCKER, *Die Rechtsvermutung*, 4, 7.

⁴⁷ See MOTZENBÄCKER, *Die Rechtsvermutung*, 11-12.

Some other uses of *praesumere* and *praesumptio* are more akin to true legal presumptions. Some of these provisions were based on evidence while others were not. An example of a presumption that was not based on evidence was that pertaining to a slave woman who was promised her freedom in the event that her first child was a boy. If she gave birth to twins and it was certain that the girl was born first, then she would not have her freedom; however, if there was no way to verify whether the girl or the boy was born first, then it would be presumed that the boy was born first, and she would be free. This provision is based not on probability but on the judgment that it is more humane.⁴⁸

There are also other presumptions that are based on evidence. An example is found in Justinian's *Codex* dealing with the situation of debtors who, in doubt about the amount they owed, paid more than necessary. The *Codex* stated this presumption: "We decree that all those who have paid while uncertain whether or not they owed the money, or anything else which they gave, should not be denied the right of recovery, and that the presumption of a compromise should not be alleged against them, unless this was specifically established by the adverse party."⁴⁹ Some other examples of presumptions, however, do not have a *nisi* clause.⁵⁰ There are also other presumptions that use the word *crederi* or *opinari* rather than *praesumere*.⁵¹

It is apparent that Roman law under Justinian took a significant step toward the concept of legal presumptions. As Rudolf Motzenbäcker wrote, "The relatively new

⁴⁸ See *D.* 34.5.10 (11). 1. See also *ibid.*, 14.

⁴⁹ "Quod nos decidentes sancimus omnibus, qui incerto animo indebitam dederunt pecuniam vel aliam quandam speciem persolverunt, repetitionem non denegari et praesumptionem transactionis non contra eos induci, nisi hoc specialiter ab altera parte approbetur" (C. 4.5.11, English translation S. SCOTT, *The Civil Law*, vol. 13, Cincinnati, The Central Trust Company, 1932, 11). See MOTZENBÄCKER, *Die Rechtsvermutung*, 14-15.

⁵⁰ See MOTZENBÄCKER, *Die Rechtsvermutung*, 15-16.

⁵¹ See *ibid.*, 18-19.

characteristic of this legal institute is the fact that a certain presumption is prescribed by law if certain conditions are met. The presumption is binding as long as the prerequisites are present and, since every presumption must naturally give way to the truth, as long as the opposite is not fully proven.”⁵² Legal presumptions then came to be accepted in Roman law and the legal systems derived from Roman law, though there was not yet any general theory formulated regarding legal presumptions or their relationship with the burden of proof.⁵³ Part of the reason for the lack of a systematic law on proofs is because Roman law was mostly substantive law with very little regulation of procedure. Thus, legal presumptions were found in substantive law without a particular connection to a system of procedure.⁵⁴

Sánchez-Gil makes the important observation that presumptions in Justinianic law were often related to internal states of persons: “Many times a specific intention is presumed; thus the legal rule which prescribes that something must be considered effective

⁵² “Das Typische an diesem damals in etwa neues Rechtsinstitut ist der Umstand, daß eine bestimmt bezeichnete Vermutung bei Vorliegen gewisser Voraussetzungen gesetzlich vorgeschrieben ist. Die Vermutung ist verbindlich, sooft die Voraussetzungen vorhanden sind und, da jede Vermutung naturgemäß der Wahrheit weichen muß, solange das Gegenteil nicht voll bewiesen ist” (MOTZENBÄCKER, *Die Rechtsvermutung*, 42). See also *ibid.*, 22; SÁNCHEZ-GIL, *La presunzione di validità*, 12, 23-24.

⁵³ “Entonces la presunción legal tomó carta de naturaleza en el Derecho romano y en todas las demás legislaciones que de él se derivaron. Pronto la nueva técnica habría de alcanzar una profusión extraordinaria, aunque no se llegó a formular una teoría general, ni menos a encuadrarla dentro de la cuestión de la carga de la prueba” (LABANDEIRA, *Las presunciones en derecho canónico*, 28). See MOTZENBÄCKER, *Die Rechtsvermutung*, 24, 29, 42.

There is no evidence in Justinianic law, however, of the presumption *iuris et de iure*, though forerunners of such presumptions can be found, for example, in *D. 38.16.3.11* where a child is not considered to be a legitimate heir if born ten months after the death of the father. See LABANDEIRA, *Las presunciones en derecho canónico*, 28-29; MOTZENBÄCKER, *Die Rechtsvermutung*, 25-29, 44.

⁵⁴ “Tali norme tuttavia erano concepite come disposizioni di natura singolare senza un rapporto diretto con un determinato sistema generale di prova. In realtà il diritto romano era un diritto eminentemente sostanziale, che si occupò poco di diritto processuale e, in maniera solo marginale, dei problemi generali riguardanti la prova” (SÁNCHEZ-GIL, *La presunzione di validità*, 24).

until the contrary has been proven will be applied in all cases in which a will or a thought has in any case existed, but it is doubtful in which direction they were really oriented.”⁵⁵

1.1.2—The Glossators

Presumptions in law have their roots in Roman law sources, but they underwent significant change and development throughout the Middle Ages, initially among the scholars of Roman law known as the legists and glossators.⁵⁶ The writings of the Glossators are important for the study of presumptions because during this time, there was a constant sharing between canonical and Roman legal scholars as canonists cited Roman law and legists cited canon law.⁵⁷

In the *Corpus iuris civilis*, the presumption was considered primarily as a procedural institute.⁵⁸ In his glosses on the *Corpus iuris civilis*, Irnerius, whom Motzenbäcker refers to as the father of the legal theory of evidence, comments on several presumptions and refers to their provisional nature that is clear from the use of formulas such as *nisi aliud probetur*.⁵⁹ Rogerius and Placentinus wrote about the relationship between presumptions and the burden of proof, with Placentinus beginning to distinguish presumptions by reason of their author.⁶⁰ Pillius provided a model for all subsequent

⁵⁵ “Molte volte si presume una determinata intenzione: così la regola giuridica che prescrive che una cosa deve essere considerata effettiva fin quando non si sia provato il contrario sarà applicata in tutti i casi in cui una volontà o un pensiero sono comunque esistiti, ma si dubita in quale direzione si siano realmente orientati” (SÁNCHEZ-GIL, *La presunzione di validità*, 26).

⁵⁶ See MOTZENBÄCKER, *Die Rechtsvermutung*, 46.

⁵⁷ See *ibid.*

⁵⁸ See *ibid.*, 147.

⁵⁹ See *ibid.*, 47-48.

⁶⁰ See *ibid.*, 58, 60.

writings on presumptions by starting with a definition of the general concept followed by distinctions of different types of presumptions.⁶¹

During the time of the Glossators, legal presumptions are clearly distinguished from human presumptions, and legal presumptions are divided into simple legal presumptions (*iuris tantum*) and irrebuttable legal presumptions (*iuris et de iure*). The exact originator of the designation *iuris et de iure* is unknown, but it first appears in the writings of the glossator Azo of Bologna, who wrote at the point when the development of terminology had come to an end in civil law.⁶² This distinction became standard in the writings of this period. Bernard of Pavia, at the end of the eleventh century, began to refer to presumptions that are of sufficient weight for a judge to render a sentence as “violent” (*violentae*) presumptions. Soon all legal presumptions would be designated as violent presumptions and, eventually, irrebuttable presumptions would be set apart in a separate category as “necessary” presumptions.⁶³

The glossators also originated the concept of full proof, as opposed to half proof or partial proof. A full proof, e.g., the testimony of two witnesses, is sufficient to render a sentence, yet even full proof could be disproven by stronger evidence. All other evidence that is not sufficient to issue a sentence is considered a partial proof, e.g. indices,

⁶¹ See *ibid.*, 63.

⁶² “Dans l’œuvre d’Azo une terminologie est forgée: on appelle ‘iuris tantum’ ou ‘iuris, legis, canonis’ la présomption légale ordinaire. La présomption contre laquelle aucune preuve n’est admise porte le nom de ‘iuris et de iure’ (qui est du reste antérieur à Azo, sans que l’on puisse savoir qui l’a inventée). Ces expressions devaient être unanimement adoptées, malgré leur manque total de logique et de clarté” (J. LEVY, *La hiérarchie des preuves dans le droit savant du moyen-âge: depuis la renaissance du droit romain jusqu’à la fin du XIVe siècle*, Annales de l’Université de Lyon, Paris, Librairie du recueil Sirey, 1939, 64). See MOTZENBÄCKER, *Die Rechtsvermutung*, 52, 71.

⁶³ “Dès Bernard de Pavie à la fin du XIIe siècle, on emploie le mot de ‘praesumptio violenta’ (ou ‘vehemens’) pour désigner celle dont la force est suffisante pour permettre au juge de rendre une condamnation. Les présomptions légales seront toutes ‘violentae’. Mais certains auteurs vont faire dans cette classe une place à part à la présomption irréfragable, ou bien la mettre à part au-dessus de la catégorie entière” (LEVY, *La hiérarchie des preuves*, 65).

presumptions, conjectures, adminicles (*adminiculi*). Also, several partial proofs could be enough to achieve the requisite proof for a sentence.⁶⁴

These partial proofs were significant for the history of legal presumptions because they would come to be referred to as having a value *ad praesumptionem*. Such presumptions, which included legal presumptions properly so-called, were not sufficient for a conviction because of the principle that proof overcomes a presumption.⁶⁵ “Some authors will call it ‘quasi probatio’ or ‘probatio ficta’ as opposed to ‘probatio vera’ whose force is complete.”⁶⁶

Among the partial proofs one finds the probable (*probabilis* or *verisimilis*) presumption. It is lower in the hierarchy of presumptions than the violent presumption, which constitutes full proof. They are all examples of human presumptions, including presumptions of fact or of nature.⁶⁷

1.1.3—The *Corpus iuris canonici*, the Decretists, and the Decretalists

Just as presumptions were developing in Roman law without there yet being a general theory of presumptions, the same can be seen in the development of canon law. In various parts of the *Corpus iuris canonici*, one finds various presumptions, but no systematic description of the various types of presumptions and their function as proofs. It

⁶⁴ “Au-dessous de la ‘probatio plena’, la seule qui puisse servir de fondement suffisant aux jugements, on trouve dans la hiérarchie médiévale d’autres moyens, désignés par des noms variables: ‘probatio semiplena’, indices, présomptions, conjectures, adminicules. Tous ne jouissent pas d’une autorité égale, et des distinctions sont nécessaires au sein de cette catégorie. Du moins tous ont ceci de commun qu’ils sont insuffisants pour réaliser une preuve complète, mais qu’ils valent tout de même les cumuler pour leur faire produire un plein effet” (LEVY, *La hiérarchie des preuves*, 106).

⁶⁵ See LEVY, *La hiérarchie des preuves*, 107.

⁶⁶ “Certains auteurs l’appelleront ‘quasi probatio’ ou ‘probatio ficta’ par opposition à la ‘probatio vera’ dont la force est complète” (LEVY, *La hiérarchie des preuves*, 107).

⁶⁷ See LEVY, *La hiérarchie des preuves*, 109.

is only over time that canonical doctrine began to develop these presumptions, and little by little, canonists began to formulate a general doctrine of presumptions, examining their role as a means of proof in canonical procedure.⁶⁸

Before 1170, legal presumptions were not yet considered separately from presumptions in general. Though there were references to presumptions and their relationship to the burden of proof, presumptions were considered in the context of circumstantial evidence. Though the concept of presumption was certainly not unknown among canonists, it became more prominent in the period after Gratian's *Decretum*. Yet, in Motzenbäcker's judgment, the recognition of legal presumptions was hindered among both legists and canonists due to the emphasis on presumptions as a type of proof.⁶⁹

Over the course of the development in legal doctrine on presumptions, there was, after 1168, a transition from the tendency to distinguish and categorize presumptions by reason of their object to distinguishing and categorizing them by reason of their author. Once this had occurred, the legal presumption could take its place in legal thought and be divided into rebuttable and irrebuttable presumptions.⁷⁰

By the end of this period, both legal presumptions and rules of evidence were viewed as types of proof.⁷¹ Though recent authors may prefer to distinguish rules of evidence from presumptions, since rules of evidence have no relationship to probability,⁷² the two were interchangeable during this period and still are today in some instances.

⁶⁸ See LABANDEIRA, *Las presunciones en derecho canónico*, 30.

⁶⁹ "Die stark beweisrechtliche Betrachtung der Vermutungen in beiden Schulen behinderte die Erkenntnis der Eigenständigkeit der gesetzlichen Vermutung" (MOTZENBÄCKER, *Die Rechtsvermutung*, 147).

⁷⁰ See MOTZENBÄCKER, *Die Rechtsvermutung*, 147-148.

⁷¹ *Ibid.*, 149.

⁷² See section 4.1 and subsections.

The following subsections examine the development and gradual clarification of presumptions in the various sections of the *Corpus iuris canonici* and in other texts, such as the writings of some of the decretists and decretalists.⁷³

1.1.3.1—Gratian’s *Decretum* (1140)

There are no legal presumptions in Gratian’s *Decretum*.⁷⁴ There are, interestingly, a couple of warnings against what could be considered human presumptions. One example that Labandeira identifies has to do with suspicion against one’s bishop. It is referred to as a *domestica praesumptio* and prohibits a bishop’s subjects from believing that they have the right to judge their pastors without serious indications of guilt.⁷⁵ Hubert, however, disagrees with Labandeira and asserts that the use of *praesumptio* in this text is equivalent to “opinion” and “perception” rather than presumption in the technical sense of the term.⁷⁶

⁷³ Only the works of relatively few jurists are mentioned in the following subsections. For a very thorough and detailed analysis of the historical development of presumptions in canon law, see MOTZENBÄCKER, *Die Rechtsvermutung*, 3-205.

⁷⁴ See LABANDEIRA, *Las presunciones en derecho canónico*, 30-31; R. HELMHOLZ, “The Law of Presumptions and the English Ecclesiastical Courts,” in ID. and D. SELLAR (eds.), *The Law of Presumptions: Essays in Comparative Legal History*, Comparative Studies in Continental and Anglo-American Legal History, no. 7, Berlin, Duncker & Humblot, 2009, 138; MOTZENBÄCKER, *Die Rechtsvermutung*, 3; HUBERT, *De praesumptionibus iurisprudentialiae*, 43.

⁷⁵ “Se califica a la sospecha contra los obispos como «domestica praesumptio», para rechazarla. Se prohíbe que los súbditos se irroguen el derecho de juzgar y censurar a sus pastores, basándose en leves indicios. Esa presunción temeraria de hombre no solo es jurídicamente irrelevante, sino también moralmente condenable” (LABANDEIRA, *Las presunciones en derecho canónico*, 31; citing C. 6., q. 1, c. 9). See also BUSSO, “Algunas consideraciones,” 74.

⁷⁶ “Bei einer genauen Übersetzung des Diktums stellt man fest, dass hier *praesumptio* nicht in einem negativen Sinn gebraucht wird und sich nicht direkt auf das Vorausgehende bezieht. Deshalb ist der Auffassung Labandeiras zu widersprechen, der die *domestica praesumptio* des Diktums mit der *suspicio* des c. 9 gleichsetzt. *Praesumptio* wird hier zwar im Sinn von *Meinung, Auffassung*, jedoch nicht im technischen Sinn von *Vermutung* gebraucht“ (HUBERT, *De praesumptionibus iurisprudentialiae*, 42).

1.1.3.2—The *Summula de praesumptionibus (Perpendicularum)*

Before the *Summula de praesumptionibus*, which was written around 1175, canonists did not know the concept of the legal presumption, only the human presumption.⁷⁷ Though basing canonical theory on the foundation laid by Irnerius, canon law developed its own doctrine of presumptions and arrived at distinctions of presumptions by reason of their author (as opposed to their object) earlier than the Roman law jurists.⁷⁸ The *Summula*, also known as the *Tractatus de praesumptionibus* or the *Perpendicularum*, was the first systematic treatment of presumptions in canon law and applied the insights and distinctions of scholastic philosophy to the topic.⁷⁹

Perhaps inspired by the writings of Placentinus, the unknown author of the *Tractatus* distinguished presumptions according to their authors. He also introduced the concept of the irrebuttable presumption.⁸⁰ The work stated that presumptions are used in matters of uncertainty and then proceeded to divide presumptions according to their author into the categories of *praesumptiones iudicis* and *praesumptiones legis*. These terms were not new, since *praesumptiones iudicis* were already mentioned by Stephen of Tournai and *praesumptiones legis* were mentioned by Placentinus; however, the combination of these designations and the development in the meaning given to *praesumptiones legis* was important.

In the *Tractatus* it is clear that *violentae praesumptiones iudicis* are so significant that a judgment must conform to them, unless there is contrary proof, and the

⁷⁷ See MOTZENBÄCKER, *Die Rechtsvermutung*, 86.

⁷⁸ See *ibid.*

⁷⁹ See *ibid.*, 93-95. See also D. DE CONCILIO, “Soggettività e qualificazione del fatto. L’indagine del *factum intrinsecum* tra diritto e teologia nel XII secolo: due casi di studio e spunti per una ricerca,” in *Historia et ius*, 22 (2022), paper 9, 1-42.

⁸⁰ See MOTZENBÄCKER, *Die Rechtsvermutung*, 93, 149.

praesumptiones iuris are divided into those that are rebuttable and those that are not.⁸¹ Though modern doctrine indicated that an irrebuttable presumption could be undermined indirectly, the conceptual distinction between direct and indirect evidence was not articulated until the early thirteenth century *Ordo “Scientiam”* was written, though the terminology would not be developed until later.⁸²

1.1.3.3—The Decretists

The jurists who commented on Gratian’s *Decretum*, known as the decretists, made important contributions to the development of the canonical doctrine on presumptions. Certain decretists wrote more substantial texts on presumptions, while others made occasional comments that, nevertheless, represented significant progress in the canonical doctrine of presumptions. For example, the comments of Rufinus represented a significant progress in the canonical doctrine of presumptions when he began to differentiate the weight of presumptions based on their persuasive force.⁸³ Simon of Bisignano began to refer to the *praesumptio iudicis* as the *praesumptio hominis*, and Peter of Blois began to refer to the *praesumptio legis* as the *praesumptio iuris*.⁸⁴

In subsequent years, canonists wrote works on the topic of presumptions and cited Roman law more and more to explain the legal presumption. The relation between the legal presumption and the burden of proof was regularly taught in canonical studies during this period.⁸⁵ Around 1215, Damasus Boemus was probably the first canonist to contrast the

⁸¹ See *ibid.*, 98.

⁸² See *ibid.*, 150.

⁸³ See *ibid.*, 88-89.

⁸⁴ See *ibid.*, 102, 108.

⁸⁵ See *ibid.*, 114.

legal presumption with the legal fiction, though fiction and presumption continued to be used in the same sense in the thirteenth century.⁸⁶ Other canonists, like Huguccio and Stephen of Tournai, made substantial contributions as well.

In his *Summa*, Huguccio often referred to presumptions and distinguished between legal presumptions and human presumptions, which he also called presumptions of fact. Huguccio saw both kinds of presumptions as being part of the same concept of presumption but considered the human presumption to give way to contrary evidence while the legal presumption did not admit of contrary proof.⁸⁷

Huguccio also provided a description of three weights of presumptions based on the strength of evidence. He wrote of the *praesumptio temeraria*, which he also called *probabilis* or *mediocris*; the *praesumptio violenta*, also called *magna*; and the *praesumptio violentissima* or *vehementissima*.⁸⁸

Huguccio, when writing on penal law, began to equate the terms *suspicio* and *praesumptio*.⁸⁹ He ranked suspicions the same way that he ranked presumptions. In this way, the idea of suspicion, which pertains to circumstantial evidence of a crime, became united with presumptions.⁹⁰

Stephen of Tournai was the first in the canonical tradition to begin to distinguish presumptions according to their author. He did not, however, use the term *praesumptio hominis* and was not familiar with the technical term *praesumptio iuris*.⁹¹ This is an

⁸⁶ See *ibid.*, 114, 148-149.

⁸⁷ See *ibid.*, 117, 120; HUBERT, *De praesumptionibus iurisprudentiae*, 44.

⁸⁸ See MOTZENBÄCKER, *Die Rechtsvermutung*, 120.

⁸⁹ See *ibid.*

⁹⁰ See *ibid.*, 120-121.

⁹¹ See *ibid.*, 90.

example of the lack of standardized terminology and concepts that would continue for a long time in the canonical history of presumptions.

1.1.3.4—Tancred of Bologna

In his *Ordo iudiciarius*, Tancred of Bologna gave the first general definition of presumption within the system of proof.⁹² He wrote: “A presumption is an argument for believing one fact which rises from proof of another fact.”⁹³ This definition emphasizes the deductive element of the logical conclusion while also emphasizing that the fact that forms the basis of the conjecture must be proven.⁹⁴ He also described the impact of presumptions on the burden of proof.⁹⁵

Though decretists like Simon of Bisignano had already described *suspiciones* as rash, probable, or violent,⁹⁶ one finds in the *Glossa ordinaria* of John Teutonicus that such classifications were also used to describe presumptions.⁹⁷ This was then further solidified by Tancred, who described four categories of presumptions: rash (*temeraria*), probable (*probabilis*), violent (*violenta*), and necessary (*necessaria*).⁹⁸ The rash presumption he described as weak and to be excluded by the law; it should not move the judge at all in his

⁹² See HUBERT, *De praesumptionibus iurisprudentialibus*, 49; See also MOTZENBÄCKER, *Die Rechtsvermutung*, 133; J. GARCÍA FAÍLDE, “Prueba presuntiva en los procesos rotales de nulidad matrimonial por simulación total y parcial,” in *Revista española de derecho canónico*, 14 (1959), 728.

⁹³ “Praesumptio est argumentum ad credendum unum factum, surgens ex probatione alterius facti” (TANCREDE, *Ordo iudiciarius*, part 3, title 14, §1, in *Pilii, Tancredi, Gratiae Libri de iudiciorum ordine*, F. BERGMANN, [ed.], Göttingen, Vandenhoeck et Ruprecht, 1842, 257).

⁹⁴ See HUBERT, *De praesumptionibus iurisprudentialibus*, 50; MOTZENBÄCKER, *Die Rechtsvermutung*, 133.

⁹⁵ See MOTZENBÄCKER, *Die Rechtsvermutung*, 134.

⁹⁶ See *ibid.*, 111.

⁹⁷ See *ibid.*, 132.

⁹⁸ See TANCREDE, *Ordo iudiciarius*, part 3, title 14, §2, 258-259. See also LABANDEIRA, *Las presunciones en derecho canónico*, 40; MOTZENBÄCKER, *Die Rechtsvermutung*, 133.

decision.⁹⁹ The probable presumption, which he also called a presumption of the judge (*iudicis*), arises from suspicions and rumors. It could be overturned by contrary proof.¹⁰⁰ The violent presumption was also called a legal presumption (*praesumptio iuris*) “because the law presumes it to be so.”¹⁰¹ This presumption arises “*ex verisimili probatione*” and it leads the judge to render a sentence unless there is contrary proof.¹⁰² The violent presumption is an irrebutable presumption, which Tancred called a presumption of law and by law (*praesumptio iuris et de iure*). It leads the judge to render a decision and does not admit of contrary proof.¹⁰³

Labandeira identifies difficulties with Tancred's classification. It does not explain why the necessity of the presumption is directly correlated to the probability of the presumption. All presumptions are probable conjectures and, therefore, could yield to contrary evidence. Nor is it clear why a particular human presumption might not have more force than a legal presumption.¹⁰⁴

⁹⁹ “Temeraria praesumptio invalida est, et repellitur a iure, et in nullo debet movere animum iudicantis” (TANCREDE, *Ordo iudiciarius*, part 3, title 14, §2, 258).

¹⁰⁰ “Haec consurgit ex suspicionibus aliquibus et fama crebescente” (TANCREDE, *Ordo iudiciarius*, part 3, title 14, §2, 258).

“Et contra talem praesumptionem admittitur probatio” (ibid.)

See HUBERT, *De praesumptionibus iurisprudentialibus*, 50.

¹⁰¹ “[Q]uoniam ius praesumit ita esse [...]” (TANCREDE, *Ordo iudiciarius*, part 3, title 14, §2, 259).

¹⁰² “Huius praesumptionis talis est effectus, quia inducit iudicem ad sententiandum, nisi probetur contra talem praesumptionem...” (TANCREDE, *Ordo iudiciarius*, part 3, title 14, §2, 259).

¹⁰³ “Necessaria praesumptio est, quae dicitur iuris et de iure; et inducit iudicem ad sententiandum; et in hoc solo discrepat a violenta, quia non recipit probationem in contrarium...” (TANCREDE, *Ordo iudiciarius*, part 3, title 14, §2, 259).

See also HUBERT, *De praesumptionibus iurisprudentialibus*, 50.

¹⁰⁴ “Pero con el simple criterio de la probabilidad para clasificar las presunciones, no puede explicarse el porqué de las necesarias («iuris et de iure»), pues por muy elocuentes que sean los hechos, nada justifica el que se prohíba la prueba contraria. El límite máximo de la probabilidad es la certeza, pero ésta [sic] no se opone a la prueba contraria, sino que se da cuando tal prueba fracasa. Desde el punto de vista de la verosimilitud, una determinada presunción de hombre puede tener más fuerza que otra presunción legal” (LABANDEIRA, *Las presunciones en derecho canónico*, 40-41).

1.1.3.5—Decretals of Gregory IX (1234)

One finds no theory of presumptions articulated in the Decretals of Gregory IX. There are, however, a series of cases that provided later commentators with a basis for elaborating a doctrine of presumptions.¹⁰⁵ In Book II, the titles on proofs of the *Corpus Iuris Civilis* are used, but there is an addition of a title *De praesumptionibus*.¹⁰⁶ It is particularly significant that this title follows the titles regarding proofs and witnesses; however, in its sixteen chapters it includes a series of particular cases and maxims of experience that do not pertain to legal evidence.¹⁰⁷ Richard Helmholz writes:

...[T]hese collections made what must be described as a relatively modest contribution to jurisprudence, and a serious student of the subject concluded that only one of the sixteen chapters in the Gregorian Decretals of 1234 dealt with ‘an authentic legal presumption.’ It is notable that more than half of its chapters on the subject come either from the Bible or from a church father, notably Gregory the Great. These writings were very far from being technically legal or systematic in their approach to the subject.¹⁰⁸

Helmholz’s mention of a “serious student” refers to Labandeira, who identified the one authentic legal presumption as being located in chapter sixteen. It stated that, in juridic acts, the suitability and capacity of persons is presumed unless there is evidence to the contrary.¹⁰⁹

Helmholz observes that these texts were still very important in the development of presumptions in canon law, because they established that presumptions could be used and because they sought to give presumptions a foundation in the Scriptural account of the judgment of Solomon (1 Kg 3:16-28):

¹⁰⁵ See LABANDEIRA, *Las presunciones en derecho canónico*, 31; see also HUBERT, *De praesumptionibus iurisprudentialia*, 46.

¹⁰⁶ See X 2, 23.

¹⁰⁷ See LABANDEIRA, *Las presunciones en derecho canónico*, 31-32; see also HELMHOLZ, “The Law of Presumptions and the English Ecclesiastical Courts,” 139; MOTZENBÄCKER, *Die Rechtsvermutung*, 135.

¹⁰⁸ HELMHOLZ, “The Law of Presumptions and the English Ecclesiastical Courts,” 139.

¹⁰⁹ “[C]um prima facie praesumatur idoneus, nisi aliud in contrario ostendatur” (quoted in LABANDEIRA, *Las presunciones en derecho canónico*, 32). See also BUSSO, “Algunas consideraciones,” 74.

The canonists treated the outcome of this biblical incident as resting upon a legal presumption. The woman who gave up her claim to the child when Solomon ordered the infant to be cut into halves and divided between the two women claiming maternity could be declared the infant's mother. This, they said, must have been because of a presumption. In a certain sense, this was true. There was no actual proof one way or the other as to which woman was the mother. Hence, the medieval lawyers reasoned, a legal presumption must have been at work in the biblical story.¹¹⁰

There are various principles in these chapters that, though they are not legal presumptions, would become very important in legal practice. Some examples of these principles are mentioned by Helmholz,¹¹¹ namely: consent can sometimes be presumed from silence;¹¹² proof of a fact can be admitted to overthrow a presumption;¹¹³ past conduct of a person can create a presumption about his future conduct;¹¹⁴ a person nominated for office in the Church by the competent authority should be presumed qualified for the office, unless the contrary is proven.¹¹⁵

Labandeira shows that later commentators on the chapters of the title *De praesumptionibus* would take the various cases and maxims of experience and "abstract the particular details of the cases and formulate general evidentiary rules."¹¹⁶ There were also other examples of legal presumptions (*iuris tantum*) that admitted contrary proof in other parts of the *Decretals*.¹¹⁷

With regard to irrebuttable presumptions (*iuris et de iure*), Labandeira gives examples that, like the legal presumptions just mentioned, were developed into true presumptions in later canonical doctrine. For example, X, 4, 1, c. 15 states: "If you find

¹¹⁰ HELMHOLZ, "The Law of Presumptions and the English Ecclesiastical Courts," 139. See X 2, 23, c. 2.

¹¹¹ See HELMHOLZ, "The Law of Presumptions and the English Ecclesiastical Courts," 139-140.

¹¹² See X 2, 23, c. 5.

¹¹³ See X 2, 23, c. 8.

¹¹⁴ See X 2, 23, c. 9.

¹¹⁵ See X 2, 23, c. 16.

¹¹⁶ "...abstraen los detalles particulares de los casos y formulan unas reglas probatorias de carácter general" (LABANDEIRA, *Las presunciones en derecho canónico*, 33).

¹¹⁷ LABANDEIRA specifically cites: X 3, 43, c. 3; X 3, 26, c. 15; and X 1, 9, c. 6; see *Las presunciones en derecho canónico*, 33, n. 34.

that a man has carnally known [a] woman after a promise of marriage, you make him to remain with her.”¹¹⁸ This norm contains an implicit presumption that sexual relations with someone implies the will to marry that one. This is the origin of an irrebuttable presumption that at this point was only implicit in the text. There are other similar texts that identified sexual relations with a person as evidence of an intent to marry.¹¹⁹

There are other examples of presumptions in which the text alludes to the impossibility of contrary proof. For example, X, 4, 1, c. 30 states: “An engagement for future marriage becomes marriage itself through subsequent sexual union. It is regarded as a presumed marriage; against such a presumption contrary proof is not admitted.”¹²⁰

In X, 4, 5, c. 6, one finds another example of a presumption that seems to be a legal presumption (*iuris tantum*); however, it is described as a vehement (*vehementer*) presumption: “That after being engaged to marry, sexual union between them having followed, one must, in fact, presume in favour of marriage, because the condition placed [on matrimonial consent] is considered to have been revoked. Thus, it is not yet in any other way proven.”¹²¹

¹¹⁸ “Si inveneris, quod primam (mulierem) post fidem praestitam cognoverit, ipsum eum ea facias remanere.”

¹¹⁹ Labandeira cites: X 4, 5, c. 3 and X 4, 5, c. 5; LABANDEIRA, *Las presunciones en derecho canónico*, 34, n. 37.

¹²⁰ “Sponsalia de futuro transeunt in matrimonium per carnalem copulam subsecutam. Praesumptum matrimonium videatur, contra praesumptionem tamen huiusmodi non est probatio admittenda.”

¹²¹ “Quod post contracta sponsalia, carnalis est inter eos copula subsecuta, pro matrimonio est vehementer quidem praesumendum, quia videtur conditionem appositam recessisse. Nam...non est tamen aliquo modo probatum...”

These two norms are very similar; yet the fact that the latter seems to allow for contrary proof, while such is excluded in the former, shows that there was not yet a clear system for organizing and classifying presumptions.¹²²

1.1.3.6—*Liber Sextus* of Boniface VIII (1298)

The *Liber Sextus* of Boniface VIII contains some specific presumptions, but it does not have a title dedicated to presumptions in a general way.¹²³ In one place the word *praesumptio* can be found in the text, but it has a different meaning. In this instance, it refers to a half proof and does not constitute independent evidence.¹²⁴

Labandeira examined various rules in the *Regulae iuris* that appear similar to presumptions; however, he only identified one as being a true presumption.¹²⁵ That is rule VIII: “Once evil, one is always presumed to be evil.”¹²⁶ Motzenbäcker also notes that the rules in the *Regulae iuris* that appear similar to presumptions differ from the formulation of legal presumptions that one would find in Roman law. Instead, they are more general and seem similar to the legal propositions in modern law codes.¹²⁷

¹²² “En este supuesto similar se inclina la norma, en cambio, por una presunción «iuris tantum», lo que indica la ausencia de un criterio unitario para todas estas cuestiones” (LABANDEIRA, *Las presunciones en derecho canónico*, 34).

¹²³ See HELMHOLZ, “The Law of Presumptions and the English Ecclesiastical Courts,” 140.

¹²⁴ See LABANDEIRA, *Las presunciones en derecho canónico*, 35; see also HUBERT, *De praesumptionibus iurisprudentialibus*, 46; BUSSO, “Algunas consideraciones,” 75.

“Neque indistincte ipsi appellant, praesumptione faciente pro eo, deferatur etiam iuramentum, sed tunc, quum inspectis personarum, et ipsius causae circumstantiis id fuerit faciendum” (*VI*° 2, 10, c. 3).

¹²⁵ Labandeira cites and comments on *RJ* 8, 30, 36, 44, 45, 47 in *VI*°. See LABANDEIRA, *Las presunciones en derecho canónico*, 35-36.

RJ 47 in *VI*, states: “Praesumitur ignorantia, ubi scientia non probatur.” Labandeira, however, does not consider this a true presumption; he writes: “Esta regla de prueba, si se refiere a hechos ajenos no notorios, no es presunción, pues coincide con la regulación normal de la carga de la prueba (cfr. cn. 16 C.I.C.) y por tanto no la invierte” (LABANDEIRA, *Las presunciones en derecho canónico*, 36).

¹²⁶ “Semel malus, semper praesumitur esse malus” (LABANDEIRA, *Las presunciones en derecho canónico*, 35-36).

¹²⁷ See MOTZENBÄCKER, *Die Rechtsvermutung*, 183.

1.1.3.7—The Clementines and the *Extravagantes*

There is no title on presumptions to be found in the Clementines or the *Extravagantes*.¹²⁸ Though there are some texts that could be described as presumptions, the term was not used in these instances.¹²⁹ Problematically, in these decretals, the word “*praesumere*” is sometimes used with a totally different significance, namely, to signify a knowingly and willingly committed act against a precept.¹³⁰ It seems that these two collections return to an earlier use of the term *praesumere* that was seen in Gratian rather than the use of the term to denote a conjecture.¹³¹

1.1.3.8—The Decretalists

Among those who commented on decretals, called decretalists, one of the most important authors on the topic of presumptions is Henry of Susa, commonly referred to as Hostiensis. Most of the other decretalists depended on the teaching of Hostiensis and that of Tancred of Bologna.¹³²

Henry of Susa, drawing on the works of the decretalists,¹³³ gave a definition of presumptions in his *Summa aurea* that was more verbose than that of Tancred.¹³⁴ He

¹²⁸ See HELMHOLZ, “The Law of Presumptions and the English Ecclesiastical Courts,” 140.

¹²⁹ See LABANDEIRA, *Las presunciones en derecho canónico*, 37, which quotes the glosses of J. Andreas on *Extrav. J. XXII*, 5, c. 1 and *Extrav. J. XXII*, 14, c. 1.

¹³⁰ See LABANDEIRA, *Las presunciones en derecho canónico*, 36. For examples of the use of *praesumere* in this sense, see 37.

For a contrary opinion, see HUBERT, *De praesumptionibus iurisprudentiae*, 48.

¹³¹ See HUBERT, *De praesumptionibus iurisprudentiae*, 49.

¹³² See *ibid.*, 51.

¹³³ See GARCÍA FAÍLDE, “Prueba presuntiva,” 728.

¹³⁴ “Praesumptio est alicuius facti dubii semiplena, aliquando quasi plena facta investigatio, quae aliquando motum animi iudicis vel alterius hominis informat qualiter debeat se habere, et aliquando ostendit qualiter debeat iudicare. Vel praesumptio est ex diversis personarum, rerum, locorum, temporum, factorum qualitatibus perspicatio et prout fieri potest consideratio certa, probatione deficiente, animi cuiuslibet hominis et maxime iudicis p[ro]babilis sive iusta instructio” (HENRY OF SUSA, *Summa aurea*, Venice, Apud Bernardum Iuntam, 1570, book 2, de praes., n. 1, 172; quoted in HUBERT, *De praesumptionibus iurisprudentiae*, 51).

emphasized the artificial nature of presumptions and the importance of the human initiative of the person making the conjecture for the sake of achieving knowledge. It also described presumptions as being a form of knowledge that is inferior to other forms of evidence.¹³⁵

Henry also divided presumptions into three different kinds based on evidentiary value, origin, and temporal relationship,¹³⁶ and he was the first to use the designation *praesumptio iuris tantum*.¹³⁷

1.1.4—Postglossators and Later Canonists

It is clear from the examination of the *Corpus iuris canonici* that presumptions were becoming a recognized part of canon law; however, there was a lack of a systematic treatment of presumptions, and the term “presumption” was sometimes used with different meanings. There was no clear distinction between the various types of presumptions, but one can see the beginnings of a differentiation between those presumptions that were rebuttable and those that were not.¹³⁸ Throughout the late medieval and modern era of legal development, the theory of presumptions was enriched by the contributions of both civil and canonical authors as many treatises were composed on court procedure.¹³⁹ Many rules were developed to govern proofs in legal processes. Whereas Roman law lacked adequate

¹³⁵ “Bei dieser doppelten Definition ist der neuartige Gebrauch von *investigatio* hervorzuheben. Das mit *sorgfältiger Suche, Nachforschung* wiederzugebende Wort unterstreicht in starkem Maß den (im aristotelischen Sinn) *künstlichen* Charakter der Vermutung und die Wichtigkeit der Initiative des nach Erkenntnis Suchenden. Ein weiteres interessantes Element ist der subsidiarische Charakter der Vermutung gegenüber anderen Beweisen: «probatione deficiente» drückt deutlich den Vorrang der anderen Beweismittel aus” (HUBERT, *De praesumptionibus iurisprudentialia*, 51).

¹³⁶ See HUBERT, *De praesumptionibus iurisprudentialia*, 51. See HENRY OF SUSSEX, *Summa aurea*, book 2, de praes., n. 4, 172.

¹³⁷ See MOTZENBÄCKER, *Die Rechtsvermutung*, 135.

¹³⁸ See LABANDEIRA, *Las presunciones en derecho canónico*, 37.

¹³⁹ See K. PENNINGTON, “The Jurisprudence of Procedure,” in W. HARTMANN and K. PENNINGTON (eds.), *The History of Courts and Procedure in Medieval Canon Law*, History of Medieval Canon Law, Washington, DC, The Catholic University of America Press, 2016, 153.

regulation, during this period there is the opposite problem in canon law of rigid rules that reduced the freedom of the judge in evaluating proofs.¹⁴⁰

As the rules of evidence began to be developed and strictly regulated, the term “presumption” began to be applied to half proof (*probatio semiplena*) and *indicia*.¹⁴¹ Presumptions thus came to be equated with evidence, since the parties in a case provided *indicia* to prove a doubtful fact. Presumptions were then known as indirect proofs.¹⁴²

1.1.4.1—Alciato

Among the Postglossators, Alciato holds an important place for the development of legal doctrine on presumptions. Alciato provided a definition of the legal presumption as a “probable conjecture coming from a certain sign, which is not otherwise obtained, that is held to be true. Every presumption of law is founded on verisimilitude.”¹⁴³ Labandeira writes that Alciato achieved a great advance in the concept of legal presumptions by freeing the legal presumption from its equation with the concept of proof or evidence; he did so by stating that legal presumptions free one from the burden of producing proof.¹⁴⁴ Labandeira summarizes: “In short, the simple legal presumption provides full proof and reverses the

¹⁴⁰ See LABANDEIRA, *Las presunciones en derecho canónico*, 38-39; HEDEMANN, *Las presunciones en el derecho*, 69.

¹⁴¹ See LABANDEIRA, *Las presunciones en derecho canónico*, 40.

¹⁴² See *ibid.*

¹⁴³ “Est probabilis coniectura ex certo signo proveniens, quae alio non adducto, pro veritate habetur. Omnis praesumptio legis est fundata super verisimili” (ALCIATO, *Tractatus de praesumptionibus*, Lyon, Apud Haereditas Iacobi Iuntae, 1551, 27, quoted in LABANDEIRA, *Las presunciones en derecho canónico*, 42). See GARCÍA FAÍLDE, “Prueba presuntiva,” 729.

¹⁴⁴ “Coniectura, ad differentiam probationis, quia praesumptio relevat ab onere probandi, ergo non est probatio. Licet verum sit quod praesumptio iuris non dicatur probatio, imo sit diversa. . . tamen lex parificat istos casus” (ALCIATO, *Tractatus de praesumptionibus*, 27, quoted in LABANDEIRA, *Las presunciones en derecho canónico*, 43). See also MOTZENBÄCKER, *Die Rechtsvermutung*, 163.

burden of proof. If the party harmed by it does not destroy the presumption, he will lose the case.”¹⁴⁵

Alciato also explained the concept of the absolute legal presumption (*praesumptio iuris et de iure*): “It is a disposition of the law that presupposes something and decides upon the presupposition as if it had been discovered for itself.”¹⁴⁶ Though he stated that direct evidence could not be admitted against an absolute legal presumption, he also listed certain exceptions.¹⁴⁷

1.1.4.2—Menochio, Mantica, and Mascardi

Adolfo Giuliani notes that in the span of just a few years during the sixteenth century, many treatises were written specifically on presumptions. Several of those treatises, in particular those of Giacomo Menochio, Fanciscus Mantica, and Giuseppe Mascardi, became so popular in the seventeenth century that their works “may be considered the civilian tradition of the doctrine of presumptions.”¹⁴⁸ When comparing these treatises, Giuliani notes that they tend to be more similar than different.¹⁴⁹

The authors of these treatises shared a common understanding of the nature of a presumption based on the literal meaning of the Latin word *prae-sumere*, which means to

¹⁴⁵ “En resumen, la presunción legal simple hace prueba plena e invierte la carga de la prueba. Si el perjudicado por ella no destruye la presunción, perderá la causa” (LABANDEIRA, *Las presunciones en derecho canónico*, 43).

¹⁴⁶ “Est dispositio legis aliquid praesumentis, et super praesumpto tanquam sibi comperto statuentis” (ALCIATO, *Tractatus de praesumptionibus*, quoted in LABANDEIRA, *Las presunciones en derecho canónico*, 43).

¹⁴⁷ See LABANDEIRA, *Las presunciones en derecho canónico*, 44; MOTZENBÄCKER, *Die Rechtsvermutung*, 163.

¹⁴⁸ GIULIANI, “Civilian Treatises on Presumptions,” 21.

K. Pennington identifies G. Menochio and G. Mascardi as being especially important for the development of procedural jurisprudence. See K. PENNINGTON, “The Jurisprudence of Procedure,” 153.

¹⁴⁹ See GIULIANI, “Civilian Treatises on Presumptions,” 22.

take in advance. The authors described the presumption as providing a conclusion before the direct proofs were evaluated.¹⁵⁰ Their explanation of the nature of presumptions indicated that it is possible to reach a conclusion without any direct proof from testimony or documents.¹⁵¹ This makes presumptions particularly appropriate for situations in which there is a lack of direct evidence. Giuliani cites various examples of such situations drawn from Menochio's treatise, concluding that "cases of adultery, simony, usury, treason, heresy, filiation, falsity, simulation, and the whole area of intentions (*dolus, fraus, culpa*) are the home of presumptions."¹⁵² In such situations, a *ratiocinatio*, a process of reasoning, takes the place of a directly provable fact:¹⁵³ "Presumption... involves a conscious process of reasoning and writers were keen to stress the incorporeal and even spiritual nature of this pursuit. Since direct experience of the fact to be proved is missing, the judge produces an image of the fact to be proved exclusively by reasoning. This reasoning may in fact offer a conclusion as unequivocal as if the fact had been seen."¹⁵⁴

The authors of the treatises on presumptions recognized that for a presumption to be legitimate there must be various limitations that keep the presumptive process from

¹⁵⁰ See *ibid.*, 23.

"Sed prius necesse est, ut aliqua attingamus circa significationem istius vocabuli, Praesumere. Et ita dicitur, quia lex antequam aliter constet, et absque aliis probationibus, habet aliquid pro vero, ex praepositione Prae et verbo Sumere. Et ista est propria et elegans significatio istius verbi, secundum quod reperitur in Digestis et aliis antiquis autoribus" (ALCIATO, *Tractatus de praesumptionibus*, pars 2, n. 1, 14).

"Et praesumptio dicta a dictione prae, id est, ante, et sumptio, hoc est, ante sumptio: quia ante legitimas probationes aliquid sumit pro vero" (J. MENOCHIO, *De praesumptionibus, conjecturis signis et indiciis*, Geneva, Cramer, Perachon & Cramer Filii, 1724, lib. I, quaest. 7, n. 4, 10).

¹⁵¹ See GIULIANI, "Civilian Treatises on Presumptions," 23.

"Praesumere...ita dicitur quia lex antequam aliter constet et absq[ue] aliis probationibus, habet aliquid pro vero, ex praepositione prae, et verbo sumere" (A. ALCIATO, *Aureus praesumptionum tractatus*, Lyon, Apud Iacobum Giuntam, 1542, pars 2, n. 1, 23).

¹⁵² GIULIANI, "Civilian Treatises on Presumptions," 23-24.

¹⁵³ "Mascardo añade veladamente en su voluminoso tratado de las pruebas un concepto nuevo: 'rationabilis'" (GARCÍA FAÍLDE, "Prueba presuntiva," 729). See J. MASCARDUS, *Conclusiones omnium probationum*, Turin, Apud Iannem Dominicum Tarinum., 1508, 20.

¹⁵⁴ GIULIANI, "Civilian Treatises on Presumptions," 24-25. See also MENOCHIO, *De praesumptionibus*, lib. I, quaest. 11, n. 16, 17.

yielding dubious presumptions. Since the process is built upon the understanding that nature operates in an orderly and regular way, the authors specified that presumptions must be based on common opinions or experience. For example, Menochio stated that a just judge should never presume what rarely occurs or is incompatible with human experience.¹⁵⁵ Those things that are irrational or uncommon cannot be presumed and must be proved.¹⁵⁶

1.1.4.3—The Analysis of Presumptions in Light of Rhetoric in the Treatises

The sixteenth century saw a revival of the study of Aristotle's *Rhetoric*. This is reflected in the treatises on presumption, in which the authors, especially Menochio, shifted their attention from Cicero and Quintilian to Aristotle.¹⁵⁷

In the sixteenth century, since there was no standard classification of presumptions, juridical, theological, and rhetorical treatises of the time had different taxonomies. Giuliani highlights three different examples from Franciscus Duarenus, Baldus de Ubaldis, and Guillaume Durand. Duarenus, a sixteenth century jurist, in his *Disputationes anniversariae*, drew from Aristotle's taxonomy of signs and divided presumptions into three classes: *necessaria*, *credibilis* (or *verisimilis*), and *non repugnans*.¹⁵⁸ The second classification, that of the fourteenth-century Baldus, followed a tripartite classification that

¹⁵⁵ See MENOCHIO, *De praesumptionibus*, lib. VI, praesumpt. 49, n. 5, 818.

¹⁵⁶ See *ibid.*, praesumpt. 31, n. 2, 785.

¹⁵⁷ See GIULIANI, "Civilian Treatises on Presumptions," 38.

¹⁵⁸ See F. DUARENUS, *Disputationes anniversariae*, in *Opera omnia*, Lyon, Apud Guliel. Rouilius, 1558, lib. I, cap. 27, 439. See also GIULIANI, "Civilian Treatises on Presumptions," 45.

"It seems worth noting that sixteenth-century writers sometimes added a second probably sign (*eikaios*) to the Aristotelian probable sign (*eikos*), obtaining eventually a tripartite division of one necessary and two probable signs (*signum*, *eikos* and *eikaios*)" (GIULIANI, "Civilian Treatises on Presumptions," 45, n. 110). See M.-L. DEMONET, "Les signes probables (*eikota*) au temps de Montaigne," in *Bibliothèque d'Humanisme et Renaissance*, 64 (2001), 7-29.

he derived from the Glossators, dividing presumptions into two main categories of human presumptions and presumptions of law, with the presumptions of law divided between legal presumptions (*iuris*) and irrebuttable presumptions (*iuris et de iure*).¹⁵⁹ The third classification, that of thirteenth-century Durand from his *Speculum iuris*, divided presumptions according to their demonstrative force into four degrees: *temeraria*, *probabilis*, *violenta*, and *necessaria*.¹⁶⁰

Menochio was also interested in founding the classifications of presumptions—*hominis*, *iuris*, and *iuris et de iure*—on categories drawn from rhetoric. This classification of presumptions had a lasting influence on subsequent authors.¹⁶¹ He divided presumptions into two classes based on the distinction between certainty and probability. He associated the irrebuttable presumption (*iuris et de iure*) with the necessary sign (τεκμήριον or *signum*), which leads to a necessary conclusion. He associated the legal and human presumptions (*iuris tantum* and *hominis*) with probable signs, which can be rebutted.¹⁶²

Menochio articulated a hybrid solution in that he stated that he was following Baldus in dividing presumptions into the three categories of irrebuttable, legal, and human, but showing that his classification was congruent with that of Quintilian. Quintilian's

¹⁵⁹ See GIULIANI, "Civilian Treatises on Presumptions," 45.

¹⁶⁰ See *ibid.*

¹⁶¹ See MENOCHIO, *De praesumptionibus*, lib. I, q. 2, n. 5, 5. See also GIULIANI, "Civilian Treatises on Presumptions," 44; HUBERT, *De praesumptionibus iurisprudentialibus*, 56; MOTZENBÄCKER, *Die Rechtsvermutung*, 194.

¹⁶² See GIULIANI, "Civilian Treatises on Presumptions," 44.

"Et hoc signum [necessarium] nil differt a praesumptione iuris et de iure, quae et necessaria et artificialis probatio dicitur...Signa tamen aliqua dantur, quae nullam in se necessitate habent. Et haec a praesumptione vel iuris, vel hominis non distant" (MENOCHIO, *De praesumptionibus*, lib. I, qu. 7, nn. 38-39, 11).

Institutiones oratoriae became very popular when it was discovered in the fifteenth century.¹⁶³

Menochio and Duarenus considered Quintilian's and Aristotle's doctrines of signs to be almost identical. Menochio attempted to justify his triadic classification derived from Baldus and the Glossators from the analogies of presumption and sign.¹⁶⁴ Menochio associated the irrebuttable presumption (*iuris et de iure*) with the necessary sign (τεκμήριον). Giuliani explains: "like the latter, it finds its basis in a certain principle that links the known to the unknown fact by means of a necessary and indissoluble connection."¹⁶⁵ The linking principle could come from one of two sources: nature or human law.

The jurists of this time would have seen particular value in nature because the natural philosophy of the time emphasized the unity of nature and sought to find in nature stringent principles of causality.¹⁶⁶ Giuliani explains: "The main importance for us is that arguments based on natural signs are the most effective. The recourse, for example, to the natural sign "she has milk, therefore she has had a child" produces an unequivocal argument, for it is based on a sequence founded on the certain and invariable course of

¹⁶³ See GIULIANI, "Civilian Treatises on Presumptions," 45-46. See also MENOCHIO, *De praesumptionibus*, lib. I, quaest. 2, n. 11, 5; J. MURPHY, *Rhetoric in the Middle Ages: A History of Rhetorical Theory from St. Augustine to the Renaissance*, Berkeley, University of California Press, 1974, 358-60; G. KENNEDY, *Classical Rhetoric and Its Christian and Secular Tradition from Ancient to Modern Times*, Chapel Hill, NC, University of North Carolina Press, 1980, 195-219.

¹⁶⁴ See GIULIANI, "Civilian Treatises on Presumptions," 46.

¹⁶⁵ *Ibid.*

¹⁶⁶ Giuliani cites as an example of this view of the philosophy of nature J. Bodin. See GIULIANI, "Civilian Treatises on Presumptions," 46. See also A. BLAIR, *The Theater of Nature: Jean Bodin and Renaissance Science*, Princeton, NJ, Princeton University Press, 1997, 86, 126.

"Violenta praesumptio a naturalibus causis et principiis nata, contrariam probationem non admittit" MENOCHIO, *De praesumptionibus*, lib. I, quaest. 3, n. 2, 6).

nature. It cannot be contradicted since nothing—except miracles—can overturn the course of nature.”¹⁶⁷

The second source, human law, is like nature in that it is well-ordered; however, unlike nature, human law is artificial. The legislator is free to establish necessary connections between facts, such that once fact A has been ascertained fact B must be concluded by the judge. Menochio wrote that the irrebuttable presumption “is called *praesumptio juris* because it is a presumption made by law; and *de jure*, because the law establishes a fixed right upon it, and holds as truth the presumption thus made.”¹⁶⁸

Menochio considered the other presumptions, human and legal, to be counterparts to probable signs (εικώς). These, unlike the irrebuttable presumption (*iuris et de iure*), could not lead to certainty because the link that they provide between a known fact and an unknown fact can only lead to a probable conclusion. Unlike the laws of nature which lead to certainty, human actions are free actions that cannot be predicted according to stringent causality. One can only make judgments in these matters based on probability and verisimilitude. Thus, Francesco Mantica explained that presumption is “*veritas verisimilis*,” or the truth of what is probable.¹⁶⁹

¹⁶⁷ GIULIANI, “Civilian Treatises on Presumptions,” 46.

“Si exhibeo instrumentum hic Patavii inter me et te confectum, die 10 Septemb. Inde necessario fiet, me ea die 10 Septembris Romae non fuisse; cum ob maximam locorum distantiam fieri non possit, ut eadem die esse potuerim utroque in loco. Hoc enim miraculose, non autem natura effici potest” (MENOCHIO, *De praesumptionibus*, lib. I, quaest. 3, n. 4, 6).

¹⁶⁸ MENOCHIO, *De praesumptionibus*, lib. I, quaest. 3, n. 18, 7; translation from GIULIANI, “Civilian Treatises on Presumptions,” 47.

¹⁶⁹ See F. MANTICA, *Tractatus de coniecturis ultimarum voluntatum*, Cologne, 1612, lib. I, tit. I, n. 8, 2.

Giuliani explains that the treatises of this time usually translated the Aristotelian εικώς with the Latin word *verisimilis* rather than *probabilis* to avoid confusion with the use of the term *probabilis* in moral theology. See GIULIANI, “Civilian Treatises on Presumptions,” 47, n. 123.

“Mantica lo dirá abiertamente completando que la presunción por ser razonable es probable” (GARCÍA FAÍLDE, J., “Prueba presuntiva,” 729).

To arrive at a conclusion based on verisimilitude or probability necessarily requires experience.¹⁷⁰ The multitude of experiences that one collects over time leads to the development of maxims of experience. Giuliani gives as the most obvious example of such maxims drawn from experience that mothers love their children and children love their parents.¹⁷¹ Over time one develops these maxims based on lived experience and can apply them to the evaluation of evidence.

The jurists recognized that, though verisimilitude lacks the certainty of nature, it still has an objective quality that is valuable in the evaluation of evidence. Their appreciation and recognition of the common course of events in nature led them to acknowledge that certain results can be expected as typical and normal, though not inevitable. Verisimilitude thus became a heuristic tool that a jurist, like the canonist Agostinho Barbosa, would compare to natural reason.¹⁷²

The conclusion drawn from the use of a presumption is the result of a syllogism. Giuliani gives an example drawn from Francisco Toledo's 1569 work *Introductio in dialecticam*:

First premise (universal rule):	every mother loves her child
Minor premise (particular case):	this is a mother

¹⁷⁰ See GIULIANI, "Civilian Treatises on Presumptions," 47-48.

"Respondeo dicendum quod prudentia est circa contingentia operabilia, sicut dictum est. In his autem non potest homo dirigi per ea quae sunt simpliciter et ex necessitate vera, sed ex his quae ut in pluribus accidunt, oportet enim principia conclusionibus esse proportionata, et ex talibus talia concludere, ut dicitur in VI Ethic. Quid autem in pluribus sit verum oportet per experimentum considerare, unde et in II Ethic. philosophus dicit quod virtus intellectualis habet generationem et augmentum ex experimento et tempore. Experimentum autem est ex pluribus memoriis; ut patet in I Metaphys. Unde consequens est quod ad prudentiam requiritur plurium memoriam habere" (THOMAS AQUINAS, *Summa theologica*, II-II, q. 49, a. 1, resp.).

¹⁷¹ See GIULIANI, "Civilian Treatises on Presumptions," 48.

¹⁷² See *ibid*; see also A. BARBOSA, *Variae tractationes iuris*, Lyon, Laurentii Durand, 1631, 139.

Conclusion: hence, she loves her child.¹⁷³

The first premise contains the maxim of experience, the minor premise is the fact drawn from evidence, and the conclusion follows from them.

In this way, the judge is steered away from making random assumptions or presuming facts based on mere chance. Instead, he must draw reasonable conclusions based on a maxim of experience that is based on verisimilitude.¹⁷⁴

In the case of the legal presumption (*iuris*), there is a connection between the known and unknown facts that is articulated by the legislator, but the conclusion does not have the certainty that one would expect from the laws of nature. It is, therefore, a probable conclusion that could be overturned by contrary proof.¹⁷⁵ Menochio gave two examples: “If I prove that Caita is the wife of Sempronius; that he lived with her, and she gave birth to Lucius, I will then draw the verisimilar conclusion that Lucius is son of Sempronius, for this is a probability approved by law (C. 1.6.6). If I prove that the document by which I promised to give you the sum of one hundred is cancelled, then a legal presumption and a verisimilar proof emerges that I paid you already. (D. 22.3.4)”¹⁷⁶

¹⁷³ See GIULIANI, “Civilian Treatises on Presumptions,” 48, drawing from F. TOLETUS, *Introductio in dialecticam*, Rome, Ex officina Vincentii Lucchini, 1569, lib. 4, cap. 13, 162.

¹⁷⁴ See GIULIANI, “Civilian Treatises on Presumptions,” 49.

¹⁷⁵ See *ibid.*

¹⁷⁶ “Si probo Caitam Sempronii uxorem esse, & cum ea cohabitasse; probemque Caiam Lucium peperisse; inde sumam verisimiliter atque credibiliter, Lucium Sempronii filium esse.... Nam (ait Baldus) est haec quaedam probabilitas a lege approbata. [...] Si probo chirographum, quo me tibi cento debere professus sum, esse cancellatum; inde iuris praesumptio verisimilisque probatio orietur me tibi satisfacisse” (MENOCHIO, *De praesumptionibus*, lib. I, quaest. 4, nn. 1-2; translation from GIULIANI, “Civilian Treatises on Presumptions,” 51).

In the case of the human presumption (*hominis*), though it is similar to the legal presumption, the conclusion is the result of the judge's own reasoning rather than the conclusion of the legislator.¹⁷⁷

1.1.4.4—The Manualists

Among the manuals of canon law in the period following the Council of Trent, the manuals of Anaklet Reiffenstuel and Franz Schmalzgrueber were particularly important. They were considered *probati auctores* in the jurisprudence of the Roman Rota.¹⁷⁸

In his manual entitled *Ius canonicum universum*, Reiffenstuel covered the topic of presumptions in four sections. Of particular importance is the definition of a presumption as “a reasonable conjecture (or proof) of a doubtful matter, collected from arguments and indices, which are frequently drawn from the circumstances of things.”¹⁷⁹ Motzenbäcker criticized this definition because he believed it to be the definition specifically of human presumptions rather than presumptions in general; however, the influence of Reiffenstuel is seen in the fact that this is the basis for the definition of presumptions that found its way into *CIC/17*, c. 1825.¹⁸⁰

In Schmalzgrueber's manual *Ius ecclesiasticum universum*, he dealt with both legal and human presumptions in his first section on the topic. In the second section he gave seven “Regulae praesumptionum” which included commentary on various presumptions

¹⁷⁷ “Non enim praesumptiones has, quas homo facit, potuit lex approbare, cum variae multiplicesque sint & ex variis causis legibus ipsis iam promulgatis, oriri soleant: & ideo dicimus, in iudiciis arbitrio esse positas” (MENOCHIO, *De praesumptionibus*, lib. I, quaest. 5, nn. 7-8, 8).

¹⁷⁸ See HUBERT, *De praesumptionibus iurisprudentiae*, 59.

¹⁷⁹ “Praesumptio est rationabilis conjectura (vel probatio) rei dubiae, collecta ex argumentis et indiciis, quae per rerum circumstantias frequenter eveniunt” (A. REIFENSTUEL, *Ius canonicum universum*, vol. 1, Rome, 1832, 376).

¹⁸⁰ See HUBERT, *De praesumptionibus iurisprudentiae*, 60. See also MOTZENBÄCKER, *Die Rechtsvermutung*, 196.

and discussion of the rules on the burden of proof.¹⁸¹ While Schamlzgrueber and other manualists were interested in articulating a theory of presumptions drawn from the practical material of the decretals, they were also interested in developing more systematic doctrine of presumptions based on precise definitions and explanations of how to use them in practice. The manualists focused on questions of interpretation regarding the nature of presumptions and the weight of evidence. The work of the manualists provided much preparatory work for the eventual codification of canon law.¹⁸²

It should also be mentioned that Enricus Pirhing, while gathering the ideas of various authors that went before him, highlighted in his *Synopsis* the important element of the rule of experience in presumptions.¹⁸³ This hearkens back to the insights of Menochio.

1.1.5—Presumptions in the Codes of Canon Law

The first Code of Canon Law, promulgated in 1917, included four canons that defined presumptions and described their role in the law. These canons were later condensed and simplified in the 1983 Code of Canon Law and the 1990 Code of Canons of the Eastern Churches.

All three Codes articulate a clear concept of presumptions that is the fruit of the long history of development traced in the previous sections. Yet, the legislator faced a significant challenge in formulating a definition of presumptions and categorizing them because, as the foregoing history has shown, the dispute on the nature of presumptions

¹⁸¹ See F. SCHMALZGRUEBER, *Ius ecclesiasticum universum*, vol. 2, Rome, Rev. Cam. Apostolicae, 1844, 211-233.

¹⁸² See HUBERT, *De praesumptionibus iurisprudentialibus*, 61-62.

¹⁸³ See E. PIRHING, *Synopsis Pirhingiana*, Rome, Typis S. Congregationis de Propaganda Fide, 1849, lib. 2, tit. 23, de praesump., & 1, n. 1, 365); GARCÍA FAÍLDE, “Prueba presuntiva,” 730.

had not been settled. So, the legislator took the conflicting opinions of previous jurists and forged legislation that would do justice to the prior tradition.¹⁸⁴ This formed a stable basis for the later composition of the *CIC/83* and the *CCEO*.

1.1.5.1—Presumptions in the *CIC/17*

In Book IV, Title X, of the *CIC/17*, there are seven chapters identifying seven types of proofs, namely, confession of the parties, witnesses, experts, judicial recognizance, documents, presumptions, and suppletory oath.¹⁸⁵

There are four canons on presumptions in Book IV of the *CIC/17*:¹⁸⁶

Canon 1825, §1—A presumption is a probable conjecture about an uncertain matter: it can be of law when it is established in the law; or [it can be] of man that is formed by the judge.

Canon 1825, §2—A presumption of law can be simply of law or [it can be] of law and by law.

Canon 1826—Against a simple presumption of law there can be admitted both direct and indirect evidence; but against a presumption of law and by law, only indirect [evidence can be admitted] that is against the fact upon which the presumption is based.

Canon 1827—Whoever has a presumption regarding his rights is freed from the burden of proving [them], which then redounds to the opposing party; if it cannot be overcome, sentence must be given in favor of the party who stands with the presumption.

Canon 1828—Presumptions that are not established in the law shall not be formed by the judge except from certain and determinate facts that are directly consistent with the matter about which there is controversy.¹⁸⁷

The text of *CIC/17* begins in c. 1825, §1, with the classification of all presumptions in two categories, namely, legal presumptions (*praesumptio iuris*) and human presumptions (*praesumptio hominis*). In §2, the category of legal presumptions is further

¹⁸⁴ See MOTZENBÄCKER, *Die Rechtsvermutung*, 233.

¹⁸⁵ See J. PROVOST, “Remarks Concerning Proofs and Presumptions,” in *The Jurist*, 39 (1979), 457. “A presumption is certainly a proof” (L. WRENN, “Notes, but Mostly Footnotes, on Presumptions,” in *The Jurist*, 30 [1970], 209).

¹⁸⁶ See *CIC/17*, Book IV, Part I, Section I, Title X, Chapter VI.

¹⁸⁷ *CIC/17*. All English translations of the *CIC/17* are from E. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, CA, Ignatius Press, 2001.

divided into presumptions of law that are simply of law (*praesumptio iuris simpliciter*) and presumption that are of law and by law (*praesumptio iuris et de iure*).¹⁸⁸

The *CIC/17* explains the relationship between a presumption and the burden of proof in cc. 1747, 1° and 1827. The former states that those things presumed by the law need not be proven. The latter states that one who has a legal presumption in his favour is freed from the burden of proof by the presumption. It is then up to the opposing party to provide evidence to overturn the presumption. If the presumption cannot be proven to have failed, then the sentence is given in favour of the one who stands on the side of the presumption.¹⁸⁹

1.1.5.2—Presumptions in the *CIC/83*

In Book VII of the *CIC/83*, in the section on procedures, three canons are included pertaining to presumptions:¹⁹⁰

Canon 1584—A presumption is a probable conjecture about an uncertain matter: a presumption of law is one which the law itself establishes; a human presumption is one which a judge formulates.

Canon 1585—A person who has a favorable presumption of law is freed from the burden of proof, which then falls to the other party.

Canon 1586—The judge is not to formulate presumptions which are not established by law unless they are directly based on a certain and determined fact connected with the matter in dispute.

¹⁸⁸ Conte a Coronata notes that some commentators identified proofs that could be admitted against presumptions of law and by law; however, with the promulgation of the *CIC/17*, only indirect proofs were admitted against these presumptions: “Auctores ante Codicem praeter probationes indirectas admittebant contra praesumptionem iuris et de iure etiam alias aliquas probationes evidetiores, nempe, confessionem iudicalem, probationem per quinque testes aut etiam per duos aut tres testes summae fidei, probationem per evidetiam facti seu per notorium. Codex has limitationes non ponit, proinde dicendum est vel eas reduci ad probationem indirectam vel iisdem amplius attendendum non esse” (M. CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3: *De processibus*, Turin, Domus editorialis Marietti, 1941, 263).

¹⁸⁹ See S. WOYWOD, *A Practical Commentary on the Code of Canon Law*, rev. ed. by C. Smith, New York, Joseph F. Wagner, 1957, 317.

¹⁹⁰ *CIC/83*, Book VII, Part II, Section I, Title IV, Chapter VI.

The first part of the definition of a presumption found in c. 1584 is the same as its predecessor, *CIC/17*, c. 1825, §1.¹⁹¹ The irrebuttable presumption is eliminated completely.

CIC/83, c. 1526, §2, 1° also states, similarly to *CIC/17*, c. 1747, that “matters presumed by the law itself” do not need proof.

1.1.5.3—Presumptions in the *CCEO*

There is no parallel to *CIC/83*, c. 1584 in the *CCEO* and, therefore, no definition of presumption.¹⁹² The *CCEO* does, however, have canons substantially similar to *CIC/83*'s cc. 1585 and 1586. The two canons on presumptions are found in number 6 of Title XXV, Article 5 on proofs:

Canon 1265—To come to a just sentence, the judge can formulate presumptions that are not established by the law itself as long as they are based on a certain and determined fact directly connected with the matter in dispute.

Canon 1266—A person who has a favorable presumption of law is freed from the burden of proof, which then falls to the other party.

It can be seen from the absence of a definition of presumption in the *CCEO* that its editors were very careful to avoid the inclusion of definitions in the text of the *CCEO*. The legislator, therefore, is more succinct in the *CCEO* than in the *CIC/83* by promulgating only two canons on presumptions, which are substantially the same as *CIC/83*'s cc. 1585-1586.

¹⁹¹ “È noto che il concetto di presunzione, sia in generale sia in riferimento alle due principali specie (*praesumptio iuris e praesumptio hominis*), è uno dei pochi casi in cui il codice di diritto canonico offre una definizione, allontanandosi dall'orientamento abitualmente seguito, e ribadito in sede di revisione del CIC, secondo cui ‘*definitiones in iure vitandae sunt*’, cfr, *Communications*, 11 (1979), 105” (M. ARROBA CONDE, “Le presunzioni nel processo le presunzioni legali alle prove e alla procedura,” in *Presunzioni e matrimonio*, Studi giuridici, no. 98, Vatican City, Libreria editrice Vaticana, 2012, 149, n. 1).

¹⁹² “Nelle norme sulle presunzioni, contrariamente a quelle precedente (cf. S.N. can. 348, §1), non è stata inserita la definizione della presunzione quale congettura probabile di una cosa incerta, ritenuta non necessaria (cf. *Nuntia* 14 (1982) 11; 28 (1989) 132)” (A. STANKIEWICZ, *Commentary on CCEO*, cc. 1265-1266, in P. PINTO [ed.], *Commento al Codice di diritto canonico*, 2nd ed., Studium Romanae Rotae, Vatican City, Libreria editrice Vaticana, 2001, 1035).

The *CCEO* also states, in c. 1207, §1, 1° that “matters presumed by the law itself” do not need proof.

1.2—A Systematic Overview of Presumptions

Now that the history of the development of legal presumptions has been carefully traced, it is possible to give a comprehensive explanation of the institute of presumptions as understood in modern legal texts, especially the various commentaries on the Codes.

1.2.1—The Nature of Presumptions in Law

Presumptions can be considered to be, in some sense, a kind of proof in judicial causes, or at least a rule governing proof.¹⁹³ They are a means to arrive at a conclusion about an uncertain matter by making a logical deduction based on one or more established facts.¹⁹⁴ They are, in a sense, a form of indirect proof: “A presumption is a reasonable conclusion concerning the truth of a doubtful matter that is deduced from indices generally or frequently connected with the truth of the matter.”¹⁹⁵ The known facts that serve as the

¹⁹³ The majority of commentators on both the *CIC/17* and the *CIC/83* recognize presumptions as a kind of proof, and in *CIC/17*, *CIC/83*, and *CCEO*, the canons on presumptions are included under the section on proofs. See *CIC/17*, Book IV, Part I, Section I, Title X, Chapter VI; *CIC/83*, Book VI, Part II, Title IV, Chapter VI; *CCEO*, Title XXV, Chapter I, Article V.

For a summary of the differing opinions of various authors, see LABANDEIRA, *Las presunciones en derecho canónico*, 133-136.

“Praesumptio igitur hodie accipi debet tamquam quoddam probationis genus” (M. POMPEDDA, “De usu praesumptionum contra matrimonii valorem,” in *L’Année canonique*, 22 [1978], 38).

¹⁹⁴ See K. BOCCAFOLA, Commentary on c. 1584, in *Exegetical Comm*, vol. 4/2, 1348; M. ARROBA CONDE, *Diritto processuale canonico*, 7th ed., Rome, Editiones Institutum Iuridicum Clarentianum, 2020, 555.

“Le presunzioni stabilite dal giudice non sono prove, ma valutazioni di prove, che vengono realizzate al momento di decidere la causa” (ARROBA CONDE, *Diritto processuale canonico*, 557).

¹⁹⁵ F. WERNZ and P. VIDAL, *Ius canonicum*, vol. 5, Rome, Apud Aedes Universitatis Gregorianae, 1927, 481; cited and translated in J. BEAL, “The Substance of Things Hoped For: Proving Simulation of Matrimonial Consent,” in *The Jurist*, 55 (1995), 771. See also J. GARCÍA FAÍLDE, *Nuevo derecho procesal*

basis for a presumption are called indications or indices (*indicia*).¹⁹⁶ The indication (*indicium*) that serves as the basis for a presumption must be established with certainty, since the indication is the cause of the presumption and the presumed fact is the effect. To arrive at a presumption, there must also be a real relationship that unites both the indications (*indicia*) and the fact that is intended to be proven.¹⁹⁷

The definition of presumption in *CIC/83*, c. 1584 seems to equate the terms presumption and conjecture. The two terms are very close in meaning, but Labandeira notes that the conjecture is the logical process, while the presumption is the result of that process; nevertheless, he notes that in ordinary language there is usually no distinction made between the process and the result.¹⁹⁸

canónico: Estudio sistemático-analítico comparado, Salamanca, Universidad Pontificia de Salamanca, 1984, 152-153.

“[C]oniectura ex aliquo signo seu indicio orta et aut a lege allegata aut a iudice assumpta ad adstruendam rei dubiae fidem” (M. LEGA, *Praelectiones in textum iuris canonici de iudiciis ecclesiasticis in scholis Pont. Sem. Rom. habitae*, book 1, vol. 1, Rome, Typis Vaticanis, 1896, 525).

“Presumere vuol dire dedurre una cosa incerta da un'altra certa, una deduzione che si fa in base alla certezza di un'altra cosa” (ARROBA CONDE, *Diritto processuale canonico*, 555).

¹⁹⁶ See LABANDEIRA, “Las máximas de experiencia,” 262.

“Indicia autem sunt signa notabilia alicuius rei ad veritatem detegendam inservientia” (CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 260).

“Hence, some indication or sign must precede the judgment in order to give it a foundation and reason, as in cause and effect. [...] Scholars have designated these indications as signs, circumstances, ‘indicia,’ arguments, suspicions, adminicles” (MANNING, *Presumptions of Law in Marriage Cases*, 4).

¹⁹⁷ See LABANDEIRA, *Las presunciones en derecho canónico*, 54; LABANDEIRA, “Las máximas de experiencia,” 262; SÁNCHEZ-GIL, *La presunzione di validità*, 64-65.

“Praesumptio deducitur ex indiciis; indicia proinde debent certa esse, et certo existere. Si indicia non existant, deficit basis praesumptionis et ipsa deficient, nequit existere praesumptio” (CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 260).

“Il fatto certo è il punto di partenza. Il fatto incerto è l’oggetto della prova. Si tratta di stabilire un rapporto logico tra il fatto certo, chiamato indizio, e l’incerto, detto indiziato. Se esiste l’indizio, il fatto indiziato si presume.

“Si tratta di una deduzione fatta con una logica di probabilità; una congettura è un’opinione, un’ipotesi, un giudizio fondato su indizi, apparenze, che sono sicuramente certi” (ARROBA CONDE, *Diritto processuale canonico*, 555).

¹⁹⁸ See LABANDEIRA, “Las máximas de experiencia,” 262.

Since presumptive reasoning arrives only at a probable conclusion, not a necessary one, it does not arrive at absolute certainty.¹⁹⁹ The conclusion reached by means of a presumption is a conjecture that two facts generally occur together; therefore, if one fact is established, the other can be presumed to have occurred as well. Thus, the presumption is indirect evidence since it presumes one fact based on some other known fact.²⁰⁰

John Beal describes the logical process in this way:

If proof by indices tends to proceed intuitively from a known fact to an as yet unknown fact by virtue of the intimate connection between the two, proof by presumptions has two complementary but distinguishable moments, the one inductive and the other deductive. The inductive moment consists in distilling from the data of experience a general principle that describes the causal relationship that generally exists between two discrete facts.

[...]

This generalization from experience, which is often referred to as “the presumption,” then becomes the major premise of a syllogism. The minor premise of the syllogism is the fact, established from other sources of proof, that the factual situation foreseen in the generalization was indeed met in the concrete case being adjudicated.²⁰¹

¹⁹⁹ See H. KELLER, “De usu praesumptionum in iure canonico,” in *Periodica de re morali, canonica, liturgica*, 23 (1934), 9*; MANNING, *Presumptions of Law in Marriage Cases*, 4.

“Proinde pr. primo est anticipatio certitudinis et probationis provisorio, dein etiam est medium, quo mens humana transit a dubio vel suspitione per opinionem seu per omnes gradus probabilitatis ad certitudinem saltem morale, quae est finis” (KELLER, “De usu praesumptionum,” 9*).

²⁰⁰ See R. RAMÍREZ NAVALÓN, “La presunción en las causas matrimoniales,” in *Ius canonicum*, 39 (1999), 486; GARCÍA FAÍLDE, *Nuevo derecho procesal canónico*, 153; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 260; K. BOCCAFOLA, Commentary on c. 1584, 1348; ARROBA CONDE, *Diritto processuale canonico*, 555; LABANDEIRA, *Las presunciones en derecho canónico*, 56.

²⁰¹ BEAL, “The Substance of Things Hoped For,” 771. See L. DEL AMO PACHÓN, *La clave probatoria en los procesos matrimoniales (indicios y circunstancias)*, Pamplona, Ediciones Universidad de Navarra, 1978, 93-94; GARCÍA FAÍLDE, *Nuevo derecho procesal canónico*, 152-154; LABANDEIRA, *Las presunciones en derecho canónico*, 57-62.

“Reapse syllogismo quodam utimur in constabilienda praesumptione, in quo *major* ex facto certo constituitur, *minor* vero ex generalibus juris principiis vel humanae prudentiae, *conclusio* dein est ipsum factum incertum probabilitate vel certitudine quadam ab hominis ratione ornatum. Quapropter verius dicendum erit praesumptionem uti et deductiva et inductiva methodo ad inveniendam veritatem” (POMPEDDA, “De usu praesumptionum contra matrimonii valorem,” 38).

“[E]l razonamiento presuntivo consta de dos fases: la primera, inductiva, tiene por fin establecer con base en la experiencia de diversos casos singulares, la premisa mayor del silogismo, que es una regla general de probabilidad; la segunda consiste en subsumir el o los indicios del caso en esa regla general, para deducir de allí el juicio singular de probabilidad en que consiste la presunción. En definitiva, esto es lo que Aristóteles y Sto. Tomás han dicho, de que el conocimiento inductivo es precisamente el fundamento de todo silogismo, al formar a partir de la experiencia la premisa mayor: y que inducción y deducción no son dos modos de conocer separados, sino que se entrecruzan continuamente” (LABANDEIRA, “Las máximas de experiencia,” 263).

What Beal refers to as the “generalization from experience” is called by some authors a “maxim of experience.” It is the logical nexus between the indication and the presumed fact.²⁰²

Beal also rightly notes that the “degree of probability of the uncertain fact generated by proof by presumptions hinges to a critical degree on the security of the facts on which the argument is based.”²⁰³ If the presumption does not have a sound basis, it can “create serious problems by obscuring rather than revealing the truth.”²⁰⁴ It must, therefore, be subject to strict interpretation.²⁰⁵

Presumptions are a supplementary form of proof that are used only when direct proof of a fact is lacking or insufficient. They are particularly helpful in attaining moral certitude in matters that are not readily verifiable, especially when those matters are internal or hidden.²⁰⁶

²⁰² See SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 67-68; ARROBA CONDE, *Diritto processuale canonico*, 555.

“La relación suele definirse como «ordo unius ad aliud», un orden de una cosa hacia otra. Ese mutuo «ser uno hacia el otro» de los hechos ha de ser de naturaleza real, objetiva. No es suficiente que el sujeto los relacione en su intelecto; si el fundamento de la relación no fuese extramental, sino simplemente de razón, el resultado sería también de razón. No es válido el salto del plano meramente *lógico* al *ontológico*, del pensar al ser; en este error han incurrido Anselmo de Cantorbery en su conocido argumento acerca de la existencia de Dios, y Descartes con su no menos celebre duda metódica. Por tanto, la relación entre el hecho base y el hecho presunto ha de tener un fundamento real, objetivo, independiente del sujeto que la piensa” (LABANDEIRA, *Las presunciones en derecho canónico*, 55).

²⁰³ BEAL, “The Substance of Things Hoped For,” 772. See also ARROBA CONDE, *Diritto processuale canonico*, 555, 557.

²⁰⁴ C. COX, “Part II: The Contentious Trial (cc. 1501-1670),” in *CLSA Comm2*, 1697.

²⁰⁵ “[S]ia le norme che la riguardano sia le risultanze in sè del procedimento logico da cui essa deriva devono ritenersi sottoposte alla più stretta interpretazione” (DELLA ROCCA, *Diritto canonico*, 423).

²⁰⁶ “Praesumptio igitur est prudens aestimatio circa singularia contingentia seu medium quoddam cognitionis, quidam processus rationis, in quo ex signis externis, praesentibus, immediatis ex una parte, et ex generalibus regulis ex altera parte con-cluditur, con-iicitur, con-ligitur veritas (facti vel regulae) sive occulta, sive interna, sive futura, adhuc incerta” (KELLER, “De usu praesumptionum,” 9*).

See also KELLER, “De usu praesumptionum,” 21*; LABANDEIRA, *Las presunciones en derecho canónico*, 55.

Since a presumption is a conjecture, it can always be overturned by contrary proof.²⁰⁷ The proof that overthrows a presumption can be either direct or indirect. A direct refutation of a presumption occurs when the presumed fact is shown to be false. An indirect refutation occurs when the facts upon which the presumption is based are shown to be false.²⁰⁸ Robert Bourgon gives a helpful example based on the common presumption that the possessor of an object is presumed to be its owner. The presumption is overturned directly if it is discovered that someone else had valid title to the object. The presumption is overturned indirectly if it can be shown that the person believed to possess the object did not in fact have possession of it.²⁰⁹

1.2.2—Types of Presumptions

Modern authors state that there are two fundamental types of presumptions, viz. legal presumptions and human presumptions.²¹⁰

²⁰⁷ See CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 260; KELLER, “De usu praesumptionum,” 11*; BOCCAFOLA, Commentary on c. 1586, in *Exegetical Comm*, vol. 4/2, 1353; COX, “Part II: The Contentious Trial,” 1697; GARCÍA FAÍLDE, *Nuevo derecho procesal canónico*, 153, 157.

²⁰⁸ See R. BOURGON, Commentary on cc. 1526-1586, in *CLSGBI Comm*, 894.

“La contraddizione può essere indiretta (se si contesta la certezza dell’indizio) o diretta (se si contesta la congettura presunta dalla legge come esperienza universale dimostrando che non si verifica nel caso concreto di cui si tratta)” (ARROBA CONDE, *Diritto processuale canonico*, 557).

²⁰⁹ See BOURGON, Commentary on cc. 1526-1586, 894.

²¹⁰ See SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, *Instructio servanda a tribunalibus dioecesanis in pettractandis causis de nullitate matrimoniorum*, *Provida Mater Ecclesia*, 15 August 1936, in *AAS*, 28 (1936), 313-361, art. 170, §1; F. WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, Tomus V. *De iudiciis ecclesiasticis*, Book I, Rome, Ex officina libraria Giachetti, filii et soc., 1914, 493; LEGA, *Praelectiones*, vol. 1, 526; A. BLAT, *Commentarium textus Codicis iuris canonici*, Liber 4: *De processibus*, Rome, Collegio Angelico, 1927, 337; BOURGON, Commentary on cc. 1526-1586, 894; WOYWOD, *A Practical Commentary*, 423.

A. SÁNCHEZ-GIL, also speaks of the *praesumptio in lege ferenda* and the *praesumptio vulgaris*: “Sono, di conseguenza, escluse sia la presunzione che serve di fondamento ad una norma—o *praesumptio in lege ferenda*—, che è per sua natura metagiuridica; sia le presunzioni che devono realizzare altri soggetti giuridici, in situazione di dubbio, per agire conformemente al diritto (cfr. ad esempio, cc. 283 §1; 764; 886 §2; 911 §2; 950, 969 §1; 1003 §2), o, in generale, per agire prudentemente; una tale presunzione viene denominata *praesumptio vulgaris* nella tradizione giuridica, per indicare che non è stata stabilita né dalla legge né dal Giudice, e non è, dunque, regolata dal diritto” (“La presunzione nella vigente normativa canonica,” in *Ius ecclesiae*, 24 [2013], 63).

1.2.2.1—Legal Presumptions

The presumption of law (*praesumptio iuris*), or legal presumption, is a presumption that is stated in the law itself, at least implicitly.²¹¹ It is “a conclusion which the law itself deduces from certain facts....”²¹²

Legal presumptions were traditionally divided into two categories based on what kind of evidence can overthrow the presumption: the simple legal presumption (*praesumptio iuris tantum*) and the irrebuttable presumption (*praesumptio iuris et de iure*). As noted above, the designations of presumption *iuris et de iure* are absent from the *CIC/83* and the *CCEO*.

1.2.2.1.1—*Praesumptio iuris (tantum)*

Though the legal presumption draws certain conclusions from proven facts, in the case of simple legal presumptions, the conclusion is considered to be true “unless and until the contrary is demonstrated.”²¹³ The simple legal presumption can be overthrown by direct

²¹¹ See W. DANIEL, Commentary on cc. 1265-1266, in J. FARIS and J. ABBASS (eds.), *A Practical Commentary to the Code of Canons of the Eastern Churches*, vol. 2, Montréal, Wilson & Lafleur, 2019, 2264; SÁNCHEZ-GIL, *La presunzione di validità*, 61.

M. Lega states that a legal presumption can be derived from positive law or natural law. As an example of a legal presumption from natural law he gives the example: “*nemo praesumitur malus nisi probetur*” (*Praelectiones*, vol. 1, 526). However, Della Rocca and Conte a Coronata, place presumptions of natural law in the category of human presumptions. See DELLA ROCCA, *Diritto canonico*, 424; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 261, 264.

Some clarity on the matter of presumptions of natural law is provided by J. Manning: “Reiffenstuel, also, has a classification of “*praesumptiones naturae*” and implies that by their force they also shift the burden of proof. Schmalzgrueber while he has to a similar classification applies these general presumptions almost recklessly in his “*Regulae Praesumptionum*.” These general presumptions are better called “Moral Universals,” mentioned previously. They are the underlying reasons for the probabilities of life and are used and frequently enforced, not as a presumption of law, but rather as general presumptions of nature common to all mankind” (MANNING, *Presumptions of Law in Marriage Cases*, 18-19).

²¹² BOCCAFOLA, Commentary on c. 1584, 1349. See also LEGA, *Praelectiones*, vol. 1, 526.

²¹³ BOCCAFOLA, Commentary on c. 1584, 1349. See also LEGA, *Praelectiones*, vol. 1, 526; WERNZ and VIDAL, *Ius canonicum*, vol. 5, n. 655, 493; BLAT, *Commentarium textus*, vol. 4, 338.

“In drawing these conclusions the legislator is guided by universal experience which teaches that in the majority of cases this is the result of these facts and circumstances. Exceptions to this rule may arise only

or indirect proof to the contrary.²¹⁴ As John Manning wrote, “in presumptions of law the legislator introduces a probable result from events that frequently happen, to prevent general danger to the welfare of the community.”²¹⁵

Commenting on the definition of presumptions found in *CIC/83*, c. 1584, Boccafola notes that the canon states that a legal presumption must be rational, which means that it must be both probable and subject to being reversed by proof to the contrary. It must be probable “because a conclusion deduced by a rational process would necessarily have to have the quality of probability in order to obtain that very assent of reason” and subject to being reversed “since it is based only on prudential or moral certitude, and not on absolute certitude.”²¹⁶

Having a presumption in one’s favour relieves one of the burden of proof in a legal process. Stanislaus Woywod explains: “He who has a presumption of law in his favour is freed from the burden of proof, which is thus shifted to his opponent; if the latter cannot prove that the presumption failed in the case, the judge must render sentence in favour of the one on whose side the presumption stands.”²¹⁷

rarely. Consequently, the exception to the rule is permitted to be demonstrated” (MANNING, *Presumptions of Law in Marriage Cases*, 15).

²¹⁴ See WOYWOD, *A Practical Commentary*, 316. See KELLER, “De usu praesumptionum,” 19*, 46*; A. VERMEERSCH and J. CREUSEN, *Epitome iuris canonici cum commentariis ad scholas et ad usum privatum*, vol. 3: *Libri IV et V Codicis iuris canonici*, 5th ed., Mechelin, H. Dessain, 1936, 94; M. LEGA, *Commentarius in iudicia ecclesiastica iuxta Codicem iuris canonici*, V. BARTOCETTI (ed.), Rome, Anonima Libreria Cattolica Italiana, 1950, vol. 2, 629; MANNING, *Presumptions of Law in Marriage Cases*, 16; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 262; GARCÍA FAÍLDE, *Nuevo derecho procesal canónico*, 155.

²¹⁵ “The element of doubt may always show its head at least to allow the mind to incline to an opposite conclusion. It is in such situations that presumptions of law are drafted since the *bonum commune* demands safeguards *ad cavendum periculum generale*. Consequently, a presumption of law tenaciously maintained by a judge is not declaring the absolute truth of the eventuality, but the truthlike. By following the norm of greatest probability, the law enacts that in justice and of necessity this is the nearest approach to truth” (MANNING, *Presumptions of Law in Marriage Cases*, 17).

²¹⁶ BOCCAFOLA, Commentary on c. 1584, 1349. See also BLAT, *Commentarium textus*, vol. 4, 338.

²¹⁷ WOYWOD, *A Practical Commentary*, 317. See VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 3, 94; WERNZ, *Ius decretalium*, vol. 5/1, 494; WERNZ and VIDAL, *Ius canonicum*, vol. 5, 493;

Thus, with legal presumptions, once fact A has been established, fact B must be presumed until proven otherwise. A party is, therefore, freed of the burden of proving fact B and it falls to the other party to produce evidence to the contrary. A party who seeks to overthrow a presumption must either show that fact A did not occur or that, despite the occurrence of fact A, fact B did not occur. By its logical nature as a presumption, in a legal presumption the legislator draws from experience that whenever fact A occurs, it is likely that fact B will follow. This is the major premise of the syllogism involved in presumptive reasoning. The legal presumption thus puts two facts in existential connection.²¹⁸

The connection with the burden of proof is an important characteristic of legal presumptions. Kenneth Pennington noted that “[the twelfth century jurist] Bulgarus made the important point that when the reus made an objection (*exceptio*) to the accusation of the actor, the reus became the actor and must, therefore, provide proof.”²¹⁹ Since c. 1526,

LEGA, *Praelectiones*, vol. 1, 526, 527-528; LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 634-635, 638-639; BLAT, *Commentarium textus*, vol. 4, 339; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 262; DELLA ROCCA, *Diritto canonico*, 424; BOURGON, Commentary on cc. 1526-1586, 894-895; COX, “Part II: The Contentious Trial,” 1698; GARCÍA FAÍLDE, *Nuevo derecho procesal canónico*, 154-155.

“Praesumptio iuris imprimis partem litigantem sive actorem sive reum, in cuius favorem constituta est, relevat ab onere probationis, dummodo constet de factis, quibus innitur. Quare parti adversae incumbit onus contraria probatione vim praesumptionis iuris elidendi” (WERNZ, *Ius decretalium*, vol. 5/1, 494).

“Generatim dicitur praesumptionem iuris esse regulam probationis legalem, modum probationis, quo unus, cui favet pr., liberator ab onere probandi, quod alteri imponitur” (KELLER, “De usu praesumptionum,” 14*).

“[T]he law actually authorizes the conclusion and directs the judge to cling to this conclusion without any process of proof until the adversary can prove either directly or indirectly that the presumption does not hold” (MANNING, *Presumptions of Law in Marriage Cases*, 16).

²¹⁸ See MANNING, *Presumptions of Law in Marriage Cases*, 17; LABANDEIRA, “Las máximas de experiencia,” 265-266.

²¹⁹ K. Pennington, “The Jurisprudence of Procedure,” in W. Hartmann, K. Pennington, (eds.), *The History of Courts and Procedure in Medieval Canon Law*, History of Medieval Canon Law, Washington, DC, The Catholic University of America Press, 2016, 129.

“Others have highlighted its allegiance to the school of Bulgarus through its inclusion of the maxim ‘Non ei, qui negat, sed ei, qui dicit, probatio incumbit;’ additional connections to Bulgarus include how, in raising an exception, the defendant became a plaintiff: ‘item in exceptionibus dicendum est, reum partibus actoris fungi oportere ad reus enim in exceptione actor constituitur’ (B. BRASINGTON, “A Twelfth-Century Treatise on Proof: *Saepenumero (uero) in iudiciis examinandis*,” in *Bulletin of Medieval Canon Law*, 32 [2015], 59-60).

§2 states that “matters presumed by the law itself” are matters that “do not need proof,” the burden of proof is on the person who does not have a legal presumption in his or her favour. Thus, when the respondent (*reus*) wishes to object to the conclusion required by a legal presumption, he or she becomes, in a sense, like the petitioner (*actor*) and must provide sufficient evidence to overthrow the legal presumption. If proof contrary to the presumption is not produced, the judge must rule in accordance with the presumption.²²⁰

1.2.2.1.2—*Praesumptio iuris et de iure*

The irrebuttable presumption (*praesumptio iuris et de iure*), is an absolute presumption and does not admit of contrary proof. Indirect proof, however, can be admitted against an absolute presumption by offering evidence against the fact on which the presumption is founded.²²¹

²²⁰ “El juez se ve igualmente afectado por la presunción; por regla general tiene libertad para apreciar el valor de las pruebas e interpretar el alcance de los hechos probados. Pero esa libertad desaparece en el momento en que la ley por una presunción establece el valor de unos hechos indiciarios” (LABANDEIRA, *Las presunciones en derecho canónico*, 142).

“Hemos visto repetidamente que la presunción exonera de la carga de la prueba a aquél en pro de quien milita, y que por tanto deberá probar la parte contraria si no quiere ser condenada en la sentencia. Esto nos ha dado pie para afirmar la inversión de la carga de la prueba. Ahora bien, cuando se dice «liberatur ab onere probandi» se indica claramente que habría carga de la prueba para el favorecido por la presunción si ésta no existiese. Normalmente corresponde probar a quien afirma una cuestión de hecho en el juicio, que puede ser el reo—oponiendo una excepción se hace actor—pero generalmente será el demandante. La presunción invierte, por consiguiente, la carga de la prueba” (ibid., 143).

Though some authors refer to a legal presumption resulting in an inversion of the burden of proof, Sánchez-Gil argues against this phrase: “Nello stesso senso, la presunzione non comporta—come afferma invece una parte della dottrina—una ‘inversione dell’onere della prova,’ perché alla parte che favorisce continua a spettare l’onere della prova del fatto indizio, mentre alla parte avversa corrisponderà l’onere eventuale—se è stato provato il fatto indizio—della controprova,” che potrà essere indirizzata a negare, nel caso concreto, tanto il fatto presunto dalla legge quanto la consistenza del fatto indizio o del rapporto fra entrambi” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 68).

²²¹ See WOYWOD, *A Practical Commentary*, 316-317. See also KELLER, “De usu praesumptionum,” 19*; WERNZ, *Ius decretalium*, vol. 5/1, 493; VERMEERSCH and CREUSEN, *Epitome iuris canonici*, 95; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 260; LEGA, *Praelectiones*, vol. 1, 526-527; LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 629; BLAT, *Commentarium textus*, vol. 4, 338; BOCCAFOLA, Commentary on c. 1584, 1349; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 262-263; DELLA ROCCA, *Diritto canonico*, 423; P. BONNET, “L’argomentazione presuntiva,” in *Presunzioni e matrimonio*, Studi giuridici, no. 98, Vatican City, Libreria editrice Vaticana, 2012, 24-26; MANNING, *Presumptions of*

CIC/17, c. 1904 was offered by Woywod as an example of such a presumption. The canon included the absolute presumption in favour of a judicial sentence after it has become *res iudicata*. This meant that the truth or justice of the sentence could never be directly attacked. The decision would still be vulnerable to indirect proof offered against the fact on which the sentence is based. As an example, Woywod wrote that if a suit had been brought based on a contract and it was later shown that there was in fact no contract between the parties, then the presumption is effectively overturned.²²²

There is no mention of irrebuttable presumptions in *CIC/83* or *CCEO*, though traces of the concept are still present.²²³

1.2.2.2—Human Presumptions

A human presumption (*praesumptio hominis*), sometimes referred to as a judicial presumption, is a conjecture that is not specified in the law. Manuel Arroba Conde wrote that human presumptions are not proofs but rather an evaluation of the proofs made by the

Law in Marriage Cases, 21; SÁNCHEZ-GIL, *La presunzione di validità*, 50; ARROBA CONDE, *Diritto processuale canonico*, 559.

Labandeira compares the functioning of an absolute presumption to that of a slide: “La presunción ‘iuris et de iure’ produce el mismo efecto que un tobogán: basta que se coloque un objeto en el extremo superior, para que sin necesidad de ulteriores maniobras se traslade a la parte inferior. Así también, es suficiente que conste el hecho A para que automáticamente la ley establezca que el hecho B está probado.” (*Las presunciones en derecho canónico*, 161-162).

²²² See WOYWOD, *A Practical Commentary*, 317; SÁNCHEZ-GIL, *La presunzione di validità*, 51. Additional examples can be found in CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 263.

²²³ “C’è una traccia nel c. 1642 §1 che stabilisce che la *res iudicata* gode della stabilità del diritto e non può essere direttamente impugnata. Ciò significa che la sentenza passata in giudicato possiede la forza probante di una presunzione non solo legale (che sarebbe impugnabile direttamente), ma di una presunzione legale e per legge (impugnabile solo indirettamente)” (ARROBA CONDE, *Diritto processuale canonico*, 559).

See DANIEL, Commentary on cc. 1265-1266, 2264; B. AUSTIN, “The Revised Book VI, Part I: Selected Norms and Commentary,” in *The Jurist*, 77 (2021), 299-300.

judge at the time of rendering a decision.²²⁴ By means of a human presumption, a judge²²⁵ “would conclude the truth of some fact from the evidence and circumstances connected with such a fact.”²²⁶ “To be sure, both facts, namely, the certain fact on which it is based and the controverted fact, are both united by a natural connection, such that the one cannot be separated from the other, and when one exists the other follows.”²²⁷ Like simple legal presumptions, human presumptions can also be overthrown either directly or indirectly.²²⁸

The *CIC/83* and the *CCEO* both contain canons that give prudent limits regarding human presumptions. *CIC/83*, c. 1586 and *CCEO*, c. 1265, like the earlier *CIC/17*, c. 1828, warn the judge of the necessity of basing presumptions on certain and determined facts.²²⁹ This is a reminder to the judge that inferential evidence can be dangerous and can easily mislead.²³⁰ This is why the canons require both 1) the certainty of the fact or indication on which the presumption is founded, and 2) a direct connection between the proven fact or

²²⁴ “Le presunzioni stabilite dal giudice non sono prove, ma valutazioni di prove, che vengono realizzate al momento di decidere la causa” (ARROBA CONDE, *Diritto processuale canonico*, 557).

²²⁵ “Schmalzgrueber offers as a definition of a *presumption of man*, that it is a conjecture not expressed in or based on a law, but drawn from the circumstances of the case and accepted as true until the contrary is demonstrated” (MANNING, *Presumptions of Law in Marriage Cases*, 9).

²²⁶ “Tuttavia non sembra che si possa escludere completamente che altri soggetti costituiti in qualche modo in autorità o chiamati eventualmente a decidere concreti problemi di giustizia—ad esempio, un arbitro, un superiore canonico, il titolare di un ufficio ecclesiastico, ecc.—possano ricorrere a vere presunzioni *hominis* quando agiscono, appunto, come giudici in un senso più ampio di quello appena accennato” (SÁNCHEZ-GIL, *La presunzione di validità*, 72).

²²⁷ BOCCAFOLA, Commentary on c. 1584, 1349. See WERNZ, *Ius decretalium*, vol. 5/1, 494; LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 629.

²²⁸ TRIBUNAL OF THE ROMAN ROTA, *coram* POMPEDDA, 20 November 1989, §8, in *Sacrae Romanae Rotae decisions seu sententiae*, 81 (1994), 689, quoted in DANIEL, Commentary on cc. 1265-1266, 2264. See also BLAT, *Commentarium textus*, vol. 4, 339; COX, “Part II: The Contentious Trial,” 1698-1699; GARCÍA FAÍLDE, *Nuevo derecho procesal canónico*, 156; SÁNCHEZ-GIL, *La presunzione di validità*, 74-76.

²²⁹ See KELLER, “De usu praesumptionum,” 46*; GARCÍA FAÍLDE, *Nuevo derecho procesal canónico*, 155; BOURGON, Commentary on cc. 1526-1586, 894.

²³⁰ Also SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, instruction *Provida Mater Ecclesia*, art. 173, 346.

²³¹ See K. LÜDICKE and R. JENKINS, *Dignitas connubii: Norms and Commentary*, Washington, DC, Canon Law Society of America, 2005, 362-363; WOYWOD, *A Practical Commentary*, 317.

“Cum pronum sit homines ex praesumptione errare, neque sententiae iudiciales sola probabilitate, quantum fieri potest, niti debeant, Codex iudicem monet ne quidquam coniciat «nisi ex facto certo et determinato quod dum eo, de quo controversia est, directe cohaereat» (c. 1828 [*CIC/17*])” (VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 3, 95).

indication and the presumed fact. Regarding the first requirement, a judge must be certain of the fact (*indicium*) on which he is basing the presumption, since the fact corresponds to the minor premise of the syllogism involved in the presumption. It would be wrong to try to draw certain inferences from dubious indications.²³¹ Furthermore, the fact on which the presumption is based cannot be itself presumed; it must be proven. A human presumption does not exempt one from the burden of proof.²³² With regard to the second requirement, there must be a direct connection between the proven fact (*indicium*) and the presumed fact. In other words, it must be clear that fact A is the probable cause of presumed fact B. The major premise of the syllogism, namely the relationship drawn from the judge's own knowledge and experience, must be solid. If it is not, there is no way to verify the necessary connection between the fact and the presumed conclusion.²³³

Klaus Lüdicke and Ronny Jenkins observed:

The most critical element of the human presumption is the experiential basis for it. The principle behind a presumption is that it allows for something to be drawn from the certain fact in such a way that someone who has similar experiences can confirm the conclusion. The conclusion must use the requirements of logic and be probable [...]. The stricter the logical connection between the presuppositions and the conclusion the less the possibility will arise that "it could have been otherwise." Thus, the presumption becomes more justifiable.²³⁴

²³¹ See BOCCAFOLA, Commentary on c. 1586, 1353; BOURGON, Commentary on cc. 1526-1586, 895; LABANDEIRA, "Las máximas de experiencia," 267, 272; ARROBA CONDE, *Diritto processuale canonico*, 557, 559.

"Nam si iam fundamentum coniecturae incertum est, quanto magis conclusio!" (KELLER, "De usu praesumptionum," 16*)

²³² See ARROBA CONDE, *Diritto processuale canonico*, 557.

²³³ See LABANDEIRA, "Las máximas de experiencia," 267.

²³⁴ LÜDICKE and JENKINS, *Dignitas Connubii: Norms and Commentary*, 363.

"There is then a normal mode of action for human beings. It cannot be called a law, nor an iron-clad rule, but an order of the normal mind in judging from antecedent experience and in applying this experience to a subsequent case. In this operation the memory and experience are tapped and the intellect forms the conclusion. Hence, because of varied experience and the total individuality of each mind the conclusion in reference to another person's actions is never absolutely certain. It is only probably certain" (MANNING, *Presumptions of Law in Marriage Cases*, 9-10).

The Instruction *Dignitas connubii*, in art. 216, §2, states that “the judge is not to make presumptions which are contrary to those developed in the jurisprudence of the Roman Rota.”²³⁵ This does not mean that the judge is limited to human presumptions that can be found in decisions of the Roman Rota, but that he cannot make presumptions that are contrary to the jurisprudence of the Rota.²³⁶ It would also be illegitimate for a judge to use presumptions that are contrary to the presumptions of the law itself.²³⁷

When joined with the various elements of direct proof, human presumptions can be especially helpful to the judge in arriving at the moral certitude necessary to render a decision.²³⁸

²³⁵ PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Instruction to be observed by diocesan and interdiocesan tribunals in handling causes of the nullity of marriage *Dignitas connubii*, 25 January 2005, English translation in LÜDICKE and JENKINS, *Dignitas connubii: Norms and Commentary*, Washington, DC, Canon Law Society of America, 2005, 362.

²³⁶ See LÜDICKE and JENKINS, *Dignitas connubii: Norms and Commentary*, 364. See also ARROBA CONDE, *Diritto processuale canonico*, 559-560.

²³⁷ “Obviously, it is entirely illegitimate for the judge to employ presumptions that are contrary to presumptions of law, as has been done in some tribunals wherein certain simple facts were adopted as factors that *per se* removed the force of the presumed validity of every marriage (cf. c. 779) and the obligation of the judge to reach objective moral certitude before declaring the nullity of the marriage” (DANIEL, *Commentary on canons 1265-1266*, 2265).

This was reiterated by the Signatura; see SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, decree, 13 December 1995, prot. n. 25651/94 VT, in W. DANIEL (ed. and trans.), *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, Montréal, Wilson & Lafleur, 2011, 717-722.

²³⁸ See A. SÁNCHEZ-GIL, “Presunción,” in J. OTADUY et al. (eds.), *Diccionario general de derecho canónico*, vol. 6, Navarra, Editorial Aranzadi, 2012, 425.

“Una deduzione, dunque, che si muove nell’ambito della ‘probabilità’, vale a dire tra i confini che separano la ‘certezza’ dalla mera ‘possibilità’. Un tipo di ragionamento, comune a tutti gli ambiti della conoscenza umana, indispensabile nel mondo del diritto per superare in modo razionale il dubbio (o la mancanza di certezza) su fatti o situazioni con rilevanza giuridica, la cui prova diretta è difficile, impossibile, o semplicemente inesistente nel caso concreto” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 63).

1.2.2.3—Legal Presumptions vs. Human Presumptions

Labandeira summarizes the various differences between the two categories of legal and human presumptions. Both types of presumptions are probable conjectures, but he identifies seven specific differences between the two.

- 1) Legal and human presumptions are distinguished by their author, since legal presumptions come from the legislator while human presumptions are made by the judge.
- 2) The legal presumption is a general rule valid for all cases of the same kind, while human presumption is specific to the case in which it is applied.
- 3) The legal presumption precedes the assumptions that it regulates, while the judicial presumption is established *a posteriori*, once all of the details of a case have been studied and evaluated.
- 4) The human presumption replaces the absence of direct evidence, while the legal presumption shift the burden of proof, changing the object of proof from one that is difficult to verify to one that is easier to verify.
- 5) The legal presumption is a mandate of the law to the judge, while the human presumption is created and freely used or set aside by the judge, provided that it is well-founded.
- 6) The human presumption confirms the principle that the judge is allowed to freely evaluate the evidence,²³⁹ whereas the legal presumption is an exception to that principle.

²³⁹ Cf. *CIC/83*, c. 1608, §3.

- 7) The legal presumption specifically applies a general principle based on experience, until contrary evidence is provided, while the human presumption allows the judge to evaluate the evidence in accord with his own experience, though he must do so with due caution.²⁴⁰

1.2.3—The Weight of Presumptions

As seen in the historical sections above, canonical doctrine traditionally distinguishes the weight of presumptions. From the thirteenth century onward, civil and canonical scholars strove to explain the weight of presumptions based on the *indicia* on which they were based; however, Manning observed: “Their conclusions were naturally based on the jurisprudence of their time.”²⁴¹ Unfortunately, the names for the different weights of presumptions and the manner of determining their weight vary significantly among the authors.²⁴²

With regard to human presumptions, Matteo Conte a Coronata wrote that canonical authorities distinguish the weight of a presumption according to the weight of the *indicium* upon which it is founded. The *indicium* may be classified as light (*leve*), leading to a rash (*temeraria*) presumption; probable (*probabile*), leading to a probable (*probabilis*) presumption; or vehement (*vehemens*), leading to a violent (*violenta*) or vehement (*vehemens*) presumption. Rash presumptions do not have any probative weight, but according to canonical tradition, a probable presumption could provide half proof

²⁴⁰ See LABANDEIRA, “Las máximas de experiencia,” 264-265.

²⁴¹ MANNING, *Presumptions of Law in Marriage Cases*, 11.

²⁴² “It should be noted in these opinions that the authors are influenced by the jurisprudence antedating the Code, where violent presumptions were confused with presumptions of law and presumptions of law about the law” (MANNING, *Presumptions of Law in Marriage Cases*, 14).

(*semiplena probatio*) and a vehement presumption can provide full proof.²⁴³ H. Keller noted that, because of the gravity of criminal matters, only a vehement presumption can lead a judge to moral certitude.²⁴⁴

Conte a Coronata wrote that the same distinctions of weight apply to legal presumptions, except that, unlike human presumptions, a legal presumption would never be considered rash (*temeraria*).²⁴⁵ He also noted that a legal presumption prevails over a human presumption;²⁴⁶ however, though this is true in general, it is now an accepted principle that vehement presumptions, since they lead a judge to moral certitude can overcome legal presumptions.²⁴⁷

By the early twentieth century, Manning could write that canonical authors generally agreed that valid human presumptions could constitute full proof in contentious cases. There was a difference of opinion, however, when it came to criminal cases.²⁴⁸

²⁴³ See CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 260, n. 8; 262, 264; KELLER, “De usu praesumptionum,” 17*; SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 65. Cf. WERNZ, *Ius decretalium*, vol. 5/1, 496. Wernz also refers to a probable presumption as *gravis* or *discreta*. ID.

“Que de varios hechos indiciarios juntos, que tomados uno a uno solamente tolerarían sacar una conclusión tímida, puede llegarse a una conclusión cierta o presunción «violenta» que constituye prueba plena; pero insisto en que una presunción «simple», que sea probable, puede, si está reforzada por cualesquiera otros argumentos de no mayor eficacia que ella, hacer prueba plena” (GARCÍA FAILDE, *Nuevo derecho procesal canónico*, 156-157).

²⁴⁴ “In criminalibus autem pr. vehemens tunc solummodo potest efficere probationem plenam, si transit in certitudinem moralem *stricte* dictam” (KELLER, “De usu praesumptionum,” 18*).

“[...] affermavano che, per il loro maggior grado di probabilità, il giudice potesse attribuire alle ‘presunzioni probabili’ il valore di prova piena e decidere la causa sulla base di esse, a meno che si trattasse di una causa penale—in cui sono operative il *favor rei* e il principio *in dubio pro reo*—, che poteva solo essere decisa sulla base di presunzioni violente o veementi” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 65).

²⁴⁵ See CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 260, n. 8.

²⁴⁶ See *ibid.*, 260.

²⁴⁷ “Quapropter, ex una parte iudicis est valorem indiciorum et praesumptionum aestimare atque edicere quamvis allatae praesumptiones probandi vim attingant et praesumptionem iuris evertere valeant; ex altera vero parte, cum agatur de praesumptionibus hominis, seu de praesumptionibus doctrinalibus et jurisprudentialibus contra aliquam explicitam praesumptionem iuris, concludentibus argumentis et circumstantiis casus peculiaris desumptis, demonstrandum est praesumptionem iuris in casu reapse superari” (POMPEDDA, “De usu praesumptionum contra matrimonii valorem,” 35).

²⁴⁸ Manning identified four different opinions on this matter. See MANNING, *Presumptions of Law in Marriage Cases*, 13.

Departing from the opinion of Schmalzgrueber and basing his opinion on texts of St. Augustine, Innocent III, and Franz Wernz and Peter Vidal, Manning comes to the prudent conclusion that the “judge should be influenced by the presumptions of the law, not by personal feelings or conjectures.”²⁴⁹ For a conviction in a penal process, “the proofs must be conclusive and the accused favored.”²⁵⁰

Although no reference is made to the weight of presumptions in the *ius vigens*, jurisprudence still makes reference to categories of presumptions based on their probative value.²⁵¹ The names and descriptions articulated by William Daniel are a good point of reference: “A *light* presumption has only a remote connection with the controverted fact and has little probative force alone; a *grave* presumption has a greater connection and more probative force; and a *vehement* presumption has an intimate connection and may constitute full proof.”²⁵²

²⁴⁹ MANNING, *Presumptions of Law in Marriage Cases*, 14.

²⁵⁰ *Ibid.*

“Propter solam suspicionem quamvis vehementem, nolumus illum de tam gravi crimine condemnari” (INNOCENT III, in X 2, 23, c. 14).

“Ceteroquin ad retinendam culpabilitatem accusati propter delicta, quae ex disciplina nunc vigente in foro ecclesiastico diiudicari et puniri solent, sufficit sane etiam ad poenas ordinarias nunc receptas infligendas illa moralis certitudo delicti, quae quodvis rationabile dubium in contrarium excludat” (WERNZ and VIDAL, *Ius canonicum*, vol. 6, 467-468).

²⁵¹ “La giurisprudenza conosce l’esistenza di categorie di presunzioni (gravi, semplice, violente), a seconda della loro efficacia probatoria. In realtà tali distinzioni esulano dal codice e poggiano sulla scelta canonica del sistema di libera valutazione delle prove” (ARROBA CONDE, *Diritto processuale canonico*, 558).

²⁵² DANIEL, Commentary on cc. 1265-1266, 2264. See A. FIORI, “Praesumptio violenta o iuris et de iure? Qualche annotazione sul contributo canonistico alla teoria delle presunzioni,” in O. CONDORELLI, et al., (eds.), *Der Einfluss der Kanonistik auf die Europäische Rechtskultur*, Bd. 1: *Zivil- und Zivilprozessrecht*, Cologne, Böhlau Verlag, 2009, 79-80.

Wernz and Vidal name the three weights of presumptions as 1) *leve*, 2) *discreta* or *probabile*, and 3) *vehementissima* or *violenta*. WERNZ and VIDAL, *Ius canonicum*, vol. 5, 494.

“Si indicium non multum urget quia aequivocum est et se habet ad verum simul et ad falsum, vocatur *leve*; si autem fortiter movet animum iudicis ad aliquid credendum sed cum aliquali dubio, *grave* indicium habetur; denique *gravissimum* seu indubitatum est illud quod parit assensum moraliter certum et excludentem omnem formidinem errandi” (POMPEDDA, “De usu praesumptionum contra matrimonii valorem,” 38).

1.2.4—Presumptions Are Not Legal Fictions

In the history of law, presumptions, especially presumptions *iuris et de iure*, have sometimes been compared to legal fictions and emerged from the history of Roman law about the same time;²⁵³ however, the two should not be confused. While presumptions derive certainty from probability, legal fictions claim the truth about something false.²⁵⁴ Both concepts are similar in that they are based on assumptions about the truth of a matter, but presumptions are presumed to be true, while fictions are known to be false.²⁵⁵ A presumption presupposes the concurrence of three circumstances in the same fact, namely, a known fact, an unknown fact, and a causal link between both.

Manning succinctly summed up the similarities and differences between presumptions and fictions:

Hence, a presumption is applied in doubtful matters, a fiction of law to know facts; a presumption is a probable truth, a fiction is contrary to the truth; a presumption is used in reference to facts, a fiction in matters of fact and of rights; a presumption permits of direct

²⁵³ “Alia [presumptio est] iuris (et) de iure. Puta cu(m) q(ui)s fingit aliq(ui)d (et) statuit super fito s(ecundu)m Goff(redum) (et) hoc no(n) admittit p(ro)batio(n)e(m) in (contra)riu(m)... Et al(ia)s g(e)n(er)aliter ubicu(m)q(ue) ius fingit et statuit sup(er) ficto. Q(ua)n(do)q(ue) t(ame)n ius fingit aliud e(ss)e q(uod) sit... Ubi ergo ius p(re)sumit (et) ex tali presuntione ius facit dicit(ur) p(re)sumptio iuris (et) de iure” (HENRY OF SUSA, *Summa, una cum summaribus et adnotationibus Reverendi Patris Domini Nicolai Superanti*, Lyon, 1537, 1, II, *De presumptionibus*, rubrica, n. 3, f. 106; quoted in BONNET, “L’argomentazione presuntiva,” 28).

“La présomption véritable au contraire a lieu « super incertis », « in re dubia »: elle établit avec une certaine probabilité un fait inconnu. Le but poursuivi est seulement de faciliter la preuve, mais aucunement d’aller contre la réalité” (LEVY, *La hiérarchie des preuves*, 64).

See also SÁNCHEZ-GIL, *La presunzione di validità*, 20-21.

²⁵⁴ “No debe confundirse la *praesumptio* con la *fictio iuris*, ya que se diferencian notablemente, porque mientras que la primera toma lo probable por cierto, la segunda toma lo falso por verdadero.” BUSO, “Algunas consideraciones,” 79.

“Si tratta di una deduzione fatta con una logica di probabilità; una congettura è un’opinione, un’ipotesi, un giudizio fondato su indizi, apparenze, che sono sicuramente certi. Questo distingue la presunzione dalle *fictio iuris*, nelle quali il fatto non è incerto ma falso” (ARROBA CONDE, *Diritto processuale canonico*, 555).

“Legislator, dum in praesumptione ex signis quibusdam veritatem conicit, in fictione, non vera pro veris ex quadam aequitate habet” (VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 3, 93).

²⁵⁵ See R. GAMA, “Presumptions and Fictions: A Collingwoodian Approach,” in M. DEL MAR and W. TWINING (eds.), *Legal Fictions in Theory and Practice*, Cham, Switzerland, Springer International Publishing, 2015, 568.

An example can be found in the *Regulae iuris*: Pro possessore habetur qui dolo desiit possidere (*RJ 36 in VI*^o). See LABANDEIRA, *Las presunciones en derecho canónico*, 36.

and indirect proof to the contrary, a fiction permits of no proof; a presumption is a type of proof at least in effect, a fiction is no proof; a presumption can be of man or of law, a fiction is only of law; presumptions can militate against each other, fictions cannot; many presumptions may concur, fictions cannot; presumptions can be extended from person to person, fictions cannot.²⁵⁶

Conclusion

It is apparent that the history of presumptions is somewhat complicated and that the clear formulation of a definition has its challenges. Presumptions are very useful and, arguably, indispensable for judging cases; nevertheless, they are supplementary. As Arroba Conde wrote: “One must not forget, however, that the function of presumptions is supplementary, an additional element that is added to the arguments from which the judge must draw certitude. Direct proofs should be preferred; in other words, it would not be legitimate to ignore what has been directly proven, even if it is contrary to the legal presumption.”²⁵⁷

Having examined the origins of presumptions in law and how they are generally understood today, the following two chapters will explain and analyze two important presumptions.

²⁵⁶ MANNING, *Presumptions of Law in Marriage Cases*, 27.

For more on fictions, see LABANDEIRA, *Las presunciones en derecho canónico*, 106-110.

²⁵⁷ “Non si può però dimenticare che la funzione delle presunzioni è suppletiva, un elemento in più che si aggiunge agli argomenti dai quali il giudice deve trarre la sua certezza. Si devono preferire le prove dirette, cioè non sarebbe legittimo misconoscere ciò che sia stato direttamente provato, anche se contrario alla presunzione legale” (ARROBA CONDE, *Diritto processuale canonico*, 558-559).

CHAPTER 2: THE PRESUMPTION OF IMPUTABILITY (CANON 1321, §4)

Introduction

A crime or delict is not the same as a sin. Indeed, canonical delicts are always sins, but not all sins are canonical delicts. Reflecting on the admonition of St. Paul to Titus that a bishop be “without crime,”¹ St. Augustine articulated the idea that a crime must be different from sin because it would be impossible for anyone to be a bishop if freedom from sin were a prerequisite. Slowly over time, theologians and canonists would develop a clearer articulation of the difference between crimes and sins.²

One of the important contributions of the Church to the development of penal law was to highlight the subjective element of guilt as an essential element to any crime. Because a crime is rooted in a sin, the subjective element is just as important as the objective element.³ That is not to say, however, that the requirement of intent for criminal responsibility was first discovered or recognized by the Church. In fact, Plato had already written that “voluntary and involuntary wrongs are recognized as distinct by every

¹ Tit 1:7 Vulgate. See AUGUSTINE, *In Joannis evangelium tractatus*, 41, 10, in J.-P. MIGNE, *Patrologiae cursus completus: Series Latina*, vol. 35, Paris, Migne, 1841, 1697-1698; quoted by Gratian, D. 25, c. 3.

² “Encore mal réalisée dans Gratien, cette distinction sera petit à petit perfectionnée par les décrétistes, puis par les décréalistes, et permettra, en obligeant à mieux cerner la définition du délit...” (O. ÉCHAPPE, “L’imputabilité de l’acte délictueux : Du droit romain au droit canonique,” in *L’Année canonique*, 30 [1987], 119).

See also S. KUTTNER, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX. systematisch auf Grund der handschriftlichen Quellen dargestellt*, Vatican City, Biblioteca Apostolica Vaticana, 1935, 6, 8. For further developments in Gratian and beyond, see 8-22.

³ See J. MARTINEZ-TORRÓN, *Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition*, Berlin, Duncker & Humblot, 1998, 168-169.

This is not to deny that the subjective element of crime can be found much earlier in Roman law. See A. BISCARDI, “L’imputabilità dell’atto delittuoso in diritto romano,” in *Atti del Colloquio romanistico-canonistico (febbraio 1978)*, Rome, Libreria editrice della Pontificia Università Lateranense, 1979.

However, ÉCHAPPE writes: “il n’en va pas aussi nettement pour l’élément subjectif du délit, dont on peut dire que sa théorie ne fut jamais énoncée avec netteté. [...] Cependant, malgré cette absence d’une théorie générale de l’imputabilité de l’acte délictueux, les textes de droit romain témoignent en maints endroits de l’apparition et du développement historique de l’idée d’une composante subjective du délit” (“L’imputabilité de l’acte délictueux,” 116).

legislator who has ever existed in any society.”⁴ The principle that a subjective criminal intention beyond the merely criminal act was required for a crime is referred to by Cicero as the “tacit law of humanity.”⁵ Yet, it took time for a clear development of the idea of the subjective element of crime, i.e. imputability, to be clearly articulated and systematically examined.⁶ Gratian cited St. Augustine’s teaching that the will was necessary to carry out a sinful act, and the canonical tradition continued to examine and articulate the imputability of crimes based on this fundamental principle.⁷

In this chapter, the notion of a canonical delict is explained beginning with the essential elements of a delict and then continuing to an in-depth examination of the subjective element of a delict, i.e. imputability. The primary focus of the chapter is c. 1321, but subsequent canons that are relevant to the imputability of a delict will also be examined along with *CCEO*, c. 1414. The chapter concludes with an initial look at the presumption of *dolus* in *CIC/17*, the change to a presumption of imputability in *CIC/83*, and the presumption of deliberateness in the *CCEO*.

⁴ PLATO, *Laws*, 861a, quoted in J. FRANKLIN, *The Science of Conjecture: Evidence and Probability before Pascal*, Baltimore, MD, Johns Hopkins University Press, 2015, 355.

⁵ CICERO, *Pro M. Tullio oratio*, ch. 22, n. 51; cited in TRIBUNAL OF THE ROMAN ROTA, *coram* JAEGER, 28 June 2016, A. 118/2016, n. 5, quoted in D. TETI, “Il diritto penale nella più recente giurisprudenza rotale: Principi generali e fattispecie delittuose,” in *Diritto penale canonico: Dottrina, prassi e giurisprudenza della Curia Romana*, *Annales doctrinae et iurisprudentiae canonicae*, no. 15, Vatican City, Libreria editrice Vaticana, 2023, 720.

⁶ See ÉCHAPPE, “L’imputabilité de l’acte délictueux,” 119.

⁷ See *ibid.*, 124. See also C. 15, q. 1., c. 1; I. SWOBODA, *Ignorance in Relation to the Imputability of Delicts: An Historical Synopsis and Commentary*, Washington, DC, The Catholic University of America Press, 1941, 14.

“Nunc vero usque adeo peccatum voluntarium est malum, ut nullo modo sit peccatum, si non sit voluntarium” (AUGUSTINE, *De vera religione*, c. 14, 27, in J.-P. MIGNE, *Patrologiae cursus completus: Series Latina*, vol. 34, Paris, Migne, 1845, 133).

“Nam et qui nesciens peccavit, non incongruenter nolens peccasse dici potest [...] peccatum sine voluntate esse non posse verissimum est” (AUGUSTINE, *Retractationes*, I, c. 15, 3, in J.-P. MIGNE, *Patrologiae cursus completus: Series Latina*, vol. 32, Paris, Migne, 1841, 609).

2.1—The Notion of a Delict

The word *delictum*, which can be translated as delict, crime, or offence,⁸ is not defined in the *CIC/83*;⁹ however, many canonical authors consider the definition of a delict found in *CIC/17* to still be an accurate definition.¹⁰

Canon 2195, §1—By the term delict, in ecclesiastical law, is understood the external and morally imputable violation of a law, to which has been added a canonical sanction which is at least indeterminate.

§2—Unless it appears otherwise from the circumstances, what is said about delicts is applied also to the violation of penal precepts to which a penal sanction has been attached.

The first paragraph of this canon articulates the three essential elements of a delict: objective, subjective, and legal (or juridical).¹¹

⁸ “One could also use the common law term *felony*, in as much as it denotes a serious offense or delict” (W. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2nd ed., Ottawa, Faculty of Canon Law, 2003, 23).

Before the promulgation of the *CIC/17*, sometimes a distinction was made between delicts, which were minor transgressions, and crimes, which were graver transgressions. See T. BOUSCAREN et al., *Canon Law: A Text and Commentary*, 4th rev. ed., Milwaukee, WI, The Bruce Publishing Company, 1966, 864; B. PIGHIN, *Diritto penale canonico*, Venice, Marcianum Press, 2008, 102-103.

⁹ The legislator chose to avoid including definitions in the *CIC/83* because definitions belong to canonical doctrine rather than legislation. See *Relatio*, 291, in *Comm*, 16 (1984), 38. See also V. DE PAOLIS, *De sanctionibus in ecclesia: Adnotationes in Codicem: Liber VI*, Rome, Editrice Pontificia Università Gregoriana, 1986, 40; A. JÓZWOWICZ, *L'imputabilità penale nella legislazione canonica*, Vatican City, Libreria editrice Vaticana, 2005, 73-74; V. DE PAOLIS and D. CITO, *Le sanzioni nella Chiesa: Commento al Codice di diritto canonico Libro VI*, Manuali, no. 8, Vatican City, Urbaniana University Press, 2008, 90; J. RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, Ottawa, Faculty of Canon Law, 2024, 59.

¹⁰ See T. GREEN, “Book VI: Sanctions in the Church (cc. 1311-1399),” in *CLSA Comm2*, 1533-1534, n. 17; J. ORSI, *Direito Penal Canônico*, São Paulo, LTR Editora Ltda., 2009, 33; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 90; A. D'AURIA, *L'imputabilità nel diritto penale canonico*, Rome, Editrice Pontificia Università Gregoriana, 1997, 12; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 59; A. CALABRESE, *Diritto penale canonico*, 3rd ed., Vatican City, Libreria editrice Vaticana, 2006, 30; A. MARZOA, Commentary on c. 1321, in *Exegetical Comm*, vol. 4/1, 263; L. CHIAPPETTA, *Il Codice di diritto canonico: Commento giuridico-pastorale*, vol. 2, F. Catozzella et al. (eds.), 3rd ed., Bologna, Edizione Dehoniane Bologna, 2011, 620.

Some authors rightly note that one can see the compatibility of the definition in *CIC/17*'s c. 2195 with *CIC/83* by noticing the similarity between the essential elements of a delict mentioned in *CIC/83*'s c. 1321, 2°. See PIGHIN, *Diritto penale canonico*, 103; JÓZWOWICZ, *L'imputabilità penale*, 73-74.

¹¹ See F. WERNZ and P. VIDAL, *Ius canonicum*, vol. 7, Rome, Gregorian University, 1937, 35; F. ROBERTI, *De delictis et poenis*, 2nd ed., vol. 1, part 1: *De delictis in genere*, Rome, Custodiam libreriam Pontificii Instituti Utriusque Iuris, 1944, 53; I. CHELODI, *Ius canonicum de delictis et poenis et de iudiciis criminalibus*, 5th ed., ed. by P. CIPROTTI, Trent, Libreria Moderna editrice A. Ardesi, 1943, 5; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 82; A. MCCOY, *Force and Fear in Relation to Delictual Imputability and Penal Responsibility: An Historical Synopsis and Commentary*, Washington, DC, The

2.1.1—The Objective Element of a Delict

The objective element of a delict consists in an external violation of an ecclesiastical penal law or a penal precept¹² that does injury to the social order of the Church.¹³ The violation can be either doing something that the law forbids or omitting something that the law commands.¹⁴ As Alan McCoy explains, “[T]his objective element is the first to be considered, since it forms the basis or foundation of every question regarding penalties.”¹⁵

Catholic University of America Press, 1944, 54; V. DE PAOLIS, “L’imputabilità dell’atto delittuoso nel libro V del CIC,” in *Atti del Colloquio romanistico-canonistica*, Rome, Libreria editrice della Pontificia Università Lateranense, 1979, 423; DE PAOLIS, *De sanctionibus in ecclesia*, 40; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 90; JÓZWOWICZ, *L’imputabilità penale*, 74, 160; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 99-100; V. DE PAOLIS, Commentary on c. 1414, in P. PINTO (ed.), *Commento al Codice dei Canoni delle Chiese Orientali*, Vatican City, Libreria editrice Vaticana, 2001, 1118-1119; PIGHIN, *Diritto penale canonico*, 103-104; GREEN, “Book VI: Sanctions in the Church,” 1540; F. EASTON, Commentary on c. 1414, in J. FARIS and J. ABBASS (eds.), *A Practical Commentary to the Code of Canons of the Eastern Churches*, vol. 2, Montréal, Wilson & Lafleur, 2019, 2537; ORSI, *Direito Penal Canônico*, 33; CHIAPPETTA, *Il Codice di diritto canonico*, 632-633; D’AURIA, *L’imputabilità nel diritto penale canonico*, 12; TRIBUNAL OF THE ROMAN ROTA, *coram* CABERLETTI, 9 March 2021, A. 28/2021, n. 3; quoted in TETI, “Il diritto penale nella più recente giurisprudenza rotale,” 717.

Not all canonists use this tripartite distinction of the elements of a delict, preferring a bipartite distinction that includes the legal or juridic elements as part of the objective element; Z. SUCHECKI, *Le sanzioni penali nella Chiesa*, Vatican City, Libreria editrice Vaticana, 1999, 54, mentioned in PIGHIN, *Diritto penale canonico*, 103, n. 23; JÓZWOWICZ, *L’imputabilità penale*, 74; J. SANCHIS, *La legge penale e il precetto penale*, Milan, Giuffrè, 1993, 11-13; WOESTMAN, *Ecclesiastical Sanctions*, 23-24; TRIBUNAL OF THE ROMAN ROTA, *coram* MONIER, 21 June 2002, in *Romanae Rotae Decisiones seu sententiae*, 94 (2002), 402.

¹² Unless otherwise noted, what is said of penal laws applies also to penal precepts.

¹³ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 41; ROBERTI, *De delictis et poenis*, 53; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 82; MCCOY, *Force and Fear*, 54; J. MCGRATH, *Comparative Study of Crime and Its Imputability in Ecclesiastical Criminal Law, and in American Criminal Law*, Washington, DC, Catholic University of America Press, 1957, 11; ORSI, *Direito Penal Canônico*, 33; JÓZWOWICZ, *L’imputabilità penale*, 74-75; EASTON, Commentary on c. 1414, 2537.

“Ius poenale enim suis principiis regitur, inter quae adest quod saecularis praesertim doctrina vocat *principium fragmentariorum*, ad cuius tenorem quaedam dumtaxat actiones (vel quandoque omissiones), peculiariter erga bonum publicum seu ordinem socialem noxiosae, a Legislatore seliguntur utpote poenalem merentes sanctionem (cf. Innocentius III, Litt. Decr. *Novit ille*, X 2, 13)” (TRIBUNAL OF THE ROMAN ROTA, *coram* AROKIARAJ, 15 June 2020, A. 85/2020, n. 6; quoted in TETI, “Il diritto penale nella più recente giurisprudenza rotale,” 719).

¹⁴ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 35-36; JÓZWOWICZ, *L’imputabilità penale*, 75; A. CALABRESE, *Diritto penale canonico*, 3rd ed., Vatican City, Libreria editrice Vaticana, 2006, 30.

“Qui non facit quod facere debet, videtur facere adversus ea quae non facit” (*D.* 50.17.121).

“Sono più frequenti i casi di violazione di ciò che è vietato, meno quelli di omissione, fatta eccezione, forse, per il precetto, cioè per l’inadempienza di quanto il precetto comanda di fare” (CALABRESE, *Diritto penale canonico*, 31).

¹⁵ MCCOY, *Force and Fear*, 54-55. Cf. SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 83.

The Church only specifies delicts for sins that are detrimental to ecclesiastical society.¹⁶ Those sins that are designated as delicts are, therefore, objectively grave both in themselves and, insofar as they are determinantal to ecclesiastical society, grave in their circumstances. Something that is not grave would have little or no relevance to ecclesiastical society, and, therefore, would not constitute a delict.¹⁷ Ángel Marzosa notes that the recognition of delicts as public juridic matters rather than private juridic matters is a unique contribution of the Church:

[...] the Church has since the beginning defended the public juridical nature of an offense. The Church does not punish it as a sin or act that is improper in itself, opposed to God and to the personal sanctification of the offender (internal forum); nor does the Church, at least directly, punish it as an act that violated some singular right of other faithful (contentious forum). It punishes an offense as an act that endangers public safety and disturbs the just social order of society (*tranquillitas*).¹⁸

An external violation is not merely an act of the intellect and the will; it must include the corporeal faculties of the person. Without this external quality, there can be no imposition of a penalty for two reasons. The first reason is that, as Aquinas wrote in the

¹⁶ See A. VERMEERSCH and J. CREUSEN, *Epitome iuris canonici*, Tomus III: *Libri IV et V Codicis iuris canonici*, Mechlin, H. Dessain, 1936, 217; ROBERTI, *De delictis et poenis*, 53; H. AYRINHAC and P. LYDON, *Penal Legislation in the New Code of Canon Law (Book V)*, New York, Benziger Brothers, 1944, 27; A. MARZOSA, Introduction to Book VI, Part I, in *Exegetical Comm*, vol. 4/1, 211; ID., Introduction to Book VI, Part I, Title III, in *Exegetical Comm*, vol. 4/1, 257-258; ID., Commentary on c. 1321, 266, 268; D'AURIA, *L'imputabilità nel diritto penale canonico*, 70; CALABRESE, *Diritto penale canonico*, 33; ORSI, *Direito Penal Canônico*, 34; M. DEL POZZO, "Il rapporto tra delitto e peccato nell'attualità del diritto canonico," in *Ius canonicum*, 53 (2013), 203.

In the earliest centuries of the Church, personal sins were sometimes punished with penalties. "But, by the fourth century, it was explicitly stated that the proper object of canonical penalties is not sin that is merely internal, but only sin with external dimensions—a sin the commission of which breaks up the order of ecclesiastical society" (MARZOSA, Commentary on c. 1321, 264).

"Even the penalty that is threatened by ecclesiastical authority—although in reality it is simply a recognition of a situation in which the subject has put himself or herself—is seen as a means of fostering communion, that is, as a means of repairing those deficiencies in the individual good and the common good that have come to light in the anti-ecclesial, criminal, and scandalous behavior of the members of the People of God" (JOHN PAUL II, Allocutio ad Decanum Sacrae Romanae Rotae ad eisdemque Tribunalis Praelatos Auditores, ineunte anno iudiciali, 17 February 1979, in *AAS*, 71 [1979], 424, English translation www.vatican.va/content/john-paul-ii/en/speeches/1979/february/documents/hf_jp-ii_spe_19790217_roman-rot.html [16 May 2025]).

¹⁷ See CALABRESE, *Diritto penale canonico*, 35; JÓZWOWICZ, *L'imputabilità penale*, 77.

The subjective gravity of delicts is explained below in section 2.1.3.4.

¹⁸ MARZOSA, Commentary on c. 1321, 264. See ROBERTI, *De delictis et poenis*, 54.

Summa theologiae, “man is not competent to judge of interior movements, that are hidden, but only of exterior acts which appear.”¹⁹ The second is because penalties are imposed for the sake of restoring the social and juridical order; no such restoration is needed if there is no violation of that order.²⁰ Thoughts, therefore, are irrelevant in regard to penal law.²¹ Violations of the law that remain completely in the interiority of the mind or the heart may be sins, but they are not delicts.²²

Though the objective element must be external, it need not be public or known to many people. Rather, the legal violation may be occult, i.e., known by only a few persons. At the same time, it is not necessary that a delict be a public violation of a penal law or a violation that is known to others. It is only necessary that the violation touch upon the external physical world, even if no one knows or sees, except of course the delinquent

¹⁹ I-II, q. 91, a. 4, resp., English translation *Summa Theologica*, rev. ed., FATHERS OF THE ENGLISH DOMINICAN PROVINCE (trans.), New York, Benziger Brothers, 1948, 998.

²⁰ See MCGRATH, *Comparative Study of Crime and Its Imputability*, 11-12; D’AURIA, *L’imputabilità nel diritto penale canonico*, 18; DE PAOLIS, *De sanctionibus in ecclesia*, 26, 40-41; CALABRESE, *Diritto penale canonico*, 36-37; ORSI, *Direito Penal Canônico*, 34; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 91.

“The purpose of ecclesiastical penal laws is to prevent the disturbance of this external social order, and, when prevention has proved fruitless, to reinstate and restore the social order” (MCCOY, *Force and Fear*, 55).

See also WERNZ and VIDAL, *Ius canonicum*, vol. 7, 36-38; M. CONTE A CORONATA, *Institutiones iuris canonici*, 2nd ed., vol. 4, Turin, Domus editorialis Marietti, 1945, 7; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 83; MCGRATH, *Comparative Study of Crime and Its Imputability*, 11-12; DE PAOLIS, *De sanctionibus in ecclesia*, 26; GREEN, “Book VI: Sanctions in the Church,” 1540; JÓZWOWICZ, *L’imputabilità penale*, 74; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 91-92; PIGHIN, *Diritto penale canonico*, 105-107; CALABRESE, *Diritto penale canonico*, 36.

²¹ See DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 91. See also G. MICHIELS, *De delictis et poenis*, 2nd ed., vol. 1, Paris, Desclée, 1961, 22; E. REGATILLO, *Institutiones iuris canonici*, vol. 2, Santander, Sal Terrae, 1951, 437; CHIAPPETTA, *Il Codice di diritto canonico*, 620, 632; PIGHIN, *Diritto penale canonico*, 105-106; F. COCCOPALMERIO, “La normativa penale della Chiesa,” in E. CAPPELLINI (ed.), *La normativa del nuovo Codice*, Brescia, Queriniana, 1983, 305; JÓZWOWICZ, *L’imputabilità penale*, 76; TRIBUNAL OF THE ROMAN ROTA, *coram CABERLETTI*, 31 July 2014, in *Romanae Rotae Decisiones seu sententiae*, 106 (2014), 345.

“Cogitationis poenam nemo patitur” (D. I, de poenit., c. 15; D. 48.19.18; quoted in MCCOY, *Force and Fear*, 55, n. 9 and PIGHIN, *Diritto penale canonico*, 106).

For the historical roots of this concept in the writings of Abelard, see KUTTNER, *Kanonistische Schuldlehre*, 4-6.

²² See ROBERTI, *De delictis et poenis*, 54; MCGRATH, *Comparative Study of Crime and Its Imputability*, 12; DE PAOLIS, *De sanctionibus in ecclesia*, 41.

himself.²³ If the delict is known to no one else, it is described as *occult*. If it is known to the whole community or could easily become known to a large number of people, it is described as *public*.²⁴

Though the occult nature of a delict does not prevent the action from being a delict, c. 1330 adds an important caveat for those delicts that must be declared or manifested to another: “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.” Thus, even if someone has engaged in an activity that is a violation of a penal law that entails some form of declaration, the person is not considered to have completed the delict if the declaration is not perceived by another person.²⁵

²³ See VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 3, 14; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 8; MCGRATH, *Comparative Study of Crime and Its Imputability*, 12; DE PAOLIS, *De sanctionibus in ecclesia*, 41; D’AURIA, *L’imputabilità nel diritto penale canonico*, 18; CHIAPPETTA, *Il Codice di diritto canonico*, 620-621; CALABRESE, *Diritto penale canonico*, 36-37; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 91; PIGHIN, *Diritto penale canonico*, 106.

²⁴ See DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 91; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 13, 19; F. COCCOPALMERIO, “La normative penale della Chiesa,” 291; MARZOA, Commentary on c. 1321, 265; CHIAPPETTA, *Il Codice di diritto canonico*, 621; PIGHIN, *Diritto penale canonico*, 106-107.

Conte a Coronata and Chiappetta further divide occult delicts into materially occult and formally occult. Chiappetta writes: “occulto materialmente, se non si conosce il fatto stesso del delitto; occulto formalmente, se è ignota l’imputabilità del reo, in quanto non si conosce l’autore del delitto o non si è certi della sua responsabilità” (CHIAPPETTA, *Il Codice di diritto canonico*, 621).

“Quaevis poena applicata per interventum superioris, agitur de poenis ferendae sententiae, consideratur publica et notoria. Item dicatur de poenis latae sententiae declaratis” (DE PAOLIS, *De sanctionibus in ecclesia*, 43-44).

For a more subtle discussion of the various degrees of notoriety of delicts, see VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 3, 220-221; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 13-20.

²⁵ See DE PAOLIS, *De sanctionibus in ecclesia*, 41; D’AURIA, *L’imputabilità nel diritto penale canonico*, 14-17; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 101.

2.1.2—The Legal or Juridical Element of a Delict

A delict does not consist of the violation of any moral or canonical norm but only the violation of a law or precept to which a penalty is attached. Thus, the legal or juridical element of a delict is the canonical penalty attached to the penal law or precept.²⁶

2.1.2.1—Moral Laws vs. Penal Laws

The failure to abide by a law or a precept can be sinful, more or less depending on the circumstances; however, it does not render a person guilty of a delict unless, he has violated a law to which a penalty is attached.²⁷ It follows, of course that sins against the precepts of the Decalogue and the divine law in general, whether natural or positive, are not delicts unless an ecclesiastical legislator has attached a penalty for their violation.²⁸ The violation of divine laws is the jurisdiction of the Church in the sacrament of penance, but the violation of divine laws that have been constituted as delicts in ecclesiastical law is subject to the punishment of the Church in the external forum.²⁹

Ángel Marzoa concisely explains the relationship between sins and delicts:

²⁶ See ROBERTI, *De delictis et poenis*, 54; JÓZWOWICZ, *L'imputabilità penale*, 75-76; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 83-84; MCGRATH, *Comparative Study of Crime and Its Imputability*, 14; MCCOY, *Force and Fear*, 54; SANCHIS, *La legge penale e il precetto penale*, 36-37; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 106; ORSI, *Direito Penal Canônico*, 35; CALABRESE, *Diritto penale canonico*, 32; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 102, n. 17; CHIAPPETTA, *Il Codice di diritto canonico*, 620; TRIBUNAL OF THE ROMAN ROTA, *coram CABERLETTI*, 9 March 2021, A. 28/2021, n. 3; quoted in TETI, "Il diritto penale nella più recente giurisprudenza rotale," 717.

Easton refers to this element as the "penal element" (EASTON, *Commentary on c. 1414*, 2537).

"Non sono quindi comprese le norme consuetudinarie e le costumanze, a meno che nella legge non siano state recepite e munite di sanzioni penali" (CALABRESE, *Diritto penale canonico*, 32).

²⁷ A possible exception could be that of *CIC/83*, c. 1399.

For information on the history of the development of the distinction between crime and sin, see KUTTNER, *Kanonistische Schuldlehre*, 3-22.

²⁸ See CALABRESE, *Diritto penale canonico*, 32.

It must be kept in mind, however, that all infractions against divine or ecclesiastical law could be the basis for a penalty under certain conditions (MICHIELS, *De delictis et poenis*, vol. 1, 66; D'AURIA, *L'imputabilità nel diritto penale canonico*, 20). See section 2.1.2.2 below.

²⁹ See MCGRATH, *Comparative Study of Crime and Its Imputability*, 13; ORSI, *Direito Penal Canônico*, 34, 35.

all offenses assume there is sin, but all sin does not necessarily assume there is an offense. This statement must be properly understood. It does not mean that *sin* is the basis of *offense*, so that after absolution of sin, responsibility for the offense disappears. Saying that ‘every offense assumes a sin’ is a *statement of fact*; where there is offense there is necessarily a grave, conscious, and free violation of a divine or ecclesiastical norm that protects the Church’s fundamental interests, meaning a violation of the moral order, a sin. But an offense arises from and displays all its effects in the juridical order. Once the offense has been committed, in some way then it becomes separated in its *iter* from the area of sin and ‘takes on a life of its own.’ This means that we find ourselves facing three possibilities: *a*) There is sin, but no offense, because a violation of the moral order is not typified as an offense in a penal norm, for example, failing to fulfill the dominical precept. *b*) There is sin, and this violation of the moral order is typified as an offense, but in the specific case there is no offense due to the lack of one of the constitutive elements of an offense, for example, an abortion committed by a minor. *c*) There is both sin and offense. In this last case, it might be that the sin was duly absolved, but the offender remained under the bond of the penalty because it had not yet been remitted, for example, someone who is punished under c. 1391 for having made a false statement in an ecclesiastical public document and who has duly confessed the sin but is still under the penalty that in his case was imposed upon him.³⁰

2.1.2.2—The Principle of Legality

The fact that delicts are committed only by the violation of laws to which a penalty is attached is in accord with the “principle of legality.” The canonical principle of legality finds its expression in the Latin maxim: *nulla poena sine lege*. The principle expresses the need for a clear articulation of what actions deserve to be penalized and who is subject to the penalty.³¹ It was enunciated in rather recent times but has been present in canon law since the twelfth century and appears to have roots in Roman law.³² This principle of

³⁰ A. MARZOA, Introduction to Book VI, Part I, Title III: Those Who Are Liable to Penal Sanctions, in *Exegetical Comm*, vol. 4/1, 258-259. See JÓZWOWICZ, *L'imputabilità penale*, 76, 163; CALABRESE, *Diritto penale canonico*, 33.

³¹ See F. ADAMI, “Il diritto penale canonico e il principio ‘Nullum crimen, nulla pena sine legge,’” in *Ephemerides iuris canonici*, 45 (1989), 138; C. FÜRST, “Penal Sanctions in the Church (cc. 1401-1467),” in G. NEDUNGATT (ed.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, Kanonika, no. 10, Rome, Pontificio Istituto Orientale, 2002, 793; JÓZWOWICZ, *L'imputabilità penale*, 69.

³² See DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 98; CHIAPPETTA, *Il Codice di diritto canonico*, 735, n. 4. Cf. JÓZWOWICZ, *L'imputabilità penale*, 69.

DE PAOLIS and CITO trace the origins of the principle of legality to C. Beccaria (DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 98); however, B. AUSTIN notes that scholars generally attribute the principle’s formulation to P. von Feuerbach (B. AUSTIN, “Nullum Crimen, Nulla Poena Sine Lege: The Principle of Legality in the *Ius vigens*,” in *Studia canonica*, 54 [2020], 13). See also P. FEUERBACH, “The Foundations of Criminal Law and the *nullum crimen* Principle,” in *Journal of International Criminal Justice*, 5 (2007), 1005;

legality is important in law because the statement of penalties for a delict helps to deter possible offenders and protects offenders from arbitrary punishment.³³

Nevertheless, though the principle of legality is well established in modern legal systems, and is rather strictly applied in the *CCEO*,³⁴ it is not absolute in the Latin Code. Most delicts are restricted to penal laws that have penalties attached, but there is still *CIC/83*, c. 1399 which allows for punishment with a just penalty for an especially grave external violation of a divine or canon law when necessary to prevent or repair scandals.³⁵ It must be said, therefore, that all infractions against divine or ecclesiastical law could be the basis for a penalty under certain conditions.³⁶

Though some scholars criticize *CIC/83*, c. 1399 for violating the principle of legality,³⁷ Wernz, commenting on its predecessor *CIC/17*, c. 2222, §1, wrote that there is no inherent contradiction. He argued that the legal element is not lacking since the canon

P. SADOWSKI, *Il principio di legalità nel diritto penale canonico*, JCD dissertation, Rome, Pontifical Gregorian University, 1999, 37-41.

Regarding roots of the principle in Roman law, see MICHIELS, *De delictis et poenis*, vol. 1, 77-78; MARZOA, Commentary on c. 1321, 267.

On the foundation of the principle in natural law, see G. DALLA TORRE, “Qualche considerazione sul principio di legalità nel diritto penale canonico,” in *Angelicum*, 85 (2008), 286. Other authors, however, emphasize that the principle is not derived from natural law (e.g. D’AURIA, “L’imputabilità nel diritto penale. Un’analisi comparata tra il C.I.C. e il C.C.E.O.,” in *Apollonaris*, 75 [2002], 102).

³³ See ADAMI, “Il diritto penale canonico e il principio,” 138; FÜRST, “Penal Sanctions in the Church,” 793; JÓZWOWICZ, *L’imputabilità penale*, 69; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 98. DE PAOLIS and CITO offer further information on the principle of legality at 99-106.

³⁴ See DE PAOLIS, Commentary on c. 1414, 1118, 1120; FÜRST, “Penal Sanctions in the Church,” 793; EASTON, Commentary on c. 1414, 2537.

³⁵ See DE PAOLIS, *De sanctionibus in ecclesia*, 43; MARZOA, Commentary on c. 1321, 267; TRIBUNAL OF THE ROMAN ROTA, *coram* JAEGER, 28 June 2016, A. 118/2016, n. 4; quoted in TETI, “Il diritto penale nella più recente giurisprudenza rotale,” 718.

The *CCEO* adheres more closely to the principle of legality in that it contains no canon analogous to *CIC/83*’s c. 1399.

³⁶ See MICHIELS, *De delictis et poenis*, vol. 1, 66, 80; D’AURIA, *L’imputabilità nel diritto penale canonico*, 20, 25.

“[...] è fatta salva la possibilità per l’Autorità della Chiesa di intervenire ogniqualvolta la pacifica convivenza sia messa in pericolo, a prescindere dal fatto che la legge violata sia sanzionata penalmente [...]” (D’AURIA, *L’imputabilità nel diritto penale canonico*, 25).

³⁷ See, e.g., J. SANCHIS, Commentary on c. 1399, in *Exegetical Comm*, vol. 4/1, 561.

grants the authority to punish and is, therefore, a true penal law.³⁸ Others argue that, since the Church is unlike a civil state and has as its goal the salvation of souls, the application of the principle of legality need not be identical to its application in civil jurisdictions.³⁹

2.1.2.3—Penalties

Though there is no definition of a penalty in the current Code, the definition found in the *CIC/17* still pertains. It describes a penalty as a privation of some good that is inflicted by a competent authority for the two-fold purpose of correcting the offender and of punishing him.⁴⁰ The penalty may be determinate or indeterminate,⁴¹ obligatory or facultative, *latae sententiae* or *ferendae sententiae*.⁴²

Penalties are a response to delictual actions:

Part of the concept of the criminal act is the fact that the perpetrator becomes deserving of punishment. The problem of punishment therefore arises, in any individual case, at the precise moment in which one become guilty of a criminal act. Punishment is the reaction demanded by law and justice against crime; they are like blow and counter-blow. The order

³⁸ “Etenim in duobus casibus paragrapho prima illius canonis contemplatis elementum legale non deest, cum lex communis illo canone contenta auctoritatem tribuat puniendi ideoque sit vera lex poenali” (WERNZ and VIDAL, *Ius canonicum*, vol. 7, 43).

For further discussion on Wernz’s position and critiques of c. 1399, see D’AURIA, *L’imputabilità nel diritto penale canonico*, 29-37.

For further information on the controversy over the principle of legality and the *CIC/17*, see J. ÁRIAS, “El sistema penal canónico ante la reforma del CIC,” in *Ius canonicum*, 15 (1975), 199-201; ADAMI, “Il diritto penale canonico e il principio,” 137-173; J. SANCHIS, *La legge penale e il precetto penale*, Milan, Giuffrè Editore, 1993, 39-48.

Commenting on the *CIC/17*, Conte a Coronata considers the inclusion of the principle of legality in c. 2195 along with the general penal norm in c. 2222, §1, charts a middle course between the two extremes of a strict principle of legality and unlimited discretion of the superior in determining what offences constitute a delict (CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 3-4).

³⁹ See JÓZWOWICZ, *L’imputabilità penale*, 71; CALABRESE, *Diritto penale canonico*, 291.

⁴⁰ See *CIC/17*, c. 2215; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 106; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 52.

“Non avendo più la definizione di delitto, rimane in qualche modo presupposta la necessità dell’elemento legale, ossia della sanzione annessa alla violazione perché si abbia un delitto. Di fatto questo elemento non appare più nel can. 1321, ma sembra indubbio che è richiesta” (DE PAOLIS and CITO, *Le sanzioni nella chiesa*, 45).

⁴¹ A determinate penalty is stated in the law, while an indeterminate penalty is left to the prudent decision of the judge or superior.

⁴² See CALABRESE, *Diritto penale canonico*, 31.

Latae sententiae penalties are not included in the *CCEO*: see *CCEO*, c. 1408.

of justice which was disrupted by the crime demands to be reestablished and restored to its original equilibrium.⁴³

Penalties do not serve a merely punitive purpose. Rather, they are “a means of sanctification with a precise pedagogical, paternal, and corrective purpose, which draws the attention of a believer to the relevance of his sin or his criminal behaviour.”⁴⁴ Ultimately, the goal of the penalty is to call the sinner to conversion.⁴⁵ Penalties are only to be imposed when the good of the Church demands it. This is why the legislator, though he has attached penalties to penal laws, still moderates the extent of their use in c. 1341, which reads: “An ordinary must initiate a judicial or administrative procedure to impose or declare penalties, when he has ascertained that neither means of pastoral solicitude, especially fraternal correction, nor a warning or rebuke can sufficiently restore justice, reform the offender, repair the scandal.”⁴⁶

Thus, penalties should not be used if fraternal correction or rebuke or other means of pastoral solicitude are sufficient; however, an ordinary is bound to impose a penalty if such fraternal or pastoral approaches are not sufficient to restore justice, reform the

⁴³ PIUS XII, Nuntia iis qui interfuerunt VI Conventui nationali Sodalium Consociationis ex iuris peritis catholicis Italiae, 5 December 1954, in *AAS*, 47 (1955), 60-71, English in *The Pope Speaks*, 2 (1955), 19-20.

⁴⁴ JÓZWOWICZ, *L'imputabilità penale*, 57.

⁴⁵ See *ibid.*, 66.

⁴⁶ The canon given here is that which is currently in force in virtue of *PGD*, 1 June 2021, in *L'Osservatore Romano*, Weekly edition in English, 4 June 2021. This canon has been slightly altered from the original c. 1341 of the *CIC/83*: “An ordinary is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender.” The new canon is more emphatic by stating that the ordinary “must” start a penal process when necessary to repair scandal, restore justice, and reform the offender; however, the legislator still states that the process should not be initiated if fraternal correction, rebuke, or other pastoral solicitude is sufficient.

offender, and repair the scandal. If even one of these elements is not addressed by fraternal correction, warning, or some other means of pastoral solicitude, a penalty is necessary.⁴⁷

2.1.3—Subjective Element of a Delict: Imputability

The mere fact of violating a penal law does not render the actor guilty of a delict. There is also a necessary subjective element of a delict which is called imputability.⁴⁸ This subjective element is the subject of c. 1321, §§2-4:⁴⁹

Canon 1321 - §2. No one is punished unless the external violation of a law or precept, committed by the person, is gravely imputable by reason of malice or negligence.

§3. A penalty established by a law or precept binds the person who has deliberately violated the law or precept; however, a person who violated a law or precept by omitting necessary diligence is not punished unless the law or precept provides otherwise.

§4. When an external violation has occurred, imputability is presumed unless it is otherwise apparent.

⁴⁷ Cf. RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 191-192. The following text of the Council of Trent was recalled by Pericle Cardinal Felici in a report to the 1967 Synod of Bishops, which was considering the guiding principles for the revision of the 1917 Code of Canon Law: “[Bishops and other ordinaries] are to remember that they are pastors and not executioners, and that they should so preside over their subjects as not to dominate them but to love them as children and siblings. They should endeavor by exhortation and warning to deter them from what is illicit lest, when they commit offenses, they are obliged to coerce them with suitable penalties. Yet, if through human frailty the subjects happen to sin, that precept of the Apostle is to be observed by them that they reprove, entreat, rebuke them in all goodness and patience, because often towards those to be corrected kindness is more effective than severity, exhortation more than threat, charity more than power” (Session XIII, de ref., chapter 1; quoted by P. Felici, “Address to the 1967 Synod of Bishops,” in *Comm*, 1 [1969], 90-91; English translation RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 62).

⁴⁸ See MCCOY, *Force and Fear*, 54; MARZOA, Introduction to Book VI, Part I, Title III, 255-256; DE PAOLIS, *De sanctionibus in ecclesia*, 41; JÓZWOWICZ, *L'imputabilità penale*, 77-78, 165, 172; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 99-104; ORSI, *Direito Penal Canônico*, 34; TRIBUNAL OF THE ROMAN ROTA, *coram* MONIER, 21 June 2002, in *RRDec.*, 94 (2002), 402.

A. CALABRESE, however, holds that once a delict is committed it exists as a delict independent of the subjective imputability of the person who committed it. See *Diritto penale canonico*, 51-53.

Significantly, the *CCEO*, though it presumes that there is a subjective element of a delict, never uses the term “imputability.” “For various reasons (among which is also the separation of the two *fora*) the controversial term *imputabilitas (moralis)* has been omitted in connection with penal liability” (FÜRST, “Penal Sanctions in the Church,” 790). See also PONTIFICIA COMMISSIO CODICI IURIS CANONICI ORIENTALIS RECOGNOSCENDO, “Lo schema dei canoni riguardanti le sanzioni penali nelle chiese orientali cattoliche,” in *Nuntia*, 4 (1977), 82-83; ID., “La nuova revisione dei canoni riguardanti le sanzioni penali nelle chiese orientali cattoliche,” in *Nuntia*, 12 (1981), 50.

For an in-depth analysis of the historical development of the concept of imputability in crime, see KUTTNER, *Kanonistische Schuldlehre*, 22ff.

⁴⁹ Cf. *CIC/17*, canons 2195, §1; 2199; 2220; 2203, §1; 2218, §2; 2226, §1; 2228; *CCEO*, canon 1414.

2.1.3.1—The Nature of Imputability

The literal meaning of the term *imputare* is “to bring into the reckoning” or “to enter into the account.” It came to refer to an attribution of merit or fault to a person.⁵⁰ In the moral sense, imputability is “a judgment in the abstract, whereby something is ascribed to a cause.”⁵¹ In the legal sense, imputability is the characteristic of a delict by which the act is attributed to its author, who is responsible for the act.⁵² Though imputability is referred to as the subjective element of a delict, in some sense it is still an objective characteristic of a delict because it is an objective characteristic of an act that reveals the relation between the act and the actor.⁵³

Pope Pius XII spoke of the fundamental importance of this subjective element of crime in his 1953 address to the Sixth International Congress on Penal Law:

Among the safeguards demanded by the law there is none, perhaps, more important or more difficult to secure than deciding culpability. It should be an unassailable principle of penal law that the “penalty” in the juridical sense always presupposes a “fault.” The simple relation of cause to effect does not merit to be considered as a juridical principle, sufficient in itself. This assertion does not in any way undermine the law. In the delict committed with an evil intention, the principle of causality is fully verified; the result—the *effectu secuto* of canon law—may, in fact, be required in order to be sure that a delict was really committed. But in penal law, causality and the resultant effect are only imputable if accompanied by culpability.⁵⁴

⁵⁰ See C. LEWIS and C. SHORT, *A Latin Dictionary*, rev. ed., Oxford, Clarendon Press, 1879; MCCOY, *Force and Fear*, 57; A. BACCETTI, *Il fondamento dell'imputabilità penale*, Rome, Tip. Sensini, 1968, 16-17; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 93. Cf. D'AURIA, *L'imputabilità nel diritto penale canonico*, 40; JÓZWOWICZ, *L'imputabilità penale*, 155.

⁵¹ SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 85.

⁵² See ROBERTI, *De delictis et poenis*, 86; BACCETTI, *Il fondamento dell'imputabilità penale*, 16; MARZOA, Introduction to Book VI, Part I, Title III, 256; DE PAOLIS, *De sanctionibus in ecclesia*, 41; BOUSCAREN et al., *Canon Law*, 866; MCGRATH, *Comparative Study of Crime and Its Imputability*, 13, 26; CALABRESE, *Diritto penale canonico*, 34; ORSI, *Diritto Penal Canônico*, 45; PIGHIN, *Diritto penale canonico*, 158; JÓZWOWICZ, *L'imputabilità penale*, 79.

⁵³ See MICHIELS, *De delictis et poenis*, 89; DE PAOLIS, “L'imputabilità dell'atto delittuoso,” 424; MARZOA, Introduction to Book VI, Part I, Title III, 256; D'AURIA, *L'imputabilità nel diritto penale canonico*, 41; B. PIGHIN, *Il nuovo sistema penale della Chiesa*, Venice, Marcianum Press, 2021, 156; JÓZWOWICZ, *L'imputabilità penale*, 115, 156, 159.

⁵⁴ PIUS XII, *Allocutio iis qui interfuerunt VI^o Conventui internationali de Ius poenali*, 3 October 1953, in *AAS*, 45 (1953), 737, English translation in *The Catholic Mind*, 52 (1954), 113.

Thus, the law of the Church only punishes human acts, that is, “acts that proceed from a free human agent and, moreover, only in so far as these acts arise from a free principle and can be attributed to the latter as their author and master.”⁵⁵ Imputability, then, “exists when the agent has the capacity to act in accordance with intentionality and intellect.”⁵⁶

2.1.3.2—Types of Imputability: Physical, Psychological, Moral, Juridical

Imputability can be physical, psychological, moral, and juridical. Some canonical authors write about physical, moral, and juridical imputability;⁵⁷ however, others rightly describe psychological imputability as separate from moral imputability since it is a necessary precondition for moral imputability.⁵⁸

2.1.3.2.1—Physical Imputability

Though physical imputability can be used loosely to speak of ascription of a physical reality to an efficient cause, such as light and heat being “imputable” to fire,

⁵⁵ SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 84. See CONTE A CORONATA, *Institutiones iuris canonici*, 26; see also BACCETTI, *Il fondamento dell'imputabilità penale*, 89-92; PIGHIN, *Diritto penale canonico*, 158; JÓZWOWICZ, *L'imputabilità penale*, 157, 172; TRIBUNAL OF THE ROMAN ROTA, *coram* MONIER, 21 June 2002, in *RRDec.*, 94 (2002), 402; ID., *coram* HEREDIA Esteban, 22 July 2015, *RRDec.*, 107 [2015], 268.

“Tunc actus imputatur agenti, quando est in potestate ipsius, ita quod habeat dominium sui actus” (THOMAS AQUINAS, *ST*, I-II, q. 21, a. 1).

“Para que haja imputabilidade, é necessário que o ato seja humano, portanto, consciente e livre. Não é suficiente a denominada imputabilidade positivista, isto é, a mera infração material da norma que traz em seu bojo uma pena” (ORSI, *Direito Penal Canônico*, 35).

⁵⁶ JÓZWOWICZ, *L'imputabilità penale*, 115.

⁵⁷ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 39-40; ROBERTI, *De delictis et poenis*, vol. 1, 86; CALABRESE, *Diritto penale canonico*, 34; JÓZWOWICZ, *L'imputabilità penale*, 81.

⁵⁸ See MICHIELS, *De delictis et poenis*, vol. 1, 90; J. SOLE, *De delictis et poenis: Praelectiones iuris canonici*, Rome, Frederickus Pustet, 1920, 13; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 7; D'AURIA, *L'imputabilità nel diritto penale canonico*, 41-44.

imputability more properly describes causality on the level of morality.⁵⁹ Thus, in the juridical sphere, physical imputability refers to the causal link between an action and criminal effect. If the link between the act and the agent is in doubt, then the imputability is in doubt and the subject cannot be held responsible.⁶⁰

2.1.3.2.2—Psychological Imputability

Psychological imputability requires that the acting person enjoy the use of reason and be able to act freely. To act with deliberation requires that one have knowledge and be able to use that knowledge to deliberate about the act to be executed.⁶¹ Free will is essential for any criminal action because the crime is formally constituted by the will. It is thus the foundation of imputability.⁶² So, for an action to be psychologically imputable, there must

⁵⁹ See SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 85; MCGRATH, *Comparative Study of Crime and Its Imputability*, 26; MCCOY, *Force and Fear*, 58; MARZOA, Introduction to Book VI, Part I, Title III, 256.

⁶⁰ See ROBERTI, *De delictis et poenis*, vol. 1, 86; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 13; MCGRATH, *Comparative Study of Crime and Its Imputability*, 26; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 7-8; F. DELLA ROCCA, *Diritto canonico*, Padova, CEDAM, 1961, 531; D'AURIA, *L'imputabilità nel diritto penale canonico*, 42; JÓZWOWICZ, *L'imputabilità penale*, 114, 155; CALABRESE, *Diritto penale canonico*, 34; D. ASTIGUETA, "Las circunstancias agravantes de la pena," in *Anuario Argentino de derecho canónico*, 23 (2017), 82.

⁶¹ See JÓZWOWICZ, *L'imputabilità penale*, 79; ASTIGUETA, "Las circunstancias agravantes de la pena," 82.

"Soltanto la mancanza assoluta di ragione e di libertà, ci spiega perché tutti gli uomini fanno una grandissima differenza fra l'operare delle bestie e quello dell'uomo; nessuno attribuisce al bruto responsabilità morale o colpa o merito in senso proprio" (BACCETTI, *Il fondamento dell'imputabilità penale*, 107).

"Il libero volere presuppone una conoscenza piena – *nihil volitum quin praecognitum...*" (DE PAOLIS and CITO, *Le sanzioni nella chiesa*, 140).

⁶² See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 55; MCCOY, *Force and Fear*, 60; MICHIELS, *De delictis et poenis*, vol. 1, 108; DE PAOLIS, *De sanctionibus in ecclesia*, 42; CALABRESE, *Diritto penale canonico*, 39, 41; DE PAOLIS and CITO, *Le sanzioni nella chiesa*, 139; D'AURIA, *L'imputabilità nel diritto penale canonico*, 75; ASTIGUETA, "Las circunstancias agravantes de la pena," 82.

"La responsabilità per gli atti umani e, in genere, tutto il sistema della moralità, hanno come inderogabile presupposto la possibilità per l'individuo di fare e di non fare, di praticare il bene piuttosto che il male, in una parola, di dirigere liberamente le proprie azioni. Se le singole volizioni fossero la conseguenza di cause esterne l'uomo non potrebbe dirsi più moralmente imputabile. Giudizio giuridico di responsabilità è anche, ed inseparabilmente, giudizio morale" (BACCETTI, *Il fondamento dell'imputabilità penale*, 92).

be a traceable connection between the criminal act and the psychological power and volitional dominion of the subject.⁶³ Andrea D’Auria explains, “an action can never be imputed to a subject if it is the result of fortuitous chance, *force majeure*, physical constraint or if we find ourselves in the presence of a reflex or instinctive act; categories that can only be recognized in relation to an *actus hominis* and not to an *actus humanus*.”⁶⁴

2.1.3.2.3—Moral Imputability

Moral imputability then refers to the property of an act that is ascribed to a subject as its author, the author being conscious and free and, therefore, having to answer to God and his conscience for the action.⁶⁵ It presupposes everything that has been said about

“Questi sono i fatti: a) prima dell’azione deliberiamo, cerchiamo i motivi e li ponderiamo; b) durante la stessa azione percepiamo che è in nostro potere di mutare la deliberazione; c) compiuta l’azione, la imputiamo a noi stessi, gioiamo o ci rattristiamo della stessa, abbiamo un’interna approvazione o riprovazione” (BACCETTI, *Il fondamento dell’imputabilità penale*, 100).

For an in-depth discussion of the necessity of free will for criminal imputability and criticism of opposing schools of thought, see BACCETTI, *Il fondamento dell’imputabilità penale*, 43-123.

⁶³ See D’AURIA, *L’imputabilità nel diritto penale canonico*, 41; PIGHIN, *Il nuovo sistema penale*, 155; JÓZWOWICZ, *L’imputabilità penale*, 155.

A delict “must be attributable to the author not only as the physical and material cause, but also as the formal cause; the act must be imputable to the author both morally and juridically” (MARZOA, *Commentary on c. 1321*, 269).

⁶⁴ D’AURIA, *L’imputabilità nel diritto penale canonico*, 42.

“Illae solae actiones vocantur proprie humanae, quarum homo est dominus” (THOMAS AQUINAS, *Summa theologiae*, I-II, q. 1, a. 1).

“[T]he law punishes with canonical sanctions only those acts which proceed from a free human agent, and, moreover, only in so far as these acts arise from a free principle and can be attributed to the latter as their author and master” (MCCOY, *Force and Fear*, 56).

⁶⁵ See ROBERTI, *De delictis et poenis*, 86; WERNZ and VIDAL, *Ius canonicum*, vol. 7, 40; D’AURIA, *L’imputabilità nel diritto penale canonico*, 45, 48; DELLA ROCCA, *Diritto canonico*, 531; JÓZWOWICZ, *L’imputabilità penale*, 114; CALABRESE, *Diritto penale canonico*, 35.

“Cum actus morales vel boni vel mali sint, eorumque bonitas vel malitia homini tamquam auctori tribuatur, ipsi prout boni sunt ad laudem et meritum, prout vero mali sunt ad vituperium seu culpam et poenam imputantur. Actus proinde morales ratione imputabilitatis vel laudabiles et meritorii vel culpabiles et poena digni sunt” (H. NOLDIN, A. SCHMITT, and G. HEINZEL, *Summa theologiae moralis*, vol. 1, *De principiis*, Innsbruck, F. Rauch, 1939, 79).

“Più precisamente allora col termine imputabilità viene descritta una qualità dell’atto e non del soggetto” (DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 93).

psychological imputability but with the added dimension of being either in accord with or against the moral law and resulting in the merit or blame of the subject himself.⁶⁶

Since moral imputability presupposes psychological imputability, it is certain that no moral (or juridical) imputability is present if the person who commits the act lacks freedom and conscious volition. Likewise, anything that diminishes the freedom or conscious volition of the person diminishes moral (and juridical) imputability.⁶⁷

2.1.3.2.4—Juridical Imputability

Juridical imputability, on the other hand, presumes moral imputability but adds the fact that the sinful conduct is also contrary to a penal law or penal precept. Fernando Della Rocca writes: “Juridic or legal imputability, as it has been defined, presupposes moral imputability, which in the strict sense is the relatedness of a determined fact to a subject who carried it out with free will and with intellectual knowledge, with capacity to want it and to understand it.”⁶⁸ This capacity renders the criminal actor responsible for the delict and, therefore, demands that he answer to the proper authority.⁶⁹ Innocent Swoboda explains: “The principles of moral imputability are derived from reason, they are

⁶⁶ See D’AURIA, *L’imputabilità nel diritto penale canonico*, 46; ASTIGUETA, “Las circunstancias agravantes de la pena,” 82-83.

⁶⁷ See D’AURIA, *L’imputabilità nel diritto penale canonico*, 49; JÓZWOWICZ, *L’imputabilità penale*, 112.

⁶⁸ “L’imputabilità giuridica o legale, così come essa si è definite, presuppone quella morale, che in senso stretto è la riferibilità di un determinato fatto al soggetto che la ha compiuto con volontà libera e con cognizione intellettuale, con capacità, cioè di volerlo e di intenderlo” (DELLA ROCCA, *Diritto canonico*, Padova, 1961, 531). See also ROBERTI, *De delictis et poenis*, 86, 97.

⁶⁹ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 40; JÓZWOWICZ, *L’imputabilità penale*, 78; CALABRESE, *Diritto penale canonico*, 35; ORSI, *Direito Penal Canônico*, 44.

Conte a Coronata defines legal imputability more simply as “actio imputanda a lege positive tangitur” (CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 7).

“Da un punto di vista strettamente giuridico l’imputabilità è la proprietà di un atto in virtù della quale esso viene ascritto ad un soggetto come delitto e questi viene assoggettato alla potestà coattiva dell’ordinamento giuridico della Chiesa” (D’AURIA, *L’imputabilità nel diritto penale canonico*, 53).

philosophical or ethical. The rules governing juridical imputability are dictated by public policy to meet the peculiar circumstances of social life....”⁷⁰

2.1.3.3—Delicts Presuppose Grave Sin

The Church’s penal law operates on the principle *nullum crimen sine culpa*.⁷¹ Though there is a clear distinction between sins in general and sins that are constituted as delicts by ecclesiastical law,⁷² the legal order and the moral order are still interrelated. As Velasio De Paolis and Davide Cito state: “There is, therefore, no separation between the legal order and the moral order, nor independence nor juxtaposition. They are two aspects of the one order established by God that must be respected. [...] [T]here is never a crime that is not in itself mortal sin.”⁷³

⁷⁰ SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 86. See MCCOY, *Force and Fear*, 58-59.

⁷¹ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 55; MICHIELS, *De delictis et poenis*, vol. 1, 106; CHELODI, *Ius canonicum de delictis et poenis et de iudiciis criminalibus*, 7; D’AURIA, *L’imputabilità nel diritto penale canonico*, 54; JÓZWOWICZ, *L’imputabilità penale*, 77.

⁷² See section 2.1.2.1.

⁷³ DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 94. See also CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 7; PIUS XII, Allocutio iis qui interfuerunt VI^o Conventui internationali de Ius poenali, 3 October 1953, in *AAS*, 45 (1953), 737; English in *The Catholic Mind*, 52 (1954), 113; DE PAOLIS, “L’imputabilità dell’atto delittuoso,” 423-424; DE PAOLIS, *De sanctionibus in ecclesia*, 26, 42-56; D’AURIA, *L’imputabilità nel diritto penale canonico*, 54.

“Authority is the source, the custodian, the protector, and the vindicator of order itself; and inasmuch as all human Authority is ultimately derived from God, every criminal act is a defiance of God Himself, of His supreme law and His sovereign majesty. This religious analysis of crime is intimately and essentially pertinent to a consideration of the criminal act” (PIUS XII, Nuntia iis qui interfuerunt VI Conventui nationali Sodalium Consotiationis ex iuris peritis catholicis Italiae, 5 December 1954, in *AAS*, 47 [1955], 60-71, English in *The Pope Speaks*, 2 [1955], 19-20).

“A imputabilidade deve ser grave. Não existe delito onde não há violação grave da lei. Essa gravidade deve ser entendida primeiramente no sentido moral, isto é, onde não se tem pecado grave, não há que se falar de delito” (ORSI, *Direito Penal Canônico*, 35).

“Social order is not separate from moral order but a part of it. Hence there can be no imputable violation of the social order, that is to say, an *offense*, if there is not also violation of the moral order, that is to say, a *sin*” (E. CUELLO CALÓN, *Derecho penal: Parte general*, vol. 1, 17th ed., Barcelona, Bosch, 1975, 415, English translation in MARZOA, Introduction to Book VI, Part I, Title III, 258).

Thus, the moral and juridic spheres are related; nevertheless, they remain distinct because all delicts are sins, but not all sins are delicts.⁷⁴ Moral imputability, for which one is accountable to God, is still distinct from penal or juridical imputability, for which one is accountable to the Church. Yet, juridical imputability always presupposes moral imputability.⁷⁵

According to c. 1321, §2, a person is not punished without grave imputability.⁷⁶ The fact that a given behaviour is designated by the legislator as a delict indicates that the behaviour is grave in an abstract or objective sense. This canon, however, is referring to the gravity of the offence not in an abstract sense but in the subjective sense. In this sense, the gravity refers to the offender's act of violating the law.⁷⁷ Thus, one is not punished unless he is guilty of a grave sin before God and his conscience.⁷⁸ If the actor is not aware

⁷⁴ See CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 9; CHIAPPETTA, *Il Codice di diritto canonico*, 632; DEL POZZO, "Il rapporto tra delitto e peccato nell'attualità del diritto canonico," 203; GREEN, "Book VI: Sanctions in the Church," 1529; ORSI, *Direito Penal Canônico*, 34; JÓZWOWICZ, *L'imputabilità penale*, 83-84.

"Ce devrait être en droit pénal un principe inattaquable que la « peine » au sens juridique suppose toujours une « faute »" (PIUS XII, Allocutio iis qui interfuerunt VI^o Conventui internationali de Ius poenali, 3 October 1953, in *AAS*, 45 [1953], 737).

⁷⁵ See DE PAOLIS, *De sanctionibus in ecclesia*, 56; JOZWOWICZ, *L'imputabilità penale*, 156, 159-160; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 102, n. 17; ASTIGUETA, "Las circunstancias agravantes de la pena," 83.

"[...] si può essere ritenuti moralmente responsabili di fronte a Dio di ciò che si è fatto, non si potrà essere nemmeno incriminati su di un piano penale" (D'AURIA, *L'imputabilità nel diritto penale canonico*, 54).

⁷⁶ See ROBERTI, *De delictis et poenis*, 54; DE PAOLIS, *De sanctionibus in ecclesia*, 42, 56; D'AURIA, *L'imputabilità nel diritto penale canonico*, 99; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 101.

It is worth noting that *CIC/17*, c. 2195 had "morally imputable" rather than "gravely imputable." The reference to the necessity of the offence being grave was located in c. 2218. For more on this change, see MARZOA, Commentary on c. 1321, in *Exegetical Comm*, vol. 4/1, 270; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 95-96.

⁷⁷ See MARZOA, Commentary on c. 1321, 270; DE PAOLIS, *De sanctionibus in ecclesia*, 42; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 97; D'AURIA, *L'imputabilità nel diritto penale canonico*, 19, 69-70; PIGHIN, *Diritto penale canonico*, 158; PIGHIN, *Il nuovo sistema penale*, 156-157; JÓZWOWICZ, *L'imputabilità penale*, 162-163; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 101, n. 16.

⁷⁸ See MCGRATH, *Comparative Study of Crime and Its Imputability*, 14; DE PAOLIS, "L'imputabilità dell'atto delittuoso," 423-424.

that he is committing a grave sin or if there are any circumstances that would diminish his subjective imputability such that the sin, while being serious in itself, becomes light, the actor does not incur punishment.⁷⁹ Likewise, if a person lacks sufficient freedom to perform a moral act, then he is also incapable of performing a delictual act.⁸⁰ De Paolis explains: “Since moral imputability is always required, and indeed grave imputability, there is no delict where this is lacking. Penal imputability, therefore, is not attributed where moral imputability is lacking. Violation of a law or precept which is not gravely morally imputable lacks an essential constitutive element of a delict. All those causes or circumstances that take away grave moral imputability take away the delict itself.”⁸¹

One does not, therefore, have criminal legal capacity without first having moral imputability, because moral culpability and guilt are prerequisites for the commission of a delict.⁸²

2.1.3.4—The Sources of Imputability

Canon 1321, §2 indicates that there are two sources of imputability: *dolus* and *culpa*.⁸³ The gravity of a crime and the severity of the penalty depend in part on the

⁷⁹ See D’AURIA, *L’imputabilità nel diritto penale canonico*, 70-71; CALABRESE, *Diritto penale canonico*, 35; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 97-98; CHIAPPETTA, *Il Codice di diritto canonico*, 632.

⁸⁰ See MCGRATH, *Comparative Study of Crime and Its Imputability*, 14; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 95; CHIAPPETTA, *Il Codice di diritto canonico*, 632; JÓZWOWICZ, *L’imputabilità penale*, 164-164.

⁸¹ DE PAOLIS, *De sanctionibus in ecclesia*, 56; translation mine. See ID., “L’imputabilità dell’atto delittuoso,” 424; JÓZWOWICZ, *L’imputabilità penale*, 118.

⁸² See J. FERNÁNDEZ ARRUTY, “La imputabilidad del delincuente en el Derecho penal canónico,” in *Atti del Congresso Internazionale di Diritto Canonico*, vol. 1-2 (1972), 614; JÓZWOWICZ, *L’imputabilità penale*, 115, 172.

⁸³ Cf. *CIC/17*, c. 2199; *CCEO*, c. 1414, §2.

Though *CCEO* does not use the terms *dolus* and *culpa*, it does include the concepts that these terms represent in the text of c. 1414, §2: “A person is only subject to penalties who has violated a penal law or penal precept, either deliberately or by seriously culpable omission of due diligence or by seriously culpable

subjective guilt of the agent, e.g., whether the commission of the delict was directly voluntary (*dolus*) or indirectly voluntary (*culpa*).⁸⁴ As McCoy explained, subjective guilt “varies in each concrete case according to the circumstances which affect the intensity of the anti-judicial will and the consciousness and the knowledge of the delinquent. Thus, the degree of imputability and of responsibility will depend on the degree of subjective malice or of culpability in ignorance or neglect.”⁸⁵

2.1.3.4.1—*Dolus*

Dolus has several meanings in law. In Roman law it often referred to deception, malice, cunning. The Romans also had a concept of *dolus bonus*, which might describe shrewdness in contract negotiation; however, the term *dolus malus* and similar phrases came to denote the criminal intention in a crime.⁸⁶ Though the *CIC/83* does use *dolus* outside of Book VI to refer to fraud, *dolus* has a different meaning in penal matters. *CIC/17*, c. 2200, §1 defined *dolus* as the “deliberate will to violate a law.” This concept of *dolus* remains unchanged in its meaning in the *CIC/83*.⁸⁷ It indicates the deliberate intention of violating the law and is often translated as “malice.”⁸⁸ Thus, to say that a delinquent has

ignorance of the law or precept.” See PCCICOR, “La nuova revisione dei canoni,” 50-52; FÜRST, “Penal Sanctions in the Church,” 790; EASTON, Commentary on c. 1414, 2537.

⁸⁴ See VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 3, 223; DE PAOLIS, “L’imputabilità dell’atto delittuoso,” 425; D’AURIA, *L’imputabilità nel diritto penale canonico*, 103; JÓZWOWICZ, *L’imputabilità penale*, 119.

⁸⁵ MCCOY, *Force and Fear*, 61.

⁸⁶ See ÉCHAPPÉ, “L’imputabilité de l’acte délictueux,” 125; D’AURIA, *L’imputabilità nel diritto penale canonico*, 77.

⁸⁷ This was the opinion of the relator of the Code Commission; see *Comm*, 2 (1970), 103. This is also the opinion of DE PAOLIS, *De sanctionibus in ecclesia*, 56-57; D’AURIA, *L’imputabilità nel diritto penale canonico*, 86; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 139; JÓZWOWICZ, *L’imputabilità penale*, 169-170; TRIBUNAL OF THE ROMAN ROTA, *coram* Caberletti, 18 November 2014, in *RRDec.*, 106 [2014], 346.

⁸⁸ See GREEN, “Book VI: Sanctions in the Church,” 1540; VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 3, 222; BOUSCAREN et al., *Canon Law*, 866; AYRINHAC, *Penal Legislation*, 31; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 90; MCCOY, *Force and Fear*, 61; MCGRATH,

acted with *dolus* implies that he or she has acted with knowledge and freedom, regardless of the delinquent's motive.⁸⁹ If a Catholic deliberately violates a penal law or penal precept, he or she is subject to a penalty.

To act with *dolus* does not require that the subject know that the law being violated is a penal law. Nor does *dolus* require that the subject know the specific penalty imposed by the law.⁹⁰ The subject must, however, advert to the fact that his action is illegal, in the

Comparative Study of Crime and Its Imputability, 27-28; ORSI, *Direito Penal Canônico*, 44-45; MARZOA, Commentary on c. 1321, 271; CHIAPPETTA, *Il Codice di diritto canonico*, 633; PIGHIN, *Il nuovo sistema penale*, 157.

⁸⁹ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 57; ROBERTI, *De delictis et poenis*, 89-90; AYRINHAC, *Penal Legislation*, 31; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 25, 26; MCCOY, *Force and Fear*, 61-62; MCGRATH, *Comparative Study of Crime and Its Imputability*, 28; MARZOA, Introduction to Book VI, Part I, Title III, 271; E. MCDONOUGH, "A Gloss on Canon 1321," in *Studia canonica*, 21 (1987), 381-390; F. NIGRO, Commentary on c. 1321, in P. PINTO (ed.), *Commento al Codice di diritto canonico*, 2nd ed., Studium romanae Rotae, Vatican City, Liberia editrice Vaticana, 2001, 767-768; DE PAOLIS, "L'imputabilità dell'atto delittuoso," 425; D'AURIA, *L'imputabilità nel diritto penale canonico*, 80, 82; DE PAOLIS, *De sanctionibus in ecclesia*, 57; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 139; CHIAPPETTA, *Il Codice di diritto canonico*, 633; JÓZWOWICZ, *L'imputabilità penale*, 119, 120.

"...è sufficiente la 'positiva' volontà di realizzare un atto anti-giuridico e illegale, in modo libero, indipendentemente dalle ragioni assunte dal soggetto per tale trasgressione" (PIGHIN, *Il nuovo sistema penale*, 157).

⁹⁰ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 58; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 91; MCGRATH, *Comparative Study of Crime and Its Imputability*, 28, 45; D'AURIA, *L'imputabilità nel diritto penale canonico*, 80, 93; PIGHIN, *Diritto penale canonico*, 159; JÓZWOWICZ, *L'imputabilità penale*, 121, 169-170.

"Occorre qui subito notare che non occorre sapere che la legge è penalmente sanzionata, cioè che si tratti di una legge penale, ma è sufficiente essere a conoscenza dell'esistenza della legge e quale ne sia la portata normativa. Ciò è dovuto al fatto che la punibilità non è elemento costitutivo del delitto e quindi la mancata conoscenza o rappresentazione di essa non può intaccare l'imputabilità dolosa nel suo momento intellettuale. In altre parole conoscenza dell'obbligo legale, non significa o per lo meno non richiede propriamente la conoscenza della legge penale o l'avvertenza dell'anti-giuridicità del proprio comportamento. È sufficiente che si conosca che il proprio comportamento è contro la norma. Proprio perché la punibilità o la concreta applicazione della pena non sono elementi costitutivi del delitto, la mancata conoscenza o rappresentazione di essa potrà dare luogo, come vedremo in seguito, ad un'attenuante (can. 1324 §1 9°) – o addirittura ad un'esimente (dal combinato disposto dei cann. 1324 §1, 9° e 1324 §3) – in ordine alla punibilità, lasciando purtuttavia assolutamente intatto il sussistere dell'imputabilità penale dell'atto compiuto" (DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 140).

Calabrese holds a different opinion: "Da parte dell'intelletto si richiede la previa cognizione della legge penale o del precetto penale in maniera globale e specifica insieme, cioè si richiede che si conosca non soltanto che un'azione o un'omissione sono vietate, ma anche che a tale azione od omissione è annessa una pena determinata" (CALABRESE, *Diritto penale canonico*, 39). In a later paragraph he states: "Parimenti è richiesto, a nostro avviso, che il soggetto conosca quale sia la pena determinata e specifica annessa alla violazione. Chi conosce che c'è una pena, ma non sa quale, oppure chi erroneamente crede che vi sia annessa una certa pena mentre ve ne è annessa un'altra, non incorre nella pena stabilita, secondo la stessa norma del can. 1324, §1, n. 9 e §3" (ibid., 40). It seems that Calabrese is conflating imputability and responsibility. One

sense that it is against the moral law.⁹¹ As Swoboda explains, “If a man were aware of the law at the time he resolved to commit the crime, or even at any time while he was deliberating upon his course of action, even though he did not actually advert to the fact while he was placing the anti-juridical action, he would still be guilty of a *delictum dolosum*. The knowledge must be had at a time when it can be said to be at least morally connected with the action.”⁹²

Dolus can be general or specific. General *dolus* describes the general intention to violate the law; it does not require any specific motive.⁹³ Specific *dolus*, however, requires a specific intention that accompanies the forbidden action. In the case of certain delicts, the specific *dolus* is a constitutive element of the delict and must be present for imputability.⁹⁴ For example, in c. 1382, §2, the canon reads: “An offender who consecrates for a

who is ignorant of the specific penalty attached to a delict can still have the crime imputed to him even though the law excuses him from the prescribed penalty. This is apparent from the very canon that he quotes, c. 1324, §1, which states: “The perpetrator of a violation is not exempt from a penalty, but the penalty established by law or precept must be tempered or a penance employed in its place....” See a similar critique in D’AURIA, *L’imputabilità nel diritto penale canonico*, 93.

⁹¹ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 57-58; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 90; MCGRATH, *Comparative Study of Crime and Its Imputability*, 28; MICHIELS, *De delictis et poenis*, vol. 1, 110; DELLA ROCCA, *Diritto canonico*, 533; MARZOA, Commentary on c. 1321, 271; DE PAOLIS, “L’imputabilità dell’atto delittuoso,” 425; D’AURIA, *L’imputabilità nel diritto penale canonico*, 51, 80; JÓZWOWICZ, *L’imputabilità penale*, 122.

“The reason why a person acts may appear to him as a good thing, although in fact it be contrary to law. He may even wish that the act were not forbidden by the law. It is sufficient for *dolus*, or malice, that the act is known to be in violation of the law, and is done willingly, no matter what the motive of the agent may be” (MCGRATH, *Comparative Study of Crime and Its Imputability*, 28). See also WERNZ and VIDAL, *Ius canonicum*, vol. 7, 58; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 141-145.

“Proprio perché la punibilità o la concreta applicazione della pena non sono elementi costitutivi del delitto, la mancata conoscenza o rappresentazione di essa potrà dare luogo ad un’attenuante (can. 1324 § 1, n. 9) — o addirittura ad un’esimente (dal combinato disposto dei can. 1324 §1, n. 9 3 1324 § 3) — in ordine alla punibilità penale dell’atto compiuto [...]” (D’AURIA, *L’imputabilità nel diritto penale canonico*, 80-81).

⁹² SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 91.

⁹³ See JÓZWOWICZ, *L’imputabilità penale*, 123.

“Sicut autem delictum non est confundendum cum motivis actus delictuosi, ita cum his non est confundendus dolus; nam propositum faciendi rem, quam lex prohibet, cohaerere potest cum finalitate, seu cum motivis subiective bonis [...]. Essentia doli consistit in positive voluntate ponendi actum contra legem modo humano, libero, quaecumque sint rationes quae inducant ad violationem legis vel praecepti, dummodo maneat libertas in agendo” (WERNZ and VIDAL, *Ius canonicum ad codicis normam exactum*, vol. 7, Rome, 1937, 58).

⁹⁴ See D’AURIA, *L’imputabilità nel diritto penale canonico*, 87.

sacrilegious purpose one or both [Eucharistic] elements, either in a eucharistic celebration or outside it, is to be punished according to the gravity of the delict, not excluding dismissal from the clerical state.” This canon requires specific *dolus* in that the delict is not committed unless the consecration of one or both species is done “for a sacrilegious purpose.” Thus, if a priest illicitly consecrates bread outside of Mass, he has not committed the delict unless he did so with a sacrilegious intention. The sacrilegious intention is the specific *dolus*.

Dolus can be direct or indirect. Direct *dolus* is present when the perpetrator is aware of the connection between his action or omission and the criminal effect and positively intends that criminal effect. Indirect *dolus* is present when the perpetrator is aware of the criminal effect of his action or omission but does not act for the sake of the criminal effect. According to Calabrese, some authors would consider indirect *dolus* to be a form of negligence. The *CIC/83*, like the *CIC/17*, only admits direct *dolus*.⁹⁵

Direct *dolus* can be subdivided into determinate and indeterminate. *Dolus* is determinate when the perpetrator intends his delictual action as a means to injure one or more specific goods which the law is designed to avoid. Indeterminate *dolus* is had when the perpetrator foresees and desires either one or more specific harmful effects but without knowing which effects will be accomplished.⁹⁶ Wernz explains the two concepts with the

⁹⁵ See CALABRESE, *Diritto penale canonico*, 41-42.

Calabrese, drawing on Roberti, further distinguishes other types of *dolus* that are beyond the scope of this current work, e.g., *dolo di danno*, *dolo di pericolo*, *dolo d'impeto*, and *dolo di proposito o di premeditazione*.

⁹⁶ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 58-59; ROBERTI, *De delictis et poenis*, 91; D'AURIA, *L'imputabilità nel diritto penale canonico*, 88. Cf. CALABRESE, *Diritto penale canonico*, 42.

“[I]ndeterminatus habetur, cum intentio effectus est generica sive quoad omnes effectus sive quoad unum vel alterum ex possibilibus” (WERNZ and VIDAL, *Ius canonicum*, vol. 7, 58).

example of a thief. If someone intends to steal something specific and in fact does so, he or she acted with determinate *dolus*. If, however, someone enters a house with the intention of stealing whatever he or she might find or whatever might be useful, he or she acts with indeterminate *dolus* regarding each thing that was stolen.⁹⁷

Dolus can be diminished or eliminated by either a defect in the mind of the person, i.e., ignorance or error or inadvertence; or a defect of the will, i.e., lack of freedom due to force, fear, necessity, or grave hardship.⁹⁸

2.1.3.4.2—*Culpa*

Culpa was introduced into canonical penal law by the Decretists. The term was originally used in Roman private law in cases of wrongful damage done to property. Though this is a matter of civil or private law, the Decretists applied the concept to delicts as well.⁹⁹

CIC/17, c. 2199 identifies *culpa* as “ignorance of the violation of the law or failure with regard to due diligence.” *CIC/83*, c. 1321, §3 also refers to the omission of due diligence, but omits any reference to “ignorance of the violation of the law.” Various

“Il dolo si dice invece indeterminato quando, in modo generico ed indistinto, si prevede e si vuole che la propria condotta criminosa possa avere uno o più effetti anti-giuridici, ma non si sa quale di questi e secondo quale modalità si verificherà di fatto” (D’AURIA, *L’imputabilità nel diritto penale canonico*, 88).

“Perché si abbia l’intenzione dolosa non si richiede che essa voglia in sé e per sé violare la legge in quanto tale e tanto meno che via sia l’odium legis, ma è sufficiente che si ponga un atto contrario alla legge con previsione di effetti anti-giuridici, qualunque possa essere il motivo. Per questo non ha molta importanza la distinzione che si fa del dolo in generico o specifico, determinato o indeterminato, ecc.” (DE PAOLIS, “L’imputabilità dell’atto delittuoso,” 425).

⁹⁷ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 58-59. Cf. D’AURIA, *L’imputabilità nel diritto penale canonico*, 88, n. 66.

⁹⁸ See BOUSCAREN et al., *Canon Law*, 866; AYRINHAC, *Penal Legislation*, 31; MCGRATH, *Comparative Study of Crime and Its Imputability*, 28; MCCOY, *Force and Fear*, 86-91; 98-99, 102-105, 136.

⁹⁹ See SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 103. Cf. KUTTNER, *Kanonistische Schuldlehre*, 186.

authors note, however, that the understanding of the nature of *culpa* is not thereby changed because culpable ignorance of the law is itself a type of omission of due diligence.¹⁰⁰

So, *culpa* describes culpable negligence in knowing the law or in observing the law. When a delict is committed *ex culpa* a criminal act is not directly willed but still the result of a voluntary action.¹⁰¹ Though *culpa* describes a lesser degree of guilt than *dolus*, it is still capable of being grave.¹⁰² Thus, De Paolis and Cito state: “every omission—whether of due diligence or of adequate knowledge of the law—[...] has as its base a grave moral fault in that one does not do what one is required to do for the purpose of making possible the right observance of the law and for avoiding the transgress of it.”¹⁰³

¹⁰⁰ See CALABRESE, *Diritto penale canonico*, 44; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 147, 150. This appears to be the understanding of the Code Commission as well; see *Comm*, 8 (1976), 176-177. This seems to be the position of the Secretariat; see *Relatio*, 292-293. See also WERNZ and VIDAL, *Ius canonicum*, vol. 7, 64-66; BOUSCAREN et al., *Canon Law*, 866; MCCOY, *Force and Fear*, 69; MCGRATH, *Comparative Study of Crime and Its Imputability*, 29-30; DE PAOLIS, *De sanctionibus in Ecclesia*, 57; DE PAOLIS, “L’imputabilità dell’atto delittuoso,” 426; JÓZWOWICZ, *L’imputabilità penale*, 171.

“The criminal act *is* directly intended when the crime is committed in ignorance of the law, but the violation of the law is not directly intended. In crimes resulting from omission of due diligence, the act done *is not* directly criminal nor is it willed directly” (MCGRATH, *Comparative Study of Crime and Its Imputability*, 30).

¹⁰¹ See SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 102; MCGRATH, *Comparative Study of Crime and Its Imputability*, 29; GREEN, “Book VI: Sanctions in the Church,” 1540; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 26, 28; DE PAOLIS, “L’imputabilità dell’atto delittuoso,” 427; D’AURIA, *L’imputabilità nel diritto penale canonico*, 103; JÓZWOWICZ, *L’imputabilità penale*, 119, 126, 171.

Delicts placed *ex culpa* were once commonly called quasi-delicts. See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 99; BOUSCAREN et al., *Canon Law*, 866; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 9, 25.

“It matters not whether the voluntary act from which the delictual fact results be in itself licit or illicit” (SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 102).

¹⁰² See BOUSCAREN et al., *Canon Law*, 866; MCCOY, *Force and Fear*, 70; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 146.

“La differenza tra dolo e colpa non è quindi riconducibile ad un’assenza o presenza di colpa in senso morale in quanto entrambi queste fonti di imputabilità presuppongono la colpa morale formalmente grave (DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 146).

¹⁰³ DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 151. See also DE PAOLIS, *De sanctionibus in ecclesia*, 57.

Delictual imputability for *culpa* is founded upon the principle that one should avoid doing harm to the public good by their actions. This can occur by omission as well as by commission, but *culpa* itself is always an omission because it is a failure to exercise due diligence or a culpable failure to foresee the harmful effects of one's action.¹⁰⁴ Thus, two obligations must exist simultaneously to be guilty of a delict from *culpa*. First one must foresee and know both the law and the facts that constitute the delict, and secondly, there must be a duty to prevent the delict from occurring. If one could not have foreseen the effects or if one could foresee them but had no duty to prevent them, then there is no delict from *culpa*.¹⁰⁵

Thus, *culpa* is said to be the willful omission of due diligence in considering the effects of one's actions.¹⁰⁶ Where anti-judicial effect is not foreseen or intended, there can be no *dolus*. But if the anti-judicial effect was not willed though it was foreseen or could have been foreseen, there is *culpa*.¹⁰⁷ Anyone who "acts against a law through ignorance due to negligence" and "anyone who does not use due diligence to ensure that his act or omission does not effectively become a violation of a law or precept" commits an offence *ex culpa*.¹⁰⁸

Omission of due diligence can be the result of negligence, failure to comply with specific norms, imprudence, incompetence, ineptitude, inadvertence, or ignorance of the law.¹⁰⁹

¹⁰⁴ See VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 3, 223; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 103; MCGRATH, *Comparative Study of Crime and Its Imputability*, 30. Cf. ROBERTI, *De Delictis et poenis*, vol. 1, 93; SOLE, *De Delictis et poenis*, 16; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 27; DE PAOLIS, "L'imputabilità dell'atto delittuoso," 426; DE PAOLIS, *De sanctionibus in ecclesia*, 57; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 146, 149; D'AURIA, *L'imputabilità nel diritto penale canonico*, 100; JÓZWOWICZ, *L'imputabilità penale*, 127; CALABRESE, *Diritto penale canonico*, 43.

In the canonical tradition, canonists sometimes distinguish between three degrees of *culpa*: *culpa lata*, *culpa levis*, and *culpa levissima*. These distinctions were found in Roman law and incorporated into canon law by the Decretists. *Culpa levissima* does not imply any moral guilt on the part of the actor and, therefore, is not relevant to penal law. *Culpa levis* would seem to imply only slight moral guilt due to the use of the word *levis*; however, the term was used in the canonical tradition to describe negligence that included grave moral guilt. *Culpa lata* describes the guilt of someone who knows both the law and the effects of one's action but does not take reasonable measures to prevent the criminal effects of the action. This was also referred to in the *CIC/17*, c. 2203, §1 as *culpa proximo*

Culpa is not merely a matter of juridical guilt but also moral guilt. This was not always clear in canonical sources before the *CIC/17*. “Pre-Code authors must, consequently, be read with care, because they often used the term *culpa* in the sense of juridical imputability in contrast to *dolus*, which latter included every form of moral imputability not excluding *culpa* in the sense explained above” (SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 104).

¹⁰⁵ See SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 106; MCGRATH, *Comparative Study of Crime and Its Imputability*, 30-31. CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 9.

“The criminal effects may be foreseen, but at the same time may be avoidable only at the price of not doing the action at all. If the agent has a right to do the act, then he is free to do so in spite of some criminal effects which will follow. The criminal effects will not be imputed to him, since they are not in any way intended by him, nor can he impede them except by giving up his legitimate right to act” (MCGRATH, *Comparative Study of Crime and Its Imputability*, 31).

“Occorre poi opportunamente chiarire che non ogni omissione materialmente intesa—pur ovviamente in presenza di una disposizione di legge—rileva penalmente, ma soltanto qualora in capo al soggetto omettente preesista un obbligo giuridico di tenere un determinato comportamento [...]. In caso contrario l'ambito di applicazione soggettivo del reato omissivo correrebbe il rischio di configurarsi come troppo vasto e indeterminato” (D'AURIA, *L'imputabilità nel diritto penale canonico*, 17).

¹⁰⁶ “Culpa dicitur factum inconsultum quo alteri iniuste nocetur, seu cum pluribus voluntaria omissio debita diligentiae in perpendendis effectibus propriae actionis” (ROBERTI, *De delictis et poenis*, vol. 1, 93). Cf. ORSI, *Direito Penal Canônico*, 45.

¹⁰⁷ See ROBERTI, *De delictis et poenis*, vol. 1, 93; WERNZ and VIDAL, *Ius canonicum*, vol. 7, 61; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 90; CALABRESE, *Diritto penale canonico*, 45-47.

¹⁰⁸ See MARZOA, Commentary on c. 1321, 272. See also VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 3, 222; CALABRESE, *Diritto penale canonico*, 45-47; D'AURIA, *L'imputabilità nel diritto penale canonico*, 100; JÓZWOWICZ, *L'imputabilità penale*, 127-128.

¹⁰⁹ See CALABRESE, *Diritto penale canonico*, 44; ROBERTI, *De delictis et poenis*, 93.

dolo. Though the term is not used in the *CIC/83*, the concept can still be found in the current c. 1326 §1, 3^o.¹¹⁰

It is important to note that not all delicts of negligence are delicts *ex culpa*. For example, the deliberate failure to do what was commanded in a penal precept would be an act of negligence, but the delict would be imputed to the actor as *dolus* rather than *culpa*.¹¹¹ “In a word, the negligence from which a crime results is not the same as a crime of negligence.”¹¹²

Culpa can be better understood by comparison with *dolus* and *casus*. Whereas a criminal act with *dolus* is both foreseen and directly intended, *culpa* is never directly intended. It may be foreseen and culpably permitted by a failure of one’s duty to prevent a delictual action, or it may be due to negligence in not foreseeing the violation of the law, either because the law is unknown to the person or because the person did not sufficiently consider the effects of his actions. If, however, there is no moral guilt in the failure to prevent the illicit effect or in not foreseeing the effect, then this would be a matter of *casus*, in the sense of “accident” or “fortuitous chance.”¹¹³

¹¹⁰ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 62, 63; ROBERTI, *De delictis et poenis*, 94; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 109-110; MCCOY, *Force and Fear*, 70-71; D’AURIA, *L’imputabilità nel diritto penale canonico*, 112, 117-123; CALABRESE, *Diritto penale canonico*, 49-50.

“*Culpa est lata*, si nec diligentia ab omnibus in re gravis momenti adhiberi solita adhibita sit; *levis*, si adhibita quidem sit diligentia communis, sed non illa quae adhiberi solet ab hominibus diligentioribus; *levissima*, si adhibita sit diligentia adhiberi solita ab hominibus diligentibus, sed non quae adhibetur ab hominibus diligentissimis” (CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 28).

¹¹¹ See SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 104; ROBERTI, *De delictis et poenis*, vol. 1, 67-68.

¹¹² SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 104.

¹¹³ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 64; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 105. See also D’AURIA, *L’imputabilità nel diritto penale canonico*, 123-126; JÓZWOWICZ, *L’imputabilità penale*, 130.

“Se non fu affatto previsto, nemmeno confusamente o come probabile, l’effetto delittuoso deve considerarsi piuttosto fortuito, e quindi non imputabile affatto” (CALABRESE, *Diritto penale canonico*, 43).

It is important to note, however, that the law does not hold those who act with *culpa* to the same level of responsibility as those who act with *dolus*. As c. 1321, §3 states, “one who violated a law or precept by omitting due diligence is not punished unless the law or precept provides otherwise.”¹¹⁴

2.1.3.5—Imputability, Responsibility, Punishability

Though imputability and responsibility are often used interchangeably,¹¹⁵ some authors argue that they should be clearly distinguished. Imputability refers to the relationship of moral causality between the agent and the act. Responsibility, however, refers to the relationship between the agent and a third party.¹¹⁶ As Marzoa states, the “consequence of imputability/culpability is *responsibility*: the author must answer for what he has done.”¹¹⁷

Calabrese explains that responsibility “specifies that the subject must answer for his act and for its consequences before God, to his conscience, and according to the

¹¹⁴ “The restriction in §2 [which in the *ius vigens* is now §3] affects only punishability, not the concept of offense, which is found in §1, where the double source of imputability is established. Thus, although except for c. 1389, as previously mentioned, the *CIC* expressly does not establish punishment for culpable offenses in pt. II, there is nothing to prevent another law or precept from determining the punishability of the offenses described in the *CIC* when they are committed with culpability” (MARZOA, Commentary on c. 1321, 273). See also DE PAOLIS, *De sanctionibus in ecclesia*, 58.

The *CIC/17* had several other delicts *ex culpa* that could be punished, for example the delicts in cc. 2378, 2382, and 2403. See SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 105.

¹¹⁵ “Normalmente, però, i due concetti vengono usati promiscuamente” (CALABRESE, *Diritto penale canonico*, 34).

“Anche il Roberti, scrivendo intorno all’imputabilità e alla responsabilità, ne ammette la distinzione, però conclude che in pratica i due termini si equivalgono” (BACCETTI, *Il fondamento dell’imputabilità penale*, 18; cf. ROBERTI, *De delictis et poenis*, 87).

“Licet quandoque imputabilitas accipiat pro responsabilitate, proprie tamen altera ab altera distinguitur” (CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 7).

¹¹⁶ See ROBERTI, *De delictis et poenis*, 87; SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 87; MCGRATH, *Comparative Study of Crime and Its Imputability*, 26-27; MCCOY, *Force and Fear*, 59; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 7; D’AURIA, *L’imputabilità nel diritto penale canonico*, 48; JÓZWOWICZ, *L’imputabilità penale*, 79-80.

¹¹⁷ MARZOA, Commentary on c. 1321, 256.

circumstances, before his fellow man.”¹¹⁸ It follows, therefore, that responsibility is related more closely to the imposition of a penalty, while imputability is limited to whether or not the perpetrator can be said to be guilty of a criminal act.¹¹⁹

Athos Baccetti, after reviewing the distinction in various authors, comes to the conclusion that there is no real difference between imputability and responsibility:

For us, the aforementioned distinction does not exist: responsibility and imputability are synonyms. One who is imputable is responsible and punishable; nor are there circumstances affecting responsibility that do not affect imputability. The common language uses the two terms interchangeably, and the majority of philosophers have always considered the two terms as equivalent. The concept of obligation is already implicit in the concept of imputability.¹²⁰

Roberti writes that the two terms are practically interchangeable, yet he gives an example of the difference between the two concepts by noting that the creation of the world is imputed to God, but God is responsible to no one.¹²¹

Swoboda and McCoy, however, see in this distinction great importance for understanding why the law excuses certain persons from penalties. Using examples from the *CIC/17*, they note that imputability and responsibility are not always present together at the same time in a given case.¹²²

If one is responsible for a delict, then one can be punished for committing the delict. But this makes it all the more important that imputability not be confused with

¹¹⁸ “La responsabilità, invece, specifica che il soggetto deve rispondere dell’atto e delle sue conseguenze davanti a Dio, alla sua coscienza e, secondo le circostanze, anche davanti agli uomini” (CALABRESE, *Diritto penale canonico*, 34).

¹¹⁹ See WERNZ and VIDAL, *Ius canonicum*, vol. 7, 55-56; BACCETTI, *Il fondamento dell’imputabilità penale*, 17-18.

“Il concetto di responsabilità è quindi più propriamente riferibile al soggetto che ha compiuto l’atto, mentre il termine imputabilità si riferisce più propriamente all’atto e i suoi effetti” (D’AURIA, *L’imputabilità nel diritto penale canonico*, 41).

¹²⁰ BACCETTI, *Il fondamento dell’imputabilità penale*, 19.

¹²¹ See ROBERTI, *De delictis et poenis*, 87; CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 7. Cf. MCCOY, *Force and Fear*, 59, n. 28; MCGRATH, *Comparative Study of Crime and Its Imputability*, 27.

¹²² See SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 87; MCCOY, *Force and Fear*, 59.

responsibility or punishability. A delict can be imputable to a person who is, nevertheless, unable to be punished for the delict. For example, a delict that is imputable *ex culpa* is properly imputed to the person who committed the delict. Yet the delict is not punished in most instances because the legislator has determined in c. 1321, §3 that those guilty of delicts *ex culpa* are not to be punished in most cases. In such a case, there is imputability and, therefore, it can be said that a delict has actually been committed. Yet the delict is not punishable because of the benevolence of the legislator expressed in c. 1321.¹²³

2.1.4—The Subject of Penal Sanctions

There are several canons that describe conditions or situations that would diminish a person's imputability. Since an action is not imputable unless it is a free and deliberate human act, imputability can be reduced or eliminated if something limited a person's ability to function freely and deliberately.¹²⁴ As *CIC/17*, c. 2199 states, "all causes that can increase, decrease, or remove *dolus* or culpability [*culpa*] likewise increase, decrease or remove imputability of the delict." Since *dolus* is the deliberate will to violate the law, *CIC/17*, c. 2200, §1 notes that *dolus* "is countered on the part of the intellect by a lack of

¹²³ See D'AURIA, *L'imputabilità nel diritto penale canonico*, 94-95; MARZOA, Commentary on c. 1321, 257; 272-273; PIGHIN, *Diritto penale canonico*, 159; PIGHIN, *Il nuovo sistema penale*, 157; JÓZWOWICZ, *L'imputabilità penale*, 117.

D'AURIA considers it regrettable that c. 1321, §2, links the concepts of punishability and imputability since this can lead to confusion of the two concepts: "A nostro modesto avviso, questa tecnica di redazione non è molto felice, in quanto il riannodare la sussistenza dell'imputabilità del delitto e del dolo come *fons imputabilitatis* alla punibilità del soggetto ci pare possa essere fonte di non pochi fraintendimenti, in quanto molto facilmente, in tal modo, si possono equivocare i due concetti di imputabilità e punibilità. [...] Ben diversamente invece se non vi è punibilità del delitto, in quanto questo può continuare a sussistere pienamente in tutti i suoi elementi costitutivi, compresa la grave imputabilità—è il caso di molte fra le circostanze esimenti" (*L'imputabilità nel diritto penale canonico*, 92).

"La differenza tra inimputabilità e non punibilità non riveste assolutamente carattere secondario, in quanto senza imputabilità non si può avere delitto, mentre può esservi commissione di delitto, senza che a questo segue l'inflizione di una sanzione" (*ibid.*, 60).

¹²⁴ See GREEN, "Book VI: Sanctions in the Church," 1541; D'AURIA, *L'imputabilità nel diritto penale canonico*, 143; PIGHIN, *Diritto penale canonico*, 157; PIGHIN, *Il nuovo sistema penale*, 160.

knowledge and on the part of the will by a lack of freedom.” Among the factors that can influence a person’s imputability; some are within the person’s control and others are beyond the person’s control.¹²⁵ In the canons considered in this section, sometimes the legislator not only recognizes factors that can diminish imputability but also excuses the delinquent from a penalty.

2.1.4.1—Incapacity to Commit a Delict

Certain people are not capable of having a delict imputed to them because of an incapacity. This is recognized in the current legislation and was present in the *CIC/17*, though with an important distinction.

CIC/17, c. 2201 makes a distinction between those who lack reason and those who are habitually insane. Those who lack reason are dealt with in §1: “Those who actually lack the use of reason are incapable of a delict.” The next paragraph pertains to those who are habitually insane: “Those who are habitually out of their minds, even though they sometimes have lucid intervals, [and despite the fact that] at the time [in question] they seemed to be acting with a certain rationality, are nevertheless presumed incapable of a delict.”¹²⁶ This distinction is noteworthy because those who lack reason are incapable of committing a delict, while those who are habitually insane are only presumed to be incapable. This legal presumption could be overturned.¹²⁷

¹²⁵ See GREEN, “Book VI: Sanctions in the Church,” 1540.

¹²⁶ *Ibid.*

¹²⁷ See MICHIELS, *De delictis et poenis*, vol. 1, 193-194; MCGRATH, *Comparative Study of Crime and Its Imputability*, 50; J. MARTIN, Commentary on cc. 1311-1399, in *CLSGBI Comm*, 755; A. TAVANI, “L’amentia habitualis nel CIC. Rilevanza giuridica quanto al consenso matrimoniale ed all’imputabilità penale,” in *Monitor ecclesiasticus*, 124 (1999), 588-589.

The Schema for penal law for the new Code combined these two paragraphs into one canon. The Code Commission was careful to make clear that neither those lacking reason nor those who are habitually insane can be punished for a delict. The draft canon used the formula “*delicti incapaces censentur*,” but the consultants recommended a change because “*censentur*” could be understood as equivalent to “*praesumuntur*.” To avoid any possibility of the canon being understood to be making a legal presumption, “*censentur*” was changed to “*habentur*.”¹²⁸ Thus, c. 1322 states: “Those who habitually lack the use of reason are considered to be incapable of a delict even if they violated a law or precept while seemingly sane.”¹²⁹

In accord with natural law, a delict cannot be imputed to a person who lacks the use of reason.¹³⁰ It is conceivable, however, that someone who is habitually insane could have lucid intervals during which he is capable of committing an act for which he is morally or juridically culpable. Thus, *CIC/17*, c. 2201, §4 stated: “Mental debility diminishes imputability of a delict, but does not remove it entirely.” To determine whether or not a person was guilty of a delict during a lucid interval would require the court to consult psychiatric experts, and they might give contrary opinions. The new canon avoids these potential difficulties by eliminating the need to consider whether or not an habitually insane person may have committed a delict during a lucid interval. The person who lacks the use

¹²⁸ *Comm*, 8 (1976), 177 at c. 11. Cf. MARTIN, *Commentary on cc. 1311-1399*, 755.

¹²⁹ This is akin to an absolute legal presumption: “Si potrebbe in questo caso parlare di una *praesumptio iuris et de iure*—presunzione che non ammette prova contraria—in quanto l’ordinamento penale considera il soggetto abitualmente incapace di intendere e di volere come incapace di commettere delitto, inimputabile, senza lasciare alcuna possibilità che venga provato il contrario” (DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 154, n. 66).

¹³⁰ See ROBERTI, *De delictis et poenis*, 114-115; MCGRATH, *Comparative Study of Crime and Its Imputability*, 49, 50-51; D’AURIA, *L’imputabilità nel diritto penale canonico*, 58; PIGHIN, *Diritto penale canonico*, 160-161; CALABRESE, *Diritto penale canonico*, 51-52; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 109.

of reason is naturally incapable of committing a delict, and the person who is habitually insane is legally incapable of committing a delict.¹³¹ The canon is a further explication and strengthening of c. 11, which exempts those lacking the use of reason from the observance of merely ecclesiastical laws, and c. 99, which presumes (*censetur*) that those who habitually lack the use of reason are not responsible for their acts.¹³²

2.1.4.2—The Effect of Circumstances on Penalties

Canon law specifies various circumstances that could diminish or increase the penalty to be imposed for a delict. This could be because the imputability of the delict is greater or lesser, or it could be because the legislator benevolently decrees that a delict will not be punished in certain circumstances.¹³³ Most of the circumstances can be said to be accidental to the delict in that they are not relevant to the existence of the essential elements

¹³¹ See MARZOA, Commentary on c. 1321, 259, 275-276; D'AURIA, *L'imputabilità nel diritto penale canonico*, 59; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 154-155; PIGHIN, *Diritto penale canonico*, 160-161; PIGHIN, *Il nuovo sistema penale*, 158; MARTIN, Commentary on cc. 1311-1399, 755; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 109, n. 35; TAVANI, "L'amentia habitualis nel CIC," 588.

¹³² See PIGHIN, *Diritto penale canonico*, 160-161; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 109-110; TAVANI, "L'amentia habitualis nel CIC," 589.

"Ora ci troviamo di fronte a una presunzione *iuris et de iure*, che non ammette la prova in contrario circa l'incapacità di delinquere di chi è 'abituamente' privo dell'uso di ragione, anche se appare sano di mente al momento di violare la legge o il precetto.

"La norma attuale non mette in discussione il principio, di diritto naturale, dell'incapacità di compiere un delitto da parte di chi non è in grado di realizzare atti umani per una specie di 'lucida follia', perché ciò comporterebbe un rimando a perizie psichiatriche, con possibili risposte contrastanti, in base alle differenti concezioni antropologiche e scientifiche di riferimento dei periti." (PIGHIN, *Diritto penale canonico*, 160).

Pighin writes that the new canon states the lack of the subjective element of a delict. It would seem, however, that, in the case of one who is habitually insane yet commits an objective delict during a lucid interval, the subjective element of the delict could in fact be present, though the punishment for the delict would be ruled out by the canon. See also D'AURIA, *L'imputabilità nel diritto penale canonico*, 59.

¹³³ CALABRESE writes that all the exempting circumstances pertain to "l'elemento soggettivo del delitto, cioè la persona e la sua imputabilità" (*Diritto penale canonico*, 53). Usually, a reference to the subjective element of a delict refers specifically to imputability; however, the final part of the sentence seems to indicate that Calabrese's reference to the "elemento soggettivo" is meant in a broader sense that includes both imputability and the *reus* himself.

Canon 1327 allows for particular law or penal precepts to establish additional exempting, mitigating, or aggravating circumstances.

of the delict, but they do have an impact on the gravity of the moral guilt of the offender and, therefore, on the gravity of the delict.¹³⁴ Once the crime is established, the circumstances are then considered when determining the punishment. There are some circumstances, however, that are directly relevant to the imputability of the delict and that could render the delict non-existent.¹³⁵

Whereas the *CIC/17* had several canons that dealt with the circumstances of delicts from the perspective of imputability, *CIC/83* deals with the circumstances instead from the perspective of responsibility. In this way, one avoids the potential struggles stemming from possible uncertainty in determining the precise extent of criminal culpability at the time a delict is committed.¹³⁶ This approach also allows various elements to be grouped together rather than divided into separate canons.¹³⁷

2.1.4.2.1—Exempting Circumstances

Canon 1323¹³⁸ lists seven factors that exempt a delinquent from a penalty:

One who has violated a law or precept is not subject to a penalty who:

1° has not yet completed the sixteenth year of age;¹³⁹

2° without negligence was ignorant that he or she violated a law or precept; moreover inadvertence and error are equivalent to ignorance;¹⁴⁰

3° acted due to physical force or a chance occurrence that one could not foresee or, if foreseen, avoid;¹⁴¹

4° acted coerced by grave fear, even if only relatively grave, or out of necessity or grave inconvenience unless the act is intrinsically evil or tends to the harm of souls;¹⁴²

¹³⁴ D'AURIA, *L'imputabilità nel diritto penale canonico*, 140-141.

¹³⁵ ASTIGUETA, "Las circunstancias agravantes de la pena," 86.

¹³⁶ MARZOA, Commentary on c. 1321, 260; PIGHIN, *Il nuovo sistema penale*, 159.

¹³⁷ PIGHIN, *Il nuovo sistema penale*, 159.

¹³⁸ There is no corresponding canon in *CCEO*, except that *CCEO*, c. 1413, §1, is similar to c. 1323, 1°. See n. 133 below.

¹³⁹ Cf. *CIC/17*, c. 2204. Cf. also *CCEO*, c. 1413, §1: "A person who has not completed the fourteenth year of age is not subject to a penalty." This approach reflects *CIC/17*, c. 2230. See EASTON, Commentary on c. 1413, 2535.

¹⁴⁰ Cf. *CIC/17*, c. 2202.

¹⁴¹ Cf. *CIC/17*, cc. 2203, §2; 2205, §1.

¹⁴² Cf. *CIC/17*, cc. 2205, §§2-3.

5° acted with due moderation for the purpose of legitimate defense of oneself or another against an unjust aggressor;¹⁴³

6° lacked the use of reason, without prejudice to the prescripts of cann. 1324 §1, n. 2 and 1326 §1, n. 4;¹⁴⁴

7° without negligence thought that one of the circumstances mentioned in nn. 4 or 5 was present.¹⁴⁵

This canon lists all the circumstances that exempt from a penalty, but they exempt from the penalty for different reasons. Some of the stated circumstances, namely those included in numbers 1 and 4, reduce the imputability of the delict, sometimes even to the point that the subjective element is completely eliminated, thereby indicating that no delict was committed.¹⁴⁶ The circumstances in numbers 2, 3, 5, 6, and 7, however, eliminate the subjective element required for a delict.¹⁴⁷

Number two of the canon states that one is not liable to punishment who was inculpably ignorant of the norm or who due to inadvertence did not intend to violate the norm or who violated the norm through error. Thus, one who acts in good faith and does not realize that he was acting contrary to the law or illegitimately, is not subject to a penalty.¹⁴⁸ Since such a person acts in good faith and is not culpably ignorant, there is no imputability through *dolus* or *culpa*.¹⁴⁹

Number three addresses the situation of a criminal action that is objectively carried out but without the necessary subjective element that is required for a delict due to physical

¹⁴³ Cf. *CIC/17*, c. 2205, §4.

¹⁴⁴ Cf. *CIC/17*, c. 2201.

¹⁴⁵ There is no parallel in the *CCEO* except for 1413, §1, which is similar to c. 1323, 1°, though only exempts those under the age of fourteen from penalty, not sixteen.

¹⁴⁶ PIGHIN, *Il nuovo sistema penale*, 160; D'AURIA, *L'imputabilità nel diritto penale canonico*, 144; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 116.

¹⁴⁷ MARZOA, Commentary on c. 1321, 278; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 158.

¹⁴⁸ ROBERTI, *De delictis et poenis*, 107-108; MARZOA, Commentary on c. 1321, 279; CALABRESE, *Diritto penale canonico*, 54; PIGHIN, *Il nuovo sistema penale*, 160-161; JÓZWOWICZ, *L'imputabilità penale*, 170, 174.

¹⁴⁹ See ROBERTI, *De delictis et poenis*, 106-108; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 158; D'AURIA, *L'imputabilità nel diritto penale canonico*, 149-152.

force or chance occurrence that could not be seen or avoided. Force, which comes from the outside and cannot be resisted, eliminates the freedom of the will required to commit a delict, and chance occurrences eliminate the foresight necessary to evaluate and freely choose a delictual act.¹⁵⁰

Number five pertains to legitimate defence of oneself or another. Such defence is recognized throughout the history of Christian moral thought.¹⁵¹ Provided that it meets the criteria for legitimate defence elaborated in moral theology,¹⁵² the person is obviously not guilty of a crime because there is neither *dolus* nor *culpa*.¹⁵³

Number six exempts from punishment anyone who engaged in criminal behaviour while lacking the use of reason, except in the cases referenced in c. 1324, §1, 2° or 1326, §1, 4°. Unlike c. 1322 which deals with those who habitually lack the use of reason, this provision applies to those who lack the use of reason only temporarily. Though the lack of reason is not habitual, there is still no delict for one who acts while lacking the use of reason because there is no basis for imputability.¹⁵⁴

¹⁵⁰ MARZOA, Commentary on c. 1321, 280-281; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 158; D'AURIA, *L'imputabilità nel diritto penale canonico*, 153; JÓZWOWICZ, *L'imputabilità penale*, 174; CALABRESE, *Diritto penale canonico*, 54-55; PIGHIN, *Il nuovo sistema penale*, 162.

“Ovviamente il grado di imputabilità varierà a seconda della maggiore o minore opposizione che si poteva opporre alla forza esterna e non si è opposta ovvero al grado di volontarietà che comunque era presente nell'atto compiuto sotto costringimento fisico” (D'AURIA, *L'imputabilità nel diritto penale canonico*, 153).

¹⁵¹ See PIGHIN, *Il nuovo sistema penale*, 162.

¹⁵² For a discussion of criteria for legitimate defence, see MARZOA, Commentary on c. 1321, 283-284; CALABRESE, *Diritto penale canonico*, 60-61; D'AURIA, *L'imputabilità nel diritto penale canonico*, 168-173; PIGHIN, *Il nuovo sistema penale*, 162-164.

¹⁵³ In fact, even the objective element of the offence is absent: “La dottrina ha allora affermato che tali circostanze intervengono a togliere l'elemento oggettivo del delitto—*legis violatio*—per cui non si potrà neanche più parlare di condotta materialmente antiggiuridica” (DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 173). See also ROBERTI, *De delictis et poenis*, 187.

¹⁵⁴ See MARZOA, Commentary on c. 1321, 284; D'AURIA, *L'imputabilità nel diritto penale canonico*, 60, 174; CALABRESE, *Diritto penale canonico*, 52-53; JÓZWOWICZ, *L'imputabilità penale*, 172; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 158; PIGHIN, *Il nuovo sistema penale*, 164.

Number seven exempts those who, without negligence, believed that they were acting in the circumstances mentioned in numbers four or five. This means that those who, through no fault of their own, have engaged in objectively criminal behaviour due to an erroneous assessment of a state of necessity, or inconvenience, or grave fear, or self-defence, still lack the subjective element necessary for a delict.¹⁵⁵

The circumstances mentioned so far eliminate the subjective element required for a delict to occur and be imputable to the actor. Numbers one and four, however, pertain to situations in which the imputability of the act may be eliminated or may only be diminished. Rather than place the burden on the judge of determining the degree of gravity of the imputability of such objectively delictual acts, the legislator exempts the actor from punishment. Thus, the act committed may in fact be an imputable delict, but the legislator has benevolently determined that the *reus* shall not be punished.¹⁵⁶

Number one exempts from punishment anyone under the age of sixteen, even though the crime may be characterized by full imputability.¹⁵⁷ Number four pertains to several heterogenous elements, namely, grave fear, a state of necessity, and grave inconvenience. These elements are rightly grouped together in that they attenuate the gravity of the imputability but do not eliminate imputability.¹⁵⁸

¹⁵⁵ See D'AURIA, *L'imputabilità nel diritto penale canonico*, 176-177; JÓZWOWICZ, *L'imputabilità penale*, 174; PIGHIN, *Il nuovo sistema penale*, 165.

¹⁵⁶ DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 159, 170-171; PIGHIN, *Il nuovo sistema penale*, 165.

¹⁵⁷ D'AURIA, *L'imputabilità nel diritto penale canonico*, 146; JÓZWOWICZ, *L'imputabilità penale*, 174-175; CALABRESE, *Diritto penale canonico*, 53-54; PIGHIN, *Il nuovo sistema penale*, 165.

“Per esempio, un minore al di sotto di sedici anni che commette un omicidio, non è passibile di alcuna pena in campo canonico. Ma ciò non significa che egli non abbia commesso il delitto” (CALABRESE, *Diritto penale canonico*, 51). See also DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 159, 172.

¹⁵⁸ D'AURIA, *L'imputabilità nel diritto penale canonico*, 156-157, 159-161, 165.

According to canonical doctrine, grave fear does not always eliminate freedom and, therefore, imputability. Such fear, which need not even be objectively grave or intentionally inflicted, exempts a person from punishment, which is appropriate considering that imputability can be greatly reduced though not eliminated.¹⁵⁹

Like grave fear, a penalty is eliminated for those who act out of necessity or due to grave inconvenience. In such cases the imputability is not removed but the threat of punishment is. Necessity occurs in situations where there is a conflict between the rights of the individual and the fulfillment of the law which would result in immediate, grave risk to oneself or another. Such a state of necessity arises from an objective situation that causes an immediate and inevitable danger. Serious inconvenience describes situations where grave and inevitable damage would occur as a result of observing a specific law.¹⁶⁰

Number four, however, includes an important exception to the exemption indicated in the *nisi* clause: “unless the act is intrinsically evil or tends to the harm of souls.” In the case of acts that are not intrinsically evil or detrimental to souls, the legislator is free to exempt a person from punishment because in such situations merely ecclesiastical laws have been violated; however, if the acts are intrinsically evil or detrimental to souls, the legislator cannot exempt from punishment because the acts are evil in their object regardless of their circumstances.¹⁶¹

¹⁵⁹ PIGHIN, *Il nuovo sistema penale*, 165-166; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 159. See also ROBERTI, *De delictis et poenis*, 151; MARZOA, Commentary on c. 1321, 282; CALABRESE, *Diritto penale canonico*, 55-56.

¹⁶⁰ ROBERTI, *De delictis et poenis*, 153-157; JÓZWOWICZ, *L'imputabilità penale*, 175; PIGHIN, *Il nuovo sistema penale*, 167-168. For additional information on the requirements for genuine necessity and grave inconvenience, see ROBERTI, *De delictis et poenis*, 153-157; MARZOA, Commentary on c. 1321, 282; CALABRESE, *Diritto penale canonico*, 57-58.

¹⁶¹ ROBERTI, *De delictis et poenis*, 152; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 159; JÓZWOWICZ, *L'imputabilità penale*, 175; CALABRESE, *Diritto penale canonico*, 59-60; D'AURIA, *L'imputabilità nel diritto penale canonico*, 166-168; PIGHIN, *Il nuovo sistema penale*, 168.

2.1.4.2.2—Attenuating or Mitigating Circumstances

Canon 1324 lists the circumstances that require mitigation of the penalty for violating a penal law or penal precept.

§1. The perpetrator of a violation is not exempt from a penalty, but the penalty established by law or precept must be tempered or a penance employed in its place if the delict was committed:

1° by one who had only imperfect use of reason;¹⁶²

2° by one who lacked the use of reason because of drunkenness or another similar culpable disturbance of mind, without prejudice to can. 1326 §1, n. 4;¹⁶³

3° from grave heat of passion that did not precede and hinder all deliberation of mind and consent of will and provided that the passion itself had not been voluntarily stimulated or fostered;¹⁶⁴

4° by a minor who has completed the age of sixteen years;¹⁶⁵

5° by one who was coerced by grave fear, even if only relatively grave, or due to necessity or grave inconvenience if the delict is intrinsically evil or tends to the harm of souls;¹⁶⁶

6° by one who acted for the purpose of legitimate defense against an unjust aggressor of oneself or another but did not observe due moderation;¹⁶⁷

7° against someone gravely and unjustly making provocation;

8° by one who thought in error due to his or her own negligence that one of the circumstances mentioned in can. 1323, nn. 4 or 5 was present;

9° by one who without negligence did not know that a penalty was attached to a law or precept;¹⁶⁸

10° by one who acted without full imputability provided that the imputability was grave.

§2. A judge can act in the same manner if another circumstance is present that diminishes the gravity of a delict.¹⁶⁹

§3. In the circumstances mentioned in §1, the offender is not bound by a *latae sententiae* penalty; nevertheless, for the sake of repentance or reparation of scandal, lighter penalties can be imposed or penances can be applied.¹⁷⁰

For more on the concept of intrinsically evil acts, see *Catechism of the Catholic Church*, 1756; JOHN PAUL II, Encyclical letter on certain fundamental questions of the moral teaching of the Church *Veritatis splendor* (6 August 1993), in *AAS*, 85 (1993), 1197-1200, n. 80-83, English at www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor.html (16 May 2025).

¹⁶² Cf. *CIC/17*, c. 2201, §4.

¹⁶³ Cf. *CIC/17*, c. 2201, §3.

¹⁶⁴ Cf. *CIC/17*, c. 2206; 2218, §1.

¹⁶⁵ Cf. *CIC/17*, c. 2204. Cf. also *CCEO*, c. 1413, §2: “However, a person who has committed a delict between the fourteenth and eighteenth year of age can be punished only with penalties that do not include the loss of some good, unless the eparchial bishop or the judge, in special cases, thinks that the reform of that person can be better accomplished in another way.”

¹⁶⁶ Cf. *CIC/17*, c. 2205, §§2-3; 2218, §1.

¹⁶⁷ Cf. *CIC/17*, c. 2205, §4.

¹⁶⁸ Cf. *CIC/17*, c. 2202, §2.

¹⁶⁹ Cf. *CIC/17*, c. 2218, §1.

¹⁷⁰ Cf. *CIC/17*, c. 2229, §§3-4; 2230.

“All’attuale formulazione delle circostanze attenuanti va riconosciuto il merito di un’esposizione più ordinata rispetto a quella del CIC 17. [...] Dal punto di vista del contenuto, la materia ha subito delle modifiche rilevanti. Alcune delle circostanze, classificate come esimenti nella prima codificazione Latina,

Paragraph one of the canon lists ten different factors that warrant a lessening of the penalty established by a penal law or penal precept. It even allows for a penance to be imposed in place of a penalty. The diminution of the penalty is due to the fact that the ten factors identified in the canon, while leaving intact the constitutive elements of the crime, diminish the crime's imputability. Since the imputability of the crime is diminished, so also is the legal responsibility and punishability of the *reus*.¹⁷¹

It is noteworthy that, unlike c. 1322, which states that those who habitually lack the use of reason are incapable of a delict, c. 1324, §1, 3° allows only for the lessening of a penalty for those who commit a delict with only imperfect use of reason, which is referred to in canonical doctrine as a mental semi-infirmity.¹⁷² Implicitly, the canon confirms that, while those with imperfect use of reason may deserve a lessening of penalty, their delict is still imputable.¹⁷³ The same rationale applies to those who are inculpably drunk or similarly impaired in 4°. ¹⁷⁴ Thus, during the investigation of a case, the assistance of psychological

rientrano ora tra quelle attenuanti, poiché considerate sotto altra prospettiva in rapporto all'*intrinsece malum* dell'atto e al danno alle anime, di cui si è già parlato. Altre sono nuove, come quelle riportate ai nn. 2, 3, 7, 9, 10 del §1, confermate nel vigente Lib. VI con due aggiunte marginali ma necessarie..." (PIGHIN, *Il nuovo sistema penale*, 169).

Cf. CCEO, c. 1413, §2, and 1415, which does not list specific attenuating circumstances: "In the elaboration of the Eastern Code, the Revision Commission decided that it would not be appropriate to incorporate the specific determinations of what constitutes a justification for a lesser penalty. [...] The Revision Commission decided to relegate the entire matter to the discretion of the judge with the *caveat* that the judge (or eparchial bishop) would always keep in mind the common practice and canonical doctrine" (EASTON, Commentary on c. 1414, 2538).

¹⁷¹ PIGHIN, *Il nuovo sistema penale*, 169; MARZOA, Commentary on c. 1321, 286.

¹⁷² "Il caso, in dottrina, passa sotto il nome di 'seminfermità mentale'" (PIGHIN, *Il nuovo sistema penale*, 170). See also CALABRESE, *Diritto penale canonico*, 64; D'AURIA, *L'imputabilità nel diritto penale canonico*, 181.

¹⁷³ See ROBERTI, *De delictis et poenis*, 115; MARZOA, Commentary on c. 1321, 288-289; CALABRESE, *Diritto penale canonico*, 61; D'AURIA, *L'imputabilità nel diritto penale canonico*, 181.

¹⁷⁴ See TAVANI, "L'amentia habitualis nel CIC," 588.

experts will be necessary to evaluate the existence and degree of diminished use of reason due to psychological conditions or drunkenness or similar impairments.¹⁷⁵

Number two pertains to those who lacked the use of reason due to drunkenness or a similar culpable disturbance of the mind. In such a state, the loss of reason is temporary. The source of the imputability of the crime in such a situation is not that of *dolus* but *culpa*. Though the offender did not intend to commit the crime, he voluntarily puts in place the cause of the crime with full awareness of the foreseeable and avoidable effects.¹⁷⁶ As noted above, the legislator chooses not to punish crimes committed *ex culpa* (see c. 1321, §3) unless the law or precept provides otherwise. Bruno Pighin considers c. 1324, §1, 2° to be one such example of the law providing otherwise.¹⁷⁷ The canon was expanded in the recent revision of Book VI to add the caveat “without prejudice to can. 1326 §1, n. 4,” which will be discussed below.¹⁷⁸

Number 3 considers a situation that is somewhat similar to 2°, namely that of an offender who acts “from grave heat of passion that did not precede and hinder all deliberation of mind and consent of will and provided that the passion itself had not been voluntarily stimulated or fostered.” Pighin describes this passion as “driven by interests, prejudices, affections, social aims, cultural and other solicitations, which lead to criminal behaviour, on the basis of an exaltation of individual aspects, to the detriment of others, inherent in the conduct.”¹⁷⁹ The person’s imputability is diminished because the grave heat

¹⁷⁵ See PIGHIN, *Il nuovo sistema penale*, 171.

¹⁷⁶ See ROBERTI, *De delictis et poenis*, 115; CALABRESE, *Diritto penale canonico*, 65; D’AURIA, *L’imputabilità nel diritto penale canonico*, 182; PIGHIN, *Il nuovo sistema penale*, 171.

¹⁷⁷ See PIGHIN, *Il nuovo sistema penale*, 171-172.

¹⁷⁸ See 2.1.4.2.4.

¹⁷⁹ “L’accezione nel can. 1324 è negativa, in quanto sottintende una passionalità mossa da interessi, pregiudizi, affetti, mire sociali, sollecitazioni culturali e di altro genere, che inducono a comportamenti delittuosi, sulla base di un’esaltazione di singoli aspetti, a scapito di altre, insiti nella condotta” (PIGHIN, *Il nuovo sistema penale*, 172).

of passion distorts one's ability to evaluate properly the circumstances and appropriate means of action. In such heat of passion, Pighin states that one "is easily sucked into the 'tunnel' of reprehensible and, in [this] case, even criminal actions."¹⁸⁰

One notes that 3^o makes two exceptions. The first exception is for those who experience such serious heat of passion that all deliberation of mind and consent of will is hindered. In such a circumstance, one cannot be guilty of a delict because there is no imputability when the deliberation of mind and consent of will are absent.¹⁸¹ Pighin sees this exception as an indication of the benignity of the legislator in taking into account such a possibility in theory; however, Pighin asserts that, in practice, there is never a complete lack of imputability in such a situation because all have a duty to avoid the delusion of passion at its first appearance before one can consent to its blinding effects.¹⁸² Such a situation is similar to that considered above in 2^o in that the person in such a state is not guilty *ex dolo* due to the inability to deliberate but is still liable to punishment or a penance by acting *ex culpa*.¹⁸³

The second exception indicates that there is no exemption from punishment for the one who "voluntarily stimulated or fostered" the heat of passion that impeded deliberation and willful consent. This becomes an aggravating circumstance that will be considered below.¹⁸⁴

¹⁸⁰ "Egli viene facilmente risucchiato nel 'tunnel' di azioni riprovevoli e, nel nostro caso, anche delittuose" (PIGHIN, *Il nuovo sistema penale*, 172). See also ROBERTI, *De delictis et poenis*, 151; D'AURIA, *L'imputabilità nel diritto penale canonico*, 185.

¹⁸¹ See PIGHIN, *Il nuovo sistema penale*, 172-173. See also MARZOA, Commentary on c. 1321, 289; D'AURIA, *L'imputabilità nel diritto penale canonico*, 185.

¹⁸² See PIGHIN, *Il nuovo sistema penale*, 172.

¹⁸³ See *ibid.*, 173.

¹⁸⁴ See section 2.1.4.2.4.

Numbers 4-6 of §1 deal with variations on the exempting circumstances seen in the previous canon. While c. 1323, 1^o exempted minors under the age of sixteen from punishment, c. 1324, §1, 4^o considers minority to be an attenuating circumstance by allowing for the tempering of a penalty or imposition of a penance on minors between the ages of sixteen and eighteen. In this way, the legislator acknowledges that the imputability of a minor may be diminished by a lack of full maturity yet, nevertheless, sufficiently grave to warrant some kind of punishment.¹⁸⁵

Canon 1323, 4^o-5^o, as seen above, deal with the exempting circumstances of grave fear, necessity or grave inconvenience, and legitimate defence whenever the act does not involve acts that are not intrinsic evils or harmful to souls. In c. 1324, §1, 5^o-6^o, the penalty is lessened or a penance imposed when dealing with the same circumstances but involving intrinsically evil acts or acts harmful to souls. In this way, the legislator acknowledges that though an offence is gravely imputable in such circumstances and the offender is deserving of punishment, there is still some diminution of imputability and, therefore, an appropriate lessening of punishment due to the presence of grave fear, necessity, or grave inconvenience.¹⁸⁶ So also, if one were to act in self-defence but without due moderation,

¹⁸⁵ See PIGHIN, *Il nuovo sistema penale*, 173; ROBERTI, *De delictis et poenis*, 112-113; D'AURIA, *L'imputabilità nel diritto penale canonico*, 187.

“Si tratta anche qui di una presunzione dell'ordinamento penale canonico che non ammette prova contraria—*praesumptio iuris et de iure*—per cui si ritiene che il minore ultrasedicenne non possa essere considerato pienamente responsabile dei suoi atti. Verosimilmente un ragazzo in sì tenera età potrebbe non aver ancora raggiunto una piena maturità psico-volitiva; di conseguenza l'imputazione fatta a suo carico dei delitti commessi, pur restando grave, deve essere mitigata, con conseguente attenuazione della punibilità” (D'AURIA, *L'imputabilità nel diritto penale canonico*, 187).

¹⁸⁶ See CALABRESE, *Diritto penale canonico*, 66; PIGHIN, *Il nuovo sistema penale*, 173-174. See also ROBERTI, *De delictis et poenis*, 152, 156; MARZOA, Commentary on c. 1321, 290; D'AURIA, *L'imputabilità nel diritto penale canonico*, 185.

imputability may be diminished and, therefore, an attenuation of the penalty is appropriate.¹⁸⁷

Likewise, where c. 1323, 7^o considered the circumstance of one who without negligence erroneously thought that he was acting in a circumstance of fear, necessity or grave inconvenience, c. 1324, 8^o deals with one who, through negligence, erroneously considered himself to be in such circumstances. In such a circumstance, the negligence that caused the erroneous judgment calls for some lessening of penalty due to a diminution of imputability.¹⁸⁸

Similar to the provision of c. 1323, 5^o, which considers the exempting circumstance of one who acts with due moderation in self-defence, c. 1324, §1, 7^o deals with the attenuating circumstance of someone who commits a delict “against someone gravely and unjustly making provocation.” Since grave provocation can provoke passions, it disturbs the mind resulting in a decrease in the intellectual and volitional capacity of the subject, which leads necessarily to an attenuation of freedom and imputability. Grave imputability is attenuated; therefore, a reduction in the penalty is appropriate.¹⁸⁹

In c. 1323, 2^o, the legislator considers one exempt from punishment if one, without negligence, is ignorant of having violated a law or precept. Similarly, in c. 1324, §1, 9^o, one is subject to an attenuated penalty or a penance who, without negligence, is ignorant of the penalty attached to a law or precept. This reflects the fact that the crime of one who is inculpably ignorant of a penalty is not unaware of acting criminally; therefore, the crime

¹⁸⁷ See ROBERTI, *De delictis et poenis*, 157-158, 159-160; MARZOA, Commentary on c. 1321, 290; CALABRESE, *Diritto penale canonico*, 66-67; PIGHIN, *Il nuovo sistema penale*, 174.

¹⁸⁸ See MARZOA, Commentary on c. 1321, 291; CALABRESE, *Diritto penale canonico*, 66; D’AURIA, *L’imputabilità nel diritto penale canonico*, 196; PIGHIN, *Il nuovo sistema penale*, 174.

¹⁸⁹ See D’AURIA, *L’imputabilità nel diritto penale canonico*, 193.

is still imputable and deserving of punishment, but the legislator still considers the inculpable ignorance to be an attenuating circumstance.¹⁹⁰

Finally, 10^o states that the penalty is lessened or a penance substituted for one who commits a delict “without full imputability provided that the imputability was grave.” The final phrase reiterates the requirement of c. 1321, §2 that the commission of a delict requires that imputability must be at least grave; otherwise, there would be a delict.¹⁹¹

The benignity of the legislator is seen in §§2 and 3 of the canon. §2 allows for the judge to temper a penalty or impose a penance in a circumstance other than those listed in §1 diminishes the gravity of a delict. §3 indicates that a *latae sententiae* penalty is not incurred by those who act in the circumstances listed in §1. In the most recent revision of Book VI, however, an addition is made to §3: “nevertheless, for the sake of repentance or reparation of scandal, lighter penalties can be imposed or penances can be applied.” Pighin notes that this addition prevents a certain disparity between the application of penalties between *latae sententiae* and *ferendae sententiae* penalties. The ten mitigating elements should not necessarily totally exempt an offender in the case of *latae sententiae* penalties while always penalizing offenders in the case of *ferendae sententiae* penalties. The lighter penalties or penances are, nevertheless, optional in the case of those who would have otherwise incurred *latae sententiae* penalties.¹⁹²

¹⁹⁰ See MARZOA, Commentary on c. 1321, 291-292; CALABRESE, *Diritto penale canonico*, 67-68; D’AURIA, *L’imputabilità nel diritto penale canonico*, 197-198; PIGHIN, *Il nuovo sistema penale*, 174.

¹⁹¹ See D’AURIA, *L’imputabilità nel diritto penale canonico*, 199.

¹⁹² See PIGHIN, *Il nuovo sistema penale*, 170; see also DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 162-164.

2.1.4.2.3—Irrelevant Circumstances

Canon 1325 states: “Crass, supine, or affected ignorance can never be considered in applying the prescripts of cann. 1323 and 1324.”¹⁹³

As J. Renken notes, “all of these factors are intentionally sought, and to consider them as occasions to exempt from or to diminish a penalty would be rewarding negative behavior.”¹⁹⁴

One looks to canonical doctrine to find the definitions of these three types of ignorance. Crass and supine ignorance exists when “a subject is aware of being in a state of ignorance of the law, but deliberately does nothing to escape from his state of ignorance.”¹⁹⁵ Affected ignorance refers to the explicit intention of remaining in ignorance;¹⁹⁶ it is “ignorance deliberately sought through premeditation in order to excuse the violation of the law, or to make that violation easier.”¹⁹⁷

Intentional ignorance is distinguished according to its object into ignorance of fact, when it concerns the reality of the circumstances in which one is operating, or ignorance of law, when it concerns the legal norms which one is bound to obey. Yet this distinction

¹⁹³ Cf. *CIC/17*, c. 2229, §1, §3, 1^o. There is no parallel in the *CCEO*.

Before *PDG*, the canon continued: “likewise drunkenness or other disturbances of mind cannot be considered if they are sought deliberately in order to commit or excuse a delict, nor can passion which is voluntarily stimulated or fostered.” This is now considered an aggravating circumstance and included in c. 1326, §1, 4^o. See section 2.1.4.2.4.

¹⁹⁴ RENKEN, *The Penal Law of the Roman Catholic Church: Commentary on Canons 1311-1399 and 1717-1731 and Other Sources of Penal Law*, Ottawa, Saint Paul University, 2015, 88.

¹⁹⁵ DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 165. Cf. ROBERTI, *De delictis et poenis*, 106; PIGHIN, *Il nuovo sistema penale*, 175; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 120; MARZOA, Commentary on c. 1321, 295; CALABRESE, *Diritto penale canonico*, 69; D’AURIA, *L’imputabilità nel diritto penale canonico*, 203.

PIGHIN considers supine ignorance to be the same as crass ignorance except that it also has “una dipendenza servile nei confronti dell’ignoranza stessa” (*Il nuovo sistema penale*, 175).

¹⁹⁶ ROBERTI, *De delictis et poenis*, 106; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 165; MARZOA, Commentary on c. 1321, 295; D’AURIA, *L’imputabilità nel diritto penale canonico*, 203; PIGHIN, *Il nuovo sistema penale*, 175.

¹⁹⁷ RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 120.

is irrelevant to the legislator insofar as he has implicitly included both types of ignorance in c. 1325; it is, therefore, an irrelevant circumstance.¹⁹⁸

One could mistakenly think that delicts committed in these three states of ignorance are delicts *ex culpa* rather than *ex dolo*. If that were the case, the imputability of the delicts would be diminished. Rather, such acts are delicts *ex dolo* because the directly desired ignorance pertains to the delictual act itself, not to the future effects. These kinds of ignorance, therefore, accentuate the gravity of the *dolus* and deserve full punishment.¹⁹⁹

2.1.4.2.4—Aggravating Circumstances

Sometimes a delict is carried out with greater subjective involvement than is usually found in a delictual act; therefore, the criminal actor's responsibility for the delict is increased.²⁰⁰ To determine the appropriate penalty in such cases is very difficult in practice because of the great difficulty in measuring the criminal's subjective guilt. Since there are no external metrics capable of precisely evaluating the criminal's internal process, the

¹⁹⁸ PIGHIN, *Il nuovo sistema penale*, 175.

¹⁹⁹ See *ibid.*; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 165-166. Cf. CALABRESE, *Diritto penale canonico*, 70.

“A peculiar willfulness detected in the genesis of a delinquent action acts as the *ratio* that unifies all the circumstances here discussed. Although it may very well be diminished at the time of committing the delinquent act, willfulness nourishes the cause by which, at that moment, the agent may not be sufficiently free...” (MARZOA, Commentary on c. 1321, 294).

²⁰⁰ PIGHIN, *Il nuovo sistema penale*, 176; D'AURIA, *L'imputabilità nel diritto penale canonico*, 207.

“Appare evidente che non sempre si potrà parlare di un aumento del momento volitivo o intellettuale, come invece si è potuto dire a proposito delle circostanze attenuanti o esimenti. [...] La coscienza e volontà con cui un soggetto ha violato la legge restano quindi invariate, ma per motivi di diversa natura aumenta la colpevolezza del reo e la deplorabilità sociale della sua condotta” (DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 168).

“Aggravation lies not in the offense itself—its specific nature is not altered—but in the person who commits the offense. It lies in the special bad intention of the offender in the first and third cases, and in the special malice presumed by the situation of dignity, authority, or office taken advantage of by the person committing the offense in the second case” (MARZOA, Commentary on c. 1321, 297).

legislator falls back on objectively verifiable criteria by specifying particular aggravating circumstances that increase punishability.²⁰¹

The aggravating circumstances for penal crimes are found in c. 1326, §1:

§1. A judge must²⁰² punish more gravely than the law or precept has established:²⁰³

1° one 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;²⁰⁴

2° one who has been established in some dignity or who has abused a position of authority or office in order to commit the delict;²⁰⁵

3° one who, when a penalty has been established against a delict based on negligence, foresaw the consequence and nonetheless omitted precautions to avoid it, which any diligent person would have employed;²⁰⁶

4° one who committed a delict in a state of drunkenness or of another mental disturbance that is sought on purpose in order to commit or excuse the delict, or due to passion voluntarily stimulated or fostered.²⁰⁷

The circumstances listed in this canon are not constitutive elements of the crime committed in that they are accidental with respect to the criminal act. If they occur in connection with a delict, they impact the punishability of the crime.²⁰⁸ The circumstances do, nevertheless, touch on the subjective element of the delict in that they manifest a particular wickedness of the individual.²⁰⁹ One who shows obstinate ill will (recidivism),²¹⁰ abuses a position of authority, acts negligently while aware of potential consequences, or seeks out mental disturbance for the sake of committing a delictual act manifests a moral

²⁰¹ PIGHIN, *Il nuovo sistema penale*, 176; MARZOA, Commentary on c. 1321, 260, 297.

²⁰² Prior to PDG, the increase of punishment for aggravating circumstances was facultative rather than obligatory: “A judge can punish...” (*CIC/83*, c. 1326, §1).

²⁰³ Cf. *CIC/17*, c. 2223, §1. Cf. also *CCEO*, c. 1416; similar to *CCEO*, c. 1415, it does not list specific examples. See n. 163 above.

²⁰⁴ Cf. *CIC/17*, c. 2208.

²⁰⁵ Cf. *CIC/17*, c. 2207.

²⁰⁶ Cf. *CIC/17*, c. 2203, §1.

²⁰⁷ Cf. *CIC/17*, c. 2201, §3; 2206

²⁰⁸ MICHIELS, *De delictis et poenis*, vol. 1, 250; PIGHIN, *Il nuovo sistema penale*, 176; D’AURIA, *L’imputabilità nel diritto penale canonico*, 208.

²⁰⁹ See ROBERTI, *De delictis et poenis*, 163-180; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 169.

²¹⁰ For the necessary characteristics for a person to be considered a recidivist, see MCGRATH, *Comparative Study of Crime and Its Imputability*, 72; MARZOA, Commentary on c. 1321, 298-299; CALABRESE, *Diritto penale canonico*, 71-72; D’AURIA, *L’imputabilità nel diritto penale canonico*, 209-212.

perversity that indicates a greater level of guilt and a greater threat to the social and juridical order of ecclesiastical society. Yet even though the moral imputability is greater, the legal imputability is already established.²¹¹

Of particular significance is the addition of §4 in the revision promulgated by *Pascite gregem Dei*. While deliberately induced intoxication or mental disturbance and voluntarily stimulated passion were mentioned as irrelevant factors in c. 1325 prior to the revision of PGD, they are now considered aggravating factors. The wisdom of the legislator is reflected in this change in that its punishment is increased for anyone who acts with greater *dolus* or anyone who sought, for example, drunkenness as a pretext for arguing that he had diminished imputability.²¹²

The canon specifies in §2 that additional penalties or penances can be imposed for *latae sententiae* delicts with aggravating circumstances. Paragraph 3 indicates that, in the case of delicts to which only a facultative penalty is indicated, the penalty becomes obligatory when the aggravating circumstances are present.²¹³

²¹¹ “No es fácil determinar en qué consiste este elemento subjetivo. Ciertamente no se puede decir que aumenta la imputabilidad, porque ésta ya es suficiente sin tener en cuenta circunstancias agravantes. Se podría decir que el culpable se coloca delante de la ley de modo tal de expresar un tipo de desprecio al orden jurídico y a su función social respeto de la salvación de las almas. Aunque la conciencia y la voluntad resten inalteradas, como hemos dicho, aumenta la culpabilidad del responsable por un mayor demérito o reproche social sobre el acto cumplido, que se funda en una cualidad personal o a modo de actuar. Creemos que en el fondo estas causas muestran la *peligrosidad* del culpable (ASTIGUETA, “Las circunstancias agravantes de la pena,” 87).

²¹² ROBERTI, *De delictis et poenis*, 115; PIGHIN, *Il nuovo sistema penale*, 179, 243; CALABRESE, *Diritto penale canonico*, 162; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 166-168; D’AURIA, *L’imputabilità nel diritto penale canonico*, 184, 205-206. On the imputability of passion voluntarily stimulated, see ROBERTI, *De delictis et poenis*, 161, 180.

²¹³ This is consistent with the PGD change to §1 (PIGHIN, *Il nuovo sistema penale*, 177). See n. 167 above.

2.2—The Evolution of the Presumption of Imputability

Since imputability is an essential element of a delict, one must deal with the difficulty of having to verify imputability in specific acts that appear to be delictual. Once the causal link between the external delictual act and the alleged delinquent has been demonstrated (physical imputability), one must further ascertain whether the act is morally and juridically imputable.²¹⁴ Criminal imputability is based on the psychological capacity and moral imputability of the subject. Since these pertain to the interior sphere of the person, they cannot be directly observed. For this reason, the law must resort to inferences and presumptions.²¹⁵ De Paolis and Cito defend the resort to a presumption stating that “it couldn’t be otherwise. In the external forum, we always proceed through investigations based on external appearances, concrete and factual circumstances, and presumptions made by the human mind or foreseen as such by the law. Also, because normally those who are sane act in a free, conscious, and voluntary way and, therefore, want to do what they do; acting coincides with intending and willing.”²¹⁶

Both the *CIC/17* and the *CIC/83* include an important legal presumption to assist the judge in the difficult matter of ascertaining moral and juridical imputability.

²¹⁴ See D’AURIA, *L’imputabilità nel diritto penale canonico*, 63.

²¹⁵ See AYRINHAC, *Penal Legislation*, 26-27; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 152; JÓZWOWICZ, *L’imputabilità penale*, 165; PIGHIN, *Diritto penale canonico*, 159; ID., *Il nuovo sistema penale*, 157.

²¹⁶ DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 152; Cf. D’AURIA, *L’imputabilità nel diritto penale canonico*, 64.

“But, this is an area that is not directly accessible to the law; thus the need for assumptions (normal, in human relationships) that are merely ‘conjectures’ (cf. 1584) about what is inside a person based on external indications. Sometimes these conjectures become definitive and irrevocable judgments. Such irrevocability (*iuris et de iure* presumption) is required by the need to operate safely in juridical traffic (cf., e.g., cc. 97 §2, 99, 1322). But, in most cases, judgments are only ‘provisional,’ based on external indications that allow giving juridical relevance to words or gestures (showing consent, for example). They may always be annulled by proof to the contrary. Such is the case for presumptions in law (*iuris tantum*)” (MARZOA, *Commentary on c. 1321, 273*).

2.2.1—The Presumption of *Dolus* in the *CIC/17*

CIC/17, c. 2200, §2 states: “Positing an external violation of the law, *dolus* in the external forum is presumed until the contrary is proven.”

Since *dolus* must be proven in the trial, the law provides a presumption that, in matters of the external forum, *dolus* is present whenever the objective element of the crime has been proven. Thus, the law presupposes that the accused acted with knowledge of the legal obligation on the part of the intellect and with freedom of the will such that the act was voluntarily performed.²¹⁷

The presumption of *dolus* is a simple legal presumption that can be overturned by proof of the contrary. The presumption brings about an inversion of the burden of proof. Rather than the burden of proving *dolus* falling on the promoter of justice, the accused has the burden of proving to the degree of moral certitude that he did not act knowingly and willingly and that the illicit act should not be held against him.²¹⁸

It is important to note that the canon indicates that *dolus* is presumed in the external forum but not in the internal forum. This reflects the principle that one generally accepts what a person confesses in the internal forum, e.g. in sacramental confession. In the external forum, however, whenever a criminal act has occurred, one presumes that the

²¹⁷ See JÓZWOWICZ, *L'imputabilità penale*, 124-125.

²¹⁸ See JÓZWOWICZ, *L'imputabilità penale*, 124-125; McDONOUGH, “A Gloss on Canon 1321,” 386; W. RICHARDSON, *The Presumption of Innocence in Canonical Trials of Clerics Accused of Child Sexual Abuse: An Historical Analysis of the Current Law*, Canon Law Monograph Series 6, Leuven, Peeters, 2011, 201.

“Agitur ut patet de praesumptione iuris quae legitima probatione ignoratae legis aut morbi aut defectu usu rationis eliditur” (CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 27).

“Hinc jure merito et violatio legis praesumitur deliberate et libere, ideoque dolose posita, donec ex circumstantiis concretis ad extra apparentibus probetur violationem legis fuisse sine ulla aut saltem sine gravi culpa morali vel ex sola culpa juridica positam” (MICHIELS, *De delictis et poenis*, vol. 1, 124).

offender is also morally responsible for it.²¹⁹ In such cases, the judge must stay with the facts that he can verify since he cannot enter into the thoughts of the person, and yet he also cannot presume the honesty of the statements of the accused.²²⁰

2.2.2—The Revision of Canonical Penal Law

When Pope John XXIII announced his desire to convoke the Second Vatican Council, he also declared his desire that the Code of Canon Law be revised.²²¹ After the first session of the Council, he established the *Pontificia Commissio Codici Iuris Canonici recognoscendo*.²²² The *Praemium canonum schema de delictis et poenis* was composed of 51 canons.²²³ Canon 19 dealt with penal imputability. The third paragraph included the presumption of *dolus* in a formula identical to *CIC/17*, c. 2200, §2.

As the consultors emended the schema and submitted suggestions, it was decided that the presumption of *dolus* should be suppressed and replaced with a presumption of imputability:

The presumption of *dolus* is suppressed, keeping only the presumption of imputability: for if the presumption of *dolus* may be admitted (and yet not always admitted) in the penal laws of states, while it may be reasonably presumed [that there is] the intention of placing an act or omission by means of which the delict is committed, it seems less consistent with reason to presume also the intention of violating the law, which intention is required for

²¹⁹ See JÓZWOWICZ, *L'imputabilità penale*, 159.

“Tuttavia trattandosi di una realtà esterna, vi sono norme proprie a seconda che si debba giudicare una realtà in foro esterno o in foro interno: nel foro interno in genere vale il principio che bisogna credere a quanto afferma l'interessato, mentre nel foro esterno, verificatosi il fatto criminoso, si presume che chi lo abbia posto, ne sia anche moralmente responsabile” (DE PAOLIS, “L'imputabilità dell'atto delittuoso,” 424). See also DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 153.

“In foro interno dolus nunquam praesumitur sed per interrogatoria cum poenitente probandus est” (P. HOLLWECK, *Codex iuris canonici. Liber quartus: De delictis et poenis. Pars I: De delictis in genere. Pars II: De poenis. Tit. I-X*, Rome, Typis Vaticanis, 1908, in Archivio Segreto Vaticano, Scatola n. 76/115; quoted in N. DIENE, *La dynamique du principe de l'imputabilité dans le droit pénal canonique: Une étude du canon 1321 du code de droit canonique*, Beau Bassin, Mauritius, Éditions Croix du Salut, 2018, 65).

²²⁰ See DE PAOLIS, “L'imputabilità dell'atto delittuoso,” 430. See also A. BLAT, *Commentarium textus Codicis iuris canonici: Liber V: De delictis et poenis*, Rome, Collegio Angelico, 1924, 16.

²²¹ JOHN XXIII, Allocution *Questa Festiva ricorrenza*, 25 January 1959, in *AAS*, 51 (1959), 65-69.

²²² JÓZWOWICZ, *L'imputabilità penale*, 133.

²²³ *Comm*, 2 (1970), 99.

dolus in canon law. Moreover, the presumption of imputability is said to cease (can. 15 §3) not only from contrary proof but whenever something else appears likely to be true.²²⁴

Thus, not only is *dolus* no longer presumed, but the presumption of imputability no longer needs contrary proof to be overturned but only appearances to the contrary. This reflects the desire of the consultors to produce penal legislation that is not overly rigorous or too severe.²²⁵

The revised canon is identical to that which was promulgated as c. 1321, §3 in *CIC/83*, which became c. 1321, §4 in the revision promulgated by *PGD*.²²⁶

2.2.3—The Presumption of Imputability in *CIC/83*

Canon 1321, §4 states: “When an external violation has occurred, imputability is presumed unless it is otherwise apparent.” It is reasonable to presume that the conduct of an adult is a human act—conscious and free. Since this is not always the case, however, this presumption can be overcome by appearances to the contrary.²²⁷ As Marzoa explains, “any well-founded doubt is sufficient to destroy the certainty of the presumption; there is no need for the opposite certainty to arise.”²²⁸

²²⁴ “Doli praesumptio (CIC can. 2200 § 1) suppressa est, servata tantum imputabilitatis praesumptione: si enim praesumptio doli admitti potest (nec tamen semper admittatur) in poenalibus civitatum legibus, cum praesumi rationabiliter possit intentio ponendi actionem vel omissionem, quae delictum committitur, rationi minus consentaneum videtur praesumere etiam intentionem violandi legem, quae intentio ad dolum iure canonico requiritur. Imputabilitatis autem praesumptio cessare dicitur (can. 15 § 3) non ex contraria tantum probatione, sed quoties aliud veri simile appareat” (*Comm*, 2, 103).

See also *Comm*, 46 (2014), 119, 139; *Comm*, 47 (2015), 448.

²²⁵ See JÓZWOWICZ, *L'imputabilità penale*, 140.

“Praesumptio in hac norma statuta, quamquam in ordinario agendi modo fundata, nostris diebus non faciliter acceptatur quia apparet contraria effato: nemo malus nisi probetur. [...] Videndum est igitur num norma ita elaborari possit ut auribus hodie offensiva non sit” (M. SAID, “Animadversiones Consultoris Marci Said,” in *Comm*, 46 [2014], 119).

²²⁶ *Comm*, 8 (1976), 176-177.

²²⁷ See PIGHIN, *Diritto penale canonico*, 160; ID., *Il nuovo sistema penale*, 158.

²²⁸ MARZOA, *Commentary on c. 1321*, 274.

“This presumption gives way to appearances to the contrary, i.e., if, given the fact of an external violation of a law or precept, some explanation other than malice or culpability *appears* probable from the

Presumptions, by their very nature, are rebuttable unless the law states otherwise. This presumption of imputability can be rebutted by the mere appearance to the contrary. So, if there is anything that would appear to indicate that the accused acted without freedom and deliberation, then the imputability must be demonstrated rather than presumed.²²⁹ Nevertheless, the mere denial of the imputability by the accused is not sufficient to overturn the presumption. If one, however, “asserts that there is a possibility that he was suffering from some type of psychological problem at the time of the alleged crime and he produces a report from an expert to this effect, then he has raised a real doubt about imputability. It is up to the promoter to resolve the doubt to the judges’ satisfaction.”²³⁰

The judge cannot presume the commission of the crime. The judge cannot convict unless he is morally certain of the occurrence of the violation of the penal law and the physical imputability of the crime. Then he must proceed to determine whether the crime is imputable through either *dolus* or *culpa*.²³¹ The judge must always be morally certain that the subjective element of the crime has been proven.²³²

facts, then the onus of establishing and proving imputability remains on the appropriate ecclesiastical authority” (MARTIN, “Commentary on cc. 1311-1399, in *CLSGBI Comm*, 755).

²²⁹ See DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 154; PIGHIN, *Diritto penale canonico*, 160; ID., *Il nuovo sistema penale*, 158; JÓZWOWICZ, *L'imputabilità penale*, 166, 168; CALABRESE, *Diritto penale canonico*, 49; RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 107-108; RICHARDSON, *The Presumption of Innocence*, 203.

²³⁰ RICHARDSON, *The Presumption of Innocence*, 203.

²³¹ See DE PAOLIS, *Le sanzioni nella Chiesa*, 467; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 153; COCCOPALMERIO, *La normativa penale della Chiesa*, 305-307; D'AURIA, *L'imputabilità nel diritto penale*, 64; JÓZWOWICZ, *L'imputabilità penale*, 167-168; A. D'AURIA, “La presunción de inocencia en el derecho penal canónico,” in *Ius canonicum*, 64 (2024), 130; TRIBUNAL OF THE ROMAN ROTA, *coram AROKIARAJ*, 15 June 2020, A. 85/2020, n. 13; referenced in D. TETI, “Il diritto penale nella più recente giurisprudenza rotale: Principi generali e fattispecie delittuose,” in *Diritto penale canonico: Dottrina, prassi e giurisprudenza della Curia Romana*, Vatican City, Libreria editrice Vaticana, 2023, 721.

Calabrese still considers it a presumption of *dolus* (CALABRESE, *Diritto penale canonico*, 49).

²³² “Here the judge meets with difficulties, even with great difficulties. To resolve them a conscientious examination of the subjective element is necessary. Did the author of the offense sufficiently know the illegality of the action? Was the decision to do it substantially free? In answering these questions one will be helped by the presumptions allowed for by law. If it is impossible to establish the guilt with moral certitude, one will abide by the principle that ‘in doubt the presumption is in favor of the accused’” (PIUS

Though c. 1321, §4 is verbally similar to the presumption of *dolus* in *CIC/17*, c. 2200, §2, the current law only presumes imputability, i.e., the act was done knowingly and willingly. The presumption is based on the reasonable assumption that people are responsible for their acts because they are capable of acting freely.²³³ As Marzoa rightly notes, “Imputability cannot be ‘seen’; it must be presumed [...] The point of departure is that the violation was committed consciously and freely. This must be considered normal in the interplay of human relationships and behavior; for both merit and penalty, the point of departure is that the thing has been done consciously and freely.”²³⁴

2.3—The Presumption of Deliberateness in the *CCEO*

CCEO, c. 1414, §3 reads: “When an external violation of a penal law or penal precept has occurred, it is presumed that it was deliberately done, unless the contrary is proven. Concerning other laws or precepts, the same is presumed only if the law or precept is violated again after a penal warning.”

This canon gives guidance on an issue of proof in the case of an alleged delict. There is a legal presumption that, once an external act in violation of a penal law or precept has been proven, it is to be presumed that the perpetrator acted deliberately.²³⁵ This

XII, Allocutio iis qui interfuerunt VI^o Conventui internationali de Ius poenali, 3 October 1953, in *AAS*, 45 (1953), 737; English in *The Catholic Mind*, 52 [1954], 113).

²³³ See DE PAOLIS, *De sanctionibus in Ecclesia*, 58; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 153; D’AURIA, *L’imputabilità nel diritto penale*, 64; JÓZWOWICZ, *L’imputabilità penale*, 168.

“To say that ‘imputability is presumed’ is to say that it is presumed that an act results from someone’s deliberate intention or (in a proper case) from his or her negligence. To say that ‘where there has been an external violation, imputability is presumed’ is to say that if a person does something that violates a law or a precept, it is presumed that his or her act results from a deliberate intention or (in a proper case) from his or her negligence” (M. HUGHES, “The Presumption of Imputability in Canon 1321, §3,” in *Studia canonica*, 21 [1987], 24).

²³⁴ MARZOA, Commentary on c. 1321, 274.

²³⁵ See RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, 108, n. 30; EASTON, Commentary on c. 1414, 2537.

presumption does not exist, however, in the violation of non-penal laws, unless the non-penal law has been violated after a penal warning.

Having examined c. 1321 of *CIC/83*, one notices very quickly that the *CCEO* has abandoned the term “imputable” and does not use the terms *dolus* and *culpa*. This was the subject of much discussion by the members of the *Coetus de delictis et poenis* that prepared the text of the penal law of the *CCEO*. There was some reluctance to abandon the use of the terms *dolus* and *culpa* since they appeared to be an accepted part of the legal heritage and also used in various civil legal systems. It was eventually decided, however, that, rather than use the traditional terms, the ideas that those terms describe would be used. Thus, *dolus* is replaced by the description of the act as *deliberate* and *culpa* is replaced by *omissio debitae diligentiae* and *graviter culpabili ignorantia legis vel praecepti*. Though the *CCEO* does not use the terms *dolus* and *culpa* in the title on penal law, the concepts are still present.²³⁶

Since the deliberate violation of a law is equivalent to *dolus*, the *CCEO* has preserved the presumption of *dolus* that had been in the *CIC/17*. At one point in the discussions of the *Coetus*, the text was changed such that it had a presumption of *dolus* or *culpa*.²³⁷ Then, the Secretary of the Commission requested that the text be discussed

²³⁶ For details of the discussion that led to the elimination of the terms *dolus* and *culpa*, see PCCICOR, “La nuova revisione dei canoni,” 50-52.

“Tale imputabilità può essere diretta o indiretta. Diretta in quanto il delinquente ha agito deliberatamente, cioè con conoscenza e libertà. Il CIC in questo caso parla di delitto *ex dolo*. Può essere indiretta, se egli ha agito per omissione della debita diligenza, ma consapevolmente di tale sua situazione. La colpa in questo caso è indiretta, in quanto egli era nella situazione di consapevolezza di non aver usato la debita diligenza e quindi nella possibilità di violare la legge: indirettamente egli è responsabile del delitto che segue alla mancanza della debita diligenza. Altra fonte di imputabilità indiretta è l’ignoranza gravemente colpevole, ossia quel tipo di ignoranza di cui l’agente è consapevole e che ha l’obbligo di deporre prima di agire: si tratta dell’ignoranza vincibile. In queste due ipotesi di volontario indiretto il CIC preferisce parlare di delitto *ex culpa*” (V. DE PAOLIS, Commentary on c. 1414, 1119).

²³⁷ “Deliberata violatio legis vel praecepti aut gravis omissio debitae diligentiae praesumuntur, posita externa violatio legis, donec contrarium probetur [...]” (PCCICOR, “La nuova revisione dei canoni,” 52).

further. The record of the meeting states that, in the course of the discussion, “it became very clear that the *praesumptio* cannot actually be referred to anything other than *dolus*: that is, it can only be presumed that the violation of the law was deliberate, while it is up to the criminal himself to demonstrate that it was not such, proving, if not complete non-involvement in the crime, at least that one acted *ex omissione debita diligentiae* or *ignorantia legis*.”²³⁸ Having reached agreement, the text of *CCEO* was promulgated with a presumption that is equivalent to *CIC/17*, c. 2200, §2.²³⁹

Conclusion

In the Church’s penal law, imputability is a fundamental, constitutive concept because delicts presuppose grave sins. For this reason, canonical penal law does not consider a delict to have been committed unless the objective element of the crime is also accompanied by the subjective element—imputability. The penalty that is imposed upon a delinquent is, therefore, contingent upon the presence of grave imputability and adjusted according to circumstances that impact imputability. In most instances, the legislator, as a sign of benevolence and mercy, chooses not to punish certain crimes even when they may be gravely imputable, e.g. crimes *ex culpa* or crimes committed by those under sixteen years of age.

²³⁸ “Durante la discussione che ne seguì apparve con tutta evidenza che effettivamente la *praesumptio* non può essere riferita se non al *dolus*: cioè si può presumere solo che la violazione della legge è deliberata, mentre appartiene al reo stesso dimostrare che essa non è tale, provando, se non la piena estraneità al delitto, almeno che si è agito *ex omissione debita diligentiae* o *ignorantia legis*” (PCCICOR, “La nuova revisione dei canoni,” 52).

²³⁹ Monier equates a deliberate act with an act *ex dolo*: “In poenali materia, iuxta normam can. 1321, nemo puniri potest nisi delictum commisit, atque essentialia haec elementa probentur: -- externa violatio legis vel praecepti, -- violationis gravis imputabilitas moralis et iuridica, producta ex dolo seu actu deliberato, vel ex culpa, seu ex omissio debitae diligentiae. Si haec elementa probentur, sanctio canonica legi vel praecepto adnexa ferenda est” (TRIBUNAL OF THE ROMAN ROTA, *coram* MONIER, 21 June 2002, in *Romanae Rotae Decisiones seu sententiae*, 94 [2002], 402).

A difficulty is encountered in ascertaining the imputability of a delict because it is an internal matter that is not accessible to the senses. For this reason, canon law resorts to presumptions to assist the judge in determining imputability. When the objective element of a delict has been proven, the *CIC/83* only presumes the imputability of the accused. This differs from the *CIC/17* which presumed not merely imputability but also a deliberate intention to violate the law—*dolus*. The *CCEO*, likewise, presumes a deliberate intention to violate the law.

Seeing that the presumptions regarding imputability bring about a reversal of the burden of proof, one might perceive in them a violation of the presumption of innocence. This latter presumption must now be thoroughly examined.

CHAPTER 3: THE PRESUMPTION OF INNOCENCE (CANON 1321, §1)

Introduction

The presumption in favour of the innocence of the accused is an ancient concept. It can be found all the way back to the 17th century B.C. in the *Code of Hammurabi*.¹ A similar idea was also articulated by the Greek orator Demosthenes in 352 B.C. when he wrote that no man can be called a murderer “until he has been convicted and found guilty [...] for then conscience permits us to inflict punishment according to knowledge, but not before.”² A related idea is expressed by Aristotle, who wrote that “every one of us would rather acquit a guilty man as innocent than condemn an innocent man as guilty.”³

These expressions of the principles that form the basis for the presumption of innocence point to the fact that this presumption is rooted in the natural law and, therefore, a fundamental principle for all legal systems. The presumption of innocence is one of the various rights that are enshrined in what is often referred to as due process. The Church must provide for due process for her members, including the presumption of innocence, just like any other society. As the former prefect of the then-Pontifical Council for Legislative Texts stated in an interview in 2002,

The Church already has a well-developed process in place for protecting the common good and ensuring that the rights of victims and the rights of the accused be respected. She would be selling herself short, settling for any system that allowed those who have been accused to be punished or their reputation to be destroyed on the basis of mere allegations, without the opportunity to defend themselves by means of a proceeding that respects the fundamentals of “due process.”

¹ See A. GRAY, *Presumption of Innocence in Peril: A Comparative Critical Perspective*, Lanham, MD, Lexington Books, 2017, 1; R. RODRÍGUEZ-OCAÑA, “Certeza moral en las causas penales, algunos obstáculos que se pueden presentar para alcanzarla,” in *Ius canonicum*, 61 (2021), 808.

² DEMOSTHENES, *Against Meidias, Androton, Aristocrates, Timocrates, Aristogeiton*, J. Vince (trans.), Cambridge, MA, Harvard University Press, 1935, 229-231; quoted in GRAY, *Presumption of Innocence in Peril*, 1.

³ ARISTOTLE, *Problems*, W. Hett (trans.), Cambridge, MA, Harvard University Press, 1937, 144-145; quoted in GRAY, *Presumption of Innocence in Peril*, 1.

In my opinion, it was absolutely essential that the norms reaffirm the principle, rooted in natural law and respected in legitimate legal systems throughout the world, that a person who is accused of an offense must be considered innocent prior to a determination of his guilt or innocence, either by means of a regular process in which the truth of the accusations could be ascertained and the alleged victim and the accused would both have the possibility of defending their positions, or by virtue of a confession.⁴

In this chapter, the origins and historical development of the presumption will be examined. Then, the history of the appearance of the presumption in canonical legislation will be outlined, followed by an explanation of the meaning and content of the presumption.

3.1—Origins and Historical Development of the Presumption of Innocence

Legal historian Kenneth Pennington states that the “general notion of a presumption or assumption of innocence” is “remarkably widespread in every legal system...except the most primitive. It may even be there too, but there were no jurists to express the idea.”⁵ But to search for the origins of this presumption, one must place it in its proper context as an essential principle of due process.

Due process is the name given to the procedure established by a legal system that includes certain requirements that protect the rights of individuals. Though the term “due process” was not known to most medieval jurists, one can clearly identify the origins of the concept in the development of the *ordo iudiciarius* that came to be an essential part of the *Ius commune*,⁶ which is the name given to the blending of Roman law, canon law, and

⁴ J. HERRANZ, Interview, November 14, 2002, on zenit.org; quoted in W. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2nd ed., Ottawa, St. Paul University, 2003, xvi.

⁵ K. PENNINGTON, “Innocent until Proven Guilty: The Origins of a Legal Maxim,” in *The Jurist*, 63 (2003), 107.

⁶ K. PENNINGTON, “Due Process, Community, and the Prince in the Evolution of the *Ordo iudiciarius*,” in *Rivista internazionale di diritto comune*, 9 (1999), 11.

feudal law that became the common law of Europe from the twelfth to the seventeenth century.⁷ Nevertheless, some of the ideas that are considered part of due process can already be found in Roman law. These elements of Roman law then found further elaboration among canonical jurists.⁸

3.1.1—Roman Law and *Regulae iuris*

There are various maxims that were articulated in Roman law that form the foundations for the presumption of innocence. These maxims were sometimes incorporated into the rules of law found in the *Liber VI* of the *Corpus iuris canonici*.

In Roman law one finds the fundamental rule that “proof is incumbent on the party who affirms a fact, not on him who denies it.”⁹ This rule is the ancestor of the modern laws requiring proof beyond a reasonable doubt or moral certitude in penal trials.¹⁰ Ulpian asserted: “no-one should be convicted on suspicion; for the Divine Trajan stated in a Rescript to Assidius Severus: ‘It is better to permit the crime of a guilty person to go unpunished than to condemn one who is innocent.’”¹¹ Justinian’s *Code* stated that penal charges must be “supported by suitable witnesses, or established by the most open

Pennington notes that “it may be anachronistic to apply the term [due process] to medieval legal systems—even if it is a medieval coinage, making its first appearance in fourteenth century English royal statutes, written in French...” (ibid.). The reference is to a statute of Edward III, 28 Edward III, c. 3 (1354): “saunz ester mesne en respons par due proces de lei” (ibid., n. 7).

⁷ J. BRUNDAGE, “Proof in Canonical Criminal Law,” in *Continuity and Change*, 11 (1996), 329; PENNINGTON, “Innocent until Proven Guilty,” 112.

⁸ K. PENNINGTON, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition*, Berkeley, University of California Press, 1993, 156; BRUNDAGE, “Proof in Canonical Criminal Law,” 330.

⁹ “Ei incumbit probatio qui dicit, non qui negat” (*D.* 22.3.2; English translation from T. MOMMSEN (ed.), *The Digest of Justinian*, A. Watson (trans.), Philadelphia, University of Pennsylvania Press, 1985). See J. FRANKLIN, *The Science of Conjecture: Evidence and Probability before Pascal*, Baltimore, MD, Johns Hopkins University Press, 2015, 7; PENNINGTON, *The Prince and the Law*, 156.

Also, “semper necessitas probandi incumbit illi, qui agit” (*D.* 22.3.21).

¹⁰ FRANKLIN, *The Science of Conjecture*, 7.

¹¹ *D.* 48.19.5, quoted in FRANKLIN, *The Science of Conjecture*, 7.

documents, or brought to proof by signs (*indiciis*) that are indubitable and clearer than light.”¹²

One can also find in Roman law the origins of the *favor rei* principle. In the *Digest*, one reads “in doubtful matters the more favourable things are always preferred”¹³ and “defendants are regarded with greater favour than plaintiffs”¹⁴ and “in penal causes that which is more favourable must be understood.”¹⁵ The latter is found in a similar formula in the rules of law of the *Liber VI*, such as rule forty-nine: “in penal matters the more benign interpretation is made.”¹⁶ A related principle is found in rule eleven: “When the rights of the parties are unclear, the defendant is favoured, not the plaintiff.”¹⁷ A rule of law of Gregory IX states: “Doubts ought to be interpreted in the more favourable way.”¹⁸

Interpreters of the *Theodosian Code* declared that “A judge dealing with a criminal matter shall not pronounce a death sentence until the accused has either confessed or been very clearly convicted by disinterested witnesses or by his companions in crime of having committed homicide, adultery, or [another] crime.”¹⁹ This statement influenced canonical thinking in the middle ages by way of the ninth-century *Capitula Angilramni* and the work of Burchard of Worms and Gratian.²⁰

¹² *Code*, 4.19.25, quoted in FRANKLIN, *The Science of Conjecture*, 7.

¹³ “Semper in dubiis benigniora praeferenda sunt” (*D.* 50.17.57).

¹⁴ “Favorabiliores rei potius quam actores habentur” (*D.* 50.17.125).

¹⁵ “In poenalibus causis benignius interpretandum est” (*D.* 50.17.155.2).

¹⁶ “In poenis benignior est interpretatio facienda” (*RJ* 49 in *VI*^o). It is also found in *CCEO*, c. 1404, §1.

¹⁷ “Quum sunt partium iura obscura, reo favendum est potius quam actori” (*RJ* 11 in *VI*^o).

¹⁸ “Dubia in meliorem partem interpretari debent” (*X* 5, 41, c. 2).

¹⁹ *Codex Theodosianus*, 9.40.1, interpretation: “Iudex criminosum discutiens non ante sententiam proferat capitalem, quam aut reus ipse fateatur aut convictus vel per innocentes testes vel per conscios criminis sui aut homicidium aut adulterium aut maleficium commisisse manifestius convincatur.” Cited and translated by BRUNDAGE, “Proof in Canonical Criminal Law,” 330.

²⁰ See BRUNDAGE, “Proof in Canonical Criminal Law,” 330.

3.1.2—The Maxim *Ut nullus describatur reus*

Richard Fraher sees at least four necessary elements in the conception of the presumption of innocence which were inherited from medieval Europe. The rabbinic tradition provided a standard for sufficiency of proof in criminal cases by requiring two witnesses to prove guilt. Both Roman law and the Old Testament required due process before one could be condemned for a crime. A third element, which Fraher considers crucial, is the Roman *dictum* that the burden of proof lays upon the accuser, not the accused. The fourth element is an egalitarian element. Fraher sees this as a development introduced into the western legal tradition by way of the Latin church fathers who taught that every individual was equal before God. This, Fraher argues, “was the final theoretical element necessary to the elaboration of a presumption of innocence.”²¹

Fraher finds “the first concise expression of the idea” of the presumption of innocence in a text falsely attributed to St. Jerome entitled *De septem ordinibus Ecclesiae*. Commenting on Sirach 11:7, the pseudo-Jerome wrote: “Before you hear someone, do not judge him; do not suspend anyone from your communion before the accusation against him is proved, ‘quia non statim qui accusatur reus est, sed qui convincitur criminosus.’”²² Fraher considers this to be evidence of “the process by which the Latin fathers assimilated ancient traditions regarding legal procedure.”²³

²¹ R. FRAHER, “‘Ut nullus describatur reus prius quam convincatur’: Presumption of Innocence in Medieval Canon law?” in *Proceedings of the Sixth International Congress of Medieval Canon Law*, S. KUTTNER and K. PENNINGTON (eds.), Vatican City, Biblioteca Apostolica Vaticana, 1985, 494.

²² PSEUDO-JEROME, *De septem ordinibus Ecclesiae*, in J. MIGNE, *Patrologia cursus completus: Series Latina*, vol. 30, Paris, Migne, 1846, 154.

²³ FRAHER, “‘Ut nullus describatur reus,’” 495.

One finds this text quoted later in a letter to the Bulgars of Pope Nicholas I dated from the year 866:²⁴ “You are to suspend no one from your communion before an accusation has been proved because one who has been accused is not immediately guilty [*reus*], but only one who has been convicted of a crime.”²⁵ This statement was included by Gratian in *Causa* 15 of his *Decretum*;²⁶ however, James Brundage surmises that it did not have a great impact on juristic thought at the time: “The teachers who commented on Gratian’s work during the second half of the twelfth century found little to say about the passage concerning the presumption of innocence and incidental remarks on other parts of Gratian’s book seem to imply that some of them felt uncomfortable with it,” especially when it came to occult crimes.²⁷

Even Pope Nicholas seems to have violated the principle himself. When he deposed two bishops for supporting the attempt of King Lothair of Lotharingia to put away his wife and marry someone else, he did not give the two bishops the benefit of a trial. As Fraher explains, “Nicholas expressly affirmed that he pronounced sentence without the usual legal process, on grounds that the offence was universally known, thereby creating an important breach in the seemingly general rule regarding presumption of innocence as he stated it in his letter to the Bulgars.”²⁸ Subsequent history indicates that there were frequent exceptions

²⁴ See *ibid.*

Fraher asserts that the text of *De septem ordinibus Ecclesiae* “was excerpted and employed as a generally applicable maxim” (*ibid.*); however, as will be seen below, Pennington considers the maxim to first appear in the writings of Johannes Monachus.

²⁵ *Regesta Pontificum Romanorum ab condita Ecclesia ad annum post Christum natum MCXCVIII*, P. JAFFÉ et al. (eds.), rev. ed., Leipzig, Veit, n. 2812; cited and translated in BRUNDAGE, “Proof in Canonical Criminal Law,” 329-330.

²⁶ C. 15, q. 8, c. 5.

²⁷ See BRUNDAGE, “Proof in Canonical Criminal Law,” 330-331.

²⁸ FRAHER, “Ut nullus describatur reus,” 496.

made to the presumption of innocence based on the concept that notorious crimes did not require a judicial trial due to their notoriety.

Fraher locates the next articulation of the presumption of innocence in the *Decretum* of Burchard of Worms. Among the procedural rules that Burchard included in this work, he mentions that a judge may not pronounce a definitive sentence against someone unless the accused has confessed or on the testimony of two witnesses.²⁹ It is not clear where Burchard derived this principle, but Fraher considers it important because “Burchard abstracted the principle of presumption of innocence and expressed it independent of any specific context, other than its association with an equally general Roman law requiring due process in criminal proceedings.”³⁰

Though the widespread recognition of the presumption of innocence in canon law does find its launching point in Gratian, it was not primarily because of Gratian’s quote of the text of Pope Nicholas but because of the *ordo iudiciarius* that it became an enduring principle. The jurists of the *ius commune* developed the rules that governed the newly developed judicial procedure, known as the *ordo iudiciarius*, that eventually supplanted the judicial ordeal, which had been a common mode of proof up to the twelfth century.³¹ This was a crucial change in the European legal world because, as Pennington states,

²⁹ See FRAHER, “Ut nullus describatur reus,” 496.

“Judex criminisum discutiens, non ante sententiam proferat finitivam quam aut reus ipse confiteatur, aut per testes idoneos vincatur” (BURCHARD, *Decretorum libri viginti*, in J.-P. MIGNE, *Patrologia cursus completus: Series Latina*, vol. 140, Paris, Migne, 910).

³⁰ FRAHER, “Ut nullus describatur reus,” 497.

³¹ See PENNINGTON, “Innocent until Proven Guilty,” 112; ID., “Due Process, Community, and the Prince,” 11-12; ID., “The Right to a Legal Defence and to a Just Procedure (Due Process),” in *Rivista internazionale di diritto comune*, 33 (2022), 9-10.

“Although the term, *ordo iudiciarius*, dates back to the early Middle Ages, from about the middle of the twelfth century it was used to describe the new procedure of Romano-canonical process in ecclesiastical letters” (PENNINGTON, “Due Process, Community, and the Prince,” 12-13).

“Procedure is the central part of any legal system. A society’s sense of justice is intimately linked to its modes of proof.”³²

In the time of judicial ordeals, the community was prominent in the trial of criminal defendants rather than high civil authorities, like the prince, and the rights of defendants were not protected. After the introduction of the *ordo*, however, the role of authority changed dramatically in medieval courts as princes took their places at the centre of the judicial system and found in the *ordo* “a new and powerful instrument of governance where they exercised their authority as judge.”³³ It is during this time that one finds the beginnings of an emphasis on rights of due process.³⁴

At the end of C. 6, q. 5, Gratian deals with the question of whether or not a defendant must prove his innocence if his accuser’s proof fails. He states that, in such a circumstance, the defendant would be exonerated. Yet even Gratian made an exception in cases of public notoriety.³⁵ Fraher writes:

Gratian argued that in cases which were clear only to the judge and not the public, or conversely, in cases manifest to the public but not the judge, the *ordo iudiciarius* was required. Gratian’s conclusion as to the scope of the term *crimina manifesta* turned out to be narrow indeed, for he determined that if someone slew another individual in plain sight of the judge and a host of others, he still could not be condemned without due process, so long as he denied his guilt. Only when the miscreant’s crime was so public and so

³² PENNINGTON, “Innocent until Proven Guilty,” 112.

³³ PENNINGTON, “Due Process, Community, and the Prince,” 9; PENNINGTON, “The Right to a Legal Defence,” 11.

³⁴ “The Anglo-American legal term ‘due process’ is also an important concept for defining defendants’ rights. Although the phrase cannot be translated elegantly into any other European language, the concept of due process is a part of every European legal system. A modern definition of the term is ‘course of legal proceedings established by the legal system...to protect individual rights.’ Jurists of the *ius commune* understood the concept and used the Latin phrase “secundum ordinem iudicarium” to express very similar ideas” (PENNINGTON, “The Right to a Legal Defence,” 12.

“Nunc videamus quando ferenda sit sententia, et quidem ordine iudiciario praemisso, scilicet lite contestata, confessionibus, attestationibus et allegationibus auditis, et omnibus causae meritis diligenter investigatis...alioquin sententia lata ordine iudiciario praetermisso vel non servato ipso iure non valet” (TANCRED, *De ordine iudiciario*, F. Bergmann [ed.], Göttingen, Vandenhoeck et Ruprecht, 1842, 271; quoted in PENNINGTON, “The Right to a Legal Defence,” 12, n. 14).

³⁵ See PENNINGTON, “The Jurisprudence of Procedure,” 134.

prolonged or repeated that the behavior itself constituted a confession of guilt could the guilty party be condemned without the full accusatorial process.³⁶

As an example of a manifest crime, Gratian cited the deposition of the two bishops in Lotharingia by Pope Nicholas I.³⁷

Pennington argues that early manuscripts of the *Decretum* give indications that many subsequent jurists were unhappy with Gratian's conclusion: "They interpolated a sentence that purported to be Gratian's words (*dictum*) in which he explained that a defendant had only to prove his exceptions and not his innocence. They also added a text taken from Justinian's Codex to make clear that a defendant was not encumbered if a plaintiff had not proven his case."³⁸

The presumption of innocence in C. 15 became prominent with the decretists. In the summa *Induent sancti*, there is mention of Nicholas II's decree which required the faithful not to receive the sacraments from a priest who is known unquestionably to have a concubine. Rather humorously, the decretist questions what it means for something to be unquestionable ("*dubitatur quid sit indubitanter scire*"). The author resolves the problem by answering that the faithful may continue to receive the sacraments from the priest until his crime becomes unquestionable due to a judicial sentence or the priest's confession of guilt.³⁹

³⁶ FRAHER, "Ut nullus describatur reus," 499.

³⁷ See C. 2, q. 1, c. 21.

³⁸ PENNINGTON, "The Jurisprudence of Procedure," 134. See also ID., "Gratian and Compurgation: An Interpolation," in *Bulletin of Medieval Canon Law*, 31 (2014), 256; B. MCMANUS, "An Interpolation at D. 12 c.6," in *Bulletin of Medieval Canon Law*, 18 (1988), 55-57.

"Actor quod asseuerat profitendo se probare non posse, reum necessitate monstrandi contrarium non astringit, cum per rerum naturam factum negantis probatio nulla sit" (C. 6, q. 4).

³⁹ See FRAHER, "Ut nullus describatur reus," 500. See ID., *Summa Induent sancti: A Critical Edition of a Twelfth-Century Canonical Treatise*, PhD dissertation, Ithaca, NY, Cornell University, 1978, D. 32, 206.

A significant exception to the presumption of innocence would come in a decretal of Pope Innocent III, *Tua nos*, where he decreed that the perpetrator of notorious fornication could be condemned without an accuser or an eyewitness to an act of fornication.⁴⁰ This led to the possibility of other notorious crimes being condemned without utilizing the *ordo iudiciarius*. The desire to eradicate clerical corruption appears to have encouraged the exceptions for notorious crimes.⁴¹

The maxim “non statim qui accusatur reus est” was still popular and canonists were applying it to cases beyond its original context. For example, the author of the summa *Et est sciendum*, applied the maxim to the theoretical problem of an heretical pope. Since it was accepted that the pope could not be judged by any earthly tribunal in D. 40, c. 6, the anonymous decretist stated that it would be irreverent to even accuse the pope of heresy and that one could not treat the pope as guilty of heresy citing the maxim from Pope Nicholas.⁴² Thus, Fraher notes: “The employment of the maxim in this context establishes that by the 1180’s it was being applied as an unofficial *regula iuris*, fair game as an argument in any legal question which dealt with procedure.”⁴³

In spite of the fact that the maxim can be found in other texts as well, it does not appear to have become a true *regula iuris*. Fraher suspects that is because the maxim uses the term *reus* which can be translated either as “guilty” or “defendant.” In the context of the maxim, it obviously means “guilty.” It provoked commentary, nevertheless, in other

⁴⁰ See X 3, 2, c. 8.

⁴¹ See FRAHER, ““Ut nullus describatur reus,”” 501. See also ID., “The Theoretical Justification for the New Criminal Law of the High Middle Ages: ‘Rei Publicae Interest, Ne Crimina Remaneant Impunita,’” in *University of Illinois Law Review*, 1984, no. 3, 577-595.

⁴² See FRAHER, ““Ut nullus describatur reus,”” 503. See also *Et est sciendum*, D. 40, c. 6, quoted in B. TIERNEY, “Pope and Council: Some New Decretist Texts,” in *Medieval Studies*, 19 (1957), 215.

⁴³ FRAHER, ““Ut nullus describatur reus,”” 502.

canonical authors; Huguccio added a gloss clarifying its meaning,⁴⁴ and the *Glossa ordinaria* clarified the text by changing it to “reus uel criminosus.”⁴⁵

The maxim still continued to exercise influence in the canonical tradition. William Durantis utilized it in his *Speculum iudiciale* in a paragraph on procedure against an unconfessed suspect. The *Speculum* would continue to be studied as a procedural textbook until the end of the Middle Ages, and the maxim would have still been read by jurists as late as the seventeenth century. William, however, included many exceptions to the maxim and limited it to the accusatorial procedure, thereby excluding it from the inquisitorial procedure.⁴⁶

3.1.3—Natural Law and the Maxim *Quilibet praesumitur innocens*

Though Fraher’s article points to the maxim *Ut nullus describatur reus* of Pope Nicholas I as the first expression of the concept behind the presumption of innocence, Pennington wrote a popular article in 2003 in which he explained the emergence of the specific maxim *Quilibet praesumitur innocens*. It is this maxim that is closest to the concept as we express it today by using the word *praesumitur*.

Pennington begins the story by going back to the jurists of the twelfth century who were seeking to legitimize the new *ordo iudiciarius*. The twelfth century jurist Paucapalea developed a justification for the *ordo* based on Scripture. In his commentary on Gratian’s *Decretum*, Paucapalea linked the *ordo* to the fall of Adam and Eve. After the original sin

⁴⁴ See HUGUCCIO, *Summa decretorum*, Admont MS 7, fol. 270ra, ad C. 15, q. 8, c. 5, s.v. *reus*; quoted in FRAHER, “‘Ut nullus describatur reus,’” 503.

⁴⁵ *Glossa ordinaria*, ad C. 8, q. 4, c. 1, s.v. *Sententie*; quoted in FRAHER, “‘Ut nullus describatur reus,’” 503.

⁴⁶ See FRAHER, “‘Ut nullus describatur reus,’” 503-504; see also 504, n. 34.

of Adam and Eve, God entered the garden and called for Adam. When Adam revealed that he had hidden from God because of his nakedness, God then accused him of eating from the tree from which he was forbidden to eat. Adam, of course, blamed Eve but to no avail. Adam and Eve were declared guilty and cast out of the Garden of Eden.⁴⁷ As Pennington writes, “Paucapalea’s point is subtle but was not [to] be lost on later jurists. Although God is omniscient, he too must summon defendants and hear their pleas.”⁴⁸

Paucapalea also found justification for the new legal process in Deuteronomy 19:15 where Moses declared that a claim must be proven by the testimony of two or three witnesses. In this, Paucapalea saw a Scriptural mandate for a basic rule of evidence for a procedure that God himself accepted.⁴⁹

Paucapalea’s effort to root the new *ordo iudiciarius* in divine law had important ramifications. As Pennington writes, “Most importantly for our story, the subtext of Paucapalea’s commentary clearly implies that if God must summon litigants to defend themselves, mere humans must also summon them and presume that every defendant is innocent until proven guilty in court.”⁵⁰

According to Pennington, “Stephen [of Tournai] was the first jurist to define the *ordo iudiciarius*.”⁵¹ Stephen wrote: “The defendant shall be summoned before his own judge and be legitimately called by three edicts or one peremptory edict. He must be

⁴⁷ See PENNINGTON, “Innocent until Proven Guilty,” 113; ID., “Due Process, Community, and the Prince,” 18-19; ID., “The Right to a Legal Defence,” 16; ID., “The Jurisprudence of Procedure,” 137-138.

⁴⁸ PENNINGTON, “Innocent until Proven Guilty,” 113; J. BRUNDAGE, *Medieval Canon Law*, rev. and expanded by M. EICHBAUER, Oxford, Routledge, 2023, 107.

⁴⁹ See PENNINGTON, “Innocent until Proven Guilty,” 113; ID., “Due Process, Community, and the Prince,” 19; ID., “The Right to a Legal Defence,” 16; ID., “The Jurisprudence of Procedure,” 138.

⁵⁰ PENNINGTON, “Innocent until Proven Guilty,” 113. See also ID., “The Right to a Legal Defence,” 16.

⁵¹ PENNINGTON, “Due Process, Community, and the Prince,” 19; ID., “The Jurisprudence of Procedure,” 139.

permitted to have legitimate delays. The accusation must be formally presented in writing. Legitimate witnesses must be produced. A decision may be rendered only after someone has been convicted or confessed. The decision must be in writing.”⁵² This definition shows how conscious the jurists of the later twelfth century were of the right of a defendant to a trial in accord with the law.⁵³ Once this idea of Paucapalea and Stephen was included by William Durantis in his *Speculum iudiciale* at the end of the thirteenth century, “the story lived in the minds of European jurists for centuries.”⁵⁴

As noted above, one can see that Pope Boniface VIII included in the *Regulae iuris* the principle that in doubtful matters “the defendant is favored, not the plaintiff.”⁵⁵ Indeed various maxims favoring the defendant were common in medieval law;⁵⁶ however, as previously noted, if someone was caught in the act of committing a crime, it was hard for many to see why a trial was necessary.⁵⁷ Many considered that, if a case was heinous and notorious, a sentence and punishment could be handed down without a trial.⁵⁸

When Tancred of Bologna wrote about procedure, he said that he would not discuss notorious crimes, but he does make some mention of it:

I have said that I would not treat notorious crimes because neither an accusation nor witnesses are necessary. Notorious crimes can be punished without them.... Nevertheless,

⁵² STEPHAN VON DOORNICK, *Die Summa über das Decretum Gratiani*, J. von Schulte (ed.), Darmstadt, Germany, Scientia Verlag Aalen, 1965, C. 2, q. 1, 5 (*an in manifestis*), 158; cited and translated by PENNINGTON, “Due Process, Community, and the Prince,” 20. See also PENNINGTON, *The Prince and the Law*, 143; P. HYAMS, “Due process versus the maintenance of order in European law: the contribution of the *ius commune*,” in *The Moral World of the Law*, P. COSS (ed.), Cambridge, Cambridge University Press, 2007, 69; BRUNDAGE, *Medieval Canon Law*, 107.

⁵³ See PENNINGTON, “Due Process, Community, and the Prince,” 20; ID., “The Jurisprudence of Procedure,” 139.

⁵⁴ PENNINGTON, “The Jurisprudence of Procedure,” 139.

⁵⁵ PENNINGTON, *The Prince and the Law*, 156.

⁵⁶ See *ibid.*

⁵⁷ See PENNINGTON, “The Right to a Legal Defence,” 19.

⁵⁸ See PENNINGTON, “Innocent until Proven Guilty,” 114; ID., “The Right to a Legal Defence,” 21. “In the middle of the thirteenth century, one of the most distinguished jurists of the age, Henricus of Segusio, summed up juristic thought when he declared that notorious crimes, especially those committed against the Church, needed no formal juridical examination” (PENNINGTON, “Innocent until Proven Guilty,” 114). More examples can be found in ID., “The Right to a Legal Defence,” 21-22.

certain parts of the 'ordo iudiciarius' must be observed in notorious criminal cases.... The defendant ought to be summoned and interrogated. He ought to have a sentence rendered whether he is present or contumaciously absent...because, if he would not be cited, the sentence would not hold.... Anyone whose crime is notorious can be punished by a judge from the power of his office, although the defendant does not appear before him and is not convicted.⁵⁹

It would take some time, nevertheless, before the jurists would conclude that “no one may be condemned without a trial to which the defendant had been summoned and in which he participated.”⁶⁰

A crucial development occurred around the middle of the thirteenth century. Up to that time, jurists considered procedural law to be a matter of human positive law and, therefore, able to be dispensed with by a prince or judge.⁶¹ Thanks to Paucapalea and subsequent canonists, the Scriptural justification for the *ordo* led to the conclusion that certain elements of judicial procedure were of divine law and could not be dispensed: “if God had to respect the rights of defendants, then the rules of procedure must transcend positive law.”⁶² The jurists of the *Ius commune* eventually came to the conclusion that the judicial process and its norms of procedure were derived from natural divine law, also referred to in this time as the *ius gentium*. A defendant, therefore, had an absolute right to a trial.⁶³

⁵⁹ TANCREDO OF BOLOGNA, *Ordo iudicarii*, in F. BERGMANN (ed.), *Pilii, Tancredi, Gratiae Libri de iudiciorum ordine*, 151-152, English translation in PENNINGTON, “The Jurisprudence of Procedure,” 146.

⁶⁰ PENNINGTON, “The Jurisprudence of Procedure,” 146-147.

⁶¹ See PENNINGTON, “Innocent until Proven Guilty,” 114. This idea had its roots in the statements of the Roman jurists Papinianus and Pomponius. See PENNINGTON, “The Right to a Legal Defence,” 22.

⁶² PENNINGTON, “Innocent until Proven Guilty,” 114.

⁶³ See *ibid.*; PENNINGTON, “Due Process, Community, and the Prince,” 10; *ID.*, “The Right to a Legal Defence,” 12, 20, 23; BRUNDAGE, *Medieval Canon Law*, 107.

“We know almost nothing about the norms governing judicial process in the early Middle Ages, but from the ninth century on there is evidence that a defendant’s right to a trial was an accepted norm. [...] Defendants did not, however, have an absolute right to a trial before the thirteenth century” (PENNINGTON, “The Right to a Legal Defence,” 20-21).

Jurists eventually began to discuss the right to actions (*actiones*). Pope Innocent IV was the first of the jurists to discuss whether or not a prince had the right to take an action away from a subject.⁶⁴ Later civilian jurists Odofredus and Guido of Suzzara began to argue that, if a person has a natural right to own property, then he also has a right to an action to recover lost property. They did not go so far, however, as to argue that the right to an action to recover property was founded in natural law.⁶⁵ Eventually, that step was taken by Jacobus de Arena, who argued that contracts were found in all legal systems and that any action for the sake of vindicating a contract preceded civil law and was rooted in the *ius gentium*.⁶⁶

Once the norms of procedure were considered to be part of natural law, it was easy for the jurists to argue that certain rights of defendants could not be violated; therefore, the right to due process was securely founded in natural law.⁶⁷

Pennington states that the most complete and sophisticated summary of juristic thought on the rights of defendants is found in the work of the French canonist Johannes Monachus (d. 1313). In his gloss on the decretal *Rem non novam* of Boniface VIII, he

⁶⁴ See PENNINGTON, “Innocent until Proven Guilty,” 115; ID., “Due Process, Community, and the Prince,” 27. For more detail on Innocent’s argument, see ID., “The Right to a Legal Defence,” 23-25.

“Sed et tunc ut quidam dicunt licet sustineatur quod auferat actionem tamen quin reddat iustitiam auferre non posset, cum esset contra ius naturale. Si vero non auferatur ius, sed differatur, tenet” (INNOCENT IV, Commentary on X 1, 2, c. 7; quoted in PENNINGTON, “Due Process, Community, and the Prince,” 28, n. 66).

⁶⁵ See PENNINGTON, “Innocent until Proven Guilty,” 115. For more detail on the arguments of Odofredus and Guido, see ID., “Due Process, Community, and the Prince,” 29-32.

⁶⁶ See PENNINGTON, “The Right to a Legal Defence, 25-26; ID., “Due Process, Community, and the Prince,” 33-34.

“Set absurdum fuerit in iuregentium si homines erunt obligati et non poterunt exigi. Ergo pro nihilo errant obligationes” (JACOBUS DE ARENA, “Lectura super titulo De actionibus,” in *Super iure civili*, Lyon 1541, fol. 262r; quoted in PENNINGTON, “Due Process, Community, and the Prince,” 33, n. 80).

⁶⁷ “A small intellectual revolution had to take place, however, before the jurists could create a coherent argument that asserted the absolute right of litigants to a trial. They had to take the fundamental principles of the *ordo iudiciarius* out of the realm of positive law and place them in a system of law over which the human prince had no authority. Consequently, in the second half of the thirteenth century, the jurists gradually removed ‘actiones’ from civil law and place them in the law of nature” (PENNINGTON, “Due Process, Community, and the Prince,” 26).

writes extensively on the rights of defendants. He argues that even the Pope cannot dispense with procedural law that is based in natural law. Pennington summarizes thus:

[Johannes Monachus] argued that no judge, even the pope, could come to a just decision unless the defendant was present in court. When a crime is notorious, the judge may proceed in a summary fashion in some parts of the process, but the summons and judgment must be observed. He argued that a summons to court (*citatio*) and a judgment (*sententia*) were integral parts of the judicial process because Genesis 3.9-12 proved that both were necessary. God had been bound to summon Adam; human judges must do the same. Then he formulated an expression of a defendant's right to a trial and to due process with the following words: a person is presumed innocent until proven guilty (*item quilbet [sic] presumitur innocens nisi probetur nocens*).⁶⁸

Here in the writings of the French canonist Johannes Monachus, one finds the first formulation of the maxim that one is presumed innocent until proven guilty. After Paucapalea had rooted the *ordo iudiciarius* in the story of Adam and Eve, the stage was set for canonists to argue that, if God must presume Adam innocent until proven guilty, so also must every other judge, prince, or pope. Johannes's commentary became the Ordinary Gloss in the late medieval canon law collection called the *Extravagantes communes*, which was reproduced and circulated until the seventeenth century.⁶⁹ As Pennington notes, "nothing in his gloss is without its antecedents, but no jurist before him had written such a thorough analysis of a defendant's right to a public and proper trial."⁷⁰

⁶⁸ PENNINGTON, "Innocent until Proven Guilty," 115. See PENNINGTON, "The Right to a Legal Defence, 26-27.

Johannes continues: "ius est promptius ad absoluendum quam ad condemmandum" (JOHANNES MONACHUS, Gloss on *Extravagantes Johannis XXII*, Com. 2.3.1, in *Extravagantes tum viginti D. Ioannis Papae XXII*, Venice, 1615, 163; quoted in PENNINGTON, "Due Process, Community, and the Prince," 36, n. 90).

"Et sic proprium non habet, abbas non priuabit eum defensione, que excommunicato, et etiam diabolo, si in iudicio adesset, non negaretur ut extra de except. Cum inter (X 2, 25, c. 5)" (GULIELMUS DURANTIS, *Speculum iudiciale*, vol. 3, Rome, Georg Lauer and Leonhard Pflugel, 1474, fol. 25rb; quoted in PENNINGTON, "The Right to a Legal Defence," 27-28, n. 65).

⁶⁹ See PENNINGTON, "Innocent until Proven Guilty," 116; ID., "Due Process, Community, and the Prince," 37; ID., "The Right to a Legal Defence," 28; HYAMS, "Due process versus the maintenance of order in European law," 70; BRUNDAGE, *Medieval Canon Law*, 107.

⁷⁰ PENNINGTON, "Due Process, Community, and the Prince," 37.

Pennington notes that, contrary to many portrayals of continental legal history, the presumption of innocence was not a marginal idea in the *Ius commune*. Though there were certainly many instances in which the presumption of innocence was not honoured, there are notable instances where it was.⁷¹ After providing a summary of an Inquisition case at Rimini against two Jewish defendants, Pennington notes that the inquisitor acquitted the men due to lack of evidence, saying: “it is better to leave a crime unpunished than to condemn an innocent person.”⁷² There are also several instances of popes declaring that those involved in trials that acquitted Jews were not to be punished and that all persons deserve justice whether Christian or Jewish.⁷³

A highpoint for the articulation of criminal law and procedure came in the sixteenth century. Whereas treatises on criminal procedure from the thirteenth to fifteenth centuries were usually brief, during the sixteenth century, large tracts were written on the rights of criminal defendants by Mascardi, Giovanni Riccio, Giulio Claro, Menochio, and Prospero Farinacci.⁷⁴

Menochio was a prolific writer who wrote about procedure in all his works. In his most important work *De presumptionibus, coniecturis, signis et indiciis*, he “listed twenty-six cases in which the defendant was presumed to be favored over the plaintiff. His

⁷¹ See PENNINGTON, “Innocent until Proven Guilty,” 117-118. See also S. SIMONSOHN, *The Apostolic See and the Jews: Documents: 492-1404*, Studies and Texts, no. 94, Toronto, Pontifical Institute of Medieval Studies, 1991, 527-529.

⁷² PENNINGTON, “Innocent until Proven Guilty,” 118.

⁷³ See *ibid.*, 118-119.

“[C]um iustitia, que omnibus communis esse debet, ipsis Iudeis ministratur” (PAUL II, quoted in S. SIMONSOHN, *The Apostolic See and the Jews*, 1164; quoted in PENNINGTON, “Innocent until Proven Guilty,” 119, n. 32).

⁷⁴ See PENNINGTON, “Innocent until Proven Guilty,” 119-120.

discussion centred on the maxim ‘In dubio pro reo’ (in doubt the defendant should be favored), which governed how the courts had evaluated evidence for centuries.”⁷⁵

Farinacci, no stranger to criminal accusations and punishment, composed a treatise entitled *Praxis et theorica criminalis*,⁷⁶ which he finished in 1601. Pennington summarizes the importance of this work for the study of the presumption of innocence:

Farinacci’s treatise bristles with the presumption of innocence. The issue arose in several different contexts. He insisted that the exception of innocence was privileged in law and could never be abolished by statute; if a statute would abolish a defendant’s right to a defense, it should be interpreted as only being unjust or calumnious defenses. Even the pope could not take away the right of a defendant to prove his innocence, since that right was grounded in the law of nature. Like other jurists who wrote on criminal procedure, Farinacci distinguished between presumptions of law and of men: a presumption of man was, for example, that in doubt, a man was presumed to be good.⁷⁷

The writings of Farinacci also influenced the Jesuit jurist Frederick von Spee. In his seventeenth century treatise on procedure in witchcraft trials, *Cautio criminalis*, he strongly condemned the use of torture to obtain confessions of guilt.⁷⁸ In response to the question of whether or not a defendant can be condemned if he does not confess under torture, von Spee wrote: “I assume that no one can be condemned unless his guilt is certain; an innocent person ought not be killed. Everyone is presumed innocent, who is not known to be guilty.”⁷⁹

⁷⁵ PENNINGTON, “The Jurisprudence of Procedure,” 153-154.

⁷⁶ See P. FARINACCI, *Praxis et theorica criminalis*, Parma, Ex typographia Erasmi Viotthi, 1605.

⁷⁷ PENNINGTON, “Innocent until Proven Guilty,” 121.

⁷⁸ See F. VON SPEE, *Cautio criminalis seu De processibus contra sagas liber*, Rinteln, Germany, Typis exscrisit Petrus Lucius Typog. Acad., 1631, 262-263; English translation in PENNINGTON, “Innocent until Proven Guilty,” 121-122.

⁷⁹ PENNINGTON, “Innocent until Proven Guilty,” 122.

3.1.4—The Presumption of Innocence in Modern Secular Law

Thanks to the writings of various jurists in the medieval period, the jurisprudence of due process was transmitted to the modern period.⁸⁰ As Pennington writes, “Due process of law became part of the intellectual baggage of every jurist who studied the *Ius commune*, and natural law continued to be the sturdy foundations upon which key elements of judicial procedure rested. Bartolomé de Las Casas, Jean Bodin, Samuel Pufendorf, Johannes Althusius, and Benedict Carpzov incorporated these norms of procedure created by the medieval jurists into their works.”⁸¹

Cesare Beccaria wrote of the importance of the presumption of innocence in a famous treatise entitled *Dei delitti e delle pene*.⁸² In arguing for the necessity of two witnesses before convicting someone of a criminal offence, Beccaria wrote: “More than one witness is needed, because, so long as one party affirms and the other denies, nothing is certain and the right triumphs that every man has to be believed innocent.”⁸³ He later argued against torture stating: “either the crime is certain or it is not; if it is certain, then no other punishment is called for than what is established by law and other torments are superfluous because the criminal’s confession is superfluous; if it is not certain, then

⁸⁰ The further influence of due process rights on the use and eventual elimination of torture, as well as the defence of due process rights against the exercise of papal power exercised by Sixtus IV can be found in PENNINGTON, “The Right to a Legal Defence,” 28-33.

⁸¹ PENNINGTON, “Due Process, Community, and the Prince,” 45; ID., “The Right to a Legal Defence,” 33.

⁸² “Beccaria and Pietro Verri, Beccaria’s muse who wrote a significant tract on torture published long after *Dei delitti*, probably borrowed Spee’s thought and adapted his words when they wrote about torture. Yet Beccaria and Verri condemned Spee, Farinacci, and other jurists at the same time that they appropriated their ideas, accusing them of being soft on torture” (PENNINGTON, “Innocent until Proven Guilty,” 122-123).

⁸³ C. BECCARIA, *Dei delitti e delle pene*, L. Firpo, Milan (ed.), Mediobanca, 1984, 56, English translation in R. BELLAMY (ed.), *On Crimes and Punishments and Other Writings*, R. Davies (trans.), Cambridge Texts in the History of Political Thought, Cambridge, Cambridge University Press, 1995, 32. See PENNINGTON, “Innocent until Proven Guilty: The Origins of a Legal Maxim,” 111.

according to the law, you ought not torment an innocent because such is a man whose crimes have not been proven.”⁸⁴

Since Beccaria’s time the recognition of the right to a presumption of innocence has become ever more popular and been included in important documents and legislation. It was included in the French *Declaration of the Rights of Man and of the Citizen* of 1789.⁸⁵ It is a part of the Universal Declaration of Human Rights of 1948⁸⁶ and the United Nations International Covenant on Civil and Political Rights.⁸⁷ The presumption is enshrined in the law of the European Union in the *Convention on the Protection of Human Rights*⁸⁸ and in the Constitution of Canada.⁸⁹ Though not included in the United States Constitution, the presumption of innocence is part of the jurisprudence of the U.S.A.⁹⁰

⁸⁴ BECCARIA, *Dei delitti e delle pene*, 62; English translation in *On Crimes and Punishments*, 39; translation corrected by PENNINGTON, “Innocent until Proven Guilty,” 111.

⁸⁵ “Tout homme étant présumé innocent jusqu’à ce qu’il ait été déclaré coupable...” (NATIONAL CONSTITUENT ASSEMBLY, *La déclaration des droits de l’homme et du citoyen*, 5 October 1789, art. 9; <https://www.elysee.fr/la-presidence/la-declaration-des-droits-de-l-homme-et-du-citoyen> [16 May 2025]).

⁸⁶ “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence” (UNITED NATIONS GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 10 December 1948, art. 11; www.un.org/en/about-us/universal-declaration-of-human-rights [16 May 2025]).

⁸⁷ “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law” (UNITED NATIONS GENERAL ASSEMBLY, *International Covenant on Civil and Political Rights*, 16 December 1966, art. 14, para. 2; www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [16 May 2025]).

⁸⁸ “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law” (COUNCIL OF EUROPE, *Convention of the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, art. 6, para. 2; www.echr.coe.int/documents/d/echr/convention_ENG [16 May 2025]).

⁸⁹ “Any person charged with an offence has the right: [...] to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal [...]” (*Constitution of Canada, Constitution Act, 1982, Part I: Canadian Charter of Rights and Freedoms*, art. 7d; https://laws-lois.justice.gc.ca/PDF/Const_TRD.pdf).

⁹⁰ The maxim of innocence until proven guilty entered American law through the 1894 Supreme Court decision *Coffin vs. U.S.* In the majority opinion written by Justice Edward Douglas White, a long history of the origins of the legal maxim is provided that traces its origins from Roman law through continental law and the Anglo-American tradition; however, though Pennington notes that White’s text contains “a dazzling display of legal history,” Pennington also concludes that “most of it is wrong” (PENNINGTON, “Innocent until Proven Guilty,” 108).

3.1.5—The Presumption of Innocence in Canonical Doctrine Under *CIC/17*

Though the presumption of innocence was not explicitly stated in the text of *CIC/17*, it was addressed in the canonical writings of that time. It is not referred to with the maxim that Johannes Monachus coined but with similar maxims, such as “no one is evil unless it be proven.” There is, however, some ambiguity or contradiction among the authors about what kind of presumption it is.

Conte a Coronata, in the section on presumptions in his *Institutiones iuris canonici*, included in the section on legal presumptions a paragraph about presumptions of nature or of natural law. These presumptions, he noted, were not mentioned in *CIC/17*, and he believed them to pertain more to human presumptions, since they pertain more to the nature of things and the common estimation of things outside of a trial. They derive their probative force from their estimation in the mind of the judge.⁹¹

One might expect that Conte a Coronata would include the presumption of innocence among the presumptions of natural law since it is derived from natural law; however, he included it among the legal presumptions, which, of course, impact the burden of proof. Specifically, when describing the differences between general and special legal presumptions, he mentioned it as an example of a general legal presumption.⁹² In the following section on human presumptions, he wrote that when presumptions conflict, “a

⁹¹ “Haec praesumptio magis ad praesumptiones *hominis* quam ad praesumptionem iuris pertinere videtur; indicium enim quod in iudicio iudici causam dat ad coniciendam veritatem idem extra iudicium *ex natura rei* ad idem causam dat *cuiilibet homini*, et quia praesumptio hominis non simpliciter ab obiecto seu a circumstantiis, sed etiam magna ex parte a iudicis conscientia vim suam obtinet, ita idem dicendum erit de praesumptione naturae” (M. CONTE A CORONATA, *Institutiones iuris canonici: ad usum utriusque cleri et scholarum*, vol. 3, *De processibus*, rev. ed., Turin, Domus editorialis Marietti, 1941, 261).

⁹² “*Praesumptionibus iuris specialibus* opponi possunt *praesumptiones iuris generales*, quae in lege aliqua generali rationem habent. Praesumptiones generales sunt: Omne factum praesumitur recte factum. Nemo malus nisi probetur etc.” (CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 262).

legal presumption prevails over any human presumption [and] special presumptions over general.”⁹³

In Victorio Bartocetti’s revision of Michele Lega’s *Commentarius in iudicia ecclesiastica*, there is also mention of presumptions contained in natural law and, therefore, called presumptions of nature or of natural law.⁹⁴ Lega and Bartocetti then included presumptions of natural law in the category of legal presumptions, mentioning as an example “no one is presumed evil unless it is proven.”⁹⁵

Lega and Bartocetti also wrote that legal presumptions relieve one of the burden of proof; however, in a subsequent section of the chapter, they excepted natural law presumptions: “Presumptions of law that are of natural law are not included in the prescript of [CIC/17] c. 1827,”⁹⁶ which states that one is freed from the burden of proof when one has a presumption of law in his favour. They wrote that the probative force of such natural law presumptions is only that which they have by nature and that one who contradicts such presumptions must offer proof.⁹⁷ Examples were given of two opposing rules of law from the *Regulae iuris*: “[T]he eighth rule of law in [the Liber] VI: ‘Once evil one is always presumed to be evil,’ constitutes a presumption of natural law contrary to the presumption

⁹³ “In conflictu praesumptionum praesumptio iuris praevallet quibuslibet hominis praesumptionibus; praesumptiones speciales generalibus” (CONTE A CORONATA, *Institutiones iuris canonici*, 264).

⁹⁴ “Nonnullae praesumptiones, quia *iure naturali* continentur, sunt praesumptiones *naturae* seu *iuris naturalis*” (M. LEGA, *Commentarius in iudicia ecclesiastica iuxta Codicem iuris canonici*, V. BARTOCETTI (ed.), Rome, Anonima Libreria Cattolica Italiana, 1950, vol. 2, 818).

⁹⁵ “*Iuris praesumptiones* illae sunt, quas lex ipsa ex certis factis deducit, ante quamcumque probationem. Huiusmodi vero *iuris* praesumptiones aliae sunt proprie *iuris positivi* [...]. Aliae potius sunt *iuris naturalis*; veluti *nemo praesumitur malus nisi probetur*” (LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 818).

⁹⁶ “Praesumptiones vero *iuris*, quae sunt *iuris naturalis* non comprehenduntur in praescripto can. 1827” (LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 819).

⁹⁷ “[S]ed vim quamvis habent probativam quoad ea quae nobis naturaliter insunt; et hinc qui asserit aliquid contrarium huic naturali qualitati, id probare debet” (LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 819).

that ‘no one is presumed evil until it is proven,’ which is destroyed even by one delict and the other succeeds.”⁹⁸

Lega and Bartocetti considered presumptions of nature to be separate from presumptions of natural law and related them to human presumptions that do not affect the burden of proof.⁹⁹ They, nevertheless, confirmed in another place that the accused is to be favoured until his guilt is proven in law and in fact.¹⁰⁰

3.1.6—The Favor of Law Against Penalties in Canonical Doctrine Under *CIC/17*

It seems that an integral element of what is referred to now as the presumption of innocence was present in canonical doctrine under the *CIC/17*, but not as a presumption of natural law. Rather it was present as a favour of law.

CIC/17, c. 1869 pertained to the moral certitude required of the judge for issuing a sentence at the end of a process. Paragraph 4 stated: “A judge who is not able to form this certitude himself shall pronounce that the right of the petitioner is not proven and shall dismiss the respondent, unless it concerns a case of favour, in which case it shall be pronounced [in benefit of] the favour and with due regard for the prescription of Canon 1679, §2.” Both Conte a Coronata and Lega and Bartocetti list four favours of law, one of

⁹⁸ “Porro regula octava Iuris in VI: «*Semel malus semper praesumitur esse malus*», constituit praesumptionem *iuris naturalis* contrariam alteri praesumptioni: «*nemo praesumitur malus nisi probetur*», quae vel per unum delictum destruitur et alia succedit” (LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 819).

⁹⁹ “Praesumptio *iuris* pro veritate habetur, unde potest deveniri ad sententiam definitivam, nisi probetur contrarium; et hoc sensu in aliam partem ista transfert onus probationis, uti explicavimus.

“Praesumptio vero *hominis* et *naturae* non habet certum valorem, sed relativum indiciis, quibus innititur et factis quibus applicatur” (LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 821).

¹⁰⁰ “In criminalibus reo favendum esse donec de crimine in iure et in facto convincatur, in aperto est; quia *nemo praesumitur esse malus* ex lege naturae; at *semel malus semper praesumitur malus*” (LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 937).

which is “liberty from penalties.”¹⁰¹ Liberty from penalties is an essential element of what one means when asserting that a person should be presumed innocent until proven guilty.

3.2—The Presumption of Innocence Implicit in the Codes

It is clear from this historical survey that the presumption of innocence is not a new concept in canon law. Though it has not necessarily been as prominent in canonical writings until the last several decades, it has not been ignored.¹⁰² As Rafael Rodríguez-Ocaña writes, “its origin and presence in canonical history have been studied; the papal magisterium has remembered it in its interventions; its multiple manifestations have been shown in the law of the Church; the jurisprudence of the Signatura has invoked it in the arguments of its sentences; and, finally, the jurisprudence of the Roman Rota has also been based on this principle.”¹⁰³

¹⁰¹ “Denique quaerendum an ius vetus censendum sit fuisse immutatum quo potissimum quatuor causae habebantur favorabiles, nempe matrimonium, libertas, dos, testamentum” (LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 943).

“Causae favorabiles nunc sunt quae valorem matrimonii protegunt, quae libertatem a poenis, quae privilegium paulinum respiciunt” (CONTE A CORONATA, *Institutiones iuris canonici*, vol. 3, 308).

See F. WERNZ and P. VIDAL, *Ius canonicum*, vol. 6, Rome, Pontificia Universitas Gregoriana, 1927, 535, 536, n. 18.

¹⁰² See F. CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico. Un marco jurídico ineludible,” in *Revista española de derecho canónico*, 78 (2021), 1219.

¹⁰³ “Se ha estudiado su origen y su presencia en la historia canónica; el magisterio papal lo ha recordado en sus intervenciones; se han mostrado sus múltiples manifestaciones en el derecho de la Iglesia; la jurisprudencia de la Signatura la ha invocado en el argumentario de sus sentencias; y, en fin, la jurisprudencia de la Rota Romana también se ha basado en ese principio” (RODRÍGUEZ-OCAÑA, “Certeza moral en las causas penales,” 810-811).

Examples from the papal magisterium: PIUS XII, *Allocutio iis qui interfuerunt VI^o Conventui internationali de Ius poenali*, 3 October 1953, in *AAS*, 45 (1953), 737; ID., *Nuntia iis qui interfuerunt VI Conventui nationali Sodalium Consociationis ex iuris peritis catholicis Italiae*, 5 December 1954, in *AAS*, 47 (1955), 65-66.

Examples from the Apostolic Signatura: SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *Definitive Sentence*, 20 June 2013, Prot. no. 45485/11 CA, English in W. DANIEL (ed. and trans.), *Ministerium Iustitiae Vol. 2: The Lex propria and More Recent Contentious-Administrative Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, Montréal, Wilson & LaFleur, 2021, 144-178; ID., *Decree*, 3 July 2004, Prot. no. 32372/01 CA, in *Ius canonicum*, 59 (2019), 295.

Though the presumption of innocence was not explicitly stated in the *CIC/17* or the original versions of *CIC/83* and *CCEO*, the presumption can be found not only in canonical doctrine but implicitly in the texts of the codes, especially in the canons relating to the burden of proof and moral certitude for rendering a decision.¹⁰⁴

3.2.1—The Presumption of Innocence and the Burden of Proof

The presumption of innocence is inextricably bound up with the burden of proof; so much so that Sánchez-Gil describes the presumption of innocence as the logical consequence of the burden of proof falling upon the accuser rather than the accused.¹⁰⁵ The burden of proof is explained in c. 1526 and *CCEO*, c. 1207:¹⁰⁶

- §1. The burden of proof rests upon the person who makes the allegation.
- §2. The following do not need proof:
 - 1° matters presumed by the law itself;
 - 2° facts alleged by one of the contending parties and admitted by the other, unless the law or the judge nevertheless requires proof.

It is clear that, if the burden of proof rests on the person who makes an allegation, as stated in §1, then the burden of proof in a criminal process is on the promoter of justice.

In the jurisprudence of the Roman Rota: “Quando manca una prova moraliter certa il reo si debba assolvere” (in V. PALESTRO, “Le sentenze penali della Rota Romana (1909-1996),” in Z. ZUCHECKI [ed.], *Il processo penale canonico*, Rome, Lateran University Press, 2003, 336).

“Né è sufficiente ‘ex se ipsa’ una grave presunzione di colpevolezza in quanto ‘criminalibus’” (ibid., 388).

“At the level of international treaties and national constitutions, the principle of *favor rei* must underpin or inform the whole penal juridical order even if it is not defined normatively...” (J. LLOBELL, “The Balance of the Interests of Victims and the Rights of the Accused: The Right to Equal Process,” in *The Penal Process and the Protection of Rights in Canon Law*, P. DUGAN [ed.], Proceedings, Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2005, 100).

¹⁰⁴ See A. SÁNCHEZ-GIL, “El principio in dubio pro reo en el derecho penal canónico. La perenne actualidad de una antigua regla jurídica,” in *Revista general de derecho canónico y derecho eclesiástico del estado*, 5 (2004), www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=402735&d=1 (16 May 2025).

The recognition of the presumption of innocence “en el Derecho canónico no es algo nuevo, pero sí su afirmación explícita y el lugar preeminente que ocupa” (CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1220).

¹⁰⁵ See SÁNCHEZ-GIL, “El principio in dubio pro reo.”

¹⁰⁶ Cf. *CIC/17*, c. 1748.

It is possible, however, that an assertion may be made by the accused, in which case the accused bears the burden of proof.¹⁰⁷ Daniel explains: “This principle applies both to the presentation of one of the doubts received in the formulation of the doubts to be resolved by definitive sentence and to juridical facts brought forward in the trial pertaining to one of the doubts or to some related factor (e.g., a witness’s credibility).”¹⁰⁸

There are various points that can be derived from this. As Francisco Campos Martínez writes: “in short, the presumption of innocence develops within the framework of the burden of proof and assumes that it is not the accused who must demonstrate that he is innocent of the accusation that is made against him, but rather that it is up to the one to whom it pertains to prove the accusation through the relevant evidence, carried out with legal validity and that can be objectively judged as evidence for prosecution.”¹⁰⁹

From this it follows that the accused cannot be found guilty simply for not responding to or refuting the claims made against him. Rather the proofs must be “full,

¹⁰⁷ “Dixi: «*actionem* aut *exceptionem* fundat in facto», quia actor probare debet *factum* suae actionis fundamentum, et reus suae exceptionis quia semper *reus excipiendo fit actor*. Equidem apud Doctores passim ita enunciatur regula, nempe *actori non reo incumbere onus probandi, nisi reus excipiendo fiat actor*; ast incongrue ita concipitur regula quia altior ratio actorem et reum aequè comprehendens est; *ei incubere onus probandi qui factum asserit*” (LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 638).

“The respondent does not have to prove anything, if he or she is content denying the claim. Nevertheless, the respondent is not prohibited from presenting a proof in advance. This rule applies to both parties, in accordance with the principle *reus in excipiendo fit actor*” (J.-P. SCHOUPE, Commentary on c. 1526, in *Exegetical Comm*, vol. 4/2, 1194).

¹⁰⁸ W. DANIEL, Commentary on c. 1207, in J. FARIS and J. ABBASS (eds.), *A Practical Commentary to the Code of Canons of the Eastern Churches*, Montréal, Wilson & Lafleur, 2019, 2209.

“If the respondent does not merely deny the plaintiff’s claim but invokes certain facts, the respondent must assume the onus of proof regarding his or her own statements” (SCHOUPE, Commentary on c. 1526, 1194).

¹⁰⁹ “En pocas palabras, la presunción de inocencia se desenvuelve en el marco de la carga probatoria y supone que no es al acusado a quien corresponde demostrar que es inocente frente a la acusación que contra él se formula, sino que es a quien la sostiene a quien toca acreditar la imputación mediante las pertinentes pruebas, practicadas con validez jurídica y que puedan objetivamente juzgarse como pruebas de cargo” (CAMPOS MARTÍNEZ, “Presunción de inocencia e investigación previa canónica,” 475). See also ID., “Presunción de inocencia y el nuevo derecho penal canónico,” 1218.

“[N]on è l’accusato che deve provare la sua non-colpevolezza; non è l’accusato che deve provare che non gli è imputabile il delitto ascrittogli” (G. MONTINI, “La struttura del processo penale giudiziale canonico,” in *Quaderni di diritto ecclesiale*, 35 [2022], 371).

pertinent, and convincing in themselves.”¹¹⁰ The legitimacy of the claim that the accused need not respond to accusation is further supported by c. 1728, §2 and *CCEO*, c. 1471, §2: “The accused is not bound to confess the delict nor can an oath be administered to the accused.”¹¹¹ This norm, combined with the presumption of innocence, indicates that the silence of the accused cannot constitute proof of his guilt.¹¹² When the accused is questioned in the investigation or the penal process, the “interrogation should focus mainly on the evidence provided in the accusation and not so much on the commission of the crime itself.”¹¹³

This placement of the burden of proof on the promoter of justice is a concrete manifestation of the Latin maxim *in dubio pro reo*, which is already well established in the

¹¹⁰ “[S]erá necesario que las pruebas sean plenas, pertinentes y convincentes en sí mismas” (D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 122).

“L’acusato in altre parole non è *tenuto* a provare la propria innocenza né, di conseguenza, è tenuto a provare l’inconsistenza delle prove (e *a fortiori*, delle accuse) portate in giudizio dal promotore di giustizia, ossia non gli può essere imputato come prova di colpevolezza che non abbia eccepito alle prove avversarie, o, in altre parole, non si possono ritenere rafforzate le prove addotte dal promotore di giustizia perché non contraddette dall’acusato. *Actore non probante, reus absolvitur* (cfr. Can. 1748 § 2 CIC17)” (G. MONTINI, “Il processo giudiziale penale, 31, not yet published; quoted in “La presunción de inocencia en el derecho penal canónico,” 122).

“Actore autem non probante, reus, etsi ipse nihil demonstravit in contrarium, absolvitur” (WERNZ and VIDAL, *Ius canonicum*, vol. 6, 378).

“We could argue, however, that a canonical, *procedural* presumption of innocence can be inferred from the principle enshrined in the code *accusatore non probante, reus absolvitur*. This is precisely where the issue of innocence might gain entrance. As a defendant in the criminal action I have no burden to meet regarding what the accuser asserts. This is *at least* because the law does not presume I am guilty of the charge I face. Consequently, if the accuser is unable to meet the burden he faces, the court is bound to acquit me of the charges” (R. JENKINS, “The Charter and Norms Two Years Later: Towards a Resolution of Recent Canonical Dilemmas,” in *CLSA Proceedings*, 66 [2004], 117).

¹¹¹ “It should be carefully noted that, according to canon 1728 § 2 CIC, the accused is not bound to confess (admit) the delict, nor can he be required to take an oath to tell the truth” (CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Vademecum on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*, 5 June 2022, version 2.0, n. 110).

¹¹² See D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 123.

“Uno de estos derechos, contemplado por nuestro ordenamiento canónico, es la posibilidad de permanecer en silencio frente a la acusación notificada, lo cual no debería ser tomado de ninguna manera como una falta de cooperación con quien conduce la investigación, ni mucho menos como un indicio de culpabilidad” (CAMPOS MARTÍNEZ, “Presunción de inocencia e investigación previa canónica,” 498-499).

¹¹³ D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 125. See MONTINI, “Il processo giudiziale,” 37.

canonical tradition. It was explicitly stated in *CIC/17*, c. 1748, “If the petitioner does not prove [the case], the respondent is absolved,” and is implicit in c. 1526 and *CCEO*, c. 1207. By holding to the maxim *in dubio pro reo* throughout the trial, the fairness of the process is made possible by eliminating unfair bias on the part of the judge.¹¹⁴

Labandeira noted that Contardo Ferrini had objected to the claim that there is a presumption in favour of the accused. Presumptions are procedural institutes that alter the order of proof, but the burden of proof is already on the *actor*, not the *reus*. To state that there is a procedural presumption in favour of the accused is redundant.¹¹⁵

3.2.2—The Presumption of Innocence and Moral Certitude

The presumption of innocence cannot be overturned without proof. An early standard for declaring the guilt of the accused was that the proofs must be “clearer than the light of the midday sun.”¹¹⁶ Gratian provided two sayings regarding doubt. One was from St. Gregory the Great: “It is a grave and unseemly business to give a judgment that purports to be certain when the matter is doubtful.”¹¹⁷ The other was from St. Augustine: “Things that are not proved through certain evidence are not to be believed.”¹¹⁸

¹¹⁴ See SÁNCHEZ-GIL, “El principio *in dubio pro reo*.”

¹¹⁵ “Por su parte Ferrini comenta que es inadmisibile la idea de que exista una presunción a favor del reo—es decir, de aquel que por regla general no tiene que probar—, pues la presunción altera el orden de la prueba, y esto no sería posible si con ella demuestra el que sin ella probaría lo mismo. Las presunciones contra el actor—añade—, que harían más dura su prueba, son absurdas. En efecto, el actor esta siempre obligado a convencer al juez de su aserto. ¿Qué otra cosa va a exigirsele con la presunción? Cuando se afirma que hay una presunción a favor del reo, esto significa en realidad que el actor no goza de presunción a su favor” (LABANDEIRA, *Las presunciones en derecho canónico*, 144).

¹¹⁶ J. WHITMAN, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, New Haven, CT, Yale University Press, 2008, 100. See also MAZZA, “Moral Certainty in Uncertain Times,” 295.

¹¹⁷ “Grave satis est et indecens, ut in re dubia certa detur sententia” (C. 11, q. 3, c. 74).

¹¹⁸ “Non credantur que certis iudiciis non demonstrantur” (C. 11, q. 3, c. 75).

It is not until the post-Tridentine era that the expression “moral certitude” began to be used in the canonical context.¹¹⁹ In time, the expression began to be used in documents issued by various congregations of the Roman Curia and, finally, was included in *CIC/17*.¹²⁰ The requirement of moral certitude for rendering a sentence is an important example of the maxim *in dubio pro reo*.¹²¹ This maxim was reaffirmed by Pope Pius XII who said: “if it is impossible to establish with moral certitude the necessary guilt, the principle *in dubio standum est pro reo* must be applied.”¹²²

In light of this canonical tradition, the current codes require that a judge be morally certain before issuing a sentence declaring the guilt of the accused. This finds expression in the current codes in c. 1608 and *CCEO*, c. 1291:¹²³

§1. For the pronouncement of any sentence, the judge must have moral certitude about the matter to be decided by the sentence.

§2. The judge must derive this certitude from the acts and the proofs.

§3. The judge, however, must appraise the proofs according to the judge’s own conscience, without prejudice to the prescripts of the law concerning the efficacy of certain proofs.

§4. A judge who was not able to arrive at this certitude is to pronounce that the right of the petitioner is not established and is to dismiss the respondent as absolved, unless it concerns a case which has the favor of law, in which case the judge must pronounce for that.

The final paragraph of this canon is particularly important for honouring the presumption of innocence. Hughes writes that “this is precisely the form that the presumption of innocence takes in the canonical trial: it is a direction in the law itself to the tribunal that it must find a person guilty *only* if it has acquired moral certainty on that

¹¹⁹ See C. IZZI, “La certezza morale nel Giudizio canonico,” in *Apollinaris*, 84 (2011), 248; citing T. SÁNCHEZ, *De sancto Matrimonii Sacramento*, vol. 1, Lyon, Laurentii Anisson, 1739, lib. II, dis. 45, n. 4, 192; Z. GROCHOLEWSKI, “La certezza morale come chiave di lettura delle norme processuali,” in *Ius ecclesiae*, 9 (1997), 424.

¹²⁰ See IZZI, “La certezza morale nel Giudizio canonico,” 248-249; see 249, n. 16 for curial documents.

¹²¹ See SÁNCHEZ-GIL, “El principio in dubio pro reo.”

¹²² “S’il est impossible d’établir la culpabilité avec une certitude morale, on s’en tiendra au principe: *in dubio standum est pro reo*,” (PIUS XII, Allocutio iis qui interfuerunt VI^o Conventui internationali de Ius poenali, 3 October 1953, in *AAS*, 45 [1953], 737).

¹²³ There are very slight grammatical differences between the two canons and their translations by the CLSA, but they are identical in content.

point.”¹²⁴ Because the accused is presumed innocent, the judge need not achieve moral certitude of the accused’s innocence; that is presumed. The judge must, however, achieve moral certitude before convicting the accused.¹²⁵ Thus, c. 1608 and *CCEO*, c. 1291 implicitly contain the presumption of innocence by requiring moral certitude to convict. It is not enough for the judge to believe that the guilt of the accused is more likely than not or to render a sentence based on a strong intuition of guilt.¹²⁶ Only proof, in law and in fact, can overturn the favour of law.

Pope Pius XII described the various degrees of certitude in an address to the Roman Rota in October 1942. He stated that, between the two extremes of “absolute certainty” and “probability or near certainty,” there is the degree of moral certitude. This moral certitude is characterized by “the exclusion of well-founded or reasonable doubt” while leaving open the “absolute possibility of the contrary.”¹²⁷

¹²⁴ M. HUGHES, “The Presumption of Imputability in Canon 1321, §3,” in *Studia canonica*, 21 (1987), 33.

“El principio de presunción de inocencia se encuentra también latente en el c. 1608 que trata sobre los pronunciamientos del juez [...]” (CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1237).

¹²⁵ See D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 128.

¹²⁶ See *ibid.*, 150.

“Being the exclusion of all positive and prudent doubt about what is asserted, a ‘preponderance of evidence’ is not equivalent to moral certitude, since such a standard consists of a complex of probative indications while not reasonably excluding others (cf. *D[ignitas]C[onnubii]* 247 §2)” (W. DANIEL, Commentary on c. 1291, in FARIS and ABBASS, *A Practical Commentary to the Code of Canons of the Eastern Churches*, 2295).

“El ‘problema’ del juez no es determinar si los hechos delictivos habrían sido posibles e imputables al acusado según las aportaciones probatorias al proceso, sino valorar si son suficientes para destruir la presunción de inocencia. Al acusado no se le pide juramento de decir la verdad, no está obligado a autoinculparse, ni se le pueden pedir razones de unos actos que el juez intuye y anticipa en su veracidad, esperando que la falta de justificación del reo sea suficiente para contrarrestar la presunción de inocencia” (RODRÍGUEZ-OCAÑA, “Certeza moral en las causas penales,” 783).

¹²⁷ “Tra la certezza assoluta e la quasi-certezza o probabilità sta, come tra due estremi, quella certezza morale, della quale d'ordinario si tratta nelle questioni sottoposte al vostro foro, ed a cui Noi qui intendiamo principalmente di riferirci. Essa, nel lato positivo, è caratterizzata da ciò, che esclude ogni fondato o ragionevole dubbio e, così considerata, si distingue essenzialmente dalla menzionata quasi-certezza; dal lato poi negativo, lascia sussistere la possibilità assoluta del contrario, e con ciò si differenzia dall'assoluta certezza. La certezza, di cui ora parliamo, è necessaria e sufficiente per pronunziare una sentenza, anche se nel caso particolare sarebbe possibile di conseguire per via diretta o indiretta una certezza assoluta. Solo così

Specifically in regard to penal cases, G. Paolo Montini writes:

in other words, the presence in the mind of the judge of any well-founded or reasonable doubt regarding the delict alleged by the promoter of justice in the penal trial, leads to the sentence of absolution of the accused or, more precisely, the sentence that establishes that the delict is not imputable to the accused and the penalty is not able to be imposed on the same. The juridic condition of the accused returns to the *status quo ante* the penal process.¹²⁸

Because the accused must be presumed innocent, the reasons for acquittal are somewhat broad. A sentence absolving the accused could be rendered: 1) because the delictual act was never committed, 2) because the act was not committed by the accused, 3) because the act does not constitute a delict, or 4) because the act is not legally imputable to the accused and, therefore, the accused cannot be punished for it.¹²⁹

può aversi una regolare e ordinata amministrazione della giustizia, che proceda senza inutili ritardi e senza eccessivo gravame del tribunale non meno che delle parti” (PIUS XII, Allocutiones ad praelatos auditores ceterosque officiales et administratos Tribunalis S. Romanae Rotae necnon eiusdem Tribunalis advocatos et procuratores, 1 October 1942, in *AAS*, 34 [1942], 339-340).

“Iudex vero non potest iudicare nisi motus morali certitudine, equidem certitudo longe distat a probabilitate; sed certitudo in iudicialibus requiritur moralis excludens non omne dubium erroris sed prudentem erroris formidinem; et haec moralis certitudo est relativa pro gravitate etiam subiectae materiae; et hoc sensu docet Divus Thomas certitudo *non est* in omnibus; sed in una quaque materia secundum proprium modum” (LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 938).

“Ad certitudinem autem moralem Iure necessariam, non sufficit praevalens probationum indiciorumque momentum, sed requiritur ut quodlibet quidam prudens dubium positivum errandi, in Iure et in facto, excludatur, etsi mera contrarii possibilitas non tollatur” (PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Instruction to be observed by diocesan and interdiocesan tribunals in handling cases of the nullity of marriage *Dignitas connubii*, art. 247, §2).

“Because *absolute* certainty is not possible, canon law aims at ‘moral certainty,’ relying on the conscience of the decision-maker, rather than on the fool’s errand of presuming that reason alone, employing scientific methods of inquiry and decision making alone, will lead to reliable and just legal conclusion” (P. BROWN, “The Right of Defense and Due Process: *Fulcrum* of Justice, Heart of Law,” in *Studia canonica*, 52 (2018), 320).

See JOHN PAUL II, Allocutio ad Tribunalis Sacrae Romanae Rotae Decanum, Praelatos Auditores, Officiales et Advocatos, novo Litibus iudicandis ineunte anno: de veritate iustitiae matre, 4 February 1980, in *AAS*, 72 (1980), 172-178; IZZI, “La certezza morale nel Giudizio canonico,” 252-253; GROCHOLEWSKI, “La certezza morale come chiave,” 429-430.

¹²⁸ “In altre parole, la presenza nell’animo del giudice di qualsiasi fondato o ragionevole dubbio circa il delitto accusato dal promotore di giustizia nel giudizio penale, comporta al sentenza di assoluzione dell’accusato dall’accusa o, più precisamente, la sentenza che non consta che il delitto sia imputabile all’accusato e la pena sia infliggibile al medesimo. La condizione giuridica dell’accusato torna allo stato *quo ante* il processo penale. Nulla aggiunge in questo ambito sostanziale (ossia di contenuto ed effetti della pronuncia) la presunzione di innocenza, ora codificata: il dubbio fondato o ragionevole lasciato *ex actis et probatis* conduce alla negativa circa le accuse formulate contro l’accusato” (MONTINI, “La struttura del processo penale giudiziale canonico,” 371).

¹²⁹ See D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 128.

The judge issues his decision in accord with the principle of free evaluation of proofs rather than a mere adherence to specific weights of legal proofs artificially applied.¹³⁰ Daniel explains:

This is distinct from the principle of legal proof (*probatio legalis*) in which the law itself dictates, to varying degrees, the weight of specific kinds of proof. Such laws are meant to aid the judge's evaluation of the proofs by contributing to or even giving rise to his certitude. A multiplication of these in procedural law can lead to a juridical formalism, and so they are rather uncommon in the *ius vigens*. The free evaluation of proofs cannot be understood as a rule giving the judge the authority to assign to proofs whatever weight he wishes. This would not be a free evaluation of proofs but an *arbitrary* evaluation of proofs, which is to be avoided altogether in the Church. Proof has objective weight, and it is for the judge to evaluate what this weight is.¹³¹

This “freedom in the evaluation of the proofs,” writes Joaquín Llobell, “is directly linked to the principle of moral certainty in conformity with the justice of the requests of the parties.”¹³² Pope Pius XII, commenting on this topic in an Allocution to the Rota, stated: “sometimes moral certitude does not arise except from a sum (*quantità*) of *indicia* and of proofs, that, taken individually, are not capable of establishing true certitude, and only when taken together eliminate any reasonable doubt to arise in a person of sound judgment.”¹³³ Giordano Caberletti makes an observation, based on the Allocution from Pius XII, that is very important for all cases, but especially penal cases: “There should be no conflicts between legal formalism, which is based on legal presumptions (cfr. Can. 1584) and free appreciation of the Proofs with which the [human] presumptions of the

¹³⁰ For the history of the gradual acceptance of free evaluation of proofs, see R. FRAHER, “Conviction According to Conscience: The Medieval Jurists’ Debate Concerning Judicial Discretion and the Law of Proof,” in *Law and History Review*, 7 (1989), 23-88.

¹³¹ DANIEL, Commentary on c. 1291, 2295. See G. CABERLETTI, “La motivazione nella Sentenza canonica,” in *Apollinaris*, 84 (2012), 123.

¹³² LLOBELL, “The Balance of the Interests,” 117.

¹³³ “Talvolta la certezza morale non risulta se non da una quantità di indizi e di prove, che, presi singolarmente, non valgono a fondare una vera certezza, e soltanto nel loro insieme non lasciano più sorgere per un uomo di sano giudizio alcun ragionevole dubbio” (PIUS XII, Allocutio ad praelatos auditores ceterosque officiales et administratos Tribunalis S. Romanae Rotae necnon eiusdem Tribunalis advocatos et procuratores, 1 October 1942, in *AAS*, 34 (1942), 340).

See IZZI, “La certezza morale nel giudizio canonico,” 261.

Judge are formed (cfr. Can. 1586); Pius XII observed that these conflicts are only apparent.”¹³⁴

Though the law allows for free evaluation, it does not allow for a purely subjective and arbitrary decision, which would necessarily violate the presumption of innocence. The moral certitude that the judge has must be based on objectively valid reasons based on the facts that were alleged and proven in the case. He must leave aside all other information that is not in the *acta* of the case. The judgment, therefore, cannot be based on subjective opinion.¹³⁵ To avoid an arbitrary decision, the judge must be guided by the guidance that the legislator gives for evaluating proofs, the jurisprudence of the Roman Rota and the Apostolic Signatura, the writings of proven authors, and the judge’s own conscience.¹³⁶

¹³⁴ “Non ci dovrebbero essere conflitti tra formalismo giuridico, che si fonda sulle presunzioni legali (cfr. Can. 1584) e libero apprezzamento delle Prove, con cui si formano le presunzioni del Giudice (cfr. Can. 1586); Pio XII osservava che questi conflitti sono solo apparenti” (PIUS XII, Allocutio ad praelatos auditores ceterosque officiales et administratos Tribunalis S. Romanae Rotae necnon eiusdem Tribunalis advocatos et procuratores, 1 October 1942, in *AAS*, 34 (1942), 341).

¹³⁵ See CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1237-1238; SCHOUPE, Commentary on c. 1526, 1460; IZZI, “La certezza morale nel giudizio canonico,” 251, 261-265; GROCHOLEWSKI, “La certezza morale come chiave,” 430-431, 441-443.

“Continúo considerando que de la aplicación de tales criterios de valoración va depender que, sobre este tema, se respete la diferencia entre libre convencimiento y convencimiento arbitrario, una aberración que entiende la libertad del juez como ausencia de todo vínculo en el momento de establecer los resultados de las pruebas. El hecho de que las reglas del c. 1572 sean más bien criterios racionales no significa que no sean vinculantes también por imperativo legal, y que marquen obligatoriamente el camino que debe seguir el juez en el momento de formar sus convencimientos sobre el caso” (CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1238).

“The moral certitude of the judge is not a mere personal conviction but is founded on objective data giving rise to full proof: “*ex actis et probatis*.” [...] Naturally, the judge’s certitude must take into account *everything* that has been carried out and proven in the process; the judge is not at liberty to ignore certain elements that do not agree with his conclusion” (DANIEL, Commentary on c. 1291, 2295).

“Il giudice, che decide dopo avere valutato le prove «*ex sua conscientia*», per pronunciarsi con certezza morale sul fatto giuridico controverso, non può che percorrere un processo logico o razionale in modo da raggiungere la *veritas cognitionis* o *veritas logica*, definite dalla Scolastici come «*conformitas vel adaequatio intellectus ad rem*»” (CABERLETTI, “La motivazione nella sentenza canonica,” 122).

¹³⁶ See DANIEL, Commentary on c. 1291, 2296.

“[I]n *iudicialibus*, conscientia est naturalis facultatis cognoscitivae applicatio ad deductas probationes seu ad acta et probata, ut eorum valor aestimetur” (LEGA, *Commentarius in iudicia ecclesiastica*, vol. 2, 940).

“[A] termine coscienza non va qui attribuito il solo significato psicologico (la consapevolezza di sé) e nemmeno quello propriamente morale (la distinzione fra bene e male morali), bensì quello di

The requirement of moral certitude in rendering a decision on penal matters requires that the judges seriously critique their own intuitions. Not only must they exclude all positive doubt of error and support their verdict with both law and fact, but they must also be careful that they do not allow their own preconceived ideas, suppositions, and emotion to colour their judgment. The presumption of innocence demands that they scrutinize even their own reasoning in arriving at a verdict.¹³⁷ The judge's moral certitude must be based on objective proofs that are "able to produce that same moral certitude in any person whatever who is competent in the matter and who is sound in judgment."¹³⁸

3.3—The Presumption of Innocence as a “Magnet” Principle

Drawing on Giuseppe Comotti, D’Auria describes the presumption of innocence as a “magnet” (*imán*) principle because it attracts other principles that guarantee a just

discernimento o valutazione critica” (P. BIANCHI, “La certezza morale e il libero convincimento del giudice,” in P. BONNET and C. GULLO [eds.], *Il giudizio di nullità matrimoniale dopo l’istruzione “Dignitas Connubii,”* Parte prima: i principi, Studi giuridici, no. 75, Vatican City, Libreria editrice Vaticana, 2007, 388).

¹³⁷ See RODRÍGUEZ-OCAÑA, “Certeza moral en las causas penales,” 778-779.

“El relato de la víctima puede transmitir credibilidad, pero la certeza moral, es decir, la verdad de la existencia del delito y su imputabilidad, no puede dar cabida a intuiciones voluntaristas, por las que el juez ‘anticipa la verdad,’ lo que le impide plantearse cualquier duda posible” (RODRÍGUEZ-OCAÑA, “Certeza moral en las causas penales,” 779).

“[T]odos los elementos, que pueden marcar con su impronta, cargada de subjetividad, una sentencia, no dejan de ser elementos espurios de ella, y que debe someterlas el propio juez al tamiz del juicio crítico conducente a la serenidad que es garantía, entre otras cosas, para el conocimiento verdadero del objeto litigioso, formado en las coordenadas objetivas del derecho aplicable y con relación a unos hechos probados sobre los que debe emitir su juicio imparcial. Juicio imparcial no solo ya respecto a los intereses, y hasta pasiones de partes, sino también independiente de los propios intereses y libre de las propias pasiones y emociones del juez” (C. DE DIEGO-LORA and R. RODRÍGUEZ-OCAÑA, *Lecciones de derecho procesal canónico: Parte general*, 2nd ed., Pamplona, Ediciones de Universidad de Navarra, 2003, 395).

The law limits the judge to making his decision based on legal proof, “ossia più precisamente nel valore, dal punto di vista dell’efficacia probatoria, che la stessa legge attribuisce ad alcuni mezzi di prova, sia in chiave positiva, ossia di idoneità a costituire prova piena, sia in chiave negativa, ossia di inidoneità a produrre, da soli, la certezza morale” (BIANCHI, “La certezza morale e il libero convincimento del giudice,” 390).

¹³⁸ M. POMPEDDA, “Decision-Sentence in Marriage Trials: Considerations of the Concept and Principles for Rendering an Ecclesiastical Sentence,” in *Quaderni dello Studio Rotale*, 5 (1990), 88, quoted in DANIEL, Commentary on c. 1291, 2296.

process.¹³⁹ These principles include the right of defence, protection of good reputation, personal privacy, and reparation of damage. These principles were present in the codes even before the presumption of innocence was explicitly stated in the revision of *CIC/83*.

3.3.1—The Right to Due Process and the Right of Defence

As mentioned above, due process is the name given to the procedure established by a legal system that includes certain requirements for the protection of the rights of individuals. Gratian included in his *Decretum* a statement supporting the right to due process from the letters of St. Augustine: “It is established also in the council of bishops that no cleric who is not yet convicted should be suspended from communion, unless he has not presented himself for examination of his case.”¹⁴⁰

Due process is essential for justice to be preserved. Phillip Brown writes:

If processes are not followed that maximize the possibility of uncovering sufficient proof of a matter and an accurate assessment of the facts, and that provide an adequate opportunity for all involved to present their own view of the facts and the law, one can hardly expect a correct result or a just outcome. For this reason, it can be said that the Right of Defense and Due Process are the fulcrums on which the lever of justice pivots, that they in fact are at the very heart of the law.¹⁴¹

¹³⁹ “El principio de presunción de inocencia se presenta, en realidad, como un concepto ‘imán’ que atrae a su alrededor otros principios, cuya finalidad es garantizar un proceso justo...” (D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 133).

“La presunzione di innocenza o di non colpevolezza ha invero una funzione pratica effettiva nella misura in cui funge da catalizzatore delle garanzie processuali riconosciute all’imputato, nonché da parametro al quale si informano sia le regole probatorie che quelle del giudizio; in particolare, questo principio fa gravare sull’accusa l’onere di provare gli elementi costitutivi del delitto ed implica che, in caso di dubbio, venga pronunciata una sentenza assolutoria” (G. COMOTTI, “Informazione, riservatezza, e denuncia nei procedimenti penali,” in GRUPPO ITALIANO DOCENTI DI DIRITTO CANONICO [ed.], *Il diritto penale al servizio della comunione nella Chiesa*, Milan, Glossa, 2021, 215).

¹⁴⁰ “In Episcoporum quoque concilio constitutum est, nullum clericum, qui nondum convictus est, suspendi a communione debere, nisi ad causam suam examinandam se non presentaverit” (C. 2, q. 1, c. 12). See M. MAZZA, “Moral Certainty in Uncertain Times: The Importance of Standards of Proof When Responding to Accusations of Clerical Misconduct,” in *The Jurist*, 79 (2023), 298.

¹⁴¹ BROWN, “The Right of Defense and Due Process,” 320.

In the *ius vigens*, the right to due process is expressed in §§2-3 of c. 221 and *CCEO*, c. 24, §§2-3,¹⁴² which read:

§2. If they are summoned to a trial by a competent authority, the Christian faithful also have the right to be judged according to the precepts of the law applied with equity.
 §3. The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law.

These canons articulate the right of all respondents to participate in a process that is in accord with established procedural norms interpreted in such a way as to protect the rights of the respondent.¹⁴³ They even instruct the judge to apply the law with equity.¹⁴⁴ This applies also to extrajudicial processes.¹⁴⁵

These canons also respond to the necessity that all arbitrariness be eliminated so that true justice can be accomplished.¹⁴⁶ This is especially relevant in penal matters because of the need to avoid potential abuses and arbitrariness in the imposition of penalties.¹⁴⁷

¹⁴² The Latin text of *CCEO*, c. 24, §3 has one word difference, while retaining the same meaning.

¹⁴³ These rights “would include specific rights such as the right to a good reputation and the right to protect one’s privacy (c. 220)” (R. KASLYN, Commentary on c. 221, in *CLSAComm*, 281).

“Il grande rispetto dovuto ai diritti della persona umana, i quali devono essere tutelati con ogni premura e sollecitudine, deve indurre il giudice all’osservanza esatta delle norme procedurali, che costituiscono appunto le garanzie dei diritti della persona” (JOHN PAUL II, Allocutio ad Decanum Sacrae Romanae Rotae ad eiusdemque Tribunalis Praelatos Auditore, ineunte anno iudiciali, 17 February 1979, in *AAS*, 71 [1979], 423-424).

“Le fait qu’elle fasse partie des canons sur les droits fondamentaux signifie que si les juges ignorent ou enfreignent les garanties établies par la norme en question, les fidèles jugés de la sorte auraient alors le droit d’attaquer les actes judiciaires réalisés pour rétablir la justice dans les normes *procedendi*, tout en respectant l’équité [...]” (D. LE TOURNEAU, *Droits et devoirs fondamentaux des fidèles et des laïcs dans l’Église*, Montréal, Wilson & Lafleur Ltée, 2011, 233).

¹⁴⁴ “Equity, or the softening of the rigor of law through charity, so that the ideal of justice may be more fully achieved and the inevitable insufficiencies of laws (c. 19) be compensated for, is an essential principle in the canonical system, and in general, in Catholic thought” (D. CENALMOR, Commentary on c. 221, in *Exegetical Comm*, vol. 2/1, 138). See also KASLYN, Commentary on c. 221, 281.

¹⁴⁵ See CENALMOR, Commentary on c. 221, 138-139; KASLYN, Commentary on c. 221, 281.

¹⁴⁶ See CENALMOR, Commentary on c. 221, 139.

¹⁴⁷ See *ibid.*

“Il fedele ha diritto che il giudice applichi le norme del diritto canonico con equità, che consiste nell’applicazione della norma giuridica a favore specialmente dell’imputato, tenendo conto di circostanze anche non previste dalla legge (D. SALACHAS, Commentary on c. 24, in P. PINTO, *Commento al Codice dei Canonici delle Chiese Orientali*, Vatican City, Libreria editrice Vaticana 2001, 33).

Implicit in these canons is the necessity of respecting the right of defence, “which is intrinsically related to the presumption of innocence.”¹⁴⁸ As Hostiensis wrote centuries ago, without the absolute right of defence, innocent persons would often be condemned.¹⁴⁹

In his 1989 address to the Roman Rota, St. John Paul II spoke at length about the right of defence.¹⁵⁰ Canon 221 is the central canon in his allocution; however, he also mentions other canons that are related to the right of defence, e.g. c. 1620, 7^o,¹⁵¹ which states that a sentence is irremediably null if the right of defence has been denied to a party in the trial, and c. 1598, §1, which requires under pain of nullity that the judge allow the parties to inspect the acts of the trial which are not known to them. He stated clearly: “let the right of defence always remain intact.”¹⁵²

The right of defence is founded in natural law, and the parties in a judicial process enjoy the right whether they choose to exercise it or not.¹⁵³ Though the right derives from natural law, it must be given expression in positive law. In a decision at the Roman Rota *coram* Di Felice, there are eight stages at which the right of defence must be protected: the citation of the respondent, the formulation of the doubt, interrogation of the parties, proof through witnesses, proof through experts, proof through instruments, the publication of the

¹⁴⁸ “Uno de los principios intrínsecamente relacionados con la presunción de inocencia es el derecho de defensa [...]” (CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1229). See LE TOURNEAU, *Droits et devoirs fondamentaux*, 235.

¹⁴⁹ “Tanta ergo aequitate iura utuntur quod etiam diabolum non condemnarent iniuste si in iudicio esse posset et eis absurdum videtur quod, actore impugnante, reo defensio legitima denegetur quod sic multoties innocens condemnaretur,” (Henricus de Segusio, *Summa*, Venice, Apud Bernardum Iuntam., 1570, Liber II, De exceptionibus, §3, 181r; quoted in J. LLOBELL, “Giusto processo e ‘amministrativizzazione’ della procedura penale canonica,” in *Stato, Chiese e pluralismo confessionale*, 14 [2019], 21).

¹⁵⁰ See JOHN PAUL II, Allocutio ad Romanae Rotae auditores, officiales et advocatos coram admissos, 26 January 1989, in *AAS*, 81 (1989), 922-927.

¹⁵¹ Cf. *CCEO*, c. 1303, §1, 7^o.

¹⁵² “Ius defensionis semper integrum maneat” (JOHN PAUL II, Allocutio ad Romanae Rotae auditores, officiales et advocatos coram admissos, 26 January 1989, 922).

¹⁵³ See BROWN, “The Right of Defense and Due Process,” 321. See also TRIBUNAL OF THE ROMAN ROTA, *coram* WYNEN, 9 March 1955, in *Romanae Rotae Decisiones seu sententiae*, 47 (1955), 220; F. DANEELS, “The Right of Defence,” in *Studia canonica*, 27 (1993), 77-95.

acts of the process, and the discussion of the case and arguments.¹⁵⁴ According to a decision of the Supreme Tribunal of the Apostolic Signatura, refusal to grant a party the exercise of the right of defence in any of these stages renders the sentence irremediably null.¹⁵⁵

Other constitutive elements of the right of defence identified by the Apostolic Signatura are the opportunity to introduce proofs in the trial, the opportunity to learn about the proofs advanced by the opposing party, the opportunity to present one's own deductions, allegations and defences, and the opportunity to respond, at least once, to the deductions, allegations and defences of the opposing party.¹⁵⁶

The Signatura also cites an important passage from the previously-cited allocution of St. John Paul II wherein he states: "One cannot conceive of a fair trial without a judicial exchange (*contradditorio*), that is, the concrete possibility granted to each party in the case to be heard and to be able to know about and challenge the petitions, the proofs and the deductions adopted by the opposing party or *ex officio*."¹⁵⁷

A Rotal decision *coram* Burke summarizes various essential elements of the right of defence that are part of the *contradictorium*: knowledge of assertions in the *libellus*, knowledge of the object of the controversy (*dubium*), knowledge of the proofs presented

¹⁵⁴ See TRIBUNAL OF THE ROMAN ROTA, *coram* DI FELICE, 24 April 1982, in *Romanae Rotae Decisiones seu sententiae*, 74 (1982), 233. See also BROWN, "The Right of Defense and Due Process," 322.

¹⁵⁵ See c. 1620, 7°; *CCEO*, c. 1303, §1, 7°. See also SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Definitive Sentence, 17 January 1987, Prot. No. 15301/83 CG, English in W. DANIEL (ed. and trans.), *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, Montréal, Wilson & LaFleur, 2011, 49; BROWN, "The Right of Defense and Due Process," 322-323.

"A grant of the right without the concrete possibility to exercise the right, at least in actuality, is the same as a denial of the right itself" (APOSTOLIC SIGNATURA, Definitive Sentence, 17 January 1987, 52).

¹⁵⁶ See APOSTOLIC SIGNATURA, Definitive Sentence, 17 January 1987, 53. See BROWN, "The Right of Defense and Due Process," 323.

¹⁵⁷ JOHN PAUL II, Allocutio ad Romanae Rotae auditores, officiales et advocatos coram admissos, 26 January 1989, in *AAS*, 81 (1989), 925, quoted in SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Circular Letter to the Judicial Vicars of the Italian Regional Tribunals, 14 November 2002, in W. DANIEL (ed. and trans.), *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, Montréal, Wilson & LaFleur, 2011, 750.

by the opposing side (publication of the acts), opportunity to present proofs, the opportunity to develop one's own arguments based on those proofs, the opportunity for rebuttal of proofs and arguments presented by the other side.¹⁵⁸ Among the norms of positive law relevant to the *contradictorium* that are intended to protect the natural right of defence are the norms regarding the assistance of advocates (c. 1481), the publication of the acts (c. 1598, §1), publication of the sentence (cc. 1614-1615), and the indication of ways to challenge a sentence (c. 1614).¹⁵⁹

3.3.2—The Right to a Good Reputation, Personal Privacy, and Repair of Damage

The presumption of innocence, especially as regards its function before the initiation of a penal process, helps to preserve the right of the person to a good reputation. Canon 220 and *CCEO*, c. 23 read: “No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy.”¹⁶⁰

Summing up the teaching of St. Thomas Aquinas on the right to a good reputation, Daniel Cenalnor writes that one's reputation is “the most precious temporal asset that a person possesses, the unlawful injury of which can be considered more serious than theft itself, since it is greater than material wealth, being closer to spiritual riches.”¹⁶¹

¹⁵⁸ See TRIBUNAL OF THE ROMAN ROTA, *coram* BURKE, 15 November 1990, unpublished, English translation in *Studia canonica*, 25 (1991), 510, citing *coram* DAVINO, 15 January 1990, in *Romanae Rotae Decisiones seu sententiae*, 82 (1990). See also BROWN, “The Right of Defense and Due Process,” 323.

¹⁵⁹ See APOSTOLIC SIGNATURA, Circular Letter to the Judicial Vicars of the Italian Regional Tribunals, 751.

¹⁶⁰ There is one word that differs between the two canons and the original and in the CLSA translation, but they are identical in content.

¹⁶¹ CENALNOR, Commentary on c. 221, 127. See THOMAS AQUINAS, *Summa theologiae*, II-II, q. 73, aa. 2-3.

This right, which is rooted in natural law, is also taught by the Church's magisterium. St. John XXIII taught that natural law requires "that due honor be given to all people and that their good name be respected."¹⁶² This right was also spoken of in the Pastoral Constitution on the Church in the Modern World *Gaudium et spes*, which taught that, among the rights and duties of the human person, are the right to a good reputation and the right to privacy.¹⁶³

It is appropriate, therefore, that the law of the Church would acknowledge the right to protect one's reputation. "This right," Jenkins states, "is of natural origin, is absolute, it does not expire, nor can it be taken from a person."¹⁶⁴ Because this right deserves the utmost protection, the calumnious denunciation of an offence to an ecclesiastical superior or other unlawful injury of a person's good name is a delict for which the guilty party must make amends for the harm caused.¹⁶⁵

There are, nevertheless, times when a good reputation could be legitimately harmed. As Cenalmor writes, the law "contemplates concrete situations, such as those

¹⁶² JOHN XXIII, Encyclical Letter *Pacem in terris*, 20 April 1963, in *AAS*, 55 (1963), 260, translation from CENALMOR, Commentary on c. 221, 126.

¹⁶³ See SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World *Gaudium et spes*, n. 26, in *AAS* 58 (1966), 1046.

¹⁶⁴ JENKINS, "The Charter and Norms Two Years Later," 119.

"Once possessed, proof of a good reputation is not required. We presume persons do, in fact, have a good reputation until it is otherwise legitimately established, through fact or law. The illicit loss of or harm to the right to a good name when caused by another has long been a punishable offense in our law, and rightly so" (ibid.)

¹⁶⁵ See c. 1390, §§2-3. Cf. *CCEO*, cc. 1452, 1454.

"El c. 1390 en su § 2 establece la obligación de castigar a quien presenta una denuncia calumniosa o de otro modo lesiona ilegítimamente la buena fama del prójimo, y en el § 3 la obligación al calumniador de dar una satisfacción conveniente. Por otro lado, el c. 128 contempla la norma de carácter general para el resarcimiento de los daños. Ambos cánones, junto con el c. 220 (lesión ilegítima de la fama), pueden ser invocados para reclamar la reparación del daño causado. La persona cuya fama e inocencia se ha violado puede promover también una acción contenciosa para obtener un resarcimiento pecuniario que integre la incompleta satisfacción aportada por la retractación impuesta por el superior competente (c. 1390 § 3), o bien, para obtener el resarcimiento del daño económico sufrido por el difamado" (CAMPOS MARTÍNEZ, "Presunción de inocencia y el nuevo derecho penal canónico," 1247).

which institute a procedural action—if such a right exists in the case in question—the publicizing of which might perhaps diminish the good reputation of the defendant.”¹⁶⁶

Since the investigation of possible delicts and the conduct of penal processes could damage the reputation of the accused,¹⁶⁷ the Codes provide certain warnings and remedies. For example, c. 1717, §2 and *CCEO*, c. 1468, §2 read: “Care must be taken so that the good name of anyone is not endangered from [a preliminary] investigation.”¹⁶⁸ By respecting the

¹⁶⁶ CENALMOR, Commentary on c. 221, 129. See P. PINTO (ed.), *Commento al Codice di diritto canonico*, Vatican City, Libreria editrice Vaticana, 1985, 988. See also E. LOZA, Commentary on c. 1726, in INSTITUTO MARTÍN DE AZPILCUETA (ed.), *Código de derecho canónico: Legislación complementaria de los países Hispanoamericanos*, 6th ed., Pamplona, Ediciones Universidad de Navarra, 2002, 1109.

“To protect both the common good (see c. 223) and the Church itself, individuals may act, even though they might thereby damage someone’s reputation. The motivating force of such an action should be a desire to protect another value, for example, the good reputation of the Church or of other individuals and not to ruin one person’s reputation; all pertinent circumstances must be taken into account before acting” (KASLYN, Commentary on c. 221, 277).

¹⁶⁷ “The canon says that the faithful are not permitted to ‘illegitimately’ harm the good reputation of another. This indicate, of course, that under both divine and ecclesiastical law there are instances in which character defects, sin or delicts can be revealed, either in the personal vindication of rights, in prosecuting justice or in any other legitimate form of betting in the name of the common good. The right to a good name must always be put in context of the rights of others and of the objective ‘right’ to which all the faithful are subject. Nonetheless, any procedural action moved against a person must be proportionate to the injustice sought to be remedied, and in any event, every procedural safeguard must be observed to ensure that the reputation of all involved is protected as much as possible” (A. ALLES, Commentary on c. 23, in J. FARIS and J. ABBASS (eds.), *A Practical Commentary to the Code of Canons of the Eastern Churches*, Montréal, Wilson & Lafleur, 2019, 106).

“Il legislatore si preoccupa che da tale previa investigazione non ne venga del danno, particolarmente per ciò che riguarda la fama, a qualcuno: sia esso lo stesso personaggio, del quale si sta verificando la notizia di delitto, sia un altro. Tale preoccupazione era stata già espressa dall’avverbio «caute» che accompagnava il verbo «inquirat» nel §1. Ora viene esplicitato di più. Di fatto il can. 220 ci richiama a non ledere illegittimamente la buona fama di cui qualcuno gode. È una norma che merita la debita attenzione. Anche se si devono usare tutte le debite garanzie per accertare la verità e raggiungere la giustizia, non si può dimenticare che tali nobili fini non tollerano mezzi iniqui o che comunque compromettano la verità e la giustizia proprio nella fase previa investigative. Questo vale soprattutto nella chiesa, per la quale la buona fama del cristiano viene lesa principalmente in quei valori di rispetto personale, di interiorità, di moralità, di fede nei quali principalmente consiste la dignità della persona (V. DE PAOLIS and D. CITO, *Le sanzioni nella Chiesa: Commento al Codice di diritto canonico libro VI*, Manuali, no. 8, Rome, Urbaniana University Press, 2008, 236). See also B. PIGHIN, *Il nuovo sistema penale della chiesa*, Manuali 15, Venice, Marcianum Press, 2021, 537.

¹⁶⁸ This protects both the accused and the faithful: “Esta necesidad apremia sobre todo a la conciencia del pueblo de Dios, ya que si luego se descubre que el acusado, cuyo buen nombre ha sido total e irremediabilmente destruido, es inocente, se producirá entre los fieles un sentimiento de desorientación y escándalo mucho mayor que cuando surgieron los hechos” (D’AURIA, “La presunción de inocencia en el derecho penal canónico,” in *Ius canonicum*, 64 [2024], 135).

“Salvada la necesaria discreción que toda investigación conlleva, no se puede mantener al clérigo o religioso denunciado—presuntamente inocente—en un silencio administrativo durante meses o años, o

reputation of the person being investigated one provides an essential element for a fair investigation. The effort to avoid damage to the reputation of the person accords with the presumption that the person is innocent.¹⁶⁹ The very fact that a process is required beyond the preliminary investigation demonstrates that the Church does not believe that the presumption of innocence can be overturned based solely on the information yielded by the preliminary investigation. It is necessary that the evidence be carefully scrutinized during the subsequent process.¹⁷⁰

Likewise, according to c. 1455, §3 and *CCEO*, c. 1113, §3, the judge may bind participants in a trial to secrecy if “the nature of the case or the proofs is such that disclosure of the acts or proofs will endanger the reputation of others.” Obviously, the reputation of the accused is included. Moreover, it is important to note that canonical doctrine considers this requirement of secrecy during the trial to be an obligation also during the preliminary investigation and during an extrajudicial process.¹⁷¹

Closely related to the right to a good reputation is the right to privacy.¹⁷² Though this concerns primarily the internal forum, it also pertains to that which has not entered the public domain and pertains to the purely private sphere of persons and institutions.¹⁷³ As stated in *Vos estis lux mundi*, “Let the legitimate defence of the good name and the privacy of all persons involved be maintained, as well as the confidentiality of their private

imponerle severas medidas cautelares sine die que acaben resultando auténticas penas condenatorias” (CAMPOS MARTÍNEZ, “Presunción de inocencia e investigación previa canónica,” 500).

¹⁶⁹ See CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1226-1227.

¹⁷⁰ See CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1228.

¹⁷¹ See COMOTTI, “Informazione, riservatezza, e denuncia,” 217-218; D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 136-137.

¹⁷² See LE TOURNEAU, *Droits et devoirs fondamentaux*, 219. See also V. MARCOZZI, “Il diritto alla propria intimità nel nuovo Codice di diritto canonico,” in *La Civiltà Cattolica*, 134 (1983), 573-580.

¹⁷³ See CENALMOR, Commentary on c. 220, 129; LE TOURNEAU, *Droits et devoirs fondamentaux*, 219.

information.” It then immediately notes the connection of privacy and good reputation to the presumption of innocence by adding: “The presumption [of innocence] applies....”¹⁷⁴

Though it is necessary that there be some degree of publicity and transparency in some penal causes, the Church is right to require secrecy for certain matters as a means of respecting the right to privacy of the accused. By respecting this right, the reality of the presumption of innocence is demonstrated by respecting the fact that the accused may be innocent and, therefore, undeserving of having his privacy violated unjustly.¹⁷⁵

Protection of the reputation of the accused and repair of unjust damage to the reputation of the accused motivates the legislator to require in c. 1726 and *CCEO*, c. 1482 that if the process produces proof that gives the judge moral certitude of the innocence of the accused, the judge is bound to issue a sentence declaring the accused to be innocent.¹⁷⁶ In fact the law allows him to do this at any stage of the trial, since continuing a trial after ascertaining the innocence of the accused would be pointless and would further harm the

¹⁷⁴ “Semper legitima tutela bonae famae servantur et privatum omnium, qui in re versantur, necnon indiciorum privatorum secretum. Praesumptio denotatis applicatur, de qua in art. 13, § 7, firmo art. 20 praescripto” (FRANCIS, Apostolic Letter *Motu Proprio Vos estis lux mundi*, 25 March 2023, art. 15, §2, in *AAS*, 115 (2023), 398).

“Officials of the court are especially called to exercise due discretion in their investigations so as not to violate the rights of the accused to confidentiality and in order not to undermine the principle of the presumption of innocence. Since even judges can make mistakes, it is proper that the law provide for suitable compensation for victims of judicial errors” (PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of the Social Doctrine of the Church*, Washington, DC, United States Conference of Catholic Bishops, 2005, n. 404).

¹⁷⁵ See CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1234.

Even though Pope Francis chose to remove the obligation of the pontifical secret in cases regarding the abuse of minors, he still insists on certain precautions for the sake of the privacy of both accused and alleged victim. See FRANCIS, *Istruzione sulla riservatezza delle cause*, 17 December 2019, n. 3, in *AAS*, 112 (2020), 72-73.

¹⁷⁶ Slight differences in the Latin texts do not change the identical meaning of the two canons.

See R. COPPOLA, *Commentary on c. 1726*, in *Exegetical Comm*, vol. 4/2, 2030; RODRÍGUEZ-OCAÑA, “Certeza moral en las causas penales,” 805.

For a different perspective, see MONTINI, “La struttura del processo penale giudiziale canonico,” 373.

reputation of the accused.¹⁷⁷ It could also be argued that one who is found innocent could seek damages from the ecclesiastical authority if anything, such as unjust cautionary measures or unnecessary public announcements, damaged the reputation of the accused.¹⁷⁸

3.3.3—The Right to Not Confess a Delict or Take an Oath

The accused has the right not to incriminate himself; therefore, he cannot be forced to confess a delict or take an oath before being questioned. As stated in c. 1728, §2 and *CCEO*, c. 1471, §2, “The accused is not bound to confess the delict nor can an oath be administered to the accused.”

Though the right not to incriminate oneself can be found in many civil legal systems, it was not always a right recognized everywhere. For example, commenting on English criminal procedure before the late eighteenth century, Paul Hyams writes that it would have been suicidal for a defendant not to speak in his own defence at that time because the defendant would not have been able to call witnesses on his own behalf or to hire legal counsel to argue on his behalf. In such a circumstance, the failure to speak in one’s own defence would have been a disaster because the jurors were allowed to draw inferences about guilt from the failure to speak.¹⁷⁹

¹⁷⁷ “In tale ipotesi, il giudice (singolo o collegiale) deve prendere atto dell’evidenza (non è solo facoltà concessa, ma un preciso dovere: *debet*) e emettere, qualunque sia il grado e lo stadio di giudizio, la sentenza con la quale dichiara l’evidenza e assolve l’accusato. Tale obbligo incombe anche se l’azione penale (a norma del can. 1362) fosse estinta per prescrizione. In questa ipotesi infatti rimarrebbe altrimenti un’ombra sullo stesso buon nome dell’accusato (DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 252).

¹⁷⁸ See CAMPOS MARTÍNEZ, “Presunción de inocencia e investigación previa canónica,” 503-504; ID., “Presunción de inocencia y el nuevo derecho penal canónico,” 1246. See also COPPOLA, Commentary on c. 1722, 2019.

¹⁷⁹ See HYAMS, “Due process versus the maintenance of order in European law,” 75.

In the canonical system, however, the right to not swear an oath is longstanding “because no one is bound to betray himself.”¹⁸⁰ One author claims that demanding an oath from the accused is moral or spiritual torture.¹⁸¹ Though some authors believe that the accused can offer a spontaneous oath, others would argue that the right to not take an oath “is an acquired right that cannot be renounced. It is a right of such a nature that it cannot admit any alteration due to a person’s inclination, not even in the form of a spontaneous oath, which might be offered to win the good will of the judge.”¹⁸²

There is a potential danger here even in the canonical system. Canon 1531 states: “§1. A party legitimately questioned must respond and must tell the whole truth. §2. If a party refuses to respond, it is for the judge to decide what can be inferred from that refusal concerning the proof of the facts.” If the judge asks the accused a question and the accused chooses not to answer, it would seem that the judge can make inferences about the refusal to answer that could influence his decision in the case.¹⁸³

Montini, however, is of a different opinion:

What is expected for each party in the trial, i.e., that the party legitimately questioned must answer and tell the truth in full [...] that if he refuses to answer it is up to the judge to evaluate what can be deduced from it for the evidence of the facts” (can. 1531), must be remodulated for the accused in the criminal trial. In fact, he is summoned for interrogation; if he does not appear he can be declared absent from the trial; however, neither the oath nor the promise to tell or have told the truth can be submitted to him; he cannot be asked any question that directly relates to the criminal act, and—in this context—his silence cannot be counted as evidence for his guilt.”¹⁸⁴

¹⁸⁰ “...quia nemo tenetur prodere se” (*Glossa ordinaria ad X 2, 20, c. 37 s.v. de causis*).

¹⁸¹ “Asking for an oath about the crime that has been committed is defined as *tortura moralis seu spiritualis*” (COPPOLA, Commentary on c. 1728, 2034-2035).

¹⁸² COPPOLA, Commentary on c. 1728, 2035.

¹⁸³ See L. EUSEBI, “La presunzione di non colpevolezza nel diritto canonico,” in *Diritto penale canonico: Dottrina, prassi e giurisprudenza della Curia Romana*, Annales doctrinae et iurisprudentiae canonicae, no. 15, Vatican City, Libreria editrice Vaticana, 2023, 240.

¹⁸⁴ “Quanto è previsto per ogni parte nel processo, ossia che «la parte legittimamente interrogata deve rispondere e dire integralmente la verità [...] che se si rifiuta di rispondere, spetta al giudice valutare che cosa se no può dedurre per la prova dei fatti» (can. 1531), deve essere rimodulato per l'accusato nel processo penale. Egli, infatti, è citato per l'interrogatorio; se non si presenta può essere dichiarato assente dal giudizio; non può però essergli sottoposto né il giuramento né la promessa di dire o di aver detto la verità;

This is in accord with the *regula iuris* that states: “He who is silent does not confess, nor does he deny.”¹⁸⁵

According to c. 1536, §1 and *CCEO*, c. 1217, §1, a judicial confession of one party relieves the other party of the burden of proof in private matters; however, this does not apply to criminal matters since they pertain to the public good. If the accused does choose to make a declaration that indicates his guilt, one could still argue that the promoter of justice is not relieved from the burden of proof,¹⁸⁶ since, according to c. 1536, §2 and *CCEO*, c. 1217, §2: “In cases regarding the public good, however, a judicial confession and other declarations of the parties can have a probative force that the judge must evaluate together with the other circumstances of the case, but full probative force cannot be attributed to them unless other elements are present that thoroughly corroborate them.” Obviously, the promoter’s burden would be greatly lessened, but he would still need to demonstrate that the confession aligns with the facts.¹⁸⁷

non può essergli rivolta alcuna domanda che attiene direttamente al fatto delittuoso, e—in questo contesto— il suo silenzio non gli può essere computato come prova per la sua colpevolezza” (MONTINI, “La struttura del processo penale giudiziale canonico,” 372).

“Uno de estos derechos, contemplado por el ordenamiento canónico, es la posibilidad de permanecer en silencio frente a la acusación notificada, lo cual no debería ser tomado de ninguna manera como una falta de cooperación con el investigador del delito, ni mucho menos como un indicio de culpabilidad” (CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1230).

Interestingly, the ECHR allows a court to draw inferences from the silence of the accused (N. MOLE and C. HANBY, *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights*, Strasbourg, The Council of Europe, 2006, 46).

See also the quote of Rodríguez-Ocaña in n. 113 above.

¹⁸⁵ “Is, qui tacet, non fatetur; sed ne utique negare videtur” (*RI* 44 in VI^o).

¹⁸⁶ See W. RICHARDSON, *The Presumption of Innocence in Canonical Trials of Clerics Accused of Child Sexual Abuse: An Historical Analysis of the Current Law*, Canon Law Monograph Series 6, Leuven, Peeters, 2011, 194.

¹⁸⁷ “Generatim rei confessio non debet considerari sufficiens ad rei ipsius damnationem, nisi aliae simul probationes adsint” (CONTE A CORONATA, *Institutiones iuris canonici*, 410). Cf. R. COPPOLA, Commentary on c. 1728, in *Exegetical Comm*, vol. 4/2, 2034.

3.4—The Presumption of Innocence Explicitly Stated in Recent Legislation

Though the presumption of innocence has its roots in the canonical tradition, it is only recently that it was explicitly stated in canonical norms. It was first mentioned in norms pertaining to the investigation of sexual abuse of minors before being added to the *CIC/83* and the *CCEO*.

3.4.1—The Presumption of Innocence in Recent Documents

The crisis in the Church regarding the sexual abuse of minors by clerics has been the occasion for the explicit statement of the presumption of innocence. The great evil of the sexual abuse of minors by clerics and the coverup of such abuse by ecclesiastical authorities provokes understandable outrage in the Christian faithful and a righteous insistence that such criminal activity be uprooted. In the midst of the necessary reform efforts, there emerged a need to rearticulate the presumption of innocence.

In June 2002, the members of the plenary assembly of the United States Conference of Catholic Bishops approved the *Charter for the Protection of Children and Young People*¹⁸⁸ and the accompanying *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*.¹⁸⁹ In the 2005 revised version of the *Charter*, article five includes the following: “A priest or deacon who is

¹⁸⁸ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Charter for the Protection of Children and Young People*, 12 December 2002, in *Report on the Implementation of the Charter for the Protection of Children and Young People*, Washington, DC, United States Conference of Catholic Bishops, 2010, 65-71.

¹⁸⁹ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, 12 December 2002, in W. WOESTMAN (ed.), *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2nd ed., Ottawa, Saint Paul University, 2003, 349-354.

For a brief overview of the history of the approval and revisions of the *Charter* and the *Essential Norms*, see B. AUSTIN, “Due Process of Law and the USCCB Essential Norms,” in *Studia canonica*, 51 (2017), 56-57.

accused of sexual abuse of a minor is to be accorded the presumption of innocence during the investigation of the allegation and all appropriate steps are to be taken to protect his reputation.”¹⁹⁰ A similar statement is included in number six of the revised version of the *Essential Norms*,¹⁹¹ “During the investigation the accused enjoys the presumption of innocence, and all appropriate steps shall be taken to protect his reputation.”¹⁹²

In the norms of the *Motu Proprio Sacramentorum sanctitatis tutela* and their subsequent revision, the presumption of innocence is not explicitly stated; however, a circular letter from the Congregation for the Doctrine of the Faith containing guidelines for dealing with cases of clerical sexual abuse of minors did contain a statement of the presumption: “the accused cleric is presumed innocent until the contrary is proven.”¹⁹³

In 2019, Pope Francis issued Guidelines for the Protection of Children and Vulnerable Adults for the Vicariate of Vatican City. After detailing how allegations of abuse are to be dealt with, he mentions the presumption of innocence and the right of defence: “The presumption of innocence shall be always guaranteed, protecting the reputation of the accused. Unless there are serious reasons to the contrary, the accused shall be informed promptly of the charges against him, in order to enable him to defend himself.

¹⁹⁰ See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Charter for the Protection of Children and Young People*, 11.

¹⁹¹ The revised version was approved by the USCCB on June 17, 2005, promulgated on May 5, 2006, and became effective 15 May 2006.

¹⁹² UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, rev. June 2018, in *Promise to Protect Pledge to Heal*, Washington, DC, United States Conference of Catholic Bishops, 2018, 23.

¹⁹³ CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Lettera circolare per aiutare le Conferenze episcopali nel preparare linee guida per il trattamento dei casi di abuso sessuale nei confronti di minori da parte di chierici*, 3 May 2011, I, d, 3, in *AAS*, 103 (2011), 408, English translation in *Origins*, 41 (2011), 42.

He shall be invited to avail himself of the assistance of civil and canonical legal advisors.”¹⁹⁴

The first explicit statement of the presumption of innocence in canonical legislation is found in the Motu Proprio *Vos estis lux mundi*, which states that the “person under investigation enjoys the presumption of innocence.”¹⁹⁵ It was strengthened in the updated version of 25 March 2023, which states that the “person under investigation always enjoys the presumption of innocence and the legitimate protection of his or her good name.”¹⁹⁶

3.4.2—The Presumption of Innocence in the Revised Canon 1321, §1 & CCEO, c. 1414, §1

On May 23, 2021, Pope Francis issued the Apostolic Constitution *Pascite gregem Dei*, by which he promulgated a revision of Book VI of *CIC/83*.¹⁹⁷ In this new Book VI, c. 1321, §1 reads: “Any person is considered (*censetur*) innocent until the contrary is proven.”¹⁹⁸ It is not insignificant that the text is at the beginning of Title III, which pertains to one who is liable to penal sanctions. This placement puts emphasis on the importance of the presumption for the respect of the dignity of the person suspected or accused of

¹⁹⁴ FRANCIS, *Linee guida per la protezione dei minori e delle persone vulnerabili*, 26 March 2019, English translation www.vatican.va/resources/resources_protezioneminori-lineeguida_20190326_en.html (16 May 2025).

¹⁹⁵ FRANCIS, Apostolic Letter Motu Proprio *Vos estis lux mundi*, 7 May 2019, art. 12, §7, in *AAS*, 111 (2019), 830. See A. D’AURIA, “L’imputabilità penale nel CIC ’83 riformato. Alcune innovazioni,” in *Ephemerides iuris canonici*, 63 (2023), 448; B. AUSTIN, “The Revised Book VI, Part I: Selected Norms and Commentary,” in *The Jurist*, 77 (2021), 299.

¹⁹⁶ FRANCIS, Apostolic Letter Motu Proprio *Vos estis lux mundi*, 25 March 2023, art. 13, §7, in *AAS*, 115 (2023), 401. See D’AURIA, “L’imputabilità penale nel CIC ’83 riformato,” 448.

¹⁹⁷ *PGD*, 534-537.

¹⁹⁸ “Quilibet innocens censetur donec contrarium probetur.”

wrongdoing, and, arguably, indicates that the presumption applies to the entire course of not only the trial but the preliminary investigation.¹⁹⁹

On March 20, 2023, Pope Francis promulgated the Apostolic Letter *Motu Proprio Vocare peccatores*²⁰⁰ making revisions to the *CCEO* that are similar to the revisions found in *PGD*. Now *CCEO*, c. 1414 includes in its first paragraph the same text as c. 1321, §1.

Since it has already been demonstrated that the presumption of innocence was already acknowledged by canonical doctrine as a presumption of natural law and that the codes implicitly honoured the presumption by means of certain procedural canons and canons articulating the fundamental rights of the faithful, one could ask what benefit is obtained by explicitly stating the presumption of innocence in c. 1321, §1 and *CCEO*, c. 1414, §1. One could go further and ask if the way that these canons are formulated leaves questions about their proper application.

3.5—The Significance of Codifying the Presumption of Innocence

D’Auria observes that the inclusion of the presumption of innocence in the new Book VI was not strictly necessary since it belongs to the “general foundation of canonical penal law.”²⁰¹ He states that the Legislator perhaps considered its inclusion opportune to

¹⁹⁹ “Es cierto [...] que el principio de presunción de inocencia impregna todo el derecho penal canónico como principio de justicia natural con todas las consecuencias procesales que de él se derivan, pero su expresa afirmación y su especial ubicación, obligan a que este sea especialmente cuidado y aplicado en cualquier fase del desarrollo de la causa penal, desde la recepción de la denuncia de un presunto delito hasta el pronunciamiento de la sentencia” (CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1224).

²⁰⁰ See FRANCIS, Apostolic Letter *Motu Proprio* by which several canons of title XXVII and canon 1152 of the Code of Canons of the Eastern Churches are changed *Vocare peccatores*, 20 March 2023, in *AAS*, 115 (2023), 383-393.

²⁰¹ D’AURIA, “L’imputabilità penale nel CIC ’83 riformato,” 448.

avoid “judicialist drifts or conceptions of ‘summary justice.’”²⁰² Campos Martínez sees great significance in its inclusion because it “manifests a clear will of the universal legislator to safeguard this principle and to establish it in the Church in an unavoidable juridic frame of reference in the application of penal law.”²⁰³

One might still ask if the inclusion of the revised c. 1321, §1 is significant for canon law in practice. Brian Austin writes: “Although the explicit adoption of the maxim is certainly to be welcomed, since the principles it embodies were already present in the ancient law, the codes, and canonical doctrine, it does not change the disposition of law.”²⁰⁴ Nevertheless, in light of the scandals that the Church must address at this time, Geraldina Boni expresses the position that including the presumption of innocence in the *CIC/83* will help to stem a negative trend in some parts of the Church where it was ignored or insufficiently addressed.²⁰⁵

²⁰² “[...] derive giustizialiste o concezioni da ‘giustizia sommaria’” (D’AURIA, “L’imputabilità penale nel CIC ’83 riformato,” 448).

²⁰³ CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1212.

“...la presunzione di innocenza—vigente come principio giuridico tradizionale e ora codificata—non aggiunge alcunché di sostanziale: dichiara quanto è già previsto e potrà semmai—auspicabilmente—rafforzare la posizione processuale ed extra-processuale dell’accusato” (MONTINI, “La struttura del processo penale giudiziale canonico,” 372).

²⁰⁴ AUSTIN, “The Revised Book VI, Part I,” 300-301.

“For example, concerning proofs, the law already establishes that “the burden of proving falls to the one who asserts it.” [c. 1526, §1] As the 1917 code again logically continued, “If the actor does not prove [his claim], the respondent [or, in a penal context, the accused] is absolved.” [c. 1748, §2] Concerning pronouncements of the judge, the law already establishes that “a judge who was not able to arrive at this [moral] certainty, is to pronounce that the right of the actor is not established (*non constare*) and is to dismiss the respondent absolved, unless it concerns a cause enjoying the favor of law, in which case the judge must pronounce for that. According to canonical doctrine, cases concerning freedom—and particularly freedom from penalties—already enjoy the favor of law. While it is certainly fitting for the presumption of innocence to be explicitly stated in positive law, it ought to be recalled that this presumption is ultimately a presumption of the natural law itself” (ibid.)

²⁰⁵ “[E]ra indiscutibilmente già vigente nell’ordinamento canonico per diritto divino naturale, ‘metapositivo’ e di per sé intrasgredibile. L’averla formalizzata nel Codice (sia pur nel diritto penale sostanziale e non in quello processuale) potrà però, come anticipato, rinvigorendo appunto il giusto processo, frenare certe allarmanti derive giustizialiste che in alcune parti della Chiesa stanno prendendo piede quale contraccolpo della sottovalutazione delle accuse del passato: e che vanno prontamente arrestate” (G. BONI, “Il Libro VI De sanctionibus poenalibus in Ecclesia: novità e qualche spigolatura critica,” *Stato, Chiese e pluralismo confessionale*, 11 (2022), 57).

3.6—The Presumption of Innocence and the Imposition of Cautionary Measures

Campos Martínez identifies in the presumption of innocence two distinct yet complementary rules: 1) the fundamental rule of the protection of the accused, such that he is not prematurely considered guilty and punished with repressive measures or procedures as if he is already guilty, and 2) the evidentiary and procedural rule that excludes the accused from bearing the burden of proving his own innocence or from being declared guilty without full and definitive proof.²⁰⁶ Both of these rules have implications for the investigation and penal process.

A particular advantage of including the presumption of innocence explicitly in the *CIC/83* is that it can serve as a reminder to the ordinary to properly understand and moderate any cautionary measures that he might wish to impose.²⁰⁷ The canon regarding cautionary measures is c. 1722:

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.

It should be obvious that the imposition of such cautionary measures could damage the reputation of the accused. For this reason and as a means of preserving the rights guaranteed by the presumption of innocence, the ordinary should not impose such precautionary

An even bolder statement: “Este clima de sospecha generalizada, que considera al clérigo como un potencial pederasta y a la institución eclesial como una encubridora negligente, es tan injusto como dañino” (CAMPOS MARTÍNEZ, “Presunción de inocencia e investigación previa canónica,” 483).

²⁰⁶ See CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1216; F. FRANCESCHI, “Inocencia [Presunción de],” in J. OTADUY et al. (eds.), *Diccionario general de derecho canónico*, vol. 4, Pamplona, Ediciones Universidad de Navarra, 2012, 600.

²⁰⁷ See D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 141.

measures without first verifying the conditions mentioned in the canon.²⁰⁸ D’Auria, along these lines, writes: “We have already seen how failure to observe the principle of presumption of innocence inevitably leads to damage to the good name and reputation of a subject, because it will inevitably lead to ‘premature’ sentences, to the imposition of excessive, unmotivated and hasty precautionary measures and, consequently, violating the right to defence and procedural guarantees.”²⁰⁹

Similarly, whenever a preliminary investigation has been initiated in accord with c. 1717, it is possible for the ordinary to place restrictions on an accused cleric or religious, which could include a prohibition to celebrate the sacraments, a command not to reside in a certain place, etc. Though analogous to the precautionary measures mentioned in c. 1722, these are, nevertheless, different. They are imposed by decree, “but not on the basis of can. 1722, but rather by virtue of his own competence as proper ordinary which, in the case of the diocesan Bishop, are mentioned in can. 392.”²¹⁰

Regarding these precautionary measures, the *Sussidio* of the Dicastery for Legislative Texts states the following:

The concrete content of these disciplinary measures and the “type” of measure must correspond to the type of delict being investigated and the nature of the scandal being sought to prevent: prohibiting confessions to minors, for example, would not be the most appropriate measure in an investigation of an economic nature. Moreover, in adopting such measures, one cannot fail to take into account the fact that the new canon 1321 §1 calls for

²⁰⁸ See CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1228. See also SÁNCHEZ-GIL, “El principio in dubio pro reo,” n. 25.

²⁰⁹ D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 158.

²¹⁰ DICASTERY FOR LEGISLATIVE TEXTS, *Penal Sanctions in the Church: User Guide for Book VI of the Code of Canon Law*, Vatican City, 2023, 188.

“At any rate, the procedural safeguards placing the burden of proof on the accuser, and envisioning acquittal of the defendant when this bar is not met, does not transfer neatly to non penal administrative actions placed by the bishop with the common good in mind. The bishop need not prove to moral certitude that an action did occur before he restricts or removes authorization for ministry. By no means does this signify that the law provides no safeguards on these occasions. What it does mean, however, is that the law does not apply the same principles or require that the same standards be met before ecclesiastical authority can act outside of the imposition of penalties” (JENKINS, “The Charter and Norms Two Years Later,” 118-119).

the presumption of innocence to be protected at all times (cf. n. 17), which also requires a proportional use of these measures.²¹¹

It is clear from this text that such precautionary measures could easily be misapplied and could unjustly damage the reputation of the accused. Such measures could also be unjustly prolonged as well. Thus, the Dicastery warns:

it is also a duty of justice on the part of the authority to limit the use of this type of measure to what is strictly necessary, both in terms of content and duration; moreover, he is obliged to formally declare by a new decree that the measures cease when he decides not to proceed with them, since they cease by law with the end of the penal trial. It is a strict duty of justice for the competent authority to ensure, even formally, that these measures cease, a duty the *must* also extend to *repairing* any consequences that may have damaged the good reputation of the person concerned.²¹²

Do these provisions of the law contradict the presumption of innocence? It is clear that these precautionary measures should not be automatically applied in every process and should only rarely be applied during a preliminary investigation.²¹³

3.7—Criticisms of the Formulation of Canon 1321, §1

The brief text of c. 1321, §1, has invited various observations by canonical authors about why the presumption of innocence is formulated as it is, in particular, regarding the use of the term *censetur* and the phrase “until the contrary is proven.” One could also note

²¹¹ DICASTERY FOR LEGISLATIVE TEXTS, *Penal Sanctions in the Church*, 187.

²¹² *Ibid.*

“Obviamente, la tutela del acusado que comporta la llamada ‘presunción de inocencia’ no es compatible con la adopción de medidas cautelares que derivan de la probable culpabilidad y peligrosidad del acusado, pero tales medidas no pueden significar una condena anticipada. En este sentido, el can. 1722 permite al Ordinario adoptar algunas medidas cautelares ‘para prevenir los escándalos, tutelar la libertad de los testigos y garantizar el curso de la justicia’ pero indicando al mismo tiempo que ‘viniendo a menos la causa, deben ser revocadas y cesan *ipso iure* de tener vigor al terminar el proceso penal.’ En consecuencia, tales medidas son legítimas solo si son dictadas por la necesidad de evitar otros daños o para asegurar la búsqueda de la verdad, y solo mientras tales exigencias perduren” (SÁNCHEZ-GIL, “El principio in dubio pro reo,” n. 25).

²¹³ See D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 141-143; COMOTTI, “Informazione, riservatezza, e denuncia,” 215-216.

the potential for disagreement about when the presumption of innocence begins. These same criticisms, of course, could be made concerning the parallel canon in the *CCEO*.

3.7.1—*Censetur*

It is interesting to note that the text of the canon does not use the word “presumed” (*praesumitur*). Instead, the text uses *censetur*, which is translated “considered.” To draw out the contrasting uses of *praesumitur* and *censetur*, Austin uses, as an example, c. 97, §2, which states: “A minor before the completion of the seventh year is called an infant and is considered (*censetur*) not responsible for oneself. With the completion of the seventh year, however, a minor is presumed (*praesumitur*) to have the use of reason.” Austin notes that *censetur* is used in this canon to describe an irrebuttable presumption²¹⁴ that can only be overturned indirectly—that is, by proving that the child in question is seven years old or older. The word *praesumitur* is used to describe a simple legal presumption that could be overturned either directly, by proving that a child over the age of seven still lacks the use of reason, or indirectly, by proving that the child has not yet reached seven years of age. Furthermore, Austin notes that in *CIC/83*, *CIC/17*, and *CCEO* the word *censeo* is never used with the phrase “*donec contrarium probetur*,” which indicates a simple legal presumption.²¹⁵ For that reason, Austin writes: “It would have been more consistent—and more in accord with the legislative tradition—had the revised canon used *praesumitur* rather than *censetur*.”²¹⁶

²¹⁴ See section 1.2.2.1.2 on presumptions *iuris et de iure*.

²¹⁵ See AUSTIN, “The Revised Book VI, Part I,” 299-300.

²¹⁶ *Ibid.*, 300.

Indeed, by its very nature, the presumption of innocence cannot be an irrebuttable presumption. The very goal of the promoter of justice is to present evidence and arguments that could overturn the presumption in the mind of the judge. For this reason, one should not place too much significance on the use of the word *censetur*, rather than *praesumitur*, in the canon because, as Austin notes, “Practically, however, it is a distinction without much of a difference [...]”²¹⁷ Pighin writes that the “presumption of innocence is *iuris tantum*, because it coexists with the probability of guilt when there is an external violation of a criminal law or of a penal precept, referred to in §4 of the same canon.”²¹⁸

3.7.2—When Does the Presumption End?

In a recent article, Pighin observed that the new §1 of c. 1321 leaves various questions unanswered—for example, what exactly needs to be proven and when the proof of guilt has been achieved.²¹⁹ Boni commented that the text of c. 1321, §1 could have been less “telegraphic” and proceeded to elaborate the point at which the presumption is overturned.²²⁰ Luciano Eusebi, similar to Pighin, noted that the new §1 “does not specify

²¹⁷ Ibid.

²¹⁸ “La presunzione di innocenza è *iuris tantum*, perché convive con la probabilità della colpevolezza quando è «posta la violazione esterna» di una legge penale o di un precetto penale, di cui al § 4 dello stesso canone” (B. PIGHIN, “Il nuovo sistema penale canonico: motivazioni, criteri ispiratori e principali novità del riformato Libro VI del CIC,” in *Ephemerides iuris canonici*, 63 [2023], 410).

²¹⁹ “Infatti sorgono in proposito diverse domande che non trovano risposta nel novellato Libro VI: ‘cosa’ occorre realmente provare? L’imputabilità o la punibilità di un reato? La domanda è rilevante soprattutto nel caso di un delitto già provato per il quale è prevista una censura. [...] Infine, l’affermazione del principio suddetto solleva interrogativi su ‘quando’ operi la prova della colpevolezza: dopo la sentenza definitiva del primo grado di giudizio o dopo una sentenza passata in giudicato? Dal decreto extra-giudiziale del procedimento amministrativo o dopo quello relativo al ricorso contro il primo decreto?” (PIGHIN, “Il nuovo sistema penale canonico,” 410)

²²⁰ “[F]orse poteva essere vergata in maniera meno ‘telegrafica’ e quindi meno ‘fiacca’ e ‘labile,’ proseguendo ‘fino alla sentenza definitiva di condanna,’ ovvero aggiungendo *expressis verbis* ‘in un giusto processo’ o ‘in un legittimo procedimento a cui consegua un provvedimento definitivo’: e questo senza ottenebrare le peculiarità tipicamente canoniche di alcune ‘risposte’ alle accuse di trasgressioni della legge penale” (BONI, “Il Libro VI De sanctionibus in Ecclesia,” 57).

[...] when it is considered that contrary proof has been acquired (if after the final conviction or already after a previous conviction).”²²¹ Others have made similar observations. José Bernal, however, seems confident that it ends when a definitive sentence has been issued.²²²

In his recent article Pighin notes that the canon’s lack of specificity is especially apparent when the canon is compared to the Constitution of the Italian Republic and the Constitution of the Swiss Confederation which state that the accused is presumed guilty until “definitive conviction” or conviction “by a final sentence,” respectively.²²³ Yet, Pighin did not seem to be concerned about this matter in his earlier manual on the new Book VI where he wrote that the presumption of innocence “persists until proof to the contrary is declared by the bodies responsible for verifying it, following a fair procedure which guarantees the search for truth and the fulfillment of justice.”²²⁴

So, when has the presumption of guilt been overturned? One can expect, in accord with secular jurists, that the presumption is not overturned until guilt has been established

²²¹ “...non specifica [...] quando sia da ritenersi acquisita la prova contraria (se dopo la condanna definitiva o già dopo una condanna precedente)” (EUSEBI, “La presunzione di non colpevolezza,” 235).

“Come debba avvenire l’acquisizione della prova contraria, che comporta il venir meno del giudizio di innocenza, non è peraltro precisato, né nella forma generica del dovere di acquisire tale consapevolezza con un accertamento legale (come asserito nella *Convenzione europea dei diritti dell’uomo*, art. 6, comma 2, relativa alla presunzione di innocenza), né nella forma, comune a molti ordinamenti civili, dello stabilire precisamente in quale momento del procedimento penale si possa considerare l’accusato come non più innocente (l’ordinamento italiano per esempio si riferisce alla condanna definitiva)” (M. MOSCONI, “L’avvio della procedura per l’applicazione della sanzione penale nella revisione del libro VI del CIC, tra opportunità e dovere per l’ordinario diocesano,” in *Quaderni di diritto ecclesiale*, 35 [2022], 283).

²²² “Este principio exige que la persona acusada por un delito no puede ser considerada y declarada culpable y, en consecuencia, castigada, hasta que no quede probada su culpabilidad en una sentencia definitiva” (J. BERNAL, “Noción de delito y delitos en el nuevo Libro VI reformado,” in *Ius canonicum*, 62 [2022], 771).

²²³ See PIGHIN, “Il nuovo sistema penale canonico,” 410.

²²⁴ “Tale presunzione perdura fino a che, dagli organi preposti a verificarla, non viene dichiarata la prova contraria, a seguito di una procedura equa, che garantisca la ricerca della verità e l’adempimento della giustizia” (PIGHIN, *Il nuovo sistema penale*, 533).

beyond a reasonable doubt as declared in a sentence at the end of a just process in which the right of defence has been honoured.

3.7.3—When Does the Presumption Begin?

Though there is nearly universal agreement within various legal systems that the presumption of innocence is desirable, there is less agreement on the content of the principle. It is only a matter of time, then, before canonists begin to observe that c. 1321, §1 does not indicate when the presumption of innocence begins. Since canonists come from different parts of the world where the presumption of innocence is understood differently in various civil legal systems, there is the potential for disagreement on this matter.²²⁵ For example, the United States Supreme Court considers the presumption of innocence to be operative only at trial.²²⁶ The European Court of Human Rights, on the other hand, considers the presumption of innocence to govern criminal proceedings in their entirety, even from the beginnings of a prosecution.²²⁷

Since the text of canon c. 1321, §1 does not mention when the presumption begins, one could perhaps argue that it begins from the moment of the notification of the alleged delict, but what does it mean to say that the accused is considered innocent before the beginning of the penal process? If an ordinary considers the accused to be innocent from the moment that he receives notice of a possible delict, then on what basis should he decree

²²⁵ See C.-F. STUCKENBERG, “Who is Presumed Innocent of What by Whom?” in *Criminal Law and Philosophy*, 8 (2014), 303.

²²⁶ See UNITED STATES SUPREME COURT, *Bell v. Wolfish*, 441 U.S. 520, 532-533 (1979), <https://supreme.justia.com/cases/federal/us/441/520/> (16 May 2025). See also STUCKENBERG, “Who is Presumed Innocent of What by Whom?” 302.

²²⁷ See EUROPEAN COURT OF HUMAN RIGHTS, *Minelli v. Switzerland*, App. no. 8660/79, Judgment on 25 March 1983, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57540%22%5D%7D> (16 May 2025), para. 30. See also STUCKENBERG, “Who is Presumed Innocent of What by Whom?” 306.

a preliminary investigation? There is no need to investigate the innocent. Or, what if the investigator presumes the accused to be innocent during the preliminary investigation? If the investigator presumes innocence, then how can he investigate the possibility of a delict having been committed?

There can be no doubt that it would be unjust to consider a person guilty from the moment of receiving the notice of a delict or from the beginning of the preliminary investigation. Such would bias the judgment of the ordinary or the appointed investigator against the accused and, thereby, prejudice their decisions. At the same time, there is no reason to evaluate the notice of a delict or to investigate it if one considers the accused to be innocent, thereby, biasing the ordinary or the investigator against the alleged victim(s).

For these reasons, it seems better for the ordinary and the investigator to remain impartial when evaluating whether or not an alleged delict has the semblance of truth and whether or not there is sufficient evidence to commence a penal process. There is no point in them trying to presume the innocence of the accused. It seems that, when one speaks of the presumption of innocence before the penal process has begun, the principle being asserted is that one must find evidence of a delict rather than simply presuming that a delict has occurred. This, however, is not a legal presumption in the procedural sense.

That there is a question as to when the presumption of innocence begins is due in part to the fact that, as explained above in section 3.3, the concept of the presumption of innocence has become a “magnet” principle that encompasses several rights and principles that help to preserve justice.²²⁸ Perhaps it would be better to reserve the name “presumption

²²⁸ See D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 133.

of innocence” to the penal process itself; then, another name could be used to refer to the rights of the accused that must be respected before the penal process, namely, the rights of defence, protection of good reputation, personal privacy, reparation of damage, freedom from punishment before proof of guilt.

Another solution could be to go back to the concept of the favour of law favoring liberty from penalties, described above in section 3.1.6. This would avoid potential disagreements about whether or not the presumption of innocence begins from the beginnings of a penal investigation or only when the penal process begins. Rather than claiming that the ordinary or the investigator in the preliminary investigation should presume the innocence of the accused, the ordinary or investigator should bear in mind that the accused must not have penalties imposed on him or her until guilt has been proven at the end of a penal process. This would maintain respect for both of the complementary rules that Campos Martínez identified in the concept of the presumption of innocence, namely, 1) the fundamental rule of the protection of the accused, such that he is not prematurely treated as guilty and punished with repressive measures or procedures, and 2) the evidentiary and procedural rule that excludes the accused from bearing the burden of proving his own innocence or from being declared guilty without full and definitive proof.²²⁹

Conclusion

The Roman historian Ammianus Marcellinus relates the following incident that demonstrates the importance of the presumption of innocence.

²²⁹ See CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1216.

Numerius, shortly before governor of Gallia Narbonensis, was accused of embezzlement, and Julian examined him with unusual judicial strictness before his tribunal publicly, admitting all who wished to attend. And when the accused defended himself by denying the charge, and could not be confuted on any point, Delphidius, a very vigorous speaker, assailing him violently and, exasperated by the lack of proofs, cried: "Can anyone, most mighty Caesar, ever be found guilty, if it be enough to deny the charge?" And Julian was inspired at once to reply to him wisely: "Can anyone be proved innocent, if it be enough to have accused him?" And this was one of many like instances of humanity.²³⁰

It is important to keep this in mind when considering that the presumption of innocence comes with a high cost. Rodríguez-Ocaña commented that

maintaining [the presumption of innocence] in its integrity, that is, without allowing room for modulations in its application, whatever the crimes and the accused, supposes that sometimes the true culprits will not be convicted because the required moral certainty has not been achieved, although the judge's "intuition" about the culpability of the accused remains undissipated. Even so, the presumption of innocence must be maintained despite this high cost, because if not "what will become of the innocent?"²³¹

The Church recognizes that there is a natural right to be presumed innocent until guilt can be proven, even if it does mean that some of the guilty might escape punishment. Nevertheless, the presumption of innocence and related due process rights and procedures are a necessity in light of human dignity. They all serve to protect the important principle that doubts must be decided in favour of the accused. The explicit statement of the presumption of innocence in the recent revision of *CIC/83* and *CCEO* is a welcome advance.

²³⁰ AMMIANUS MARCELLINUS, *History, Volume I: Books 14-19*, J. Rolfe (trans.), Loeb Classical Library, no. 300, Cambridge, MA, Harvard University Press, 1950, 405.

²³¹ "La presunción de inocencia de los fieles frente a las acusaciones de delitos, supone un alto coste para el sistema procesal, pues mantenerla en su integridad, es decir, sin que se dé cabida a modulaciones en su aplicación, sean cuales sean los delitos y los acusados, supone que a veces no serán condenados los verdaderos culpables porque no se ha alcanzado la certeza moral requerida, aunque la 'intuición' del juez sobre la culpabilidad del reo siga sin disiparse. Aun así, la presunción de inocencia debe mantenerse a pesar de ese alto coste, porque si no «¿qué será del inocente?»" (RODRÍGUEZ-OCAÑA, "Certeza moral en las causas penales," 783)

CHAPTER 4: TWO PRESUMPTIONS IN CONFLICT?

Introduction

Having examined the history and nature of presumptions in general and given a general description of the presumptions of imputability and innocence in particular, it is now necessary to compare the presumptions of imputability and innocence to see whether or not they conflict.

First, the presumptions will be compared to demonstrate whether or not they fit the description of presumptions found in c. 1584. This will clarify what these institutes of law really are and demonstrate that the presumption of innocence is not a probable conjecture and, therefore, should be considered a favour of law.

Second, claims of conflict between the presumption of innocence and the presumption of imputability by several jurists will be explained. Then, important points will be considered that provide the basis for responding to these alleged conflicts, followed by a response to each of the claims of conflict.

Finally, the presumption of *dolus* still exists in the *CCEO* and, arguably, in the *CIC/83* as well; therefore, arguments will be offered in defence of the presumption of *dolus*, how the presumption can be overcome, and why it does not contradict the favour of law benefiting the accused.

4.1—Presumptions and Norms Often Called Presumptions

It should be clear from Chapter One that the study of presumptions in law can be characterized as a constant development that has been plagued by a chronic lack of clarity. The definition of a presumption, the types of presumptions, the weights of presumptions

have all been discussed and debated throughout the centuries with various authors differing in their titles and categorizations of the various presumptions.

To clearly ascertain whether or not there is a contradiction between the presumption of innocence and the presumption of imputability one must first identify precisely what kinds of presumptions they are.

It was explained in Chapter One that presumptions came to be described as logical deductions based on established facts. A known fact or indication (*indicium*) is the basis for inferring another unknown fact based on a maxim of experience. It is a kind of conjecture based on presumptive reasoning or probability.¹ This understanding of presumptions is reflected in the text of c. 1584: “A presumption is a probable conjecture about an uncertain matter [...]” Because the presumption makes an inference based on what is probable, the burden of proof rests on the person who asserts something contrary to the presumption.

It becomes clear in the history of presumptions, however, that legal texts characterized as presumptions do not always fit this definition. Many such presumptions were not always based on probability, and even in cases where they were, they were also intended to preserve some value or principle.² James Franklin mentions, for example, that in Roman law the “Carbonian Edict declared that if there was a doubt as to whether a child was in fact the issue of someone who had left money in a will, the presumption was in

¹ See section 1.2.1.

² See A. SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” in *Ius ecclesiae*, 24 (2013), 71.

favor of the child.”³ This presumption is based not on a judgment of what is probable or likely but what is more equitable.

Before there were true legal presumptions, there were many instances of common opinions that functioned as normative interpretations. In section 1.1.1.1, it was noted that, in the opinion of Labandeira, there are no true legal presumptions in the classical period of Roman law but only unofficial presumptions in the form of common opinions. Sánchez-Gil preferred to describe them as rules for interpreting a person’s will or thoughts rather than presumptions, since they are not based on reasoning from a known fact to an unknown fact.⁴

In Justinian’s *Digesta*, one finds the jurist Tryphoninus articulating a presumption regarding a matter of inheritance.⁵ Hohmann summarized the presumption and the hypothetical story on which it is based:

A man has appointed Titius as the substitute heir to the second of the man’s two sons to die, and both underage sons die together in a shipwreck. In the disputation ensuing from this hypothetical, it can be argued both that Titius should receive nothing, since neither brother survived the other, and thus there is no “second son to die,” since neither son died first, or that he should inherit from both, since neither brother was survived by the other, and in that sense both were the “second son to die.” The jurist Tryphoninus opts for the second alternative, deciding that the substitute should receive both inheritances: “[S]ince neither brother survived the other, they are each regarded as having died both first and second.”⁶

Hohmann notes the obvious point that it is not probable that both sons died simultaneously, but if one died before the other, Titius, the substitute heir, would have a problem because “he could not prove which son had died second, and thus an essential element of his claim, the identity of the person from whom he is to inherit, could not be established, and therefore

³ J. FRANKLIN, *The Science of Conjecture: Evidence and Probability before Pascal*, Baltimore, MD, Johns Hopkins University Press, 2015, 9.

⁴ See section 1.1.1.1.

⁵ See *D.* 34.5.9(10).

⁶ H. HOHMANN, “Presumptions in Roman Legal Argumentation,” in *Ontario Society for the Study of Argumentation Conference Archive*, 61, 2.

his claim would fail. The rather non-probabilistic presumption of a simultaneous death allows the jurist to reach the result following from a more likely course of events, but avoiding the awkward problem of the proof of the identity of the survivor by presuming that both are survivors, and thus allowing Titius to inherit from both.”⁷

Hohmann provided many more examples of presumptions from the *Digest* that are not based primarily on probable conjectures but on policy goals or on presumptions about the intentions of testators.⁸

Recall that, in the Mucian presumption described in section 1.1.1.1, it was presumed that, in case of doubt, the property of a widow was presumed to have been received from her husband. This is not so much a probability as a decision to avoid what Pomponius described as “any disgraceful inquiry involving a wife.”⁹

Many other such examples have been identified by Hohmann. Based on his study of the history of presumptions and their impact on the burden of proof, he has argued that “policy concerns often far better explain such shifts of the burden of proof than do considerations of factual probability.”¹⁰

Such presumptions based on policy concerns rather than simply on probability continued to appear among medieval canonists. For example, Huguccio introduced a presumption that a child born after marriage is presumed to be the legitimate child of his father, and Azo soon after established that the presumption reversed the burden of proof in contestations of paternity. Though it may be probable that a child born during a marriage

⁷ Ibid.

⁸ Ibid., 2-6.

⁹ See section 1.1.1.1, n. 29.

¹⁰ HOHMANN, “Presumptions in Roman Legal Argumentation,” 1.

is the child of its father, the motive for the presumption also included the jurists desire to protect children from seizure of inheritance by third parties.¹¹

It becomes clear from the history of presumptions that whether a presumption is based on a probable conjecture or on a desired interpretation is not always clear, nor are the two options mutually exclusive; however, it is clear that some presumptions are rules of interpretation that are not based on a probable conjecture at all.¹² Sánchez-Gil has written that “canon law has also known presumptions of this type, established by the legislator to protect very specific interests of justice [that are] not easily protected in any other way.”¹³

Sánchez-Gil considered it legitimate to ask whether such presumptions of this kind “really constitute the most convenient use of the presumption, or whether they are not instead a somewhat incorrect use – at least from a logical point of view – adopted by the legislator more on the strength of tradition than on the basis of a true presumptive reasoning and, therefore, without the appropriate terminological rigor.”¹⁴ For this reason, he proposes that “the legal presumption correctly formulated [should be] characterized by being a truly

¹¹ See F. ROUMY, “Family Law,” in A. WINROTH and J. WEI (eds.), *The Cambridge History of Medieval Canon Law*, Cambridge, Cambridge University Press, 2022, 482-483.

¹² “Tuttavia, in rapporto diretto con la nozione di presunzione giuridica come giudizio di probabilità qualificata esposta in precedenza, l’aspetto da sottolineare è che non pochi esempi storici di presunzioni *iuris simpliciter* e tanto più di presunzioni *iuris et de iure* potrebbero essere citati proprio per confutare tale qualità, o, quanto meno, per mostrare delle forzature nel normale ragionamento presuntivo, mediante l’imposizione, sotto la veste di una presunzione *iuris*, di una previsione legale imperativa che appare poco o per nulla «probabile», non solo nel caso concreto cui deve essere applicata, ma persino in generale” (A. SÁNCHEZ-GIL, *La presunzione di validità dell’atto giuridico nel diritto canonico*, Monografie Giuridiche, no. 30, Rome, Giuffrè Editore, 2006, 53-54).

¹³ “Anche il diritto canonico ha conosciuto presunzioni di questo tipo, stabilite dal legislatore per proteggere interessi di giustizia ben precisi e non facilmente tutelabili in altro modo” (SÁNCHEZ-GIL, *La presunzione di validità*, 54).

¹⁴ “Risulta nondimeno legittimo chiedersi, in sede scientifica, se questa o altre presunzioni del genere costituiscano davvero l’uso più conveniente della presunzione, o se non siano invece un uso in qualche modo scorretto—almeno sotto il profilo logico—adoperato dal legislatore più in forza della tradizione che sulla base di un vero ragionamento presuntivo e, quindi, senza l’opportuno rigore terminologico” (SÁNCHEZ-GIL, *La presunzione di validità*, 54).

probable deduction.”¹⁵ Such “high probability” in the legal presumption makes it possible to attain a level of certitude that approaches moral certitude.

So, it is clear that some presumptions are probable conjectures while other presumptions are based on some other value unrelated to probability, such that they could be more properly called rules of interpretation. It is possible for a presumption to be based on both probability and some other value, but for the sake of clarity, one can speak of probable presumptions and non-probable presumptions, which are really rules of interpretation. The value that undergirds the non-probable presumption could be equity, fairness, or, as Hohmann described it, a “policy concern.”

The legislator defines presumptions as probable conjectures in c. 1584, but the term is used much more broadly in secular legal and philosophical literature. Even among canonists the term is used more broadly, especially since forms of the verb *presumere* are used by the legislator and canonical authors in relation to matters that do not involve probable conjectures.¹⁶ Inevitably misunderstandings and confusion result if there is no

¹⁵ “Oltre che per il suo oggetto e per il suo autore, la presunzione giuridica correttamente formulata si caratterizza per essere una deduzione veramente probabile. Lungi dall’essere una semplice deduzione meramente possibile o scarsamente probabile, la presunzione giuridica è un ‘giudizio di probabilità qualificata,’ vale a dire un ragionamento che permette di raggiungere una ‘alta probabilità,’ vicina alla certezza morale, con cui è possibile dirimere un problema giuridico, fintanto che non consti il contrario” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 63).

¹⁶ In addition to non-probable presumptions, which are more accurately called rules of interpretation, there are also a *praesumptio in lege ferenda*, which are the presumptions that undergird a particular norm, and a *praesumptio vulgaris*, which are presumptions that guide a person to act in accord with the law or with prudence: “Oltre ad avere per oggetto una cosa incerta con rilevanza giuridica, la presunzione giuridica si caratterizza per essere formulata da chi è investito di autorità per decidere o giudicare sulle questioni giuridiche, come sono, principalmente, il legislatore, che la stabilisce in un testo legale, e il giudice, che la formula nella sentenza. Sono, di conseguenza, escluse sia la presunzione che serve di fondamento ad una norma—o *praesumptio in lege ferenda*—, che è per sua natura metagiuridica; sia le presunzioni che devono realizzare altri soggetti giuridici, in situazione di dubbio, per agire conformemente al diritto (cfr., ad esempio, cc. 283 §1; 390; 764; 886 §2; 911 §2; 950; 969 §1; 1003 §2), o, in generale, per agire prudentemente; una tale presunzione viene denominata *praesumptio vulgaris* nella tradizione giuridica, per indicare che non è stata stabilita né dalla legge né dal giudice, e non è, dunque, regolata dal diritto” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 63).

further clarification of the different concepts that are often referred to by the name “presumptions.”

4.1.1—Labandeira’s Distinction Between Presumptions and Other Norms in *CIC/17*

Labandeira and Sánchez-Gil have provided important, helpful clarifications and distinctions concerning probable presumptions and other interpretative rules. Labandeira notes that when the *CIC/17* was being drafted, Cardinal Gasparri sought to collect and arrange the many legal dispositions that had been dispersed throughout the *Corpus iuris canonici* and later collections in such a way that the former legal discipline would be preserved and that the same expressions drawn from the sources would be used in the new canons.¹⁷ Since the new code used much of the same terminology as the previous legal sources, one finds the term *praesumere* used with various different meanings.

Writing when the *CIC/17* was in force, Labandeira carefully analyzed the various presumptions and uses of the term *praesumere* in the *CIC/17*. After setting aside the uses of the term that describe the intention to violate the law,¹⁸ he identified various canonical norms that are not true legal presumptions in the procedural sense. He analyzes various canons and divides them into three categories: regulatory precepts, interpretative rules, and fictions. Since fictions are already addressed in section 1.2.4, they are not considered here.

¹⁷ See LABANDEIRA, *Las presunciones en derecho canónico*, 70. Cf. P. GASPARRI, Letter *Perlegisti*, 6 April 1904, in *Acta Sanctae Sedis*, 37 (1904-1905), 130-131.

¹⁸ See LABANDEIRA, *Las presunciones en derecho canónico*, 70-71.

4.1.1.1—Regulatory Precepts

Labandeira defines regulatory precepts as norms that “impose a certain legal assessment in a restrictive manner.”¹⁹ They do not articulate a presumption because they are not based on a probable conjecture. Rather, they are mandates directed to those subject to the law, including the judge, and cannot be undermined by contrary evidence.²⁰ As Labandeira explained, “they establish a principle that must be applied in certain factual situations indicated by the same norm. To discover its nature, it is necessary to look at the legal result, not at the facts that serve as its antecedent.”²¹

Several examples from the former code are cited and explained, but one that is particularly instructive pertains to *CIC/17*, c. 1014, which states: “Marriage enjoys the favor of law; therefore in doubt the validity of marriage is to be upheld until the contrary is proved, with due regard for the prescription of Canon 1127.”

Various canonical authors considered this canon to contain a simple legal presumption (*iuris tantum*).²² Labandeira disagreed. The principle that marriage enjoys the favour of law has many legal effects, including that a marriage celebrated is considered valid until its nullity has been certainly demonstrated and declared in a sentence. Thus, it meets Labandeira’s definition of a regulatory precept because it “impose[s] a certain legal assessment in a restrictive manner.” Since it imposes the assessment that a marriage was

¹⁹ “Entendemos por tales las normas que imponen una determinada valoración jurídica de una manera taxativa” (LABANDEIRA, *Las presunciones en derecho canónico*, 91).

²⁰ “No interpretan una voluntad ni establecen una presunción; por ello constituyen un mandato dirigido al juez o a los súbditos que no puede ser menoscabado con pruebas contrarias ni otro tipo de argumentos” (LABANDEIRA, *Las presunciones en derecho canónico*, 91-92).

²¹ “Consagran un principio que debe ser aplicado en determinados supuestos de hecho señalados por la misma norma. Para descubrir su naturaleza es preciso atender al resultado jurídico, no a los hechos que le sirven de antecedente” (LABANDEIRA, *Las presunciones en derecho canónico*, 92).

²² Labandeira cites G. Cavigioli, M. Conte a Coronata, L. del Amo, H. Cicognani, F. Roberti, and L. Keller. See LABANDEIRA, *Las presunciones en derecho canónico*, 95-96.

valid based simply on the fact that the marriage has been celebrated, nothing is being presumed. The law directs the judge to consider the marriage valid independent of any probabilities until a matrimonial nullity process has arrived at a sentence of nullity.²³

Sánchez-Gil, writing after the promulgation of the *CIC/83*, does not mention this category of regulatory precepts. If one lists the various examples of regulatory precepts that Labandeira identified in *CIC/17* and compares them to the *CIC/83*, one notices that the newer canons sometimes omit the provisions to which Labandeira was referring. In a couple of instances, including *CIC/17*, c. 1014 on marriage enjoying the favour of law, the canons remain in the *CIC/83* as c. 1060; however, Sánchez-Gil considers them to be true legal presumptions that are based on probability.²⁴ It seems that Sánchez-Gil was correct in stating that c. 1060 is based on a probable presumption;²⁵ nevertheless, it also seems that Labandeira had an important insight that the canon is a directive from the legislator as to how a celebrated marriage is to be considered valid until the contrary is proven through a legal process.

²³ “Ese principio, que es de derecho material, produce múltiples efectos jurídicos, y el primero de ellos es que el matrimonio celebrado se considera valido mientras no se haya demostrado con certeza y declarado por sentencia la nulidad del mismo.

[...]

Todas esas razones válidas han pesado indudablemente sobre el ánimo del legislador y justifican moralmente la fuerza que imprimió a la norma. Pero desde el punto de vista jurídico no podemos aceptar que se trate de una presunción legal: la fuerza de una norma—cualesquiera que sean sus antecedentes—debe deducirse de su texto. La redacción es concluyente: en caso de duda el matrimonio se considera valido, mientras no se demuestre lo contrario. Sus efectos son en primer lugar materiales; la condición de aplicabilidad es natural, ya que la validez no podría fingirse. Pero tampoco se presume, sino que se establece en forma imperativa: «standum est» (LABANDEIRA, *Las presunciones en derecho canónico*, 96-97).

²⁴ See SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 58-59.

²⁵ “Anche se al posto del verbo ‘presumere’ il c. 1060 usa la formula tradizionale «*in dubio standum est pro valore matrimonii*», è lo stesso legislatore a considerarla una vera presunzione nel c. 1086 §3” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 58).

4.1.1.2—Interpretative Rules

Some canons contain interpretative rules that produce specific legal consequences based on a manifestation of will. They give meaning to the words or actions of a person, whether it be the legislator, the competent authority, or a private individual. These interpretative rules differ from presumptions in that they are not probable judgments. Though they may be based on a presumption made by the legislator in promulgating such norms, they impose specific obligatory interpretations regardless of a judgment of probability by the judge or the competent authority.²⁶ They do not admit contrary evidence, though their effectiveness can be negated by an applicable condition that is stated in the rule itself.²⁷ These interpretative rules can be divided into two kinds—rules that interpret general laws and rules that assess the will of the subject.²⁸

An example of a norm that interprets a general law is *CIC/17*, c. 8, §2: “A law is not presumed personal, but territorial, unless something else is established.” Though the canon uses the term *praesumitur*, there is no probable conjecture involved. Rather, the legislator states that laws are to be interpreted as territorial unless there is a specific exception.²⁹ Another example is *CIC/17*, c. 23: “In cases of doubt, the revocation of a

²⁶ “La diferencia entre normas interpretativas y normas presuntivas estriba en que estas constituyen un juicio probable, valido mientras no se pruebe lo contrario; en cambio la norma interpretativa, aunque pueda estar fundada en una presunción vulgar del legislador, impone una única interpretación obligatoria” (LABANDEIRA, *Las presunciones en derecho canónico*, 100).

See SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 60.

²⁷ “No admite prueba contraria, pero puede paralizarse su eficacia cuando la misma norma señale alguna condición de aplicabilidad” (LABANDEIRA, *Las presunciones en derecho canónico*, 106).

²⁸ “Estas reglas contienen también una disposición de la ley, la cual interpreta el valor de una voluntad que produce una consecuencia jurídica. En esto se distinguen de las simples normas dispositivas: también establecen un principio aplicable, pero a la vista de una manifestación de voluntad. Las normas interpretativas conceden determinado sentido a las palabras o conducta de una persona, bien sea las del legislador, de la autoridad competente o de una particular que se halla en una determinada situación jurídica. De aquí que, tomando el termino interpretación en su sentido más alto, hayamos de referirnos por separado a las normas que interpretan leyes generales, las referentes a leyes particulares y aquellas que valoran la voluntad del súbdito” (LABANDEIRA, *Las presunciones en derecho canónico*, 99-100).

²⁹ See LABANDEIRA, *Las presunciones en derecho canónico*, 100-101.

preexisting law is not presumed, but later laws are to be brought in line with older laws and, to the extent possible, reconciled with them.” This canon, too, states how laws are to be interpreted without regard to probability, even though it uses the term *praesumitur*. Labandeira noted: “The expressions ‘in dubio’ and ‘nisi aliud constet’ are used interchangeably in these rules that we have seen, and in those that interpret particular laws ‘in doubt,’ as we said before, means that the general principle plays its part even in doubtful cases, so that the judge cannot, in equal arguments for or against, pronounce himself in favor of the opposite thesis.”³⁰

An interpretative rule that assesses the will of the subject can be found in *CIC/17*, c. 1084: “Simple error concerning the unity of marriage or its indissolubility or its sacramental dignity, even if it gave rise to the contract, does not vitiate matrimonial consent.” This norm contains a direction from the legislator that marital consent is to be considered valid even if one of the parties had an error about the essential qualities of marriage or its sacramental dignity. This norm is not based on the probability that the parties posited valid consent. It leaves open the possibility that a spouse excluded consent but directs that it is not to be considered invalid due to the simple error.³¹

When Sánchez-Gil defined interpretative rules and gave various examples, he did not make Labandeira’s distinction between rules interpreting general laws and rules assessing the will of the subject. He, nevertheless, noted that these interpretative rules are

³⁰ “Las expresiones «in dubio» y «nisi aliud constet» se utilizan indistintamente en estas normas que hemos visto, y en aquellas que interpretan las leyes particulares. «En la duda», como antes dijimos, significa que el principio general juega su papel aun en los casos dudosos, de modo que el juez no puede, en igualdad de argumentos a favor o en contra, pronunciarse por la tesis contraria” (LABANDEIRA, *Las presunciones en derecho canónico*, 101).

³¹ See LABANDEIRA, *Las presunciones en derecho canónico*, 103-104. Other examples of interpretative rules can be found in SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 59-60.

established by the legislator to resolve situations of ambiguity or doubt and are improperly formulated as presumptions, since they are not based on probability.³²

4.1.2—The Presumption of Innocence Is a Not a True Presumption

A presumption, in the stricter sense of the term, is a probable conjecture. Is the presumption of innocence a probable conjecture? The answer to this question might depend in part on when one considers the presumption of innocence to come into play. If one considers the presumption to begin from the moment that a person has been accused of a crime, it seems difficult, if not impossible, to answer because of the difficulty involved in ascertaining whether the majority of persons accused of a crime turn out to be innocent or not. On the other hand, if one considers the presumption to be a procedural presumption that is limited to the trial, then it could be argued that the majority of persons who are actually charged with a crime and undergo a trial are more likely to be guilty, since a conscientious promoter of justice or prosecutor would not proceed to trial without significant evidence of guilt.³³

But rather than debating when the presumption comes into play and the probability of the guilt of the accused, it is necessary to clearly state that the presumption of innocence is not a presumption in the technical sense of c. 1584.³⁴ As Rodríguez-Ocaña has written, it “is more like a principle than a presumption itself” because “it does not have a certain

³² “Tuttavia, nel CIC sono abbondanti le norme interpretative o dispositive di vario genere, stabilite dal legislatore per risolvere situazioni di dubbio o di ambiguità, che sono state formulate impropriamente come presunzioni, senza che contengano—a mio avviso—un vero giudizio di probabilità” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 59).

³³ “[I]t is more likely than not that the defendant is guilty, since more defendants are convicted than acquitted” (H. HOHMANN, “Presumptions in Legal Argumentation: From Antiquity to the Middle Ages,” in H. HANSEN, et al. [eds.], *Presumptions and Burdens of Proof: An Anthology of Argumentation and the Law*, Tuscaloosa, AL, The University of Alabama Press, 2019, 25).

³⁴ See D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 17.

prior fact on which the conjecture is based.”³⁵ As Nicholas Rescher has argued, “[t]he presumption of innocence does not rest on the fact that accused individuals are generally innocent. [...] Presumptions [in a broader sense] have a life of their own determined correlative with the objectives in whose service they are operative.”³⁶

So, whether one considers the presumption of innocence to begin at the time of accusation or at the commencement of the trial, it is clearly not a presumption in the proper sense of the term, because there is no proven fact on which the presumption is founded, and there is no basis for arguing that the accused is more likely innocent of the crime of which he or she has been accused. Rather, one is considered innocent for the sake of fairness. The legislator considers that it is more just and equitable to consider the person innocent until guilt has been proven. This helps to guarantee a fair process and avoid the possibility of an innocent person being punished. These are weighty considerations that justify the rule, but they are not based on probability.³⁷ It is clear, then, that the presumption

³⁵ “Esta presunción (que se parece más a un principio que a una presunción propiamente dicha porque no tiene un hecho previo cierto en el que se basa la conjetura...)” (R. RODRÍGUEZ-OCAÑA, “Certeza moral en las causas penales, algunos obstáculos que se pueden presentar para alcanzarla,” in *Ius canonicum*, 61 [2021], 809).

See C.-F. STUCKENBERG, “Who is Presumed Innocent of What by Whom?” in *Criminal Law and Philosophy*, 8 (2014), 305.

³⁶ N. RESCHER, *Presumption and the Practices of Tentative Cognition*, Cambridge, Cambridge University Press, 2006, 9.

³⁷ “...no es una presunción al estilo de las presunciones reguladas en los cc. 1584-1586 CIC. No existe un hecho indicio del que se parte para deducir que esa persona es inocente, sino que deriva de la misma dignidad de la persona humana que se la considere inocente de las acusaciones hasta que medie sentencia firme condenatoria, para la cual se exige en el juez la certeza moral sobre la existencia del delito y su imputación, certeza que solo se debe alcanzar de lo alegado y probado en juicio. Se podría decir que el indicio en este caso es la misma dignidad de la persona que es de tal naturaleza que su refutación solo puede provenir de la voz de la justicia en la Iglesia que es la sentencia firme del juez” (R. RODRÍGUEZ-OCAÑA, “El motu proprio *Vos estis lux mundi*,” in *Ius canonicum*, 59 [2019], 867; see J. BERNAL, “Noción de delito y delitos en el nuevo Libro VI reformado,” in *Ius canonicum*, 62 [2022], 772).

“Antes de seguir avanzando, es importante aclarar que esta presunción de la inocencia, técnicamente, no es la presunción jurídica de los cánones 1584 y 1586 CIC, porque no se trata de la deducción probable de un hecho incierto que tiene un fundamento de hecho directamente conectado con el objeto de la presunción y que hay que comprobar en un caso concreto para que la causa pueda decidirse a partir de la misma presunción. [...] y se distingue de ellas en que no se apoya sobre el fundamento de tipo fáctico,

of innocence is an example of what Labandeira would call a regulatory precept and, perhaps, what Sánchez-Gil would call an interpretative rule.

Perhaps this is the reason that the legislator chose not to use a form of the word *praesumere* in the formulation of c. 1321, §1. It was noted in section 3.7.1 that c. 1321, §1 uses the Latin word *censetur*. Austin observed that the choice of this word seemed out of place since *censere* is used in other parts of *CIC/83* to describe irrebuttable presumptions of the law. He states that it would have been better to use a form of the word *presumere* rather than *censere*.

It seems, however, that it was appropriate for the legislator to avoid the use of *praesumere* in c. 1321, §1 because the presumption of innocence is not really a presumption in the stricter sense of the term. Sánchez-Gil has written that legal presumptions could use such terms as “consider” or “believe” but that it is preferable from the perspective of legislative technique that they use the term “presume.”³⁸ He has also written that the word “presume” should be reserved for presumptions that are probable

directamente relacionado con la inocencia del imputado verificable en cada caso concreto” (CAMPOS MARTÍNEZ, “Presunción de inocencia y el nuevo derecho penal canónico,” 1217).

“Note that this presumption is valid (legally appropriate) even though the universal generalization is incorrect. Universality is dispensable for presumption, nor does presumptive appropriateness even require statistical generality. Thus contrast (a) the presumption that the accused is innocent of a crime until proven guilty of it and (b) the proposition that people accused of a crime are usually innocent of it unless their guilt can be proven in a court of law. It may well be—indeed presumably is—actually the case that most of the time the people accused of a crime did actually commit it. Nevertheless that presumption remains a perfectly appropriate legal principle. Presumptions are validated by their functional efficacy within their operative context and not by their statistical accuracy” (RESCHER, *Presumption and the Practices of Tentative Cognition*, 9).

³⁸ “Questo comporta inoltre, necessariamente, che la norma presuntiva adoperi una terminologia che significhi in modo univoco e chiaro una congettura probabile, cioè un giudizio di tipo presuntivo. Come si è detto, anche se qualche volta si potrebbero ammettere termini quali «considerare» o «ritenere»—sempre se adoperati con un significato equivalente a «presumere»—conviene ribadire che è preferibile, e più corretto sotto il profilo della tecnica legislativa, che le presunzioni *iuris* adoperino unicamente il termine «presumere», anche per facilitare l’interpretazione e l’applicazione di quanto disposto nel can. 1526 §2, 1” (SÁNCHEZ-GIL, *La presunzione di validità*, 62-63).

conjectures.³⁹ One could argue, therefore, that the presumption of innocence should not use the term “presume” since it is not based on a probable conjecture. Austin may be correct that *censere* is not the ideal word to use, since it is associated with irrebuttable presumptions; however, since c. 1584 states that a presumption is a probable conjecture and the presumption of innocence is not based on a probable conjecture, it seems correct that the legislator avoided the use of *praesumere*.

4.1.3—The Presumption of Innocence as a *Favor iuris*

The name “presumption of innocence” is so universally used in various legal systems that there is not much chance of abandoning it. There is benefit, nevertheless, in identifying more clearly what kind of norm is contained in c. 1321, §1 and avoiding the idea that it contains a presumption. In light of the distinctions made by Labandeira, it seems more appropriate to see the presumption of innocence as a regulatory precept that imposes a certain legal assessment in a restrictive manner; specifically, it imposes upon the judge the duty of considering the accused to be innocent and unpunishable until the promoter of justice has presented evidence of guilt and the judge is morally certain that the accused has committed a delict.

³⁹ “Sono del parere che sarebbe stato più adatto, sotto il profilo tecnico-giuridico, [...] riservare il verbo ‘presumere,’ per le deduzioni veramente ‘probabili’” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 60-61).

Sánchez-Gil offers his reasons for insisting on more precise terminology: “Certamente, alle osservazioni critiche appena esposte, si potrebbe obiettare che sono semplici opinioni, tra tante altre in una materia di per se confusa e per certi versi inestricabile come è quella delle presunzioni, e che non trovano conferma nella vigente normativa, che—come si è visto—usa con disinvoltura la presunzione come un semplice schema legale per legare conseguenze giuridiche ad un determinato fatto. Penso, tuttavia, che una migliore comprensione della presunzione giuridica e una tecnica legislativa più raffinata e corretta, che riservasse le presunzioni *iuris* a veri giudizi di probabilità, aiuterebbe anche i giudici ad adoperare correttamente il ragionamento presuntivo” (ibid., 62).

A favour of law (*favor iuris*) is, in the words of Sánchez-Gil, “the preferential or reinforced protection that the legal system—ultimately, society as a whole—recognizes and grants to certain persons, institutions, or legal assets, considering that, due to their condition, their situation of weakness, or their relevance for the common or private good, need special protection.”⁴⁰ He offers several examples of favours of law, including the favour of the respondent, the favour of liberty (originally in reverence to manumission but, eventually, in penal matters), the favour of matrimony, and the favour of the faith.⁴¹ They can often be found articulated in various rules of law (*regulae iuris*), such as *in dubio pro reo*.⁴² Throughout history many of these rules are used in jurisprudence or included in legislation, sometimes as legal presumptions, “with the aim of facilitating the burden of proof of an alleged fact in a case deserving of protection, until proven otherwise.”⁴³

⁴⁰ “Nella tradizione giuridica si intende per *favor iuris*—o favore del diritto—la tutela preferenziata o rinforzata che l’ordinamento giuridico—in definitiva, la società nel suo insieme—riconosce e accorda a determinate persone, istituzioni o beni giuridici, considerato che, per la loro condizione, la loro situazione di debolezza o la loro rilevanza per il bene comune o privato, hanno bisogno di una speciale protezione” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 71).

Regarding the origin of the *favor iuris*, Sánchez-Gil wrote: “Nella sua origine il *favor iuris* appare unito al principio «*odia restringi, et favores convenit ampliari*» (VI reg. iur. 15), che esprime la tendenza del diritto canonico—e, in generale, dell’ordine giuridico di tradizione romano-cristiana—alla tutela della verità, della dignità della persona e del esercizio libero e responsabile dei suoi diritti e doveri” (ibid., 71).

⁴¹ “Come esempi di *favor iuris* presenti nella tradizione giuridica, civile e canonica, possono essere menzionati il *favore rei*, il *favor minoris*, il *favor debitoris*, il *favor heredis*, il *favor possidentis*, il *favor legitimitatis* (in materia di filiazione), il *favor libertatis* (in origine in materia de *manumissio*, successivamente in materia penale), il *favor matrimonii*, il *favor testamenti*, il *favor dotis*, il *favor fidei*, o anche—con una portata più generale—il *favor vitae*, il *favor veritatis*, il *favor personae*, il *favor actus* o il *favor legis*” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 72).

⁴² See SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 72.

⁴³ “Lungo la storia molte di queste regole sono state adoperate dalla giurisprudenza e inserite nella legislazione, in questo caso come massime o principi legali, o anche come presunzioni *iuris*, allo scopo di agevolare l’onere della prova del fatto presunto in una causa meritevole di tutela, finché venga provato il contrario” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 72).

Sánchez-Gil has written that favours of law are often confused with presumptions, though they should be clearly distinguished.⁴⁴

Labandeira's example of the favour of law regarding the validity of marriage as a regulatory principle seems to be an ideal analogy for the norm of c. 1321, §1. The so-called "presumption of innocence" is better conceived of as a favour of law that requires the judge to issue a sentence in favour of the accused unless he achieves moral certitude that the accused committed a delict.

Canon 1608, §4 states: "a judge who was not able to arrive at this certitude is to pronounce that the right of the petitioner is not established and is to dismiss the respondent as absolved, unless it concerns a case which has the favour of law, in which case the judge must pronounce for that." The formulation of the canon implies that a favour of law exempts from the ordinary procedural principle that the respondent (*reus*) is absolved if the petitioner (*actor*) does not prove his or her claim. One might argue, then, that the *favor rei* is redundant, since the procedural principle stated in the canon already favours the respondent. Yet, the *favor rei* is the basis for the principle itself. A cause enjoying the favour of law is, in the words of Carmelo de Diego-Lora, "the causally focused juridical object favored by the law."⁴⁵

⁴⁴ "Questo fenomeno ha provocato con il tempo una certa confusione tra il *favor iuris* e la presunzione *iuris* in cui eventualmente si manifesta, fino al punto di considerar le due realtà come se fossero una medesima cosa" (SÁNCHEZ-GIL, "La presunzione nella vigente normativa canonica," 72).

Sánchez-Gil considers the formulation of c. 1060 to contribute to the tendency to confuse favours of law and legal presumptions. The canon states the favour of matrimony followed by the legal presumption of the validity of a marriage. The formulation of the canon and its connection of the two legal concepts with the word *quare*, leads some to believe that they are intrinsically connected. In reality, they are distinct. The legal presumption of the validity of marriage is not based on the favour of law but on the fact that the marriage ceremony was properly celebrated. See SÁNCHEZ-GIL, "La presunzione nella vigente normativa canonica," 73.

⁴⁵ C. DE DIEGO-LORA, Commentary on c. 1608, in *Exegetical Comm*, vol. 4/2, 1468.

In a judicial penal process, the promoter of justice takes the place of the petitioner, and the accused is the respondent. The law favours the accused in that he or she cannot be convicted unless there is moral certitude that the accusation of the promoter of justice has been proven. The judge must find in favour of the accused unless he has attained moral certitude of guilt.⁴⁶

4.1.4—The Presumption of Imputability Is a Probable Conjecture

Some presumptions, like the presumption of imputability, are included in the law because of the difficulty in discovering the will or intention of a person.⁴⁷ Sánchez-Gil noted that scholars have identified hundreds of decisions in the *Corpus iuris civilis* that, though they did not use the term *praesumptio*, refer to the will of the subject.⁴⁸ This was a concern of ancient jurists for the obvious reason that it is difficult to arrive at conclusions regarding a person's internal will.

Thus, faced with cases in which the internal will remains unattainable, classical jurists mostly give absolute solutions dictated by reasons of justice, even though the real will remains unknown, in which they tend to resolve according to what they consider most fair and useful not only for the specific case but also for society. Consequently, real will is not strictly presumed, but an absolute or peremptory solution is used; therefore, it is possible to affirm that in classical jurisprudence these reasonings were interpretative rules of substantive law.⁴⁹

⁴⁶ “In conclusion, the moral certainty that the judge must acquire in order to find for the petitioner extends to all elements of the process, on which the judge must issue a favorable opinion before pronouncing that judgment for the petitioner” (DE DIEGO-LORA, Commentary on c. 1608, 1469).

The favour of law regarding liberty from penalties is already part of canonical doctrine and very similar to the presumption of innocence, as explained in section 3.1.6.

⁴⁷ See SÁNCHEZ-GIL, *La presunzione di validità*, 18; R. MOTZENBÄCKER, *Die Rechtsvermutung im kanonischen Recht*, Munich, Kommissionsverlag Karl Zink, 1958, 259.

⁴⁸ See SÁNCHEZ-GIL, *La presunzione di validità*, 18.

“Il termine *interpretari* è infatti proprio del diritto sostantivo dell'epoca classica, mentre il termine *praesumere* sarà collegato alla prova solo dal diritto giustiniano con il consolidamento delle disposizioni riguardanti il processo (ibid., 18, n. 24).

⁴⁹ “Così, di fronte a casi in cui la volontà interna rimane inabborabile, i giureconsulti classici danno per lo più soluzioni assolute dettate da ragioni di giustizia, pur rimanendo sconosciuta la volontà reale, nelle quali tendo a risolvere secondo quello che ritengono più equo ed utile non solo per il caso concreto ma anche per la società. Di conseguenza, propriamente non si presume la volontà reale, ma si adopera una soluzione

This became standard in classical law for interpreting the intention behind certain declarations. The classical texts indicate that if one pronounces certain words, then he is bound to fulfill what he declared. In such circumstances, the person's words would have to be interpreted according to the meaning that they would have in current usage.⁵⁰ This came to be expressed in one of the rules of law at the end of the *Digest*: "In uncertain matters we look for that which has the appearance of truth or which is usually likely to occur."⁵¹ In this way, the law had certain "imposed assumptions" regarding a person's internal will until the existence of a different will was proven "and this without giving it the name of presumption and without suspecting the transcendence that such a way of reasoning would have in the future."⁵²

Assumptions about a person's internal will are particularly relevant to ecclesiastical penal law, since the Church only considers an action or omission to be a delict if it is a sin. Yet, in the external forum, the ecclesiastical judge does not have direct access to the moral sphere of the person whereby he can achieve certainty regarding a person's moral imputability, which includes psychological imputability. Since one's ability to understand and to will are internal matters, the judge must make inferences about them based on external conduct.⁵³ To assist the judge in making a determination about the psychological and moral imputability of the accused, the Church provides a presumption of imputability.

assoluta o tassativa; per cui è possibile affermare che nella giurisprudenza classica tali ragionamenti erano regole interpretative di diritto sostanziale" (SÁNCHEZ-GIL, *La presunzione di validità*, 18).

⁵⁰ See SÁNCHEZ-GIL, *La presunzione di validità*, 19.

⁵¹ "In obscuris inspici solet, quod verisimilius est, aut quod plerumque fieri solet" (*D.* 2.14.39). See SÁNCHEZ-GIL, *La presunzione di validità*, 19.

⁵² "In definitiva, nelle soluzioni giurisprudenziali accennate è possibile rilevare risposte provvisorie e condizionate, nella forma di «supposizioni imposte» di una determinata volontà diversa; e questo senza dargli il nome di presunzioni e senza sospettare la trascendenza che avrebbe avuto nel futuro un tale modo di ragionare" (SÁNCHEZ-GIL, *La presunzione di validità*, 19).

⁵³ See H. KELLER, "De usu praesumptionum in iure canonico," in *Periodica de re morali, canonica, liturgica*, 23 (1934), 22*-27*.

The canon serves as a rule of interpretation whereby the legislator instructs the judge that he may presume that a delict that has been proven to be physically imputable to the accused is also psychologically and morally imputable.⁵⁴

While the presumption of imputability is a rule of interpretation concerning the internal ability of the person to understand and to freely will, it is also a probable conjecture. As previously stated in section 2.2, De Paolis and Cito argued that “normally those who are sane act in a free, conscious, and voluntary way and, therefore, want to do what they do; acting coincides with understanding and willing.”⁵⁵ Likewise, D’Auria wrote: “normally, one who is sane acts in a free, conscious, and voluntary manner and, consequently, wants to do what he does.”⁵⁶

It is not at all unreasonable to assume that a person who has committed an action did so knowingly and willingly, especially when it comes to acts that are sanctioned as delicts. One must conclude then that the presumption of imputability, which is nothing more than a presumption that one has acted knowingly and willingly, is a probable conjecture.

⁵⁴ “Ici le juge se heurte à des problèmes difficiles, même très difficiles. Pour les résoudre, il faut avant tout un examen consciencieux du fait subjectif—l’auteur du délit connaissait—il suffisamment l’illégalité de son acte ? Sa décision de l’accomplir était-elle substantiellement libre ? On s’aidera pour répondre à ces questions des présomptions prévues par le droit. S’il est impossible d’établir la culpabilité avec une certitude morale, on s’en tiendra au principe : *in dubio standum est pro reo*,” (PIUS XII, Allocutio iis qui interfuerunt VI^o conventui internationali de ius poenali, 3 October 1953, in *AAS*, 45 [1953], 737, English translation in *The Catholic Mind*, 52 [1954], 113).

⁵⁵ V. DE PAOLIS and D. CITO, *Le sanzioni nella Chiesa: Commento al Codice di diritto canonico Libro VI*, Manuali, no. 8, Vatican City, Urbaniana University Press, 2008, 152.

⁵⁶ A. D’AURIA, *L’imputabilità nel diritto penale canonico*, Rome, Editrice Pontificia Università Gregoriana, 1997, 64.

4.2—Criticisms of the Presumption of Imputability

In section 2.2.2, it was noted that the consultors who developed the text of *CIC/83* believed that the presumption of *dolus* found in *CIC/17*, c. 2200, §2 should be eliminated, stating that “it seems less consistent with reason to presume also the intention of violating the law, which intention is required for *dolus* in canon law.”⁵⁷ Yet the revision found in *CIC/83* remained problematic for some authors, especially because of a possible conflict with the presumption of innocence.

4.2.1—J. Provost

When commenting on the draft schema for what would become Book VI, James Provost⁵⁸ found the presumption of imputability problematic because he considered it to be a presumption of guilt: “While a considerable relaxation of previous presumptions is contained in this provision, it still presumes guilt rather than innocence. This may be a legitimate presumption in itself but is hardly a common presumption for all peoples throughout the world [...] Certainly it is not contrary to Christ to presume people innocent, whereas it may be questionable that it is a specifically Christian insight to presume people to be guilty.”⁵⁹

⁵⁷ “[R]ationi minus consentaneum videtur praesumere etiam intentionem violandi legem, quae intentio ad dolum iure canonico requiritur (*Comm*, 2, 103).

⁵⁸ James Provost was a respected canonist who would go on to become a professor of canon law at the Catholic University of America.

⁵⁹ J. PROVOST, “Revision of Book V of the Code of Canon Law,” in *Studia canonica*, 9 (1975), 147.

4.2.2—T. Green

In his commentary on c. 1321, Thomas Green⁶⁰ considered the presumption of imputability in *CIC/83* to be better than the presumption of *dolus* in *CIC/17*. He noted that the burden of proof is “less stringent than in the former code.”⁶¹ Yet this change was still problematic in the opinion of Green:

the traditional Anglo-American presumption of innocence until one is proven guilty seems still more appropriate, since it better protects the reputation of alleged offenders by placing an even more stringent burden of proof on the institution. Church law should vindicate freedom, justice, and equity even more forcefully than civil law does. Accordingly, the code should presume purity of intent until the guilt of alleged offenders is formally demonstrated.⁶²

4.2.3—L. Eusebi

In 2023, a collection of forty-two essays on canonical penal law was published by Libreria editrice Vaticana, entitled *Diritto penale canonico: dottrina, prassi e giurisprudenza della Curia Romana*. One of the essays, specifically on the topic of the presumption of innocence, was written by Luciano Eusebi.⁶³

Eusebi, noting several shortcomings (*carenze*) with regard to protections for the accused, identified one of the shortcomings as the *vexata quaestio* of the presumption of imputability. He noted that, though the reference to imputability in c. 1321, §4 is a reference only to the capacity to understand and to will, one might be tempted to presume the entire subjective element of the crime.⁶⁴

⁶⁰ Thomas Green was the Stephen Kuttner Distinguished Professor of Canon Law at the Catholic University of America. He wrote the commentary on penal law for *CLSA Comm2*.

⁶¹ T. GREEN, Commentary on c. 1321, in *CLSA Comm2*, 1541.

⁶² GREEN, Commentary on c. 1321, 1541.

⁶³ Luciano Eusebi is a respected professor of Italian penal law at the Università Cattolica del Sacro Cuore in Milan.

⁶⁴ “Ma allora si dica, finalmente, che l’imputabilità canonica coincide, come nel codice penale italiano, con la (sola) capacità d’intendere e di volere. Altrimenti incombe la tentazione che venga presunta, finché non appaia altrimenti, l’intera colpevolezza soggettiva” (L. EUSEBI, “La presunzione di non

4.2.4—N. Bartone

In the same volume, an essay was contributed by Nicola Bartone,⁶⁵ who made an observation similar to that of Eusebi. He asserted that, based on c. 1321, §§2-3, there is a lack of clarity concerning subjective imputation, “i.e., the psychological connection that must exist between [criminal] behaviour and the value which is defended by the penal norm.”⁶⁶ He noted that §3 requires that punishment of a crime only be applied in instances of deliberate violations of the penal law, while §2 states that the transgressor is punished only when he is gravely imputable through *dolus* or *culpa*. Neither the terms “gravely” nor “imputable,” as linked to *dolus* and *culpa*, are defined.⁶⁷ Bartone continued:

In c. 1321, §4, it is established that imputability is presumed; however, the essence and foundation of imputability is not defined. The lack of definition of this fundamental legal entity, preliminary to the entire penal system, seems to become even more complicated given that in the previous §2 the legislative formula links “seriously imputable” to *dolus* and *culpa*. *Dolus* and *culpa*, however, are conceptual and practical terms pertaining to the psychological connection between the action (i.e., the cause) and the event (i.e., the effect), that is, they fall within the subjective imputation. They constitute the indispensable and preliminary structural element of the fact-crime (or rather connection or syntagm); they do not concern imputability, that is, the criminal’s ability to understand and will. If this were not the case, the judge would fall into the abusive error of evaluating the (presumed innocent) offender’s ability to self-determine before even identifying and determining the

colpevolezza nel diritto canonico,” in *Diritto penale canonico: Dottrina, prassi e giurisprudenza della Curia Romana*, *Annales doctrinae et iurisprudentiae canonicae*, no. 15, Vatican City, Libreria editrice Vaticana, 2023, 241).

⁶⁵ Nicola Bartone is a university professor of penal law and comparative penal law at the Università degli Studi di Salerno with special expertise in international penal law and the penal law of the European Union. He also serves as an advocate of the Holy See *ad utrumque forum*.

⁶⁶ “Dai §§2 e 3 non risulta chiaro il tipo di imputazione soggettiva, cioè quale debba essere il *nesso psichico* tra condotta e lesione del valore tutelato dalla norma penale” (N. BARTONE, “La tipicità del reato e della pena garanzia per l’innocente. La posizione canonica-statale-internazionale,” in *Diritto penale canonico: Dottrina, prassi e giurisprudenza della Curia Romana*, *Annales doctrinae et iurisprudentiae canonicae*, no. 15, Vatican City, Libreria editrice Vaticana, 2023, 114).

⁶⁷ “È richiesto il dolo, come statuito nel § 3, dove è scritto che il trasgressore viene punito quando viola la legge «deliberatamente» (cioè abbia agito con la consapevolezza e la volontà di causare con la sua condotta la lesione del valore tutelato dalla specifica norma sanzionata penalmente), oppure, come invece si legge nel precedente § 2, il trasgressore viene punito allorquando sia «gravemente imputabile», «per dolo o colpa»?

“E quale è il parametro del «gravemente» e quale è il significato di «imputabile», che viene collegato al «dolo o colpa?»” (BARTONE, “La tipicità del reato,” 114)

crime for which the subject must answer. Already, therefore, with this inversion of examination the principle of innocence is trampled upon.⁶⁸

The judge must first ascertain whether the fact (constituting the crime) exists and then whether, at the time the crime was committed, the offender was capable of understanding and willing.⁶⁹

To avoid the possibility of confusion in the interpretation and application, Bartone recommended that a definition of imputability be inserted into c. 1321. He recommended the definition given in the text of the 1930 Italian Penal Code: “No one can be punished for an act foreseen by law as a crime if, at the time in which it was committed, it was not imputable. One is imputable who has the capacity to understand and to will.”⁷⁰

4.2.5—P. Skonieczny

Piotr Skonieczny⁷¹ published an article criticizing the text of the current presumption of imputability and proposing its abrogation.⁷² Rather than summarizing all

⁶⁸ “Nel can. 1321 § 4 si statuisce che l’imputabilità si presume; non viene però definita quale sia la essenza e la consistenza della imputabilità. La mancata definizione di questa fondamentale entità giuridica, preliminare a tutto il sistema penale, sembra ancor più complicarsi dato che nel precedente § 2 la formula legislativa collega il «gravemente imputabile» al dolo e alla colpa. *Dolo e colpa* sono però termini, concettuali e pratici, attinenti al nesso psichico tra l’azione (cioè la *causa*) e l’evento (cioè il *risultato*), cioè rientrano nella *imputazione soggettiva*, costituiscono l’indispensabile e preliminare elemento strutturale del fatto-reato (o meglio nesso o sintagma); non attengono alla *imputabilità*, cioè alla capacità di intendere e di volere del reo. Se così non fosse il giudice cadrebbe nell’errore-abuso di valutare la capacità di autodeterminarsi del reo (presunto innocente) prima ancora di individuare e determinare il reato del quale il soggetto deve rispondere. Pertanto già con questa inversione di esame si calpesta il principio di innocenza” (BARTONE, “La tipicità del reato,” 114).

⁶⁹ “Il giudice deve accertare prima che sussista il fatto (costituente il reato) e poi se, al momento della commissione del fatto, il reo era capace di intendere e di volere” (BARTONE, “La tipicità del reato,” 114).

⁷⁰ “Al fine di evitare equivoci nella interpretazione e applicazione, sarebbe auspicabile un intervento normativo chiarificatore o ancor meglio immettere nel can. 1321 la definizione e individuazione di *imputabilità* eventualmente mutuabile da quella contenuta nell’art. 85 del Codice penale Italiano del 1930 (Codice Rocco): «Nessuno può essere punito per un fatto preveduto dalla legge come reato se, al momento in cui lo ha commesso, non era imputabile. È imputabile chi ha la capacità di intendere e di volere»” (BARTONE, “La tipicità del reato,” 115).

⁷¹ Piotr Skonieczny, O.P., is a Polish attorney who later studied canon law and became a professor of canon law at the Pontifical University of St. Thomas Aquinas in Urbe. He has since become a professor of canonical penal law at the Pontifical University of John Paul II in Krakow.

⁷² See P. SKONIECZNY, “La presunzione dell’imputabilità (can. 1321, §3 *CIC/83*): commento ad un disposto da abrogare,” in *Angelicum*, 90 (2013), 391-446.

the points of his article, the following summarizes some of the main points of his argument that are connected to his understanding of the presumption of innocence.

Skonieczny's article examined the presumption of imputability while comparing it with civil law. It begins with a comparison of continental and canonical doctrine on presumptions and the primacy of the presumption of innocence in secular legal systems. Of particular note is the emphasis that Skonieczny placed on the distinction in continental doctrine between substantive and procedural presumptions with presumptions in penal law relegated to the category of substantive presumptions and no longer considered to establish proof.⁷³ He rightly noted that this distinction between substantive and procedural presumptions is not common in canonical doctrine.⁷⁴

Regarding presumptions in penal law in particular, Skonieczny proceeded to describe how modern states have enshrined the presumption of innocence in their constitutional law or in laws protecting fundamental rights.⁷⁵ Likewise, modern states no longer have a general presumption of guilt (*colpevolezza*) or *dolus*.⁷⁶ Rather, modern states

⁷³ “Nelle codificazioni maggiori del XIX sec. Si separa il processo penale, in cui la presunzione non può costituire una prova; le presunzioni legali relative, infatti, si riferiscono piuttosto al diritto penale sostanziale che a quello processuale. Nelle stesse codificazioni civili la presunzione non è più riconosciuta soltanto come prova, ma pure come mezzo di valutazione e di apprezzamento delle prove. La presunzione non si limita più alla sede processuale, essendo inoltre un istituto del diritto sostantivo, sempre, tuttavia, distinguendoli, quello processuale da quello sostanziale” (SKONIECZNY, “La presunzione dell'imputabilità,” 393).

⁷⁴ “Nella letteratura canonistica a tal proposito non vi è alcuna riflessione riguardante la distinzione delle presunzioni formali e sostanziali oppure quelle operanti nel settore processualistico o sostanziale” (SKONIECZNY, “La presunzione dell'imputabilità,” 397).

Sánchez-Gil has written about the substantive and procedural nature of legal presumptions. See SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 70-71.

⁷⁵ See SKONIECZNY, “La presunzione dell'imputabilità,” 398.

⁷⁶ “A differenza dell'ordinamento canonico, nei codici penali oppure nei codici di procedura penale vigenti degli Stati moderni non si stabilisce, di regola, alcuna presunzione *generale* della colpevolezza o del dolo” (SKONIECZNY, “La presunzione dell'imputabilità,” 398).

require proof of the subjective element of the crime, while the legislator presumes the freedom of the human will.⁷⁷

Since presumptions are founded on maxims of experience, Skonieczny explained that belief in the free will of the human person could lead to a substantive presumption of *dolus*. In other words, if a person, who by nature is endowed with freedom of will, chooses to commit a criminal act, then one might presume that he did so with the intention of breaking the law. This presumption of *dolus* was articulated by the medieval glossators and functioned in both civilian and canonical doctrine even into the period of the Enlightenment. Defended by Feuerbach, it was included in the Bavarian penal code of 1813 but, in time, was downgraded to a human presumption.⁷⁸ Skonieczny emphasized that the presumption of guilt is a substantive presumption, which is not written in the law but presumed, rather than a procedural presumption. In this way it coexists with the procedural presumption of innocence, which is explicitly established in the law.⁷⁹ In modern civil law, he wrote, “the presumption of guilt is acknowledged only in exceptional cases, in case the

⁷⁷ “Nelle procedure penali degli Stati moderni si richiede, infatti, la prova dell’elemento soggettivo del reato e, di regola, non lo si fa. Il legislatore, invece, presuppone la libertà della volontà umana” (SKONIECZNY, “La presunzione dell’imputabilità,” 399).

⁷⁸ “Si può esprimere, infatti, la summenzionata massima di esperienza oltre alla verità sulla libertà della persona umana come la presunzione del dolo (*praesumptio doli*), nel senso della presunzione *iuris tantum* che vige sia nel campo sostanziale che in quello processuale. In tale accezione si diceva nel Medioevo tra i glossatori civilisti e canonisti: ‘provato il fatto, provato il dolo,’ in altre parole, dato il fatto, il dolo si presume (*facta laesione praesumitur dolus, donec probatur contrarium*). Il concetto della presunzione *iuris tantum* del dolo, sostanziale e processuale, vigeva come tale anche nell’epoca illuminista ed era presente ancora nel codice penale bavarese del 1813 del Feuerbach (*allgemeine praesumptio doli*), anche se fu declassato alla *praesumptio hominis* dalla giurisprudenza” (SKONIECZNY, “La presunzione dell’imputabilità,” 400-401).

⁷⁹ “Nondimeno, il concetto più popolare e presente negli ordinamenti penali attuali rinuncia alle conseguenze sostanziali del presupposto antropologico della libertà umana, proclamando l’unica vigenza della presunzione (processuale) di innocenza, conosciuta ancora nel diritto romano” (SKONIECZNY, “La presunzione dell’imputabilità,” 401).

subjective element was not able to be proved in some way (for example, in crimes of defamation, of smuggling, or road traffic, etc.).⁸⁰

Moving on specifically to the presumption of imputability, Skonieczny examined the origins of the presumption of *dolus* and the history of its development and eventual change to the presumption of imputability. Having noted that there is no presumption of *dolus* or imputability in the *Corpus iuris canonici*, he acknowledged that there are traces of the concept in the Decretals of Gregory IX,⁸¹ but that these traces articulate a maxim of experience or a presumption of the judge rather than a legal presumption in the technical sense.⁸² He stated that what began as a human presumption changed into a legal presumption of *dolus* due to a misinterpretation by the civil glossators.⁸³

Skonieczny then went on to explain the history of the formulation of the presumption of *dolus* in the *CIC/17* and the revisions that resulted in the *CIC/83*. He noted in particular the legislator's rationale for changing from a presumption of *dolus* to a presumption of imputability: "In the canonical system, it was neither reasonable nor justified to presume the *dolus* of the perpetrator of the delict, in which case is presumed

⁸⁰ "La presunzione della colpevolezza è ammessa soltanto in casi eccezionali, se qualora l'elemento soggettivo non potesse essere provato in alcun modo (ad es. nei reati di diffamazione, di contrabbando, del traffico stradale, ecc.)" (SKONIECZNY, "La presunzione dell'imputabilità," 402).

⁸¹ "Nel *Corpus Iuris Canonici* non vi era stabilita espressamente una presunzione dell'imputabilità, anche se qualche traccia di essa si può dedurre dal cap. I del Titolo 23 *de praesumptionibus* [sic] del Libro II delle *Decretali* di Gregorio IX e dal cap. IV del Titolo 39 *de sententia excommunicationis* del Libro V delle stesse *Decretali*" (SKONIECZNY, "La presunzione dell'imputabilità," 403).

⁸² "Da suddetti disposti medievali si vede che si tratta piuttosto delle massime di esperienza oppure, al massimo, delle presunzioni [sic] giudiziali (*praesumptiones hominis*) che delle presunzioni del diritto in senso tecnico (*praesumptiones iuris*), anche se le *Decretali* hanno avuto forza di legge" (SKONIECZNY, "La presunzione dell'imputabilità," 404).

⁸³ "In realtà, si proponeva una ricostruzione del dolo dalle circostanze: ciò che è più adeguato al concetto della presunzione *hominis* che a quella legale. Sotto l'influsso dei glossatori civilisti che hanno interpretato erroneamente le fonti del diritto romano in proposito, alla dottrina dell'*Abbas Antiquus* († 1296), secondo cui *in dubio in delictis praesumitur dolus*, è stata recepita nell'apparato al citato cap. I del Titolo 23 *de praesumptionibus* [sic] del Libro II delle *Decretali*" (SKONIECZNY, "La presunzione dell'imputabilità," 405).

not only the will to commit a delictual action or omission but also the intention to violate an ecclesiastical law.”⁸⁴

Skonieczny then went on to articulate his criticisms of c. 1321, §4⁸⁵ and the presumption that it contains. In addition to specific criticisms of lack of precision in the text of the canon, he was concerned about the use of the term “imputability” and the formula “*nisi aliud appareat.*” He emphasized that the current text does not express a true legal presumption because a legal presumption is in force until there is proof to the contrary. By changing the text to say that the presumption is in force unless it appears otherwise, Skonieczny believes that there is no longer a true legal presumption. He noted that some canonists still hold that c. 1321, §4 contains a legal presumption while others do not. Both groups of canonists, he wrote, take as a given that the presumption is procedural, rather than substantive. In this way, they both fall into error, according to Skonieczny, but he sided with the canonists who deny that c. 1321, §4 contains a true presumption.⁸⁶ In canon law, legal presumption and inversion of the burden of proof are two sides of the

⁸⁴ “Nell’ordinamento canonico non era razionale neppure giustificato presumere il dolo dell’autore del delitto, poiché in tale caso si presume, non soltanto la volontà di commettere un’azione o un’omissione delittuosa, quanto l’intenzione di violare una legge ecclesiastica” (SKONIECZNY, “La presunzione dell’imputabilità,” 411).

It is worth noting that Skonieczny betrays here a misunderstanding of the nature of *dolus* in ecclesiastical law by presuming that *dolus* requires the intent to violate an *ecclesiastical* law when in fact only intent to violate the *moral* law is required for *dolus*.

⁸⁵ Since he was writing long before Pope Francis’ reform of Book VI and its addition of an additional paragraph at the beginning of c. 1321, Skonieczny’s text refers to c. 1321, §3, which has since become c. 1321, §4.

⁸⁶ “Prima di esprimere la personale opinione, si deve notare che i sostenitori di ambedue le posizioni comprendono la presunzione, di cui al can. 1321, § 3 *CIC/83*, come istituto processuale. In realtà, la redazione del disposto commentato è come se fosse del tutto una presunzione in senso processuale e non sostanziale. Entrambe le teorie, però, non distinguono, in effetti, l’aspetto sostanziale da quello procedurale, come invece sono distinti nella teoria generale del diritto. In tale senso entrambe le opinioni cadono in errore. Si deve tuttavia condividere la seconda opinione in quanto nega il carattere della presunzione processuale (e, quindi, del tutto la presunzione “vera”) in rapporto al can. 1321, § 3 *CIC/83*” (SKONIECZNY, “La presunzione dell’imputabilità,” 418).

same coin. Since demonstrable proof is no longer required to overcome the presumption of imputability, there is no real inversion of the burden of proof.⁸⁷

Since the presumption of c. 1321, §4 can be overcome by appearances to the contrary, which is much more lenient than *CIC/17*, c. 2200, §2, Skonieczny wrote that the formula in the current text of the canon is a result of the principle *in dubio pro reo*. Yet, by allowing the presumption to be overcome by mere appearances to the contrary, however, Skonieczny argued that the presumption of innocence prevails over the presumption of imputability only once these contrary appearances are found, whereas the presumption of innocence should begin at the beginning of the process.⁸⁸ Similar to Eusebi, Skonieczny asserted that there is a risk that a tribunal may not ascertain the culpability of the accused because of the presumption of imputability.⁸⁹ According to Skonieczny, this is one reason why the presumption of imputability does not work as a procedural presumption.

Skonieczny also argued that the presumption of imputability fails from the perspective of substantive presumptions. He wrote that legislators, both civil and ecclesiastical, presume the liberty of the human agent in accomplishing criminal conduct.

⁸⁷ “Ovviamente, il disposto commentato non richiede una reale inversione dell’onere della prova, non esigendo per niente una dimostrazione [sic] probatoria. Dal punto di vista tecnico-giuridico (processuale) tale figura, di cui al can. 1321, §3 *CIC/83*, non può essere chiamata ‘presunzione’” (SKONIECZNY, “La presunzione dell’imputabilità,” 419).

⁸⁸ “Sembra, allora, che questa locuzione sia una delle conseguenze del principio *in dubio pro reo* e, nello stesso momento, del principio della presunzione di innocenza in quanto entrambi i principi si compenetrano e influenzano a vicenda. Nel diritto penale canonico prevale, quindi, il principio della presunzione di innocenza sulla presunzione dell’imputabilità (e sull’onere della prova). Questa supremazia del principio di innocenza nel diritto penale canonico non esiste però fin dall’inizio del procedimento penale, ma soltanto dopo la sollevazione di qualche dubbio da parte dell’imputato” (SKONIECZNY, “La presunzione dell’imputabilità,” 420-421).

⁸⁹ “Teoricamente, il disposto commentato, inteso come presunzione anche processuale, rischia di non accertare la colpevolezza dell’imputato, la quale, comunque, si presume” (SKONIECZNY, “La presunzione dell’imputabilità,” 423).

This presumption is only overcome when there are proofs to the contrary.⁹⁰ This would not be a problem, wrote Skonieczny, if this were confined to the realm of substantive presumption, but many canonists, following the example of the legislator, interpret it as a procedural presumption, which necessarily conflicts with the presumption of innocence.⁹¹

Skonieczny then went on to analyze the meaning of imputability in c. 1321, §4, but this crucial part of his argument will be described and analyzed in detail in the following section.

In the concluding section of his article, Skonieczny advocated for the abrogation of the presumption of imputability (and the presumption of deliberateness in the *CCEO*, as well) by summarizing his main points. First, the presumption of imputability is contrary to the *in dubio pro reo* principle, the *nullum crimen sine culpa* principle, and “the fundamental right to the presumption of innocence: the guilt of the accused must always be proven.”⁹² Second, the presumption of *dolus* is contrary to today’s legal culture and undermines the Church’s witness to justice, fairness and freedom.⁹³ Third, the presumption does not

⁹⁰ “Eppure, nel campo del diritto penale *sostanziale*, come punto di partenza, il legislatore (ecclesiastico e statale) presuppone la piena libertà dell’agente nel realizzare la sua condotta delittuosa. Il presupposto della libertà umana, infatti, ha un carattere *antropologico* e, pertanto, non è sottoposta a prova. In definitiva, nel diritto penale *sostanziale*, non in quello processuale, vale la presunzione dell’imputabilità soggettiva. Detta presunzione sostanziale può essere tolta soltanto nei casi delle scusanti provate” (SKONIECZNY, “La presunzione dell’imputabilità,” 425).

⁹¹ “Sembra, purtroppo, che i canonisti, seguendo il legislatore del Codice latino vigente, mescolino i due settori: quello processuale e quello sostantivo. [...] Detto disposto, dunque, non si può estendere alla dimensione processuale, in quanto esso non abolisce il *favor innocentiae*” (SKONIECZNY, “La presunzione dell’imputabilità,” 425).

⁹² “I legislatori dei codici penali odierni, infatti, mai hanno previsto questa presunzione, in quanto contraria al diritto fondamentale alla presunzione di innocenza: la colpevolezza dell’imputato deve essere sempre provata” (SKONIECZNY, “La presunzione dell’imputabilità,” 441).

⁹³ “Nel contesto giuridico attuale, con la presunzione di innocenza, nessun fedele capisce la presunzione dell’imputabilità o del dolo: essa è contraria alla cultura giuridica odierna. Perché il diritto della Chiesa cattolica non dovrebbe essere il custode della giustizia, equità e libertà come gli altri ordinamenti giuridici degli Stati moderni?” (SKONIECZNY, “La presunzione dell’imputabilità,” 442).

provide any help in achieving moral certitude.⁹⁴ Skonieczny argued that a simple human presumption of imputability is sufficient, since it is already an implicit presumption of the legislator, and that, by means of indirect evidence, the subjective element of the crime must be proven.⁹⁵

4.3—Elements of a Response to the Critics

To respond to these criticisms, the following sections draw from the information in the previous chapters and provide additional information for demonstrating how the presumption of imputability is compatible with the presumption of innocence.

In the previous chapter, an explanation of the presumption of imputability was already given; however, the following is a deeper examination of the meaning of the presumption in light of disagreements among canonical scholars. First, the meaning of the word “imputability” as it is used in c. 1321, §4 is clarified. Then, the procedural significance of the presumption is examined based on canonical doctrine. This will include an examination of the significance of presumptions on the burden of proof and further reflection on the possibility of reversing the burden of proof in penal cases.

⁹⁴ “Come è stato già detto e come è stato osservato nella dottrina canonistica tedesca, questa presunzione non dà alcun appoggio (*eine Stütze*) e non aiuta alla formazione della certezza morale per decidere la causa secondo il can. 1608, §1 *CIC/83*” (SKONIECZNY, “La presunzione dell’imputabilità,” 442).

⁹⁵ “Basta, in realtà, la presunzione semplice, *hominis*, adoperata dal giudice o dal superiore. [...] Pertanto si deve desumere (interiore) l’elemento soggettivo dai segni esteriori, cioè indirettamente. Solo dopo aver raccolto tutte le prove e gli indizi capaci di indicare la sussistenza del dolo o della colpa, e possibile determinare la massima di esperienza e condurre il sillogismo giudiziale (la presunzione semplice). Non si capisce, perché l’elemento soggettivo del delitto canonico non debba seguire le stesse regole dell’accertamento previsto per gli altri elementi essenziali, soggettivi e oggettivi, della fattispecie delittuosa. [...] Infine, si deve notare che un’abrogazione del can. 1321, § 3 *CIC/83* aiuterebbe paradossalmente a scoprire la presunzione (oppure, forse meglio, il presupposto) *del legislatore* della libera volontà della persona umana e della capacità generale di delitto” (SKONIECZNY, “La presunzione dell’imputabilità,” 442-443, 445).

4.3.1—The Proper Interpretation of “Imputability” in c. 1321, §4

It is essential that laws be clearly written so that they can be properly observed, but this is especially the case when dealing with penal law. Thus, c. 18 reads: “Laws which establish a penalty, restrict the free exercise of rights, or contain an exception from the law are subject to strict interpretation.” It is, therefore, particularly problematic that the meaning of “imputability” in c. 1321, §4 has not been readily agreed upon by canonists. Skonieczny identifies three different interpretations that have been used by various scholars.

4.3.1.1—Interpretation I: Imputability Is *Dolus*

Though c. 1321, §4 only presumes imputability and no longer presumes *dolus* as *CIC/17*, c. 2200, §2 did, the significance of the change has not always been clear to some scholars. Skonieczny identified Francesco Nigro and Antonio Calabrese as authors who interpreted imputability to mean *dolus*. Nigro acknowledged that the change in terminology was a response to the argument that it is less in accordance with reason to presume that one wanted to intentionally violate the law, but he then goes on to say that the presumption of imputability indicates that one is to presume that a delictual act is imputable to the person and that the person must be presumed to have acted knowing the law and voluntarily carrying out the act.⁹⁶ This seems, however, to be equivalent to *dolus*.

⁹⁶ “[Il canone] ulteriormente evidenzia questa scelta in favore del delinquente, liberandolo dalla presunzione del dolo, di cui al can. 2200, § 2 del CIC 17 [...]. Se a prima vista la soppressione della presunzione del dolo è stata giustificata nei *Praenotanda* dello schema, perché sembra meno conforme alla ragione presumere che si voglia violare intenzionalmente la legge, come richiede precisamente il dolo in senso canonico, si è cercato di compensare trasferendo la presunzione dal dolo alla imputabilità, cioè l’atto fisico delittuoso deve ritenersi imputabile a chi lo ha commesso e si deve presumere che egli abbia agito conoscendo la legge e ponendo volontariamente l’atto contrario” (F. NIGRO, Commentary on c. 1321, in *Commento al Codice di diritto canonico*, P. PINTO [ed.], Studia Urbaniana, no. 21, Rome, Urbaniana University Press, 1985, 759).

Calabrese arrives at the conclusion that the canon retains a presumption of *dolus* by a peculiar argument:

But since the source of imputability [...] is not only intent, but also negligence, it should be deduced that [...] both intent and negligence are presumed, depending on the case. However, the current law, for penalties to be incurred, generally requires imputability for malice, and not also for negligence, unless this is provided for by law or precept; therefore, it must be concluded that even in the current legal system it is only *dolus* or imputability due to *dolus* that is presumed [...] with the exception of cases expressly established by law, in which, since guilt is sufficient to constitute the crime, guilt or imputability due to negligence is to be presumed.

In this attempt to make sense of the meaning of “imputability” in this context, Calabrese ends up confusing imputability and responsibility in such a way that the accused continues to be burdened with a presumption of *dolus* in the majority of cases.

American canonists not mentioned by Skonieczny have also asserted that the presumption of imputability is a presumption of *dolus*. Green claimed that the presumption of imputability “seems to involve *dolus*, or criminal intent; yet since *culpa*, or negligence, at times grounds imputability, this factor must also be considered.”⁹⁷ He then went on to state in the quote above, that the code “should presume purity of intent.” There seems to have been a bit of confusion in Green’s understanding since, though he stated that *culpa* must be considered, he still interpreted the canon as failing to presume “purity of intent.”

This interpretation seems to be shared by Jenkins as well. In a paper delivered at the annual convention of the Canon Law Society of America in 2004, Jenkins asserted that the current law does not presume guilt but that it “does presume legal responsibility—willful and malicious intent—once an act in violation of the criminal law has been established. In this way, the canonical prosecutor does not as a rule bear the burden of

⁹⁷ GREEN, Commentary on c. 1321, 1540-1541.

proving malicious intent once he has proven the commission of a criminal act, and the court does not indicate circumstances require positive proof of legal responsibility.”⁹⁸

Skonieczny rejected the interpretation of authors that saw a presumption of *dolus* in the presumption of imputability because their interpretation “is obviously contrary to the historical and literal interpretation of c. 1321 §[4].”⁹⁹

4.3.1.2—Interpretation II: Imputability Is Understanding and Free Choice

Skonieczny gives a second definition of “imputability” in c. 1321, §4 as general imputability, without specifying *dolus* or *culpa*. He states that this is the more common opinion. In a footnote he lists the many authors who espoused this interpretation, including De Paolis, Luigi Chiappetta, Marzoa, Sánchez-Gil, and Pighin, among others.¹⁰⁰ Though this is the most common opinion, Skonieczny rejects this interpretation claiming that it is

contrary to the literal interpretation of c. 1321, §[4], which establishes *imputabilitas*, and not the freedom of the acting subject, as the followers of this theory wish. From a logical point of view, moreover, its supporters presuppose a certain contradiction between “generic imputability” and “specific *dolus* or specific *culpa*.” the legislator of *CIC/83* in fact, *contrary* to *CIC/17*, provides for presumed imputability and not *dolus*. Instead, between imputability and *dolus* (and *culpa*), there is the logical relationship of correlativity: imputability does not exist without *dolus* or *culpa*, because only these two elements are the sources of imputability [...].¹⁰¹

⁹⁸ R. JENKINS, “The Charter and Norms Two Years Later: Towards a Resolution of Recent Canonical Dilemmas,” in *CLSA Proceedings*, 66 (2004), 117.

⁹⁹ “Tale opinione, tuttavia, non può essere condivisa, in quanto è evidentemente contraria all’interpretazione storica e letterale del can. 1321, § 3 *CIC/83*. Se il legislatore [*sic*] ecclesiastico avesse voluto conservare la disciplina precedente, non avrebbe avuto alcun senso cambiare la formulazione del disposto commentato” (SKONIECZNY, “La presunzione dell’imputabilità,” 429).

¹⁰⁰ See SKONIECZNY, “La presunzione dell’imputabilità,” 430, n. 152.

¹⁰¹ “Essa è contraria all’interpretazione letterale del can. 1321, § 3, il quale stabilisce dell’*imputabilitas*, e non della ‘libertà’ del soggetto agente, come desiderano i seguaci di tale teoria. Dal punto di vista logico, inoltre, i suoi sostenitori presuppongono una certa contraddizione tra ‘l’imputabilità generica’ e ‘il dolo specifico o la colpa specifica’: il legislatore del *CIC/83* infatti, *a contrario* del *CIC/17*, dispone dell’imputabilità presunta e non del dolo, *si esclude* la presunzione del dolo. Invece, tra l’imputabilità e il dolo (e la colpa) c’è il rapporto logico della correlatività: l’imputabilità non esiste senza dolo o senza colpa, perché soltanto questi due elementi sono le fonti dell’imputabilità (cfr. can. 1321, § 1 *CIC/83*); in altre parole, questi istituti penali sono in relazione simultanea tra di loro” (SKONIECZNY, “La presunzione dell’imputabilità,” 431).

Skonieczny seems to think that the second interpretation denies the intrinsic connection between imputability and the two sources of imputability—*dolus* and *culpa*. Yet this is not at all the case. Rather, c. 1321, §4 states that the judge presumes that the accused has the prerequisites of advertence and free will to have acted with either *dolus* or *culpa*.

4.3.1.3—Interpretation III: Imputability Is *Dolus* and *Culpa*

The third interpretation that Skonieczny identifies is the interpretation that, in c. 1321, §4, imputability refers to both *dolus* and *culpa* and, therefore, presumes guilt.¹⁰² He cites an article by Marianus-Alphonsus Myrcha in which it is asserted that both sources are presumed simultaneously, thereby, making the presumption stronger than the presumption of *dolus* in *CIC/17*.¹⁰³ It is this third interpretation that Skonieczny considers to be the correct one.¹⁰⁴

4.3.1.4—The Proper Interpretation of Imputability

Skonieczny had argued that the first interpretation (imputability=*dolus*) was incorrect because it could not account for the history of how the canon was drafted. Yet, he ends up accepting the third interpretation (imputability=*dolus* and *culpa*), which also

¹⁰² “L’ultima teoria sostiene che la presunzione dell’imputabilità sia più severa di quella del dolo, perché comprende non soltanto questo, ma pure la colpa (*sic!*)” (SKONIECZNY, “La presunzione dell’imputabilità,” 432; the “sic!” is original).

¹⁰³ “Constructio haec est contra can. 2203 § 1 et in omnibus codicibus poenalibus civitatum non praesumitur culpa, praesumitur solummodo dolus. Deinde *imputabilitas* est vero *dolus aut culpa*. Praesumptio imputabilitatis est ergo *praesumptionem utriusque speciei imputabilitatis*, quod in comparatione cum Codice Juris Canonici, can. 2200 § 2, est dilatatio praesumptionis doli in culpam et quod in comparatione cum Codice Juris Canonici est acutio responsabilitatis” (M.-A. MYRCHA, “De lege ferenda in iure poenali canónico animadversiones,” in *Prawo Kanoniczne*, 18 [1975], 29).

¹⁰⁴ “Si deve condividere pertanto questa teoria, la quale affonda le sue radici nel termine *imputabilitas*” (SKONIECZNY, “La presunzione dell’imputabilità,” 432).

cannot account for the history of how the canon was drafted. In the *Praenotanda* of the 1973 schema for Book VI, it is written:

The presumption of malice (CIC c. 2200, § 1) is suppressed, there remains only the presumption of imputability: for if a presumption of malice can be allowed (though it is not always) in the penal law of States, since an intention of placing the act or omission by which the delict is committed can be reasonably presumed, it seems less fitting to extend the presumption to the intention to violate the law, an intention that is required for malice in canon law.¹⁰⁵

In light of this history, the drafters of the canon could not have intended to strengthen the presumption, which the third interpretation presumes, and certainly did not intend to presume both *dolus* and *culpa* simultaneously, which is inherently contradictory.

The formulation of c. 1321, §4 lends itself to a possible misunderstanding due to ambiguity in the term “imputability.” In section 2.1.3, it was stated that the subjective element of a delict is imputability; however, the entire subjective element of the delict is not what is presumed in c. 1321, §4. As the majority of canonical authors have stated, the correct interpretation of what is being presumed in c. 1321, §4 is the capacity to commit a delict, i.e., the ability to understand and to freely choose. This leaves the judge with the duty of ascertaining whether or not the accused is guilty of a delict *ex dolo* or *ex culpa*. Since the accused is presumed to have the capacity to commit a delictual act, then he or she must have done so either *ex dolo* or *ex culpa*.

4.3.2—The Procedural Significance of c. 1321, §4

In a penal process, once a causal link has been proven between the delictual act and the accused that is physical, psychological, moral, and legal, the guilt of the accused can

¹⁰⁵ *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur*, Vatican City, Typis polyglottis Vaticanis, 1973, 7, English translation in M. HUGHES, “The Presumption of Imputability in Canon 1321, § 3,” in *Studia canonica*, 21 (1987), 22.

be declared. Since imputability requires that the accused be acting with understanding and free will, a judge trying to ascertain if there is proof of psychological and moral imputability could have the difficult task of delving into the psychological and moral state of the accused at the time of the delictual act. For this, c. 1321, §4 assists the judge by providing the presumption of imputability.¹⁰⁶ Michael Hughes explained its significance: “It means that, given that the external act that is complained of has been shown to be the accused’s act, an actual proof is not required that the accused person was perfectly *compos mentis* at the time; i.e., it is presumed that his or her act results from a deliberate intention or (in a proper case) from his or her negligence; that is presumed ‘nisi aliud appareat,’ ‘unless it appears otherwise.’”¹⁰⁷

In light of the fact that c. 1526, §2, 1° states that matters presumed by the law do not need proof, how should one understand the presumption of imputability from a procedural point of view? This question will be answered by examining the role of presumptions in penal cases, clarifying what is and is not presumed, and examining the possibility of reverse burdens in penal processes and when they can be justly employed.

4.3.2.1—Legal Presumptions in Penal Cases

It was explained in section 3.2.2 that the judge must achieve moral certitude before issuing a sentence. As c. 1608, §3 states, the judge “must appraise the proofs according to the judge’s own conscience, without prejudice to the prescripts of law concerning the efficacy of certain proofs.” Based on this canon, Juan García Faílde observed that the judge

¹⁰⁶ See A. D’AURIA, “La presunción de inocencia en el derecho penal canónico,” in *Ius canonicum*, 64 (2024), 21.

¹⁰⁷ HUGHES, “The Presumption of Imputability in Canon 1321, § 3,” 28.

has the freedom to evaluate the evidence obtained in a trial, but then he goes on to say that “this liberty disappears in relation to those evidentiary facts (*hechos indiciarios*) whose value is established by means of a presumption of law.”¹⁰⁸

Legal presumptions do restrict the liberty of the judge in some sense. Usually, a legal presumption stands until the contrary is proven. To overturn a legal presumption there must either be direct evidence that proves the conjecture to be false in the given circumstance or indirect evidence in the form of a vehement or most grave human presumption that gives the judge moral certitude that the conjecture is false in the given circumstance.¹⁰⁹ In the case of the presumption of imputability, however, the judge does

¹⁰⁸ “Sabido es que el juez eclesiástico tiene por regla general libertad para apreciar el valor de las pruebas y el alcance de los hechos probados; pero esta libertad desaparece en relación con los hechos indiciarios cuyo valor es establecido por una presunción «de derecho»” (J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico: Estudio sistemático-analítico comparado*, Salamanca, Universidad Pontificia de Salamanca, 1984, 155).

“In tal caso, quando cioè la mancanza di certezza circa il fatto da giudicare impedisce di pronunciare un giudizio positivo sul merito della causa, la legge, ed in particolare l'ordinamento dei processi, danno al giudice regole obbligatorie sopra il modo di procedere, nelle quali le *praesumptiones iuris* e i *favores iuris* hanno una importanza decisiva. Di queste regole di diritto e di procedura il giudice non può non tener conto. Sarebbe però da riguardarsi come una esagerata o erronea applicazione di tali norme e come una falsa interpretazione della volontà del legislatore, se il giudice volesse a quelle ricorrere, quando si ha non solo una quasi-sicurezza, ma una certezza nel proprio e vero senso. Contro la verità e la sua sicura conoscenza non si danno né presunzioni né favori di diritto” (PIUS XII, Allocutio ad praelatos auditores ceterosque officiales et administratos Tribunalis S. Romanae Rotae necnon eiusdem Tribunalis advocatos et procuratores, 1 October 1942, in *AAS*, 34 [1942], 339).

¹⁰⁹ “Quapropter, ex una parte iudicis est valorem indiciorum et praesumptionum aestimare atque edicere quannam allatae praesumptiones probandi vim attingant et praesumptionem juris evertere valeant; ex altera vero parte, cum agatur de praesumptionibus hominis, seu de praesumptionibus doctrinalibus et jurisprudentialibus contra aliquam explicitam praesumptionem juris, concludentibus argumentis et circumstantiis casus peculiaris desumptis, demonstrandum est praesumptionem juris in casu reapse superari” (M. POMPEDDA, “De usu praesumptionum contra matrimonii valorem,” *L'Année canonique*, 22 [1978], 35).

“Denique *gravissimum* seu indubitatum est illud quod parit assensum moraliter certum et excludentem omnem formidinem errandi” (ibid., 38).

“Igitur dicendum est *praesumptionem ex indiciis gravissimis plene probare*, quod valet etiam in causis arduis, veluti in re criminali aut in causis matrimonialibus: nam nec lex nec ratio impedit quominus in eis certitudo moralis acquiratur etiam ex indiciis gravissimis, quae nullum dubium in mente iudicis relinquunt” (ibid., 40).

“Denique praesumptio hominis, quae vocatur gravissima sive vehemens, vel violenta, probationem quidem in contrarium absolute non excludit; at imprimis hoc ipsum onus probandi transfert in adversarium, et nisi is evidentibus argumentis contrarium probarit, pro veritate accipitur [...]” (F. WERNZ and P. VIDAL, *Ius canonicum*, vol. 6, Rome, Apud Aedes Universitatis Gregorianae, 1927, 469).

See SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 65.

not need moral certitude to overcome the presumption because it is overcome by appearances to the contrary rather than proof.¹¹⁰

The judge's liberty does not disappear when there is a legal presumption in penal trials. Pope Pius XII addressed this very issue:

The human Judge [...] has the duty, before publishing the judicial sentence, to form a moral certainty, which is to say one that excludes every reasonable and serious doubt regarding the external fact and the internal culpability. He does not have, however, an immediate vision of the interior state of the accused, as it was in the moment of action; on the contrary, most times he is not in a position to reconstruct with full clarity from the evidence [...] But this lack and impossibility should not be exaggerated, as if it were ordinarily impossible for the human Judge to achieve sufficient security and, therefore, a solid basis for the sentence. According to the cases, the Judge will not fail to consult specialists concerning the capacity and responsibility of the alleged offender [...] *If, despite all these concerns, an important and serious doubt still remains, no conscientious judge will proceed with a conviction.*¹¹¹

Sometimes a judge may encounter a conflict between his appraisal of evidence in conscience and the appraisal of evidence according to law. Having reflected on the possibility of this situation, Diego-Lora, based on his examination of canonical doctrine

¹¹⁰ Elizabeth McDonough asserted that moral certitude is required to overturn the presumption of imputability in *CIC/83*: "It should be noted immediately that although moral certitude is required for overturning the presumption of imputability in canon 1321, §3, a recognizably lesser degree of prevailing weight of evidence having value in law and jurisprudence should be required to reach the moral certitude necessary for overturning a presumption that holds *nisi aliud appareat* than is required to reach the moral certitude necessary for overturning a presumption that holds *donec contrarium probetur*" (E. MCDONOUGH, "A *Novus Habitus Mentis* for Sanctions in the Church," in *The Jurist*, 48 [1988], 737). She seems to have been saying that there must be moral certitude of the appearances to the contrary, which is far less than the moral certitude necessary to consider the contrary of the presumption to have been proved. It seems, in the opinion of this author, that moral certitude can only be had of proof, not of appearances.

This appears to indicate some confusion in McDonough's thought regarding moral certitude. Further evidence of this confusion or, at least, lack of precision on the matter of moral certitude can be seen when she wrote about "[a]rriving at moral certitude for a *non constat* or *constat*" (MCDONOUGH, "A *Novus Habitus Mentis*," 737). There is no need, however, to arrive at moral certitude for a verdict of *non constat* in marriage cases (to which she is referring in the text) or penal cases.

¹¹¹ "Il giudice umano [...] ha il dovere di formarsi, prima di emanare la sentenza giudiziale, una certezza morale, vale a dire che escluda ogni ragionevole e serio dubbio circa il fatto esteriore e l'interna colpevolezza. Ora però egli non ha una immediata visione dello stato interiore dell'imputato, come era nel momento dell'azione; anzi il più delle volte non è in grado di ricostruirlo con piena chiarezza dagli argomenti di prova [...] Ma questa mancanza e impossibilità non deve essere esagerata, come se fosse d'ordinario impossibile al giudice umano di conseguire una sufficiente sicurezza, e quindi un solido fondamento per la sentenza. Secondo i casi, il giudice non mancherà di consultare rinomati specialisti sulla capacità e responsabilità del presunto reo [...] Se nonostante tutte queste premure, rimane ancora un importante e serio dubbio, Nessun Giudice coscienzioso procederà a una sentenza di condanna" (PIUS XII, *Nuntia iis qui interfuerunt VI Conventui nationali Sodalium Consociationis ex iuris peritis catholicis Italiae*, 5 December 1954, in *AAS*, 47 [1955], 65, 67).

and jurisprudence, wrote in favour of the freedom of the judge when it comes to achieving moral certitude. He argued that the rules on the analysis of evidence should not distort the moral certitude of the judge because “[t]his could make it seem as if the judge were only an instrument for the mechanical application of positive law and not the author and person responsible for the justice that the judgment requires for each specific case, albeit subject to law.”¹¹² He went on to further explain his reasoning, which merits a lengthy quote:

Therefore, we understand that the legal criteria of evaluation of the proof, that appear in the letter of the law as binding, are not really anything more than guidelines that should be taken into account, given that they are the result of juridical experience, and they are offered by the legislator as assistance and collaboration to the judge when he is pronouncing judgment. However, under no circumstances should they restrict or force his conscience to the extent that the judge could come to a position where he did not consider the judgment as his own, but rather the fruit of the law that imposes the evaluation criteria.

Consequently, these legal rules should serve as guidelines and working material provided by the legislator, which is why the judge must take them into account when pronouncing the judgment. The judge must either rely on them completely, if the moral certainty that in conscience he acquires regarding the facts in dispute coincides with the sources of certainty provided by the legal evaluation of evidence, or not follow them, in which case the judge must, in the reasoning of the judgment, show the reasons that have led him not to follow the established criteria of legal evaluation in the given case.¹¹³

Taking these points into consideration, it is clear that the judge’s hands are not tied by the presumption of imputability. He is free to obtain additional proofs *ex officio* and may have the duty to do so, since c. 1452, §2 states that “the judge can supply for the negligence of the parties in furnishing proofs or in lodging exceptions whenever the judge

¹¹² C. DE DIEGO-LORA, Commentary on c. 1608, in *Exegetical Comm*, vol. 4/2, 1465.

¹¹³ *Ibid.*

“Cuando los criterios interpretativos personales del juzgador contradicen a los generales, deberá razonar y explicar fundadamente la peculiaridad concreta de su dictado judicial” (R. RODRÍGUEZ-OCAÑA, “Certeza moral en las causas penales, algunos obstáculos que se pueden presentar para alcanzarla,” in *Ius canonicum*, 61 [2021], 789).

“Invero la presunzione *iuris* si applica «in quanto tale» solamente nel caso in cui il giudice «rimane in situazione di dubbio» nei confronti del fatto presunto, il quale di per sé resta ancora incerto nell’animo del giudice nonostante la presunzione della legge. In questo senso sembra artificioso affermare che le presunzioni *iuris* sostituiscono la certezza del giudice per una sorta di «certezza legale», oppure che le presunzioni legali costituiscono di fatto una parziale deroga del principio del libero apprezzamento delle prove da parte del giudice. Il giudice deve valutare—seguendo proprio questo principio—sia le prove prodotte, sia gli indizi, sia le presunzioni legali applicabili al caso, cercando di raggiungere la personale certezza morale, potendo—ma anche dovendo—applicare la presunzione *iuris* nel caso in cui, dopo aver valutato le prove e gli indizi prodotti, rimanga personalmente in situazione di dubbio (SÁNCHEZ-GIL, *La presunzione di validità*, 69-70).

considers it necessary in order to avoid a gravely unjust judgment, without prejudice to the prescripts of can. 1600.”¹¹⁴ If the judge sees that there is evidence that gives the appearance that the delict was not committed consciously and freely, then additional proof is needed. The fact also remains that the judge must arrive at moral certitude regardless of the presumption. As Hughes explained,

[t]he *inquisitional* canon law process leaves the fact-finding to the judge, as well as the definitive judgement on the issue. In his hands too is the dynamic of the trial. Canon law necessarily has norms to guide the judge in these tasks. Here, the presumption of imputability takes the form of a direction in the law itself to the tribunal as to how it is to assess the evidence it has received: it will presume that a person intended to do what he or she did do, but if any doubt is raised then that doubt has to be resolved, for the tribunal must arrive at moral certitude to make a judgment of guilt.¹¹⁵

4.3.2.2—The Subjective Element of the Delict Is Not Ignored Due to the Presumption

Once there is proof to the point of moral certitude of the objective element of the alleged delict, the presumption of imputability does not indicate that the subjective element is to be ignored by the judge. Rather, this presumption only presumes that the accused had the requisite ability to deliberate and freely choose such that his act can be imputed to him. This interpretation can be supported by three arguments from the text of *CIC/83*.

First, once the objective element has been proven and imputability is presumed, most canonists would hold that the judge must still ascertain the source of imputability—*dolus* or *culpa*. This is because the presumption in c. 1321, §4 does not presume either source of imputability.¹¹⁶ It is necessary, therefore, that the judge consider proofs relevant to the subjective element of the crime and examine the imputability of the accused so as to

¹¹⁴ Cf. *CCEO*, c. 1110, §2.

Presentare prove ed eccezioni “possono essere presentate dal giudice sempre, di propria iniziativa. Anche in questo caso si stabiliscono due condizioni: supplire la negligenza delle parti ed evitare una sentenza ingiusta” (M. ARROBA CONDE, *Diritto processuale canonico*, 7th ed., Rome, Editiones Institutum Iuridicum Clarentianum, 2020, 340).

¹¹⁵ HUGHES, “The Presumption of Imputability in Canon 1321, § 3,” 33.

¹¹⁶ See D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 23.

determine whether or not the accused acted with *dolus* or *culpa*, especially since c. 1321, §3 exempts delinquents from punishment for most crimes committed *ex culpa*.

Second, the legislator has indicated various exempting, mitigating, and aggravating circumstances for delicts (cc. 1323-1326). Many of these circumstances are relevant because of their influence on imputability. Ordinarily, the accused should raise the issue of exempting or mitigating circumstances; however, the judge should not ignore such matters simply because the accused does not offer evidence of them. A conscientious judge must evaluate any evidence that would indicate such circumstances were present when the alleged delict was committed.

Thirdly, c. 1345 allows the judge to abstain from imposing a penalty in some circumstances if the imputability of the offender was lessened: “Whenever the offender had only the imperfect use of reason or committed the delict out of necessity or grave fear or the heat of passion [...] from drunkenness or a similar mental disturbance, the judge can even abstain from imposing any penalty if he thinks that reform of the person can be better accomplished in another way.” Since these elements that impact imputability are also relevant to determining a sentence, it is clear that the legislator does not intend for the judge to merely presume the entire subjective element based on c. 1321, §4.¹¹⁷

¹¹⁷ Even under the *CIC/17*, which had an explicitly stated presumption of *dolus*, there was not a presumption of the entire subjective element of the delict. Not only were there canons pertaining to the circumstances of the crime, but there were also canons reminding the judge of the duty to temper the imposed penalty based on the imputability of the delict. For example, c. 2218, §§1-2 stated:

§1. In applying penalties, equitable proportion must be observed with the delict, taking into consideration imputability, scandal, and harm; wherefore there must be considered not only the object and gravity of the law but also the age, knowledge, training, sex, condition, and mental state of the delinquent, the dignity of the person who was offended by the delict, or who committed the delict, the intended purpose, the place and time wherein the delict was committed, whether the delinquent was moved by passion or acted with great fear, and whether he repented of the delict and tried himself to prevent its evil effects, and other similar things.

It is certain, therefore, that the legislator intends for the judge to ascertain the imputability of every delict by obtaining and weighing evidence relevant to the subjective element since that evidence is necessary to determine if a penalty can be justly imposed and whether that penalty should be increased or diminished due to increased or diminished imputability.

Understood properly, the presumption of imputability does not in any way undermine the process or excuse the judge and the promoter of justice from doing their due diligence. As Hughes wrote, the presumption of imputability “does not substitute for the process. It does not excuse the court or administrator from searching for the truth, from the investigation of the facts. It does not mean that any accused person is presumed to be guilty.”¹¹⁸

Regarding internal causes that eliminate imputability, the legislator indicates in c. 1321, §4 that such internal causes need not be investigated unless there is evidence that gives the appearance that the person acted without the ability to understand and to freely will. If there are such appearances, then the presumption is overturned, and the judge must obtain additional evidence to verify that there was nothing that eliminated imputability or that diminished imputability enough to eliminate grave culpability.

§2. Not only those things that excuse from all imputability, but also those things [that excuse] from grave [imputability], equally excuse from any penalty, whether automatic or formal, even in the external forum if the excuse was brought in the external forum.

The judge had to investigate and establish the circumstances impacting imputability so that the penalty for the proven delict might be proportionately determined. It is clear, therefore, that the judge could not use the presumption of *dolus* as justification to cease investigating the imputability of the delict. If he were to do so, he would not then be able to proportion the penalty to be imposed on the offender according to imputability.

A penalty was once overturned at the Roman Roma because it was demonstrated that the judge had not sufficiently considered circumstances that lessened the imputability of the offence. See T. BOUSCAREN (ed.), *The Canon Law Digest*, vol. 2, Milwaukee, WI, The Bruce Publishing Company, 1956, 569-570.

¹¹⁸ HUGHES, “The Presumption of Imputability in Canon 1321, § 3,” 28.

4.3.2.3—The Presumption of Imputability and the Burden of Proof

After the objective element of a delict has been proven and it is proven that the delict is physically imputable to the accused, a claim that the accused could not understand or freely choose the delictual act is, essentially, an exception. It is as if the accused is saying: “The promoter of justice has proved that I committed the delictual act, but I object that I was suffering from a lack of discretion and/or free will at the time of the act.”

Due to the ancient principle that the burden of proof shifts to the respondent when he raises an exception, and due to the logical demands of argumentation, it is necessary that the burden of proof shift to the accused in such a circumstance. The exception could take the form of a claim of temporary insanity, or inculpable ignorance of the immorality of the action, or force, etc. It is, therefore, necessary that the accused present evidence to justify a claim that he was not acting with understanding and free will at the time that he committed the objective element of the alleged delict. Not only is this the expectation of canon law, but it is also the expectation of some secular legal systems. In British law, for example, if a defendant wants to argue that he committed the objective elements of a crime but that he was legally insane at the time, he must prove insanity on the balance of probabilities.¹¹⁹ Canon law does not require such a high burden of proof; it only requires enough evidence to remove moral certitude in the conscience of the judge.

Anticipating objections to placing the burden on the accused to give evidence that he or she lacked understanding and free will, D’Auria stated that “it could not be any other way.”¹²⁰ He explained that, in the external forum, one must proceed according to external

¹¹⁹ See G. WILLIAMS and D. BAKER, *Textbook of Criminal Law*, London, Sweet & Maxwell, 2015, 62.

¹²⁰ “Y no podría ser de otro modo” (D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 22).

appearances and concrete circumstances all the while utilizing both human and legal presumptions. It is not unreasonable to presume that a proven act is imputable “because normally those who are sane act freely, consciously and voluntarily and, therefore, want to do what they do; acting coincides with intending and wanting.”¹²¹

As mentioned in section 2.2.3, the presumption of imputability does not allow the judge to escape the duty of ascertaining that the illegal act occurred or that the act is physically imputable to the accused.¹²² This must be proven with moral certitude. It is only after the act and the physical imputability are established that the burden of proof is, in some sense, reversed and the accused must give evidence (if such evidence has not already appeared) that he lacked understanding and free will at the time of committing the delict. Even if the accused lodges no exception, the judge can still supply for the negligence of the accused and his or her advocate by considering exceptions, as stated in c. 1452, §2. Failure to do so when there are indications that imputability might have been lacking would result in reasonable doubts that would deprive the judge of the moral certitude concerning the subjective element of the delict, thereby necessitating an acquittal.

4.3.2.4—The Possibility of Reverse Burdens in Criminal Processes

One could object that there should never be a reversal of the burden of proof in criminal cases. The maxim *in dubio pro reo*, it is argued, demands that the promoter of justice bear the burden of proving every element of a crime, and to do otherwise would be

¹²¹ “También, porque normalmente quienes están cuerdos actúan libre, consciente y voluntariamente y, por tanto, quieren hacer lo que hacen; actuar coincide con pretender y querer” (D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 22).

¹²² See G. MICHIELS, *De delictis et poenis*, 2nd ed., vol. 1, Paris, Desclée, 1961, 125; DE PAOLIS and CITO, *Le sanzioni nella Chiesa*, 152-153; D’AURIA, “La presunción de inocencia en el derecho penal canónico,” 22.

tantamount to a presumption of guilt and a violation of the presumption of innocence. When making this objection, Skonieczny argued that the Church should be an exemplar of respect for the person in her judicial processes. He lamented that, in this respect, the Church's legal system is late in implementing legal provisions that many other secular states have already included.¹²³

It is true that some secular legal systems do not allow certain reverse burdens in penal processes because such are considered to be contrary to the presumption of innocence.¹²⁴ The European Court of Human Rights stated in a 1988 case that the presumption of innocence “requires, *inter alia*, that when carrying out their duties, the members of a court should not start out with the preconceived idea that the accused has committed the offence charged: the burden of proof is on the prosecution, and any doubt should benefit the accused.”¹²⁵ Yet, the Court allows that the burden of proof can shift to the accused when establishing a defence. This does not detract from the duty of the prosecution to bear the overall burden of proving the guilt of the accused; therefore, any rule that shifts the burden of proof must remain “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”¹²⁶

¹²³ “Nel contesto giuridico attuale, con la presunzione di innocenza, nessun fedele capisce la presunzione dell'imputabilità o del dolo: essa è contraria alla cultura giuridica odierna. Perché il diritto della Chiesa cattolica non dovrebbe essere il custode della giustizia, equità e libertà come gli altri ordinamenti giuridici degli Stati moderni?” (SKONIECZNY, “La presunzione dell'imputabilità,” 442)

¹²⁴ The prohibition of reverse burdens is not a logically necessary conclusion of the presumption of innocence. See STUCKENBERG, “Who is Presumed Innocent of What by Whom?” 308.

¹²⁵ EUROPEAN COURT OF HUMAN RIGHTS, *Barberá, Messegué and Jabardo v. Spain*, 6 December 1988, App. No. 10590/83, Judgment on 6 December 1988, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57429%22%5D%7D> (16 May 2025), para. 77.

¹²⁶ EUROPEAN COURT OF HUMAN RIGHTS, *Salabiaku v. France*, App. no. 10519/83, Judgment on 7 October 1988, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57570%22%5D%7D> (16 May 2025), para. 28.

See also W. RICHARDSON, *The Presumption of Innocence in Canonical Trials of Clerics Accused of Child Sexual Abuse: An Historical Analysis of the Current Law*, Canon Law Monograph Series 6, Leuven, Uitgeverij Peeters, 2011, 5-6.

One could argue, based on the reasoning of the European Court of Human Rights that an irrebuttable presumption would be out of place in a criminal process, but reasonable rebuttable presumptions could be appropriate, especially if the judge is free to acquit when reasonable doubt remains.¹²⁷

4.3.2.5—The *Favor iuris* Stands Above the Shifting Burden of Proof

As mentioned earlier, c. 1526, §2, 1° indicates that matters presumed by the law do not need proof; therefore, the promoter of justice need not present proof of imputability, since it is presumed by c. 1321, §4. It then falls to the accused to make an exception and provide some evidence that he or she lacked imputability.

The fact that the burden of proof can shift from the promoter of justice to the accused when the objective element of the crime has been proven does not negate the overarching favour of law enjoyed by the accused. The accused is still considered innocent until there is proof to the degree of moral certitude that the accused committed a delict.

¹²⁷ “La Corte Europea dei diritti dell’uomo, del resto, ha rassicurato sulla compatibilità delle presunzioni legali con la presunzione di innocenza (art. 6 CEDU comma 2°), a condizione che esse si mantengano entro limiti ragionevoli e che lascino spazio per la prova contraria: gravi dubbi di legittimità costituzionale potrebbero sorgere, pertanto, con riferimento alle presunzioni di tipo assoluto, per le quali, *de iure condendo*, sarebbe opportuno considerare una ‘relativizzazione’, se non si volesse radicalmente espellerle dal sistema” (F. CAPOROTUNDO, “Presunzioni legali e onere della prova nel processo penale,” in *Giurisprudenza penale*, 2017/1, 15).

In the *Salabiaku* decision, the European Court of Human Rights stated that the French courts had respected the defendant’s right to be presumed innocent is because, among other reasons French law allows the courts “genuine freedom of assessment” even in strict liability offences: “As the Government argued at the hearing on 20 June 1988, the French courts thus do enjoy a genuine freedom of assessment in this area and the ‘accused may ... be accorded the benefit of the doubt, even where the offence is one of strict liability” (EUROPEAN COURT OF HUMAN RIGHTS, *Salabiaku v. France*, para. 29).

4.4—Responses to Criticisms of the Presumption of Imputability

Having further investigated the meaning of the presumption of imputability and its procedural significance, it is possible to respond to the criticisms of section 4.2.

4.4.1—Response to Provost and Green

In light of the foregoing, it seems clear that the criticisms of Provost and Green were based on a misunderstanding of the meaning of the presumption of imputability. Though Green acknowledged that the presumption of imputability is milder than the presumption of *dolus*, he still saw it as opposed to the presumption of innocence. Yet there is nothing about the presumption of imputability that need prejudice the presumption of innocence.

First of all, the presumption of imputability does not even become operative until there is proof of the objective element of the delict and that it can be physically imputed to the accused.

Secondly, the presumption of imputability, when properly understood, only presumes that a person acted with discretion and free will. This does not demand that the judge convict the accused. It is, rather, a guide to the judge that he need not consider mental illness or other relevant defences unless there are indications to suggest that such excusing conditions might be present. Though Green is concerned that the Church's law should presume purity of intent, the presumption of imputability in no way presumes otherwise; it only presumes that the accused was capable of intending and freely acting.

Thirdly, to demand that the tribunal have proof that a person acted with the ability to discern and to act with free will is not necessary for the cause of justice. As shown above,

even some civil jurisdictions place burdens on defendants who wish to argue that they were lacking in mental competence to discern and freely act.

Fourthly, the presumption of imputability does not negate the *favor rei*, which remains until both the objective and subjective elements of the delict have been proven to the degree of moral certitude.

4.4.2—Response to Eusebi

Eusebi's critique is not so much a claim of conflict between the presumptions of innocence and imputability as a warning that a conflict could occur. His critique is insightful in identifying a possible danger in the application of the law. It is difficult not to agree with Eusebi's concern that the presumption of imputability could be misunderstood as a presumption of the entire subjective element of the delict. This could be a very real danger, especially since many canonists lack experience in criminal trials. Eusebi's criticism points to the need for clarity regarding the definition of imputability. This need becomes apparent in the objections of Bartone and Skonieczny.

4.4.3—Response to Bartone

Eusebi's concern about clarity on the meaning of terms in penal law is reiterated by Bartone, who recommends that the law include a definition of imputability. Though the legislator prefers canonists to look to doctrine to find definitions, it might be that definitions of some terms would be helpful, especially when canonists have been previously trained in other legal systems and traditions.

Bartone is a respected scholar in the penal law of the European Union and international penal law. There can be no doubt of his expertise in penal law; however, his critique of canon law seems to indicate a lack of knowledge of the canonical tradition. This, incidentally, supports his argument for the need of definitions.

When Bartone explains his concern about danger to the presumption of innocence, it is based on the possibility that the judge might begin investigating the ability of the accused to self-determine before having established that a crime was committed by demonstrating imputation.¹²⁸ The problem is that Bartone defines imputability and imputation differently than the canonical tradition. Bartone defines imputation as the psychological connection between the action and the event, which is described as *dolus* or *culpa*.¹²⁹ He defines imputability as the criminal's ability to will and to understand.¹³⁰ The canonical tradition, however, does not draw such a clear line between imputability and imputation because they cannot be separated.

So, the problem here is more fundamental. In canon law, juridical imputability does not exist without moral (and, therefore, psychological) imputability. A delict cannot be attributed to a person *ex dolo* or *ex culpa* unless the person has the ability to understand and to will. What Bartone describes as imputation is inseparable from imputability. It would be impossible for a canonical judge to ascertain the imputability of a delict as being

¹²⁸ “Se così non fosse il giudice cadrebbe nell’errore-abuso di valutare la capacità di autodeterminarsi del reo (presunto innocente) prima ancora di individuare e determinare il reato del quale il soggetto deve rispondere. Pertanto già con questa inversione di esame si calpesta il principio di innocenza” (BARTONE, “La tipicità del reato e della pena garanzia per l’innocente,” 114).

¹²⁹ “*Dolo* e *colpa* sono però termini, concettuali e pratici, attinenti al nesso psichico tra l’azione (cioè la *causa*) e l’evento (cioè il *risultato*), cioè rientrano nella *imputazione soggettiva*, costituiscono l’indispensabile e preliminare elemento strutturale del fatto-reato (o meglio nesso o sintagma)” (BARTONE, “La tipicità del reato e della pena garanzia per l’innocente,” 114).

¹³⁰ “[Dolo e colpa] non attengono alla *imputabilità*, cioè alla capacità di intendere e di volere del reo” (BARTONE, “La tipicità del reato e della pena garanzia per l’innocente,” 114).

ex dolo or *ex culpa* without first proving, or at least presuming, that the accused acted with understanding and free will. As stated above in 2.1.3.2.2, free will is the foundation of imputability. *Dolus* and *culpa* cannot exist without understanding and free will.

The confusion here seems to be the result of presuming that the terms used in canon law have the same meaning in other legal systems. D’Auria expressed this danger in his book on imputability: “We prefer to avoid making parallels and comparisons with the Italian penal system, as often the same terms—imputability, culpability, legal guilt—indicate rather different realities.”¹³¹ Unlike canon law, which considers imputability to be a quality of the criminal act, Italian law considers imputability to be a quality of the offender: “[Italian] criminal law doctrine expresses the concept of imputability ‘negatively,’ as that which can exclude the attribution of an act to a subject, without worrying about investigating the requirements of subjective attributability—*dolo* and *colpa*.”¹³²

Once the meaning of terms is clarified, Bartone’s claim that c. 1321, §4 is contrary to the presumption of innocence no longer holds. He remains correct, however, that there is a potential difficulty when the law does not include definitions of certain terms.

4.4.4—Response to Skonieczny

A partial response to Skonieczny has already been given in section 4.3.1 and its subsections by clarifying that the presumption of imputability is not a presumption of *dolus*

¹³¹ “Preferiamo evitare di operare paralleli e confronti col sistema penale italiano, in quanto spesso i medesimi termini—imputabilità, colpevolezza, colpa giuridica—indicano realtà alquanto differenti” (D’AURIA, *L’imputabilità nel diritto penale canonico*, 53, n. 60).

¹³² “[L]a dottrina penalistica esprime ‘in negativo’ il concetto di imputabilità, come ciò che possa escludere l’attribuibilità di un atto ad un soggetto, senza preoccuparsi di indagare sui requisiti di riconducibilità soggettiva—*dolo* e *colpa*” (D’AURIA, *L’imputabilità nel diritto penale canonico*, 53, n. 60).

or *culpa*. Because Skonieczny misinterprets the presumption of imputability as being a presumption of *dolus* and *culpa*, he sees conflict with the presumption of innocence where no conflict really exists. Under the overarching favour of law in favour of the accused until a guilty verdict is rendered, there is the possibility of reversals of the burden of proof. This, as noted above, is accepted in secular law systems, as acknowledged by the European Court of Human Rights.

Skonieczny mentioned that a presumption and reversal of the burden of proof are two sides of the same coin.¹³³ Though this is true in some sense, Skonieczny fails to account for the fact that presumptions in penal law do not compel a judge to reach a certain verdict. He also fails to see that there can be a reversal of the burden of proof on the level of the presentation of evidence without eliminating the overarching favour of law.¹³⁴

Perhaps because of his training in civil law, Skonieczny made frequent reference to the distinction between substantive and procedural presumptions, though he did note that such a distinction is rarely made in canonical doctrine.¹³⁵ He argued that it would be better to consider the presumption of imputability to be either an unwritten presumption of the legislator or a human presumption on the part of the judge. In this way, it serves the purpose of guiding the thought process of the judge without conflicting with the procedural presumption of innocence. It is not necessary, however, to remove the presumption of

¹³³ “Come è stato già spiegato, nella teoria generale sulla presunzione le espressioni ‘presunzione’ e ‘inversione dell’onore della prova’ sono fungibili. Si tratta, in realtà, dei due lati della stessa medaglia, a quale mantiene un forte aspetto processuale” (SKONIECZNY, “La presunzione dell’imputabilità,” 419).

¹³⁴ The fact that the presumption of innocence stands as a favour of law above the shifting burden of proof in a penal process is strengthened by the choice of the legislator to add an explicit statement of the so-called presumption of innocence in c. 1321, §1 while refraining from the use of any form of the word “presume,” thereby elevating it above the canonical procedural institute of presumptions.

¹³⁵ See LABANDEIRA, *Las presunciones en derecho canónico*, 131-133.

Regarding the lack of agreement among scholars on substantive and procedural presumptions and the fact that legal presumptions have both substantive and procedural characteristics, see SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 70-71.

imputability or to designate it as a substantive presumption with no procedural significance. If the accused chooses to object that he lacked understanding and free will at the time of committing the objective element of the delict, it is only logical that he should bear the burden of producing evidence that supports this contention. This does not imply that the presumption of innocence has been replaced by a presumption of guilt or that the presumption of innocence no longer applies. Rather, the presumption of innocence applies until the judge has arrived at moral certitude of guilt; nevertheless, if the accused wants to make his objection, the burden of giving some evidence that he lacked imputability is on the accused. The presumption of imputability reverses the burden of proof, but it does not eliminate the presumption of innocence because, in reality, the “presumption of innocence” is not really a presumption but a favour of law.

Another reason for Skonieczny’s erroneous interpretation of the role of the presumption of imputability seems to be a lack of a clear distinction between a presumption of guilt, a presumption of *dolus*, and strict liability.¹³⁶ If he did, in fact, think that the presumption of imputability is equivalent to a presumption of guilt and a presupposition of the entire subjective element of the crime, then there is no wonder that he would see a conflict with the presumption of innocence; however, this is not at all the case. There are no strict liability offences in canon law and the favour of law benefiting the accused is not suspended once the objective element of a delict is proven. If a judge continues to have a reasonable doubt about the subjective imputability of a crime and cannot obtain sufficient evidence to overcome this doubt, he must decide in favour of the accused.

¹³⁶ See SKONIECZNY, “La presunzione dell’imputabilità,” 401-402.

Skonieczny noted that the change to the presumption of imputability in the *CIC/83* which allows for the presumption to be overturned by appearances to the contrary is in accord with the principle *in dubio pro reo*. Yet he drew an interesting conclusion from this by claiming that the presumption of innocence does not take effect until the contrary appearances are found. He wrote:

In the canonical penal law, therefore, the principle of the presumption of innocence prevails over the presumption of imputability (and the burden of proof). This supremacy of the principle of innocence in canonical penal law, however, does not exist from the beginning of the penal procedure, but only after the raising of some doubt on the part of the accused. This is contrary to the modern concept of the principle of innocence: it is in force even before the beginning of the process (*sic!*). The norm regarding canon 1321, § [4] *CIC/83* renders impossible such application of the principle of innocence, favourable to the accused.¹³⁷

This is a puzzling claim. The presumption of imputability does not even come into play until there is proof of the objective element of the delict and proof that the accused was the physical cause of the objective element. There is nothing that prevents the *favor rei* from governing the process before the presumption of imputability comes into play, and even then, as just argued, the *favor rei* remains even when the presumption of imputability comes into play. Perhaps this misunderstanding on the part of Skonieczny is related to his apparent equating of the presumption of imputability with a presumption of guilt.

When it comes to the burden of proof, Skonieczny claimed that the presumption of imputability in *CIC/83* is not a true presumption because the formula *nisi aliud appareat* does not achieve a reversal of the burden of proof. It is not clear how this claim accords

¹³⁷ “Nel diritto penale canonico prevale, quindi, il principio della presunzione di innocenza sulla presunzione dell’imputabilità (e sull’onere della prova). Questa supremazia del principio di innocenza nel diritto penale canonico non esiste però fin dall’inizio del procedimento penale, ma soltanto dopo la sollevazione di qualche dubbio da parte dell’imputato. Ciò è contrario al concetto moderno del principio di innocenza: esso vige anche prima di inviare il processo (*sic!*). La norma inerente [sic] al can. 1321, § 3 *CIC/83* rende impossibile tale applicazione del principio di innocenza, favorevole al reo” (SKONIECZNY, “La presunzione dell’imputabilità,” 421-422; the “sic!” is original).

with his other claim that the presumption is contrary to the presumption of innocence in the procedural realm, since a non-presumption that does not impact the burden of proof would not conflict with a procedural presumption of innocence. But even if the presumption of imputability is a true presumption that impacts the burden of proof, as noted above, even in modern civil legal systems, there is no absolute prohibition of reverse burdens of proof. In fact, since the presumption of imputability, properly understood, is a presumption of the ability to understand and to freely choose, the canonical legal system is not that different from civil legal systems since many of them require that a criminal defendant provide some evidence to support the claim that he was lacking the fundamental ability to understand and to freely choose at the time of committing a crime.

In light of the foregoing responses to Skonieczny's arguments, it is clear that Skonieczny is mistaken in his claims that the presumption of imputability is contrary to the principles *in dubio pro reo*, *nullum crimen sine culpa*, and the presumption of innocence. When properly understood, the presumption of imputability is not a presumption of the entire subjective element of the crime and does not eliminate the *favor rei*; therefore, it does not undermine the Church's witness to justice and fairness. Rather, the presumption of imputability functions as a guide to the judge in obtaining and assessing the proofs of the process so that he can achieve moral certitude regarding one of the essential elements of a delict, i.e., the subjective element.

4.5—The Presumption of *Dolus*

In light of the criticisms of the presumption of imputability, one might expect that the ecclesiastical legislator would not even consider maintaining the presumption of *dolus*.

The stronger presumption of *dolus* that had been included in the *CIC/17* was criticized for conflicting with the natural law presumption that one is presumed good until evil is proven.¹³⁸ Yet the presumption was retained in the *CCEO*.

As stated in section 2.3, the legislator of the *CCEO* preferred to avoid the terms *dolus* and *culpa*; therefore, c. 1414 does not use those terms but rather substitutes terms that express the ideas behind *dolus* and *culpa*. In place of *dolus*, the *CCEO* speaks of a delict that was done “deliberately.” Thus, c. 1414 states: “When an external violation of a penal law or penal precept has occurred, it is presumed that it was deliberately done, unless the contrary is proven. Concerning other laws or precepts, the same is presumed only if the law or precept is violated again after a penal warning.”

The presumption of *dolus*, though omitted from *CIC/83* due to the benign disposition of the legislator, is not necessarily an unjust legal institute. An argument can be made in support of the presumption of deliberateness in the *CCEO* to show that it is just and that it does not contradict the *favor rei*. It is also argued that the presumption of *dolus* should be restored to the *CIC* and that it already exists *de facto*.

4.5.1—An Argument for the Presumption of *Dolus*

It is clear from the above defence of the presumption of imputability in *CIC/83* that it is reasonable to presume that the accused acted with understanding and free will. This is a probable conjecture because people ordinarily act freely and intend to do what they do.

¹³⁸ “Eine Normenkollision kann in der Form eintreten, dass in einem Einzelfall mehrere RV anzuwenden sind. [...] Dieses Verhältnis besteht z. B. zwischen der Vermutung des c. 2200 §2 und der vom Naturrecht abgeleiteten Regel, *Quivis praesumatur bonus nisi probetur malus*” (MOTZENBÄCKER, *Die Rechtsvermutung*, 323).

To claim otherwise requires that one demonstrate a psychic defect or some kind of limitation of free will or that the delictual action or omission was due to chance.

Canonical doctrine only recognizes two sources of imputability; therefore, if a delict is morally and legally imputable, then the subject must have acted either *ex dolo* (deliberately) or *ex culpa* (culpable omission of due diligence or culpable ignorance of the law or precept). One must ask, therefore, if it is reasonable and just to presume that a person who is capable of free will and has committed the objective element of a delict has acted *ex dolo*.

It must be remembered that *dolus* does not require any special premeditation or moral perversity. It only requires, on the part of the intellect, an awareness of the legal obligation and, on the part of the will, freedom. The awareness of the legal obligation does not necessarily imply knowledge of the penal norm but only awareness that it is contrary to the moral law.¹³⁹ The ecclesiastical legislator does not presume that one is ignorant of penal laws (*CCEO*, c. 1497, §2), and it would be unreasonable for the law to presume that one is lacking in freedom without some evidence; therefore, the presumption of *dolus* is a logical consequence of the law itself.

¹³⁹ “Non indica una particolare premeditazione o perversità, è semplicemente «deliberata voluntas violandi legem». Richiede un duplice elemento: conoscenza da parte dell’intelletto dell’obbligazione legale e, da parte della volontà, la libertà (è il significato di deliberata voluntas). Conoscenza dell’obbligo legale, non significa o per lo meno non richiede propriamente la conoscenza della legge penale o l’avvertenza dell’antigiuridicità del proprio comportamento. È sufficiente che si conosca che il proprio comportamento è contro la norma” (V. DE PAOLIS, “L’imputabilità dell’atto delittuoso nel Libro V del CIC,” in *Atti del Colloquio romanistico-canonistico (febbraio 1978)*, Rome, Libreria editrice della Pontificia Università Lateranense, 1979, 424).

4.5.1.1—No Presumption of Ignorance (*CCEO*, c. 1497, §2) and the Requirement of a Warning Whenever Possible (*CCEO*, c. 1407)

Perhaps one of the most common circumstances that could eliminate *dolus* is inculpable ignorance of the illegality of the delictual act. It must be remembered, as explained in section 2.1.3.4.1, that the imputability of a delict does not require that the accused was aware of the fact that the delictual action is listed as a delict in ecclesiastical law; it is only required that the accused have known at the time that the act or omission was contrary to the moral law.

Now, this ignorance is not presumed.¹⁴⁰ Like the *CIC/83*,¹⁴¹ the *CCEO* does not presume ignorance of laws or penalties. One reads in the first part of c. 1497, §2: “Ignorance or error about a law, a penalty, a fact concerning another is not presumed [...].”

Furthermore, the likelihood that a delict was committed out of inculpable ignorance or inadvertence is even less likely under the *CCEO* because of c. 1407, which states: “If, in the judgment of the hierarch who can impose the penalty, the nature of the delict permits it, the penalty cannot be imposed unless the offender has been warned at least once beforehand to desist from the delict and has been given a suitable time for repentance.”¹⁴²

¹⁴⁰ Since the time of the Decretals of Gregory IX, one who pleads ignorance must prove his excuse because the law presumes that a person knows what he is doing. See I. SWOBODA, *Ignorance in Relation to the Imputability of Delicts: An Historical Synopsis and Commentary*, Washington, DC, The Catholic University of America Press, 1941, 43. Swoboda cites X 1, 6, c. 20.

¹⁴¹ Canon 15, §2.

¹⁴² There is no parallel canon in the *CIC/83*, which only requires a prior warning for medicinal penalties (censures); however, the *CCEO* makes no distinction between medicinal and expiatory penalties.

“Il CIC distingue le pene medicinali e le pene espiatorie. Per irrogare le prime richiede sempre, per la validità della irrogazione [sic] della pena, la previa ammonizione canonica, a norma del can. 1347, che parla di contumacia e di abbandono di essa. La distinzione delle pene in espiatorie e medicinali è un cardine dell’ordinamento penale latino.

“Il CCEO non conosce la distinzione suddetta. Perciò non ha una norma altrettanto precisa come il CIC. Nello spirito dello stesso ordinamento penale canonico riconosce però che là dove è possibile il superiore proceda sempre, prima di irrogare la pena, ad una previa ammonizione” (V. DE PAOLIS, Commentary on c. 1414, in P. PINTO, *Commento al Codice dei Canonici delle Chiese Orientali*, Vatican City, Libreria editrice Vaticana, 2001, 1112-1113).

This canon requires that at least one warning be given in some cases before a penalty can be imposed. In those cases where a prior warning has been given, which would be required for many penal laws and, by their very nature, for all penal precepts, one who proceeds to act contrary to the penal law or penal precept is most likely acting deliberately. If a prior warning has been given, it is completely reasonable for the judge to presume that the offence was deliberate. In such cases, the presumption of deliberateness would not result in any injustice to the accused.

The canon does not forbid the imposition of a penalty in all circumstances where a warning was lacking. The legislator recognizes that there are some delicts that do not allow for a previous warning other than the penal law itself. It is left to the discretion of the hierarch to determine whether the delict permits a prior warning.¹⁴³

4.5.1.2—A Probable Conjecture

If it is reasonable and probable to presume that a person acts with understanding and free will and that such a person's delictual act is imputable, then it is also reasonable and probable to presume that an imputable act was committed *ex dolo*. Canon law does not presume that persons are ignorant of penal law, much less the moral law; therefore, one who acts knowingly and willingly contrary to the moral law is most likely to have acted deliberately, i.e. *ex dolo*.

Innocent Swoboda observed that, while the principles of moral imputability are derived from reason, the rules of juridic imputability are "dictated by public policy to meet

¹⁴³ "Non fa dipendere tuttavia la validità della irrogazione della pena della previa ammonizione, sia perché tale ammonizione è richiesta solo là dove la natura del delitto lo permetta, sia perché il giudizio è lasciato allo stesso superiore competente. L'istituto dell'ammonizione acquista pertanto un particolare è rilevante significato nell'ordinamento penale orientale" (DE PAOLIS, Commentary on c. 1414, 1113).

the peculiar circumstances of social life and consequently need not always be perfectly logical” and may be “more or less arbitrary.”¹⁴⁴ Among the examples that he offers in support of this statement are the *CIC/17*’s presumptions regarding the external forum, such as the presumption of *dolus*.¹⁴⁵ Swoboda’s characterization of the rules of juridic imputability as “more or less arbitrary” is perhaps an unfortunate formulation. It may be true that such rules are not derived from reason, but they are indeed reasonable because they are a formulation of the wisdom of the Church’s experience over time. So also, many legal presumptions are the result not of an arbitrary choice of the legislator but of long legal experience.¹⁴⁶ There is nothing arbitrary about the presumption of *dolus* from a logical standpoint, because it is indeed probable that a person who is presumed to know the law and presumed to act knowingly and willingly can also be presumed to have acted deliberately.

As quoted in section 2.3, when the Commission was discussing the presumption of *dolus*, the members came to the following conclusion: “it became very clear that the *praesumptio* cannot actually be referred to anything other than *dolus*: that is, it can only be presumed that the violation of the law was deliberate, while it is up to the criminal himself

¹⁴⁴ SWOBODA, *Ignorance in Relation to the Imputability of Delicts*, 86.

¹⁴⁵ See *ibid.*

¹⁴⁶ “Per quanto riguarda, infine, la *ratio legis* delle presunzioni *iuris*, è opportuno ricordare che non sono frutto dell’arbitrio del legislatore ma il risultato di una lunga esperienza giuridica, in cui confluiscono varie ragioni di giustizia e di equità. Tra queste, possono essere indicate: l’obiettivo difficoltà di provare alcuni fatti che si ritengono determinanti per la vita giuridica e di cui sarebbe ingiusto o iniquo esigere la prova; la tutela di un certo bene giuridico che si ritiene meritevole di una speciale protezione; e l’applicazione del principio di normalità, intesa non in senso sociologico ma normativo” (SÁNCHEZ-GIL, “La presunzione nella vigente normativa canonica,” 71).

to demonstrate that it was not such, proving, if not complete non-involvement in the crime, at least that one acted *ex omissione debitae diligentiae* or *ex ignorantia legis*.”¹⁴⁷

4.5.1.3—Evidence of the Objective Element Usually Provides Evidence of *Dolus*

Ferrini argued that “ordinarily, when the act is proven, the *dolus* is proven. Not because it is presumed, but because it is evident from the way in which the event and the corresponding intention occurred.”¹⁴⁸ Thus, when the objective element of a delict has been proven with moral certitude, the circumstances presented in proving the objective element will often demonstrate that the delictual act was committed *ex dolo*. By the same logic, one could argue that the circumstances that would indicate that a delict was committed *ex culpa*, rather than *ex dolo*, will often be evident from the way in which the event and the corresponding intention occurred. The evidence presented as proof of the objective element of the delict and the causal physical connection to the accused will likely provide some indications of any circumstances that might have eliminated *dolus*. If there are persuasive indications that the accused acted out of ignorance or due to an omission of due diligence, the judge must investigate this further and cannot rely on the presumption of *dolus*, since a presumption, by its very nature, is useful only where there is lack of evidence.¹⁴⁹

¹⁴⁷ “Durante la discussione che ne seguì apparve con tutta evidenza che effettivamente la *praesumptio* non può essere riferita se non al *dolus*: cioè si può presumere solo che la violazione della legge è deliberata, mentre appartiene al reo stesso dimostrare che essa non è tale, provando, se non la piena estraneità al delitto, almeno che si è agito *ex omissione debitae diligentiae* o *ignorantia legis*” (PONTIFICIA COMMISSIO CODICI IURIS CANONICI ORIENTALIS RECOGNOSCENDO, “La nuova revisione dei canoni riguardanti le sanzioni penali nelle chiese orientali cattoliche,” in *Nuntia*, 12 [1981], 52).

¹⁴⁸ “Ordinariamente provato il fatto è provato il dolo. Non perché dato quello questo si presume, ma perché risulta evidente dal modo con cui il fatto avvenne l’intenzione corrispondente” (C. FERRINI, *Diritto penale romano: Teorie generali*, Milan, Hoepli, 1899, 152-153).

¹⁴⁹ See section 1.2.1. See also E. LABANDEIRA, *Las presunciones en derecho canónico*, Pamplona, Universidad de Navarra, S.A., 1967, 130.

“Praesumptio locum habet solummodo in dubiis” (A. REIFFENSTUEL, *Ius canonicum universum*, vol. 2, Rome, Apud Dominicum Ercole, 1832, 376).

If there is no evidence presented in the process that indicates circumstances eliminating *dolus*, then it must fall to the accused to present evidence that demonstrates his or her lack of *dolus*. Because of the nature of these circumstances, the accused is in the best position to know what those circumstances are.

4.5.1.4—Overturning the Presumption of *Dolus*

As explained in section 2.1.3.4.1, the circumstances that change imputability from *dolus* to *culpa* would be those circumstances that cause a defect in the mind or the will of the actor. Circumstances that result in a deficiency of the will would be a lack of freedom due to force, fear, necessity, or hardship. It follows, therefore, that the presumption of *dolus* could be overcome by convincing evidence of the grave defect of the mind or lack of freedom of the will.¹⁵⁰

Canonists noted that the law in *CIC/17* required the defendant to prove lack of *dolus* to the level of moral certitude.¹⁵¹ This is true, but it can be countered by direct or indirect evidence; therefore, a strong human presumption could overturn the presumption of *dolus*.¹⁵²

4.5.2—Compatible with the *Favor rei*

The presumption of deliberateness is a probable conjecture that the law instructs the judge to make once there is proof of the objective element of a delict and a physical

¹⁵⁰ “Agitur ut patet de praesumptione iuris quae legitima probatione ignoratae legis aut morbi aut defectu usu rationis eliditur” (CONTE A CORONATA, *Institutiones iuris canonici*, vol. 4, 27).

¹⁵¹ See GREEN, Commentary on c. 1321, 1541; J. RENKEN, *The Penal Law of the Roman Catholic Church: Substantive Law*, Ottawa, Faculty of Canon Law, 2024, 107; MOTZENBÄCKER, *Die Rechtsvermutung*, 481, n. 8.

¹⁵² See n. 109 above.

causal connection between the delictual act or omission and the accused. Yet the presumption of deliberateness does not eliminate the *favor rei* and the requirement of moral certitude for overcoming the *favor rei*.

4.5.3—An Argument for the Presumption of *Dolus* in the *CIC*

As noted above in section 4.5.1, the presumption of *dolus* is a logical consequence of the law as it currently stands. *Dolus* requires knowledge of the law, discretion, and freedom. Since the *CIC/83* presumes imputability in c. 1321, §4 and presumes knowledge of the penal law in c. 15, §2, it is a logical conclusion that *dolus* is presumed once the objective element of the delict and its physical causal link with the accused has been proven. So, unless there are appearances to indicate that one lacked imputability, *dolus* should be presumed.

Though the legislator has sought to mitigate the presumption by changing it to a presumption of imputability, the logical consequence of that presumption combined with c. 15, §2 has the same result as *CIC/17*, c. 2200, §2, except that mere appearances to the contrary can overturn the presumption of imputability. Since the legislator has chosen to maintain the mitigated presumption of imputability in the reformed Book VI, it would seem that the legislator should modify c. 15, §2 to exclude penal laws if he wants to eliminate a presumption of *dolus*; however, since *dolus* only requires knowledge of the moral law, not penal legislation, even this would not eliminate the logical conclusion that *dolus* should be presumed. To effectively mitigate the presumption of *dolus*, it would be necessary for the legislator to state that knowledge of the moral law is not presumed, and that is not possible in most cases since many delicts are based on offences against the natural law.

In civil law the presumption of innocence is sometimes understood to be a check on the power of the state. If a secular state wants to deprive a person of his or her right to liberty, then the state must prove every element of the crime, not only the objective element but also the subjective element. This is understandable in the civil context because the state is only interested in restoring what has been damaged in civil society by the alleged crime of the accused.

In the Church, however, penal law is aimed not only at restoring what has been damaged in ecclesiastical society but also to healing the soul of the offender.¹⁵³ The penal process is used as a last resort when methods of pastoral care, warning, or correction are perceived to be insufficient to restore justice, reform the offender, and prevent scandal.¹⁵⁴ If a penal process has been initiated due to the need to address these three matters, and if the objective element of the delict has been proven with moral certitude, then there is no benefit to the Church or the accused to acquit based on a mere lack of evidence regarding the subjective element of the crime. In many cases, there are already indications of the subjective element from the circumstances of the delict itself, and the accused has the right to raise exceptions to demonstrate a lack of subjective culpability due to ignorance of the law, lack of freedom, or inability to deliberate. There is little danger, therefore, that the accused will be punished for an act that lacked the requisite subjective element of the crime. Indeed, if the law is inclined to allowing the guilty to escape punishment without providing compelling evidence that they did not act *ex dolo*, then the Church's restraints could be "relaxed unto a dissoluteness of life and contempt of the law."¹⁵⁵

¹⁵³ *CCEO*, c. 1401.

¹⁵⁴ See c. 1341. Cf. *CCEO*, cc. 1403, 1409.

¹⁵⁵ *CCEO*, c. 1401.

Conclusion

This chapter has argued that there is no contradiction between the presumption of imputability and the presumption of innocence. By clarifying the differences between presumptions based on probability, like the presumption of imputability, and presumptions that constitute rules of interpretation, like the presumption of innocence, it was demonstrated that the two presumptions have different foundations and that these foundations impact the way that they are applied to the penal procedure.

Then, the criticisms of the presumption of imputability offered by several authors were explained. Their objections provided a context in which to articulate the necessary elements for clarifying relevant points and then offer responses to their criticisms. Responding to the criticisms of these respected authors demonstrated that there is no contradiction between the presumption of imputability and the presumption of innocence.

The change from a presumption of *dolus* in *CIC/17* to a presumption of imputability in *CIC/83* makes the retention of the presumption of deliberateness in the *CCEO* all the more significant. Yet it has been shown that the presumption of deliberateness in the *CCEO* is not unreasonable and that it, too, is compatible with the *favor rei*.

GENERAL CONCLUSION

This study began with the question of whether or not there is a conflict between the presumption of innocence and the presumption of imputability. By examining the nature of presumptions, the imputability of delicts, and the essential content of the presumption of innocence, a foundation was laid for engaging with criticisms of the presumption of imputability and responding to claims of its conflict with the presumption of innocence. This, in turn, yielded insights into the meaning of both presumptions and the continued existence of a presumption of *dolus* in not only the *CCEO* but, arguably, also the *CIC/83*.

The definition of a presumption as a “probable conjecture about an uncertain matter” in c. 1584 is somewhat deceptive in its simplicity. An examination of the history of this legal concept demonstrates that various legal scholars have struggled to give an adequate definition of legal presumptions. Rooted in ancient rhetoric and Roman law, the presumption began as a tool of argument and persuasion. Certain presumptions began to be accepted in the writings of jurists before presumptions eventually began to appear in legislation, such as the *Code* and *Digest* of Justinian. As presumptions were analyzed by many civilians and canonists throughout the centuries, they began to be categorized and became a fixture in legal reasoning. In time, presumptions that were used in argumentation came to be known as human presumptions, while presumptions that are stated in the law have come to be referred to as legal presumptions. Legal presumptions are supplementary in that they supply for certain lacunae caused by the lack of direct proof. As a type of indirect proof, they are in some sense provisional since they always give way to direct proof. Legal presumptions, which are clearly distinguished from legal fictions, impact the

burden of proof in legal processes by shifting the burden to the one who does not have the legal presumption in his or her favour.

Moving on to the topic of the imputability of delicts, this thesis has explained the canonical doctrine on the nature of a delict and the essential elements of a delict, with special focus on the subjective element, i.e., imputability. An act cannot be juridically imputable unless it is a free and deliberate human act. Delicts are not punished unless the offender acted with grave imputability, and in the canonical tradition, imputability has only two sources, viz., *dolus* and *culpa*. *Dolus* describes the deliberate violation of the law, while *culpa* describes violations of the law through negligence, which occurs through omission of due diligence in observing the law. For most delicts, a penalty is not imposed if committed *ex culpa*. The juridical imputability and the punishability of delicts can be impacted by aggravating, mitigating, or even eliminating circumstances mentioned in cc. 1322-1326.

Juridic imputability presupposes physical, psychological, and moral imputability. It is difficult to prove the psychological and moral imputability of a delict, because they cannot be directly observed. For this reason, the legislator of the *CIC/17* included a presumption of *dolus* in c. 2200, §2 that could be overcome only by proof to the contrary. This presumption was replaced by a presumption of imputability in *CIC/83*, c. 1321, §4, a presumption that can be overcome by appearances to the contrary. The *CCEO* retains in c. 1414, §3 a presumption of deliberateness that is equivalent to the presumption of *dolus* of *CIC/17*.

After having examined the nature and elements of a delict and the presumption of imputability, the presumption of innocence was analyzed and explained. The natural law

principle that one should be considered innocent of a crime until proven guilty is an ancient principle enshrined in the legal writings of various civilizations from ancient times. Though its articulation in the western legal tradition owes much to the contribution of canonists, and though it has always been implicitly included in the law of the Church, it was only recently that it was explicitly stated in the revisions of the *CIC/83* and the *CCEO*.

There is some ambiguity regarding what exactly is meant by the presumption of innocence since it is understood differently in various legal systems. This thesis has demonstrated that, while the presumption of innocence is sometimes used, in the words of Andrea D'Auria, as a "magnet" principle that includes various rights, including the rights to due process, defence, good reputation, personal privacy, repair of damages, and to the right of the accused to not take an oath or incriminate himself, the essential core of the presumption of innocence is that the burden of proving a delict is on the accuser and that the accused cannot be condemned unless there is moral certitude that the accused is guilty of the alleged delict.

The final chapter of this thesis was dedicated to clarifying the nature of presumptions in general and the presumptions of innocence and imputability in particular, by evaluating various objections to the presumption of imputability, and drawing conclusions from all that has been presented. The following are important conclusions resulting from this study.

The term "presumption" is still ambiguous in legal writing and discourse. Though c. 1584 describes a presumption as a probable conjecture, the term is used much more broadly in canon law and other legal systems. The term is often used to refer to regulatory precepts, in which the legislator establishes a principle to be applied to situations with

certain factual indications, or interpretive rules, in which the legislator directs that a law or intention is to be interpreted in a specific way. Neither regulatory precepts nor interpretive rules need be based on probability. They are often placed in the law to preserve a value or principle.

The so-called presumption of innocence is not a presumption in the sense of c. 1584, because it is not a probable conjecture. It is what Eduardo Labandeira describes as a regulatory precept. More specifically, it is a *favor iuris*. It serves as a means of ensuring that a fair process is conducted and that there is less likelihood of an innocent person being condemned. The legislator rightly avoids the word *praesumere* in formulating c. 1321, §1 and *CCEO*, c. 1414, §1, since he is not articulating a probable conjecture.

Though the presumption of imputability and the presumption of innocence are commonly referred to as presumptions, only that of imputability is a presumption in the stricter sense of the term. Though it is a rule of interpretation, it is also rooted in the probable conjecture that a person who acts contrary to a penal norm has acted with the ability to exercise due discretion of judgment.

Many claims of conflict between the presumption of innocence and the presumption of imputability are based either on a misunderstanding of the meaning of the term imputability or an assumption that terms related to imputability are used the same in canon law as in other legal systems. As used in c. 1321, §4, imputability refers to the ability of the accused to have exercised due discretion of judgment at the time of the delictual act. It indicates to the judge that he need not consider the possibility of mental illness or some other factor eliminating discretion of judgment unless there are indications that such conditions might be present. The presumption of imputability only applies when the

objective element of the delict has been proven; however, even when the objective element has been proven, the judge must still determine whether or not the accused acted with *dolus* or *culpa* and any exempting, mitigating, or aggravating circumstances. Furthermore, the presumption of imputability does not force the judge to arrive at a guilty verdict whenever there is reasonable doubt about the imputability of the accused. The presumption of imputability, therefore, does not contradict the presumption of innocence.

The presumption of imputability shifts the burden of proof to the accused whenever the objective element of the delict has been proven. The presumption, therefore, does not allow the judge to escape the duty of ascertaining whether or not the illegal act occurred or that it is physically imputable to the accused. It is not unreasonable that, once these elements have been proven, the law then places on the accused the duty of providing any evidence that he or she did not act with due discretion of judgment. Such a reverse burden need not be considered to violate the presumption of innocence. The text of c. 1321, §4 shows the benignity of the legislator by allowing that the presumption of imputability can be overturned simply by appearances to the contrary rather than full proof. Even while the burden of proof has shifted to the accused, the presumption of innocence remains as an overarching favour of law, since the accused must be considered innocent until proof to the degree of moral certitude has been achieved.

Though it is evident that those responsible for drafting c. 1321 wanted to eliminate the presumption of *dolus* that had been present in *CIC/17*, c. 2200, §2, it does not appear that the desired effect has been achieved, since c. 15, §2 states that ignorance of the law is not presumed. If a delictual act is committed by someone who is presumed to have due discretion of judgment (c. 1321, §4) and also presumed to have knowledge that the act is

contrary to the moral law (c. 15, §2), then the effect of these two presumptions is the same as a presumption of *dolus*. If the legislator should wish to avoid a presumption of *dolus*, then a future revision of the canons should perhaps state that the presumption of knowledge in c. 15, §2 does not apply to delicts.

An explicit presumption of *dolus* remains in the *CCEO*, c. 1414, §3's presumption of deliberateness. This is not an unreasonable presumption, since it is reasonable to presume and indeed probable that a person acted with due discretion of judgment; therefore, it is also a reasonable and probable presumption that one has acted with knowledge of the moral law and, therefore, *ex dolo*. Furthermore, it has been argued that proof of the objective element of a delict will oftentimes provide proof of the source of imputability as well. If the evidence presented in a penal process does not indicate circumstances that would eliminate *dolus*, then the burden of producing evidence of lack of *dolus* reasonably shifts to the accused. Such circumstances would be those elements that indicate a defect in the mind or the will of the accused. It seems, therefore, that the presumption of *dolus* in the *CCEO* is not unreasonable and could justly be made explicit in future revisions of the *CIC/83*. Such a presumption would be compatible with the overarching favour of law that considers that person to be innocent until guilt is proven.

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BIOGRAPHICAL NOTE

James Mercer Clark, Jr., was born in Houston, Texas, in 1982 and baptized at Christ Church Episcopal Cathedral in the same city. Along with his parents, he was received into full communion with the Catholic Church as a child. He was raised in Houston and in Savannah, Tennessee. After graduating from high school in 2000 and then attending St. Joseph Seminary College in St. Benedict, Louisiana, he completed his undergraduate studies in theology and philosophy at Franciscan University of Steubenville in Ohio. After earning the Bachelor of Arts degree, he earned the degree of Master of Arts in Theology and Christian Ministry at the same university. He worked for two years as a religion teacher, organist, and choir director at St. Michael Catholic Church and School in Memphis, Tennessee, before attending Sacred Heart Major Seminary in Detroit, Michigan, where he earned the pontifical Bachelor of Sacred Theology.

After completing two years of further study and formation for the priesthood at Kenrick-Glennon Seminary in Saint Louis, Missouri, he was ordained priest for the Diocese of Memphis in Tennessee on June 4, 2011. While serving in parochial ministry in Memphis, he was assigned to begin studies in canon law through the distance learning program of St. Paul University in Ottawa, Ontario. While studying for the licentiate, he was appointed pastor of his hometown parish of Saint Mary in Savannah, Tennessee, and its mission church, Our Lady of the Lake, in Counce, Tennessee. His assignment as pastor was cut short when he was assigned to full-time study in Ottawa. After earning the Licentiate in Canon Law in 2018, he was appointed judicial vicar and chancellor of the Diocese of Memphis in Tennessee, where he continues to serve in those offices.