

CANONS 1395 AND 19

APPLICATION OF THE *ESSENTIAL NORMS* IN CASES OF DOUBT

The 2006 "Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons" direct that, in cases of doubt as to whether specific behaviors constitute an offense under canon 1395, "the writings of recognized moral theologians should be consulted." Can you make some specific suggestions as to how such consultation could be conducted?

OPINION

The moral theology aspects of clergy sexual misconduct cases are important not only for applying the *Essential Norms* correctly,¹ but for understanding canon 1395 of the 1983 *Code of Canon Law*, its Pio-Benedictine predecessors, and several other ecclesiastical documents.² William H. Woestman, O.M.I. recently underscored the need for canonists to come to grips with the moral tradition on sexual misconduct,³ but he did not make specific suggestions as to authors. I will offer some below. A few preliminary points should be made.

¹ "If there is any doubt whether a specific act qualifies as an external, objectively grave violation [of the sixth commandment of the Decalogue], the writings of recognized moral theologians should be consulted, and the opinions of recognized experts should be appropriately obtained." United States Conference of Catholic Bishops, "Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons" (Washington, DC: United States Conference of Catholic Bishops, 2006), footnote 2, available at <http://www.usccb.org/ocyp/2005EssentialNorms.pdf> [accessed June 2009].

² "Sub luce igitur principiorum iuris atque interpretationis canonicae, unaque cum normis e morali theologia haustis, vigentes hodie ecclesiasticae leges in materia sollicitationis examine subiiciuntur, ut certa ab incertis, solide probabiles a fundamento destitutis opinionibus sedulo distinguentes, tum littera tum sensus legum earumque ad praxim applicatio, clarius cognoscatur." Juan Ortega Uhink, *De Delicto Sollicitationis, Canon Law Studies No. 289* (Washington, DC: Catholic University of America Press, 1954), 129. There is no reason to limit Uhink's observation to Pio-Benedictine solicitation cases. For examples of other ecclesiastical documents for which moral theology categories are relevant, see, e.g., Pope John Paul II, *motu proprio Sacramentorum sanctitatis tutela*, April 30, 2001, *Acta Apostolicae Sedis* 93 (2001) 737-739; National Conference of Catholic Bishops, *Canonical Delicts Involving Sexual Misconduct and Dismissal From the Clerical State* (Washington, DC: United States Catholic Conference, 1995), 6; or Supremae Sacrae Congregationis Sancti Officii, *Instructio de Modo Procedendi in Causis Sollicitationis, Crimen Sollicitationis*, March 16, 1962 (Vatican City: Typis Polyglottis Vaticanis, 1962), nos. 71 and 73.

³ William H. Woestman, O.M.I., "An Offense Against the Sixth Commandment of the Decalogue," in *Roman Replies and CLSA Advisory Opinions 2006*, eds. F. Stephen Pedone and Paul D. Counce (Alexandria, VA: Canon Law Society of America, 2006), 86-88.

“approved authors,” but it is the group known as “approved authors” that the architects of the 1983 Code would have had in mind when drafting norms on sexual misconduct cases. This means, in turn, that one must study materials generated almost entirely before the Second Vatican Council and that a large portion of those materials will be available only in Latin. Given that a fair number of important moralists writing before Vatican II were well trained in canon law, canonists consulting them today enjoy some affinity with them. It is to these authors that I will now provide some introduction.

As a practical matter, most American canonists will turn first to authors writing in English for an orientation to the moral-canonical issues they are researching. In my opinion, the single best place to begin any English-language canonically-oriented research into moral issues is Henry Davis, S.J. (English Jesuit, 1866-1952),⁵ whose justly renowned *Moral and Pastoral Theology* was published, in four volumes, by Sheed and Ward beginning in 1934.⁶ Davis knows the manualist tradition intimately. He ably weaves canonical considerations into his moral analysis, tries to keep a good eye on pastoral questions (especially in matters likely to arise in confession), and does not overload his text with footnotes. Davis is, moreover, an excellent starting point from which one can, if desired, go back to older English-language sources—such as Thomas Slater, S.J. (English Jesuit, 1855-1928),⁷ *Questions of Moral Theology* (1908/1915), or to co-authors John A. McHugh, O.P. (American Dominican, 1880-1950)⁸ and Charles J. Callan, O.P. (American

⁵ See T. Corbishley, “Davis, Henry,” *New Catholic Encyclopedia*, 2nd ed. (Detroit, MI: Thomsan/Gale Group, 2003), IV: 544-545. Although 99% of Davis’ material is in English, he wrote about certain sexual issues in Latin, doubtless out of a sense of propriety.

⁶ Most manualist theologians published multiple editions of their works with only slight changes from edition to edition. It is well to keep track of, then, besides what edition one is consulting and what page number, the topic or paragraph number of a given subject, if one is given, because topic numbers tended to remain more constant. Also, be aware that many works were known not only by the last name of the original author (e.g., “Génicot” or “Noldin”), but by the author and the later editors or redactors of their works (e.g., “Génicot-Salsman” or “Noldin-Schmidt”). This can be confusing because some works, such as Ford and Kelly, were jointly penned by two different authors. Exposure to the works will make such distinctions clear.

⁷ See J. Bischoff, “Slater, Thomas,” *New Catholic Encyclopedia* (New York: McGraw-Hill, 1967), XIII: 280, and R. Brouillard, *Dictionnaire de Théologie Catholique* (Paris: Letouzey et Ané, 1941), XIV/2: 2245-2246. Slater has a number of other monographs on specific moral theology topics besides his famous, and more general, English text.

⁸ See J. Phelps, “McHugh, John Ambrose,” *New Catholic Encyclopedia* (New York: McGraw Hill, 1967), IX: 35, and John Delaney, *Dictionary of American Catholic Biography* (Garden City, NY: Doubleday, 1984), 371.

Besides these two classic Latin language authors, *many* other experts could be listed. In alphabetical order, some that I have found useful would include:

- Joseph Aertnys, S.J. (Dutch Jesuit, 1828-1915),¹⁵ *Theologia Moralis Secundum Doctrinam S. Alphonsi, de Ligorio, Doctoris Ecclesi* (1886/1887), in two volumes
- Giuseppe D'Annibale (Italian cardinal, 1815-1892),¹⁶ *Summula Theologiae Moralis*, (1881-1883), in three volumes
- Eduard Génicot, S.J. (Belgian Jesuit, 1856-1900),¹⁷ *Theologiae Moralis Institutionis* (1896) and his *Casus Conscientiae* (1901)
- Augustino Lehmkuhl, S.J. (German Jesuit, 1834-1918),¹⁸ with two major works, *Theologia Moralis* (1883), in two volumes, and *Casus Conscientiae ad Usum Confessariorum Compositi et Soluti* (1902-1904), also in two volumes
- Benoît Henri Merkelbach, O.P. (Belgian Dominican, 1871-1942),¹⁹ *Summa Theologiae Moralis* (1931-1940), in three volumes, and *Quaestiones de Castitate et Luxuria Quas in Utilitatem Cleri* (1936)
- Jerome Noldin, S.J. (Austrian Jesuit, 1838-1922),²⁰ *Summa Theologiae Moralis* (1902) in three volumes
- Dominicus Prümmer, O.P. (Austrian Dominican, 1866-1931),²¹ *Manuale Theologiae Moralis* (1914), in three volumes, and *Vademecum Theologiae Moralis* (1921), the fifth/sixth edition of which was translated into English by Gerald Shelton and published under the title *Handbook of Moral Theology* (1956)

¹⁵ See A. Sampers, "Aertnys, Jozef," *New Catholic Encyclopedia*, 2nd ed. (Detroit, MI: Thomson/Gale Group, 2003), I: 140.

¹⁶ See P. Mulhern, "Annibale, Giuseppe," *New Catholic Encyclopedia* (New York: McGraw Hill, 1967), I: 561, and A. Beugnet, *Dictionnaire de Théologie Catholique* (Paris: Letouzey et Ané, 1923), I/1:1322.

¹⁷ See J. Campana, "Génicot, Édouard," *New Catholic Encyclopedia*, 2nd ed. (Detroit, MI: Thomson/Gale Group, 2003), VI:135, and P. Bernard, *Dictionnaire de Théologie Catholique* (Paris: Letouzey et Ané, 1924), VI/1:1223-1224.

¹⁸ R. Bush, "Lehmkuhl, August," *New Catholic Encyclopedia* (New York: McGraw Hill, 1967), VIII: 619.

¹⁹ See C. Lozier, "Merkelbach, Benoît Henri," *New Catholic Encyclopedia* (New York: McGraw Hill, 1967), IX: 686.

²⁰ See J. Upton, "Noldin, Hieronymus," *New Catholic Encyclopedia*, 2nd ed. (Detroit, MI: Thomson/Gale Group, 2003), X: 409-410.

²¹ See generally C. Lozier, "Prümmer, Dominikus," *New Catholic Encyclopedia*, 2nd ed. (Detroit, MI: Thomson/Gale Group, 2003), XI: 793-794, and anon., "In memoriam [D. Prümmer]," *Jus Pontificium* 11 (1931) 119-121.

- Aloysius Sabetti, S.J. (Italian Jesuit, 1839-1898),²² *Compendium Theologiae Moralis* (1884), in two volumes.

Finally, although not writing his moral works primarily in Latin, Heribert Jone, O.F.M. Cap. (German Capuchin, 1885-1967),²³ who published his *Katholische Moraltheologie* in 1930, should certainly be mentioned, as his respected text was translated into English by Urban Adelman, O.F.M., Cap. and appeared widely during the 1940s and 1950s under the simple title *Moral Theology*.

Brief mention can also be made of two moral theology dictionaries that appeared late in the manualist era, namely, Pietro Palazzini's *Dictionarium Morale et Canonicum* (1962-1968), in four volumes, and Francesco Roberti's *Dictionary of Moral Theology* (1962, being an English translation of the 1954 Italian original). Occasionally, I think, useful moral information can be found in Palazzini's dictionary (though I much prefer the canonical entries therein), but one could, in my opinion, safely skip Roberti's moral dictionary without fear of missing anything unique.

While an orientation to theologians and works is helpful, only extended consultation with the materials themselves will enable one to arrive at an understanding of how the manualist method impacted canonical thinking. I could say that, broadly speaking, manualist moral theologians followed one of two philosophical schools (those of Sts. Alphonsus Ligouri and Thomas Aquinas) but by no means are manualists simply defenders of their own school and opponents of the other. Even less are they parrots of one another within a single discipline. The debates among manualists were lively, if more subtle than many of us are accustomed to today, and the insights they developed remain useful not simply to canonists, but to all those striving to use the mind to assess and direct human conduct.

Edward N. Peters, J.D., J.C.D.

²² See J. Hennesey, "Sabetti, Aloysius," *New Catholic Encyclopedia*, 2nd ed. (Detroit, MI: Thomson/Gale Group, 2003), XII: 462, and R. Brouillard, *Dictionnaire de Théologie Catholique* (Paris: Letouzey et Ané, 1939), XIV/1:438.

²³ See Wilhelm Lederer, *Pater Dr. Heribert Jone: Ein Leben für Gott und die Wissenschaft* (Schelklinger Hefte: Stadtarchiv, 1988), 13.

Dominican, 1877-1962),⁹ *Moral Theology*, in two volumes (1929). Or, one can move forward to English-language authors writing just before Vatican II, especially to co-authors John C. Ford, S.J. (American Jesuit, 1902-1989)¹⁰ and Gerald Kelly, S.J. (American Jesuit, 1902-1964),¹¹ *Contemporary Moral Theology*, in two volumes (1958-1963), or Francis J. Connell, C.Ss.R. (American Redemptorist, 1888-1967),¹² *Outlines of Moral Theology*, 2nd edition (1958). Finally, from Davis one can move across, as is usually eventually necessary, to the major Latin-language moral theology authors.

The saintly Roman Jesuit Felix M. Cappello, S.J. (1879-1962)¹³ published his famous *Tractatus Canonico-Moralis de Sacramentis* during the 1920s and 1930s, in five volumes, with the seventh and final edition appearing in 1962 on the eve of the Council. Cappello is by far my preferred consultation source among the Latin-language canonico-moralists. Essentially a canonist who also did fine work in morals, Cappello is the epitome of scholars who reverence tradition without losing track of the values that tradition is meant to serve. One who disagrees with Cappello's analysis on this or that point bears a heavy burden of proof. Then, second only to Cappello, I would consult his co-religionist, the Belgian Jesuit Arthur Vermeersch, S.J. (1858-1936),¹⁴ essentially a moralist who also did fine work as a canonist, who is best known for his *Theologiae Moralis Principia, Responsa, Consilia* (1922/1924), in four volumes.

⁹ See J. Coffey, "Callahan, Charles Jerome," *New Catholic Encyclopedia*, 2nd ed. (Detroit, MI: Thomson/Gale Group, 2003), II: 876, and John Delaney, *Dictionary of American Catholic Biography* (Garden City, NY: Doubleday, 1984), 81.

¹⁰ See Eric Genilo, *John Cuthbert Ford: Moral Theologian at the End of the Manualist Era* (Washington, DC: Georgetown University Press, 2007), passim. Although Ford was not a paradigmatic manualist, and although I am not convinced that Genilo fully understood the context in which Ford worked, Genilo's study is a useful introduction to Ford and to the wider manualist method.

¹¹ See C. McAuliffe, "Kelly, Gerard Andrew," *New Catholic Encyclopedia*, 2nd ed. (Detroit, MI: Thomson/Gale Group, 2003), VIII: 139, and John Delaney, *Dictionary of American Catholic Biography* (Garden City, NY: Doubleday, 1984), 290. See also Edwin Lisson, *The Historical Context and Sources of Moral Theology in the Writings of Gerald A. Kelly, S.J.* (Rome: Gregorian, 1975).

¹² See L. Riley, "Connell, Francis J.," *New Catholic Encyclopedia*, 2nd ed. (Detroit, MI: Thomson/Gale Group, 2003), IV: 126, and John Delaney, *Dictionary of American Catholic Biography* (Garden City, NY: Doubleday, 1984), 108.

¹³ See Petrus Huizing, "In memoriam Felicis Mariae Cappello S.J.," *Periodica* 51 (1962) 410-412. For a bibliography of Cappello's work through 1958, see anon., "Scripta R. P. F. M. Cappello S.I.," *Periodica* 48 (1959) vii-xxiv.

¹⁴ See J. Upton, "Vermeersch, Arthur," *New Catholic Encyclopedia*, 2nd ed. (Detroit, MI: Thomson/Gale Group, 2003), XIV: 452-453; Joseph Creusen, *Le Père Arthur Vermeersch, S.J.: L'homme et l'oeuvre* (1947); and anon., "[Arcturus Vermeersch S.J.]," *Jus Pontificium* 17 (1937) 106-110.

First, one must realize that the modern canons on penal law were in place by quite early in the post-Conciliar reform process, having been drafted by men steeped in the dominant pre-conciliar method of doing moral theology known as the “manualist tradition.”⁴ One must understand how moral writers and commentators approached these issues yesterday in order to advise better canonical decision-makers today. For example, to understand the phrase in canon 1395, §1 threatening punishment of those persisting “with scandal in another external sin against the sixth commandment of the Decalogue,” one must be aware, as were the canonists who drafted those canons, of the moral tradition that: (1) understood *scandal* in a way quite differently from how it is used in common parlance; (2) took for granted several distinctions between *external* sins and *internal* sins; (3) saw the sixth commandment as upholding the virtue of *chastity* while the ninth commandment worked in service to *modesty*; (4) knew what it meant (and did not mean) to say that “sins against chastity admit no parvity of matter,” and so on.

Second, the cautionary language in canon 19 about not using “the common and constant opinion of learned persons” in penal matters does not mean that one cannot consult older authors for guidance in understanding the law on penal cases (indeed, one often must do so in accord with c. 17); rather, canon 19 forbids parleying *moral* offenses into canonical *crimes* by, say, logical extension or analogy with other delicts. Obviously, that is not what the *Essential Norms* are calling for here: Canon 1395 itself accords canonical consequences to certain kinds of offenses, while the *Essential Norms* simply direct consultation with moral theology authors in order to identify more precisely what the offenses scored by law are.

Third, although the *Essential Norms* use the phrase “recognized authors,” it would probably have been better to describe such consultation in terms of “approved authors” (*auctores probati*) rather than “recognized authors.” There are several reasons for this, not the least of which is that it approaches this subject matter on its own terms rather than imposing on it more delicate, and sometimes more ambiguous, terminology from a later period. The simple fact is that the pool of “recognized authors” is necessarily wider than is the pool of

⁴ On the “manualist tradition,” see generally, Charles E. Curran, *Moral Theology at the End of the Century* (Milwaukee, WI: Marquette University Press, 1999), especially 1-34. Not all moral theologians writing before the Second Vatican Council were manualists, of course. See, e.g., Bernhard Häring, *The Law of Christ* (Westminster, MD: Newman Press, 1961), in 3 volumes. Most penal canons of the 1983 Code were in place no later than 1973. See Edward N. Peters, *Incrementa in Progressu 1983 Codicis Iuris Canonici: A Legislative History of the Code of Canon Law* (Montréal: Wilson & Lafleur, 2005), 1135-1197, especially 1195.