

OVERDOSING ON THE MEDICINE OF MERCY

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“[O]ften errors vanish as quickly as they arise, like fog before the sun. The Church has always opposed these errors. Frequently she has condemned them with the greatest severity. Nowadays however, the Spouse of Christ prefers to make use of the medicine of mercy rather than that of severity. She considers that she meets the needs of the present day by demonstrating the validity of her teaching rather than by condemnations.”

—Pope John XXIII (1962)

In a remarkable article published last spring, James Hitchcock argued that an unrealistic spirit of “compulsory optimism” has pervaded the Church since the Second Vatican Council and that the effects of this compulsory optimism have been to cause the faithful to ignore the devastating internal crisis afflicting the Church and to disable the hierarchy from taking any action effectively to address that crisis or the scandals associated with it [“The End of *Gaudium et Spes*?” *Cath. World Rpt.* (May 2003)]. The debilitating spirit of optimism identified by Hitchcock has been at least as present in canon law as in any other aspect of the Church’s life. The most striking example of this phenomenon in the legal realm has been the near abandonment of the Church’s penal or criminal law in the decades since Vatican II. The post-conciliar decline in penal law is not only a symptom of the problem described by Hitchcock, but it is also a major cause of a host of other problems, especially the sexual abuse crisis in America.

The Last Document of Vatican II

To understand the decline of penal law, one must remember the connection between Vatican II and the 1983 Code of Canon Law (the code currently in force in the Church). Pope John XXIII had announced on the same day—25 January 1959—both the convocation of the Second Vatican Council and also the reform of the Code of Canon Law. When Pope John Paul II promulgated the 1983 code, he described it as a translation of the Vatican II teachings into legal language. In

fact, one prominent canonist has described the code as the final document of Vatican II [C. Burke, *Authority and Freedom in the Church* (Ignatius, 1988), 35].

We do not imply that the current code and its deficiencies are an inevitable result of the teaching of Vatican II. Rather, we believe that the spirit of “compulsory optimism” that characterized the period in which the Council met left an unmistakable imprint on the 1983 code as well. Although we here join in Hitchcock’s critique of that *optimistic spirit* and its impact on the life of the Church, neither he nor we suggest that the Church would have been better served by a mood of *pessimism*. Rather, we believe along with Hitchcock that the most correct Catholic attitude is one of *moral realism*, born of the Church’s own teaching that, although human nature is inherently good, that nature is, at the same time, *fallen* human nature.

The post-Vatican II debate concerned not only *what type* of penal law the Church should have, but whether the Church should have *any* penal law at all [cf. V. De Paolis – D. Cito, *Le sanzioni nella Chiesa* (Urbana, 2000), 58-61]. Indeed some scholars already had argued that any type of law was inherently inconsistent with the Church’s spiritual nature.

Proponents of an exclusively “spiritualistic” understanding of the Church were especially opposed to the existence of penal law. They and others argued that, because penal law resorts to coercion to correct and punish the faithful who commit ecclesiastical crimes (delicts), penal law therefore is incompatible with the principle of religious liberty. Another argument advanced against penal law was that



the conversion of transgressors should be absolutely voluntary and never should be the result of coercion.

These arguments did not prevail and, among the seven books of the 1983 Code of Canon Law, one was devoted to penal law. The survival of penal law, at least in some form, seems to have been inevitable. Vatican II itself had affirmed that the Church is not only a spiritual community, but a visible and hierarchic one as well [Dogm. Const. on the Ch. *Lumen gentium* (21 Nov. 1964), 8]. Thus, Book VI of the 1983 code contains the Church's legislation on penal law, and the first canon of that book declares, "The Church has its own inherent right to constrain with penal sanctions Christ's faithful who commit offenses" [can. 1311].

Penal Law after Vatican II

If penal law survived, however, the new form that it took was very different from the Church's previous penal law. While the Church's earlier code (that of 1917) had contained 220 canons on penal law, this number was reduced to only 89 canons in the 1983 code. The number of penalties for specific crimes was reduced from 101 in the 1917 code to 35 in the 1983 code.

This reduction in the number of canons and penalties corresponded to a general decline in the importance of penal law in the new code. One of the most prominent authorities on penal law, Velasio De Paolis, cites canon 1341 as the provision most indicative of the shift from the 1917 code to the 1983 code. That canon provides that an ecclesiastical authority may begin a penal process "only when he perceives that neither by fraternal correction or reproof, nor by any methods of pastoral care, can the scandal be sufficiently repaired, justice restored and the offender reformed." Thus, the 1983 code itself contains an unmistakable bias against the invocation of the Church's penal law and establishes it as a last resort to be used only after all other options have failed.

Other changes in the new code include the abolition of all definitions of legal terms and a simplification of the procedures for remission of penalties. The new code expresses a preference for declared penalties over automatic or *latae sententiae* penalties, and for the infliction of penalties by a penal trial rather than by a simple decree of the bishop. However, bishops enjoy a great deal more discretion under the new code in deciding on specific penalties and indeed in deciding whether to invoke the penal law at all. [On differences between the two codes, see generally T. Green, "Introduction to Book VI," in *The Code of Canon Law: A Text and Commentary* (Paulist, 1985).]

Penal Practice after Vatican II

The penal process was supposed to be the option of *last resort*, but in practice it became an option of *no resort* whatsoever. That is, for all practical purposes, recourse to the penal process became a merely theoretical possibility. Since the codification of 1983, few penalties have been inflicted. Between the years 1983 and 1998 (the last year for which figures are available) the Church's standard court of appeals, the Roman Rota, decided only three penal cases on the merits.¹

One of the reasons for reducing the number of penalties and expanding the discretion of the bishops was to allow the bishops to adapt penal discipline to local circumstances. In fact, however, almost no bishops have promulgated particular (local) law on penal discipline. One of the few who has

done so is Bishop Fabian Bruskewitz of Lincoln, Nebraska, who in 1996 legislated the penalty of excommunication for the offense of joining or remaining a member of certain organizations whose purposes are incompatible with the Catholic faith. When he did so, however, he received more criticism than commendation from his brother bishops.

The assumption both among the Church's leaders and even in the law itself seems to be that penalties and penal trials are almost never necessary. This attitude recalls Pope John XXIII's speech at the opening of Vatican II, in which he said that, although the Church continues to oppose doctrinal errors as she always has done, today she "prefers to make use of the medicine of mercy rather than that of severity."

Perhaps canon 1341's relegation of penalties to the option of last resort is not objectionable in itself. We do not assert that Church leaders should impose penalties simply for the sake of doing so. If the other options cited in that canon—fraternal correction, reproof, and pastoral care—had proven effective, then there would have been no ground for criticizing the failure to use the penal law.

However, the practice of Church leaders in applying the "medicine of mercy" virtually every time that a problem has arisen has been one of the most spectacular failures of the post-conciliar period. One need only recall the many instances of doctrinal unorthodoxy and liturgical abuse that have gone unpunished and uncorrected. The most outrageous example of the failure to punish, however, concerns the sexual abuse of minors. We now know that, from 1950 to 2002, accusations of sexual abuse were made against more than 4,000 members of the Catholic clergy in the United States [John Jay Coll. of Crim. Justice, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States* (27 Feb. 2004)]. However, the response of choice by bishops and religious superiors usually was the "medicine of mercy" and never or almost never was the penal trial [cf. *ibid.*; J. Llobell, Addr. "Contemperamento tra gli interessi lesi e i diritti dell'imputato" (Rome: Pont. U. Holy Cross, 25 Mar. 2004)].

Even before the American crisis of sexual abuse came to light, De Paolis already had pointed out that, in the years since Vatican II, penal law had come to be neglected in favor of a dangerous and misplaced emphasis on pastoral methods of correction [De Paolis—Cito, *Le sanzioni nella Chiesa*, 210]. This caused him to question whether the penal law of the 1983 code was adequate to prevent damage to souls and to protect the rights of the faithful [Ibid.].

An Aversion to All Correction?

The post-conciliar aversion to the use of penal processes has become almost an aversion to correction itself, regardless of the form. Canon 1341 expresses a preference against penal trials and in favor of the milder remedies of fraternal correction, reproof, and pastoral action. In at least some contexts, however, it appears that most Church leaders have not had the stomach even to use these gentlest forms of correction.

The documents disclosed in the Boston civil litigation show *not* that Cardinal Law opted for private pastoral methods to rebuke his priests who had sexually abused minors, but rather that he seems not to have rebuked them at all. His letters to them expressed only gratitude for their service and sympathy for the difficulties that they were experiencing [cf. R. Dreher, "Faith in Our Fathers," *National Review Online* (25

Jan. 2002)]. Thus, from all that appears in the record, it seems not to be the case that the cardinal opted for pastoral methods of correction that sadly proved ineffective, but rather that he made no serious effort whatsoever—pastoral or otherwise—to correct them or to reprove them for their crimes.

Several bishops have said that they addressed clerical sexual abuse only as a matter for the confessional and for psychological treatment. They claim that this approach, though flawed in retrospect, was justified by their belief at the time that priests could be cured of their proclivity to molest children and adolescents. However, these bishops cannot explain why they ignored the law for such a long time. During this entire period, the penal law of the Church recognized clerical sexual abuse of minors as a serious crime and required that it be punished [1983 CIC can. 1395 §2; 1917 CIC can. 2359 §2].² Yet it seems that no one or almost no one ever was punished under these provisions of the law. Regardless of what they believed about whether pedophilia was curable or not, it is shocking that so many of our bishops, faced with this multitude of complaints of sexual abuse, felt so free to ignore the law of the universal Church.

This aversion to correction extends even to actions in other contexts that only resemble penal action. Thus, when Archbishop Raymond Burke notified unrepentant pro-abortion politicians that they would be denied communion, Cardinal Theodore McCarrick and Cardinal Roger Mahony criticized his action. McCarrick referred to Burke's action as a "sanction" and Mahony stated that such a step was improper unless the politicians had been found guilty of a crime. However, the cardinals were wrong to assume that Burke's action was a penal sanction or that it had anything at all to do with penal law.

Rather, as Archbishop Burke already had explained, the question is one of sacramental discipline. The law of the Church states that persons who "obstinately persist in manifest grave sin are not to be admitted to holy communion" (can. 915). Note that the canon states not that such persons *may* be denied communion, but rather that they *are not to be admitted*. Despite the obligatory nature of this canon, however, few bishops have attempted to correct the pro-abortion Catholic politicians in their dioceses or even have spoken out against the phenomenon of public promoters of abortion continuing to receive communion in Catholic churches week after week and year after year.

A Revival of Penal Law?

Because this article has offered a critique of the post-conciliar decline of the Church's penal law, one might expect us enthusiastically to welcome the recent announcement that several ecclesiastical penal trials of clerics accused of sexual abuse are to be held in the United States. It is indeed possible that Church leaders now are prepared to end their almost exclusive reliance on the medicine of mercy for nearly every problem. Perhaps they realize that there is a certain wisdom in the fact that penal law describes some of its strongest measures as *medicinal* [can. 1312 §1, 1°]. Mercy is a fine medicine, but it is not the sole medicine available to Church leaders and it is not the remedy best suited to every situation.

However, there are dangers in this apparent revival. Under public pressure arising from the American sexual abuse crisis, Church leaders here and in Rome have eroded many of the

protections that the Church's penal law has afforded to persons accused of ecclesiastical crimes, such as the right to a trial, the right to appeal, and the right to face one's accusers [cf. J. Allen, "The Word from Rome" (26 Mar. 2004)]. These policies may provide cover for embattled Church leaders, but they do not serve the search for truth in these cases.

Church leaders both in America and in Rome seem to believe that the rights of defendants do not require legal recognition, but will be sufficiently protected by the goodwill of bishops and judges. If this is indeed their thinking, then what we are witnessing is not a real solution to the crisis of penal law in the Church, but only an exchange of one false optimism for another.

Notes

¹ These numbers include only penal cases decided in the Church's judicial system. Other cases undoubtedly have been decided in the administrative system. However, the tribunal to which these cases may be appealed, the Apostolic Signatura, imposes strict rules of secrecy on its cases. As a result, the number of penal cases decided in the administrative system is unknown. However, Carlo Gullo, an advocate who practices before both the Rota and the Signatura, asserts that his experience in practicing before the Signatura suggests that the number of administrative cases decided by that tribunal is relatively small [Carlo Gullo, *Addr. "Le ragioni della tutela giudiziale in ambito penale"* (Rome: Pont. U. Holy Cross, 25 Mar. 2004)].

² In the 1917 code and the original 1983 code, the crime was defined as sexual activity with a minor below the age of 16. In 1993, the National Conference of Catholic Bishops requested and received permission for a derogation from canon 1395 §2 to make sexual activity with any person below the age of 18 a crime.

Saint John Fisher

1469-1535

This issue is dedicated to the English martyr, who suffered for upholding the indissolubility of marriage and for defending the Church from royal power. He was beheaded on Tower Hill after having been convicted of treason for his refusal to acknowledge King Henry VIII as the supreme head of the Church.

Widely known as an educator and preacher, Fisher was made Bishop of Rochester and also elected Chancellor of Cambridge University in 1504. He earned the enmity of King Henry for opposing encroachments on the Church in 1529 and later for preaching against Henry's divorce from Queen Catherine. Fisher was arrested and imprisoned several times before his martyrdom and, alone among his brother bishops, never wavered in his dedication to the defense of marriage and the rights of the Church.

With American tribunals issuing thousands of decrees of nullity every year and the Church being accused of interfering in civil politics merely for the defense of innocent life, St. John Fisher serves as a shining example and a powerful intercessor in our own day.

Saint John Fisher, pray for us.