

CURRENT THEOLOGY

NOTES ON MORAL THEOLOGY: 1992

THE MAGISTERIUM AND MORALITY

What is the proper relationship between moral theology and the teaching office of the Church? Recently, the Congregation for the Doctrine of the Faith (CDF) has taken a series of steps to define the magisterium's authority. Some commentators have welcomed these steps. Others believe that these documents of the CDF raise serious issues concerning the scope of authoritative teaching on moral matters and the legitimacy of dissent. They charge that the documents represent significant extensions of the magisterium's claims which are unwarranted by tradition or the subject matter of morality. Are the ground rules under which theologians, pastors, and other ministers operate being changed in the waning days of the present pontificate? And more fundamentally, do the initiatives of the CDF canonize a particular method of moral theology which relies excessively on unexceptional concrete moral norms?

In this Note we will examine three of these initiatives: *The Catechism of the Catholic Church* promulgated by John Paul II on 8 December 1992, the new "Profession of Faith and Oath of Fidelity," and the "Instruction on the Ecclesial Vocation of the Theologian." Finally, we will consider a recent study, *The Abuse of Casuistry*, in which Albert R. Jonsen and Stephen Toulmin argue that the currently accepted ethics of principles remains remote from human experience because it views the moral life from the wrong end of the telescope.¹ The venerable tradition of casuistry locates moral meaning in particular cases of action with their specific intentions and circumstances rather than in universal theory or abstract principles.

Recent Vatican Documents on Moral Authority

The Universal Catechism

In December of 1989, the Congregation for the Doctrine of the Faith issued a draft of a proposed "Catechism for the Universal Church." It was a lengthy compendium of church teaching on faith and morals that was intended to serve as a point of reference for religious education

¹ Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: Univ. of California, 1988).

materials which local conferences would formulate. Its spirit and content contrasted sharply with the message of the Vatican Council.²

In March 1990, the Administrative Committee of the United States Catholic Conference approved the report of the Ad Hoc Committee on the Catechism for the Universal Church which roundly criticized the draft. They underscored how much the draft disagreed with the explicit teaching of the Council on several important matters. No distinction was made between the levels of teaching or the "hierarchy of truths."³ It paid no attention to the development of doctrines in the tradition. It ignored the difference between the basic beliefs of the Church which are not changeable and the language within which they are expressed. The moral vision was couched in terms of obedience to divine law rather than the following of Christ. The American bishops requested that the revised version of the catechism be resubmitted to the world's bishops, but their suggestion was not accepted by the CDF.

Although most bishops approved the draft document, over 40% of the recommended changes were directed to the section on morality, which was then extensively rewritten. In late November, the press reported leaks from the final version, mostly concentrating on novel types of moral infractions (cheating on income taxes, insider trading, drunk driving, etc.).⁴ The official English-language edition will not be available until March 1993.

Profession of Faith and Oath of Fidelity

The new "Profession of Faith and Oath of Fidelity" mandated by the CDF on 1 March 1989 present an even more troubling example of curial redefinition of the appropriate response to magisterial teaching. The profession and oath have become mandatory for all new pastors, rectors, heads of religious communities, and teachers of philosophy and theology in seminaries or ecclesiastical faculties. Ladislav Orsy doubts

² Critical essays on the catechism appeared in *America* 162/8 (3 March 1990) 189–222. A more complete collection of essays is in Thomas J. Reese, S.J., ed., *The Universal Catechism Reader: Reflections & Responses* (HarperSanFrancisco, 1990). For a sample of the conservative response, see *Fellowship of Catholic Scholars Newsletter* 13 no. 3 (June 1990) 2–3, 8–20.

³ "Decree on Ecumenism" no. 11, in Walter Abbott, ed., *The Documents of Vatican II* (New York: America, 1966) 354.

⁴ The *New York Times*' front-page headline read "New Catechism for Catholics Defines Sins of the Modern World," 17 November 1992, 1, 6; Peter Hebblethwaite's title in the *National Catholic Reporter* was "A few 'thou shalt' and 'shalt nots' for our day," 29/6 (4 December 1992) 14. See also Gerald M. Costello, "The New Catechism: Will It Play in Baltimore?" *U.S. Catholic* (October 1992) 48–51; Jean-Marie Quennois, "Ratzinger's Testament," *Catholic World Report* 2/10 (November 1992) 36–41. For a traditionalist defense, see William J. Wrenn, *Catechesis and Controversies: Religious Education in the Postconciliar Years* (San Francisco: Ignatius, 1991).

that it applies to theologians in universities, except those in faculties which are chartered by the hierarchy and confer ecclesiastical degrees.

There is some ambiguity in Canon 833 concerning who must make the profession of faith. It mentions "the rectors of ecclesiastical or Catholic universities" and "the teachers in any university whatsoever who teach disciplines which deal with faith and morals." Orsy comments:

The presidents of universities that are Catholic *de facto* (in fact) or are Catholic "by inspiration," as it is in the case of nearly all Catholic universities in the United States, are not bound since they do not hold their office and function "in the name of the Church." Nor are teachers of theology in such institutions bound, because they have never received a canonical mission from an ecclesiastical superior "to teach in the name of the Church."⁵

In Germany, Switzerland, and Austria, however, where Catholic faculties of theology have been established in state universities, theologians teach with an ecclesiastical mandate which can be withdrawn by church authorities, as in the case of Hans Küng at Tübingen. The precariousness of their position helps explain the vehement protest of 163 European theologians in "the Cologne Declaration" in 1989.⁶

The Catholic Theological Society of America (CTSA) in collaboration with the Canon Law Society of America issued a thorough analysis of the new profession and oath which charges that they contain an untraditional extension of magisterial authority. The first paragraph of the profession repeats the formulation of Vatican I and specifies the assent of faith to what is infallibly taught concerning God's revelation. The second paragraph appears to specify a new form of assent to church teaching and deliberately expands the grey zone between what is infallibly taught and what is authentic but reformable doctrine. Infallible teaching requires the assent of faith; whereas authoritative but reformable teaching calls for interior assent, namely, the "religious submission of the will and intellect."⁷ *Lumen gentium* no. 25

⁵ Ladislav Orsy, S.J. "The New Profession of Faith and Oath of Fidelity," *America* 160 (15 April 1989) 345.

⁶ Text of the Declaration in *The Tablet* 243 (1989) 140–42. The Catholic Theological Society of America registered objection to similar reactionary policies of the Vatican in "Do Not Extinguish the Spirit," *Origins* 20/29 (1990) 462–67. Archbishop John R. Quinn, a member of the CTSA, questioned the strategy of making these criticisms public (*ibid.* 467).

⁷ *Report of the Catholic Theological Society of America Committee on the Profession of Faith and the Oath of Fidelity* (CTSA and Canon Law Society of America, April 15, 1990) 87. The CTSA committee was composed of Michael J. Buckley, S.J., Margaret Farley, R.S.M., John T. Ford, C.S.C., Walter Principe, S.S.B., and James H. Provost.

bequeathed the controverted term *obsequium religiosum*, which denotes the attitude of "respect," "reverence," and "loyalty" even more than an act of "obedience" or "submission."

The second paragraph of the new profession of faith states: "I also firmly accept and hold each and every thing that is proposed by that same [Church] definitively with regard to teaching concerning faith and morals." The CTSA report charges that there is serious ambiguity concerning the object of this promise. Different traditional interpretations about these "secondary" objects of infallibility exist among Catholic theologians. Some hold that the category includes only what is *strictly required* to safeguard the deposit of faith; others include what is *connected* with it; others would include the *entire natural law*. "There are some, for example, who would subsume the teaching of artificial birth control under what is 'definitively proposed.' Each of these positions has its advocates, and each interpretation would provide a very different rubric by which this paragraph would be understood and applied."⁸

The new profession extends the object of this assent to include teaching of the magisterium that is deemed necessary support for the matters definitively taught as well as any decision that is made to terminate further debate on a subject. This would appear to go considerably beyond the express intent of *Lumen gentium* no. 25 and Canon 749, which limit "definitive" teaching to what has been infallibly declared. The CTSA report warns that Vatican I and II refrained from teaching this doctrine, at least explicitly. "Such an act by those making this profession entails a commitment which the Church itself has never taught in a definitive manner"⁹

No consultation with the bishops of the world preceded the formulating and mandating of this new profession of faith. The bishops did not request this extension of authority, which, in the report's view, is not warranted by the New Testament, the Second Vatican Council, or tradition. The report sums up its evaluation:

The novel insistence that theologians hold "an office," that they "speak in the name of the Church," and that they must be "mandated" or "missioned" by the hierarchy to teach, is read by many theologians both as a theological misinterpretation of the nature of theological work and as another tendency toward excessive centralization and inhibiting control within the Church.¹⁰

⁸ Ibid. 79.

⁹ Ibid. 84.

¹⁰ Ibid. 103-4. See also Kevin T. Kelly, "The Role of the Moral Theologian in the Life of the Church," in Raphael Gallagher, C.S.S.R. and Brendan McConvery, C.S.S.R., eds., *History and Conscience: Studies in Honor of Father Sean O'Riordan, C.S.S.R.* (Dublin:

Ecclesial Vocation of the Theologian

On 24 May 1990, the CDF. issued its "Instruction on the Ecclesial Vocation of the Theologian."¹¹ It officially ratifies the extension of authority introduced in the second paragraph of the Profession of Faith. In addition it creates an entirely new category of reformable teaching. Different responses are specified for the various levels of official teaching:

a. *Infallible Teaching.* It is a doctrine of faith that the magisterium can teach infallibly on matters of faith and morals. Solemn definitions of what is found in revelation as well as "teaching of the ordinary and universal magisterium when it proposes for belief a teaching of faith as divinely revealed" call for "the assent of theological faith."¹² Moral norms contained in revelation can also be taught infallibly, even though human reason can know them naturally. Although Vatican I affirmed that infallible teaching extends also to morals, most scholars would agree that there has never been a formal *ex cathedra* definition of morality.¹³

b. *Definitive Declarations.* Truths of faith and morals, "which even if not divinely revealed are nevertheless strictly and intimately connected with revelation" when proposed by the magisterium "in a definitive way," must be "firmly accepted and held."¹⁴ Avery Dulles writes that this category ("definitive declarations of nonrevealed truths closely connected with revelation and the Christian life") is

Gill and Macmillan, 1989) 8–23; John M. Huels, O.S.M. "Focus on Canon Law: The Profession of Faith and Oath of Fidelity Revisited," *New Theology Review* 79–84; Eoin de Bhaldraithe, O.C.S.O., *One in Christ* 26/4 (1990) 358–61.

¹¹ Vatican Congregation for the Doctrine of the Faith, "Instruction on the Ecclesial Vocation of the Theologian," *Origins* 20 (5 July 1990) 117–26. See John R. Quinn, "Observations on Doctrinal Congregation's Instruction," *Origins* 20/13 (1990) 202–5; John E. Thiel, "The Theologian in the Eyes of the Magisterium," *Heythrop Journal* 32 (1991) 383–87.

¹² CDF, "Instruction" par. 23, p. 122.

¹³ See John Mahoney's account of the confusion surrounding Vatican I's reliance on the Council of Trent's phrase "in matters of faith and morals" to specify papal infallibility (*The Making of Moral Theology: A Study of the Roman Catholic Tradition* [Oxford: Clarendon, 1987] 165). The question remains whether "mores" in the decrees of Trent refers to morals or to a wider range of practices and customs, such as veneration of the saints, prayers for the dead, etc., which were under attack by the Reformers.

¹⁴ CDF, "Instruction" par. 23, p. 122. The Instruction further asserts that the magisterium teaches infallibly, i.e. in a definitive manner, not only the contents of revelation, but also propositions which are "intimately connected with [the truths of revelation] in such a way that the definitive character of such affirmations derives in the final analysis from revelation itself" (*ibid.* par 16, p. 121).

implied by Vatican I and II, even though it is not explicitly mentioned in their documents.¹⁵ He believes it is debatable whether the magisterium can teach all matters that pertain to the natural law in a definitive manner.

This is the form of assent ("to accept firmly and hold") which is ambiguously asserted in the 1989 Profession of Faith. Orsy found it puzzling to say that anything in the realm of fallibility could be proposed as definitive. In addition, if the appropriate response ("to accept firmly and hold") is not an act of faith (which is made to the first category of truths), what does this novel phrase mean? Neither the Second Vatican Council nor the canons of the 1983 Code use such language.¹⁶ Francis A. Sullivan pointed out in this journal that following *Lumen gentium* no. 25 most theologians who do "admit a secondary object of infallibility limit it to what is strictly required in order for the magisterium to defend or explain some revealed truth." The CDF Instruction extends the range of this secondary object of infallibility to truths that are "intimately connected" with revelation, not merely those that are necessarily required for its defense.¹⁷

Does the Instruction include in what is taught "in a definitive way" those magisterial teachings concerning natural-law material not found explicitly in revelation? In a quasi-official commentary in *L'Osservatore Romano*, Umberto Betti asserted, "All that refers to the natural law, in that it is an expression of God's will, can also be included in the object of irreformable definitions, even though not of faith."¹⁸ Sullivan holds the more common opinion that this is not the case: "In my opinion, to say that something can be the object of *authentic* (read: authoritative) magisterium, or to say that the *competence* of the magisterium extends to it, does not necessarily imply that the magisterium is authorized or competent to speak with infallibility on such a matter."¹⁹ Different interpretations on this matter could

¹⁵ Avery Dulles, *The Craft of Theology: From Symbol to System* (New York: Crossroad, 1992) 109.

¹⁶ Orsy, "The New Profession of Faith and Oath of Fidelity," *Doctrine and Life* 39 (1989) 507–12.

¹⁷ Francis A. Sullivan, S.J., "The Theologian's Ecclesial Vocation and the 1990 CDF Instruction," *TS* 52 (1991) 51–68, at 56.

¹⁸ *L'Osservatore Romano*, 25 February 1989, 6.

¹⁹ Sullivan, "The Theologian's Ecclesial Vocation" 57. See also his "Some Observations on the New Formula for the Profession of Faith," *Gregorianum* 70 (1989) 552–54, and his *Magisterium: Teaching Authority in the Catholic Church* (New York: Paulist, 1983) 136–52; also Andre Naud, *Le Magistère incertain*, *Heritage et project* 39 (Montreal: Fides, 1987) ch. 2; John P. Boyle, "The Natural Law and the Magisterium," *CTSA*

generate divergent expectations between the CDF and moral theologians.

c. *Nondefinitive Teaching*. Nondefinitive teaching which aids in understanding the contents of revelation calls for an interior religious assent of mind and will, the *obsequium religiosum*. Papal encyclicals and most of the teaching of Vatican II fall under this category. Dulles states that such teaching is not "a mere opinion that Catholics are free to disregard. The teaching has a real, though not unconditional, claim on the assent of the faithful."²⁰ The Instruction sees interior assent as the norm, but recognizes that there may be some exceptions. A theologian might raise questions to this level of teaching about its timeliness, form, or content. The CDF encourages the theologian to maintain an attitude of loyalty and respect, but also "to assess accurately the authoritativeness of the interventions, which becomes clear from the nature of the documents, the insistence with which a teaching is repeated, and the very way in which it is expressed."²¹

This advice presumes that theologians can and should make judgments about the level of authority of moral teachings. They should examine the level of teaching (ecumenical council, encyclical, formal instruction, papal allocution, comment by a Vatican congregation on current issues, etc.), the constancy of witness in the tradition, and the actual content (which seems to imply that the arguments should be weighed as well as the conclusions). What happens, however, when theologians or bishops consider a given teaching to be less authoritative than those who issue it? Recent official documents have said little about the responsibility of officeholders to consult widely and frame persuasive arguments for moral positions; they focus almost exclusively on the dispositions of those who are their recipients. The ordinary magisterium, however, is not exhausted by Vatican documents. John Mahoney has described the process of interpretation that followed *Humanae vitae* as "collegiality after the fact": "Thus the teaching of the Church's ordinary *magisterium* on contraception is not to be considered as *Humanae vitae* alone, but *Humanae vitae* in the light of all other more particular episcopal statements."²²

d. *Prudential Interventions*. Finally, the instruction mentions prudential interventions in "questions under discussion which involve, in addition to solid principles, certain contingent and conjectural ele-

Proceedings 34 (1979) 189–210; Franz Böckle, "Le magistère de l'Eglise en matière morale," *Revue théologique de Louvain* 19 (1989) 3–16.

²⁰ Dulles, *Craft of Theology* 110.

²¹ CDF, "Instruction," par 24, p. 123.

²² John Mahoney, *The Making of Moral Theology* 277.

ments. It often only becomes possible with the passage of time to distinguish between what is necessary and what is contingent."²³ Avery Dulles remarks that this category "appears to be new" and calls for "external conformity or obedience" rather than full internal assent, since it remains in the public forum. Cardinal Ratzinger gave some examples of this level of teaching in his press conference on the Instruction: "In this regard one can refer to the statements of the Popes during the last century on religious freedom as well as the antimodernistic decisions of the Biblical Commission of that time . . . The details of the determinations of their contents were later superseded once they had carried out their pastoral duty at a particular moment."²⁴

The CDF admits the possibility of "deficiencies" only on this final level of teaching. When the passage of time reveals deficiencies in some magisterial pronouncement, does it then get deposited in this wastebasket of embarrassing edicts? It seems unlikely that Pius IX considered "The Syllabus of Errors" or *Mirari vos* to be no more than prudential interventions which eventually would be discarded. This fourth category could be quite ambiguous for moral theologians: How is one to determine what depends on principle and what on prudence, or what is timeless and what is contingent? Do not the applications of principles in the third category also engage the contingent in such a way that they too are prudential judgments (at least in part) and not strict deductions from universal moral principles?

The Instruction counts on time to discern which assertions in magisterial pronouncements are valid and which are not. The history of doctrinal development has not always been so tranquil, particularly in recent memory. Were the tragic effects of the antimodernist crusade in establishing reactionary seminary training and retarding biblical scholarship no more than the effects of carrying out "the pastoral duty" of these prudential interventions?²⁵

The Instruction holds that there is no "right of dissent" from any teaching that the Church authoritatively makes. If theologians cannot in conscience agree with "nonirreformable" teaching, they are forbidden to discuss the matter publicly. The document identifies all public disagreement over ordinary teaching with open defiance and de facto subversion of the teaching mission of the Church. This forces the hi-

²³ CDF, "Instruction," par. 24, p. 122.

²⁴ Dulles, *Craft of Theology* 111, citing Cardinal Ratzinger from *L'Osservatore Romano* [English weekly edition] 2 July 1990, 5. Does the recent CDF statement on discrimination against homosexuals fall into this fourth category? See John F. Touhey, "The C.D.F. and Homosexuals: Rewriting the Moral Tradition," *America* 167/6 (1992) 136-38.

²⁵ For a different interpretation of the Modernist suppression, see Louis Janssens, "The Non-infallible Magisterium and Theology," *Louvain Studies* 14/3 (1989) 195-259.

erarchy to be the arbiters of theological disputes, a duty which most bishops do not seek and even fewer are professionally competent to perform. It also seems to ignore the fact that Vatican documents are reported instantly and frequently erroneously in the popular press. Should not theologians and pastors make use of the same media to interpret them?

On 14 November 1991, the U.S. bishops approved a lengthy statement on "The Teaching Ministry of the Diocesan Bishop: A Pastoral Reflection." It develops the theological foundations for episcopal teaching, insists that the teaching of the bishop finds its most significant expression in preaching the gospel, and calls for collaboration and regular dialogue between bishops and theologians. The bishops insist that not all teachings of the magisterium make an identical claim on Catholics. In a remark clearly directed to integralists who adopt an "all or nothing" attitude and question the orthodoxy of their opponents, they write: "Unfortunately, in the context of intrachurch polemics, *heresy* is often used rather loosely to designate any form of the nonacceptance of church teaching or any proposal of novel theological opinions or pastoral practices. To use the technical term 'heresy' in such a broad way would be erroneous and unjust."²⁶

The pastoral reflection accepts the four categories of magisterial teaching set forth in the CDF's instruction and provides examples of the first three. First, the resurrection of Jesus from the dead calls for the assent of faith. Second, the natural immortality of the human soul would be an instance of "definitive, non-revealed truth" which calls for "firm assent." Finally, "an example of teaching which is non-definitive and calls for *obsequium religiosum* is the teaching of the instruction *Donum vitae* against such practices as artificial insemination, surrogate motherhood and in vitro fertilization."²⁷

The statement also spells out the different forms of rejection: "heresy" designates the rejection of the first category of truths; "error" of the second category; nonacceptance of nondefinitive teaching is either withholding of assent, private dissent, or public dissent. The bishops concentrate on the latter and qualify both terms. In American parlance, the term "dissent" is not restricted to the meaning given it by the CDF, that is, organized public opposition to the magisterium. Secondly, "public" should not be applied to "the professional discussions

²⁶ National Conference of Catholic Bishops, "The Teaching Ministry of the Diocesan Bishop: A Pastoral Reflection," *Origins* 21 (2 January 1992) 474-92, at 487. See also Johann-Baptist Metz and Edward Schillebeeckx, *Orthodoxy and Heterodoxy*, Concilium (Edinburg: T. and T. Clark, 1987) 192.

²⁷ "The Teaching Ministry" 491-92.

that occur among theologians within the confines of scholarly meetings and dialogues or to the scholarly publication of views, since they can develop and refine magisterial teachings." Along with the CDF, they do not condone turning to the mass media, organizing public opposition, and advocating "an alternative position as the correct interpretation of beliefs or as reliable guidance for the lives of Catholics."²⁸ Although their statement mostly emphasizes the *extrinsic authority* of magisterial teaching (trust in the guidance of the Spirit, willingness to listen to those who hold pastoral office, desire to maintain the unity of the Church, etc.), it also acknowledges that there may be times when the *intrinsic authority* of certain teachings presents a stumbling block: "Yet the reception of non-definitive teaching may be significantly limited by ignorance, prejudice, and poor or no teaching, as well as by disagreement and contestation among the faithful. This may be a sign that the issue would benefit from clarification or from comprehensive restatement and persuasive teaching by the magisterium."²⁹

Do Catholics Have the Right to Dissent?

Since the Council a number of theologians have proposed that there is a right to dissent for Catholics.³⁰ (Those discussions have not taken "dissent" in the narrow sense rejected by the CDF, and usually they have not ruled out some forms of public disagreement with official positions). The case has been made on the basis of the right to religious liberty ratified in *Dignitatis humanae*. Since the right to freedom from state coercion in matters of religious belief and practice is asserted to be a basic human right, does it not follow that Catholics enjoy a similar

²⁸ Ibid. 488.

²⁹ Ibid. 489. See also Patrick Howell, S.J., and Gary Chamberlain, eds., *Empowering Authority: The Charism of Episcopacy and Primacy in the Church Today* (Kansas City, Mo.: Sheed and Ward, 1990), especially the articles by David Tracy, Anne Patrick, and Peter Chirico, S.S.; William W. May, *Vatican Authority and American Catholic Dissent: The Curran Case and Its Consequences* (New York: Crossroad, 1987). For a philosophical argument that church documents ought to rely primarily on extrinsic authority, see J. L. A. Garcia, "Moral Reasoning and the Catholic Church," *New Oxford Review* 59/5 (1992) 13–17.

³⁰ See Leonard Swidler and Herbert O'Brien, eds., *A Catholic Bill of Rights* (Kansas City, Mo.: Sheed and Ward, 1988), especially chapter 8, "Expressing Dissent," where canonist Joseph Koury argues that, even though magisterial documents had not ratified a right to dissent, they had not ruled it out either. Koury cites the principle enunciated by Pius XI in 1923 as still useful: "In those matters in which there is division of opinion among the best authors in Catholic schools, no one is to be forbidden to follow that opinion which seems to him [or her] to be nearer the truth" (AAS 15 [1923] 307 f., trans. in *Canon Law Digest* 1 [1934] 669–70).

freedom vis-à-vis church authorities? John Courtney Murray and the other authors of the council document deliberately avoided spelling out the intraecclesial implications of religious liberty.

In a carefully worked argument, Daniel M. Cowdin argues the case for a qualified right to dissent for Catholics which is analogous to civil liberty of religion. Because church membership is not identical with citizenship, the right to dissent within a given religious community cannot be exactly parallel to the natural right of religious liberty.³¹ The state must grant "minimal autonomy" to believers; that is, it must respect a community's self-definition and guarantee its members the "right to exit" the community, as well as the right to remain within it, even when its practices may seem odious to other members of the secular polity. As such, the state is not committed to enforce an internal "right of dissent" in any group whose self-understanding does not include it.

Cowdin judges that at this point in its history, the Roman Catholic Church is "a veritable incubator of dissent" because it is undergoing a major transition in self-understanding and "there is legitimate question as to who does and does not participate in the process of reaching a binding self-understanding, and what that participation entails."³² Some teachings stand at the core of the faith yet are not clearly defined; others have been so defined but are not central. Sincere and warrantable dissent may occur in both areas. "The magisterium has the power to generate and promulgate church doctrine, which, if not clearly defined or not explicitly affirmed as core, invites multiple interpretation and hence dissent. Needless harm is caused when such teachings are then enforced *as if* they were core and clearly defined."³³ Diversity of opinions can be expected on moral doctrines since they have changed substantively over time, they appeal to a common human sense of natural law, and they are expressed with a certain tentativeness in the "ordinary" magisterium. Cowdin concludes, "A right to dissent is entirely appropriate, and even especially appropriate, in a time of transition (for it is precisely a time in which multiple church identities are available)."³⁴

Could church authorities resolve the issue by unilaterally declaring

³¹ Daniel M. Cowdin, "Religious Liberty, Religious Dissent, and the Catholic Tradition," *Heythrop Journal* 32 (1991) 21–61, at 29. Religious liberty cannot be totally irrelevant to religious dissent, particularly for the Church which affirmed the principle in *Dignitatis humanae*: "If a religion *morally* endorses religious liberty as a *civil* right, it seems minimally committed to a further moral endorsement of any logical ramifications which this civil guarantee might entail for matters of dissent" (ibid.).

³² Ibid. 36.

³³ Ibid. 47.

³⁴ Ibid. 55.

that all debated matters belong to the core of the faith? Such a move would be open to legitimate criticism because the magisterium remains part of the Church, not above it:

Infallible statements are not simply unilateral declarations by an office-holder to be imposed on the rest of the Church by fiat, but rather, they emerge from the historical movement of the tradition as a whole and are confirmed by a sense of the faithful beforehand; they are thus expressions of core communal identity and not simply creators of it.³⁵

Cowdin argues from the value of sociality that this recasting of ecclesial self-understanding cannot stay out of the public realm because these approaches have to be lived out in the open in order to be evaluated.

Competence of the Magisterium on Moral Teaching

Faith and Morals

The past two ecumenical councils and recent Vatican and episcopal discussions have made no distinction between the Church's competence in morality as compared to faith. For the most part, they have focused on the theological and juridical justification for authentic teaching rather than on its content. The difference, if there is one, would not arise from the power of the teacher but from the subject matter. Should we expect the same level of clarity, universality, and evidential force in moral questions as in matters of faith? This question echoes Aristotle's caveat that it is a mark of an educated person to expect no more certitude from a discipline than its subject matter can afford: the standards for mathematical reasoning should not be applied to arguments over public policy.³⁶

Norbert Rigali writes that the magisterial authority in relation to faith is analogous, not univocal, to its relation to morals. Since Christian faith is based on revelation given to the believing community, and the Church's pastors are charged with the mandate to communicate and safeguard this faith, "the pastoral teaching office of the Church stands in direct relation to Christian faith in its entirety."³⁷ Morality, however, does not belong to the Church because it does not rest on revelation, but in human nature, conscience, and common wisdom. Faith comes from hearing the proclamation of the gospel, while morals come from hearing a much wider chorus of voices.

³⁵ Ibid. 51.

³⁶ Aristotle, *Nicomachean Ethics* 1.3.1–4, 1094b.

³⁷ Norbert J. Rigali, S.J., "Moral Theology and the Magisterium," *Horizons* 15 (1988) 116–24, at 121.

Catholic tradition has invoked natural law to teach that the universality of morals originates in God's creation.

Since the deposit of faith, therefore, is by no means an exclusive source of morals, not even the morals of Christians, the pastoral teaching office of the Church does not have a direct relation to morals in their entirety similar to its direct relation to the totality of Christian faith . . . [It] has neither the responsibility nor the competence to produce answers to all moral questions, much less to have definitive answers in every case.³⁸

Moral theologians need to listen diligently to all the voices that enlighten moral debates. "While current moral teaching of the magisterium is normative in moral theology, it is by no means the only norm of this science."³⁹ Treating disagreements over moral matters as if they were disagreements over belief ignores the analogous differences between the two subject matters and the respective competencies of the Church to address them.

Josef Fuchs endorses Rigali's position. After presenting basic principles derived from revelation in the search for moral wisdom, the magisterium should recognize that "people themselves must seek and find the answers."⁴⁰ He also warns that it becomes problematic when the magisterium itself determines the limits of its own competence, particularly on questions of the natural law. Moral theologians must present the Church's teachings but also accept the responsibility to point out where they contain problems of method or deficient arguments. Nevertheless, they should not attempt to persuade their audiences to go against those teachings. With no little wisdom, Fuchs concludes: "Occasionally I have said this: I do not say anything I do not stand behind, but maybe I do not say everything behind which I stand. I think it is generally wrong to want to provoke. In the face of possible difficulties from the magisterium a person must get a sense of what may be said under the circumstances, what must be said, and what should not be said."⁴¹

Goodness and Rightness

European moral theologians have introduced another distinction: the Church possesses a different competence on matters of moral *good-*

³⁸ Ibid. 122.

³⁹ Ibid. 124.

⁴⁰ Josef Fuchs, S.J., "The Magisterium and Moral Theology," *Theology Digest* 38 (1991) 103-07, at 106.

⁴¹ Ibid. 107. See also his article "The Absolute in Morality and the Christian Conscience," *Gregorianum* 71 (1990) 697-711.

ness than it does on matters of moral *rightness*. James F. Keenan summarizes this discussion:

Moral theologians like Bruno Schüller, Josef Fuchs, Klaus Demmer, and Louis Janssens write that if a person *strives* out of love or out of duty to realize right living, then that person is good notwithstanding the fact that the actual realization may be right or wrong . . . Goodness requires that the agent strive out of love or out of duty to realize right living. Good people can act rightly or wrongly.⁴²

The CDF's recent instruction holds that the divine commission to pastor the flock extends to "definitive" teaching of moral norms, since they specify the right conduct which is necessary for salvation. Others hold that the Church's primary responsibility is with good and evil, that is the openness or closedness of individuals to the salvation offered in Christ. Fuchs writes, "Only secondarily is the magisterium responsible for how people live and structure their lives in the world generally because in and of themselves these are not questions of salvation."⁴³ Because *right and wrong*, which pertain to the guidance of particular actions, are of secondary concern for salvation, the Church does not have the same competence on these questions as it does on matters of *good and evil*. As Rigali has argued, the rightness of actions depends on a whole range of intramundane factors which must be taken into account by anyone, including church leaders. In relation to salvation, motivation has priority over rightness of conduct because the person's motivations determine his or her moral existence. The person's good will and intention to act lovingly confer the moral quality upon right actions. However, since it is possible for people to do what is "materially" wrong and yet act in good faith (the erroneous conscience) it is clear that rightness alone does not determine moral goodness.

Richard McCormick and others argue that concrete moral norms, therefore, are not "truths of salvation" in the sense that they are nec-

⁴² James F. Keenan, S.J., "Virtue Ethics: Making a Case as It Comes of Age," *Thought* 68 (1992) 115–27, at 117–18. An excellent account of the emergence of this distinction in moral theology is found in Bernard Hoose, *Proportionalism: The American Debate and Its European Roots* (Washington: Georgetown Univ., 1987) 41–67. See also Bruno Schüller, "Neuere Beiträge zum Thema 'Begründung sittlicher Normen,'" in *Theologische Berichte* 4 (Einsiedeln: Benziger, 1974) 109–81; and Josef Fuchs, *Christian Ethics in a Secular Arena* (Washington: Georgetown Univ., 1984) 143–53.

⁴³ *Ibid.* 105. This priority finds support in virtue ethics' emphasis on the defining dispositions of character over an ethics centered on doing; see Joseph J. Kotva, Jr. "An Appeal for a Christian Virtue Ethic," *Thought* 67 (1992) 158–79.

essarily linked to salvation. He supports Karl Rahner's judgment that concrete moral norms do not fall under the infallible competence of the Church.⁴⁴ Following these theologians, "competence" is an analogous concept in church teaching. The nature of the subject matter of morality and its relation to salvation impose certain limits on the Church's capacity to teach. Regrettably, the recent documents of the magisterium do not recognize the differences between teaching on faith and on morals.

Casuistry: An Alternative Approach

The tradition of Catholic moral reflection contains alternatives to the act-centered model that dominates recent magisterial documents. At times, they appear to be elaborate footnotes to *Humanae vitae*, constructed to buttress the document at its most controversial point, namely, the concrete, exceptionless moral prescription that every act of intercourse must be open to the transmission of life. The battle between defenders of such norms and their proportionalist opponents may be interminable because it is contested on the wrong turf. Toulmin and Jonsen shift the debate to the particular context of action. They find "the primary locus of moral understanding as lying in the recognition of *paradigmatic examples* of good and evil, right and wrong: the typical cases, for example, of fairness or unfairness, cruelty or kindness, truth-telling or lying, whose merits and shortcomings even a small child 'knows at a glance.'"⁴⁵ The typical cases ground the principles; they do not merely exemplify truths which are established theoretically. The traditional casuists, however, were not situationists, because they operated within the guidance of general moral maxims

⁴⁴ Karl Rahner, "Basic Observations on the Subject of Changeable and Unchangeable Factors in the Church," in *Theological Investigations* 14 (New York: Seabury, 1976) 14, cited in Richard A. McCormick, S.J., *The Critical Calling: Reflections on Moral Dilemmas Since Vatican II* (Washington: Georgetown Univ., 1989) 99.

⁴⁵ Jonsen and Toulmin, *Abuse of Casuistry* 330. They cite Aristotle for this reliance on "ultimate particulars . . . those moral instances that serve as the final objects of comparison in moral argument, which we have [he argues] a basic capacity to 'recognize at sight' for what they are . . ." (ibid. 403 n. 30; cf. Aristotle, *Nicomachean Ethics* 2.2.3–4, 1104a. See further Albert R. Jonsen, "Of Balloons and Bicycles: Or, The Relationship between Ethical Theory and Practical Judgment," *Hastings Center Report* 21/5 (1991) 14–60; Richard B. Miller, "On Transplanting Human Fetal Tissue: Presumptive Duties and the Task of Casuistry," *Journal of Medicine and Philosophy* 14 (1989) 617–40; John D. Arras, "Common Law Morality," *Hastings Center Report* 20/4 (1990) 35–37, and "Getting Down to Cases: The Revival of Casuistry in Bioethics," *Journal of Medicine and Philosophy* 16 (1991) 29–51. This last article contains full and excellent bibliography on recent uses of casuistry in bioethics.

and the generalized patterns of value determined by paradigmatic cases.⁴⁶

Jonsen and Toulmin defend casuistry from the abuse heaped upon it by Blaise Pascal and contend that it is a more adequate mode of ethics than the deductivist theoretical accounts that have preoccupied the field for the past century.⁴⁷ Aristotle and Aquinas, by contrast, began their ethics from the limits of action rather than the requirements of universal theory. In geometry and other theoretical disciplines the arguments are idealized, atemporal, and necessary, while in matters of practice they are concrete, temporal, and presumptive rather than certain.⁴⁸

Practical wisdom operates more like the diagnosis of a skilled physician than the deductions of a mathematician. "Taxonomies" of well-analyzed typical cases are brought to bear against the unique set of symptoms presented by the patient; diagnosis moves between paradigmatic cases and the actual facts by analogical reasoning to determine the appropriate treatment. Generalizations are not abstract universals but patterns which are tested against the particular circumstances. The practice of law concurs with medicine: "In ethics as in law, particular patterns of argument depend for their force not on making comprehensive or mutually exclusive claims to *universality*; rather, their force comes from earning a place in the accepted armamentarium of moral arguments, when applied to a limited range of *particular* cases."⁴⁹

The casuistry which reached its maturity in the century between 1556 and 1656 realized that moral reflection begins where no rule applies, where traditional rules conflict, or where new circumstances call into question the validity of customary patterns of action. Then one must recall the paradigm example in order to ascertain whether the changed circumstances or intentions still maintain the gestalt of values which the paradigm embodies or not. The casuists invoke the traditional list of circumstances (who, what, when, where, why, how, and by what means) to bring the relevant facts to the surface. They also take note of the conditions of the agent. "Does fear for one's life, for one's reputation, for one's goods, justify a lie? . . . The cases are filled with qualifications about greater or lesser harm, more or less serious

⁴⁶ The authors' insistence on this point is missed in a reading from a deontological viewpoint: see the review of Romanus Cessario, O.P., in *The Thomist* 54 (1990) 154.

⁴⁷ The same point is made from a different perspective by Carl Elliot in "Where Ethics Comes from and What to Do about It," *Hastings Center Report* 22/4 (1992) 28–35.

⁴⁸ Jonsen and Toulmin 26–28.

⁴⁹ *Ibid.* 299.

injury, more or less imminent danger, greater or lesser assurance of outcome."⁵⁰

The manualist moral theology which still informs magisterial documents relegates circumstances to a secondary role: they cannot redefine the "object" of the action itself. For the casuist, as for the lawyer and the physician, the particular circumstances make the case. Even for Aquinas "circumstances may also, however, change the very nature of the moral act . . . these particular circumstances [may] involve something so contrary to reason that they become an essential feature of the act."⁵¹ Except for the primary precepts of the natural law (e.g. to know the truth, to live in society) all moral laws admit of exceptions. "Intrinsically evil acts," the staple of recent magisterial teaching of sexual and procreative ethics, are not found until the late seventeenth century, when casuistry declined into more rigid systems.⁵²

What does this mean for the present state of moral philosophy and theology? "By ignoring the insights of the casuists and rejecting their use of moral discernment for a more principled but grossly simplistic approach to moral issues, we do humanity a disservice that has produced bitter fruit."⁵³ The Catholic tradition would be better served by admitting the alternatives which it contains. The lack of reception given by many to the magisterium's moral teachings should not be too quickly dismissed as stemming from bad will or the pernicious effects of liberal, democratic culture. A modest recognition that the Holy Spirit does not absolve the Church from the limits of human practical reflection and that norm-centered ethics is not canonical might make the Church's moral guidance more intelligible in the future.

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CAPITAL PUNISHMENT

In major metropolitan areas, it is now customary for the late evening news to begin with a review of the day's murders. This serves as a factual counterpart to the innumerable fictional murders of prime-time entertainment. Crime and the ineffectiveness of our society's response to it have been an important theme in many recent elections. The liberal climate that once led many people to expect that the ten-

⁵⁰ Ibid. 253–54. See James Gaffney's perceptive review in which he raises the question whether casuistry can work on "macro-ethical" questions where paradigmatic social arrangements are called into question or have yet to be discovered (*Commonweal* 67/14 [1990] 468).

⁵¹ Jonsen and Toulmin 134.

⁵² Ibid. 186, 262.

⁵³ Ibid. 342.