

*The canonical crime of solicitation
is likely more widespread
than many may suppose.*

When bad advice in confession becomes a crime

By Dr. Edward N. Peters

■ All would agree that if a given piece of advice is bad in the confessional, then a priest's giving it to a penitent would be, at a minimum, a failure in pastoral care. Depending on circumstances, a priest's proffering of bad advice in confession might even, as a violation of charity or justice, be sinful. But, that the giving of bad advice in confession could be a *crime* under Church law would be startling. And yet, exactly this reading of Canon 1387 of the 1983 Code of Canon Law is required, I suggest, in light of sound canonical tradition and recent Roman curial norms.

Canon 1387 states: "A priest who in the act, on the occasion, or under the pretext of confession solicits a penitent to sin against the sixth commandment of the Decalogue is to be punished, according to the gravity of the delict, by suspension, prohibitions, and privations; in graver cases he is to be dismissed from the clerical state." The image

of solicitation that springs to mind here is, of course, that of a priest using the confessional to propose carnal liaisons to a female penitent.¹ To be sure, such reprehensible behavior is criminalized by Canon 1387. But neither the text of Canon 1387 (specifically the phrase, "solicits a penitent to sin against the sixth commandment of the Decalogue") nor the tradition behind the modern canon construes the crime of solicitation that narrowly.

First, the canonical crime of solicitation is not limited to cases wherein a confessor's bad advice given is only toward a penitent's sexual misconduct with the priest himself. John Martin, commenting on Canon 1387 in the British-Irish canonical commentary *Letter & Spirit* (1985) at 799, observes: "The offence is committed whether the priest encourages the penitent to sin either with the priest himself or with any third party." Thomas Green, writing in the 2000 *CLSA New*

Commentary (at 1591), agrees: “The delict might also be verified if the solicited sexual activity involves the penitent and a third party, not necessarily the priest and the penitent.” And Leon del Amo in the 2004 *Code of Canon Law Annotated* (at 1077), notes: “The offense consists in soliciting the penitent to sin against the sixth commandment, either with the person soliciting or with a third party.” No commentator on the 1983 Code disputes the understanding of solicitation in Canon 1387 as embracing not only a confessor’s advice toward sexual sin between the penitent and the confessor himself, but also between the penitent and a third party. But to see clearly how a confessor’s giving a penitent objectively immoral advice, even if such advice is directed toward the solitary acts of the penitent alone, can also constitute a form of solicitation, a review of canonical commentary on the crime of solicitation under the earlier, 1917 Code, is helpful.

Solicitation under the 1917 Code

Canon 1387 traces its roots to Canons 904 and 2368 § 1 of the 1917 Code, which two norms incorporated by express reference the celebrated penal constitution of Pope Benedict XIV *Sacramentum poenitentiae* (1741), one of just a handful of documents considered so important by the architect of the 1917 Code, Cardinal Pietro Gasparri, that he arranged for it to be repromulgated *in toto* as an appendix to the Pio-Benedictine Code. Benedict XIV’s constitution *Sacramentum*, while not the first universal legislation against solicitation in confession—that distinction belongs to Pope Gregory XV’s constitution *Universi* (1622)—yielded the most detailed, and indeed still current, description of solicitation in confession as being committed by a priest who “in regard to any sort of penitent [nb: male or female, young or old], either in the act of sacramental confession or [in times or places closely related to confession], solicits to turpitude or shameful deeds...by words or signs or

nods or touch or by a writing to be read then or later” (my translation). It was the phrase “solicits to turpitude or shameful deeds” that Pio-Benedictine commentators saw as bringing immoral advice by a confessor to a penitent concerning *any* sexual matters, to be acted upon in *any* context, within the purview of solicitation as a canonical crime.

For example, Patrick Lydon, in his famous *Ready Answers in Canon Law* (1937) at 483, wrote: “Solicitation exists if the confessor sinfully suggests that the person commit impure acts alone or with others, for example, counsels the use of contraceptives.” Nicholas Halligan, in his well-regarded *Administration of the Sacraments* (1963) at 248, noted that “it makes no difference whether the confessor solicited a male or female penitent...to sin with him with another or solitarily.” Likewise Abbo-Hannan in the *Sacred Canons* (1960) II: 30 said: “Indeed, the delict is committed even by wrong advice as to the sinfulness of evil thoughts.” And Felix Cappello, perhaps the greatest commentator on sacramental law under the Pio-Benedictine Code, in his *Tractatus Canonico-Moralis de Sacramentis* (1944) II: 434, pointed to a response by the Sacred Penitentiary that called for the formal denunciation of a confessor who suggested various immoral practices (chiefly deliberate fantasies and self-abuse) to female penitents who were experiencing the extended absence of their husbands.

Because the broad interpretation accorded solicitation meant that what might have been, in some cases, simply malformed (as opposed to malevolent) advice to a penitent could be construed as a criminal act, commentators under the 1917 Code urged that caution be exercised in accepting allegations of solicitation, and that undue haste in investigating allegations of solicitation be avoided. Several authors noted that sufficient awareness by the confessor regarding the depravity of his advice must be proven before full sanctions could be levied. In mak-

ing these cautionary remarks Pio-Benedictine commentators would surely be joined by commentators on the 1983 Code although, it seems, this aspect of the question has not yet attracted much attention from them. But, aside from a few prudential caveats, there seems to be no doubt that a confessor's advice toward immoral activity in sexual matters, whether it concerns acts to be performed by the penitent alone, with a third party, or with the confessor himself, constitutes solicitation in confession and hence is a very serious crime under modern canon law.

Procedural directives

Prosecuting cases of alleged solicitation, however, is difficult for a number of reasons. First, because by definition the crime of solicitation occurs with regard to the sacrament of confession, an accused priest will be very limited in what responses he can make in his own defense. Moreover, the very words or actions by which solicitation might be suspected can be open, often enough, to various interpretations. In recognition of this problem Pio-Benedictine commentators analyzed many hypothetical confessor-penitent exchanges to help ecclesiastical authorities distinguish between what were criminal acts of solicitation and what were perhaps imprudent comments or even inappropriate flirtations. Finally, it is clear that mere rumors of solicitation by a confessor, even if untrue, can be very damaging to the reputation of the priest in question and to the integrity of ministry in the Church, and the discussion of possible cases of solicitation outside the strict confines of the canonical investigation process can lead to the suppression, distortion, or exaggeration of the evidence.

To assist local church leaders in handling cases of alleged solicitation in confession under the Pio-Benedictine Code, the Holy See issued two almost identical sets of instructions—the first in 1922, and a second, slightly expanded, in 1962—regarding the manner of proceeding canonically in solici-

tation cases.² Both documents were titled *Crimen sollicitationis*, and both dealt overwhelmingly (as in 70 out of 74 numbered paragraphs in the 1962 version) with the crime of solicitation in confession. Because both documents also dealt very briefly with the canonical process for the investigation of clergy homosexual acts and child sexual abuse, however, it was in the latter, highly charged atmosphere that these documents, chiefly the 1962 version, were most often discussed—and quite often misconstrued.³

Today, in any event, the procedural norms of *Crimen* are no longer law. The 1962 instruction (which had replaced the 1922 version) was itself replaced in April-May of 2001 by two documents: first, John Paul II's *motu proprio Sacramentorum sanctitatis tutela*, which served as a sort of ecclesiastical enabling legislation, and second, a set of implementing norms issued by Congregation for the Doctrine of the Faith in its "*Epistula ad totius Catholicae Ecclesiae Episcopos*."⁴ It is within a single sentence—indeed, a single phrase within a sentence—of the CDF implementing norms that modern support for the interpretation of the crime of solicitation to include the rendering of objectively immoral advice on sexual matters to a penitent is, I think, to be found.

According to Art.4 §1,4° of the revised "Substantive Norms" for implementing *Sacramentorum*, among delicts against the sacrament of penance reserved to the Congregation for the Doctrine of the Faith for judgment is "the solicitation to a sin against the sixth commandment of the Decalogue in the act, on the occasion, or under the pretext of confession, mentioned in Canon 1387 of the Code of Canon Law and in Canon 1458 of the Code of Canons of the Eastern Churches, *if it is directed to sinning with the confessor himself*" (emphasis added). It is the reservation of solicitation cases to the Holy See if they were "directed to sinning with the confessor himself" that warrants comment. First, some context.

The adjudication of most canonical crimes is *not* reserved to the Holy See. This is how it should be. The inherent dignity of particular churches, their responsibility for their own governance, the principle of subsidiarity, all of these factors and others besides suggest that wherever possible, offenses against church order be adjudicated at the local level. When certain crimes *are* reserved to the Holy See for judgment, it is generally because special difficulties inherent in certain kinds of cases inhibit their effective processing by a local church whose resources might be taxed by unusually complex prosecutions. Similarly, some offenses are so serious that their doctrinal or canonical reverberations could reach beyond the boundaries of the local church, and so an authority above the local level should be involved in trying them. The crime of solicitation in confession seems both serious enough in content and complex enough in the trying that its reservation to Rome, at least under certain circumstances, makes sense in both regards.

Now, as we have seen, commentary on the 1983 Code is unanimous that solicitation in confession occurs when a confessor gives advice to a penitent that countenances or encourages sexual sin by the penitent with the confessor himself or with a third party. Moreover, given the common interpretation of Pio-Benedictine commentators that solicitation occurs even when confessors advise a penitent toward solitary sexual sin (say, that of self-abuse or the use of pornography)—an interpretation not contradicted by any modern scholar and readily embraced within the text of Canon 1387—it seems clear that, even under the revised law, three distinct fact-patterns (namely, solitary sexual sin, sexual sin with a third party, or sexual sin with the confessor) can present themselves in solicitation cases; but only one of these, namely, solicitation directed toward sinning with the confessor himself, is reserved to the Apostolic See for judgment.

The particular depravity of a confessor

advising a penitent (of either sex and of any age) toward sexual sin *with the confessor himself* warrants, I think, this procedural reservation. The confessor is selfishly seeking to satisfy his own lust and is trying to arrange for the violation of his own sacred person contrary to a host of values embraced by the Western Church obligations of celibacy as binding most clerics and of continence binding all clerics (Canon 277). Moreover, if the penitent being solicited is a minor, the confessor might be in violation of one or more civil laws, the additional consequences of which could reach beyond diocesan boundaries. Such considerations support the reservation of solicitation cases in furtherance of sexual conduct with the confessor himself.

But, precisely because the adjudication of solicitation cases is reserved to the Holy See only when a confessor gave immoral advice to a penitent in furtherance of sexual sin with the confessor himself, a confessor's giving objectively immoral sexual advice to a

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penitent, to be acted on either by the penitent alone or by the penitent with a third party, remains a crime under the 1983 Code, but one to be tried at the local level.

Local responsibility to hear solicitation cases

The reservation to Rome of only those solicitation cases involving sin with the confessor himself should not in any way diminish appreciation for the depravity of solicitation cases involving confessional advice toward a penitent sinning sexually with a third party or alone. Indeed, it seems much more likely that confessors will offer penitents objectively immoral advice toward activities they foresee happening between penitents and a third party (such as homosexual acts, heterosexual fornication or adultery, contraception, and so on), or acts to be performed by the penitent alone (such as self-abuse, pornography, voyeurism, and so on), than it is that they will try to induce penitents to sins with the confessors personally, which means that these two forms of solicitation in confession are much more likely to occur.

We end these remarks where we began, that is, by recognizing the fact that the very possibility that certain forms of bad advice in confession could constitute a canonical crime is going to be startling. It is quite likely that most younger priests have never been told of this interpretation of the law, however fixed in the canonical firmament it might have been, and that even older priests might have thought that this broad interpretation of solicitation had fallen into desuetude—a position never probable in itself, and, since the appearance of *Sacramentorum sanctitatis*, etc., a position quite untenable. Yet, however we arrived at the present situation, the harm being done to souls by bad confessional advice in regard to sexual matters is real and requires an effective ecclesiastical response. I have outlined above the penal response to solicitation cases but, before closing, I would like to offer one additional suggestion.

The venerable institution of “canon peni-

tentiary” (Canon 508 §1 and Canon 968) is almost completely absent from the American Catholic landscape. While here is not the place to present the mechanics of reviving this office (an office apparently *required*, however, at the arch/diocesan level by Canon 508 §2), it does seem useful to suggest that a properly trained canon penitentiary might be in good position to educate arch/diocesan presbyterates as to the basic law regarding solicitation in confession, and to assist confessors with difficult moral cases. The point would not be for canon penitentiaries to resolve solicitation allegations (indeed, their special faculties for the remission of certain kinds of censures are, strictly speaking, irrelevant in the adjudication of solicitation cases), but rather, to establish an officer with expertise in helping priests to avoid running afoul of penal law in the first place.

Confessors who, in response to requests by penitents to be led closer to God, offer instead advice toward conduct that leads the faithful further away from him, do damage to those souls and to the wider faith community. Those charged with the care of the community of believers should not delay in advising their priests of the law on solicitation in confession, nor should they hesitate to investigate and, where warranted, to punish such serious crimes promptly. ■

End notes

¹ Anecdotal evidence indicates that some penitents have received bad advice regarding other important areas of moral life (for example in regard to decision-making on bio-medical questions), but Canon 1987 criminalizes only the giving of objectively immoral advice in regard to the sixth commandment of the Decalogue, that is, sexual conduct. See Green, *CLSA Commentary* (1985) at 927. How the Church should deal with the problem of confessors giving immoral advice regarding, say, euthanasia or infanticide, is not addressed here.

² An unofficial English translation of the

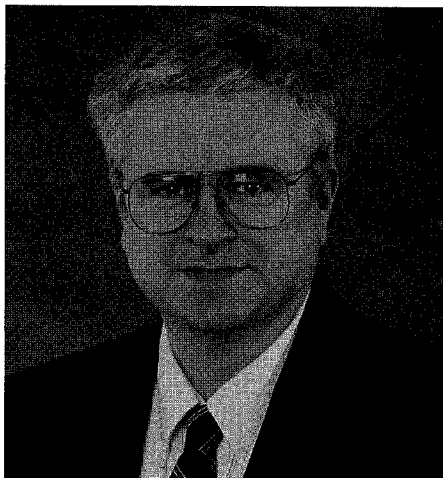
1962 instruction is available online at http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html.

³ For a refutation of one of the more egregious media misrepresentations of *Crimen*, see my “Smearing the Pope: The BBC and Benedict XVI,” *Catholic World Report* (December 2006) at 40-43, available online at: <http://www.renewamerica.com/images/columns/080520abbott.pdf>. For a good overview of what the 1962 version of *Crimen* did—and did not—say, see John Beal, “The 1962 instruction *Crimen sollicitationis*: caught red-handed or handed a red herring?” *Studia canonica*, 41 (2007), 199-236, available online at <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf>.

⁴ See John Paul II, *Sacramentorum sanctitatis tutela* (April 30, 2001), *Acta Apostolicae Sedis* 93 (2001), 737-739, and Congrega-

tion for the Doctrine of the Faith, “*Epistula ad totius Catholicae Ecclesiae Episcopos aliosque ... de delictis gravioribus eidem Congregationi pro Doctrina Fidei reservatis*” (May 18, 2001), *Acta Apostolicae Sedis* 93 (2001), 785-788. The CDF implementing norms were themselves modified most recently in 2010 and (even though these modifications do not affect the topic of solicitation in confession) resort should always be had to the current norms when processing contemporary solicitation cases. The revised norms are available online at: http://www.vatican.va/resources/resources_norme_en.html.

⁵ I am indebted to a conversation with Timothy Ferguson, JCL, of the Tribunal of the Archdiocese of Detroit for suggesting the possibility of canon penitentiaries serving as resource persons for confessors facing difficult sexual morality questions.



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